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Directorate General for Research

WORKING DOCUMENT

**PUBLIC UNDERTAKINGS AND PUBLIC
SERVICE ACTIVITIES
IN THE EUROPEAN UNION**

Economic Affairs Series

W-21

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FOREWORD

This study was carried out at the request of the Committee on Economic and Monetary Affairs and Industrial Policy of the European Parliament. It follows on from a preliminary study completed in February 1994, used as the basis for a resolution tabled by Mr Speciale and adopted by the European Parliament on 6 May 1994. It covers the 12 Member States of the European Union prior to the latest enlargement.

The part of the study on public service tasks allocated to undertakings was produced, for 9 Member States, on the basis of research conducted by the CIRIEC, Centre International de Recherches et d'Information sur l'économie publique, sociale et coopérative, international scientific organisation headed by Professor THIRY and having at its disposal a network of experts in various EU Member States. The author wishes to thank all nine experts for their patient research carried out on the basis of questions put to them. The statistics on public undertakings are those of the CEEP. They were compiled and kindly passed on by Mr BIZAGUET. Two trainees/Schuman scholars from the European Parliament's Research Directorate, Ms EBBERS and Mr de ALMEIDA, made considerable contributions to the research on public service undertakings in Germany and Portugal.

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INTRODUCTION

From the 1930s and 40s onwards European countries had an economic system where public undertakings played an important if not decisive role in certain sectors. Some of these undertakings, brought into public ownership (usually State ownership) for various reasons, accidental or ideological, competed with private undertakings producing similar goods and services, in the framework of commercial law and the market economy. Many of them had, however, been allocated specific tasks by the authorities: working in a given sector they were supposed to maintain in the public interest activities that are not always profitable according to the criteria of the market economy. Quite often these activities were known as "public services". The undertakings in question had a duty to carry them out. In return these same undertakings enjoyed special rights, sometimes exclusively, outside commercial law in any case, considered necessary for accomplishing their tasks.

The position of public undertakings in the economy and their "public service" role were called into question in the 1980s. First of all there was a trend of hostility towards public undertakings per se, stemming from a desire to trim back the role of the authorities in the economy both by virtue of a liberalist principle of generally reducing that role and for the sake of economic efficiency. From this point of view, public undertakings, especially those resulting from nationalization, were attacked as the extreme stage of State control of the economy: by owning and running undertakings, the authorities were usurping the rightful role of individuals. From its birthplace, the United States, this trend gradually gathered momentum in all European countries; the last to be affected were France, Portugal and Greece, where the public sector was the biggest as a result of a recent wave of nationalization measures, something unheard of in other Member States. This trend took the form of a privatization policy which has already put into private hands much of the State's economic ownership. This privatization is almost complete in Great Britain, well advanced in Germany, and in full swing in France, Italy and Portugal.

There is a second trend of similar inspiration and comparable effect: deregulation or, more accurately, liberalization. This consists, regardless of the type of ownership, public or private undertaking, in cutting back as far as possible public actions that run counter to market mechanisms. This refers, of course, to the tasks and obligations allocated to undertakings by the authorities for the sake of the public interest and the special rights granted in exchange. The whole set of "public service" rules is being challenged as it is seen as a hurdle to the free action of the vital factors of the market economy, starting with competition between undertakings. In fact it is not just public undertakings but the very notion of "public service" which is contested here, regardless of how that service is provided: directly run by the authorities, entrusted to public undertakings or even delegated to private undertakings. It is not, therefore, merely a case of criticizing the public management of a given service and demanding that it be privatized and transferred to the private sector. The principle of public service itself is rejected on the grounds that many of these activities, traditionally regarded as public services because they are in the general interest, are not in the public interest at all, are really activities like any other and should, subsequently, be left, without any State intervention, to the freedom of private initiative:

they should only exist if the market deems them of use – i.e. profitable. This argument that certain activities have lost their vital importance has been boosted by technological developments which, in certain sectors (especially telecommunications), have led to the creation of new services which no longer seem to depend on public services, either because they are not sufficiently vital to be seen as "in the public interest" or because they may be provided easily and cheaply without State intervention by undertakings operating in accordance with market rules.

Europe has played its part in both these trends. Probably not by encouraging privatization, since EU law is in principle neutral as to the balance between private and public ownership and the EEC Treaty leaves such decisions entirely to the Member States. What has had an effect, however, is the very project of a customs union, gradually transformed into a single market, and the obligations on Member States to achieve it: bans on any measures tantamount to quantitative restrictions on trade, the removal of obstacles to the freedom of settlement or the provision of services, tight controls on public aids or violations of business competition rules, etc. The common aim of all these requirements – removing obstacles to intra – Community trade – inevitably collided with the machinery set up by States before European construction began in order to make national adjustments, for the public interest, to the effects of the market economy. This was often the aim of public undertakings which enjoyed special rights deemed necessary for carrying out their "public service" tasks. European construction as envisaged by the Treaty of Rome definitely did not predetermine the kind of economic policy to be pursued by a future united Europe: in principle it did not prevent it from being either pro – or anti – interventionist and, for example, from one day creating EU – level public services on behalf of the "European" public interest. But pending that future common economic policy, the construction of Europe as a single market brought in its wake a challenge to national public services whenever they threatened to delay it.

As a result, this dual trend of privatization and liberalization, bolstered by the very nature of Community integration, presents a challenge not only to public undertakings but also to "public service" itself. It calls for a re – examination of the legitimacy of this concept, i.e. the question of whether certain economic activities do indeed serve the public interest and, by extension, should be set up and run by the authorities. Of course, such an exercise requires that the field of our investigation be established. It must be made quite clear that the public services being dealt with are economic activities, a convenient two – fold definition that encapsulates the subject. "Activity" to distinguish public services from other forms of State intervention in the economy such as laying down the rules and laws applied to undertakings, general economic controls (macro – economic policy), or financial support for certain sectors, etc. "Economic" to exclude non – mercantile State activities, such as so – called administrative, social or cultural public services (the police, justice, social welfare, education, etc.) offering services funded by taxation and usually free of charge. Economic public services produce commercial goods or (more often) services that are acquired at a price.

This study will be limited to those commercial public services that operate on the

basis of "networks" or "grids", i.e. very large – scale infrastructures. Vital for the population, unwieldy by nature and having specific technical, legal and economic features, these infrastructures and the activities which they support largely depend on the public service. This study will, therefore, concentrate on undertakings offering "network public services" in seven sectors seen as the most significant because of their economic and social importance and because they are "public services" in virtually all the Member States. They are:

- electricity, gas and water distribution;
- national railways and local public transport;
- postal services and telecommunications.

In each of these sectors the way they are organized in the different Member States will be explained: the general legal framework applied, the undertakings operating therein, the public service tasks and obligations and the special rights granted to operators.

In this analysis of the concept of public service in general and network public services in particular, the study will obviously not deal with public undertakings as such but will consider all public service operators, public and private alike.

The study will go on to consider the European dimension of public service. This means first of all examining European Union powers in the matter and the attitude of Community institutions on the basis of those powers towards various public service activities. Thought will then be given to the possibility of a common European policy based on a joint concept and intended, if not to create European public services, at least to preserve national public services and sufficiently harmonize them so as to guarantee a minimum level of services in the general interest of everyone in the Union.

Before considering that aspect, the ultimate goal of this study, the current situation must first be examined:

- public undertakings in Member States, their situation in the economy and their organization (Part One);
- the concept of public service as it exists, more or less, in the Member States and the tasks and obligations actually imposed, in accordance with the principle of public service, on undertakings, whether public or private, operating in network activities (Part Two).

This leaves the final part to deal with European Union powers and actions vis – à – vis public services, followed by the content and instruments of a more ambitious European policy in this matter.

PART ONE

SITUATION OF PUBLIC UNDERTAKINGS IN THE EUROPEAN UNION

CHAPTER I. CONCEPTION AND ORGANIZATION METHOD OF PUBLIC UNDERTAKINGS

The concept of public undertaking covers a wide variety of situations, if only because a whole host of different reasons have led to the creation of public undertakings in European countries ever since the beginning of their heyday, i.e. the mid 19th century. Public undertakings were set up by granting legal status to bodies which to date had been mere services run by state departments; through increased intervention by authorities (such as municipalities) in economic activity (gas, electricity, transport, savings banks); compelled by the needs of war or economic crisis, which forced the State to take over essential activities in the national interest; in order to run, in the public interest, activities regarded as "natural monopolies" (railways, water, gas and electricity distribution, telecommunications); in pursuit of general nationalization policies often with an ideological basis; the better to attain regional development targets; and, finally, on occasions in order to manage international activities involving several States or governed by international bodies. There are many more cases where the causes were simply accidental: such as sequestration or reparations following wars, for example¹.

Section I. Definition of public undertakings

This diversity naturally means that it will not be easy to define such an undertaking. In general, national legislatures have rarely sought to do so. Several attempts have been made, on the other hand, by international or Community authorities:

I. First of all, the United Nations. For their part the UN regard public undertakings as being "companies and quasi companies which are under the control of government bodies, control being defined as the ability to determine the undertaking's general policy by the choice of its management, if necessary". The definition goes on to state that:

"A government may have control of a company

- 1) by ownership of more than half the voting shares or controlling over half the shareholders' voting rights;
- 2) by special legislation, decree or regulation giving it the power to determine

1. Cf the first two chapters of the work by Mr A. Bizaguet: "Le secteur public et les privatisations". QSJ. Presses Universitaires de France. Republished in June 1992.

the company's policy or appoint its management".²

II. For their part the Community institutions have endeavoured to define public undertakings whenever the exercise of their powers has called on them to do so.

A. The Court of Justice was the first institution to act. Back in 1962 (Mannesmann judgment³), it defined a public undertaking as any undertaking placed directly or indirectly under the dominant influence of the State or a local authority and which has separate assets and its own budget and accounts. This definition emphasizes the concept of dominant influence more than ownership. Indeed it seems to imply, by insisting on separate assets, on the existence of a legal personality. In other decisions, however, the Court has asserted that a body exercising economic activities of an industrial or commercial character need not have a legal personality distinct from the State in order to be regarded as a public undertaking (Decoster⁴).

B. The European Commission had to come up with its own definition in the 1980 Directive on the transparency of financial relations between Member States and public undertakings⁵. In this directive a public undertaking is defined as any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. The key factor here is "dominant influence", which is broader than that of ownership as it may take other forms. The Directive also states the exact point beyond which each of these indicators constitutes a dominant influence. It says that the authorities are regarded as exerting a dominant influence when they, directly or indirectly in relation to an undertaking, hold the majority of the undertaking's subscribed capital, control the majority of the votes in connection with the shares issued by the undertaking or can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body (e.g. board of governors).

This Commission definition is used as a reference for all Community legislation applicable to public undertakings: e.g. see the Council Directive on public markets in so-called excluded sectors, the very sectors where public undertakings still dominate⁶.

III. It is clear from these definitions that ownership of the capital by a public body (the

2. Definition taken from the United Nations System of National Accounts (SNA): United Nations, A system of national accounts, Studies in Methods, Series F N° 2 rev 3, 1968.

3. Case 19/61, judgment of 13 July 1962, Rec. 675.

4. Case 69/91, judgment of 7 October 1993, Rec. 93 I 5335.

5. 80/723/EEC of 25 June 1980, OJ L 195 of 29.7.80, p. 35.

6. Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. OJ L 297 of 29.10.90.

State or another official authority) is no longer regarded as the sole criterion for a public undertaking. We have to add cases where a public body exercises a dominant influence over the undertaking without holding all the capital. This influence may thus consist of various means, ranging from ownership rights, obviously, to:

- 1) powers to appoint management (chairman and members of the board of directors);
- 2) the ability to influence key decisions through the special rights exercised by public authority representatives on the board of directors (such as the right of veto).

But these definitions are inadequate to demarcate the concept and give a precise idea of what is meant by public undertakings, since they only relate to the term "public". We also need to look at the word "undertaking" to define the field that we are investigating. An undertaking exists when all the following factors are to be found:

- 1) Compulsorily, an initiative and control by the State or other public bodies (federal states, local authorities) according to the criteria set out above;
- 2) but other factors, too, setting the public undertaking apart from other activities governed by the authorities:
 - a) A public undertaking must have a minimum of autonomy vis – à – vis the authority which created it. This certainly implies budgetary and accounting autonomy. It should, logically, imply a legal personality: it seems excessive to consider undertakings to include simple State services or territorial authorities under the hierarchical control of the authority with staff normally comprising civil servants. The Court of Justice, however, has been seen to acknowledge that this could be the case and so it should probably be accepted in the case of major economic public services which in some countries were until recently directly State – run (railways, post and telecommunications);
 - b) It must have industrial or commercial aims: i.e. to produce and sell goods or services, and act as a manufacturer or trader; a body, even with legal personality, whose aims are administrative, cultural or social, and hence non – commercial, such as a school, university, hospital or prison, is not a public undertaking;
 - c) Its management and operating procedures must closely resemble those of private undertakings, i.e. private law must apply to at least part of its arrangements relating to staff, contracts and property.

Section II. Legal forms of public undertakings

Even if we can agree on the features defining public undertakings, their legal forms are seen to vary enormously.

To give no more than a brief account of this variety, an initial distinction could be made in respect of the division of ownership: i.e. between undertakings entirely owned by the State or other public authorities and those where the public authorities simply hold no more than the majority share (at least half) of the capital, the remainder being held by private individuals or entities, so – called mixed – investment undertakings.

A more conventional and legally more rewarding criterion is whether they fall mainly under ordinary or special law. In most Member States, a distinction is made in the legal system between public or private law. But even in States which do not use this legal terminology, i.e. the United Kingdom and Ireland, a distinction is nevertheless made between undertakings subjected to ordinary commercial law and those which are governed by the special legislation which originally set them up and determines their exceptional operational rules. This distinction is, therefore, valid for the whole of the Union.

I. Undertakings falling basically under special law (public law or special legislation) have been given various names at various times and in different countries: state – owned company with legal personality, independent operator, independent public undertaking, public establishment, public corporation, national undertaking, and so on. They share the following features:

- 1) They come, in most cases, entirely under public ownership;
- 2) They are bound to the principle of specialization; i.e. they cannot operate outside their specific field, laid down by the law;
- 3) They cannot go to arbitration to settle disputes in the way that private companies can;
- 4) They are immune to private forms of enforcement (such as attachment or seizure);
- 5) They cannot be made bankrupt;
- 6) They are very closely supervised by the appropriate ministry and their accounts, often kept by public accountants, are audited by public bodies, often judicial or even parliamentary;
- 7) Their staff is often covered not by labour law but by a special legal system, a "statute" (if not that of civil servants at least that of "public employees");
- 8) They may, in certain cases, conclude contracts not governed by the rules of ordinary law.

They are covered by ordinary law only in respect of some of their workforce (e.g. the blue collar part) and certain aspects of their relationship with suppliers, users or

customers.

II. The other category comprises undertakings set up under ordinary law, whether their capital is entirely or only majority public – owned. They are normally, like private undertakings, limited liability companies sometimes with an indication of their origin (state company, national company, public company, nationalized company) and more rarely companies taking other forms, i.e. with cooperative or mutual status. These undertakings:

- 1) may go to arbitration and are subject to private enforcement and bankruptcy;
- 2) apply private accounting rules;
- 3) have a staff generally subjected to labour law apart, possibly, from some of the management;
- 4) are unable to conclude administrative contracts not subjected to ordinary law.

III. Most undertakings belong to one of these categories or the other, although there are, of course, examples of "mixed" undertakings with features of both systems in endless permutations. It could be added that public undertakings may exist in other forms, e.g. economic lobbies or associations, but far more seldom.

Section III. Relationship with public authority

The dominant influence of public authorities which, as we have seen, defines public undertakings, is exercised in very many ways, varying greatly one to another, but always serving objectives intended to distinguish public from private undertakings.

I. Intervention methods of authorities in public undertakings

A) Intervention instruments

1) Firstly, control of the management bodies of undertakings. The authorities control the appointment of top managers:

– either directly, having been given the right to make appointments under the law setting up the undertaking;

– or indirectly, by having (through the special law setting up the undertaking or simply using rights granted to holders of capital, in the case of undertakings governed by ordinary law) enough representatives on the collegiate body (general meeting, board of directors or supervising board) to choose those managers.

2) Secondly, financial interventions

a) The authorities may act here in their capacity of shareholders: increasing or reducing capital;

b) They may also consist of budgetary appropriations paid to the undertaking for the purchase of equipment or to cover operational costs, a facility reserved by definition for the authorities.

3) Thirdly, by controlling decision – making in the undertaking by vetting or approving certain decisions: investment, markets, charges, managerial salaries, technical options or accounts.

B) Intervention bodies

The bodies entrusted with implementing the instruments of public influence include:

1) administrative bodies: the authority itself or bodies specialised in this supervision. (In French the word "tutelle" – guardianship or tutelage – is used to describe vetting procedures, in particular).

2) legislative bodies: parliamentary assemblies, entrusted, above all, with approving decisions already taken.

3) judicial bodies: courts of audit, in particular; invariably supervision after the event.

C) The influence of the authorities is automatic when they have full ownership of the undertaking. When they are only majority owners, this influence is guaranteed by the means listed above. It is far harder to exert when public ownership is minority – let alone non – existent. This would then clearly be a situation covered by ordinary law with power belonging entirely to the owners. For the authorities to intervene in undertakings without owning them the law must give them powers falling outside ordinary law, such as for appointing managers or approving decisions. This is very rare other than in exceptional times, such as a crisis or war, when States sometimes take over undertakings without acquiring ownership thereof (e.g. sequestration). However, with recent privatizations in certain European countries, we are seeing companies where the capital is practically all private but the State retains the power to interfere. This power, linked to a "golden share", is essentially negative in nature: it means being able to veto certain major decisions by the undertaking, in particular allowing it to fall into "foreign" hands (capital increases, takeover bids, etc). Can we regard this right of intervention as sufficient to enable us to talk of a public undertaking, despite the privatization? This would be going a bit far, as the right is essentially negative and should only be relevant in certain circumstances. It cannot exercise the "dominant influence" required by the definition of public undertakings which clearly do not, in practice, exist where there is at the very least no majority ownership of the capital.

II. The aims of public intervention

The influence of the authorities in public undertakings necessarily serves aims differentiating these undertakings from private ones, without which their very existence would not be justified.

That is true even for public undertakings whose activity could also be performed by private initiative and are therefore subjected to ordinary law. Free of special obligations and enjoying no prerogatives, they only apply, in principle, the rules of competition and profitability. Yet, in their case, unlike that of their private competitors, those rules are not exclusive. They also fulfil certain tasks which, without being public service tasks because their activity does not bear the features of such a service, are nonetheless governed by public interest or, at least, by State policy – economic and social policy, in particular: e.g. the execution of a specific industrial policy or setting an example in respect of social policy.

This is obviously all the more applicable in the case of public undertakings whose activity is serving the public in the sense of our definition of this concept: i.e. an activity producing goods or services in the public interest and entrusted to do so by the authorities.

Conclusion

The conclusion to be drawn from these various attempts to define and analyse public undertakings can be annotated as follows:

- 1) they are bodies of varying legal nature covered by ordinary law or special legislation and appearing in a wide variety of forms and designations;
- 2) they are set up by the authorities (State or local authority) which exert a dominant influence over them, essentially by dint of their ownership rights, and possibly by other means too;
- 3) they enjoy substantial autonomy to act vis – à – vis those authorities, nonetheless, thanks on the whole to their legal personality;
- 4) they produce and sell goods and services with certain aims set by the authorities without necessarily performing a public service task.

CHAPTER II. POSITION OF PUBLIC UNDERTAKINGS IN THE ECONOMY

The attempts to define public undertakings just outlined are of legal and administrative interest. But they are not enough for statisticians. For them to come up with figures fully reflecting the reality facing public undertakings, they need an operational definition, i.e. one precise enough to assign each practical case to a given category. In order that these figures should be comparable from one country to another and suitable therefore for working out European aggregates, the definition must also be the same one for all national statistical institutes. No such definition yet exists (cf. the EUROSTAT⁷ project to draw up highly refined criteria for a European definition) which means that the figures at our disposal for assessing the importance of public undertakings in the European Union are of relative value only.

However, as this study does not call for the degree of precision sought by the professionals, we shall be satisfied with the adequate degree of accuracy offered by the work of the CEEP⁸, which acts as a very good basis. Every three years the CEEP conducts a survey to assess the share held by public undertakings in the economy as a whole – or rather the non – agricultural economy, i.e. leaving out agriculture and administration. It carries out this survey via the national statistical organizations. In view of the work involved in processing the figures, it is published about two years after the year in which it is based. Thus the 1993 survey, whose results were published in 1994, is based on the late 1991 figures.

Section I. Overall position

Table 1 shows the results of this survey. The relative position of public undertakings is assessed in terms of what seem to be the three most important criteria (dimensions):

- workforce;
- added value;
- gross fixed capital formation (GFCF), i.e. investment.

The figures for these three quantities are expressed as percentages. The authors of the survey also merged these percentages (by arithmetical mean) to obtain an aggregate figure giving an accurate picture of the relative size of public undertakings.

This average figure for the European Union as a whole is about 12%, and represents the size of the public undertakings sector in the Member States as a whole. We do have to go beyond this overall figure, although it is useful as a general indicator.

7. Statistical Office of the European Communities

8. European Centre of Public Enterprises

1) First of all, we note that this overall figure conceals substantial differences between the three basic criteria:

- the percentage for the workforce is noticeably lower;
- the percentage for GFCF markedly higher;
- that for value added lies in between the two.

The first conclusion is that the productivity of public undertakings is above average, which is probably not the conventional wisdom, and they have a proportionately very high investment record.

2) The other main lesson to be learned from these figures is the difference from one Member State to another:

- there are four countries where public undertakings account for up to a fifth of the national economy: Portugal, Greece, Italy and France;
- three others lie around the European Union average: Ireland, Denmark and Germany;
- Spain, Belgium and the Netherlands follow with 8 or 9%;
- the UK and Luxembourg bring up the rear with 4% or less.

Section II. Development over time

Table 2 shows the development in the relative importance of public undertakings in the European Union over the last 20 years or so (1973 – 1991). Two opposite trends may be noted:

- growth over about the first half of the period, clearly corresponding to decisions to strengthen the public sector in a certain number of Member States: nationalization in Portugal, France and Greece; everywhere, to some extent, the impact of the crisis with a downturn in the output of the private sector while public undertakings in contrast kept activity going, often at the request of governments;
- a greater decline over the second half of the period, essentially caused by the wave of privatizations, a worldwide trend which has affected nearly all the Member States, to different degrees: very marked in the UK and now almost spent, clear but coming much later and not yet complete in France and Portugal.

In other words, the figure is lower at the end of this period than at the beginning. This fall is expected to continue, given the number of privatizations forecast for the next few years. But the number of public undertakings in the Member States ought then to settle at around 10%,

the natural floor.

Section III. Position sector by sector

The importance of public undertakings in Europe varies widely, of course, from one industry to the other. Table 3 gives an idea of this sector – by – sector variation, using the workforce as the yardstick:

- public undertakings predominate in transport and telecommunications with 58% and in the energy sector with 55%. They have a near monopoly in the railways, air transport, ports and airports, postal and telecommunications services, electricity, gas, nuclear energy, coal, sea transport, urban transport and oil;
- in the services they account for a large share, especially in financial services (banks and insurance) where they make up 20%;
- on the other hand, they are very poorly represented in manufacturing industry, at 3.4%.

These figures do, of course, need to be differentiated by country, which reveals inter alia:

- the smallness of the public energy sector in the UK and the Benelux countries;
- the relative size of the public sector manufacturing industry in France and Italy, negligible in the other countries;
- the public sector's virtual monopoly in transport and telecommunications in Italy and the size of the banking and insurance public sectors in Portugal and Greece.

CEEP
1993 Survey
(1991 financial year)

Table 1
IMPACT OF WORKFORCE, GROSS VALUE ADDED AND GFCF OF PUBLIC PARTICIPATION
UNDERTAKINGS IN THE COMMERCIAL AND NON – AGRICULTURAL ECONOMY IN EUROPE

Country	Workforce (1000)	% Workforce (2)	% V.A. (2)	% GFCF (2)	% mean of 3 criteria	Mean 88 (2)	Mean 85 (2)	Mean 82 (2)
France	1783	13.4	15.1	24.2	17.6	18.3	24.0	22.8
FRG (1)	1687	8.3	10.0	14.9	11.1	11.6	12.4	14.0
Italy	1485	13.5	20.0	23.5	19.0	19.6	20.3	20.0
UK	747	4.3	4.0	5.0	4.5	7.4	12.7	16.2
Spain	407	6.0	8.0	12.8	9.0	10.0	12.0	12.0
Portugal	216	10.6	21.5	30.0	20.7	24.0	22.7	23.9
Belgium	200	9.8	7.5	8.4	8.6	10.3	11.1	12.1
Netherlands	157	5.1	8.0	9.2	7.5	9.6	9.0	9.0
Greece	179	14.7	17.0	30.0	20.6	20.8	23.2	22.3
Denmark	115	8.2	8.7	17.6	11.5	11.9	11.4	12.0
Ireland	67	8.7	11.5	16.9	12.4	14.4	15.3	15.1
Luxembourg	5	3.2	5.2	4.6	4.4	4.9	4.5	5.0
Public sector in the commercial non – agricultural economy of Europe (3)	7048	8.9%	10.9%	15.6%	11.8%	13.3%	15.3%	16.4%

(1) without former GDR

(2) % public sector in commercial non – agricultural economy in Europe

(3) not including former GDR

Table 2**CHANGE IN IMPORTANCE OF THE PUBLIC UNDERTAKING SECTOR IN THE COMMUNITY OVER THE LAST 20 YEARS (% of non - agricultural commercial economy)**

	end 1973	end 1979	end 1982	end 1985	end 1988	end 1991
Workforce	8.3	11.9	12.8	11.5	10.6	8.9
Value added	11	13.2	14.1	13.4	12	10.9
Investment	22	22.5	22.9	21	17.3	15.6
Mean impact	13.8	15.8	16.6	15.3	13.3	11.8

Source: CEEP

Table 3
SECTORAL DISTRIBUTION OF WORKFORCE IN PUBLIC PARTICIPATION UNDERTAKINGS IN THE
COMMERCIAL NON – AGRICULTURAL ECONOMY IN EUROPE

(in '000 employees)

Country	ENERGY		INDUSTRY		'TRANSPORT' AND TELECOM.		FINANCIAL SECTOR		OTHER SERVICES AND TRADES		Total national public sectors (work force)
	Work force	% in the industry	Work force	% in the industry	Work force	% in the industry	Work force	% in the industry	Work force	% in the industry	
France	202	88.0%	465	11.1%	783	58.8%	193	32.0%	140	2.4%	1748
FRG (1)	290	63.0%	120	1.1%	930	60.0%	279	30.0%	68	2.0%	1687
Italy	172	89.0%	312	10.0%	705	82.5%	249	50.0%	48	2.0%	1485
UK	103	23.5%	8	0.2%	262	34.0%	13	1.0%	161	3.0%	747
Spain	61	45.0%	79	3.0%	228	50.0%	20	6.0%	19	1.2%	407
Portugal	26	36.9%	40	3.0%	92	41.0%	49	65.3%	8	0.8%	216
Belgium	10	27.3%	5	0.5%	160	64.3%	24	7.4%	1	0.3%	200
Netherlands	2	3.5%	–	–	154	42.2%	1	0.1%	–	–	157
Greece	35	90.0%	6	1.3%	76	37.8%	40	60.0%	22	4.0%	179
Denmark	18	90.0%	3	0.6%	89	53.6%	–	–	6	1.0%	115
Ireland	14	68.0%	3	1.1%	46	52.0%	4	5.0%	–	–	67
Luxembourg	–	–	–	–	3	32.8%	2	9.3%	–	–	5
Public sector of the Twelve (2)	933	55.0%	1041	3.4%	3728	58.0%	874	20.0%	473	1 to 2%	7048

(1) without former GDR

(2) Public workforce and % employed by non – agricultural commercial industries in Europe (not former GDR)

PART TWO

PUBLIC SERVICE TASKS ALLOCATED TO UNDERTAKINGS IN THE MEMBER STATES

Having described the concept and position of public undertakings in European countries, we shall leave aside these undertakings as such and focus on the other half of the couple forming the subject of this study: economic public services. We must first of all define the concept of "public service" itself and clarify the principles and ways and means. We shall then endeavour to describe the special legal system applied to undertakings providing the public service, made up of tasks and obligations, on one hand, and special rights, on the other. They will undoubtedly include many a public undertaking but also a good many private undertakings running public services: our survey must therefore cover all of what might be called "public service operators".

CHAPTER I. THE BASIC MACHINERY OF PUBLIC SERVICES

Section I. The concept of public service

This is a central concept found in most States based on the rule of law. The expression is used in particular by the continental European countries where the legal tradition is characterised by a pronounced difference between public and private law. However, if we take not the term itself but its basic meaning, it will be found under other designations, even in legal systems based on the Anglo – Saxon tradition which themselves also have the concept of public interest or general interest, under the name, for example, of "public utility" or "public interest". It can therefore be assumed that this concept exists in all Member States.

I. Defining public service

A public service is an economic activity falling under the public interest and invariably determined, created and controlled by the authorities and subject in varying degrees to legal arrangements standing outside ordinary law, regardless of the type of body, private or public, entrusted with effectively providing it. It is worth taking a further look at the various points included in this definition.

A) Public services are primarily activities. Regardless of the way in which they are run and the bodies providing them, they exist by dint of their function: to produce goods and, above all, services, for the public. This is how they differ from other forms of State intervention (or other authorities) in the economy which are not production activities.

1) They must first of all be distinguished from economic regulation, dictated by the desire to safeguard safety, health or the environment: for example, health and safety rules at work, rules applied to the manufacture of industrial goods (especially foodstuffs),

building regulations, etc. In this regulatory function, authorities pursue a different aim than that borne in mind when creating a public service. When regulating it is not their intention that the activities in question, for example car production, chemicals or food, should necessarily be guaranteed: the existence of these activities relies on private initiative rather than on the authorities and it is possible that private initiative would see no point in taking part in them, in particular because it would not benefit from them, in which case the goods in question could be supplied, for example, by imports. The authorities only wish to ensure that these goods and services, if they are produced at all, are produced in accordance with certain rules. On the contrary, the public service consists, from the authority's point of view, in ensuring that certain goods and services, which it sees as vital (electricity, water or gas distribution, for example) will actually be produced and supplied to the public. In the function of regulation we cannot really speak of any attack on the freedom of enterprise (otherwise known as freedom of trade or industry): the entrepreneur does not need the authorities' authorization to start up an activity but must merely comply with any rules applied to that activity. In the public service, the system of freedom of enterprise is abandoned: these are activities defined by the authorities and which, if not guaranteed by the authorities themselves, can only be guaranteed by an undertaking if the authorities agree and only under their supervision;

2) A distinction must also be made between the public service and public interest tasks not involving the production of goods and services: striking the key economic balances, intervening financially to help ailing sectors, etc. For these tasks, the State may, in addition, as we have seen, make use of certain public undertakings: while not running public services or having any such obligations they may then be entrusted with helping to execute a general, economic or social policy;

B) Public services are an economic activity. That is why they can be entrusted to undertakings. The assets produced – goods or services – are commercial assets supplied to the public at a price and are, therefore, similar to the goods and services produced by the rest of the economy. These goods and services differ from the services of general interest provided free or nearly free of charge by the authorities and which also are public services, but non – economic public services – often known as administrative, social or cultural public services: for example, the services provided by the courts, the police, the schools system, hospitals or prisons;

C) Public services rely on the existence of a public need. As such, this may be distinguished from purely private need, that of individuals, determined by them individually and expressed in a market where demand is satisfied by supply which in turn seeks to satisfy it. A public need is, on the contrary, regarded as that of the people as a whole, being approximately the same for all, and being fundamental. These characteristics all mean that it cannot be formulated by individuals as such or met by private initiative;

D) The public need and the public service run with the purpose of meeting it can be determined and organized by the public authorities alone, in the performance of their task of representing the community. Only the public authorities can devise, define and

organize public services. They may, of course, entrust them to a separate – public or private – body to be managed but will always retain responsibility for their nature, scope and even justification; this is because public services are not immutable and the public authorities may, in time, be called upon to terminate them when the need which led to their creation ceases to exist. This responsibility is all the more justified when, above all, it concerns activities that would not exist unless they were performed by the authorities because they are not profitable, something that obviously discourages private initiative;

E) Public services, either operated directly by the public authorities or entrusted to separate bodies, are generally accompanied by public authority legal prerogatives, ordinary law would be ineffective: for example, the right to compulsory purchase, the right to use public property, special operating rights which may include a monopoly, the collection of charges, the right to conclude administrative contracts (with clauses not covered by ordinary law);

F) The body entrusted with providing the public service is allocated a task generally carrying specific obligations and must be subjected to a certain degree of supervision by the public authorities which may, for example, vet managerial appointments or control prices and charges.

II. Principles of public service

Thus defined, a public service can be expressed by basic principles, normally three in number:

A) Equality

Since public services are regarded as meeting a general (i.e. if not universal at least very broad and, at the same time, basic) need, one which the community must provide for all, they need to be offered on an equal basis. All users should have access to them on the same terms, the only admissible differences in treatment being justified by objectively different situations relating to the service in question. This principle generally has two consequences for the operator:

- the obligation to provide the service to everyone or, at least, the greatest possible number, in what is generally known as a service obligation, which is more or less universal;
- the obligation to practise a uniform basic price, sufficiently low to be accessible to all, which often means practising equalization, the uniform price being lower than what it should be in areas where the cost of the service is high and higher in areas where the cost is low (the latter "subsidizing" the former).

B) Continuity

As public service is regarded as being vital for the community it should be provided without interruption. It must be available at all times to the public and operated regularly and punctually. The operator has to run it at all costs, even at a loss. Operators must therefore organize their activity, especially supplies and investment, so as to be in a position to meet any demand and never to run out of supplies. This calls for planning, of course, in the more or less long term, depending on the type of activity. Of course, this "supply obligation" is quite different from the obligation on ordinary commercial activity: traders also have an obligation, to sell, but it is much less far-reaching since it is limited by stocks; there is no duty to renew that stock to meet demand. This principle of continuity has long been the justification for banning strikes in the public services.

C) Adaptability

This means that public services, created to meet a public need, must adapt to the developments in that need and, ultimately, disappear if that need ceases to exist. Since the initiative and definition of the service is the exclusive duty of the authorities it is logical that they should be able unilaterally and at any moment to change the rules of its organization and operation and withdraw it when it is no longer needed.

III. Variability of public service

Of course, the concept of public service, clear and firm enough in principle, is highly variable in its actual content. There is no such thing as an intrinsically public service. What we mean by public interest and more precisely the activities thus described may change according to several factors.

1) It may vary according to the view governments take of society, whether leaning towards the liberalist or collective approach. We can, therefore, imagine two theoretical extremes:

- pure liberalism where the public interest is reduced to practically zero: the idea of public service tends to disappear and with it, moreover, that of the State; all that is left is individual interest and private initiative;

- pure collectivism where every human need can be said to be a matter of public interest and, therefore, has to be met by setting up a public service. This is the case, in particular, of any economic activity.

In fact, reality lies between these extremes and a variety of intermediate situations exist.

2) The consistency of public services in a given activity obviously reflects the economic level reached by a society, since each country offers its citizens services in

proportion to its resources. The density of electrification, the abundance of available water, the frequency and comfort of trains and buses, the speed of the mail and the number of telephone call – boxes, will obviously vary according to development level. Nevertheless, a public service will exist whenever the authorities, according to the means at their disposal, endeavour to bring within reach of the population services regarded as vital for the community which they govern.

3) The extension of the concept also depends on technical developments. The birth of the railway was an opportunity to establish a new public service but was done gradually considering that this new means of locomotion was regarded as something to be available for everyone. Similarly the telephone was not at the beginning thought to be a sufficiently vital means of communication for it to be made accessible to the population as a whole by turning it into a public service. On the other hand, it is possible that technical progress might render useless the maintenance in public service of a given activity: this is true of new telecommunication services which can easily exist according to the rules of private initiative and of competition because they can be supplied en masse at reasonable prices, without the need for action by the authorities and governed exclusively by market economics.

4) Whereas the fundamental principles of public service enumerated above (equality, continuity and adaptability) are valid as a general rule, they apply to each sector differently:

– The obligation to supply, stemming from the principle of continuity, is particularly far – reaching for electricity distribution where the very nature of the product requires at all times, at risk of interruption, a perfect balance to be struck between demand and supply.

– The obligation to connect, following on from the principle of equality, may not exist for the whole of a national territory and be absent from certain regions (gas distribution) or from certain towns (not all urban areas have public transport: that depends on the local authorities in question).

– Even when ensured for the whole territory, supplies may be truly universal, as in the case of water, electricity, post and telephones where all users are served "at home", or simply general, with more or less dense networks and variable levels of services, such as railways (rail networks vary in density and trains do not always stop at all stations).

There is, therefore, no lasting and universal criterion for deciding whether and to what extent an economic activity will be organized as a public service. The decision, dependent on time, location and the activities in question, is up to the authorities and, by extension, the communities they represent. But despite all these many variations, one thing is constant: a public service will exist when a community feels that the supply of a good or service which is a public need is not satisfactorily provided by private initiative and must, therefore, be taken over, in one way or another, by an authority.

Section II. Defining and establishing public services

By definition public services intended to meet a need in the public interest can be set up only by public authorities and must remain in their charge: they have a monopoly over the decisions setting them up, defining their scope, retaining supervisory power over them (responsibility), even if they hand over their operation to independent bodies, and terminating them.

I. As a rule any initiative to set up public services must be taken by the State. It is the legislature that normally determines which activities will be public services. But in a federal State, like Germany, the federal States themselves may have a degree of initiative.

II. Responsibility, on the other hand, i.e. the power to organize and supervise the service, may be conferred by law on various authorities:

- 1) the central State: so – called national public services;
- 2) federal States within a federation;
- 3) local authorities (regions or provinces, departments, municipalities): these are local public services.

Section III. Public service management procedures and the imposition of public service obligations on undertakings

A public authority deciding to set up a public service can always choose to run it itself: mobilising its own staff (public servants or outside labour) and resources. This is generally known as direct management or control. But, in many cases, it will prefer to entrust the management to a public or private undertaking while, of course, retaining control. This is indirect management or delegated management; reference is made to "delegating public services". In this case, the authority must define the undertaking's general task, i.e. the service entrusted to it: its "public service task". But it will also tend to impose specific obligations for the fulfilment of that task: "public service obligations". These tasks and obligations are fixed in the framework of different procedures or techniques for delegating public services.

I. First, there are unilateral public service delegation procedures: the tasks and obligations are set by law or regulation. This is conventionally the case when operators are public undertakings. The legislation setting up the undertaking (by granting legal personality to a State department or nationalizing a private undertaking) also defines the public service task and the obligations pertaining to it.

II. In other cases, there are contractual delegation procedures: tasks and obligations are included in a contract concluded between the authority and the undertaking entrusted with providing the service. This is necessarily the case when the operator is a private undertaking. But the contractual technique is becoming increasingly widespread in the case of public undertakings, if not for their general tasks, which mostly are still defined by law, at least for their detailed obligations. The type of public service contract varies according to the type of reciprocal obligations of the authorities and service operators and according to the way in which the operators are remunerated.

A) The most usual type is that where the operator acts as an ordinary contractor, carrying out the activity entrusted to it at its own risk. The authority leaves it to the operator to provide the service but does not pay for it. The operator is remunerated through the activity, i.e. by receiving payments from the users. This situation has two variants:

1) In the first, the operator is entrusted not only with providing the service, but also installing it, i.e. constructing at its own cost the necessary infrastructures for its operation: for example, mains for water distribution. For this work, it is not reimbursed by the authorities and must rely on payments from users. These infrastructures do not become its property, however, but remain that of the authorities which resumes possession of them at the end of the contract. This technique is usually known as a public service concession, since the authority is known as the "conceding authority" and the operator as the "concessionaire".

2) In the second version, the operator does not carry out the work needed for the operation of the service. This work is put at its disposal by the authority to which it usually makes a payment in return. This process is known as farming out, as the operator is the "farmer".

Farming out tends, necessarily, to last a shorter time than concessions since, unlike "farmers", concessionaires must, in addition to operational costs, cover the initial investment costs. That aside, the difference between the two processes is one of degree not of nature. Otherwise, farmers and concessionaires alike have the same obligations and the same rights, usually set by a contract containing the vital principles and a set of specifications governing the detailed operational conditions of the service, in particular user charges. Concessionaires and farmers are obliged to operate the service according to very strict rules and are openly exempt from these restrictions in cases of force majeure but not in the case of financial difficulties, since the undertaking implies the acceptance of a certain amount of risk. If the operator fails to meet these conditions, it is liable to disciplinary action taken by the administration, in the worst case consisting of unilateral termination of the contract. This is why it must comply with service changes demanded by the contracting authority even if they contradict the clauses of the specifications. On this score, it should be noted that many of these clauses are only contractual in name: they are in reality service regulations imposed by the authority thanks to its power to define the service; as such, they may be unilaterally changed by that authority. If these changes call into question the financial balance of the contract and if the operator has not been able to obtain from the

administration permission to increase its charges, its only right is that to compensation. On the other hand, it has at its disposal any assets (land, equipment) that the administration allocates to the service, may resort to expropriation and the establishment of statutory easements.

B) In the second type of contractual public service delegation, the operator is only the manager, directly remunerated by the delegating authority. It receives no user charges as they are collected by the authority itself. However, in most cases its remuneration depends on the results of the service operation: it receives a percentage of the turnover. This is referred to as interested management.

C) The final type of contract is that where the operator is remunerated by a price paid by the authority. It builds the necessary infrastructures for the public service and then operates the service for a certain length of time, while the charges are again collected by the authority. This process is known in certain countries as a "public works undertaking contract". It must be distinguished from public works contracts where the co-contractor of the administration does nothing more than construct the infrastructures without operating them and from services contracts by which the authority calls on an operator to provide a given service: in both cases, as we shall see below, no public service is performed.

D) Apart from these three main types, which themselves have variants, of course, there are other types of contractual procedures, quite varied in nature, devised by authorities to ensure that public services are performed by undertakings. These include contracts concluded for some years now between certain States and public undertakings in order to specify public service tasks and obligations which are defined in overly general terms in legislation or regulations: management contracts in Belgium; "planning", "programming" or "objective" contracts in France. Unlike unilateral procedures which, in principle, only concern public undertakings, contractual procedures may be used to entrust public services to private and public undertakings alike. However, in the case of a public undertaking the contractual aspect is on the doubtful side since, even if the public undertaking has a legal personality, it will not necessarily have free will since its capital lies mostly in the hands of the authority which also appoints its management and, therefore, exercises a "dominant influence". In most cases, therefore, it is the law setting up or nationalizing the public undertaking which defines the public service and sets the obligations imposed in its connection. Although the word "concession" may appear, it has no contractual meaning.

III. An important point is the principle that the authority enjoys full freedom in the choice of operator for a public service. This is the main difference from public procurement contracts where the administration is entrusted, in principle, with calling for tenders for competition and concluding contracts with the undertaking offering it the best economic advantages. This requirement is justified by the fundamental differences between the two operations.

A) In a public procurement contract, the administration obtains a good,

for example vehicles or office equipment (i.e. a public supply contract), or a service, for example building a road or conducting a study (a public procurement contract for works or services) and pays a remuneration to the supplier or provider of the services out of the public purse. But the good or service supplied serves, above all, for the operation of the administration: there is not, strictly speaking, any execution of a public service, i.e. any supply of a service to the public itself. What is essentially important is to ensure the best possible use of public money in order to protect the taxpayers' interests. Besides, this is a one-off operation and so the effect is limited in time.

B) In public service contracts, the administration buys nothing and therefore makes, in general, no public expenditure. The aim is not to ensure its own operation but an activity of benefit to the public. Furthermore, this activity is seen to be lasting and, for technical reasons, is not appropriate for a series of different operators working in rapid succession over time; it must be entrusted to the same undertaking for a long period. For this major public interest task, for which the authority bears exclusive responsibility, knowing that it is linked to an operator over a long time, it is understandable that this authority should have the greatest possible freedom in the choice of co-contractor.

However, there is a trend at present to submit public service contracts to certain obligations that weigh down public procurement contracts. This is true of Community legislation. For example, Directive 93/37 of 14 June 1993 concerning the coordination of procedures for the award of public works contracts applies to concessions. These concessions clearly differ, however, from works contracts in that they consist not only in creating an infrastructure but also in operating it, i.e. running a public service, for example a motorway. The Directive applies to the concession contract, at least for certain advertising obligations: the authority which contemplates applying a concession must make that intention known by an announcement published in the OJEC and observe a minimum period between the publication of the announcement and the deadline for applications.

National legislation also tends to stipulate the procedure for the contractual delegation of public services. German legislation has introduced the principle of limiting the duration of contracts to a maximum of 20 years. In France, a 1993 Act⁹ also prohibits contracts of unlimited duration and compels the authorities concerned to issue calls for tender to two or more undertakings, without removing their power freely to choose from them.

These legislative developments at Community and national level do not, therefore, go as far as to extend to public service delegation procedures all the restrictions applied to public procurement contracts: they only subject them to advertising obligations and limit the duration of contracts, generally leaving authorities full freedom in the final choice of operator.

9. Act 93-122 of 29 January 1993 on the prevention of corruption and transparency in economic dealings and public procedures (Official Gazette of the French Republic, 30.03.93).

Section IV. Public service and public undertaking

Analysis of the concept of public service and its methods of organization confirm in full the distinction suggested above between public undertaking and public service. The two concepts do not overlap in that there are public undertakings which are completely out of the scope of public service whereas there are many examples of public services entrusted to private undertakings.

I. There are public undertakings which are clearly outside public service because their activities relate to goods and services that do not have to be provided by the authorities and that depend solely on private initiative. As such these activities come under ordinary law and must compete with other undertakings, private ones in particular. This refers, in particular, to industrial public undertakings (car manufacture, aeronautics, steel, chemicals, etc) and undertakings in the financial sector (banks and insurance). In our liberal societies, the production of cars and the management of bank accounts are not regarded as public services. The rest of this study will leave aside these public undertakings and only take into consideration those managing economic public services which, in so doing, have taken over from the bodies which provided the same services before them: either public administrations (State or other public bodies) which have acquired legal autonomy, or private undertakings running public services which have been nationalized.

II. On the other hand, there are a good many private undertakings also performing public service tasks. There always have been, still are, and it can safely be said there are likely to be even more in the future. Whereas, ever since the wave of nationalization halfway through the century, undertakings running public services have mostly been public undertakings, the current privatization trend, when it maintains, alongside activities subjected to competition, services operating in the public interest, hands these public services over to private undertakings – i.e. a return to the situation prior to nationalization.

The subject of the study, therefore, leads us to deal only with those public undertakings running public services plus any private undertakings performing similar tasks, i.e. the group of undertakings that might be called "public service undertakings" or, to use an expression taken from the Treaty of Rome, "undertakings entrusted with services of general economic interest". Nor should we forget those cases where the public service is not entrusted to an undertaking but directly run by the authorities themselves, which then also act as "public service operators".

CHAPTER II PUBLIC SERVICE APPLICATIONS IN THE MAIN NETWORK ACTIVITIES

In order to perform their task, public service operators have obligations imposed on them and are granted special rights, outside ordinary law, as a counterpart to the obligations.

Conducting a survey of these tasks, obligations and rights imposed on and granted to public service operators in the different Member States is no mean task for two reasons at least.

1) First of all because of the great number of authorities and undertakings in question since, apart from the State, a whole range of authorities may run public services and entrust their operation to undertakings: when you add on the local authorities in all the Member States, the result is tens of thousands of bodies in charge of public services.

2) The second reason is the variety, and even inaccessibility, of documents laying down the tasks and obligations of public services. It is a stroke of luck when these tasks and obligations are set out and specified in written documents, legislative texts or regulations and contracts. Very often they are not written down but result from customary practice or general principles determined by case – law.

As we pointed out in the introduction, this survey will be confined to the so – called "network" sectors. They are the most significant economic public service sectors, primarily because they are massive services whose vital character for the population as a whole justifies their being run or organized so attentively by the authorities. They also often rely on highly unwieldy fixed infrastructures¹⁰ which, on one hand, call for land occupation privileges (occupation of public land and easement rights) and, on the other hand, lead to situations of "natural monopoly" since their duplication would be a waste of money and create considerable legal and practical difficulties, and also because they are more profitable the greater the size of the activity. The concept of public service, with its balance of obligations and rights, therefore applies particularly well.

We have selected the most important of these networks:

- public electricity and gas distribution;
- public drinking water distribution;
- national railway networks and local public transport;

10. The postal service is the exception here but it does nonetheless have a considerable network given the very large number of collection points and the daily delivery to all addresses.

- postal and telecommunications services.

We could have added certain forms of sea and air transport, ports and airports, toll motorways and bridges, urban heating services, water purification, refuse collection, funeral services, etc. We have selected these seven sectors, however, because they meet all of the following criteria:

- they affect most citizens;
- they are run as public services, with some nuances, in all Member States;
- apart from local transport and water distribution, where those in charge mostly belong to local authorities, they are services organized nationwide and are therefore easier to study.

The following network – by – network surveys endeavour to specify, for each sector and each country:

- the general legal framework, i.e. the role played by the authorities and the way in which the public service is conceived overall;
- the sector structure, i.e. the operators providing the service;
- the public service tasks and obligations imposed on the operators;
- the special rights granted to them.

Section 1 – Electricity

I – GERMANY

GENERAL LEGAL FRAMEWORK

- 1) In principle there are no restrictions on exports and imports.
- 2) On the other hand, production and transportation are subject to State controls, and State authorization for building new installations is required.
- 3) Distribution to consumers is regarded as a public responsibility:
 - . Land authorization for public supplies;
 - . each municipality is responsible for granting undertakings "concessions" or the right to distribute to the public within its territory.

SECTOR STRUCTURE

- A. 9 "interlinked companies" (commercial companies with a majority of public shareholders, Länder and local authorities):
 - 1) provide the bulk of production as well as imports and exports;
 - 2) operate most of the national transportation network;
 - 3) supply regional and municipal companies;
 - 4) sometimes distribute directly to the consumer.
- B. Some 80 regional companies (commercial companies of which 60% of the shares are held by public bodies, 40% by individuals):
 - 1) buy electricity from the interlinked companies or other regional companies or produce it themselves;
 - 2) supply municipal companies and consumers.
- C. Some 500 municipal companies (municipal corporations or commercial companies) provide the bulk of distribution to consumers, most of them in one municipality (some also produce electricity).

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) Municipal concessions usually provide for the obligation to provide (both connect to the grid and supply without interruption) all domestic consumers on the municipal territory.
- 2) By law, domestic supplies must be as safe and cheap as possible.
- 3) Under an agreement between undertakings, distributors are obliged to buy up excess production of independent producers.
- 4) They must observe federal regulations setting supply conditions for domestic consumers, in particular general charges; their charges must be approved by the Land administration. (On the other hand, suppliers to large consumers are governed by freely negotiated contracts).

OPERATORS' SPECIAL RIGHTS

- 1) No special rights for import or export.
- 2) Municipal concessions grant concessionaires a municipal distribution monopoly (network construction and distribution), for a fee.
- 3) Furthermore, production, transportation and distribution undertakings conclude between them demarcation agreements (territorial shareout), as an exemption from competition legislation.
- 4) The right to compulsory purchase to build the transportation and distribution network, when necessary.
- 5) Municipal concessions give the right to use the public highway for building lines.
- 6) Distribution undertakings are not expressly entitled to transportation but the owner of a network may not refuse access without a valid reasons (such as lack of capacity).

I – BELGIUM

GENERAL LEGAL FRAMEWORK

- 1) In theory, there are no restrictions on imports and exports.
- 2) The construction of production and transmission installations is subject to approval by the federal authorities on the basis of the opinions of two public bodies, the Comité de Contrôle de l'Electricité et du Gaz (CCEG) and the Comité National de

l'Energie.

- 3) Distribution to small consumers (less than 1000 KW) is the legal responsibility of the municipalities which may exercise that responsibility:
 - directly (corporations);
 - or through "pure" inter – municipal companies (comprising municipalities only) or mixed ones (comprising municipalities and an undertaking such as Electrabel);
 - or by entrusting it by concession to a private undertaking (on the wane).
- 4) Distribution to large consumers is free of restriction.

SECTOR STRUCTURE

A. Production, imports, transportation

- 1) 90% of production is carried out by a private undertaking, Electrabel, the rest shared more or less equally between the SPE (a public undertaking owned by a group of municipalities) and independent producers.
- 2) Energy flow management (production coordination, links with neighbouring countries, imports and exports) is performed by the CPTE, a limited company owned jointly by Electrabel and the SPE.
- 3) The transportation network belongs mainly to GECOLI, a cooperative owned jointly by Electrabel and the SPE and, to a lesser extent, to the producers.

B. Distribution

82% of distribution to small consumers is carried out by mixed inter – municipal companies, 17% by pure inter – municipal companies and the remainder directly by the municipalities (corporations). Medium – sized consumers are usually supplied by inter – municipal companies while the larger ones buy direct from the producers.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) Municipal distribution undertakings are obliged (by their statutes or concession contract) to supply electricity to all small consumers in their area of activity. This implies the obligation both to connect and to supply without interruption, as they are responsible for power cuts and variations in voltage or frequency, and are obliged to pay damages (the onus of proof lies with the consumer).

- 2) Distributors may buy their electricity without restriction but the charges for these purchases are determined by the Comité de Contrôle de l'Electricité et du Gaz.
- 3) The charges for sales to small consumers are set by the CCEG: in practice, they are identical for the whole country.

OPERATORS' SPECIAL RIGHTS

Each municipal distribution undertaking enjoys exclusivity in its area. The law allows electricity transportation or distribution undertakings to use the public highway (with authorization or permission from the roads department) and gives the right to compulsory purchase or to establish easements for installing works on private land.

I – DENMARK

GENERAL LEGAL FRAMEWORK

- 1) Imports and exports are unrestricted for transmission undertakings and subject to authorization over 100,000 volts for distributors.
- 2) For production, transmission and distribution, a ministerial licence is needed.
- 3) Production investment is subject to government authorization.

SECTOR STRUCTURE

- production: almost all of it is carried out by 7 companies owned by the distribution undertakings;
- high – voltage transmission: 2 undertakings (East and West of the country) run by the production undertakings, each with its own network but cooperating with one another;
- distribution: a hundred or so undertakings, half of which belong to the municipalities, the rest being private.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) Producers are legally obliged to supply electricity. They must submit annual development plans to the government which may impose obligations on them in terms of capacity, energy sources or storage.

- 2) Distributors have no obligations:
 - they buy directly from the producers at prices calculated by the transmission undertakings and taking into account transportation costs;
 - they share costs so as to even out prices for small consumers across the country;
 - however, these prices are subject to ministerial control.

OPERATORS' SPECIAL RIGHTS

- 1) Transmission undertakings have a monopoly in their area.
- 2) Distribution licences define the operation area and therefore create monopolies.
- 3) The infrastructures (transportation and distribution networks) have the right to occupy public land and to compulsory purchase of private lands.

I – SPAIN

GENERAL LEGAL FRAMEWORK

- 1) Production calls for a ministerial authorization.
- 2) Medium and high voltage transportation calls for an operation licence and ministerial authorization for each installation (declaration of public utility).
- 3) Distributors must obtain a concession from the ministry or autonomous communities (special administrative contract, usually for 75 years) and an authorization (issued by the various authorities) to set up their installations. A single operator cannot be producer and distributor simultaneously.

SECTOR STRUCTURE

- 1) Production: 10 undertakings (including one public, ENDESA) supply over 90%, the remainder coming from independent producers.
- 2) High voltage transmission: carried out by a mixed undertaking, REDESA (51% of shares belong to public bodies).
- 3) Distribution
 - 90% by large private production undertakings;

- the remainder by hundreds of small undertakings.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) The transmission undertaking, REDESA, is legally obliged to run all production and the high voltage transportation grid (220 KV and above) giving the best quality of service and safety.
- 2) The concessions granted to distribution undertakings impose certain obligations, in particular to supply all end consumers.
- 3) Distribution charges are set annually by the government on a uniform national basis (different charges for different sized consumers).

OPERATORS' SPECIAL RIGHTS

- 1) Imports, exports and high voltage transportation are the legal monopoly of REDESA.
- 2) Distribution undertakings usually enjoy a monopoly in their area on the basis of the concession; in certain cities, however, several undertakings may operate simultaneously.
- 3) The law grants the right to compulsory purchase to set up production, transportation and distribution installations (after declaration of public utility).

I – FRANCE

GENERAL LEGAL FRAMEWORK

The whole chain (import, production, export, transportation and distribution) is an integrated service entrusted by law to the EDF but only transportation and distribution are regarded as public services *stricto sensu*:

- national public service for transportation (State concession)
- local public service for distribution (municipal concessions)

Production investment is subject to public authorization.

SECTOR STRUCTURE

One operator dominates, namely the EDF (a State – owned public undertaking), supplying 92% of all production and 96% of distribution.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) Service obligation: the public distribution concessionaire must connect to the grid anyone applying for a connection (an obligation not written in law but usually featuring in the specifications of concessions).
- 2) Supply obligation: as the holder of the general supply grid concession, the EDF must ensure uninterrupted supplies for consumers and independent distributors. In other words, it must meet absolutely any level of demand and cannot run out of supplies. This calls for a continuous supply of the grid and, therefore, supply safety through long – term investment.
- 3) Equal charges: the charges must be the same for all consumers on national territory (provided they are in an identical situation within the distribution perimeter and with several categories according to the volume of consumption), which calls for costs to be evenly spread (equalization). Charges are set by the EDF within a ceiling set by the appropriate minister.
- 4) As a result of its transmission and distribution monopoly, the EDF must transport independent producers' electricity between different consumption sites and buy up the production of independent producers.

OPERATORS' SPECIAL RIGHTS

- 1) The EDF has, under law, an absolute monopoly for import and export.
- 2) It also enjoys a transmission monopoly (national concession for the transportation network).
- 3) It enjoys a production monopoly with some exceptions (railways, coal producers, small producers in existence at the time of nationalization, independent producers, hydroelectric power below a certain power, electricity produced under the supervision of local authorities by incinerating refuse).
- 4) It enjoys a distribution monopoly with the exception of municipal undertakings existing when it was set up (about 200, some of which are located in some large cities), which means that, apart from these exceptions, it is the compulsory concessionaire for municipalities. Within the concession area, the concessionaire has

exclusive distribution rights.

- 5) The EDF may, for its production, transportation and distribution installations, use the public highways (roads) and establish easements or even resort to compulsory purchase (after public interest has been declared by the authority).

I - GREECE

GENERAL LEGAL FRAMEWORK

All production, transportation and distribution is regarded by the law as a public service for which the State is responsible. Investment is subject to government authorization.

SECTOR STRUCTURE

Apart from "self – producers" (2% of all production) and some independent producers, a single State – owned public undertaking, PPC (Public Power Corporation), is responsible for nearly all production and all transportation and distribution.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) PPC is obliged to connect consumers without discrimination wherever their geographical location and at the lowest possible price.
- 2) It must ensure uninterrupted supplies.
- 3) Rates are set by government and are uniform throughout the country, with three categories of user: domestic consumers, commerce and agriculture, industry.
- 4) PPC must balance its books.
- 5) PPC must allow self – producers whose production site does not coincide with the consumption site to use its grid for transporting their electricity.

OPERATORS' SPECIAL RIGHTS

- 1) PPC has a legal monopoly for importing, producing, transporting and distributing:
 - a) with some exceptions in the case of production:
 - self – producers
 - local authorities producing for their consumers (when the district is not connected to the PPC grid)
 - some independents (within certain limits and provided they sell their

production to PPC)

- b) without exception for transportation;
 - c) with virtually no exceptions for distribution – the production of independents and surpluses of "self – producers" must be sold to PPC (exceptions: local authorities for the energy that they produce; self – producers but only if the PPC connection price is too high or if PPC fails to supply).
- 2) PPC has the right to the compulsory purchase of property in order to build the grid infrastructures.
 - 3) Subsidies to offset public service obligations are legally permissible but in practice are never granted.

I – IRELAND

GENERAL LEGAL FRAMEWORK

Electricity production, transportation and distribution may be regarded as public service activities. Investment is subject to government approval.

SECTOR STRUCTURE

A State – owned public undertaking, the Irish Electricity Supply Board (ESB), sees to almost all activity at all stages of production. There are a few private producers selling their production to ESB.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) ESB is obliged to supply electricity on request to all consumers, including those in remote areas or on islands.
- 2) The charge for domestic consumers is set by the appropriate minister on an ESB proposal and is uniform throughout the country. There is a separate charge for industry.

OPERATORS' SPECIAL RIGHTS

- 1) ESB enjoys an absolute monopoly for imports and transportation.

- 2) ESB enjoys a production and distribution monopoly but may delegate it.
- 3) For its installations ESB has the right to establish easements or to compulsory purchase.

I - ITALY

GENERAL LEGAL FRAMEWORK

The whole production chain is regarded as a public service activity which is, in general, the responsibility of the State which must, in particular, approve all investment. Distribution is nevertheless the responsibility of the municipalities, which grant concessions.

SECTOR STRUCTURE

- 1) ENEL, a public undertaking (a private law company owned by the State), accounts for 80% of all production, all transportation and 90% of distribution.
- 2) Self – producers account for 12%, the remainder being produced by independent undertakings, especially municipal ones.
- 3) 10% of distribution not conceded to ENEL is carried out by municipal companies.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) ENEL must transport the electricity of self – producers (from the production site to the consumption site) but is not obliged to grant access to its grid to third parties.
- 2) All distributors must operate in the public interest, and ENEL must also ensure supplies to all users at minimum cost.
- 3) ENEL is not entitled to indulge in other activities than electricity.
- 4) A flat charge is set for the whole country by a government body (the Interministerial Prices Committee).
- 5) The Industry Ministry has signed a "programme contract" with ENEL, which includes service quality clauses and an obligation to set up a commercial inquiries unit and a repairs service.

OPERATORS' SPECIAL RIGHTS

ENEL enjoys a 20 – year legal concession for all its activities.

- 1) However, its monopoly is only absolute for import, export and transportation.
- 2) For production, the monopoly only refers to installations with a capacity of more than 3 million W and also exempts self – producers.
- 3) There is no nationwide distribution monopoly but all concessionaires have exclusivity in their concession area.
- 4) ENEL enjoys the right to compulsory purchase for infrastructures needed for the grid.

I – LUXEMBOURG

GENERAL LEGAL FRAMEWORK

Production is only subject to the obtention of a State licence. However, transmission and distribution are regarded as public services and the State has granted their concession to CEGEDEL. State control of this undertaking (a private law company) is guaranteed by ownership rights (41% golden share) and its participation in the board of directors(it appoints two of its members and is represented by a commissioner who has right of veto over decisions). Imports are carried out by the State which sells imported electricity to CEGEDEL.

SECTOR STRUCTURE

- 1) Production: it covers barely 10% of needs: mostly steel industry own – producers (SOTEL) and small amounts of hydroelectricity and co – generation. All the rest is imported.
- 2) Transmission and distribution
 - mainly carried out by CEGEDEL;
 - to a small extent by SOTEL (only for the steel industry).

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) CEGEDEL is under the obligation to connect at uniform charges, although remote consumers must contribute to the initial outlay.
- 2) It is obliged to supply electricity and the rates are negotiated with the government as

part of an agreement.

OPERATORS' SPECIAL RIGHTS

- 1) Transmission and distribution are the legal monopoly of CEGEDEL.
- 2) For this purpose, CEGEDEL has sole rights to establish and operate installations and overhead or underground cables on public land or through compulsory purchase.
- 3) There are exceptions, however, to these exclusive rights:
 - a) They do not apply to steel companies, whose association (SOTEL) may freely import, establish transmission cables between different sites in certain conditions and distribute electricity to its members.
 - b) A few municipal distribution undertakings are allowed to operate.

I – NETHERLANDS

GENERAL LEGAL FRAMEWORK

The sector is under the general responsibility of the State which:

- 1) has subordinated the right to produce to the obtention of a licence with restrictions for distribution undertakings (they may not produce more than 3 million W, 25 million if they are using renewable energy or co-generation);
- 2) has entrusted the SEP (a company owned jointly by the production undertakings):
 - a monopoly for most imports (electricity of over 500 V; low voltage imports are unrestricted for consumers and distributors alike);
 - a monopoly for purchasing all electricity produced;
 - high voltage transportation, but without a monopoly (in theory other undertakings may build lines).

Investment must be approved by the various authorities.

SECTOR STRUCTURE

- 1) Production: 4 undertakings owned by local authorities (provinces and

municipalities); the shares of two of them are also held by distribution companies.

- 2) Transportation: the network is owned by the SEP.
- 3) Distribution: 48 undertakings, two – thirds of which are companies whose shares are held by the local authorities, the remainder being municipal corporations.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) The SEP must give distributors access to its grid, and can only refuse it if there is not enough capacity. Access by third parties is also possible.
- 2) Distributors must buy the surpluses of own – producers when they are produced by renewable energy or by co – generation.
- 3) Distributors are subject to the general obligations of safety, continuity and quality.
- 4) Distributors have an obligation to serve and supply in their area: they must connect and supply all consumers on request (unless there is a risk of damaging the grid).
- 5) Connection and supply conditions, as well as selling prices for domestic consumers, are set by the distribution undertakings – there are basic charges and a maximum charge determined by the association of these undertakings (VEEN) and approved by the appropriate minister.

OPERATORS' SPECIAL RIGHTS

- 1) Distributors are legally entitled to be supplied by their regional producer.
- 2) Distributors have no exclusive rights: consumers may in principle be supplied wherever they wish; in practice only bigger consumers have the means to do so.

I – PORTUGAL

GENERAL LEGAL FRAMEWORK

Legally, the transportation and distribution of electricity are a public service entrusted to the "Public Supply System" (SEP) which includes both EDP (Electricity of Portugal) and RNT (National Transportation Grid). Imports and exports are subject to government authorization and public distribution to the obtention of a licence. But EDP has lost its production monopoly and private undertakings may also produce electricity. They must, however, sell their surplus to EDP.

SECTOR STRUCTURE

- 1) Most production is carried out by EDP, a public undertaking (fully State – owned; the State appoints its top management) in the form of a private law company.
- 2) The shareout of production and the high and medium voltage transmission system as well as interconnections are the responsibility of RNT, a formally separate undertaking but fully dependent on EDP.
- 3) Distribution: it is mostly carried out by EDP, and to a small extent by some municipal undertakings.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) EDP must buy up all the production of independent producers.
- 2) RNT is obliged to give access to the transportation grid unless there is a risk to the safety of public distribution.
- 3) Holders of public distribution licences must ensure a regular supply.
- 4) Distributors must not discriminate between consumers (equality of access to supplies).
- 5) Flat charges are set annually by agreement between EDP and the government (or local governments in the case of the islands); they differ according to voltage. The government sets the payment conditions. Large consumers may obtain special conditions by contract.

OPERATORS' SPECIAL RIGHTS

For setting up their grids, transportation and distribution undertakings are entitled to use public land and have the right to compulsory purchase or to establish easements. But there are no provisions for compensation for their public service obligations.

I – UNITED KINGDOM

ENGLAND AND WALES

GENERAL LEGAL FRAMEWORK

- 1) The system is not integrated, except in a small number of cases (then the undertaking's accounts must separate production, transmission and distribution costs).
- 2) Transportation and distribution have retained the character of a public service.
- 3) The authorities still intervene to a great extent:
 - the government retains a golden share in the National Grid Company (the one it held in the regional electricity companies disappeared in 1995);
 - above all, the Electricity Regulation Office and its head, the Director General of Electricity Supply, have considerable supervisory powers.

Since there is no integration, producers and distributors must take part in a central pool run by the National Grid Company which sets prices every half an hour according to supply and demand. They are not obliged to sell to or buy from the pool but they may deal with each other outside the pool (apart from own – producers which must sell to the pool all their surpluses of over 10 million W).

- 4) The right to operate in the electricity sector is subordinated to the obtention of a licence:
 - a production licence
 - or a transmission licence
 - or a public supply licence, which entitles the holder to supply all consumers within a given area and which is reserved for regional electricity companies;
 - or a second tier supply licence which entitles, within certain limits, production undertakings to distribute or regional distribution companies to supply outside their area.

SECTOR STRUCTURE

A. Production:

- 1) Nuclear electricity: Nuclear Electric, a private law undertaking in which the State is the only shareholder;
- 2) Conventional electricity: 2 privatized undertakings, Power Gen and National Power, accounting for 80% of total electricity production.

B. Transportation: carried out in full by the National Grid Company, jointly owned by regional electricity companies, which owns the national high voltage transportation network and interconnectors with Scotland and France.

C. Distribution: 12 regional electricity companies, private undertakings, seeing to nearly all distribution within their own areas.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) The National Grid Company has a legal obligation to maintain and develop an efficient and economical transportation system.
- 2) Undertakings holding public supply licences (regional electricity companies) are obliged to serve and supply in their areas: they must connect on request and supply current to small users (less than 100 kW) according to their needs. This is not the case of holders of second tier supply licences.
- 3) Under their licences, regional companies may not produce more than 15% of their needs.
- 4) All undertakings holding a licence are obliged to grant access to third parties to their grids, within the limits of their capacities.
- 5) Public suppliers must enable their small consumers (less than 100 kW) to benefit from a non – discriminatory charge, since the regulator (Director General of Electricity Supply) can set a maximum charge. Medium – sized consumers (100 – 10,000 kW) may choose between a public supplier charge and a price fixed by contract with a second – level supplier. Larger consumers (over 10,000 kW) must conclude contracts.

OPERATORS' SPECIAL RIGHTS

- 1) Imports: in theory all holders of a public supply licence or a second tier licence may import electricity.

- 2) Transportation: the holder of a 25 – year licence, the National Grid Company, has the monopoly over high – voltage transmission in England and Wales.
- 3) Distribution: each regional company has in its area (defined by its licence) a monopoly for supplies to small consumers, i.e. those whose consumption is less than 100 kW. Consumers over this ceiling may turn to second tier suppliers (other regional companies or production companies) which may not, however, exceed 15% of the area market, without authorization of the Director General of Electricity Supply. In 1998 this ceiling is due to be abolished and all consumers will be able to choose their suppliers (ending the monopoly).
- 4) Undertakings holding a second tier licence may carry out work on the public highway (with the agreement of the appropriate authority) and have the right to compulsory purchase.

SCOTLAND

- 1) Three main producers: Scottish Nuclear (State – owned), Scottish Hydro and Scottish Power (private undertakings).
- 2) Two producers (Scottish Hydro and Scottish Power) see to the transmission and distribution of electricity (integrated system with overall licences), each with its own area but granting third parties grid access.

Section II – GAS

II – GERMANY

GENERAL LEGAL FRAMEWORK

- 1) Import and export are unrestricted.
- 2) Transportation is not a monopoly: in principle distributors may get supplies wherever they want.
- 3) Distribution is regarded overall as a public service. Distributors must have a licence issued by the Land and a municipality concession (concessions are granted, on payment, for a maximum of 20 years).

SECTOR STRUCTURE

- 1) Transportation is carried out by 8 undertakings which also control most imports.
- 2) Distribution is shared out between hundreds of undertakings most of which come under local authority control, either directly run as corporations or in the form of companies in which municipalities hold all or most of the shares. Some of them are totally private.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) Transportation charges are not controlled.
- 2) Within their concessions distributors are obliged to connect and supply all domestic users.
- 3) Distributors have a legal obligation to publish their conditions and charges, with at least two charges for domestic users. Otherwise pricing is unrestricted.

OPERATORS' SPECIAL RIGHTS

- 1) Since the transportation undertakings are spread over the supply areas, distributors do not, in practice, have a choice of supplier.
- 2) Distribution concessions give the exclusive right to construct and maintain within the municipal boundaries a distribution network for the end consumer: there is in effect a

distribution monopoly.

- 3) Concessions also give the right to use the public highway for laying mains.
- 4) Transportation undertakings also have access to the public highway for their mains and have the right to compulsory purchase.

II - BELGIUM

GENERAL LEGAL FRAMEWORK

All transportation and distribution is regarded as a public service. The Government is represented on the board of directors of DISTRIGAZ: its representatives may refer decisions contrary to the public interest to the minister, for cancellation. Inter – municipal associations define the distribution networks.

SECTOR STRUCTURE

Fully integrated: a single undertaking, DISTRIGAZ, a private undertaking (previously 50% State – owned), sees to the purchase, storage, transportation and sale to big industrial customers and public distributors. The latter are the municipalities, in the form of mixed or "pure" inter – municipal associations (depending on whether they include participation by private undertakings as well as that of the municipalities).

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) DISTRIGAZ must ensure continuity of supplies to distributors.
- 2) The distributors are themselves obliged to supply their customers.
- 3) The basic charges are defined by the minister upon the recommendation of the Comité de Contrôle de l'Electricité et du Gaz. These charges are equalized nationwide and are therefore identical for the whole country.

OPERATORS' SPECIAL RIGHTS

- 1) DISTRIGAZ legally enjoys an exclusive concession for transporting gas by mains. Inter – municipal associations also have a distribution concession.
- 2) These concessions entitle holders to right of way on public land and, if public interest has been declared, to the right to compulsory purchase or to establish easements.

II – DENMARK

GENERAL LEGAL FRAMEWORK

The transportation and distribution of gas are not regarded by law as public services. However, in order to import, sell, transport or store gas a licence from the Energy Ministry is required.

SECTOR STRUCTURE

Natural gas is extracted by private undertakings but is sold in full to Dansk Naturgas (a subsidiary of the State undertaking DONG) which transports and supplies all of it to distributors and also sees to a small part of the distribution. The five main distributors are inter – municipal corporations.

PUBLIC SERVICE TASKS AND OBLIGATIONS

The law stipulates that the Energy Minister may impose on distribution undertakings the obligation to supply gas and may also control costs.

OPERATORS' SPECIAL RIGHTS

- 1) The Energy Minister's licence may grant a monopoly for a set period, at different stages from production to supply. Dansk Naturgas enjoys a transportation monopoly until 2012.
- 2) Distributors enjoy a legal monopoly for sales to large consumers.
- 3) To establish transportation and distribution networks, undertakings have access to the public land and have the right to compulsory purchase.

II – SPAIN

GENERAL LEGAL FRAMEWORK

- 1) The following are regarded as public services:
 - transporting gas by medium or high pressure mains from production, processing or storage centres to the distribution network;
 - the distribution of all combustible gas by mains to urban areas or a given territorial area.
- 2) At each stage in the process (production, transportation, distribution) administrative

concessions are required. These are given, in the form of a contract (for a maximum of 75 years) by the State for nationwide installations (gas – pipelines) and by the autonomous communities for local distribution networks.

- 3) General planning and definition of the national gas – pipeline network is State responsibility.

SECTOR STRUCTURE

There is a single operator, the State undertaking ENAGAS.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) Concession contracts set the conditions for creating the installations needed for providing the public service.
- 2) The law sets the principles for charges intended to achieve uniform sales prices for the public while maintaining the economic and financial balance of the concessionaires.

OPERATORS' SPECIAL RIGHTS

Administrative concession contracts confer the right to compulsory purchase (after declaration of public interest).

II – FRANCE

GENERAL LEGAL FRAMEWORK

The whole sector was almost entirely nationalized and entrusted to Gaz de France (GDF) in 1946 and is regarded by law as being a totally public service. The transportation of natural gas can only be carried out, under a State concession granted by the appropriate minister, by a public corporation or by a company which is either 30% State – owned or owned by public corporations. Public distribution is the responsibility of the municipalities which may distribute directly or concede it.

SECTOR STRUCTURE

Gaz de France (GDF, a fully State – owned public corporation) runs the whole sector of combustible gas transported by mains (import, transportation, distribution and export).

PUBLIC SERVICE TASKS AND OBLIGATIONS

Generally speaking, GDF, responsible for the whole sector, must operate the public service regularly and punctually. This general responsibility is translated by special obligations.

- 1) Obligation to connect (or universal service). GDF must connect to the distribution network any consumer so requesting, without discrimination and in pre – established conditions (set out in the concession specifications). But this obligation is only valid within the perimeter of the existing distribution concessions. It does not mean that GDF must meet every request by a municipality to set up a new distribution network.
- 2) Obligation to supply (comes under the principle of continuity of public services). GDF must supply without interruption all connected consumers, with priority to users of public distribution (major industrial consumers are connected directly to the transportation network). This implies a long term supplies policy (i.e. imports, since national production has petered out: replacing industrial gas with natural gas) and a storage policy.
- 3) Obligation of equal treatment (principle of equality of access to public services). Domestic consumers must benefit from uniform charges regardless of their location in the country. To achieve that aim, prices are set not on the basis of the real costs of the concession in question but the mean costs of all concessions: i.e. the concept of equalizing prices nationwide. Prices are set, taking into account maximum general charges, by the appropriate minister. For industrial customers, prices are set globally.

OPERATORS' SPECIAL RIGHTS

GDF enjoys a monopoly for the whole sector, with slight differences from one stage of the process to another.

- 1) Import and export: absolute monopoly, regarded as the necessary counterpart for the supply obligation.
- 2) Production: there is a monopoly except for natural gas, small undertakings non – existent at the time of nationalization and undertakings already public at the time.
- 3) Transportation: 3 undertakings currently benefit from the required State concession:
 - the Société Nationale des Gaz du Sud – Ouest (private company in which GDF holds 30%, the remainder belonging to Elf – Aquitaine) for the South – West region;

- the Compagnie Française du Méthane (50% held by GDF), for certain areas;
- GDF for most of the country.

4) Distribution

- Since gas distribution was nationalized for GDF's benefit with the exception of small undertakings and public undertakings existing in 1946, GDF is, apart from these exceptions, the compulsory concessionaire for municipalities: it is, therefore, in a position of virtually exclusive national distributor.
- Any concessionaire has a monopoly for public distribution in the area covered by its concession.

- 5) For building transportation and production networks, undertakings may use public land (in particular the public highways) and, if there is no friendly settlement and if the public interest has been declared, have the right to establish easements or to compulsory purchase. Installations (gas mains) remain the property of the authorities (State for transportation, municipalities for distribution).

II - GREECE

GENERAL LEGAL FRAMEWORK

- 1) The initiative to set up a public distribution network is left to municipalities.
- 2) Distribution may be carried out by municipal, private or mixed undertakings.

SECTOR STRUCTURE

Public gas distribution is highly under-developed: it is limited to Athens and some large towns (Thessaloniki, Volos and Larissa). There are as yet no imports of natural gas and the network is being built. Imports, transportation and distribution to large consumers are entrusted to DEPA (Public Gas Corporation of Greece), a limited company which is a subsidiary of DEP, a public undertaking; distribution to small consumers is to be carried out by municipal or mixed undertakings.

PUBLIC SERVICE TASKS AND OBLIGATIONS

To date there have been no set public service obligations.

OPERATORS' SPECIAL RIGHTS

- There are no nationwide exclusive rights.
- DEPA has the right to compulsory purchase for building the network.
- The distribution operation deficit is met by the State.

II - IRELAND

GENERAL LEGAL FRAMEWORK

The transportation and public distribution of gas by mains may be regarded as a public service.

SECTOR STRUCTURE

A single undertaking, the Irish Gas Board, State – owned, imports and transports gas. It also distributes it either directly or through four regional subsidiaries over which it has complete control.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) The Irish Gas Board is entrusted by law with the purchase, transportation and distribution of gas.
- 2) The IGB must observe the customs and standards of a responsible gas undertaking but has no service or supply obligations.
- 3) It must see to the proper functioning of mains and connections needed for supplies.
- 4) Rates for domestic users are subject to ministerial approval.

OPERATORS' SPECIAL RIGHTS

- 1) The Irish Gas Board's monopoly is only de facto. In theory, any other undertaking could build networks but the government could oblige it to meet the same construction and operation conditions as the IGB.

- 2) As the legal successors to the old municipal distribution companies, the IGB's regional subsidiaries enjoy a monopoly for distributing gas in their respective areas.
- 3) In order to build mains, the IGB has access to public land and the right to compulsory purchase.

II - ITALY

GENERAL LEGAL FRAMEWORK

- 1) Production and imports are not regarded as public services.
- 2) On the other hand, storage is regarded as in the public interest and depends on 30 – year concessions granted by the State.
- 3) Public distribution is a municipal public service by law. Municipalities exercise these powers:
 - either by operating the service themselves: directly (corporations) or indirectly (by setting up an autonomous municipal agency);
 - or by entrusting the service to an external undertaking to which they grant concessions (usually for 30 years) and which may be a municipal company (exclusive public capital, a majority or minority share) or a private undertaking.

SECTOR STRUCTURE

- 1) Production and imports are dominated by ENI, a State undertaking, and its subsidiary AGIP.
- 2) Transportation is carried out almost exclusively by the SNAM, another ENI subsidiary, which owns nearly all the network.
- 3) Public distribution is carried out by a large number of operators which buy the gas from the SNAM.
- 4) The SNAM sells direct to large consumers.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) The transportation network is, in principle, at the disposal of distributors. Its owner

must allow gas produced in the country to be conveyed along it provided that it is technically possible. But it is difficult to determine a price for this facility given the vertical integration of the system (transportation is not separate from the overall gas activity sector).

- 2) Prices charged to domestic users are State – controlled: they are set by the Interministerial Prices Committee (CIP) on proposals from the distributors, according to a formula intended to equalize prices nationwide. On the other hand, the transporters' selling price to distributors and industrial consumer prices are not restricted, although the CIP may approve them or reject them.

OPERATORS' SPECIAL RIGHTS

- 1) Production and imports are not subject to any legal monopoly: ENI's domination is de facto.
- 2) Municipal public distribution concessions enjoy exclusivity in the concession area.
- 3) Storage and transportation installations may be declared to be in the public interest, which entitles holders to the right to compulsory purchase and use public land.

II – LUXEMBOURG

GENERAL LEGAL FRAMEWORK

Gas transportation and distribution are regarded by the law as being in the public interest. But access by consumers to gas is not possible throughout the country. Prices are set by the distributors.

SECTOR STRUCTURE

- All gas is imported (no national production) by a single undertaking, SOTEG (50% State – owned, 50% owned by the steel undertakings), which transports all gas.
- Distribution is shared out geographically between:
 - . 2 municipal corporations (for Luxembourg and Dudelange);
 - . 2 mainly public undertakings (State and municipalities, some private shareholders), SUDGAZ (for the southern municipalities) and LUXGAZ (for the rest of the country).

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) No obligation to serve the whole country: distribution is only carried out in places where it is profitable.
- 2) In areas where gas is distributed, any residents so requesting must be connected and connected users must be kept supplied.

OPERATORS' SPECIAL RIGHTS

- 1) No monopolies for imports, transportation or distribution.
- 2) As a transportation undertaking set up by law, SOTEG is legally entitled, albeit not exclusively, to use public land free of charge and exercise the right to compulsory purchase for laying mains (when the law declares it to be in the public interest).
- 3) Distributors also enjoy these rights.

II – NETHERLANDS

GENERAL LEGAL FRAMEWORK

The transportation and public distribution of gas are regarded as public interest activities. The main transportation axes are defined by the State which grants concessions for laying mains. Public distribution is a municipal responsibility; municipalities either carry it out themselves, through municipal corporations, or entrust it to companies holding a special licence for that purpose. On the other hand, supplies to large consumers, directly carried out by Gasunie, fall outside the public service.

SECTOR STRUCTURE

Gas production is in the hands of private undertakings. A single undertaking, Gasunie (a private undertaking with a sizeable State participation) buys, transports and sells to distributors all gas used in the country. Distribution is shared by forty or so undertakings which are either municipal corporations or, more often, companies owned by the municipalities or provinces. These distributors are grouped in an association (VEGIN).

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) Gasunie is obliged to ensure continuous supplies, under an agreement with VEGIN.
- 2) Domestic consumer charges are set by distributors on VEGIN's recommendation,

and the minister has certain powers of control (for setting maximum prices).

OPERATORS' SPECIAL RIGHTS

There are no legal exclusive rights.

- 1) Gasunie is the only importer and owns the whole transportation network, but not on the basis of any legal monopoly.
- 2) It exclusively supplies distributors but merely under an agreement with them (VEGIN).
- 3) Distribution is covered by no monopoly.
- 4) Transportation or distribution concessionaires laying gas mains may, after declaration of public interest, have right of way on public or private land and have the right to compulsory purchase.

II – PORTUGAL

GENERAL LEGAL FRAMEWORK

Transportation and distribution are regarded as public services and call for government concessions.

SECTOR STRUCTURE

A public undertaking (100% State – owned), Gas of Portugal (GDP), dominates: it transports all gas and distributes it, either by itself (in the Lisbon region) or through three subsidiaries (in the northern, central and southern regions).

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) Distribution undertakings must supply small consumers.
- 2) They may not merge.
- 3) Prices charged to small consumers are subject to ministerial approval.

OPERATORS' SPECIAL RIGHTS

- 1) GDP is the exclusive supplier and transporter.
- 2) Distributors enjoy exclusivity for distributing gas in their respective areas.
- 3) To install their networks, concessionaires have access to public land and may force access to private land and have the right to compulsory purchase.

II - UNITED KINGDOM

GENERAL LEGAL FRAMEWORK

The Gas Act regulates gas supplies. Its provisions are applied by the appropriate minister and the Director General of Gas Supply.

According to this legislation:

- Imports and exports are subject to ministerial authorization;
- the right to supply gas by mains in a given area is subordinated to "public gas supplier" authorizations, also granted by the minister.

SECTOR STRUCTURE

British Gas, a private undertaking (previously public), covers the whole sector: production, transmission and distribution. It is currently the only "public gas supplier".

PUBLIC SERVICE TASKS AND OBLIGATIONS

As public gas supplier, British Gas must:

- 1) set up and maintain an efficient, coordinated and economically sound distribution network.
- 2) supply on request all consumers of less than 25,000 thermal units per annum situated at a maximum of 25 yards from a gas mains.
- 3) meet all reasonable gas demands within the limits of profitability.
- 4) publish charges for small consumers with no discrimination and for which the average does not exceed a maximum set according to a formula laid down by the

Director General of Gas Supply.

- 5) observe a "Public Supply Code" including, in particular, obligations to provide a regular service and maintain meters and rules on cutting off people who fail to pay their bills. Furthermore, the authorization granted to British Gas obliges it:
 - to provide an efficient, round – the – clock telephone answering service in respect of leaks;
 - to set up a user counselling service (for rational gas use and payment problems), especially for the elderly or the disabled.
- 6) The Director General of Gas Supply may:
 - set the conditions in which public suppliers owning a transportation network must grant network access to another distributor, by increasing capacity if necessary (conditions include: same type of gas, no problems for public supplier obligations, payment of a fee);
 - in the framework of his charge control powers, impose on British Gas the obligation to publish performance figures.

OPERATORS' SPECIAL RIGHTS

British Gas has the legal quality of "public gas supplier". The law allows other undertakings to obtain a public supply authorization, in the long run, but this has not yet happened.

- 1) The law gives British Gas a 25 year monopoly for supplying consumers of less than 25,000 thermal units per annum located a maximum of 25 yards from the existing mains.
- 2) As public supplier, British Gas has a legal right to lay mains on the public highway and, with the authorization of the appropriate minister, to compulsory purchase.

Section III – WATER DISTRIBUTION

III – GERMANY

GENERAL LEGAL FRAMEWORK

Water distribution is a public service for which responsibility lies with the municipalities; they may distribute it themselves or entrust it to companies. Prices are set by the municipalities.

SECTOR STRUCTURE

96% of operators are municipal undertakings, the others are mixed undertakings (public and private capital) and some private undertakings (this is rare).

III – BELGIUM

GENERAL LEGAL FRAMEWORK

Water distribution is a public service for which the municipalities have exclusive responsibility. They exercise it:

- directly: municipal service without separate accounts;
- by setting up municipal corporations, i.e. bodies without legal personality but with their own budgets and accounts;
- by joining up with an "inter – municipal" company (association of municipalities with legal personality), which may be "pure" (only municipalities) or "mixed" (association of municipalities and private undertakings);
- or, by granting concessions to third parties (inter – municipal associations or private undertakings).

In all cases, the municipality owns the network and sets prices.

SECTOR STRUCTURE

The operators are:

- in two – thirds of cases: the municipality itself, by direct management or through a municipal undertaking;

- in 20% of cases, but covering 85% of consumers: inter – municipal associations;
- exceptionally: concessionaire undertakings.

PUBLIC SERVICE TASKS AND OBLIGATIONS

Water distributors are obliged:

- to connect to the network any resident of a block of flats or house so requesting, upon payment for any supplementary costs incurred in the case of remote localities;
- to supply all subscribers.

OPERATORS' SPECIAL RIGHTS

Distributors may:

- exercise the right to compulsory purchase (the decision lies with the region);
- occupy the public highway (municipal, provincial or regional, with the permission of the authority in question).

III – DENMARK

GENERAL LEGAL FRAMEWORK

Water distribution is a public service, albeit not one organized by law. It is left to the municipalities to carry it out.

SECTOR STRUCTURE

Operators are mostly departments within the municipal administration (without budgetary or accounting autonomy).

PUBLIC SERVICE TASKS AND OBLIGATIONS

Distributors are obliged to connect and supply consumers.

OPERATORS' SPECIAL RIGHTS

Distributors have, in practice, exclusivity in their area, access to public land and the right to compulsory purchase in order to create their networks.

III – SPAIN

GENERAL LEGAL FRAMEWORK

Water distribution is a public service which is the responsibility of local or regional authorities (municipalities and autonomous communities). The authorities may perform the service themselves or entrust it to municipal, multi – municipal or autonomous community public undertakings. Charges are always subject to the decision of the authority in question.

SECTOR STRUCTURE

Operators are:

- in some cases, the authorities themselves;
- usually public undertakings owned by the municipalities, singly or in groups, or by the autonomous communities.

III – FRANCE

GENERAL LEGAL FRAMEWORK

Drinking water distribution is legally a public service for which municipalities, singly or in groups, have responsibility. Municipalities may:

- 1) perform the service themselves (direct management)
 - . through the municipal administration itself;
 - . by setting up a municipal body with budgetary and accounting autonomy;
 - . or, by setting up a full – blown corporation.
- 2) or delegate it to an undertaking (indirect management) by concession or by farming it out (or by other public service delegation procedures).

In all cases, charges are set by the municipality.

SECTOR STRUCTURE

- 1) In a half of all municipalities, especially small rural ones: the municipalities

themselves, by direct management.

- 2) In the other half (representing 80% of the population) by private undertakings to which distribution is delegated, some of them sizeable (Lyonnaise des Eaux, Générale des Eaux, Bouygues, SAUR, etc).

PUBLIC SERVICE TASKS AND OBLIGATIONS

Distributors must connect to the network and supply with drinking water all users within the area for which they are responsible, according to the usual principles of public service: equality of access, continuity of service, adaptation to developments in needs. In cases of concessions, they must make the necessary investment for establishing, maintaining and extending the network which remains, in any case, municipal property. Public service delegation contracts may compel contractors to make certain payments to the municipality: initial payment, operation charge, payment of annual instalments in respect of any debt left over from the old corporation.

OPERATORS' SPECIAL RIGHTS

- 1) The distributor has a monopoly in the area where it is responsible for distribution.
- 2) For laying mains, distributors have access to public land (authorization from the roads department), and have the right to establish easements and to compulsory purchase.
- 3) Network installation works may receive State subsidies.

III - GREECE

GENERAL LEGAL FRAMEWORK

Water distribution is regarded as a public service. It is the responsibility of municipalities.

SECTOR STRUCTURE

- a State – owned public undertaking for the Athens region;
- municipal undertakings in certain towns and cities;
- municipal corporations in small municipalities;
- private concessionaires (this is relatively rare).

PUBLIC SERVICE TASKS AND OBLIGATIONS

Undertakings in charge of water distribution must supply all users in equal conditions within each category (households, industry, etc).

OPERATORS' SPECIAL RIGHTS

- 1) All undertakings entrusted with water distribution enjoy a monopoly in their area.
- 2) They have access to State land and public land owned by other authorities and have the right to compulsory purchase.
- 3) Sometimes they receive subsidies.

III – IRELAND

GENERAL LEGAL FRAMEWORK

Water distribution is legally a municipal public service.

SECTOR STRUCTURE

Operators are always local authorities.

PUBLIC SERVICE TASKS AND OBLIGATIONS

Municipalities are obliged to supply good quality water.

OPERATORS' SPECIAL RIGHTS

Municipalities enjoy a monopoly by definition.

III – ITALY

GENERAL LEGAL FRAMEWORK

Drinking – water distribution is a municipal public service. Municipalities may supply it themselves, through their own departments, by setting up municipal agencies, or by entrusting it to inter – municipal agencies or State bodies, or concede it to private undertakings. Prices are set by the municipalities.

SECTOR STRUCTURE

- direct municipal management: about one third of the water distributed;
- municipal agencies: about one quarter;
- inter – municipal agencies: 18%;
- State bodies: 18%
- private undertakings (such as Italgas): 6%.

III – LUXEMBOURG

GENERAL LEGAL FRAMEWORK

Water distribution is, by law, a municipal public service. Municipalities exercise these powers either alone or by forming syndicates. They may also concede the service to third parties provided the appropriate minister gives the go – ahead. Prices are set by the minister on the proposal of the municipalities.

SECTOR STRUCTURE

- 1) Production: apart from some municipalities with sufficient own resources, most are supplied, at least in part, by the Syndicat des Eaux du Barrage d' Esch – sur – Sûre (SEBES), a syndicate comprising municipalities (half the shares) and the State (the other half).
- 2) Distribution: municipalities and syndicates thereof.

PUBLIC SERVICE TASKS AND OBLIGATIONS

The municipalities are responsible for creating the distribution network. They must connect all users within built – up areas; anyone living far outside those boundaries must meet the extra cost.

OPERATORS' SPECIAL RIGHTS

- 1) Access to public and private land belonging to the authorities for infrastructure work:

- by right and free of charge for SEBES;
 - subject to government authorization in the case of municipalities and syndicates.
- 2) Compulsory purchase:
- by right for SEBES;
 - with government agreement for municipalities and their syndicates.
- 3) Right of way on private land: acquired in return for payment.

III – NETHERLANDS

GENERAL LEGAL FRAMEWORK

Water distribution is a municipal public service and the authorities may concede the service to an operator. Charges are controlled by the authorities.

SECTOR STRUCTURE

- two major production undertakings and some smaller ones;
- apart from one municipal corporation (Amsterdam), distributors (thirty or so) are all public undertakings fully owned by municipalities or provinces (except Tilburg and Doorn, where there are minority private shareholders).

PUBLIC SERVICE TASKS AND OBLIGATIONS

Operators are obliged to supply all users, maintain the network and extend it to meet needs.

OPERATORS' SPECIAL RIGHTS

- 1) Distributors enjoy a monopoly within their particular area.
- 2) For installing the network, they have access to public land and have the right to compulsory purchase.

III – PORTUGAL

GENERAL LEGAL FRAMEWORK

By law, public water distribution is a public service:

- 1) either solely municipal: the municipality provides the service itself or through a municipal agency or concedes it to an undertaking or consumer association;
- 2) or multi – municipal, with State intervention: the service is conceded by the State to a public undertaking (majority of the capital belonging to authorities) which also concludes a contract with each municipality concerned.

SECTOR STRUCTURE

As provided by law, operators include municipalities themselves, associations thereof, public or private undertakings and consumer associations.

PUBLIC SERVICE TASKS AND OBLIGATIONS

They are established by the concession contract. Generally speaking, concessionaires must provide a service, build and maintain the distribution network and pay a charge to the conceding authority.

OPERATORS' SPECIAL RIGHTS

- 1) Concessionaires have operation monopolies in their area.
- 2) Concessionaires may use public land (over – and underground) and have the right to compulsory purchase.
- 3) Concessionaires may receive public subsidies.

III – UNITED KINGDOM

GENERAL LEGAL FRAMEWORK

In the final instance, water distribution is State responsibility. In the case of England and Wales, the State has withdrawn management from the old "water authorities" (public agencies) and entrusted it to private concessionaires. These companies are subject to the control of the Secretary of State for the Environment (although the golden share which used to enable him to prevent a single shareholder from holding more than 15% of a company

disappeared in 1995) and, above all, OFWAT, the Water Industry Regulator, which is empowered to cap annual price increases and lay down quality standards.

SECTOR STRUCTURE

- England and Wales: 88 private companies;
- Scotland: 9 authorities owned by regional councils;
- Northern Ireland: 3 public authorities.

PUBLIC SERVICE TASKS AND OBLIGATIONS

Distributors must:

- maintain a pricing system that satisfies consumers' interests, especially those in rural or remote areas;
- meet quality standards.

OPERATORS' SPECIAL RIGHTS

Distributors have a monopoly in their area and, for installing the infrastructures, have right of way on public and private highways.

Section IV – RAILWAYS

IV – GERMANY

GENERAL LEGAL FRAMEWORK AND SECTOR STRUCTURE

- 1) Powers for the public railways service are held by the State, in the case of long haul, and by the Länder, in the case of shorter journeys. The network itself is owned by the federal State.
- 2) Deutsche Bahn, a public undertaking owned by the federal State in the form of a private law company (since 1 January 1994; previously it was simply a department of the federal Ministry of Transport, without a legal personality), is by law a public interest undertaking, under the tutelage of the Minister of Transport. Infrastructure and transport service accounts have been separated.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) By law, DB must provide the "best possible transport service": this obligation, especially valid for the passenger service, obliges it to develop its network.
- 2) It must exact uniform fares so as not to penalise economically vulnerable areas, especially in terms of transport, which means that loss – making services are maintained.
- 3) It must implement special low fares ("social") as demanded by the authorities.

OPERATORS' SPECIAL RIGHTS

Public service obligations must be offset by the authorities imposing them: i.e. the federal State, Länder or municipalities.

IV – BELGIUM

GENERAL LEGAL FRAMEWORK AND SECTOR STRUCTURE

- 1) The SNCB, an autonomous public undertaking (since 1992) is the only operator.
- 2) Ownership of the railways network (lines and neighbouring land) has been transferred from the State to the SNCB.

- 3) The construction of new lines depends on a State decision (ten – year investment plans).
- 4) The SNCB may take a line or station out of service with ministerial approval. It is free to decide how to use or dispose of assets.

PUBLIC SERVICE TASKS AND OBLIGATIONS

A. General tasks are determined by law:

- domestic transport for ordinary passengers (international passenger services, goods and parcels deliveries are not regarded as public service activities; they are carried out on a purely commercial basis).
- acquiring, building, maintaining, operating and managing infrastructures.
- providing services for national needs.

B. Detailed obligations are included in the management contract concluded with the State.

1) Domestic passenger transport:

- a) for the whole network: 160,000 train – km on working days
100,000 train – km on other days
- b) for "inter – city" links (between main stations):
70,000 train – km and 16 trains in each direction on each link on working days
55,000 trains – km and 12 trains in each direction on other days
- c) for local links (between small stations):
60,000 train – km and 4 trains in each direction on each link on working days
30,000 train – km on other days
- d) for peak – time or back – up services:
20,000 train – km on working days

2) Infrastructures:

- making investment (acquiring land, building tracks, purchasing rolling stock) provided for in the ten – year plan (submitted by the SNCB and

approved by the government), financed by the Ministry of Communications;

- maintenance, management and operation.

3) Serving national needs

These are tasks carried out for other public services:

- international parcels service;
- transporting passengers or goods for ministerial departments;
- obligations towards civil and military defence
 - . certain lines or disused installations may not be disposed of,
 - . participation in international defence bodies entrusted with coordinating rail transport,
 - . participation in civilian and military exercises,
 - . setting up a permanent bureau dealing with defence problems;
- participation in organizing and executing police and customs controls and safety checks at the Cross – Channel terminal at Brussels – South.

OPERATORS' SPECIAL RIGHTS

- 1) The SNCB enjoys a monopoly for national and international rail services.
- 2) For building tracks and buildings needed for operations, it has the right to compulsory purchase.
- 3) To offset public service obligations it receives a financial contribution from the State.

IV – DENMARK

GENERAL LEGAL FRAMEWORK AND SECTOR STRUCTURE

- 1) The State (government and parliament) decides when to build or decommission lines.
- 2) Passenger transport is regarded as a public service.

3) Operators:

- a State undertaking, Danske Statsbanen (DSB), a department (without legal personality) at the Ministry of Public Transport, owns the national railways (five – sixths of the whole network);
- local railways are run by a dozen private law undertakings, mostly State – owned or owned by local authorities.

PUBLIC SERVICE TASKS AND OBLIGATIONS

The public service obligations defined by the State for the national railways and by the local authorities for local railways include infrastructure management, regular and good quality service and set fares.

OPERATORS' SPECIAL RIGHTS

- 1) Undertakings enjoy a monopoly on their lines.
- 2) They have the right to compulsory purchase for building new lines.
- 3) To offset their public service obligations they receive subsidies.

IV – SPAIN

GENERAL LEGAL FRAMEWORK AND SECTOR STRUCTURE

A public undertaking (fully State – owned), the national network of Spanish Railways (RENFE) is responsible for the whole network and all rail transport.

PUBLIC SERVICE TASKS AND OBLIGATIONS

These are now contained in a programme contract with the State:

- 1) Infrastructure management.
- 2) Providing certain passenger services, mainly over short or medium haul, exceptionally for long haul.

OPERATORS' SPECIAL RIGHTS

- 1) Monopoly and the right to compulsory purchase.

- 2) Public service obligations are covered by corresponding State contributions.

IV – FRANCE

GENERAL LEGAL FRAMEWORK AND SECTOR STRUCTURE

- 1) The only operator is the SNCF, a totally State – owned public undertaking (it became a "public establishment" in 1983; was previously a mixed economy limited company, almost totally State – owned).
- 2) The State decides ultimately whether new railway tracks should be built.
- 3) The railway tracks are part of State land (public railway land) and the rolling stock is owned by the SNCF.
- 4) The regional and local authorities participate in the organization of the regional rail links:
 - these links must legally be included in the regional transport plan (established by the regional council);
 - they are run by contracts between regions and the SNCF;
 - any change to services (opening or closing a line, creating or removing a halt) calls for consultation of the regions, departments and municipalities concerned.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- A. The public railways service is entrusted in full to the SNCF by law (1982 Special Domestic Transport Act, and the specifications adopted by decree in 1983). It comprises:
 - 1) the infrastructure: the SNCF must "operate, adapt and develop, according to the principles of public service, the national rail network";
 - 2) the rail network: the SNCF "must operate the rail services on this network in the best possible conditions of safety, accessibility, speed, comfort and punctuality". It is the "set of services offered by the SNCF" which must be "implemented according to the principles of public service, especially in terms of continuity and conditions of access for users" in order to "help to meet users' needs in the most advantageous economic and social conditions for the community, contribute to national unity and solidarity and national defence".

B. The SNCF's general public service task is translated by obligations. The main ones are:

1) Providing services which are, *stricto sensu*, in the public interest, i.e. mainly passenger transport in order to satisfy the "right to transport" provided for by law.

a) Services of regional interest

These are commuter links or "public transport services": these include urban services (Paris region and major cities), defined in accordance with the authorities concerned (included in regional transport plans), inter-city links and rural train services.

b) National services or main-line links, defined by the SNCF under its own rules.

2) Applying social fares for certain passenger categories (families, soldiers).

3) Meeting certain national defence obligations (maintaining lines and buildings, transporting troops).

4) Fulfilling service quality conditions for passengers:

- extra services
- enough seats
- luggage transport
- information

5) Applying the principle of fare equalization. This principle applies to basic fares, which must be the same for everyone throughout the country, varying only according to the distance covered. Some nuances in time and space are now allowed. Fares are communicated to the Minister of Transport who may reject them within a week (they are regarded as approved after that deadline).

OPERATORS' SPECIAL RIGHTS

1) The SNCF has exclusive use of the national rail network. No other undertaking may offer transport services on the network without its agreement (by farming out lines or by means of operation contracts).

2) For constructing the lines and buildings needed for operations, the SNCF has the

right to compulsory purchase if it has been declared in the public interest.

- 3) To offset its public service obligations, the SNCF receives contributions from the authorities:
 - a) from the State to cover:
 - some infrastructure spending
 - special low ("social") fares
 - the deficit for operating regional interest passenger services
 - national defence costs
 - shortfalls when fare increase requests are turned down
 - b) from local authorities (regions, in particular, but also departments and municipalities) for the services they call on the SNCF to provide over and above the norm.
- 4) Bearing in mind this State funding, the SNCF must balance its books without any longer being able to count on State help.

IV – GREECE

GENERAL LEGAL FRAMEWORK AND SECTOR STRUCTURE

- All rail services are regarded as public services and therefore are State responsibility. The government has the ultimate say in creating or decommissioning tracks or rail links. Fares are subjected to it for approval.
- The Organization of Hellenic Railways (OHR), public undertaking (a limited company of which the State is the only shareholder), is the sole operator.

PUBLIC SERVICE TASKS AND OBLIGATIONS

The OHR must:

- maintain infrastructures (which it alone owns);
- provide passenger services throughout the network regardless of profitability;
- charge uniform fares per user category.

OPERATORS' SPECIAL RIGHTS

The OHR:

- has a legal monopoly for urban and inter – city rail services (possible exemptions through legislation);
- has use of State public land needed for the rail service;
- has the right to compulsory purchase;
- receives State subsidies to offset its public service obligations.

IV – IRELAND

GENERAL LEGAL FRAMEWORK AND SECTOR STRUCTURE

- 1) The construction or decommissioning of lines requires a ministerial decision.
- 2) CIE, a State – owned public transport undertaking, whose management is appointed by the appropriate minister, owns the rail network.
- 3) Irish Rail, a subsidiary of CIE, runs the network, owns the rolling stock and provides a transport service.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) Obligation to maintain the railways.
- 2) Obligation to provide a passenger service throughout the country, even if it makes a loss. Only ministerial decisions may decommission links, following public inquiries.
- 3) No obligation to equalize fares, but prices are subject to ministerial approval.

OPERATORS' SPECIAL RIGHTS

- 1) Irish Rail has a transport monopoly on the network but trains from Northern Ireland are allowed to use the tracks (and vice versa).
- 2) To build new lines, it has the right to compulsory purchase.
- 3) State subsidies to offset public service obligations.

IV – ITALY

GENERAL LEGAL FRAMEWORK AND SECTOR STRUCTURE

- 1) The railways are a public service for which the State has responsibility and may concede the management.
- 2) Most of the network (75% approximately) and the rail service has been entrusted to the State Railways, a totally public undertaking which for a long time was an agency with limited autonomy and was turned, in 1992, into a limited company.
- 3) The remainder is conceded to private operators.

PUBLIC SERVICE TASKS AND OBLIGATIONS

These are set out in a "public service contract" concluded between the State Railways and the Minister of Transport. They include, in particular:

- safety obligations;
- health, safety and presentation conditions;
- compensation for passengers whose trains are very late.

Rates are submitted for approval to the Minister of Transport. They are uniform for the whole country.

OPERATORS' SPECIAL RIGHTS

- 1) The State railways and concessionaires usually have a service monopoly for their particular area.
- 2) They have the right to compulsory purchase for building infrastructures.
- 3) Building tracks is subsidized by the authorities.
- 4) Public service obligations are covered by compensatory subsidies.

IV – LUXEMBOURG

GENERAL LEGAL FRAMEWORK AND SECTOR STRUCTURE

- 1) The rail network is part of the State property. The State has fully owned the network since 1995. The National Company of Luxembourg Railways (CFL), which previously owned the network, now merely runs it.
- 2) Building or decommissioning lines is State responsibility.
- 3) Network management and passenger transport are regarded as being public services.
- 4) The single operator, CFL, is a unique company – its capital is totally public (63.25% of shares belong to the Luxembourg State, 24.50% to the Belgian State and 12.25% to the French State). The legislative reforms under way would give it limited company status without altering the capital shareout ratios.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) The CFL must keep the rail network in a good state of repairs.
- 2) The State compels the CFL to provide a passenger transport service – in particular this means that State approval is needed to decommission a service or set timetables. Under the new legislation specific obligations would be laid down in a contract.
- 3) Fares are set by agreement between the State and municipal authorities, as part of a "national price community".

OPERATORS' SPECIAL RIGHTS

- 1) The CFL no longer enjoy a network operation monopoly. Other undertakings may be authorized to provide transport services.
- 2) The CFL have the right to compulsory purchase, on behalf of the State, for building lines or installations needed for operating them.
- 3) The State meets infrastructure costs and compensates for public service obligations.

IV – NETHERLANDS

GENERAL LEGAL FRAMEWORK AND SECTOR STRUCTURE

The Dutch railways (NS) are still a fully State – owned public undertaking but, since 1 January 1994, have been operated as a commercial company and split into three autonomous units: infrastructure management, traffic control and transport service management.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) Rail network management will be withdrawn from NS which will have to pay a fee to use it.
- 2) Certain passenger transport services in the public interest are covered by public service contracts concluded with the tutelage authorities.
- 3) Third parties have theoretical access to the network but this has not yet been put into practice.

OPERATORS' SPECIAL RIGHTS

The public service obligations imposed by the authorities must be financially compensated for by them.

IV – PORTUGAL

GENERAL LEGAL FRAMEWORK AND SECTOR STRUCTURE

- 1) The government decides whether to build or decommission railway lines.
- 2) Railways lines are State property while rolling stock belongs to the Portuguese Railways Company.
- 3) Rail transport is a public service run under a system of concessions.
- 4) The sole operator is the Portuguese Railways Company (CP), which is a public undertaking (legally a public law corporation).

PUBLIC SERVICE TASKS AND OBLIGATIONS

According to the concession contract, CP must:

- 1) maintain the rail network.
- 2) maintain the services necessary for the public interest, even if they run at a loss: if they withdraw a public interest link they must provide alternative passenger transport.
- 3) submit their fares for government approval.
- 4) charge special fares for certain categories of passenger (soldiers, members of parliament and government).

OPERATORS' SPECIAL RIGHTS

- 1) The law now stipulates that the State may concede rail transport services to other undertakings than the CP and they may in turn "sub-concede" certain services. In practice the CP still enjoy a de facto monopoly.
- 2) To build the lines and buildings needed for operation, the CP have free access to the public land and have the right to compulsory purchase.
- 3) To offset their public service obligations, the CP receive State subsidies.

IV - UNITED KINGDOM

GENERAL LEGAL FRAMEWORK AND SECTOR STRUCTURE

- 1) The construction of railway lines depends on a government decision.
- 2) Under the Railways Privatization Act (1993):
 - responsibility for infrastructure is entrusted to a separate undertaking, Railtrack;
 - rail transport operations are covered by "franchises" issued for 7 years by an ad hoc office to operators, which may be private undertakings. This office may decide whether a service may be withdrawn.
- 3) British Rail, a State-owned undertaking, has been split up into thirty or so independent companies: these companies, many of which have already been privatized, operate various services and lines.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) Railtrack is responsible for track upkeep.
- 2) Passenger service obligations are set out in the "franchise" contracts concluded between service operators and the "Office of Franchises" (e.g. maximum fares, frequency and quality of service). Operators may not charge different fares for customers in the same category.

OPERATORS' SPECIAL RIGHTS

- 1) "Franchises" offer monopoly situations, except on certain lines where there may be competition.
- 2) When services run at a loss, "franchise" contracts include some level of subsidy.
- 3) For building infrastructures they may have the right to compulsory purchase.

Section V – LOCAL PUBLIC TRANSPORT

V – GERMANY

GENERAL LEGAL FRAMEWORK

- 1) Operators must obtain a licence issued by the local authorities (by unilateral decision and not in the form of contracts) for a variable duration (maximum 8 years for buses and 25 years for trams and metros).
- 2) Operators may entrust certain services to sub – contractors.

SECTOR STRUCTURE

Numerous operators, mostly private.

PUBLIC SERVICE TASKS AND OBLIGATIONS

Application of fares set by the authorities, sometimes with reductions for certain categories (students, the elderly, etc).

OPERATORS' SPECIAL RIGHTS

Public service obligations are offset by financial contributions from the authorities.

V – BELGIUM

GENERAL LEGAL FRAMEWORK

Local public passenger transport is a public service for which the regions are responsible. They have entrusted this service to operating companies which they have set up for this purpose and which may in turn sub – contract them to private undertakings. The right to operate a service requires an authorization for each route (in the form of a licence or concession) from the regional executive.

SECTOR STRUCTURE

- 1) Wallonia:
 - a holding company, the Société Régionale Wallonne du transport public de personnes (SRWT), a totally public undertaking (100% region – owned).

- 5 public transport companies (TEC), one per sector (Brabant Wallon, Charleroi, Hainaut, Namur – Luxembourg, Liège – Verviers), public undertakings owned by SRWT (51%) and the sector municipalities (49%) in proportion to their population, each operates all passenger transport services in its own sector.
- 2) Flanders: one company (VVM), a public undertaking structured into 5 regional directorates, operates all local transport in the region.
- 3) Brussels – Capital Region: also one undertaking set up by the Region, the STIB (Société des Transports Intercommunaux de Bruxelles), operates all public passenger transport.

Some services have been contracted out to private operators.

PUBLIC SERVICE TASKS AND OBLIGATIONS

These tasks and obligations are stipulated by the decrees setting up the operating companies and by the management contracts that they have concluded with the regional authorities. Generally speaking, these companies must provide transport services throughout the area that they cover and meet the needs of all their population.

1) Wallonia

- a) Quantitative objectives: operating companies must increase their passenger figures (set percentage for the duration of the management contract) and may not cut the amount of services on offer by more than 2% (in terms of kilometres) before regionalization, plus 10% of supply for each area (urban, suburban, rural) taken separately.
- b) Qualitative objectives: information, bus – stop facilities, vehicle comfort, etc.

2) Flanders

The operating company must ensure that the social function of public transport is fulfilled, i.e. satisfying the "right to mobility" especially for persons with mobility difficulties. Its transport services must meet the following standards:

- a) Quantity:
 - . increased number of passengers
 - . minimum services per zone (expressed in kilometres)

b) **Quality:**

- accessibility (maximum distance from the nearest bus – stop, etc)
- minimum frequency of services
- rationality of routes
- comfort (enough seats)
- reliability (punctuality, regularity)
- information
- bus – stop or tram – stop facilities

3) **Brussels – Capital**

The operating company must increase frequency of transport by at least 10% per annum.

- 4) In all cases, fares are subject to the approval of the regional authorities. They are uniform for a given region. Regular consultations are held to ensure coherence between fares and the different operating areas, especially where routes interconnect.

OPERATORS' SPECIAL RIGHTS

- 1) Operating companies have a monopoly in their area.
- 2) They may occupy public land (for bus – stops and stations, etc).
- 3) They receive from the regions:
 - investment subsidies
 - operation subsidies, set out in the management contracts; the principle is that expenditure must be balanced by revenue.

V – DENMARK

GENERAL LEGAL FRAMEWORK

Local transport is regarded as a public service. The authorities responsible are mostly regional councils or, sometimes, municipal councils. They exercise their powers through public transport undertakings.

SECTOR STRUCTURE

Operators are either public undertakings owned by local authorities or private undertakings which are sub – contractors to the public undertakings.

PUBLIC SERVICE TASKS AND OBLIGATIONS

Operators must maintain the equipment (when it belongs to the authorities) and provide services, even on routes running at a loss.

OPERATORS' SPECIAL RIGHTS

- 1) Operators enjoy a monopoly for the services entrusted to them.
- 2) If necessary they have privileged access to public land (bus lanes, tram routes, etc).
- 3) They receive subsidies from the authorities to offset their public service obligations.

V – SPAIN

GENERAL LEGAL FRAMEWORK

The authorities responsible are the municipalities and regions (although the State intervenes in bus transport crossing regional boundaries). They entrust the service to public undertakings under their ownership or to private undertakings to which they grant concessions. In all cases, they determine the service details (routes and timetables) and fares.

SECTOR STRUCTURE

Operators are public undertakings owned by local authorities, in the case of urban buses and metros, and private undertakings, in the case of inter – city buses.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) Running a regular and uninterrupted service, observing rules laid down by the authorities: routes, frequency, fares, including reductions for certain passenger categories (large families, the elderly, etc).
- 2) Granting access to the service to all citizens.

OPERATORS' SPECIAL RIGHTS

- 1) Operators have exclusivity for the services entrusted to them.
- 2) They have privileged access to the public land (occupation of land for railways, traffic privileges for road transport).
- 3) They operate at their own risk on the basis of fares set by the authorities and are not entitled to compensation except in exceptional situations.

V – FRANCE

GENERAL LEGAL FRAMEWORK

- 1) The regular public transport of people is legally (domestic transport Act) a public service and citizens must have their recognized "right to transport" satisfied.
- 2) This public service is the responsibility of authorities known as "organizing authorities" which are:
 - a) in the Paris region: the Syndicat des Transports Parisiens, which is an association of the State and the regional departments and municipalities.
 - b) elsewhere:
 - for urban transport: municipalities and their groupings
 - for inter – city and rural transport: the departments
 - for regional interest transport: the regions.
- 3) These authorities are responsible for defining and organizing public transport:
 - choosing the means of transport
 - the consistency of the service: routes, stops and frequency
 - choosing operators
 - fares and ways of remunerating operators
 - carrying out necessary infrastructures
- 4) These authorities may:
 - provide the service themselves (a corporation, which may simply be the local authority department or a local public undertaking with legal

- personality)
- or entrust it by contract to an outside undertaking: these contracts last 7–10 years in general and may be of several types (concession, farming out, profit – sharing corporation, all – in management, etc).

SECTOR STRUCTURE

- 1) In the Paris region, one public undertaking (State – owned), the RATP, provides most public transport services. The remainder are provided by the public railways undertaking (SNCF) and private undertakings.
- 2) Elsewhere:
 - a) Urban public transport is provided by:
 - mainly private undertakings
 - occasionally by undertakings that depend totally on the local authorities (corporations) or mixed economy undertakings (majority public capital)
 - b) Inter – city and rural public transport is provided almost solely by private undertakings.

PUBLIC SERVICE TASKS AND OBLIGATIONS

In all cases it is the organizing authorities that define the consistency of the service. When they entrust it to an undertaking, this is translated by obligations for it which are set out in the contract and specified in the accompanying specifications.

- 1) Operators must provide the planned services, in quantity and quality terms (routes, location of stops, frequency, timetables, capacity and comfort of vehicles).
- 2) They must meet certain obligations towards users (information, in particular).
- 3) They must charge the fares set by the organizing authority either unilaterally or at the operators' proposal, never exceeding an increase maximum determined by the government.
- 4) Generally speaking, they must guarantee an uninterrupted service in all circumstances or else the contract may be terminated. Organizing authorities may unilaterally change the consistency of the service and the operational methods.

OPERATORS' SPECIAL RIGHTS

- 1) In nearly all cases, operators enjoy a monopoly in the area and for the services entrusted to them. In the Paris region, the monopoly is entrusted by law to the RATP (it includes the metro lines and bus routes existing when the undertaking was set up) and the SNCF (for suburban railway lines). It also stems from the contract between the operator and the organizing authority, but the contract may be preceded by a call for tenders.
- 2) Operators have special rights vis – à – vis the public highways (roads):
 - the right of occupation to lay metro and tram rails and to install stops
 - in some cases, traffic privileges: bus lanes, in particular.
- 3) Given their responsibility in defining and organizing the service, the authorities meet all investment costs, most of the time; they also retain ownership of infrastructures and any rolling stock they may have bought.
- 4) To offset their public service tasks and obligations, operators usually receive operational subsidies intended to cover general deficits inherent in the public transport of people and compensation to offset any fare reductions imposed upon them (mainly for social reasons).

V – GREECE

GENERAL LEGAL FRAMEWORK

- 1) Local public transport is regarded as a public service.
- 2) Its content (routes and timetables) is entirely determined by the authorities: a special authority (OAS) in Athens, and the prefectures for the rest of the country.
- 3) The State sets fares for the whole country.
- 4) Apart from Thessaloniki, there are no contracts between authorities and operators.

SECTOR STRUCTURE

- 1) Most operators are cooperatives of private undertakings supplying vehicles and drivers.

- 2) In Athens, the service is provided by three State – owned public undertakings.
- 3) In Thessaloniki: private undertaking.
- 4) On Rhodes: municipal undertaking.

PUBLIC SERVICE TASKS AND OBLIGATIONS

Operators must meet conditions set by the authorities.

OPERATORS' SPECIAL RIGHTS

- 1) Operators have monopolies wherever they operate.
- 2) Fares are subsidized everywhere by the authorities to offset the obligations imposed on operators.

V – IRELAND

GENERAL LEGAL FRAMEWORK

Public transport is organized on an essentially national basis. The local authorities play a very limited role. Main responsibility lies with the state established and controlled CIE (Transport Authority of Ireland). Through this entity, the state defines the public transport service. There are also bus services run on a purely commercial basis.

SECTOR STRUCTURE

- 1) CIE, which also owns the national railways company (Irish Rail), provides most local transport services through its two subsidiaries:
 - Dublin Bus, for the capital and its area;
 - Irish Bus, for other towns, inter – city services and rural routes.
- 2) A number of private operators also provide bus services, especially in the countryside.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- . The law calls on the CIE to provide efficient, safe and economically sound services.
- . Certain categories (pensioners, students, etc) may travel free or pay reduced fares.
- . School transport is the responsibility of Irish Bus.

OPERATORS' SPECIAL RIGHTS

- CIE has a monopoly for urban rail or bus transport; long distance bus operators face competition.
- The State offers financial compensation for public service obligations.

V – ITALY

GENERAL LEGAL FRAMEWORK

- 1) Public passenger transport is regarded as a public service. The organizing authorities determine the content of the service (routes and timetables) and fares. They are:
 - the municipalities, in the case of urban transport;
 - the regions, in the case of rural and inter – city transport.
- 2) These authorities may offer the service directly or set up for that purpose public bodies. They may also entrust it to private undertakings, chosen possibly after calls for tender and to which they may grant renewable concessions. The authority make a financial contribution to investment and operational costs.

SECTOR STRUCTURE

Most operators are local public undertakings.

PUBLIC SERVICE TASKS AND OBLIGATIONS

As a public service, public transport must observe the principles of equal access for users, continuity of service (regular and uninterrupted services) and efficiency.

OPERATORS' SPECIAL RIGHTS

- 1) Operators have exclusivity for the route entrusted to them.

- 2) When the infrastructures require it, operators may occupy the public highway.

V – LUXEMBOURG

GENERAL LEGAL FRAMEWORK

Local public transport is regarded as a public service. The authorities responsible are:

- the city of Luxembourg for transport in the capital;
- the syndicate of municipalities of the canton of Esch, for public transport in that canton;
- elsewhere, each municipality for transport on its territory;
- the Ministry of Transport for inter – city transport.

The authorities set routes, timetables and fares.

SECTOR STRUCTURE

The operators are:

- 1) for urban services: public undertakings owned by the local authorities in question, e.g.:
 - AVL (Autobus de la Ville de Luxembourg)
 - TICE (Tramways Intercommunaux du Canton d'Esch)
- 2) for inter – city services: private bus undertakings operating on the basis of 10 – year concessions, routes defined by the Ministry of Transport within the general road transport scheme.

OPERATORS' SPECIAL RIGHTS

Costs incurred to meet service requirements are met out of the municipal or State budget.

V – NETHERLANDS

GENERAL LEGAL FRAMEWORK

The organizing authorities are responsible for setting routes and timetables. They are:

- a) for urban transport: the municipalities which provide the service
- directly by their own undertakings,
 - or by concluding contracts with regional transport companies (for 12 years);
- b) for inter – city transport: the State, which issues licences to transport companies for unlimited periods.

In all cases, fares are set by the State.

SECTOR STRUCTURE

Most operators are public undertakings owned by the municipalities or the State (which controls a group of "regional transport companies" by a holding).

OPERATORS' SPECIAL RIGHTS

Everywhere operators enjoy a monopoly and receive sizeable subsidies from the authorities.

V – PORTUGAL

GENERAL LEGAL FRAMEWORK

The public transport of people is regarded as a public service. the authorities decide the routes, timetables and fares. They are:

- 1) the State for inter – city transport: to date, through a public bus undertaking (Rodoviária Nacional) recently split into three companies ready for privatization.
- 2) the municipalities for urban transport:
 - in cities, the service is provided directly by the municipality or by local public undertakings;
 - in small municipalities, it tends to be entrusted to undertakings by concession.

SECTOR STRUCTURE

A wide variety of operators:

- national public undertakings;
- municipal public undertakings, e.g. in the capital, the Lisbon Railways Company and the Metropolitan;
- private undertakings.

PUBLIC SERVICE TASKS AND OBLIGATIONS

They are defined in concession contracts. Generally speaking, operators must provide a service in pre – set conditions for routes, timetables and fares.

OPERATORS' SPECIAL RIGHTS

- 1) Operators enjoy a monopoly on the routes entrusted to them.
- 2) Railways and metro operators in Lisbon may use the public land and have the right to compulsory purchase to build their infrastructures.
- 3) The authorities regularly compensate for public service deficits with subsidies.

V – UNITED KINGDOM

GENERAL LEGAL FRAMEWORK

- 1) Most services operate on a strictly commercial basis. This is the case of long distance coaches and most local bus services in England (apart from Greater London), Wales and Scotland. The authorities do not intervene (no contracts with operators). Operators decide their own service content (routes and timetables) as well as fares.
- 2) When the service is regarded as meeting a public interest need (beyond market requirements):
 - either it is provided by a public undertaking owned by the organizing authority which defines routes, timetables and fares
 - or the organizing authority entrusts it to a private undertaking after an appeal for tenders and a fixed – length contract is signed. The organizing authority sets the routes and timetables. Fares are set by the organizing authority or the operator. Facilities and rolling stock may belong to one or the other.

SECTOR STRUCTURE

- 1) Public operators
 - a) In Greater London:
 - London Buses, London Underground and Docklands Light Railway, public undertakings fully owned by London Regional Transport, the organizing authority.
 - British Rail, for suburban lines.
 - b) Local interest railways in the rest of England, Wales and Scotland:
 - British Rail
 - Some railway companies owned by local authorities
 - c) In Northern Ireland, all public transport is run by State – owned public undertakings.
- 2) Private operators: provide most bus services in England outside London, Wales and Scotland, plus some bus routes in London.

PUBLIC SERVICE TASKS AND OBLIGATIONS

They relate to routes, frequency and, sometimes, fares.

OPERATORS' SPECIAL RIGHTS

- 1) Public undertakings operate as a monopoly and receive subsidies from the authorities which own them to offset losses.
- 2) Private concessionaire undertakings enjoy a de facto monopoly, resulting from their concession (even if by right another undertaking could, in theory, provide the same service without a concession, on a purely commercial basis) and receive subsidies to offset the extra commercial cost of the service.

Section VI – POSTAL SERVICES

VI – GERMANY

GENERAL LEGAL FRAMEWORK

Constitutionally the postal service (Postdienst) is a public service for which the federal State has responsibility. Along with the two other public undertakings for telecommunications and postal banking services, the postal service is still today, under the 1989 Act, an entity, the Federal Post Office (Deutsche Bundespost Postdienst), under the tutelage of the Minister of Post and Telecommunications. The minister's role is to ensure that the service operates in accordance with the principles and policy of the Federal Republic. On this score, he may issue directives and approve postal charges.

SECTOR STRUCTURE

The postal service has, since 1989, been a public undertaking with a legal personality (it used simply to be a department in the federal Ministry of Post and Telecommunications). Privatization is being contemplated.

PUBLIC SERVICE TASKS AND OBLIGATIONS

A. Universal service

The postal service is legally obliged to meet the community's postal service needs (i.e. those of the citizens, the economy and administration) and, for that purpose, to put sufficient resources, in accordance with technological and economic requirements, at the disposal of everyone in identical conditions.

This universal service task includes the following services:

- 1) "letter mail": letters, postcards, electronic mail, parcels service for goods and books, mail advertising, unaddressed mail;
- 2) parcel delivery: small parcels up to a certain weight (20 kg) and certain dimensions;
- 3) press mail;
- 4) transfrontier services.

All these services must be performed within a reasonable period and at prices accessible and identical for all (principle of equalization).

B. Confidentiality

This is an obligation laid down by the Constitution and specified by law. It forbids all post office employee to open closed mail and to communicate its content to third parties.

OPERATORS' SPECIAL RIGHTS

The postal service enjoys a legal monopoly for transporting addressed mail (collection, transportation and distribution), i.e. all dispatches containing written communications or any other information from one person to another, up to 1 kg. In practice, this includes letters, postcards and information mail and applies to transfrontier mail, too. Not covered by this monopoly are goods, small parcels, newspapers and magazines.

VI - BELGIUM

GENERAL LEGAL FRAMEWORK

The postal service is a public service for which the State is responsible; it is organized by law which entrusts operation of it to the public undertaking "La Poste". Rates are set by "La Poste" but the principles applied to rates are set out in the management contract concluded between it and the State. The minister in charge may reject rates presented for his approval. Postage stamps are issued by royal decree on the proposal of "La Poste".

SECTOR STRUCTURE

In 1992 "La Poste" became an "autonomous public undertaking" (it was previously a "public interest body", under close ministerial tutelage) but remains in full State ownership.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- A. General public service tasks are set by law. They are intended to "safeguard permanently the universality and confidentiality of written communications". They include:
- letter mail: the collection, transportation and distribution throughout the country of all correspondence or dispatches (personal or impersonal, handwritten or printed, sealed or unsealed, addressed or not);
 - stamp sales.

- B. These tasks must be carried out in the observance of certain principles laid down by law or even the Constitution, and reiterated in the management contract:
- 1) Principle of equality: all users must have access to postal services in equal conditions, which means inter alia uniform rates throughout the country.
 - 2) Principle of continuity: "La Poste" must provide a service in all circumstances.
 - 3) Principle of confidentiality: the secret of correspondence, guaranteed by the Constitution.
- C. To perform these tasks, "La Poste" is subject to specific obligations.
- 1) Some set or laid down by law or regulation:
 - to provide each municipality with at least one mail box;
 - to carry out, in each municipality, at least one collection, dispatch and distribution of mail on each working day;
 - to distribute mail to every home in the country;
 - to distribute electoral documents;
 - to distribute certain letter mail dispatches under franchise;
 - to distribute certain mail items on Saturdays.
 - 2) others are listed in the management contract concluded between the State and "La Poste".
 - to distribute urgent mail the first working day after posting;
 - for other mail, to attain the objective of 80% on the following working day and 95% the day after that;
 - setting latest collection times;
 - making specific commitments to improve customer information and reception and service quality.

OPERATORS' SPECIAL RIGHTS

- 1) "La Poste" has a legal monopoly for collecting, transporting and distributing sealed

and unsealed letters, postcards and some other addressed items, of up to 1 kg in weight, apart from rapid delivery services which are now open to competition.

- 2) When it was turned into a public undertaking, "La Poste" received full ownership of the buildings which the State put at its disposal when it was only a department. It has the right to compulsory purchase for new buildings, if public interest is declared.
- 3) "La Poste" traditionally is entitled to instal mail boxes on the public highway, with permission from the roads department.
- 4) "La Poste" receives a yearly State contribution to cover shortfalls resulting from rates imposed on it for certain services (official paid, reduced rates for electoral documents and newspapers and periodicals).

VI - DENMARK

GENERAL LEGAL FRAMEWORK

The postal services are a public service whose content is defined by law; rates are fixed by the government.

SECTOR STRUCTURE

The postal service is provided by the Postal Services Division which is part (along with Telecommunications) of the Post and Telegraph Administration. This is a department of the Ministry of Communications and has no legal personality, although it enjoys a fair degree of administrative and financial autonomy.

PUBLIC SERVICE TASKS AND OBLIGATIONS

The postal service is legally obliged:

- 1) to collect, transport and distribute mail throughout the country – i.e.:
 - addressed letters of up to 1 kg,
 - mail addressed to the blind of up to 7 kg,
 - parcels up to 20 kg,
 - addressed newspapers and periodicals up to 500 g,
 - unaddressed mail.

The aim is to distribute mail within 24 hours, or 3–4 days at reduced rate.

- 2) to produce and sell stamps;

- 3) to observe correspondence secrecy.

OPERATORS' SPECIAL RIGHTS

- 1) The postal service has a legal monopoly for the collection, transportation and distribution of letters, postcards and other dispatches containing handwritten messages, up to 1 kg. The distribution of pre – paid dispatches is unrestricted.
- 2) The postal service may use public land for its facilities (buildings, mail boxes).

VI – SPAIN

GENERAL LEGAL FRAMEWORK

Constitutionally and legally, postal services are public services for which the State is exclusively responsible.

SECTOR STRUCTURE

The postal service is entrusted to the Autonomous Mail and Telegraph Body, an entity with legal personality set up in 1992 (previously it was just a department of the Ministry of Transport and Telecommunications).

PUBLIC SERVICE TASKS AND OBLIGATIONS

The post office is legally obliged to collect, transport and distribute correspondence throughout the country: letters, postcards, periodicals, printed matter, small parcels (up to 500 g). Distribution must be daily. The service is subject by law to the obligation to respect the inviolability of personal correspondence (a right guaranteed by the Constitution). Rates are set by the government.

OPERATORS' SPECIAL RIGHTS

The post office enjoys a legal monopoly for the collection, transportation and distribution of letters (up to 2 kg) and postcards (up to 20 g) as well as stamp and franking – machine distribution.

VI – FRANCE

GENERAL LEGAL FRAMEWORK

The postal service is legally a public service entrusted to the Post Office. Public service tasks are defined by law and specified in a list of specifications which is a government decree. The undertaking is still under the tutelage of the appropriate ministers who still have

powers to decide on rates (increases are included in the "plan contract" concluded between the State and the Post Office).

SECTOR STRUCTURE

Since 1990 the Post Office has been a corporation under public law and therefore a legally autonomous public undertaking, whereas previously it was just part of the Post and Telecommunications Administration and had no legal personality.

PUBLIC SERVICE TASKS AND OBLIGATIONS

A. Public service tasks

By law, the Post Office has the fundamental task of providing throughout the country:

- 1) the public mail service in all forms (what the specifications define as "the collection, transportation and distribution of correspondence and goods");
- 2) the public service of transporting and distributing the press.

The undertaking must also make a contribution to defence and State security.

B. Public service obligations

- 1) These accrue from the usual principles of public service and are set by law or laid down in the specifications.
 - a) According to the principle of equal treatment, the Post Office must:
 - set up a network of facilities covering the whole country: post offices and mail boxes on the public highway;
 - apply the same basic rates throughout the country, through equalization;
 - b) According to the principle of continuity, the service must be provided uninterruptedly. Specifically mail must be collected from public mail boxes and distributed to homes on every working day.
- 2) The Post Office is also legally bound by the special obligation of respecting the inviolability and secrecy of correspondence.
- 3) The government may impose further obligations on the Post Office.

OPERATORS' SPECIAL RIGHTS

- 1) The Post Office has a legal monopoly for transporting letters as well as parcels and papers not exceeding 1 kg.
- 2) It has a monopoly for issuing stamps.
- 3) It has at its disposal its own public property and received free of charge full ownership of the real estate which the State previously put at its disposal when it was only a department.
- 4) For performing its public service tasks, it has the right to compulsory purchase.
- 5) It is fully entitled to instal on the public highway the facilities needed for its task (highway permission).
- 6) It receives a financial contribution from the State to offset its obligations to distribute the press and the supplementary public service obligations imposed upon it.

VI – GREECE

GENERAL LEGAL FRAMEWORK

The post office is a public service for which the State has responsibility. The management is appointed by the government.

SECTOR STRUCTURE

The Hellenic Post Office is a public undertaking with legal personality, in the form of a company with the State as sole shareholder.

PUBLIC SERVICE TASKS AND OBLIGATIONS

The post office must maintain offices throughout the country and provide a full postal service. Rates must be approved by the appropriate minister.

OPERATORS' SPECIAL RIGHTS

- 1) The post office enjoys a legal monopoly for transporting domestic and international mail, i.e. personal written correspondence, letters or postcards, up to 2 kg.
- 2) For its infrastructures (offices, public mail boxes, etc) the post office has privileged access to the public land and the right to compulsory purchase.

- 3) The post office's deficit, covered by the telecommunications organization in the past, will probably now be met by the State.

VI – IRELAND

GENERAL LEGAL FRAMEWORK

The post office is a public service under the tutelage of the minister who appoints the management and controls rates.

SECTOR STRUCTURE

The Irish Post Office is a public undertaking in the form of a private law company all of whose shares are held by the State.

PUBLIC SERVICE TASKS AND OBLIGATIONS

The post office must by law provide a postal service throughout the country and abroad, fully and efficiently, and at the lowest possible cost for the user, even where the service is not profitable. It must respect the secrecy of correspondence (infringements are criminal offences).

OPERATORS' SPECIAL RIGHTS

- 1) The post office has a legal monopoly for collecting, transporting and distributing mail items up to 2 kg: i.e all items apart from telegrams, periodicals and parcels (unless the periodical or parcel contains a personal communication). The post office or tutelage minister may, in principle, grant derogations to this monopoly.
- 2) The post office has the right to compulsory purchase.

VI – ITALY

GENERAL LEGAL FRAMEWORK

Legally the postal service is a public service, for which the State – or rather, the Ministry of Post and Telecommunications – has responsibility.

SECTOR STRUCTURE

Since 1993 the Italian post office has been a public economic body, with legal personality (it was previously simply a department of the Ministry of Post and Telecommunications). There are plans to turn it into a commercial law company in 1996.

PUBLIC SERVICE TASKS AND OBLIGATIONS

The post office must provide a postal service throughout the country. The recent "programme contract" between the post office and the State includes a "public postal service charter" which includes the following obligations: equal treatment of users, rapid response to requests, easy access to offices (for the disabled), etc. The post office must observe correspondence secrecy and rates are set by the government.

OPERATORS' SPECIAL RIGHTS

- 1) The State (and the post office, on its behalf) have the monopoly:
 - of the collection, transportation and distribution of correspondence, letters and postcards), of up to 2 kg;
 - of transporting parcels of up to 20 kg between large towns;

However, the post office may concede to third parties certain services covered by the monopoly: i.e. distributing express mail and transporting letters and parcels. The collection, transportation and distribution of pre – franked mail is not restricted.

- 2) For its infrastructures, the post office has access to the public land and has the right to compulsory purchase.

VI – LUXEMBOURG

GENERAL LEGAL FRAMEWORK

The postal service is legally a public service for which the State has responsibility. The State concedes operations to the Post and Telecommunications Undertaking which remains under the tutelage of the appropriate minister. Postal rates are decided by the government.

SECTOR STRUCTURE

In 1992, the Post and Telecommunications, previously simply a government department, became a public establishment entitled "the Post and Telecommunications Undertaking" – i.e. a fully State – owned public undertaking with legal personality. The post office is a separate division of this undertaking.

PUBLIC SERVICE TASKS AND OBLIGATIONS

Given its general responsibility to operate the postal service, the post office must find the resources to collect mail (enough mail boxes and daily, at the very least, collections),

transport it (with the aim of delivering mail the day after mailing) and distribute it (once a day on working days). It is legally entrusted with producing, issuing and selling stamps. The Constitution obliges it to respect correspondence secrecy.

OPERATORS' SPECIAL RIGHTS

- 1) The post office has a legal monopoly for transporting letters and postcards of up to 2 kg, letters being defined as written communications sent in one copy and not reproduced by mechanical or photographic means.
- 2) When it was turned into a public undertaking, the post office received full ownership of the buildings which the State used to put at its disposal when it was merely a department. For new buildings, it no longer enjoys any privilege and is subject to ordinary law for purchasing or renting premises.
- 3) By tradition the post office is entitled by the authorities to instal mail boxes on the public highways (permission from the roads department).
- 4) Certain loss – making services may receive State compensation.

VI – NETHERLANDS

GENERAL LEGAL FRAMEWORK

The postal service is a public service for which the State has responsibility. Organized by law, it is conceded to PTT Post. The appropriate minister (Transport and Public Works) retains powers to issue general directives to the concessionaire which must submit an annual report. Postal rates are set by agreement between the concessionaire and the minister.

SECTOR STRUCTURE

PTT Nederland, a private undertaking since 1993 (previously 100% State – owned) is divided into two branches, PTT Post and PTT Telecom.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) The law entrusts the concessionaire:
 - with transporting all addressed items within the country and abroad (up to certain weight, set by the government at 10 kg);
 - with installing public mail boxes on the public highway;

- with issuing stamps.

The concessionaire may entrust these obligations to a subsidiary but remains responsible for the service.

- 2) The concessionaire must comply with the directives issued by the appropriate minister in terms of quality of service, rate structures, safety of dispatches, confidentiality and the provision of unprofitable services. The directives issued by the minister include the following obligations:
 - charging uniform rates throughout the country;
 - maintaining the post office network;
 - observing a maximum distance between public mail boxes;
 - distributing mail on every working day;
 - distributing every letter the day after it is posted.
- 3) It must observe correspondence secrecy, as guaranteed by the Constitution.

OPERATORS' SPECIAL RIGHTS

- 1) The concessionaire enjoys a monopoly for transporting letters and postcards of up to 500 g, and issuing stamps.
- 2) The concessionaire has exclusive rights for installing mail boxes on the public highway.
- 3) The concessionaire is entitled to financial compensation for unprofitable services provided at the express request of the government.

VI – PORTUGAL

GENERAL LEGAL FRAMEWORK

The post office is a public service for which the State has responsibility. This service is organized by law and entrusted to CTT. It remains under the tutelage of the appropriate minister and a regulatory body, the Portuguese Communications Institute, which controls rates and service quality.

SECTOR STRUCTURE

In 1992, the Portuguese post office, CTT, was separated from telecommunications (with which it used to form a single undertaking) and turned into a limited company, albeit State-owned. In other words, it is a public undertaking.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) The post office must provide a universal postal service throughout the country, i.e.:
 - the collection, transportation and distribution of postal correspondence;
 - the issue and sale of stamps;
 - a fax service.
- 2) It must establish the infrastructure needed for this service.
- 3) It must respect correspondence secrecy.

OPERATORS' SPECIAL RIGHTS

- 1) The post office enjoys a monopoly
 - for collecting, transporting and distributing all addressed mail up to 2 kg;
 - for issuing and selling stamps;
 - for the fax service.
- 2) The post office is entitled to a State subsidy to offset its public service obligations.
- 3) For its infrastructures (post offices, public mail boxes), the post office has access to the public land and the right to compulsory purchase.

VI – UNITED KINGDOM

GENERAL LEGAL FRAMEWORK

The postal service is regarded as a public service and the State is responsible for it. It is entrusted by law to the Post Office which remains under government tutelage: the appropriate minister appoints its chairman and members of the board of directors. He is empowered to approve basic rates.

SECTOR STRUCTURE

The main operator is the Post Office, a fully State – owned public corporation (the government recently withdrew its privatization Bill).

PUBLIC SERVICE TASKS AND OBLIGATIONS

The Post Office must legally meet "all reasonable demands" for carrying mail throughout the country. This task does not extend to newspapers and is not translated by any distribution frequency obligations. The Post Office must respect correspondence secrecy.

OPERATORS' SPECIAL RIGHTS

- 1) The Post Office has the monopoly for the collection, transportation and distribution of letters (defined as written communications sent to a specific address other than by a telecommunications system). The appropriate minister may grant independent operators licences exempting them from the monopoly: he has already done so for express mail costing more than £1 per dispatch.
- 2) The Post Office has right of access to the public highway to instal mail boxes and has the right to compulsory purchase for buildings.

Section VII – TELECOMMUNICATIONS

VII – GERMANY

GENERAL LEGAL FRAMEWORK

According to the Constitution, the State is responsible for organising the public telecommunications network and telephone service. This responsibility is entrusted by law to Deutsche Telekom. Private undertakings may also offer other telecommunications services on the basis of a State licence.

SECTOR STRUCTURE

Until recently merely a department of the Federal Ministry of Post and Telecommunications, in 1989 Deutsche Telekom became a public undertaking. On 1 January 1995 the undertaking was turned into a private law company while remaining State – owned. There are plans for gradual privatization beginning in 1996; private operators already exist.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) Deutsche Telekom is legally obliged to set up throughout the country sufficient infrastructures to make telecommunications services accessible to all.
- 2) It must provide everyone throughout the country with a basic vocal telephone service, with specific obligations:
 - to provide a service
 - to connect users
 - to provide emergency and information services
 - to offer minimum quality standards
 - to publish directories
- 3) Undertakings with licences for other services have the same obligations in respect of those services;

OPERATORS' SPECIAL RIGHTS

Deutsche Telekom has lost its monopoly for installing telephones. For the time being it retains on behalf of the State a monopoly for infrastructures and vocal telephone services but current legislative plans would end it.

VII – BELGIUM

GENERAL LEGAL FRAMEWORK

A certain number of telecommunications services are still regarded as a public service and are entrusted by law to BELGACOM. For these activities, the undertaking remains under a certain State tutelage to which it is tied by a management contract setting out the tasks stemming from its public service tasks.

SECTOR STRUCTURE

BELGACOM is an autonomous public undertaking which in 1991 succeeded the RTT (Régie des Télégraphes et Téléphones).

PUBLIC SERVICE TASKS AND OBLIGATIONS

- A. BELGACOM's general public service tasks are set by law. The undertaking must provide users with a regular, uninterrupted and equal service in the following areas:
- infrastructure
 - public installations
 - telephone and telegraph services
 - telex
 - mobile phone services
 - radio messages
- B. The management contract defines the detailed obligations imposed on the undertaking to execute its tasks:
- extending (with specific objectives for 5 years) the numerical network;
 - extending (also with detailed figures) the mobile phone network;
 - improving telephone connection times (aim: 5 days for 90% of cases by end of 1996);
 - reducing and dealing more quickly with service interruptions;
 - installing a minimum number of public telephone call – boxes;
 - providing information and supplying directories;
 - public service charges must increase more slowly than the consumer prices index and include social reductions (remote elderly persons, the disabled, etc).

OPERATORS' SPECIAL RIGHTS

- 1) BELGACOM enjoys a monopoly for vocal telephone services.

- 2) For its infrastructures, BELGACOM has the right to compulsory purchase, to establish easements and to use the public land.
- 3) BELGACOM receives a State subsidy to cover the losses resulting from its public service obligations.

VII – DENMARK

GENERAL LEGAL FRAMEWORK

Telecommunications are regarded by law as a public service.

SECTOR STRUCTURE

- 1) A mixed economy undertaking (majority State ownership), Tele Danmark provides most telecommunication activities.
- 2) A private undertaking (Dansk Mobil Telefon) competes with Tele Danmark for mobile telephones.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- Tele Danmark is obliged to connect anyone applying for a telephone, provide an information service and supply directories.
- Public service activities (mainly vocal telephones) must apply a uniform charge.

OPERATORS' SPECIAL RIGHTS

- 1) Tele Danmark has a monopoly for vocal telephones.
- 2) For its infrastructures, Tele Danmark may use public land and has the right to compulsory purchase (and to establish easements).

VII – SPAIN

GENERAL LEGAL FRAMEWORK

Telecommunications activities in general are regarded as a public service and are State responsibility. The State entrust their execution to Telefonica de España by a concession contract.

SECTOR STRUCTURE

Telefonica is a private undertaking but is State – controlled (one third State ownership).

PUBLIC SERVICE TASKS AND OBLIGATIONS

A. General tasks

Telefonica must provide a telephone service in the public interest, i.e. continuously and permanently while ensuring that communications are of high quality, safe and secret.

B. Specific obligations

- 1) Any user so requesting must be connected to the telephone network.
- 2) Public call – boxes must be installed throughout the country (at least one per 10 inhabitants).
- 3) An information service must be laid on and directories published.

OPERATORS' SPECIAL RIGHTS

Telefonica has a monopoly for the public telephone network and for basic telephone services, including information services and directories.

VII – FRANCE

GENERAL LEGAL FRAMEWORK

A good many telecommunications activities are regarded by the law as public services and are therefore State responsibility: these include creating public networks and providing public interest services such as vocal telephone services and telex. By law these public service activities are generally entrusted to the public operator, France Télécom, in exclusivity but some of them may, after ministerial authorization, be run by other operators. Non – public service activities are not restricted. Tutelage over the public operator and the exercise of State responsibilities in the sector are ensured by the Ministry of Post and Telecommunications, assisted by the Commission Supérieure du Service Public.

SECTOR STRUCTURE

- 1) The telecommunications service, until 1991 merely a division of the State administration of Post and Telecommunications, changed its name to France Télécom, became the "public operator", a public undertaking proper, while remaining a public State – owned corporation.

- 2) Private operators (such as the Société Française de Radiotéléphonie) operate services not covered by the monopoly.

PUBLIC SERVICE TASKS AND OBLIGATIONS

France Télécom's public service tasks are set by law and specified in the form of detailed obligations to be found in the specifications laid down by the State.

A. Public service tasks

- 1) to establish and operate the public networks needed for public telecommunications services and to connect these networks with foreign ones.
- 2) to provide all public telecommunications services while observing the principles of equality, continuity and adaptation, i.e. services throughout the country, treating users equally, providing a service in all circumstances and taking into account the government's local and regional planning policy.

B. Public service obligations:

- to connect to the telephone network anyone so requesting, as quickly as possible, in reasonable and uniform financial conditions.
- to apply uniform communications rates regardless of the locality, which calls for equalization of cost differences; charges are subjected to government control.
- to install public call – boxes on public land in sufficient numbers to meet the population's needs.
- to publish telephone directories and provide an information service.
- to offer data transmission services and public radio telephone connections.
- to offer the best possible service and, in particular, deal quickly with interruptions or disturbances and provide user information.
- to assist State defence and public safety.
- to provide free transmission of emergency calls and radio communications at sea.
- to respect communications secrecy.
- to provide any other services the government may regard as in the public interest.

OPERATORS' SPECIAL RIGHTS

- 1) France Télécom has a legal monopoly:
 - for installing public networks (except in cases of ministerial derogation granted to other operators, in case of public interest needs and provided that the obligations inherent in a public service activity are met);
 - for the telephone service between fixed points;
 - for the telex service;
 - for telephone call – boxes on public land.

Other telecommunications activities are open to competition (for example installing telephones, mobile telephone services, data transmission).

- 2) For its public service tasks, France Télécom has a priority for the use of State – allocated frequencies.
- 3) France Télécom has received full ownership of the immovable assets (depending on the State's public or private land) which the State previously put at the disposal of the former telecommunications department. It also has at its disposal the public land which it owns (and which is inalienable and not subject to limitation).
- 4) For its public service tasks, France Télécom has the right to compulsory purchase and to gain access to public land.
- 5) France Télécom receives financial compensation to offset those public services that are free of charge, especially those which the State imposes for certain users (reductions for the press, free emergency calls, telephone calls at sea, etc).

VII – GREECE

GENERAL LEGAL FRAMEWORK

By law, telecommunications are a public service activity.

SECTOR STRUCTURE

The Telecommunications Organization of Greece (OTE) is a public undertaking in the form of a limited company – the State is the only shareholder.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) OTE must connect to the telephone network all users at uniform prices. Any user situated more than 200 metres from the network must meet the extra cost.
- 2) OTE must provide the service at the same price but charges may vary for local, trunk and international calls.

OPERATORS' SPECIAL RIGHTS

- 1) OTE has a monopoly for the network and fixed telephone calls (including information and directories); mobile telephones are open to competition.
- 2) To instal infrastructures OTE has the right to compulsory purchase.
- 3) By law financial compensation must be paid for losses resulting from public service obligations. In practice this has never had to be applied.

VII – IRELAND

GENERAL LEGAL FRAMEWORK

Telecommunications are regarded as a public service activity. The main operator, Irish Telecom, was set up by law and its management are government appointees. Telephone service charges are subject to ministerial approval.

SECTOR STRUCTURE

Irish Telecom, a State – owned public undertaking, provides most basic telecommunications services. Some independent operators provides other services.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) The law gives Irish Telecom the task of providing the State and the population with a comprehensive and efficient telecommunications service.
- 2) Irish Telecom is obliged to connect all users to the network provided that the request can be reasonably met.

OPERATORS' SPECIAL RIGHTS

Irish Telecom has a monopoly for fixed vocal telephone services, telex and satellite communications.

VII - ITALY

GENERAL LEGAL FRAMEWORK

Basic telecommunications services are legally regarded as public services and are exclusively State responsibility (Ministry of Post and Telecommunications). The State may concede their operation to undertakings. Charges are subject to government approval.

SECTOR STRUCTURE

In 1992 the former Telephones Corporation (ASTT) was turned by law into a private undertaking in the form of a company owned by the IRI (itself a corporation): the STET. The STET is the parent company of Telecom Italia, which runs national telecommunications services, Italcable, providing international services, and Telespazio, in charge of satellite communications.

PUBLIC SERVICE TASKS AND OBLIGATIONS

- 1) The law has granted Iritel the public telecommunications service concession. This service is provided by the SIP which is entrusted with the national telephone service, including installing the network and public call – boxes, mobile telephones, information services and directories. International services are left to Italcable.
- 2) A ministerial regulation sets the SIP's specific obligations for a basic telephone service:
 - a maximum of 60 days for a new connection (30 days when moving house);
 - dealing with breakdowns within 2 days (with a 5% standing charge reduction for every day extra).

OPERATORS' SPECIAL RIGHTS

- 1) Iritel has a monopoly for the network, basic services (vocal telephones and data transmission, including information services and directories) and mobile telephones (installing telephones and value – added services are operated in open competition).

- 2) For its installations, Iritel has the right to compulsory purchase and to establish easements.

VII - LUXEMBOURG

GENERAL LEGAL FRAMEWORK

Basic telecommunications services are regarded by the law as public services and State responsibility. The State concedes operations to the Post and Telecommunications Undertaking (EPT) which remains under government tutelage. Charges are subject to government approval.

SECTOR STRUCTURE

EPT is a public establishment, i.e. a public undertaking with legal personality, which in 1992 replaced the State department which previously ran telecommunications services. These services are a division within the undertaking.

PUBLIC SERVICE TASKS AND OBLIGATIONS

As concessionaire for public telecommunication services, the EPT must:

- connect to the telephone network at a uniform price anyone so requesting, provided they are within the perimeter of municipal built – up areas. Outside that perimeter users must meet extra costs.
- provide a telephone service at uniform prices (equalization).
- provide an information service and supply directories.

OPERATORS' SPECIAL RIGHTS

The EPT:

- enjoys a monopoly for the telephone network and vocal telephone services;
- is entitled to use the public land and to establish easements on private land.

VII - NETHERLANDS

GENERAL LEGAL FRAMEWORK

Basic telecommunications services are public services, State responsibility and organized by law. They are conceded to PTT Telecom. The appropriate minister (Transport and Public Works) is still empowered to issue general directives to the concessionaire which must submit a yearly report.

SECTOR STRUCTURE

PTT Telecom BV is a subsidiary of PTT Nederland, a private undertaking since 1993 (previously a public undertaking, 100% State - owned).

PUBLIC SERVICE TASKS AND OBLIGATIONS

The law obliges the concessionaire:

- to run the telecommunication infrastructure;
- to guarantee connection for all to the telephones network, at a uniform price;
- to provide basic services at a uniform price: telephones, telegraph, telex, directories.

OPERATORS' SPECIAL RIGHTS

The concessionaire has a legal monopoly:

- for building and running the network;
- for providing basic services (fixed vocal telephone services, telegraphs, telex).

VII - PORTUGAL

GENERAL LEGAL FRAMEWORK

The law regards basic telecommunications services as public services for which the State has responsibility. These services are conceded to Portugal Telecom.

SECTOR STRUCTURE

- The only public service operator, Portugal Telecom is a public undertaking set up by law in 1992, in the form of a limited company under full State ownership, out of the telecommunications sector of CTT (joint post and telecommunications undertaking), to be merged in 1994 with the Lisbon and Oporto Telephones Company.
- There are private operators, especially for value – added services.

PUBLIC SERVICE TASKS AND OBLIGATIONS

The law and concession contract between the State and Portugal Telecom entrust the latter with:

- 1) the task of providing all telecommunications services;
- 2) the obligation:
 - to provide a universal service throughout the country
 - to guarantee equal access to the service
 - to ensure continuity and service quality
 - to guarantee the inviolability of communications
 - to provide information services, directories, commercial assistance and maintenance.

OPERATORS' SPECIAL RIGHTS

- 1) Portugal Telecom has a monopoly for the network and basic telephone services, including directory supplies.
- 2) In order to instal its infrastructures, Portugal Telecom may use the public land, has the right to compulsory purchase and to establish easements on private land.

VII – UNITED KINGDOM

GENERAL LEGAL FRAMEWORK

The State retains its responsibility and the telecommunications sector is organized by law, providing for the issue of licences granted under certain conditions to operators. Controls

over operators are carried out by a public body, Oftel.

SECTOR STRUCTURE

British Telecom, a private undertaking (previously State – owned), provides most telecommunications services, in competition with some private undertakings, especially Mercury.

PUBLIC SERVICE TASKS AND OBLIGATIONS

According to its licence, British Telecom must:

- provide a universal telephone service throughout the country and some special services (emergencies);
- maintain sufficient numbers of telephone call – boxes;
- provide an information service;
- set prices according to an overall formula, without discrimination.

OPERATORS' SPECIAL RIGHTS

British Telecom has no special rights compared with ordinary operators.

Summary

A. Analysis of the organization of major public service networks reveals widely varying situations from country to country and sector to sector. In respect of the appropriate authority: central State, federal States or regions, or local authorities. In respect of the operators in question: ministerial departments, public or private undertakings with a monopoly throughout the country, major oligopolistic undertakings, or a host of small operators with varying legal status. In respect of the tasks, obligations and special rights: ranging from very substantial and specific to negligible and vague, with a whole range of situations in between, formalized or implicit, resulting from public regulation (laws or some other form of regulation), or contracts between the authorities and operators, sometimes simply the product of customary practice and even, in some cases, (e.g. the shareout of areas of exclusivity) of agreements between the operators themselves. In respect of how activities are monitored in the public interest: by the public administration itself (the traditional "continental" method) or by an independent "regulatory" body, appointed by the authorities (British model).

B. These criteria could be used to establish a national typology.

1) We would have a first group of countries, mostly "southern" ones (Belgium, Spain, France, Greece, Italy, Luxembourg and Portugal) where:

- the concept of public service is well – established;
- the norm remains in most sectors (electricity, gas, railways, postal services and telecommunications) for almost exclusive central State powers and a major national public undertaking legally entrusted with specific and restrictive tasks and obligations, granted very substantial rights nearly always tantamount to monopolies;
- certain sectors (water and urban transport) are, on the contrary, the responsibility of local authorities and are run by a wide variety of operators;
- there is, however, a trend towards privatizing public undertakings and reducing both obligations and special rights.

2) In a second group (United Kingdom, Ireland):

- the notion of public service is not traditionally formalized;
- until recently, however (early 1980s), the situation in reality was not so very different from the countries in the first group;

- the recent privatization and liberalization trend has, especially in Great Britain, substantially changed the landscape so that it is now mainly composed of private operators subjected to "regulators" outside the authorities' control although they are appointed by them and act in the public interest;
- there remain, nonetheless, large areas within public ownership, subjected to public interest requirements and enjoying special rights.

3) In a third group, all "northern" countries (Germany, Denmark and the Netherlands):

- in certain sectors (railways, postal services and telecommunications) the situation has always been similar to that in the first group, sometimes even with direct management by the national authorities;
- other sectors, on the other hand (electricity, gas, water and urban transport) were mainly regional or local responsibilities and a fair number of operators had exclusivity areas often determined by agreements between them rather than by decisions taken by the authorities;
- there is a current trend towards privatizing national public undertakings, while maintaining existing regional and local powers and, in general, a fairly high degree of public service obligations

C. There is, however, a common feature to them all: nowhere do network activities have the same status as that applied to the production of ordinary goods and services. Even in the more anti-interventionist countries, they are not usually left to "free enterprise" or "the freedom of trade and industry" according to which:

- everyone is free to indulge in any form of production, without need of authorization, provided that applicable legislation is respected (safety rules, environmental protection, product definition, etc);
- the authorities do not intervene, allowing individuals to take (or not take) the initiative, such that the nature of the products and services in question and the very existence of the activity obey market laws.

On the contrary, network activities are always placed, by law and sometimes even by the constitution, under the special responsibility of the authorities: the authorities must take action so that, regardless of private initiative and precisely when it is lacking, these activities will be fully ensured, according to strict rules. This responsibility is usually founded on the idea, often explicitly formulated, that the services in question meet the people's vital needs. The texts go as far as referring to the "right" to transport, mobility, communication, correspondence safety, etc. It would appear that there is a widespread notion that these services are not "social" services aimed at the needy section of the national community but

come within the sphere of "fundamental rights" at the disposal of all citizens.

The responsibility that is given to the authorities always brings with it special rights to intervene, mostly in the form of special legislation, sometimes contractual procedures. Nowhere are network activities simply covered by ordinary commercial or industrial law. In a nutshell, in none of these countries is there any legislation or public contract aimed at guaranteeing the production of steel, shirts or chocolate, but there are, of course, state rules applicable to undertakings intent on producing those products. On the other hand, everywhere, without exception, the State acts to ensure the existence, come what may, of electricity, gas and water distribution, railways and urban transport, and postal and telephone services. Whereas in the case of legislation on ordinary commercial and industrial activities, the authorities regulate so that these activities can operate without any concern as to whether or not they exist, legislation on public service activities ensures the very existence of the activities in question.

The authorities deal with public service activities in a variety of ways but the virtually universal method is for the authority to limit access to the activity (which is subjected to authorization, or at least a licence), by an ultimate right to control investment and prices, by imposing upon operators any obligations justified by the public interest and granting special rights intended to reduce if not to stamp out competition.

There is definitely a general trend, at rates that vary from country to country, towards making these systems more flexible and less dependent on the authorities:

- a switch from services directly run by the authorities to a service with a minimum level of autonomy, to a public undertaking or, ultimately, to privatization;
- a switch from control by the authorities themselves to "regulation" entrusted to an independent body;
- a switch from monopolies to more or less open competition;
- a tendency to limit obligations.

Everywhere, however, these activities continue to be covered by special rules preserving the role of the authorities. In countries (especially the United Kingdom) where direct government control has been replaced by "regulators", these regulators, appointed by the authorities, exercise the task of controlling a sector on behalf of the public interest in a way in essence not unlike the controls practised by the administration which they have replaced and often wielding considerable powers over operators. There are no "regulators" of the production of cars or biscuits, and rightly so. Nowhere have network activities become activities like any other, merely covered by ordinary legislation on industry and commerce. Whether or not the actual term is used, it is the concept of public service which, in principle at least, is always applied.

PART THREE

PUBLIC SERVICES AND EUROPE

The study of national situations has shown that economic network activities, regarded as in the public interest, are nearly everywhere carried out by the authorities. They ensure that these activities are organized according to certain principles and rules, even if the way of going about this may be approached differently (control by the State or by an independent regulatory body), the extent and nature of the obligations and special rights of operators vary enormously and the activities themselves are increasingly being partly or fully handed over from authority controls to be run by private undertakings. Although the expression "public service" is not used everywhere, it could be said that the idea at least is present in all European Union countries.

It remains to be seen what place this idea may have at Union level itself. It could be purported that European powers in this matter exist in the Treaty of Rome itself. But for a long time these powers had no effect. It is more or less only with the creation of the internal market that the essential principles and rules set out by the Treaty for the economy as a whole, above all the freedom of movement of goods and services between the Member States and the specific requirements stemming from them, tended to be applied to network activities too. The notion of public service, impregnating these activities as it still does in most Member States, has been challenged. At the same time, the concept has taken on, for the first time, a European dimension offering food for thought as to how it might be given a common content and how common policy instruments in its connection might be devised.

CHAPTER I EUROPEAN POWERS OVER PUBLIC SERVICES

Does the European Union have powers to deal with public services? To answer this question, we should recall that whereas the States automatically have full sovereign powers, the Union (like the Community before it) must be given these powers: those powers cannot be taken for granted but must be demonstrated by provisions in the Treaty.

From this point of view, the situation is clear in terms of public undertakings: the Union has no powers either to help or hinder them. The Treaty of Rome (Article 222) enjoins neutrality as regards systems of property ownership – public or private. It is much less clear for public services which are only mentioned in those terms in one article of restricted scope. This leads on to consideration of a good many provisions in the Treaty which, without referring to the concept explicitly, indirectly concern it and may, therefore, be used as a basis for European powers in this area. We shall then take a look at the mechanisms that could be used to implement those powers.

Section I Fundamental powers: their basis in the Treaties

I. In the EEC Treaty

A. The Treaty of Rome only employs the expression "public service" once. It does so in Article 77 which, in the transport sector, legitimizes aids "if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service". The scope of this provision is limited since it only refers to only one of the sectors where the public service concept is usually applied. Nonetheless, it is one of the main sectors and the concept is recognized in one of its vital aspects: the legitimacy of public participation in its funding.

B. The Treaty does, in fact, recognize the validity of the concept for the economy as a whole but under another name, that of "services of general economic interest". Article 90(2) reserves a special fate for undertakings entrusted with running such services: they are only subjected to Treaty rules, especially those relating to competition "in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them". On the other hand, public undertakings and undertakings enjoying special or exclusive rights do not benefit as such from this derogation and paragraph 1 of the same article subjects them to all Treaty rules.

C. There are other Treaty provisions which, without referring to the concept of public service, even under another name, could obviously affect public services existing in Member States. They are some of the most important instruments of Community construction. They are:

1) The very aim of the internal market which requires the abolition between Member States of obstacles to the freedom of movement of goods, persons and

services (Article 3c, strengthened by Article 7a).

2) The prohibition of any measures restricting the movement of goods between Member States (quantitative restrictions and all measures having equivalent effect), on imports and exports alike (Article 30 and 34), albeit with the possibility of derogations to this prohibition on grounds of security or public health (Article 36).

3) The obligation to adjust monopolies of a commercial character so as to end discrimination between nationals of Member States: Article 37(1).

4) The prohibition on restrictions to the freedom of establishment and freedom to provide services (Articles 52 and 59), with the exception of activities connected with the exercise of official authority and other activities determined by Council decision (Article 55), once again with the possibility of a derogation for reasons of security or public health (Article 56).

5) Provisions providing for legislation on transport: common rules applicable to international transport and conditions under which non – resident carriers may operate national transport services within a Member State (Article 75(1)).

6) The prohibition of anti – competitive behaviour by undertakings, agreements and abuses of a dominant position (Articles 85 and 86), with a possible exception for any agreement "which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit" (Article 85(3)).

7) The prohibition of State aids to undertakings – with a limited number of exceptions including (Article 92):

- aids having a social character;
- elements of local or regional planning policy: regional policy and industrial restructuring.

8) The aim of "economic and social cohesion" added to the Treaty by the Single Act (1986), later to become Title XIX (Article 130b and foll.) after changes brought about by the Treaty on European Union: it involves, in particular, reducing the backward development of the less – favoured regions and is based on the use of structural funds.

D. In other words, the Treaty contains quite a few provisions which, even when they do not refer to public service or a similar concept, are nonetheless very likely to have effects on the public services existing in the Member States. The Community may act on national public service activities and compel them to comply with the main provisions of the customs union and internal market: freedom of movement of goods, freedom of

establishment, freedom to provide services and competition rules. This brings us to the heart of the machinery which Community construction applies to challenge public services organized on a national scale: by requiring, for the purpose of creating a common or single market, the removal of any obstacle to the freedom to sell goods and services from one State to another and to establish on the territory of another State than one's own in order to produce goods or provide services, the Treaty could not but threaten the protection measures which States had taken in respect of certain activities for the sake of the public interest and which could be broken down into special or even exclusive rights limiting or fully removing the freedom to produce, buy, sell, transport, import or export. On the other hand, the derogation opportunities which the Treaty itself offers in order to mitigate these liberalization measures may be used to safeguard public services:

1) The exception to freedoms of establishment or to provide services for activities connected with the exercise of official authority seems to concern only administrative activities: justice, police, conventional administrative services. It is hard to see how they could be applied to economic public services.

2) On the other hand, it is conceivable that in order to protect national public services the derogations to the different freedoms (movement of goods, establishment, to provide services) on the grounds of security or public health could be used: postal services, telecommunications, electricity, railways and water distribution could all concern either or both of these notions.

3) Some of the exceptions applicable to the prohibition of agreements and public aids stem from considerations of public interest (technical progress, consumer interests, social policy, regional planning) and can therefore also be used to justify the existence of public services.

4) The aim of economic and social cohesion is generally regarded as an element of general interest and, as such, is very often cited to justify the creation of public services. It could perfectly well, therefore, be used as a basis for a Community policy for the defence of these services.

5) It is, however, obviously Article 90 which, by providing for an overall derogation to the Treaty rules in the case of services of general economic interest, offers the widest opportunities for protecting public services.

II. In the Treaty on European Union

Some of the provisions added to the Treaty of Rome in the Maastricht Treaty are liable to affect public services.

A. First of all, there are the two new objectives given to the Union:

1) consumer protection to be guaranteed at a high level (Title XI, Article

129a);

2) environmental protection (Title XVI).

B. At least equally important are the trans – European networks:

1) Nature and objectives of the networks

It is planned (Title XII, Article 129b) that the Community should contribute to the establishment and development of trans – European networks of transport, telecommunications and energy infrastructures. These networks are obviously justified in the general aim of economic and social cohesion and one of their main goals is "to link island, landlocked and peripheral regions with the central regions". They are based, above all, on the interconnection and interoperability of national networks.

2) Method of Community intervention (Article 129c)

The Community sets the guidelines for identifying "common interest projects", comprising objectives, priorities and the main thrust of activities. It may lend its support to the financial efforts of Member States for projects identified as of common interest in the form of:

- feasibility studies
- loan guarantees
- interest subsidies
- subsidies to transport infrastructures through the Cohesion Fund.

These new powers are very significant from the public service point of view. Of course, they are not real powers to establish European level public services but only to create infrastructures. These infrastructures are based, nonetheless, on the idea of a European public interest and, just as nation States in the 19th and 20th centuries created on their own scale great infrastructure networks of railways, electricity distribution and telephone services which have been the basis of public services operating in those sectors, it might just be conceivable that European networks might, in turn, serve as a basis for European public services in the future.

Section II Means of exercising powers: instruments and procedures

The implementation of the powers granted by the Treaties to the Community or the Union to act on public services is carried out through the usual means of action at the disposal of the Community institutions. These means are of two kinds: individual, or one –

off, interventions and general interventions, essentially legislation.

I. One – off interventions

These consist in dealing with specific cases, either administratively or judicially.

A) By administrative channels

These are in the hands of the Commission in its role of "guardian" of the Treaties.

1) First of all, the Commission has the general ability to intervene, the procedure in cases of irregularity, provided for in Article 169 of the EC Treaty and applying to all Treaty provisions imposing obligations on the Member States. When the Commission feels that a State has failed to fulfil one of these obligations it may, after inviting the State in question to submit observations, deliver a "reasoned opinion" requiring it to amend the wrongful act (law, regulation or practice). Failing compliance, the Commission may bring the matter before the Court of Justice.

2) The Commission also enjoys special powers for applying competition rules.

a) In respect of undertakings (Articles 85 and 86 of the EC Treaty). The Commission may:

- recognize that a given practice does not comply with the rules (a so – called "negative clearance" decision);
- exempt an agreement for one of the reasons stipulated in Article 85(3);
- or, on the contrary, order an undertaking to end an abusive practice, possibly by fining it.

b) In respect of States (Articles 92 – 94). The Commission may:

- regard state aids as compatible with the common market because they are covered by one of the considerations provided for in Article 92(2 and 3);
- or deem them incompatible and, after giving notice to the State concerned to submit its comments, call upon it to put an end to them.

3) The Commission also has at its disposal special powers in respect of public

service activities under Article 90(3). The text expressly calls upon it to ensure the application of the Treaty rules on public undertakings and undertakings with special or exclusive rights entrusted with the operation of services of general economic interest, which is a fairly good general definition of the public service sector, and enables it to take appropriate "decisions" and address them to Member States. As the Court of Justice has confirmed, these decisions may assert that a given State measure is incompatible with the Treaty rules and indicate what the State in question must do to rectify the situation.

B) Through judicial channels

A case relating to a public service activity may come before Community justice (the Court of Justice or, more rarely, the Court of First Instance) by the following referral methods:

- 1) Referral before the Court by the Commission when a State has not complied with a reasoned opinion or a decision to end a state aid taken by that institution (Article 169).
- 2) Referral before the Court by a Member State which considers that another Member State has failed to fulfil an obligation (Article 170).
- 3) Referral before the Courts by the undertaking or State challenging a Commission decision against it (Article 173).
- 4) Referral before the Court by the Council, Commission or a Member State to review the legality of the acts of the institutions, especially legislative acts (Article 173).
- 5) Referral before the Court to give preliminary rulings (Article 177) by the court or tribunal of a Member State to interpret Community law (Treaty or application legislation) in a case before that court or tribunal.

II. General interventions

The Community may also act on public service activities by means of general interventions.

- A. Either declaratory or doctrinal texts, preparatory to the legislative process: communications, Community white or green papers, Council or European Parliament resolutions.
- B. Or, of course, legislative measures themselves.
 - 1) By applying the general provisions of the EC Treaty, legislation

(regulations or directives) is proposed by the Commission and adopted by the European Parliament and Council according to the respective powers of these two institutions and by implementing procedural methods that vary according to the subject. If we take the Treaty subjects likely to be of interest to public services, we obtain the following four cases:

a) Legislation on transport (Article 75): procedure under Article 189c, the so-called co-decision between Council and European Parliament.

b) Harmonising the legislative, regulatory and administrative provisions of the Member States to establish and operate the common market (Article 100): unanimity of the Council after consultation of the European Parliament.

c) Legislative harmonization to attain the objectives of the internal market (Article 100a): so-called "cooperation" procedure between Council and Parliament, introduced by the Single Act and according to which, by derogation to the previous procedure, the qualified majority of the Council suffices for adopting measures (procedure amended by the Treaty on European Union, to become Article 189b thereof).

d) Trans-European networks:

– decisions on guidelines: procedure of cooperation between the European Parliament and the Council (Article 189b)

– other decisions: co-decision procedure (Article 189c)

2) Apart from the ordinary legislative process, the EC Treaty also lays down for public services the Commission's own legislative powers: the "directives" which Article 90(3) enables it to issue in respect of public service undertakings could, as recognized by the Court of Justice, act perfectly as directives in the usual meaning of the Treaty, i.e. regulatory directives.

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This perusal of the relevant provisions of the Treaty reveals that the Community institutions have at their disposal a fairly wide range of powers and means of action to intervene in public service activities. Taken as a whole, however, they are relatively neutral: they either make it possible drastically to cut back the role of public services by submitting the activities in question strictly to the various economic freedom rules in the treaties, or to protect public service by applying all the exceptions and derogations provided for in the same rules; and there is a whole range of intermediate solutions in between the two extremes. Everything depends on the attitude adopted by the Community institutions towards the concept of public service. It is this attitude that we must endeavour to clarify by studying their main decisions in this sphere.

CHAPTER II THE USE OF EUROPEAN POWERS: THE COMMUNITY'S ATTITUDE TO PUBLIC SERVICES

Whereas the Treaty of Rome gave Community institutions, as we have seen, the means to act on public service, it is only in recent years that they have begun to take an interest in the activities covered by this concept and to deal with the issue of public service. As for the new powers granted to them in this respect by the Maastricht Treaty, which only entered into force in October 1993, they are still too recent to have given rise to anything other than the first signs of action.

For thirty years or so the institutions created by the Treaty of Rome (1957) put public service "on the back – burner".

1) This abstention is probably due in part to the fact that "public service" and "public undertaking" were somehow lumped together, perhaps unconsciously. Public undertakings were protected by the Treaty's neutrality (Article 222) in their respect: a neutrality based, perhaps, on the concern that the Community could not be seen as "anti – socialist" or blocking State freedom to nationalize parts of the economy. Public undertakings were sacrosanct and public service, hidden behind them, benefitted from their "immunity".

2) There is, however, probably a more fundamental reason: the fear of too direct a challenge to national sovereignty. Major public service networks closely depended, after all, by definition, on the official authorities that had zealously given them special protection. To apply market rules to them was tantamount to attacking that protection and, therefore, touching States' sensitivity much more than when dealing with purely commercial activities. The situation changed when, in the mid – 1980s, the single market project pushed the common market logic as far as it would go, viz. by removing all obstacles to the complete liberation of economic movements within the Community area in order to create a genuinely integrated market. By wanting to enforce all the requirements lying dormant in the common market, the Community ended up by tackling the activities where the public service concept was applied and which had so far escaped the "Community liberation" trend. Of course, the Commission White Paper of June 1985, the starting – point for the enterprise of creating an internal market aimed at its completion on 1 January 1993, made no mention of public services and did no more than scratch the surface of certain sectors where the notion applies (transport and telecommunications). But it did launch a policy which, by aiming to liberalize markets, could not avoid dealing with public services and, indeed, it was during the next few years that we were to see for the first time Community institutions directly intervening, through administrative, judicial and legislative channels, in public service activities.

As far as legislation is concerned, this interventionist policy benefitted from a vital procedural change which took place at the same time. The Treaty of Rome originally

required unanimity on the Council to legislate in this sphere and there is no doubt that certain States would have blocked any challenge to their public services if ever the Commission had envisaged making one. It is the Single Act of 1986 that, by introducing the rule of majority voting on the Council to adopt most legislation on the internal market (Article 100a EC), opened up the possibility to legislate in public service activities.

Section I. Administrative action

This refers to initiatives taken by the Commission on the basis of the special powers (pointed out earlier) at its disposal to implement the Treaties. These initiatives have consisted in more or less challenging the special rights bestowed upon public service undertakings, especially exclusivity rights, on one hand, and public aids, on the other, wherever they contravened the relevant rules of the Treaties.

I. The Commission's intervention means

A. To challenge exclusive or special rights¹¹ of public service undertakings, the Commission has relied either on competition rules or free movement rules.

1) In the case of competition, the base used has been the prohibition of abuse of dominant positions established by Article 86 of the Treaty of Rome. Of course, Article 85, prohibiting agreements, is valid for public service undertakings like any other and there are cases of understandings reached for reasons of public service (for example, the "demarcation agreements" under which German electricity distribution undertakings decide upon exclusivity areas). But in most cases public undertakings enjoy monopoly situations because they have been granted to them by an authority. It is Article 86 which, therefore, seems the most relevant and the Commission tends to consider that any monopoly given to an undertaking is tantamount to the abuse of a dominant position.

2) Free movement rules did not allow for opposition to production monopolies not concerning intra – Community trade as such. The Commission could obviously, on the other hand, base itself on the clear prohibition of any measure restricting the movement of goods between Member States, import and export alike (Article 30 and 34) and the obligation to arrange trade monopolies so as to end any discrimination between Community nationals (Article 37).

B. To challenge public aids granted to public service undertakings, the Commission has in general strictly applied the principle of prohibiting these aids laid down by the Treaty of Rome (Article 92). In particular, it has systematically attacked financial support given by States to those public service undertakings which are also public

11. Both terms feature in Article 90 of the Treaty of Rome but have different uses in derived legislation: this legislation tends to reserve the expression "exclusive rights" to strictly monopoly situations, where particular rights are entrusted to one undertaking alone, whereas "special rights" proper refer to rights given to more than one operator, in limited numbers a priori.

undertakings, generally the case until recently, considering that this support was tantamount to aid whenever it had been granted in conditions that would not have been accepted by an investor operating in the normal framework of the market economy.

II. Implementation

These intervention means, attacking the problem from several angles, were not, however, fully implemented until the late 1980s. Only very late in the day and very gradually did the Commission take an interest in public service activities.

A. Until the mid – 1980s, there was virtually no Commission action vis – à – vis public service activities. The relationship between these activities and Community law is not really considered, whether to bring them under the ordinary law of the market economy or to strengthen their special status. The problem was simply swept under the carpet.

1) The Commission definitely carried out its duty under the Treaty of Rome (Article 37) to attack commercial monopolies but only in respect of activities outside public service: State monopolies concerning alcoholic beverages, tobacco and matches, traditional monopolies in several countries; monopolies concerning oil products.

2) The Commission is also particularly concerned with public undertakings. The Commission tends to feel that these undertakings often violate the Treaty rules which are, after all, expressly applicable to them. Suspicions focus on the financial support given to them by their State shareholders: this support is seen as a disguised form of public aid, something clearly prohibited by the Treaty. This concern was translated in 1980 (on 25 June) by Directive 80/723 on the transparency of financial relations between Member States and public undertakings. This Directive, the first issued by the Commission on the basis of Article 90(3), compels States to inform the Commission of any financial support they give to public undertakings and is clearly seen as a surveillance instrument designed to help the Commission track down any public aids given to these undertakings. But it is public undertakings which are in the firing line here, not public service activity. This activity seems to be spared such concerns: the Directive excludes from its scope energy, water, postal services, telecommunications and transport. This is close to the position expressed by the Commission in its 1976 report on competition¹², which stated that there is no doubt that public undertakings may act on a national scale as an especially valuable instrument for pursuing aims of economic or social policy. At this stage, therefore, it would seem that the Commission's policy has regarded these public service activities as being covered, overall, by Article 90(2) and therefore not calling for any special investigation.

3) Mention should be made, however, of a test case where the Commission felt the need to challenge an exclusive right in a public service activity. It concerned the natural gas imports monopoly granted by Belgian law to the Distrigaz

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company. The Commission contested this monopoly on the basis of Article 37 and Belgium withdrew it from its legislation in 1983.

B. Over the next few years, from 1985 to 1990, the Commission did begin to take real action to apply Community law to public service activities. 1985 was the year of the White Paper launching the enterprise of completing the internal market. It was also the year when the aforementioned Directive on transparency in relations between States and public undertakings was amended to include in its scope the main public service sectors: energy, water, transport, postal services and telecommunications. On these bases, the Commission could now act in these sectors, beginning by focusing on the latter two.

1) The Commission first set its sights on telecommunications terminals. Most Member States included the import and marketing of these terminals in the monopoly of their national post and telecommunications body. The Commission contested this exclusive right on the basis of Articles 37 and 86. It first took action in Germany, compelling it to end the monopoly for telephones in 1985 and, threatening it with a decision under Article 90(3), for modems connected to the public telephone network in 1986. Over the next few years it applied Article 169 to compel Belgium, Spain, Italy and Germany to alter their legislation and end any exclusive rights in respect of supplying terminals. In the telecommunications sector, the Commission also called upon Belgium's RTT to abandon its restrictions on granting third parties access to international data transmission networks (1990). On the other hand, in the same year, it granted a derogation to the ban on agreements in the case of such agreements between telephone companies for installing systems which seem to offer user advantages as set out in Article 90(3): management of data network services (MDNS), a Europe – wide mobile telephone system (ECR 90) and the paging system linked to the Irish public network (Eirpage).

2) The Commission also tackled international express mail, a mail delivery service, which several Member States regarded as part of the monopoly of their national post office bodies, therefore preventing other undertakings from offering this kind of service. Judging this extensive practice of the postal monopoly to be contrary to Articles 86 and 90(1), not justified by the public interest task requirements of the post office, and ruling out exemption under Article 90(2), the Commission intervened to end it in Ireland (1985), Italy, the Netherlands and Spain, which all changed their legislation in 1989 – 90 after being the subject of formal decisions in this respect under Article 90(3).

3) Mention should also be made of the Commission's action in the transport sector. Under Article 7 and 90(1), it challenged reduced fares on air and sea routes to and from the Balearic and Canary islands and the Azores and Madeira, reserved by Spain and Portugal to their own nationals residing in those archipelagos. Under pressure, the two governments changed their legislation to extend this benefit to all Community nationals residing there (1987). On the other hand, in 1987 the Commission again granted a derogation under Article 92(3) to aids given to public transport in the Basque Country and Andalusia.

C. After 1990, the Commission's action in respect of public service activities, patchy and limited until then, became systematic and all-embracing.

1) There was now an overall policy on the subject. It is expressed, for example, in the annual reports on competition. The 1991 report refers to the need to open up these activities to competition and, for that purpose, to conduct a critical examination of regulations to verify whether the sectors concerned could not perform their public service task in the framework of less restrictive systems. It turns the abolition of obstacles in those sectors into a priority aim to be attained by making systematic reference to Article 90. The 1992 report includes a new heading called "special or exclusive rights" and presents "de-monopolization" as one of the main challenges for completing the internal market, since "monopolies" are regarded as contrary to competition rules, the freedoms of movement of goods and provision of services and non-discrimination on the basis of nationality.

Indeed, this heightens awareness of the relevance of the public service concept and clearly registers that it is justified by the different aspects of public interest. For example, the 1992 report recognizes that, for the sake of Community cohesion, the maintenance of a universal service is especially important for peripheral or thinly populated regions. The 1994 report acknowledges that exclusive rights may be justified by a public service task whose fulfilment the Commission does not intend to challenge, while explicitly mentioning Article 90(2). There is the added concern that the provision of public service and its justifications should be appreciated no longer solely from a national perspective but also a Community one, in the interest of the internal market. According to the 1992 report, Community undertakings and consumers will not derive all the possible benefit of the single market unless regulated sectors are devised on a single-market scale.

Nonetheless it must be recalled that the derogations granted by the Treaty to public service activities can only, like any exception to a rule, be interpreted strictly: as the same 1992 report states, they must be applied while searching for the least restrictive possible solutions from the point of view of competition and the fundamental freedoms of Community law. These freedoms remain the general norm for business activity.

2) Having devised its policy in respect of public service activities, the Commission also specifies the instruments it intends to implement it with. That is how it renders systematic its means of controlling aids granted to the undertakings in question. In a Communication to the Member States on State aids to public undertakings, of July 1991, intended to make explicit application of Articles 91 and 93 of the Treaty and the aforementioned Directive 80/723, it precisely formulates the principle of the investor in market economies as a criterion for assessing any public funding granted to these undertakings: any funding not complying with the behaviour of a private investor operating in the normal conditions of a market economy will be regarded as an aid.

Furthermore, the Commission regularly confirms that it always reserves the possibility of using its own powers, under Articles 90(3) and 169, especially in cases where the normal Community legislative mechanism proves ineffectual.

3) On these bases, the Commission has carried out its action in the telecommunications and transport sectors. In its "Guidelines" on telecommunications issued in September 1991, it warned that it would regard as an abuse of a dominant position any refusal to grant access to the network, discriminatory charges and cross subsidization. In the same year, it addressed a reasoned opinion (Article 169) to 3 States (Greece, Ireland and Italy) for failing to implement legislation allowing competition for supplying telecommunications services and called on France not to extend France Telecom's monopoly to phonecard telephone call – boxes located on public land.

In the case of transport, we should mention the notice served to Denmark which, on the basis of its railways monopoly, refused a shipping company access to a port to provide a ferry link to Germany: this refusal, regarded as an abuse of a dominant position (Articles 86 and 90(1)) led to a decision under Article 90(3) on 21 December 1993.

The Commission has also acted against the exclusive rights of national airlines in respect of auxiliary services in airports. On the other hand, it judged compatible with the Treaty (its Article 92(3a)) a Portuguese government aid to TAP to offset public service obligations for its service to the Azores and Madeira.

4) The Commission has begun to take action in a sector which it had so far left practically intact: energy. In its 1989 report on competition, it announced its intention to take action in this sector more thoroughly than in the past with a view to the gradual integration of the energy market, while acknowledging that it had "special features" which might be taken into account under Articles 85(3) and 90(2). It specified that it intended to inquire into the public aids granted, especially to the electricity sector, and to apply Article 90(3) which, unlike Article 169, would enable it to take preventive measures. It also declared that it had already begun examining electricity transmission and distribution monopolies.

These declarations of intent were acted upon. The Commission prohibited (decision of 16 January 1991, under Article 85(1))¹³ an agreement between Dutch electricity companies which prevented distribution companies and industrial consumers from importing electricity. Above all, a "head – on action" was taken against the electricity and natural gas import and export monopolies practised in several Member States. These monopolies were judged to be contrary to Articles 30, 34 and 37 and in 1991 were the subject of observations addressed under Article 169 to nine States. As six of them (Denmark, Spain, France, Ireland, Italy and the Netherlands) had not offered satisfactory explanations, the Commission addressed to them a reasoned opinion (November 1992) compelling them to alter their legislation. Since five of these States (as in the meantime Denmark had decided to abolish its gas imports monopoly) were unable to point to legislative projects in this respect, the Commission took the case before the Court of Justice in early 1994; the case is still pending.

13. Ijssel power – station decision

Section II. The courts' contribution

Alongside the Commission's administrative action, the role of the Court of Justice had to be important in shaping a Community attitude towards public service. We know of the Court's major prerogatives, outlined above, within the Community's institutional system. They have, after all, been exercised in cases concerning the public service brought before the Court by the Commission out of concern to have its positions guaranteed (Article 169), by a Member State contesting, on the contrary, a Commission decision (Article 173) or by a national court having to solve a dispute between domestic parties (Article 177). Generally speaking, the case-law which has resulted from these cases has lent support to the Commission's action. It is not the Court which has made the first move, if only because it hardly had to state its position on the concept of public service until the 1990s, other than vaguely and occasionally. It is only in recent years that cases clearly with this concept at stake have become numerous and that, therefore, the Community courts have had a chance to start formulating a doctrine on this subject.

I. For a long time, the Court had no opportunity to state a position on the fate of public services in respect of Community law. It limited itself to applying the final paragraph of Article 90 of the Treaty of Rome, confirming that undertakings enjoying exclusive or special rights were subjected to the rules of the Treaty.

A. In 1974, in the *Sacchi* judgment (30 April), concerning an audiovisual-related case, the Court gave full scope to the principle, laid down by Article 90, of the legality of exclusive or special rights, stating that nothing in the Treaty was opposed to the right of Member States, for considerations of public interest of a non-economic nature, to exempt radio and television broadcasts from the rules of competition, by entrusting the exclusive right to operate them to one or more establishments.

The Court merely required that these rights be the result of a deliberate express step taken by the authority, as specified in the same year in the *BRT* judgment (27 March). But it stressed, at the same time, that these rights must be compatible with compliance with the rules of the Treaty, as Article 90 itself requires. The *Sacchi* judgment added that for the purpose of performing their task, however, these establishments fall, in that the performance of their task comprises economic activities, within the provisions referred to by Article 90.

Seventeen years later, the *ERT* judgment (18 June 1981) confirmed this position, still in respect of the audiovisual. According to this judgment, Community law does not oppose the granting of television monopolies, for considerations of public interest of a non-economic nature. The ways of organizing and exercising such a monopoly must not, however, violate the provisions of the Treaty on matters of the free movement of goods and services or competition rules.

B. It is the whole set of Treaty provisions that special or exclusive rights must comply with, even if Article 90 emphasizes competition rules.

The Court has therefore condemned exclusive rights as contravening the free movement of goods governed by Articles 30, 34 and 37. This has been the case in particular of import or export monopolies in the following judgments: Manghera, 5 February 1976, lubricant refiners, 10 March 1983 and Campus Oil, 10 July 1984, on oil products; more recently, the so – called "telecommunications terminals" judgment of 19 March 1991 condemning exclusive rights for importing, marketing, connecting, running and maintaining this equipment.

The same is true of the freedom to provide services (Article 59): ERT judgment of 18 June 1991 condemning exclusive rights for broadcasting and retransmitting television programmes.

But it is attacks on competition which have been behind the largest number of cases condemning exclusive rights, mainly in the form of abuses of a dominant position (Article 86). The Court has taken the position that this abuse occurs when a monopolistic undertaking does not, in fact, perform the task for which it enjoys the exclusive right while that same right by definition prevents other operators from making good any shortages (Höfner judgment of 23 April 1991). It has also judged contrary to Article 86 the responsibility entrusted to an undertaking to set the technical rules applied to the goods and services which it produces or provides itself: the aforementioned "telecommunications terminals" judgment and the following: RTT of 13 December 1991; Lagache, Decoster and Taillandier of 27 October 1993.

Exclusive rights must also comply with the prohibition in principle of State aids (Articles 92 and 97), although case – law is very limited on this score. The Court upheld, with nuances, the doctrine of the private investor in market economies formulated by the Commission to assess State financial support for public undertakings (Alfa Romeo judgment of 21 March 1981 and ENI judgment of 21 March 1991).

All these decisions condemn exclusive or special rights as contravening the rules of the Treaty. But in fact it is difficult to see how they could not contravene them since their aim is precisely to shelter their beneficiaries from the mechanisms of the market economy, competition in particular. Whereas, therefore, virtually all exclusive or special rights violate the Treaty, they can only be accepted if they are covered by the cases of derogation provided by the Treaty itself.

II. Only very late in the day did the Court acknowledge that undertakings enjoy exclusive or special rights contrary to the rules of the Treaty of Rome on the basis of derogations provided by the Treaty, be they special derogations or the general derogation of Article 90(2).

A. There are practically no cases where the Court has based its judgment

on special derogations: Articles 36 and 56 (justification by reasons of security or public health for exclusive rights exempted from the freedom of movement of goods, establishment or to provide services), 85(3) and 92 (exclusive rights exempted from the prohibition of agreements or public aids). If anything we can offer an example a contrario: the ERT judgment (mentioned earlier) ruling out application of Article 56 to an exclusive right for retransmitting television programmes. The Court also cited, but again to reject it in this case, the possibility of using the case – law concept of "vital requirements" derived in particular from public interest (the "Cassis de Dijon" case – law) to justify an exclusive right exempted from a Treaty rule (judgment Commission/The Netherlands of 27 July 1991).

B. It has, on the other hand, fairly often referred and, recently increasingly so, to the possibility of a general derogation provided by paragraph 2 of Article 90 for "services of general economic interest".

1) Indeed the Court has long since made a very cautious use of this possibility. For some time it actually refused to acknowledge its direct effect, which meant that its use could only give rise to court controls in the case of appeals against inaction or proceedings for annulment, but not in cases of references for preliminary rulings. This was the position taken, in particular, in the Müller judgment of 14 July 1971. It was altered by the 1974 BRT judgment (mentioned earlier) which recognized, on the contrary, that the national court was responsible for deciding whether an undertaking claiming to provide services of general economic interest in order to be exempted from Treaty rules really was providing such services.

But recognition of the direct effect did not lead the Court of Justice at once to examine cases in depth in order to investigate the relevance of applying the concept of general economic interest. It tended to give States carte blanche in this matter. This is true of the Müller judgment on a port operations monopoly, and was also the case of the aforementioned Sacchi judgment on the exclusive right to broadcast radio and television programmes. However, a particularly interesting judgment is that in the Steinike case, of 22 March 1977, in which the Court recognized that, where it applies, Article 90(2) may permit exemptions from all Treaty rules, including the prohibition of State aids.

2) The Court then moved towards a more thorough investigation of application of Article 90(2). For a time it seemed to think that labelling an activity as a public or general interest activity was mainly a task for the national courts (aforementioned ERT judgment). But, considering that the concept could not be exclusively national even if its content varied from country to country, it granted itself assessment powers. It therefore accepted application of the concept to a water distribution service ("Anseau – Navewa" judgment of 8 November 1983) and a public telephone network (RTT judgment, already mentioned, and the "Telecommunications services" judgment of 17 November 1992), and refused to do so for port operations ("Port of Genoa" judgment of 10 December 1991), while accepting it in the "Müller" judgment concerning the Luxembourg port of Mertert.

At the same time, pointing out that the derogation in Article

90(2) is an exceptional one, in accordance with case – law tradition it adopted a strict interpretation. It required that the rules of the Treaty which an undertaking quoted for exemption, for the sake of its general interest task, should make that task not only more difficult but impossible. It has therefore regularly refused to apply a derogation when that impossibility was not established. A whole set of judgments are based on this idea: British Telecom (20 March 1985), CLT (3 October 1985), Höfner (23 April 1991), Port of Genoa, RTT – INNO and "Telecom services" (already mentioned). In the Port of Genoa judgment, the Court pointed out that even supposing (which it did not) that the port activities in question could be regarded as a task of general economic interest, neither the information in the case – file nor the observations submitted suggested that application of the Treaty rules, especially those on competition and free movement, would be likely to prevent the successful performance of such a task. Similarly, the RTT and "Telecommunications services" judgments, while acknowledging that the task entrusted by the authorities to an undertaking to put at users' disposal a public telephone network is undoubtedly a task of general economic interest, reject the idea that this task requires that the undertaking be granted a monopoly for the sale of telephone terminals or the provision of all telecommunications services. In accordance with the principle of proportionality, which often underlies its decisions, the Court feels that public service tasks must preferably be performed by the means least contrary to the rules of the Treaty and that exclusive rights should be avoided wherever possible.

3) Recently, the Court seems to have settled for a relatively well established doctrine for applying Article 90(2). In two very clear – cut judgments, *Corbeau* (1993) and *Almelo* (1994), it brought the derogation fully into play for vital public services. In both cases, it acknowledged that exclusive rights clearly contravening the Treaty rules (freedom of establishment and to provide services, prohibition of the abuse of a dominant position) were justified by needs accruing from a general interest task entrusted to an undertaking by the authorities: postal services in the former case and public electricity distribution in the latter. It is worth quoting extracts from these decisions which signal the coming of age of the courts' position on the public service concept.

a) In the Corbeau judgment (19 May 1993), the Court began by defining the postal service in question as comprising the obligation to collect, transport and distribute mail, for all users, throughout the territory of the Member State concerned, at uniform rates and in similar quality conditions, regardless of any special situations and the economic profitability of each individual operation. It concluded that such an obligation called for the possibility of compensating between profitable sectors of activities and less profitable ones and thereby justified limits on competition from private undertakings in the economically profitable sectors.

This contains in every element (continuity, universality, equal access regardless of cost, implying financial equalization) the conventional definition of a public service and signals its debut entry into Community law, in such a complete form.

At the same time, for the sake of the very concept at the basis

of this definition, general or public interest, the Court imposes limits on the area of exemption. It excludes from it "specific services, dissociable from the service of general interest", which meet the special needs of economic operators and which call for certain supplementary services which the traditional postal service does not offer, where those services do not risk upsetting the economic balance of the service of general economic interest provided by the exclusive right holder. In the case of the post office this refers to mail collection from homes and express mail distribution.

b) In the Almelo judgment (27 April 1994), the Court pointed out that the undertaking in question was entrusted by the authorities with the task of ensuring the uninterrupted supply of electrical energy, throughout the conceded territory, to all consumers, local distributors or end-users, in the quantities demanded at any time, at uniform rates and in conditions that could not vary other than according to objective criteria applied to all customers. It deduced that restrictions on competition from other operators must be allowed, wherever they proved necessary in order to enable the undertaking invested with this general interest task to perform it.

The wording is the same as in the Corbeau judgment. This time, nevertheless, instead of deciding itself how to determine whether the exclusive or special right calling for a derogation from the Treaty rules (in this case an exclusive purchase clause compelling the municipalities to buy electricity from the company in question) is necessary for performing the general interest task, the Court leaves this responsibility to the national courts. It does take pains to point out to them that this should be determined by taking into account the economic conditions in which the undertaking operates, in particular the costs it must bear and any regulations, in particular relating to the environment, to which it is subject. This is, substantially, the concept of "economic balance" explicitly mentioned in the Corbeau judgment and vital for a realistic conception of public services.

c) These two mutually compatible judgments suggest that Community case-law is now clear as to its approach to the concept of public service. It gives the concept itself a safe place in the Community's legal order: public service is recognized in its vital elements, including its dimension of economic balance, which means that it is a set of more or less profitable activities where those that are profitable compensate for those that are not. At the same time, limits are imposed on it since it must be confined to activities clearly related to the public interest and any services only meeting individual needs must be excluded, unless of course those services are necessary for the economic balance of the whole and, therefore, for the performance of a general or public interest task.

This approach is, then, a fairly broad one, probably less limited than that in force in some Member States but clearly narrower than the Commission's which, rather than conceiving public service as a global activity tends to limit it to specific obligations imposed upon an activity that happens to be governed by market rules. It will be interesting to discover whether the Court will confirm this approach in the case of a major dispute: that between the Commission and five Member States, including Spain, France and Italy, which

have maintained electricity and natural gas import and export monopolies for the benefit of major national undertakings. Against the Commission, which opposes this, the governments in question are citing Article 90(2) and claiming that these monopolies are necessary for the public service tasks entrusted to these undertakings. It will be the first time that the Court will have to take a position on exclusive rights and public services of such a size and such economic and political scope.

Section III. Legislation

Unlike administrative action, a Commission prerogative, and judicial action, in the hands of the Court, legislation is normally the joint task of the Commission, the European Parliament and the Council. By studying it we can, therefore, find out the attitude to public services of each of these institutions. As we have seen, however, the Commission has its own legislative powers in this sphere (Article 90(3)) and has sometimes wielded them. More usually, however, it has applied the joint interinstitutional procedure of ordinary law, in which, short of decision-making powers, the role of initiative granted to it by the Treaty gives it considerable influence.

Whenever the Commission has wanted to introduce legislation, it has, above all, been in order to extend to network activities the principles of the internal market: freedom of movement of goods, free provision of services, competition. It has decided that to achieve this, administrative and judicial action, consisting in directly applying the relevant provisions of the Treaties, was not enough: to end all the obstacles put up by national rules and practices, legislation was needed. Propelled by the Commission, the Community has passed a great deal of legislation, sometimes of a general nature but more often on a sector by sector basis.

I. General legislation

The Community might have considered passing legislation on economic public services as a whole. This might have consisted in trying to regulate, overall, the relationships between these services and the authorities responsible for them: the fields concerned and means of setting them up, financing, tasks and obligations, exclusive and special rights. The Treaty provisions mentioned above (major "freedoms" of the internal market and competition rules) could, if necessary, have provided a base. Such an attempt would probably have met with the resistance of national governments, given the extent to which public services lie at the very heart of State activity: to legislate on public services as a whole would almost certainly have been seen as interference in a sphere which has fundamentally remained under national powers.

The initiatives taken to do this could, therefore, only be modest, i.e. indirect or of limited scope. In fact, there are only two examples.

A) The example of an indirect legislative initiative was the 1980 Commission Directive on the transparency of financial relations between Member States and their public

undertakings (80/723 of 25 June). This text is the first case of the Commission's use of its own regulatory powers, given to it by Article 90(3). But, as we saw earlier¹⁴, it only affects public service very slightly, especially in its original version which excluded from its scope the main network activities.

B) The example of an initiative on a limited aspect is legislation on public procurement contracts. As we have seen, public procurement contracts are not linked per se to economic public services. They are contracts through which authorities acquire goods (public supplies contracts) and services (public works contracts and services contracts) which they need in order to operate and they pay the suppliers the price of these goods and services. They are not required for the purpose of executing a public service which is, after all, an activity of general economic interest operating, over a long time, not for the benefit of the administration itself but for users, who are the public at large. As such they are, therefore, quite distinct from contracts through which the same authorities entrust undertakings with the task of operating, for the public good, the public services for which they are responsible, procedures often called "public service delegations" which include, in particular, public works concessions and public service concessions.

Nonetheless, the Community has endeavoured to subject these delegations to its legislation on public procurement contracts.

1) Initial legislation on public works contracts (Directive 71/305 of 26 July 1971) quite logically excluded from its scope public works concessions. Unlike public works contracts, through which authorities have built those infrastructures not related to the operation of an economic public service, public works concessions are designed to entrust to undertakings not only the completion of a public work but also its operation, which often consists in providing a public service: for example a motorway, a port or a tunnel, which the undertaking will operate for the public and from which any earnings, raised from the public (tolls), will act as the undertaking's remuneration.

However, the amendment to this Directive, in 1989 (Directive 89/440 of 18 July) makes certain provisions of the text, at least, applicable to concessions. Any authority considering the granting of a concession must be subject to the following advertising rules:

- to make its intention known through an announcement published in the Office Journal of the European Communities;
- to allow a period of at least 52 days between the dispatch of this announcement and the deadline for applications in respect of the concession.

2) Similarly, the Commission has tried to include public service

14. See page 138.

concessions in legislation on public procurement of services (Directive 92/50 of 18 June 1992). In its initial proposal of 6 December 1990, the Commission, while acknowledging the difference between the two concepts, planned to apply to concessions with a certain annual turnover forecast (5 million or ECU or more) the advertising rules, at least, of the Directive:

- an announcement in the Official Journal of the Communities;
- minimum periods for each stage of the procedure of granting concessions and for communications with applicants;
- publishing the result of the procedure in the OJEC.

The amended proposal of 30 August 1991 lowered the application threshold to 2 million ECU.

What is astonishing, and probably the result of pressure exerted by the governments concerned, is that these proposals came to little. Any mention of concessions disappeared from the final directive which went as far as to specify, albeit in a confused way, although the intention is clear, that it does not apply to service contracts granted to a body which is itself an adjudicating authority, on the basis of an exclusive right which it enjoys pursuant to legislative, regulatory or administrative provisions.

3) These efforts to include public service delegations in Community legislation on public contracts were therefore clumsy since they confused quite different things. Nonetheless, they do translate, albeit in the form of an inappropriate instrument, the desire to submit, in part at least, to competition obligations those acts by which authorities entrust to undertakings the operation of public services and which were previously characterized by the discretionary powers ("intuitus personae") which the authorities were allowed for choosing their partners.

This desire, moreover, probably played a part in the decision, maintained for some time, to exclude from legislation on public contracts those contracts concluded by undertakings in network sectors (water, electricity and gas distribution, public transport, telecommunications) holding exclusive or special rights. This exclusion was justified since the aim was to make legislative obligations binding not so much on these contracts as on the very acts by which the undertakings in question had received their special rights from the authorities. Since the attempt failed in the case of public service concessions, it is quite natural that the undertakings in these so-called "excluded" sectors should have been the subject of Community legislation, not because of the concession contracts that they are granted by the authorities but because of the contracts that they conclude with their own suppliers. This was recognition that the undertakings in question, to which public services were delegated, could also be regarded as adjudicating authorities and be compelled to have their contracts qualified by similar limitations to those imposed on the authorities. It was

also a way of demonstrating an understanding of the distinction between public contracts and public service delegations, as the new legislation (Directive 90/531 of 17 September 1990) refers quite rightly (Article 2(2)) to networks intended to provide a service to the public.

II. Sectoral legislation

This has affected all the major network sectors, apart from water distribution.

A. Electricity and gas

In 1989, the Commission announced its intention to introduce legislation to open up the market in these two sectors. But legislative action began with texts of limited scope before going to the heart of the special rights which undertakings entrusted with producing, transporting and distributing electricity and gas still commonly enjoy.

1) The first legislative action consisted in imposing price transparency. This was Council Directive 90/377 of 29 June 1990, according to which electricity and gas suppliers must communicate to the Commission the prices they charge to industrial consumers. The fact that it is limited to large consumers means this text has no real impact on the public service.

2) The "transit" Directives (90/547 of 29 October 1990 for electricity and 91/296 of 31 May 1991 for gas) challenge, on the contrary, an exclusive right, the monopoly of operating transportation networks, since they oblige all undertakings responsible for one of these networks to put it at the disposal of other undertakings for energy exchanges between Member States (a border must be crossed). But these other undertakings themselves can only be electricity or gas operators and not customers of network operators. The distribution monopolies are not affected and these texts do no more than make compulsory those facilities already practised for a long time on a voluntary basis.

3) Of far greater impact on the public service are the legislative proposals presented in 1992 and still pending at the Council.

a) In their initial version (21 February 1992), they impose, for both energy sources:

- the abolition of exclusive production and transportation rights.
- the separation, in the case of integrated undertakings, of production, transmission and distribution activities, at least for management and accounting (the "unbundling" concept, i.e. dissociation), in order to control cross - subsidies between the different activities.
- and, above all, access for third parties to the network, at least for distribution undertakings and large consumers - in other words enabling these

undertakings and consumers to use the network to buy their gas or electricity from other suppliers than the supplier holding exclusive rights.

Called upon to take a position on these proposals, on 30 November 1992, the Council voiced certain doubts, making it known that, in its opinion, Community legislation establishing the internal energy market should respect not only the requirements of transparency and non-discrimination but also considerations such as security of supply, the protection of small consumers and the different supply systems in Member States.

The European Parliament paid special attention to the Commission proposals. It examined the problem in depth in the form of a particularly important report drafted by its Committee on Energy, the DESAMA report, the conclusions of which were reiterated for the most part by the Assembly itself in its Resolution on the subject, passed on 17 November 1993. This text calls for the abolition of exclusive rights only for new production capacities which would be allocated by a call for tenders. It maintains the appointment of network management by the authorities and the authorities' right to concede transportation and distribution services, be they local, regional or national. It limits "unbundling" to accounting. Above all, it contemplates access by third parties to networks only for large end-users and in a negotiated form (instead of being compulsory). It also insists on the concept of public service, with explicit reference to Article 90(2) of the Treaty and stipulates that it covers both security of supplies and central services to be provided to the public (supply obligation and price equalization).

b) In response to this critical reaction by the Council and, above all, the European Parliament, the Commission presented a revised proposal (10 December 1993). Negotiated access to networks by third parties and limiting "unbundling" to accounting are accepted in it. But the abolition of exclusive rights at all stages in the process, including distribution, is maintained. As for the public service, it is spelled out in the new text together with the conventional definition and justifications. In it, security of supply and consumer protection are said to call for a certain number of public service obligations whose fulfilment is not guaranteed by free competition alone. Among these public service obligations, the text mentions: supply obligation, the maintenance of security, the development of capacity to meet demand and equal treatment for end-customers. However, the definition of these obligations by the Member States must comply with precise conditions: transparency, non-discrimination and notification to the Commission.

The Council responded to these revised proposals, limiting itself at first to electricity, and fairly quickly accepting the liberalization of production, accounts "unbundling", the provisions relating to the operation of networks and the criteria for defining public service obligations. But it failed to reach a common position on third party access to networks as certain States, France in particular, focused on the alternative concept of "single buyer" according to which the States may continue to give an undertaking exclusive transportation and distribution rights: large consumers wanting to buy electricity from another supplier or independent producers intent on selling outside national territory must ask that undertaking to carry out these operations on their behalf (meeting of 29

November 1994).

The Commission was very sceptical in respect of the single buyer proposal. In a document addressed to the Council of 22 March 1995, it held that this concept is not compatible with the Treaty unless the undertaking in question acts as a totally neutral intermediary between producers and consumers, which pre – supposes the following conditions: competition in production, total freedom for consumers to choose their suppliers, including in another Member State, and to build for that purpose direct transmission lines, an obligation for the single buyer to purchase all the requested quantities under specific conditions.

At the beginning of 1996, the Council had still failed to reach a common position. At its meeting of 1 June 1995, it had admitted, however, that third party network access and single buyer could co – exist, allowing each State to choose its system provided that there was no discrimination at any stage in the process and that the final version of legislation took into account the different national situations, in order to safeguard the public service obligations deemed necessary by the States. Apart from that, the national positions had not changed. At the meetings of 20 December 1995, 3 and 4 February and 7 May 1996 ministers failed to reach a final decision.

B) Public transport

As we have seen, the Treaty of Rome (Article 77) makes explicit mention of public service obligations in the transport sector. What remains to be known is the position this concept really occupies in the legislation applying the Treaty.

1) For land transport, the first text on the subject was Council Regulation 1191/69 of 26 June 1969 on the action of Member States in matters of obligations inherent in the concept of public service in railway, road and waterway transport. This text clearly refers to the conventional concept of public service since it stipulates that the obligations in question are intended to guarantee sufficient transport services, taking account, in particular, of social, environmental or regional planning factors, with a view to offering charge conditions determined to assist certain categories of passengers. It goes on to describe these obligations as one which the undertaking would not assume – or not to the same extent or in the same conditions – if it were considering its own commercial interests. It compels States to abolish these obligations or compensate for them according to common criteria. Another Regulation (1190/69), issued on the same day, stipulates the rule for railways.

We should also mention Council Decision 75/327 of 20 May 1975 on reorganization of railway undertakings and harmonization of rules governing financial relations between these undertakings and States. Undoubtedly, above all, this text obliges States to grant these undertakings autonomy vis – à – vis their assets, budgets and accounts and calls for them to be managed in such a way as to strike a financial balance. But, at the same time, it points out the role that they play in the general interest and acknowledges that

States are entitled to define for that purpose public service obligations which must appear in the budget and accounts.

The consideration, albeit very limited, of the concept of public service in these partial texts is hardly present at all in the railway legislation brought out when the single market was set up. Council Directive 91/440 of 29 July 1991 on the development of Community railways makes no mention of the public service. It is totally dedicated to opening up the rail services market. For this purpose, it reiterates prescriptions already included in previous texts: the budgetary and accounting independence of railway undertakings vis-à-vis the States, commercial-type management aimed at striking a financial balance. It even goes much further by organising the unbundling of infrastructure management and transport service operations. Not only must the two activities be separate from an accounting point of view but also the rail undertakings of several Member States may form international groups which would have access to infrastructures on the same footing as national undertakings (if they pay a non-discriminatory fee to the network management). This text displays nothing more than a desire to open up the market, without any reference to the public service.

Both Directives adopted by the Council to apply Directive 91/440 are themselves essentially based on liberal policies. The first (95/18 of 19 June 1995) obliges Member States to issue operation licences to rail undertakings without any restrictions other than basic conditions relating to capacity and good repute. The second (96/19 of 19 June 1995) calls for infrastructures to be shared out without discrimination, on the basis of commercial-type user fees. It does, however, authorise States to give priority of infrastructure access to services supplied in the public interest and, even, special rights if this is vital for ensuring a decent level of public service.

The European Parliament has endeavoured to defend the cause of the public service in the railways. It has regularly claimed that railway undertakings had to be regarded as being in the public interest or destined for public service (see Resolution of 26 May 1989 on railway problems) and maintained their character of undertakings focused on the common good in order to guarantee an appropriate supply of rail transport not only on main, profitable, lines but also in peripheral and thinly populated regions, according to a Parliamentary report on the future Directive 91/440 (the Simpson report of 30 November 1990). While supporting the opening up of the market aimed at by this Directive, it tried to steer it towards the notion of public service: one of its amendments calls on the States to guarantee that companies function in a way that is compatible with their public function (the Commission text prefers a reference to abiding by commercial principles); another allows States to subsidise unprofitable lines whose routes are based on political criteria (Legislative Resolution of 13 December 1990). We should finally point out Parliament backing for a rail initiative which can be likened to a sort of European-scale public service: the "Inter-Rail" system allowing young people to travel in Europe at reduced rates. On 12 September 1992, the European Parliament asked the States and companies to endeavour to maintain this system.

2) Legislation on air transport also refers to the public service. Its fundamental objective is once again to ensure that the market is opened up. But the basic text on this matter, Council Regulation 2408/92 of 23 July 1992, while essentially aimed at opening up, as of 1 April 1997, access for Community operators to all internal air links in the Union, bears in mind public service needs. It makes it possible both to maintain public service obligations and special rights:

- on one hand, on routes deemed to be vital for the development of a region, a State may impose on operators services defined by standards of continuity, regularity, capacity and price which carriers would not comply with if they were to consider only their commercial interest;

- on the other hand, for new public service links, a State may limit access to a single operator for a period of three years, albeit after a call for tenders.

It should be noted that the European Parliament strongly insisted that public service be taken into consideration in air transport. In its Resolution of 20 April 1993 on the Commission report on the development of aid schemes in the sector, it set out a certain number of important principles in this area:

- The need for public service, including at Community level, is linked to regional planning, in particular aimed at peripheral regions.

- Public service links must be open to any undertaking, regardless of its status.

- The costs engendered by these links must be reimbursed by the authorities in a transparent way.

The European Parliament agreed on the usefulness of defining air transport public service at Community level and called on the Commission to do so.

The Commission replied to a certain extent to this invitation in its Communication of 1 June 1994 ("European civil aviation towards better horizons"). In it the Commission recognizes that air companies provide a public service in the broader sense of the term, which it specifies by the following considerations. It states that:

- air transport must supply these services at a reasonable cost wherever people and undertakings need them;

- safety nets are required for cases where the market alone would not enable certain objectives to be obtained;

- some of the specific features of air transport may sometimes oblige the authorities to intervene either to adjust imbalances in the system or directly to attain

other objectives – i.e. a public service.

3) Similar concerns can be observed in the case of sea transport. Community legislation (Council Regulation 3577/92 of 7 December 1992) is aimed essentially at abolishing restrictions on the free provision of services within Member States. But it does also allow States to subordinate this freedom to public service obligations for links between the Continent and islands or between the islands themselves, and these obligations may cover "ports to be served, regularity, continuity, frequency, capacity to provide the service, rates to be charged and manning of the vessel".

4) Community legislation on transport therefore gives primacy to opening the market but the concept of public service is paid attention, with more or less clarity, in all sectors. In order to appreciate the Community attitude to transport public service in general we should mention the Commission Communication of December 1992 on the future development of a common transport policy. Of the two vital objectives which the Commission sets in this text for the common policy, the first is undoubtedly the abolition of restrictions on providing services in order to bring about the completion of the internal market. But the second is the contribution to economic and social cohesion by increasing mobility. This second objective implies, according to the Commission, improving infrastructures in order to reduce disparities between regions and to strengthen links between remote regions (islands, peripheral and landlocked regions) and central regions as well as assisting less favoured persons. It ends by recognising the legitimacy of public service obligations compensated by the authorities, which must be allowed a derogation from the obligation to give the Community prior notice. The same ideas are reiterated in a more recent document, the Communication of 12 July 1995 on transport policy, under the expression of "citizens' network" offering varied and high quality public transport. In these general texts we find vital elements of the conventional concept of public service.

C. Telecommunications

As in the case of energy and transport, Community legislation on telecommunications has combined the desire to open the market and the concern to maintain public interest services. This dual aim is translated by two types of legislation: on one hand, "liberalization" measures taken by the Commission on the basis of its own powers and, on the other hand, texts aimed at "harmonizing" national rules adopted, according to the "normal" Community legislative procedure, by the Council and the Parliament.

1) The basic philosophy

The dual concern with opening the market and maintaining public interest services is already fully developed in the Green Paper published by the Commission in 1987 to set out legislative actions planned in the sector (Green Paper on the development of the common market of telecommunications services and equipment, 30 June).

This text states the fundamental need to extend to the sector the

principles of the internal market: the freedom of providing services and competition. It announces the measures involved: liberalization of the supply of terminals, a gradual opening up of the services market and separating, within national telecommunications administrations, regulatory and operational activities.

At the same time it clearly expresses the need to maintain, regardless of market rules, services justified by considerations of general interest, related to Community cohesion. These "vital" services must be "offered universally", i.e. guaranteed throughout the territory ("general geographical cover") and supplied to all users on the same terms regardless of their locality and, therefore, the cost of connection to the network. Ensuring these services is a "public service task" (this expression is spelled out).

The Green Paper goes on to say that this task presupposes that those bodies enjoying "exclusive or special rights" should continue to do so. These rights, consisting of "reserved" services, are necessary because they enable the financial viability of universal type services (in the form of "cross - subsidies"). They must be applied both to the setting up and operation of networks and the supply of "basic services".

This sets out a system in which the opening of the market, the dominant factor, is corrected by the concept of universal service and its necessary counterpart, exclusive or special rights. There is, however, a hint of the limits up against which these two correctives may collide and which quite simply depend on the extent to which they are applied:

a) Which activities will be submitted to universal service obligations and what will be the extent of those obligations? The Green Paper refers "essentially" to a single activity, local telephone communications; although it adds telex it does so "where necessary and provisionally" and only envisages that the obligation of egalitarian supply should be fulfilled "reasonably".

b) What reserved services will be maintained? The Green Paper specifies that these services will be limited in number and that the limits will be defined by the cases where exclusivity is necessary for the safeguard of the public service task. This limit is obviously fully in line with Article 90(2) but the text does add a rider: it refers to the exclusivity necessary "at this stage", which obviously seems to mean that, at a later stage, there will be no more need and that exclusive rights will no longer therefore be justified.

The effective balance of the system should therefore depend on the concrete responses which future legislation might provide for these questions. Depending on whether it defines closely or loosely the notion of universal service and whether or not it leaves its operators the sufficient resources to ensure it, it would compensate the opening up of the market with general interest correctives or would carry out a complete liberalization of the sector. We should say at once that, even if the need for public service has always been present, the second situation has been generally favoured.

2) The first liberalization measures

Prepared in this way by the Green Paper, the first legislative measures consisted, in the beginning, in opening up the market. They were taken by the Commission in pursuance of the own powers which it enjoys under Article 90(3) of the Treaty.

a) By means of Directive 83/301 of 16 May 1988 on competition in the markets in telecommunications terminal equipment the Commission put into legislation its administrative interventions in this area (described earlier¹⁵) by abolishing special or exclusive rights for importing, marketing, connecting, putting into service and maintaining terminals: in the future, Member States must open the right to provide these various services to all operators.

b) The Commission then carried out an opening of the market for all telecommunications services with the exception of vocal telephone communications. This it did by means of Directive 90/388 of 28 June 1990. It compels Member States to abolish special or exclusive rights in these services. It does allow, however, official authorities to entrust certain operators with the establishment and operation of a universal network defined as having general geographical cover and being provided on demand and within a reasonable period to all service suppliers or users. It also acknowledges that this task may be translated by "public service obligations", relating in particular to conditions of permanence, availability and service quality, whose proper execution depends on financial resources which invariably come for the most part from the telephone service. Consequently, it accepts that this service should not yet be open to competition and should be the subject of exclusive or special rights. It should, however, be noted that this is the only exception, contrary to the Green Paper which had contemplated reserving other services such telex. Note should also be taken of the requirement, a conventional one in the Community conception of public service, that the authority responsible for controlling special rights and, generally speaking, applying regulation, should be separate from the operators.

3) Setting up the regulatory framework

In order for liberalization measures to be effective, in particular to facilitate the provision of transfrontier services, it was necessary to harmonize at Community level conditions of access to networks. This is the goal of legislation known as open network procurement (ONP).

a) The main text in this respect is Council Directive 90/387 of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network procurement. This is a framework text establishing the principle of harmonizing conditions of access to public networks. It calls for the examination, sector by sector, of restrictions which might subsist and, therefore, need

15. See page 139.

special legislative measures. It too, however, acknowledges that these restrictions might be justified by considerations of public interest which, in addition to the "essential requirements" of a technical nature (security of operation and integrity of the network, inter-operability of services and protection of data), might be translated by public services entrusted by official authorities to one or more operators. Special or exclusive rights reserving the supply of these services are therefore accepted, on the condition however that they are compatible with Community law and that charges are based on costs.

b) In the framework set out by Directive 90/387, specific legislation has applied the principles of ONP to particular activities:

- rented lines (Council Directive 92/44 of 5 June 1992);
- packet-switched data transmission (Council Recommendation 92/382 of 5 June 1992);
- digital service integration network (Council Recommendation 92/383 also of 5 June 1992).

c) In respect of this Community regulation of telecommunications now under way, mention should also be made of a decision which is part of what might be called the creation of an embryonic European-scale public telephone service: Council Decision 91/396 of 29 July 1991 to set up a single European emergency call number (112).

4) Liberalization and regulation of telephone communications

In the area of telecommunications, it is the telephone which is the essential element of public service. That is why it had provisionally escaped, along with those network infrastructures needed for its supply, the liberalization decision taken in 1990. But since then it has been subjected to the general process: the abolition of exclusive or special rights, on one hand, and regulatory harmonization including public service objectives, on the other.

a) In 1992, the Commission presented a proposal for a Directive which set the consistency of a universal telephone service to be guaranteed by the Member States. But, unlike the Green Paper, there was no longer any question of allowing this service to enjoy exclusive or special rights. In the meantime the choice had been made by the Commission to extend liberalization to this previously spared sector.

b) In the same year, the Commission published a Communication on tariffs: "Towards cost orientation and the adjustment of pricing structures - Telecommunications tariffs in the Community" (15 July 1992). As its title indicates, this document calls for a restructuring of charges, consisting in particular in raising charges for costly telephone services such as connecting to the network and local calls and lowering those services whose costs had diminished such as long-distance and international calls. In

addition to its liberal thinking, this position was justified by the desire to abolish the "surcharge" on intra – Community communications vis – à – vis national communications over the same distance, the so – called "border effect". But it was obviously likely to hamper the provision of a universal service already based in several countries on a system of equalization.

c) The Commission guidelines were fleshed out following a public consultation in 1992 and 1993. These were set out in a communication from the Commission to the Council and the Parliament of 28 April 1993 concerning consultation over examination of the situation of telecommunications services.

In this communication, the Commission proposed fully opening up telephone services as of 1 January 1998. It does state that this opening should be accompanied by the maintenance of the universal service whose definition must be established at Community level. The text quotes as justifications for a universal service, on one hand its "social function", i.e. the need to assist the poorer categories, and on the other its contribution to "social and regional cohesion".

The universal service is regarded as being made up of services which are universally put at the disposal of the public, given their considerable role in society, which is translated by the following principles:

- universality: access for all users in approachable conditions;
- equality: access is given in the same terms regardless of the geographical location of users;
- continuity: the provision of a defined quality service is guaranteed without interruption.

From these principles the text draws precise conclusions:

- as for the initial access: Member States must guarantee the provision of a telephone service and public telephone service. Users are entitled to gain access to a network and use it and are entitled to a contract specifying the service provided; the estimated time taken for putting it at their disposal must be made public.
- as for the service quality: Member States must see to the publication of quality objectives and surveillance of levels achieved in this matter by the operators.
- as for prices: charges must be based on cost but with special provisions for social purposes (people on low income, the disabled, the elderly, etc.)
- as for special obligations:

- . public call boxes allowing, in particular, access to emergency services
 - . directories made available to subscribers
 - . access to international services
 - . detailed billing
- as for satisfying users' demands: conciliation procedures or procedures for solving disputes must be provided for.

In other words, while proposing the complete liberalization of the telephone service, the Commission repeated the conventional justifications and principles of the public service.

d) This dual approach is set out in another Commission communication published in the same year. (Communication to the Council, European Parliament and Economic and Social Committee on developing a universal service in a competitive environment, 15 November 1993). It reiterates the idea that liberalization calls for a Community definition of the universal service so that operators everywhere have the same obligations, specifying that although States must be allowed to add supplementary obligations, this may not be a source of restriction of access to the market. We find once again the same justification (promotion of economic and social cohesion of the Community) and the same elements of the content of universal service:

- supplying the service to anyone requesting it for reasonable purposes, at a uniform price not directly reflecting in each case its real cost
- service quality
- charges reflecting costs but with special schemes for social purposes
- special obligations such as operator assistance and emergency services
- machinery for solving disputes.

Unlike the previous communication, this text deals with the problem of financing the universal service. It recognizes that the service is not always economically profitable for its operators. In order to finance this extra cost, it envisages only two means:

- cross – subsidies, i.e. transfers from profitable services (for example long distance communications) towards loss making services (local communications),
- access fees payable by new operators.

The text does, however, set limits on these practices. They must respect Community law (i.e. the various aspects of Article 90) and, above all, not interfere with the

"fundamental requirement" of restructuring charges, previously put forward, with the aim of greater cover of the universal service by its own revenue.

e) The Council has gone along with the Commission's concepts.

By a Resolution of 22 July 1993 it adopted the guidelines of the first communication: liberalization of telephone calls on 1 January 1998 and the principles of universal service. It has even taken on board the far more detailed ideas of the second communication, in its Resolution of 7 February 1994. This Resolution takes up justifications (social and territorial cohesion), the definition (a minimum set of services, defined by a given quality, and the supply of these services to all users, at a reasonable price, wherever they are located) and the principles (universality, equality and continuity) of universal service. It also includes the elements of the detailed content of the service:

- each user's entitlement to have a telephone linked to the network within the shortest time possible
- publication and control of quality objectives
- detailed billing
- accessible and cheap procedures for solving disputes
- supply of directories
- operator assistance and information service, including at European level
- a sufficient number of public call – boxes
- access to emergency services, in particular for the free European emergency call number
- special conditions for persons with special needs
- reverse charge or collect calls

The Council also acknowledges that the universal service must usually be financed on a commercial basis according to market rules and that any deficit may only be covered by internal transfers or operators' access fees.

In its latest Resolution on the subject, that of 18 September 1995, the Council confirmed that the regulatory framework to be adopted as of 1998 should, as well general competition, allow for the maintenance and even the development of the universal service, defined as a minimum set of services of a given quality at affordable prices. It stated

the need for common principles for financing this service while leaving Member States the choice between two alternatives: access fees or guarantee funds.

f) The European Parliament reacted to these Commission guidelines by approving everything concerned with decompartmentalizing national markets while, at the same time, making a strong case for the universal service. For the European Parliament the "crucial role" played by telecommunications services in the Community integration should apply to consumers as well as undertakings. This is the case in particular of telephone communications in which the Community must guarantee European citizens a quality service which is easily accessible and provided at a reasonable cost. This requirement presupposes that the liberalization process must be gradual and be accompanied by the highest possible protection of the universal telephone service. That means not only defining the service on a Community scale, for all European citizens, but also a cautious approach to the restructuring of charges recommended by the Commission: it must be "gradual" and "controlled" in order to bear in mind economically weak or fragile consumers (the elderly or disabled) and less favoured regions (Resolutions of 20 April 1993).

g) The Directive on telephone communications, finally adopted in December 1995¹⁶ (Directive 95/62 of the European Parliament and the Council of 13 December 1995 on the application of open network procurement to telephone communications), defines the elements of a public telephone service harmonized on a Community scale.

The fundamental principle of this service is that all European citizens are entitled to access. In order to fulfil this right, States must see to it:

– that telecommunications bodies provide a fixed public telephone network and a telephone service;

– that users may obtain, upon simple request, a connection to the network at an affordable price and within determined periods, and that these access conditions should be the subject of public information;

– that charges for services, while being fundamentally cost – based, should allow for accessibility of the service, if necessary by imposing constraints on operators, for example special charges for social utilities (emergency services, small consumers, special social categories);

– that essential supplementary services are ensured, namely detailed billing, regularly updated telephone directories and the installation of call – boxes on the public highway in sufficient numbers and geographically distributed in a balanced way.

16. The proposal presented in 1992 by the Commission had been rejected by the European Parliament because of the insufficiently "communautaire" nature of the application machinery that it provided for (committees). An amended proposal had to be presented in 1994.

These obligations defined at Community level are applied by the national authorities which must, in certain cases (connection deadlines, service quality, time taken over repairs, etc.), specify them with numerical objectives. However, there are plans to establish common indicators to assess service quality on a Community scale.

5) Liberalization of infrastructures

Once the principle of ending restrictions on competition for telephone services was accepted, telecommunications networks were the only part of the sector still to escape liberalization.

a) In another Green Paper (on the liberalization of telecommunications infrastructures and cable television networks), published in two parts in October 1994 and January 1995, the Commission proposed to submit them to it. For this purpose it planned the process in two stages:

– for those services already liberalized (satellite communications, mobile communications, certain fixed land communications), a speedy liberalization of "alternative" infrastructures, i.e. both existing infrastructures other than those of public telecommunications bodies (in particular the networks of railway, electricity and water companies, motorways and cable television) and new infrastructures;

– for all services, liberalization of all infrastructures on 1 January 1998.

The Commission claimed at the same time that the achievement of this liberalization in the right conditions called for the establishment of a Community regulatory framework. Initially this framework would include common principles for the universal service:

– for the time being its content was limited to telephone communications but could evolve according to technical developments and users' needs.

– all operators should contribute to its provision or financing. For this financing the Commission excludes all but two alternatives (other than, of course, cases where universal services were self-financing): access fees or an independent fund, expressing its preference for the latter method.

Regulation should also include the principles of inter-connection and inter-operability of networks and services together with the general framework of licence issue.

b) By a Resolution of 22 December 1994, followed up by another of 18 September 1995, the Council approved the deadline of 1 January 1998 for general liberalization and recognized the need for the proposed regulatory framework. As for the

early opening of alternative infrastructures for already liberalized services, it left it to the Commission to take the decision on the basis of its own powers.

c) Parliament also approved the proposals in the Green Paper while insisting on the requirements of universal service (Resolutions of 7 April and 19 May 1995). It insisted that prior to liberalization this service should be the subject of Community regulation in the form of a directive to include:

- a definition of the universal service consisting of a minimum level of infrastructures and quality services provided at a price affordable by all Union citizens;
- the obligation on all operators to provide this service;
- the financing of this service in the form of national funds fed by all operators in proportion to their market share.

d) On the basis of this Parliament and Council backing, the Commission took the planned liberalization measures on the basis of Article 90(3) in the form of amendments to its original Directive, 90/388:

- abolition as of 1 January 1996, of restrictions on the use of television cable networks for supplying already liberalized services (all services other than telephone communications) (Directive 95/51 of 18 October 1995).
- abolition as of 1 July 1996, of restrictions on using other alternative networks as well as constructing and operating new networks for supplying liberalized services (Directive 96/19 of 13 March, 1996 on the achievement of full competition on telecommunications markets).
- and abolition (by the same Directive 96/19) on 1 January 1998 of the same restrictions in respect of telephone calls.

It should be emphasized that this Directive 96/19, the final stage of liberalization, specifies the measures that Member States must take in order to make liberalization effective within set deadlines:

- any procedures connected with licences, general authorizations or declarations must be based on objective, non – discriminatory, proportionate and transparent conditions.
- the number of licences may only be limited on the basis of the need to manage the frequency spectrum.
- any discrimination in the granting of passage rights must be

abolished.

- exclusive rights for supplying directories must be abolished.
- a procedure of appeals to the national regulatory authority or another independent body in the case unresolved disputes involving telecommunications bodies must be set up.
- wherever they still exist (i.e. telephone calls until 1998) exclusive or special rights must be determined by means of regulation and made public.

6) Other liberalization measures

Furthermore, on the basis of specific Green Papers, the Commission has, again by amending Directive 90/388, liberalized two other sectors, both for infrastructures and services.

a) Satellite communications (Directive 94/46 of 13 October 1994).

b) Mobile and personal communications (Directive 96/2 of 16 January 1996). It must be pointed out that the European Parliament has shown a special interest in this sector. In its Resolution of 19 May 1995 on the Green Paper presented by the Commission on the subject, it stressed the important role which mobile communications might play in the provision of the universal service because they enabled a solution to be found for the problem of connecting isolated, disabled or less favoured persons and remote regions: provided that any obstacles to inter - connection between mobile and fixed networks were lifted and that service obligations were imposed on operators. The Parliament also highlighted the need, in the long run, to create a European authority for frequency management. The Directive does not take up this idea but does take on board some of the European Parliament's concerns by allowing States to impose public service requirements and by guaranteeing inter - connections.

7) Pursuit of legislative harmonization and examination of the question of universal service

a) At the end of 1995 the Commission presented proposals to further legislative harmonization in the form of the complete liberalization of the sector:

- a proposal for a Directive on inter - connection and guaranteeing the universal service (19 July 1995);
- a proposal for adapting Directive 90/387 (14 November 1995);
- a proposal for a Directive on the issue of licences for operating

networks or services (27 November 1995).

The proposal on inter – connection is aimed at effectively ensuring access to networks and services by guaranteeing the right of all operators to obtain this access on the basis of commercial negotiations. Operators in place, mainly former telecommunications monopolies, which are in a position to control access by new operators (because they hold, for example, rights of passage on the public highway, the use of frequencies or the use of national numbering) must allow these operators to be connected to their networks by accepting any commercially reasonable demand. The text also allows for a sharing of universal service obligations with all operators meeting some of these obligations or contributing to their financing.

Once again the European Parliament reacted by insisting on universal service. The report which it adopted as the basis of its opinion on the Directive (the Read report of 26 January 1996, approved on 14 February) is actually in keeping with the conventional concept of public service since it takes pains to point out that the issue is not an aspect of consumer protection nor even a social policy, i.e. directed at the needy, but a matter of citizenship. It refers to the right for citizens to enjoy all essential resources necessary for their integration in the societal 'network' of our times. It insists that this citizenship service should be devised at European level in the form of a specific Community regulation including a definition, the tariff scheme and the means of financing. It confirms the European Parliament's preference for financing through independent funds rather than direct operator fees. It also reiterates the demand, an old European Parliament chestnut, for a European authority entrusted with application of the regulation.

The proposal on issue of licences leaves powers in this subject to Member States but imposes on them a specific guideline, which is very liberal. Preference is given to a regulatory regime (setting the essential requirements, universal service obligations and inter – connection rules) imposed on operators without their having need for individual authorizations, on simple declaration or even without any formality. If they opt nevertheless for a system of authorizations or licences, States must limit their application to particular situations, particularly those stemming from the physical constraints of the networks such as the availability of frequencies or rights of passage, and furthermore they may only limit their number in strict ratio to those constraints.

b) In a recent communication to the Council and the Parliament (13 March 1996), the Commission set out a summary of its position on the universal service as must be maintained, even developed, in the context of the complete liberalization of telecommunications.

This text recalls that the universal service is, above all, inspired by a desire to avoid a "two – speed society" in the area of information, and therefore in access to modern communications. This access must be guaranteed at similar levels throughout the Community, above all because its economic and social cohesion cannot tolerate excessive differences of service levels between the Member States but also in order to facilitate the

emergence of Europe – wide services. In other words, this is a fundamental element of Community telecommunications policy going "hand in hand" with liberalization.

The text concludes that the content of the universal service must essentially be set at Community level. For the time being this content has been limited to access to the fixed public telephone network and the provision at prices affordable by all users of a basic service including the use of fax and modem, operator assistance, access to emergency services, the supply of information, e.g. in the form of a directory, public call – boxes in sufficient numbers and the publication of information on conditions of access, prices and service quality. Even thus limited, this service is quite an achievement: for many regions in the Community it is still a distant goal and the priority is, therefore, to apply it everywhere. It is too soon to broaden it at present. However, given technical developments, future broadening should not be ruled out: the situation should, therefore, be re – examined by 1998.

The text does acknowledge, however, that overall the financial means for ensuring the universal service defined, in this way, on a Community scale has to be set at Community level, in the shape of general methods: independent funds or direct operators' fees paid to service providers. The choice between these methods and the detail of their operations would be left to Member States. This responsibility obviously includes that of ensuring an "affordable price" for the universal service. This is a tricky notion which is not necessarily synonymous with equalized uniform tariffs: it may be possible to comply by other means, such as the use of machinery to limit charges (price capping) or special charges for certain users (the elderly, people on a low income, or "small" consumers).

The Commission recognizes that special services are probably called for in addition to the universal service guaranteed by the Community: for less – favoured regions which pose a crucial problem; for the disabled for whom telecommunications are, as it puts it, a vital link with the community in which they live. But it maintains that these services may not be financed by the means planned for the universal service: they must be dealt with by the social policies of the Member States.

D. Postal services

Less complex and far more recent than the texts relating to telecommunications, Community postal legislation nevertheless resembles it by its emphasis on the concept of universal service and the decision – taking pattern: general guidelines in the form of a Green Paper, a pre – legislative document setting out choices, and finally a proposal for a directive.

1) The Green Paper on the development of the single market for postal services, published by the Commission on 11 June 1992, justifies Community intervention in the postal sector by the concern for applying to it, as to all economic activities, the principles of the internal market. Here, too, it is necessary to remove obstacles to the free provision of services and to competition. But, as in other network activities, pure

liberalization is not enough since the postal activity essentially includes a very strong general interest component. Good postal services are a factor of social and economic cohesion and as a result come under "public service tasks": this is a fundamental "political principle". After all, cohesion is no longer assessed only at domestic levels but at Community – wide levels. That is why any disparities from one Member State to another in the definition and level of postal services disturbs the operation of the internal market. It is vital to reduce them and, all in all, access to communications, of which postal services are a part, for all citizens, all undertakings and all organizations in the Community is a fundamental social requirement.

Driven by this conviction the Commission goes as far as seeing in it the justification for an integrated Community postal administration with identical conditions of access, levels of service and charges. The idea is rejected as premature but is noteworthy as a case where the creation of a genuine European public service has been contemplated.

At this stage, the public postal service will still be organized at national level. But its contents must be largely defined on a European scale since a minimum of harmonization is necessary in order to ensure the proper functioning of the internal market and the cohesion of the Community. To designate the public postal service, i.e. the content of the general interest of the postal service, the Commission uses, as it does for telecommunications, the expression "universal service", which it defines as an accessible postal service which must continue to exist in the Community, both for national services within the Member States and for transfrontier services between two Member States. This universal service must, it says, be provided at an affordable price, offer a satisfactory quality of service and be accessible to all.

This universal service therefore applies both to internal services and intra – Community services and essentially has three elements:

- general accessibility: the text refers to possibilities for collection and distribution at all points of the Community;
- reasonable prices;
- a satisfactory quality of service.

But the Community definition of universal service cannot be boiled down to these general objectives. In order to be effective it must include specific obligations:

- a) concerning access conditions which must be equal for all and made public;
- b) concerning quality: Community standards will be necessary, for example at least one collection and distribution per working day and delivery the

following day for domestic mail, three days for intra – Community mail, with compliance with these standards being monitored by a common body wielding disciplinary powers;

c) concerning charges which should be brought closer together;

d) concerning technical aspects such as classifying correspondence, envelope size and postal codes.

Defined in a common way, the universal service must, according to the Commission, be the cornerstone of Community policy in the postal service. But in order to achieve this in satisfactory conditions, the imposition of objectives and even detailed obligations on Member States and, by them, on postal administrations, is not enough. It is also necessary to ensure financial viability, i.e. give the bodies to which the universal service will be entrusted the economic means to comply with one of its essential components: the maintenance of prices affordable by all. For this purpose these bodies must be guaranteed a sufficient volume of activity in order to share out such costs, which make the service unprofitable in certain areas, and thereby to obtain lower unitary costs. This leads on to granting them exclusivity of certain services – i.e. the notion of "reserved services".

The extent of these reserved services must be defined at Community level because, if all freedom to do so is left to the Member States, the opening up of the market, which remains nonetheless, alongside universal service, a fundamental objective, would be called into question and it must be acknowledged that, at present, certain States have set the exclusive rights of the postal administrations at an excessive level vis – à – vis the needs of the universal service. But, in order to respect the requirements of the internal market, freedom of service and competition, the Community definition must itself be strictly limited to what is necessary for the objective, the principle of "proportionality" which requires a search for the "least restrictive" solution for freedom. That is why logically the reserved service must only cover a part of the universal service. It would only include so – called standard postal communications defined by the personal nature of dispatches (essentially letters and postcards) and weight and price limits. Without doubt, it would not include publications, merchandise, express mail and international mail, and probably addressed advertisements and intra – Community mail.

This European definition of reserved services would therefore be a maximum: the States would not be able to go beyond it unless they could justify doing so under Community law (on the basis of Article 90(2) of the Treaty). But it would not be a minimum: the States could remain below it. Therefore, it would be more accurate to refer to "reservable" services, as the guarantee given to the universal service would still be within national powers and therefore dependent on the attitude of the States.

The relationship between universal service and reserved (or reservable) service is in fact conceived in a somewhat ambiguous manner, both in terms of content and financing. The provision of the reserved service defined at Community level

will be regarded as being part of the universal service and therefore to be compulsorily ensured at national level. On the other hand, a State may ensure a wider universal service than the Community reservable service but may not reserve that supplementary service without legal justification. Furthermore this non – reserved universal service may not receive any subsidies from the reserved sector. It must, therefore, be financed separately and, in principle, be self – sufficient. It will normally operate according to the market rules, which may lead to different charges according to locality, but may also maintain a uniform charge throughout the territory and, for that purpose, allow for equalization provided that this is exclusively internal and transparent. However, if some of these services are not profitable it may be possible for the authorities which have imposed them to pay subsidies.

We should add to this the rule of separating the functions of regulation and operation, conventional in Community law on network activities, and obviously demonstrative of the will to open the markets up to different operators acting in the greatest possible competition. The choice of liberalization remains the dominant feature despite the weight given to universal service because of the very strong limits imposed on the reserved service which it was supposed to guarantee.

2) The guidelines of the Green Paper were specified in a "pre – legislative" communication of the Commission to the Council and the European Parliament, published on 2 June 1993, entitled Guidelines for the development of Community postal services.

These contain a restatement of the general interest dimension of postal services, which it describes as an essential instrument of communication and exchange, vital for all economic and social activities, fostering social cohesion by facilitating links between geographically distant citizens and undertakings. They also feature the choice of a universal service defined on a Community scale in order to harmonize the quality of the service, which varies widely from one State to another especially in the case of transfrontier mail, so as to ensure the proper functioning of the internal market.

The basic elements of the definition of this service are the same, as are the obligations which may be imposed in order to ensure the level (in the case of the transfrontier service, Community standards with an independent body to monitor their compliance; in that of domestic mail, national standards compatible with the Community's). But the content of the universal service is specified. It should include, in the case of transfrontier and domestic services alike, all addressed mail weighing under 2 kg for correspondence (letters, postcards, addressed advertisements, catalogues, books, publications and other printed matter) and 20 kg for parcels, as well as the registered mail service. It would therefore exclude express mail, self – mail, self – distribution, unaddressed items and any new services.

The initial guidelines for reserved services are confirmed. Defined at Community level, as a sub – set within the universal service, they would include basic correspondence within certain weight and price limits. A new development, however, is that

addressed advertisements and transfrontier mail, which the Green Paper opposed, are this time given consideration for inclusion.

There is also a new development in the financial relationship between the two sectors. Although the principle remains that of a system of cost – linked charges for each service, it is acknowledged that cross – subsidies from the reserved sector to the non – reserved universal sector may be allowed if necessary for the latter's execution.

3) The legislative proposals logically following on from these study and guidance documents were slow in coming out. This is partly a result of hesitations on the Commission's part over certain basic points, especially the extent of the reserved service but also the form of legislation to be adopted, since the Community Executive had seriously envisaged bringing out legislation solely on the basis of Article 90(3). The Council and the European Parliament, of course, called loudly for using normal legislative channels and called for the swift presentation of proposals along these lines. It should also be pointed out that during this waiting period, the Parliament debated the issue at length: in particular, in its Resolution of 22 January 1993 (adopted on the basis of the Simpson Report), it approved the basic principles of the Green Paper but came out in favour of maintaining addressed advertisements and all transfrontier mail within the reserved service. For its part, the Council backed the idea of a minimum quality service ensured on a European scale for all citizens of the Union, for the sake, in particular, of the requirements of cohesion, and a reserved service enabling reasonable prices to be maintained (see its Resolution of 7 February 1994).

The Commission finally completed the drafting of its legislative proposals in July 1995 although they were not published until the beginning of December of that year. The proposed legislation takes the form of a Parliament and Council Directive based on Articles 100a for the basis and 189b for the procedure. In the "communication" which accompanies the proposal and in the explanatory memorandum, the Commission reiterates its decision to strike a balance between two essential considerations. First of all, the "public service requirements", whose conventional principles of universality, equality, continuity and adaptability are explicitly repeated and which must be translated by the definition, on a Community scale, of a universal service, especially necessary for less favoured and peripheral regions. The Commission vehemently insists on the novelty and scope of such a "Community postal service": given the heterogeneity of the level of services between Member States, a guarantee of service quality throughout the Union would make a vital contribution to the completion of the internal market by facilitating transfrontier communications for business and would be a step forward for the mass of local mail users in less developed countries. In these documents we may detect a very clear awareness of doing a "European public service", i.e. ensuring that an essential economic service is guaranteed at equivalent levels for all citizens of the Union. An important point which differentiates the attitude here from that adopted for telecommunications: the guarantee is not regarded as solely comprising obligations imposed on service suppliers but includes an assurance of durable financing in the form of the mechanism of "reserved services". This guarantee of a European universal service is qualified as a "principal objective" of the legislation, the other

objective obviously being applying to the sector the principles of the internal market. From this dual viewpoint, the recitals of the proposal for a Directive definitely reassert the very marked dimension of general interest of the postal service and the resulting universal service requirements, including the maintenance of reserved services, but they specify that the latter must be set without prejudice to application of the competition rules of the Treaty.

a) The text of the proposal for a Directive fleshes out the concept of universal service. The general definition it offers grants users a "right" which Member States must satisfy. It obeys the by no means negligible principles of public service which are: equality (identical services offered to all users), continuity (without interruption except in cases of force majeure), adaptability (development in accordance with technical, economic and social changes and users' requests) together with the special obligation of inviolability and correspondence secrecy. Its content echoes and specifies the suggestions made in the "guidelines". It includes the collection, transportation and distribution of correspondence, plus addressed books, catalogues, newspapers and periodical writings, weighing up to 2 kg and parcels up to 20 kg, as well as the dispatch of registered mail and items with a declared value, for both transfrontier and domestic services. All services must be guaranteed at least five times a week, with, in particular, a collection from specific points and distribution to private homes or corporation premises at least once a day, except in exceptional circumstances or geographical conditions. The requirement to provide these services at all points of the territory brings with it the obligation to allow for a sufficient density of "contact points" and "collection locations". Quality standards for transportation, and the regularity and reliability of services will be fixed by the Commission for intra – Community services, and by the States for national services. The Directive obliges States, in the case of intra – Community mail, to delivery mail within three working days for 90% of dispatches and five days for 99% and sets as an objective for national mail a deadline of one working day for 80% of dispatches. The rules on rates selected for the universal service take up the idea set out in the "guidelines". Prices must be cost – linked for each service, also thereby obliging service suppliers to hold separate accounts for each element of the reserved service and for non – reserved services. But these rates must also be affordable, which leads to the possibility of charging uniform rates throughout a given country's territory.

b) The definition of the services likely to be reserved was awaited with bated breath, given its crucial importance for the viability of the universal service as well as the hesitations and controversies to which it had already given rise. As expected this includes domestic correspondence, limitations on prices and weights (previously announced but without specification), being set respectively at five times the basic rate and 350 grams. Also included are the rights to instal letter boxes on the public highway and to issue postage stamps. Incoming transfrontier mail and, an essential element because of its economic importance, addressed advertising are also included, albeit within certain limits: on one hand, this must be necessary for the financial balance of the universal service, which permits administrative and judicial controls; on the other hand, it is only until 31 December 2000, a deadline which can only be extended by decision of the Commission. Moreover, the whole composition of the reserved service will be re – examined some time in the year 2000. Within these limits, States may decide which services they reserve and designate the bodies

to benefit from them. All other services are free with the rider, however, that the official authorities may submit them to declaration. They may even subordinate them to authorization but within objective conditions or to universal service obligations, possibly with contributions to a compensation fund.

c) Non – reserved services may be offered by operators on the basis of non – discriminatory procedures (declarations or authorizations). As expected, the job of seeing to the application of the Directive and ensuring compliance with competition rules is entrusted to "national regulatory authorities" which must be legally and functionally independent from the operators.

4) The European Parliament adopted a relatively critical attitude vis – à – vis the proposal for a Directive (Simpson Report and its amendments approved on 9 May 1996). Although it took on board the general guidelines, in keeping with its previous stances it voiced its concern for the universal service. Confirming that this service must, in its opinion, be regarded as a public service, in other words a service of general economic and social interest whose provision is entrusted to certain undertakings such that those offering the service have a vocation to serve the public interest, it came out in favour of strengthening the reserved service which is a guarantee of it:

– first of all, by including among those services likely to be reserved addressed advertising and incoming transfrontier mail, on the same footing as the other elements: i.e. no obligation for financial justification and no time limit (viz. scrapping the deadline of the year 2000 beyond which reservation could only continue if the Commission so decided);

– then, by scrapping the automatic re – examination of all the reserved services in the year 2000;

– and, finally, by enabling States to reserve other services, if necessary for maintaining the universal service.

III. The trans – European networks

Linked to sectoral legislation are the decisions taken by the Community in respect of trans – European networks. The Community has now begun to exercise the new responsibility given to it by the Treaty of Maastricht to create these networks in the sectors of transport, energy and telecommunications.

A. General guidelines

1) The basic ideas are set out in the 1994 Commission White Paper "Growth, Competitiveness, Employment", which focuses on the networks. This text endeavours to establish the meaning of the Community's role, namely that of integrating national operations in the broader framework of Community interest. In the particular case

of transport this integration consists in giving a Community dimension to high quality public services. This clearly emphasizes the importance of these networks for establishing a Community general interest which might lead to the creation of European scale public services.

2) The political fillip has been given by the European Council, in particular at its meetings in Copenhagen (December 1993), Corfu (June 1994) and Essen (December 1994).

B. Sectoral legislative action

This has begun to take shape mainly in the sectors of transport and energy, less clearly in that of telecommunications.

1) Transport

The main texts are:

a) The Council decisions of 29 October 1993 (93/628, 629 and 630)¹⁷ establishing in particular a combined transport network referred to as the "citizens' network" and a road network including, in particular, the construction of missing links.

b) The proposal for a Council and European Parliament decision on Community guidelines for developing the trans – European transport network¹⁸.

Presented initially by the Commission in March 1994, it has been amended and is currently being adopted by the Parliament and the Council. Its aim is to establish the main thrust of action needed to complete the network and to pinpoint common interest projects which should be part of it. It gives the network the objectives of ensuring the mobility of persons throughout the Community by offering them quality infrastructures.

c) The proposal for the Council Directive on the inter – operability of the European high – speed train network¹⁹.

Following on from a Council resolution on the subject of 17 December 1993 and the insistent demands of the Parliament, this was presented by the Commission in April 1994 and is currently being examined by the Parliament in second reading. It is aimed at fostering the inter – connection and inter – operability of national high – speed train networks in order to create a European network whose national components ("sub – systems") will be managed by the Member States with common requirements to be respected.

17. OJ L 305 of 10.12.93.

18. COM(95) 298.

19. OJ C 203 of 8.8.95.

2) Energy

a) A proposal for a Council Regulation on a declaration of European interest to facilitate the completion of trans – European networks in the area of electricity and natural gas transportation²⁰.

Presented by the Commission in February 1992 and currently being discussed at the Council, it defines the declaration of European interest as recognition that the completion of a given electricity or natural gas transportation project falls within a set of guidelines established by the Council. Aimed at facilitating the private financing of the project, the declaration is to be made by the Commission.

b) Commission communication to the European Parliament and the Council on Community guidelines in matters of trans – European energy networks (19 January 1994)²¹.

This text highlights the inadequacy of national actions in order to justify the need for a "guidance action" by the Community adopting concepts and actions which exist in Member States and which can be more effectively tackled at Community level in the future leading to integration of the Community area. Its general objectives are:

- to fill in gaps at the borders of national networks;
- to develop inter – connections;
- to connect isolated countries and regions or those which are inadequately supplied;
- to achieve the inter – operability of networks on a European scale and the maintenance of service quality, in particular continuity of supplies.

c) European Parliament and Council Decision establishing a set of guidelines on the trans – European networks in the energy sector²².

Proposed by the Commission in February 1994 this Decision recently (7 May 1996) reached the end of its adoption process; it contains:

- an action plan in which the Community identifies common interest projects and then helps to create favourable conditions for their realization.
- sectoral objectives which are:

20. OJ C 124 of 6.5.93.

21. COM(93) 685.

22. OJ C 205 of 10.8.95.

. for electricity, connecting very high voltage networks and developing their inter – connection.

. for gas:

. introducing natural gas into regions where it is not supplied;

. connecting isolated networks;

. increasing transportation, reception and storage capacities.

C. Telecommunications

In June 1995, the Commission presented a legislative project for trans – European telecommunications networks. Once again this project takes the form of a proposal for a European Parliament and Council decision concerning a set of guidelines²³ for these networks, which is now being adopted. Like the parallel proposals for the other networks it is aimed at establishing objectives, priorities and the main thrust of the planned actions. Among the main priorities selected are applications contributing to economic and social cohesion, actions aimed at less favoured regions, in particular rural and peripheral regions, and the elimination of weak points and missing links in order to complete inter – connection and inter – operability of the network.

Section IV. General positions on the public service

While the Community institutions have, in fact, largely dealt with the public service sector by sector in their administrative, judicial or legislative actions, they have taken very little global action. There has been practically no sign of any overall intervention by the Council or even the Commission. Only the European Parliament, in addition to the positions it has taken in the framework of its participation in sectoral legislation, has endeavoured to adopt a general approach to the subject.

I. We should first of all mention its 1993 Resolution on the role of the public service in the completion of the internal market (12 February 1993). In it, the Assembly asserts that:

– it is the responsibility of the public sector to provide public services (energy, water, transport, etc.) of high quality, meeting the needs of the population and generally economic interest;

23. OJ C 302 of 14.11.95.

– competitiveness must also be assessed in terms of the collective needs of the citizens;

– the Community must ensure that every citizen enjoys equal access to goods and services of general interest.

It therefore asks the Commission to define the concept of public service and general interest and, in its competition policy, to safeguard the principle of freedom of access to the public service on the basis of criteria such as financial accessibility and quality.

This resolution is an important one since it is perhaps the first case of an official text referring to the principle of equal access by all European citizens to goods and services of general interest, the very principle of a European public service, and calling for a common definition of this service.

II. Later in 1993 (27 April), the European Parliament held a hearing on public undertakings to discuss the balance between competition and public sector obligations.

III. In 1994 (6 May), in a Resolution on public undertakings, privatization and public services in the Community, based on the Speciale report, the European Parliament makes a distinction between public manufacturing undertakings and public enterprises which run public services at local or national level, in that whereas the former respond more to the requirements of economic development the latter meet the need to perform public tasks, although both of them serve the general interest.

It adds, with concern, that in the current state of affairs, the concept of public service and that of general interest have still yet to be defined and that the competition policy and other policies linked to the market must be made compatible with the recognition of the public interest and the citizens' right to be offered public services accessible to all and complying with standards of homogeneous quality, so that in particular genuine equality between European citizens is guaranteed".

In order to meet these objectives, the European Parliament calls for three actions:

1) The inclusion of the public service in the Treaty at the time of the review scheduled for 1996;

2) The adoption by the Union, at the Commission's initiative, of a "European public service charter" which would include the following aspects, inter alia:

– identifying the common principles to be met by public services in Europe in order to meet the requirements of a genuine European citizenship;

- uniform treatment for all users in different services distributed on a national basis but with a supra – national dimension;
- quantitative and qualitative standards to be guaranteed by all services;
- forms of control by user – consumers;
- a list of services to which these principles must be applied on a European basis.

3) The creation of a temporary parliamentary committee entrusted with examining the problems of public services in Europe, to operate at least until the charter was adopted.

IV. Finally, the Parliament Resolution on the inter – governmental conference on revision of the Treaty on European Union (Bourlanges – Martin Report of 17 May 1995) contains a whole passage explicitly referring to public service. In point XI of Part One, ("Objectives and Policy of the Union"), the text calls for this concept to be introduced into the Treaty. It says that the position of the public service in the framework of European Union actions should be asserted by introducing new articles defining the notion and scope of "universal service", guaranteeing each citizen the right of equal access to services of general interest and by "ad hoc" provisions taking into account the special nature of public service undertakings.

Conclusion on the Community's attitude to the public service

Following on from examination of the Treaties, that of the policies pursued seems to suggest that the public service is both part of the Community's concerns and within its powers. Indeed, the very logic of European construction which was, in order to bring about a single market, that of bringing down all barriers to the free movement of goods and services, could not help but challenge those obstacles which were the special rights created by national States in order to protect their public services. But, at the same time, the Treaties bore in mind the existence of services of general economic interest and allowed for them a series of possible exemptions to the rules on free movement and competition. For a long time the problem was barely posed in practice because the logic of the common market had not been pushed to its extreme. It was the undertaking to complete the internal market which, as of the mid 1980s, affected the so – called network activities where the bulk of economic public services are concentrated. The Community institutions then began to examine the compatibility of the exclusive or special rights enjoyed by these services with Community law.

I. The Commission has exercised its administrative powers to challenge these privileges, in particular in telecommunications, postal services and transport. Since 1990 it has even done so systematically in all sectors, including energy. Its general attitude has been

to attach some importance to public service while considering that special rights ought to be ended.

II. The Court of Justice seldom delivered judgement until the late 1980s. Even then it initially was very cautious in its use of the exemptions provided for by the Treaties for public services. Very recently, however, it has relied on Article 90(2) to acknowledge the public service in its essential elements, including its dimension of economic balance.

III. Mainly inspired by the Commission and sometimes determined by it in the framework of its own powers, Community legislation on network activities has been largely aimed at applying to them the principles and rules of the internal market.

A) The idea of public service is probably considered but in a very watered down form compared with many national situations. It is indeed regularly stated in its conventional elements: a definition relying on reference to the notion of general interest and the constituent principles of equality of access, continuity and adaptability. However, at other times, some decisions seem to suggest that it is perhaps not understood in its full dimension, that of an overall activity provided in full by the authorities in order to ensure that it exists for the public's benefit and not only in order to regulate its operation, as is the case of ordinary commercial activities. Community texts (legislative and pre – legislative) often refer therefore to "commercial regulations" in connection with intervention by the authorities aimed at imposing general interest obligations on the activities in question. This expression is ambiguous: taken literally it would signify that sight has been lost of the vital difference between the creation of a public service and the various forms of regulating economic activity and that, in the end, public service obligations and those obligations stemming, for example, from the rules for the protection of public health, safety or the environment, or labour law, are being confused. Another reduction of meaning: the texts seem often to regard the public service as aimed at the "needy" part of the population and, therefore, as having a "social" application, whereas fundamentally is to supposed be at the disposal of all citizens and of an essentially "civic" scope.

B) This adulteration results in the reduction of the content of public service. From a comprehensive activity placed under a single responsibility and entrusted to a single operator, the traditional standard, it is now subjected to a breaking up process usually carried out in the following stages:

1) Separating the function of regulation or control from that of operation.

2) Separating, within the operation itself, at least for accounts and management, infrastructure, on one hand, and the service, on the other, so as to switch the infrastructure from its traditional condition of an asset for the exclusive use of a single operator to that of a common medium for the activity of several operators competing with each other: this is the fundamental notion of "common carrier", the Commission's philosophy on network activities according to which the operators of energy, transport or

telecommunications distribution must offer their services by using gas and electricity mains, railways and telephone lines in the same way as road hauliers use roads.

3) Possibly, breaking up the supply of the service itself (for example, between production, transmission and distribution).

4) Liberalizing the activity, both for the supply of the infrastructure and the supply of services to the public. Including the abolition of special rights granted traditionally to operators to enable them to ensure a better service, this liberalization obviously has tended to challenge the overall viability of the system. Its consequences include making it very difficult or even prohibiting (by banning "cross – subsidies" and encouraging an exclusively cost – based system of charges) the maintenance of uniform prices for users in an extensive territory achieved through equalization between loss – making and profit – making regions.

5) Last but not least, reducing the public service to a limited area within a given activity: in the form of either obligations aimed at a restricted section of the public (certain categories deserving special treatment because of their age, state of health, resources or geographical situation) or a broad "universal service" in terms of target public but with a fairly thin consistency.

C) There are nuances from one sector to another

1) It is probably the sector of telecommunications which has been most liberalized. The universal service has been maintained there but only in the form of relatively restricted obligations, and special or exclusive rights will gradually be phased out once competition is extended to all activities: the only area still to have escaped, telephone calls, will in turn be liberalized in 1998.

2) This liberalizing trend is far less advanced in the energy sector: only transport monopolies have been affected, in the form of a transit obligation; access by third parties to the network, implying the full abolition of exclusive production and transport rights and the reduction of these rights for distribution, is still under discussion at the Council where it is meeting with strong resistance by certain States.

3) Legislation on railways, while partly opening the markets, is such that a special place in access to the network has been retained for operators offering a public service.

4) Undoubtedly, it is the project on postal legislation which is most generous to public service by focusing to a large extent on the "universal service" and guaranteeing its economic viability by a fairly substantial "reserved service". It remains to be seen, of course, what will remain of this reserved service after the intermediary period, scheduled to end in the year 2000, since the proposal for a Directive does not guarantee its maintenance beyond then.

IV. In this general trend, where liberalization has been dominant, the different institutions have not played identical roles. The Commission has largely led the way with a fairly clear doctrine: serious attention paid to services of general interest no doubt, but with priority to opening up the market, leading to a reduction – if not an abolition – of the privileges on which these services often relied. The Court had previously backed the Commission's policy but recently it seems to have taken a clear position in favour of the special rights needed for the public service. The Council is obviously more divided since it brings together governments with widely differing views on the subject, ranging from partisans of a maximum opening of the market to the defenders of the most conventional public service. Generally speaking, it has watered down the Commission's proposals in order to allow special rights a place in general interest activities at the cost of slowing down the adoption of texts, many of which are still being examined. Finally it is the European Parliament which has most strongly backed the public service and its requirements in terms of special and exclusive rights. It has done so in the different sectors, when examining specialised legislation, in particular in connection with energy, telecommunications and the postal services. But it has also done so in a general way, by defending in several resolutions and reports both the notion of public service itself and the idea that it should be defined so that it can be protected at European level and so that the essential services stemming from it can be guaranteed at the same level for all citizens of the European Union.

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V. Any conclusion that the public service has been reduced as a result of Community action must, however, be finely tuned in two ways:

1) On one hand, it should be pointed out that the expression "public service" itself, until recently seldom used when not contested, has been widely disseminated in the Community sphere. It now has its rightful place there and it could be considered to have advanced the idea which it encapsulates: witness a greater awareness general interest requirements in the more recent texts.

2) On the other hand, whereas there is no doubt that the leeway given to national public services has been reined in and that this may be considered irreversible, there are already hints of the introduction of Community – scale compensation in the form primarily of "minimal level services" (sometimes, as it happens, superior to those found in certain Member States) guaranteed for all Union citizens and, potentially at least, in the form of common supervisory authorities: i.e. the first signs of a possible European public service in the full sense of the term.

CHAPTER III ELEMENTS OF A EUROPEAN PUBLIC SERVICE POLICY

Whether it is a hope or a fear, European intervention in the field of the public service is no longer speculation. It has largely become a fact. Based on powers well established in the Treaties, it has been the subject of considerable applications and is likely to develop further. Indeed, on one hand, the extension of the principles and rules of the internal market to major general interest networks is inevitable, since the Treaty of Rome provides for it, as long as their special mission is protected. On the other hand, more recent objectives added to the Treaties, such as economic and social cohesion, environmental and consumer protection, the creation of European citizenship and of trans – European networks also require Europe to act in the sphere of public services.

Therefore, the question is no longer whether European intervention exists in this field. It is whether that intervention is coherent, something involving all the major Community institutions together with the varied and complex provisions of the Treaties. Another question is the direction or orientation of that intervention: it may, after all, be more or less ambitious and decisive; it may, above all, concentrate more or less on public service according to whether intervention is within a moderately or strictly liberal perspective.

The question raised is, in a nutshell, that of a European public service policy. The following considerations are an attempt to help to define that policy, by making proposals (or at least setting out options) in respect of both the aspects implied:

- 1) Its possible content, i.e. the goal which it may set and the means of attaining it.
- 2) The necessary instruments, which means examining the existing machinery and, if it is inadequate, contemplating new ones.

Section I The content of a European public service policy

European intervention in the field of the public service presupposes that the Community institutions have their own particular idea of that notion. In individual cases submitted to them, the Commission and Court will be hard put not to reach a decision on whether or not to apply an exemption to the rules on free movement and competition for the sake of services of general economic interest. It is difficult for them to do so without defining the content and limits of those services, which is tantamount to a minimum European definition of public service. Similarly, when it adopts texts on network activities a Community legislative authority will make a choice to strike a certain balance between opening up the market and maintaining any restrictions dictated by the need for a public service. This choice is obviously based on a certain conception of general interest. This is the first task of any European policy, indeed its overall objective: agreeing on the basis of a minimum common conception for maintaining a certain level of public service in economic activity.

Once that general objective has been defined, the second task will be that of deciding the method for attaining it, i.e. the application measures. Given the European decision – making context, this means operating a share of powers and determining what will be decided by common action and what will remain the responsibility of the Member States.

I. General objective: The maintenance of a sufficient level of public service in economic activity

The first imperative for any European public service policy is to agree on a common definition of this notion. It seems that thought could be given to doing so in a relatively ambitious way, i.e. by setting the objective of maintaining an appreciable level of concerns of general interest in economic activity. It may be claimed that the bases exist to reach an agreement on this objective. As has been seen, despite the different terminology in use and varied legal forms and technical administrative solutions existing in the Member States, the notion of economic activity or general interest is understood and applied in them all. It should, therefore, be possible to agree on the idea that certain economic activities are in the general interest and as a result require intervention by the official authorities: this is what is generally understood by public service since that is quite simply the justification for it. These are the vital elements of the concept on which agreement might be reached:

A. The notion of activity of general economic interest

1) Definition

As the justification of authority in a democratic society, the concern of general interest inspires action by that authority in all areas within its powers including economic intervention. Alongside the regulations covering all economic activity, this intervention also consists in organizing (or having organized) production activities operating in the general interest. These "economic public services" have two aspects:

a) On one hand, they are activities which, to a large extent, fall outside market rules and profit – making logic since they are regarded as so important that they must be ensured in any case and made accessible to everyone, which means both proximity to users and reasonable prices, and also because, by their nature, they are ill suited to competition and often justify special rights;

b) On the other hand, these activities remain economic activities, generally ensured by undertakings and not administrations. As such they are billed to the user at a price which takes account of costs, something that differentiates them from social services which are based on the idea of assisting the needier and, if not free of charge, supplied at least in return for a contribution that is not cost – related. These services are dispensed not only to the less favoured but to all citizens regardless of their economic and social level.

2) Components of general interest

Given this definition, the notion of activity of economic general interest covers a variety of components which may be divided into two main categories:

a) The first is related to integration, which is connected with people's well-being and their integration into society and may be qualified as a concern for democratic citizenship or the solidity of social links. It includes the following considerations:

– social cohesion according to which all citizens, regardless of their age, physical state (illness, disability), means of existence and geographical location, are guaranteed access to the services which are regarded as essential for taking part in social life, in order to feel a member of society or, thanks to solidarity, to strengthen the social unit and avoid social disintegration and exclusion;

– territorial cohesion which makes it impossible to leave entire areas without those basic services necessary for modern social and economic life, which would condemn them to lower levels of activity and living standards than the rest of the country, a situation which, particularly in the case of peripheral or island regions, would eventually threaten national unity (the notions of regional planning and territorial continuity);

– the desire to ensure the effective enjoyment of certain fundamental freedoms vital for participation in social life: freedom of movement, which implies the existence of frequent, extensive and cheap transport; freedom of expression, which calls for cheap and reliable means of communication (traditional postal services protected by correspondence secrecy, a public telephone system, etc.); freedom of the press, which must be supported by certain facilities granted in the context of the public postal service.

b) Collective efficiency which is more concerned with the interest of society taken as a whole. This includes:

– overall economic efficiency leading to the search for solutions benefiting society as a whole and sometimes contrary to individual economic rationale: for example, certain exclusive rights enabling optimum yields;

– long-term concerns making heavy investment without immediate profit more acceptable;

– controlling non-renewable or rare resources and environmental protection;

– the requirement to manage the public domain which belongs to the community and so is put at the disposal of public services or the public directly: roads, railways, airspace, the airwaves, etc.;

– finally, national security which also relies on the organization of certain economic services, particularly communications.

3) These concerns imply serious constraints:

a) ensuring the service in all circumstances, which means allowing for the corresponding demand and investment;

b) serving all users, regardless of location or time, even when demand is lower and, furthermore, when the service runs at a loss;

c) practising reasonable (and preferably uniform) prices.

These constraints were often reflected in the traditional principles, defined above, namely continuity, equality and adaptation. These principles are still valid since they lie at the very heart of the public service. They are also sufficiently general to be adapted to new problems, as some consequences only appear over time. It could, therefore, be purported that the principle of equality carries with it a requirement of simplicity, which means that the service remains comprehensible and, as a result, within the grasp of the majority of the population. In this sense it is by no means certain that it is in the interest of the general public to be faced, according to a certain trend, with large numbers of different operators, for telephone services or electricity for example, offering no end of price and service combinations. Complication – and the resulting risk of confusion – are not in the spirit of public service.

On the other hand, the conventional conception must be enriched. In fact, it has been open to legitimate criticism for its basic reliance on an administrative and technical approach: we were satisfied with a basic service, offering minimum services, often ensured rigidly and impersonally and we were more concerned with technical performance than consumer needs while tending to overlook good management. Economic and social developments have made us more demanding:

– the concern for service quality, calling for improvements (regularity, punctuality), diversification, in order to meet a variety of customers' needs, and target setting;

– respect for users (transparency and responsibility): information, repairs or swift compensation for any faults, procedures for solving disputes, allowing services to be monitored by independent bodies;

– the concern for good management perhaps not in terms as strict as those for purely commercial activities but constantly aimed at balancing the books.

B. Identifying activities of general interest

The decision to consider an activity as being one of general interest and, therefore, creating a public service at local or national scale naturally lies primarily with the authorities concerned. But intervention by Community law in general interest activities calls for an agreement on the scope of the activities in question. The response has been given by the executive or legislative action of the Community itself. The activities concerned are, as we have seen, the major networks affecting the general public: public transport, electricity, gas distribution, postal services and telecommunications. On the other hand, European intervention has not affected the distribution of water: this is because it is essentially organized at local level without any exclusive rights on a national scale and therefore did not call for any special action when the internal market was being created (in fact all that Community law has done is to ban national discrimination in the choice of operators, issue regulations on the quality of drinking water and pass legislation on public contracts for operators).

However, even though there is a consensus among the Member States to consider these activities as qualifying for public service treatment, there is a definite trend to insist that only a part rather than the whole of the activity should be run as a public service.

a) This part would comprise, first of all, the infrastructures which may not always be entirely left to private initiative and competition especially since they often entail privileges such as the occupation of land, including the sub-soil (use of public land, easements or compulsory purchase of private land) and, for economic, technical and ecological reasons, it may be difficult to increase their numbers or size. The most obvious cases are railways, electricity transmission and gas transportation. To take the example of railways, not only is it very difficult to increase the number of lines and traffic capacity but also infrastructures and rolling stock are so well adapted to one another that they must be integrated if they are to be properly run: if more than one operator were to run a service on a single infrastructure extremely detailed planning would be called for, including complicated controls, and the result would be greater safety risks and a waste of time and energy. The fact that it is impossible to store electricity and the need for supply to meet demand continuously and without fault heighten the need for its transmission to be run in an integrated way.

b) It might also cover the minimum service to be guaranteed for all users, what is known as the universal service.

c) The remainder, i.e. the operation of numerous aspects of the activity, would be left to the free initiative of operators.

This trend is making serious inroads into the traditional concept of public service in many Member States. That concept was both global and unitary: the service was always entrusted, usually without time limits – or at least for a long period – to a single undertaking which was responsible for the whole activity, its operation as well as the

infrastructures; this gave the undertaking an overview of the activity and enabled it to adapt the infrastructure to long – term service needs by making appropriate investments, spreading the cost over time and space, and as a result to practise uniform charges (by equalization, i.e. the profitable sectors compensating for unprofitable ones).

The trend towards a restrictive concept limiting the public service to the management of the infrastructure and some operational obligations has been very marked in a number of Member States, the United Kingdom in particular. As a result of action by the Commission, the Community has adopted it to a large extent in its administrative and legislative measures. As a result of this dominant trend, the European conception of the public service will can never be as broad as that which prevailed in the Member States most attached to the notion.

C. The inability of private initiative to respond spontaneously to general requirements

Whatever, however, the differences of opinion on the extent to be given to the notion of public service, there must at least be agreement on the principle that private initiative cannot define that service; it is not for private initiative to decide whether a given economic activity is in the general interest and is therefore to be regarded as a public service.

1) First of all, it has no legitimacy to do so because it represents vested interests.

2) Nor has it the ability to do so. Its objective is to make profits, not to serve the general interest. It is indifferent to the considerations of social cohesion and regional planning. It tends to ignore the long term ("shortsightedness of the market") and does not spontaneously indulge in activities whose profitability is by definition uncertain, or even non – existent, and which often call for heavy investment to boot. We could give the example of private electricity undertakings in France before the war: they totally neglected electrification in the countryside, which is costly, and concentrated on highly profitable urban operations instead.

D. The need for public intervention

1) Given their legitimacy (which in democratic regimes is bestowed by elections), only the authorities are in a position to speak on behalf of the general interest and can decide whether to create a public service and define its content. They may be central, federal or local authorities, according to the special features of the constitutional systems and administrative organization of the Member States.

2) Given this very legitimacy, they alone have the power to impose obligations resulting from public service on the (public or private) undertakings entrusted with them and to grant those undertakings any special rights which might be necessary for the fulfilment of these obligations.

3) Furthermore, they alone have the ability to set up control or regulation

bodies to supervise public service activities, whether they be a part of public administration or separate from it.

II. Achieving the aim: sharing responsibilities between the European Union and the Member States

An agreement at European level on the general aim of maintaining a substantial level of public service is one thing. Another thing is to achieve that aim, i.e. choosing the means of attaining it. We are no longer dealing with public service as an abstract principle but public services in the practical sense of the term, such as they operate in the different sectors of the economy where they exist. This operation probably calls for a share of European decision – making but it is difficult to see how a great deal of leeway could not be left to Member States given the very strong attachment of many countries to their traditions and achievements in this field. The share – out of powers between European and national levels must, therefore, take into account as much as possible the principle of subsidiarity, which means that it will vary from sector to sector. Those sectors which are mainly organized at local level, for example water distribution and refuse collection, will have to remain within national powers. On the other hand, those reliant on strong centralization to be properly run, such railways or postal services, might be suitable for a sizeable share of European intervention.

A. The Union's role

A European Union role in the operation of public services is necessary for at least two reasons:

– First of all it is dictated by the internal market: its rules of free movement and competition give the European institutions a say in the obligations and special rights which characterize public service activities. This say takes the form either of case – by – case surveillance or legislative harmonization.

– Moreover, the objectives of economic and social cohesion and consumer protection and the notion of European citizenship call for an assurance that all Union nationals, regardless of the country or region where they live, have access on an equal footing to a number of fundamental services – what might be called the right of the European citizen to public service. These justifications of general interest, the foundations of the public service, set out above, are now being taken into account, at least in part, at European level; there is a trend towards recognition of a "European general interest". This again may be achieved by harmonizing national legislation but may, in the end, lead to the setting up of genuine European public services.

1) Case – by – case surveillance

This refers to action by the European institutions aimed at the proper application of those provisions in Treaties affecting the public service: competition and the

freedoms of the internal market. This action is necessary wherever these provisions have not given rise to secondary legislation aimed at harmonizing national rules in the different sectors in question: sectors which have not been harmonized and, where they have been, those aspects left within the powers of Member States.

a) Surveillance is primarily guaranteed by the administrative action of the Commission. As we have seen, its powers in this area, in particular those which it enjoys under Articles 90(3) and 169, are very important. They may be exercised on the basis of an all – out interpretation of the rules on competition and free movement, allowing the public service only a tiny place, leading in the long run to sharp cuts in national public services through a ban on the exclusive or special rights from which they benefit. The Commission may, on the other hand, apply in full any permissible exemptions and, in so doing, safeguard existing public services as far as possible. In between the two options, a whole range of intermediary solutions are obviously possible.

b) Judicial intervention may also be more or less favourable to the public service, according to the Court of Justice's view of the extent of its control.

– It may choose to leave it for the national courts to decide whether an activity is a "general economic interest service" in the sense of the Treaty or not, in which case national public services will probably be given favourable treatment.

– It may, on the contrary, decide that it should apply the notion to practical cases: depending on whether its definition is minimalist or, at the other extreme, catch – all, i.e. excluding or demanding the application of exemptions, it will either cut back or boost national public services.

2) Sectoral legislative harmonization

Legislative action aimed at harmonizing national rules sector by sector is obviously far more important than case – by – case surveillance since it influences the whole of a sector of activity in all the Member States at the same time. It may adopt a whole range of options listed here, in order of intensity of the "communitarization" of the public service:

a) The Union could take an extreme view and more or less rule out public service in a given sector and call for total liberalization:

- the absence of any obligation imposed on a European scale;
- a ban on any special right and any funding of general interest services outside the strict market machinery.

At present there are no examples of this extreme solution.

b) On the contrary, the Union may give the States complete leeway for

organizing the public service: this is largely true of local public services (urban transport, water, sewage).

c) In certain sectors, the Union might think it expedient to compel the Member States to comply with a certain number of public service (or "universal service") obligations by calling for a given solution to their financing, a solution which may or may not include the possibility of reserving certain services to a given operator (exclusive or special rights constituting a "reserved service"): this is the option which has been chosen for electricity, gas and telecommunications.

d) This exercise of setting common public service obligations may be taken to the point of constituting the blueprint of a European public service in a given sector, by defining with precision (for example in quantitative forms) the minimum level of services to be ensured for all Union nationals and imposed on the Member States, even if the guarantee is not the direct responsibility of the Community institutions themselves but that of the national authorities. The legislative proposals relating to the postal services resemble this solution. The trans-European networks might also accommodate the emergence of fledgling European public services. For example an integrated rail network does not call only for modifications to the infrastructure in order to carry out inter-connection: i.e. adapting existing lines (with a single gauge) and even building new lines (missing links). If inter-operability is to be ensured, it also requires more harmonization of rolling stock (uniform dimensions, a single system of electricity supplies or, at least, adaptable engines avoiding locomotive changes at borders) and signalling systems.

3) The creation of genuine European public services

In order for these "fledglings" to become full-blown European public services, it would obviously be necessary to go beyond the definition of obligations and special rights and for the Union to take responsibility for setting up the service and monitoring it. This would mean:

a) That the Union itself, by "European public service delegations" (in the form of unilateral decisions or conventions) would entrust the provision of a given service on a European dimension to one or more operators: it might be considered for certain passenger rail services (high speed European services) or even for telecommunication services or the transportation of electricity or gas;

b) that the Union would set up European control (or "regulatory") authorities: this has been contemplated in the case of railways, telecommunications and civil aviation.

B. Leeway given to States

Excepting the extreme solution of ruling out public service altogether, all options for European action are admissible in principle: the choice of one or the other must depend on

the special features of the activity in question. It should, however, be recognized that the creation of comprehensive European public services is only a possibility to be studied with caution, applicable to certain limited activities and not in any case for several years to come. On the other hand, it goes without saying that local public services must remain outside European legislative intervention. In fact, most sectors will be subject to limited harmonization consisting in basic rules for defining obligations and special rights and for financing the service, leaving the Member States a fairly wide berth for specifying those rules and, in particular, the main responsibilities for setting up and monitoring the service (choice of operators, legal instruments and method of monitoring).

1) The extent of obligations and special rights

a) Obligations

When European legislation imposes public service obligations in a sector, calling it for example a "universal service", these obligations should preferably not be seen as a ceiling but, on the contrary, as a minimum guarantee by the Union which Member States must always be free to exceed by imposing supplementary requirements dictated by special national needs. This question is self-evident when legislation provides for no obligations.

This means that the Union must not have a monopoly for defining "general economic interest services" in accordance with Article 90(2): States must be able to define these services themselves in addition to European legislation as long as, of course, the Court of Justice has the ultimate say over those definitions.

b) Special or exclusive rights

On the other hand, when European legislation allows operators to enjoy special or even exclusive rights, under the name for example of "reserved services", this should be considered as a ceiling not to be exceeded because these are exemptions from the rules on competition and free movement. If the States do go further they must be able to justify this on the basis of exemptions provided for by the Treaty, and once again the ultimate control will lie with the Court of Justice.

When legislation makes no provision it may be taken for granted that the States are given some leeway to confer upon operators prerogatives falling outside ordinary law: compulsory purchase, occupation of the public domain, even exclusive operation rights. There are those who claim that their public services can be managed without applying special rights. On the contrary, others feel that these rights are necessary not only for managing the infrastructure but also for operating the service. They point out that undertakings cannot be expected to take on the heavy commitments inherent in the public service (for example, ensuring in all circumstances the provision of a service at a uniform price) unless they are offered a certain market, i.e. exclusivity over a given territory (and that territory must also be sufficiently large so that there is a balance between

profitable and unprofitable areas). A certain diversity seems legitimate, taking into account national, legal and administrative traditions but, of course, must always be compatible with the framework of the Treaty rules and under the control of the Court of Justice.

2. Financing

In other words: who must pay for the public service? The commonly acknowledged objective, that of most European legislation, is that the service should offset its costs with revenue, i.e. the price paid by users. This objective must be tempered by the requirement of charging reasonable rates, affordable by the greatest number of people, a vital principle, of course, of the public service and an obligation currently imposed by legislation. It can only, therefore, be attained where services make a profit, for example in densely populated regions where costs are low vis – à – vis revenue. Where services are not profitable, for example in thinly populated regions, the maintenance of a reasonable charge will lead to a deficit. Account must also be taken of particular obligations imposed on operators by the authorities, in particular reduced rates or even free services for certain categories of users: for example large families, the disabled and war invalids in public transport.

Union law (legislation or the direct application of the Treaty rules) must allow for the means to finance these deficits and even give the Member States the possibility of choosing between one or more of the following methods:

- equalization: the operator applies uniform charges in a given territory, which means that the profitable regions subsidize the loss – makers.
- market access fees imposed on those operators exempted from public service obligations and paid to operators which are subject to these obligations.
- an independently – run guarantee fund fed by all operators in proportion to their size.
- a contribution by the authorities themselves which may be justified in certain cases, in particular to compensate for particular burdens imposed on operators by those authorities.

3) The choice of operators

The Union may legitimately, on the basis of its competition principles, make it compulsory to separate "operators" and "regulators". In particular, it may demand that, when operators are public administrations themselves or public undertakings, that administration or undertaking should not at the same time be entrusted with the task of regulating or monitoring the sector, a situation that could give rise to the abuse of a dominant position. But, with that rider, it must be neutral as to the quality of the operators (public or private), if only in application of Article 222 of the Treaty of Rome. States must,

therefore, be able to continue to choose between the different ways of running public services.

a) Direct management by the authority

This system, sometimes called a "corporation", in which the authority itself operates the service using its own assets and staff, was for a long time the usual practice for running public services. Not so long ago in certain Member States it was still the case for the major national services (postal services, telecommunications and railways, etc.). Its disadvantage is its unwieldiness, since the rules of public administration are applied to budgets, accounting and staff management. It has been virtually phased out in network activities, with the notable exception of certain local services (public transport, drinking – water supplies, refuse collection, etc.).

b) Management by public undertakings

These corporation – run services have often been handed over to other bodies, leading to the creation of a good number of public undertakings. Other public undertakings were created by nationalization and some from scratch. In any case, regardless of their origin, most public services in Union Member States are still run by public undertakings.

c) Management by private undertakings

Prior to the "historic nationalizations", many vital public services (railways, gas and electricity distribution, etc.) were run by private undertakings. This is once more and increasingly the case as several States have followed the lead taken here by Great Britain, the first European country massively to privatize public service undertakings. This solution is supposed to offer the user higher quality and cheaper services, because it flexibly adapts to needs and is cheaper to operate. But it seems to be less appropriate for activities calling for large – scale investment whose profitability is uncertain or long – term, never an attractive prospect for private capital.

4) The choice of legal instruments to set operators' obligations and rights

The European Union may impose on States a certain degree of transparency in setting operators' rights and obligations. In the past these rights and obligations had sometimes been uncertain, especially since they had become established by custom, or even mere practice, rather than written decisions. It is a welcome development that they should be clearly defined and made public, in order for users to know what they are; this calls for their inclusion in documents of legal value. But the nature of that document must be left to the free choice of the Member States which will act according to their own constitutional rules or legal traditions.

a) The chosen instrument might, therefore, be a unilateral State decision:

a law or government decree. This is the most usual procedure when services are entrusted to public undertakings: in that case it is the decision to set up or nationalize an undertaking that usually determines its tasks and rights.

b) Contracts are required when services are run by private undertakings since they must, of course, consent to them. But contractual procedures are becoming increasingly widespread, as we have seen, with public undertakings. Given their flexibility it would seem more appropriate and better adapted to a modern way of thinking than unilateral procedures. A point to be emphasized in respect of the procedures for concluding these public service contracts, which are very much favoured by local authorities: until now these procedures have always been characterised by the absence of any constraint for the authority in question, not only as to the final choice of co-contractor but even as to competition between several candidates prior to that choice. Current developments on this score should be highlighted: as we have seen, national legislation tends to call for at least an obligation to advertise the contract prior to its conclusion. It would be legitimate for European legislation to generalize this obligation, for the sake of the general rules of freedom and competition of the internal market. But it must allow States to maintain the traditional principle of allowing authorities to choose the operators to which they entrust their public services. It should be reiterated that, in their substance, public service contracts are not public procurement contracts and should not be submitted to the very strict rules applicable to the awarding of the latter.

5) Means of monitoring the execution of public services

The execution of public services must be subject to special monitoring, first of all because they are created by the authorities in the public interest and those authorities have the right and duty to ensure that they are properly run; secondly because any special rights granted, such as the allocation in certain cases of public funds, obviously require their use to be supervised. European legislation may legitimately include provisions relating to these controls, if only to impose, as we have often seen, the principle of separating regulators from operators. But, while respecting these general principles, it must allow the Member States the possibility to choose among different procedures:

- monitoring carried out by the administration itself
- monitoring by an external body appointed by the administration
- monitoring by composite bodies representing the interests in question: authorities, customer undertakings and individual users.

Section II. Instruments of a European public service policy

In order to pursue a public service policy whose objective is to maintain a substantial level of activity of general economic interest while giving Member States considerable leeway as to the practical means of achieving it, the existing European instruments are

applicable but in need of strengthening.

I. Making better use of existing instruments

As seen, the Treaties include a good number of provisions affecting public service and the Union authorities have made considerable use of them in their administrative, judicial and legislative action. However this action, far from having the aim of strengthening the public service, has been based instead on a limited conception of the notion. Regarded as a system of exceptions to the principle of ordinary law that was to remain that of freedom of movement and competition, the public service has been confined to a narrow area of network activities: infrastructure management, which was to be separated from operations and, in the case of the latter, a limitation to one-off obligations or a skeleton "universal service". There is therefore, to start with, room for a more ambitious use of existing machinery.

A. Role of the Court of Justice

It is to be hoped that the Court of Justice will keep to its recent trend (Corbeau and Almelo judgments) and put all its efforts into the derogation allowed by Article 90(2) of the Treaty in favour of services of general economic interest. That would probably urge the Commission to correct its tendency to apply single market rules to public services without any differentiation, as if they were ordinary economic activities. This would also be a step towards recognition of a special place for public services in European construction.

B. Legislative action

The Commission's legislative proposals on network activities should be carefully examined by European legislators. Since the Council is weakened by differences between the Member States over the issue, special responsibility lies with the European Parliament which should have two concerns:

1) to preserve a sufficient level of public service in each sector in question, defending a broad conception of the notion, as a system of substantial tasks and obligations offset, if necessary, by special or exclusive rights.

2) to defend the trend towards European public services: either in the framework of sectoral legislation or on the basis of the trans-European networks. That does not necessarily mean that the Union should create public services itself: that prerogative will be left for mostly in the hands of the Member States even if the possibility of common regulatory authorities might be contemplated. But it could, at least, define those services with enough precision to ensure, in all Member States, a minimum of identical services, the idea being that equal access to these services is part of Union citizenship and a logical aspect of European integration.

A litmus test is the proposal for a Directive on postal services currently being

discussed. It might be the first example of truly European legislation on public service since the tasks and even the detailed obligations and special rights of the service are defined at European level, although implementation is left to the Member States: this is an embryonic European public service.

C. However, even though better use could be made of the existing instruments, they are insufficient. The provisions in question are scattered throughout the Treaties and are generally presented as exceptions to the rule. In order to be applied coherently and vigorously, they call for a global guidance framework. But to overcome resistance, a means of motivation is also needed. In other words, if the existing instruments are to be used in the appropriate way new ones have to be created.

II. Setting up a new system

Existing Community machinery can only play a part in helping public service activities under two conditions:

- 1) If the concept of public service is established as one of the basic principles of the European Union, i.e. at "constitutional" level, which calls for guidance texts.
- 2) If a system of incentives is created, with political/administrative bodies acting as factors of coherence and vigilance in the public service field.

A. Guidance texts enshrining the concept of public service at European level

1) Amending the Treaty

As long as public service's position in the Treaties is nothing more than an exception to the rules of freedom of movement and competition, its administrative, judicial and legislative protection will remain flimsy. It should be turned into a concept in its own right and on an equal footing with those rules in the creation and management of the internal market. There are several ways of doing this. A given term should be adopted: public service, public utility service or, the expression already used by the Treaty, "service of general economic interest". There is also the question as to which Treaty provisions to amend: the aims of the Community (Articles 2 and 3), definition of the internal market (Article 7a), Article 90 or the procedure applicable to legislation relating to the internal market (Article 100a).

The proposals made so far, which have naturally been coming thick and fast with the approach of the IGC – Intergovernmental Conference – meeting in 1996 to revise the Treaties, refer with varying degrees of precision to these different solutions.

- a) Many of these proposals contain very general aims:

- None of the official contributions by the national governments to the preparation of the IGC mentions public service with the exception of Spain's, which includes in the areas where the rule of unanimity in the Council should be maintained the degree of quantitative and qualitative development of the public services, closely linked to the special features and prosperity of each Member State²⁴. However, according to the report drafted by the Study Group set up to prepare for the IGC, a majority of Member States' representatives recommended that the IGC examine the strengthening of the notion of public services of general interest, as one of the principles of market criteria²⁵. It should also be noted that the Belgian Minister for European Affairs, Mr DERYCKE, recently (early February 1996) called for the principle of public service to be integrated into the Treaty.

- The European Commission, which had barely referred to the subject until then, set aside a small place for the subject in its opinion on the convening of the Conference (28 February 1996). It stated that citizens' access to universal services or services of general interest, contributing to the aims of solidarity and equal treatment, were among the values common to all European societies, but did not call expressly for any particular amendment to the Treaty.

- The European Confederation of Trade Unions, in a resolution on the challenges of the IGC (14 and 15 December 1995), called for the principle of service of general interest and the right of access to a quality service and the recognition of its role as a pre-condition for European citizenship to be enshrined in the Treaty.

- In its "Appeal by representatives of civil society", of 27 February 1996, the International European Movement did no more than ask for the role of services of general interest to be recognised in the Treaty.

b) As part of its preparation for participation in the IGC, the European Parliament has regularly called for full introduction of the concept of public service into the Treaty.

- It did so first in its basic resolution for the conference, the Bourlanges - Martin report of 17 May 1995, suggesting that a set of new provisions to this end should be added to the Treaty. It said that the place of public service in European Union actions should be laid down by introducing new articles defining the concept and scope of the "universal service", guaranteeing every citizen the right to equal access to services of general interest, and "ad hoc" provisions taking into account the special features of public service undertakings.

24. Spanish Ministry of Foreign Affairs: "The 1996 Intergovernmental Conference: some thoughts". March 1995

25. Study Group report, 5 December 1995.

– The resolution of 14 December 1995 on the IGC agenda with a view to the European Council in Madrid, asked for the terms of reference for the conference to include, among other priorities set by the Parliament, the definition of a role for public services of general interest in the economic and social fields and the introduction of a universal right of access to those services.

– The resolution of 13 March 1996 (on the EP's opinion on the convening of the IGC and the assessment of the work of the Study Group) is more specific than any other official position on the subject. Asserting that Community action must not only focus on the establishment of a competitive system but also on serving the general interest and, therefore, include tasks aimed at strengthening economic and social cohesion and consumer and user protection, it calls for:

– amendments to Article B of the TEU and 90 and 100a of the EC Treaty to include services of general interest;

– and the addition to the Treaty of the fundamental principles of public service, i.e. accessibility, universality, equality, continuity, quality, transparency and participation.

c) Among more specific proposals, we should mention those of the "Initiative pour des services d'utilité publique en Europe" (ISUPE). They are aimed, on one hand, at ending the current situation of the public service, i.e. an exception to the principle of competition, and giving it a place of its own while, on the other hand, fostering the emergence of European public services²⁶.

– Title V of the Third Part of the EC Treaty would be amended to include activities of general economic interest. It would then be called "Common rules on activities of general economic interest, competition and approximation of legislation" and would include a new chapter on these activities. This chapter would contain the following provisions:

. a Council regulation would set for each sector the minimum general interest obligations which might be imposed by a Member State on an undertaking;

. in accordance with that regulation, the States could define the tasks for undertakings entrusted with a service of general economic interest which would then be granted a derogation from the Treaty rules, especially those on competition;

. the Member States could set obligations of general interest other than those set out in the Council regulation provided they complied with the Treaty

26. These proposals can be found in the article by S. RODRIGUES. "Comment intégrer les principes du service public dans le droit positif communautaire". Revue Française de Droit Administratif No 2. March - April 1995

rules;

the Community would aim to create services of general economic interest at European level.

– The following sentence would be added to paragraph 1 of Article 100a outlining the procedure applicable to legislative harmonization measures taken in the framework of the internal market:

"These measures take into account, by applying in particular the principle of economic and social cohesion, the considerations of public utility that may justify an adjustment to the competition rules enacted by the present Treaty".

d) A fairly similar proposal, but one based on a much more thorough examination, was made by the European Centre of Public Enterprises (CEEP) in a report published in June 1995, entitled "Europe, competition and public service". It is also aimed at including the principle of public service in the Treaty on the same footing as that of competition, in order to give the Community institutions support for intervention, in particular through legislative channels, in the sectors where this principle is to be applied. To comply with existing provisions and in order to have as broad a terminology as possible in the different countries, it also suggests using the expression in Article 90: "service of general economic interest". It consists of a new Chapter II (comprising a single Article 94) coming after the chapter on competition (in Title V of the third part) and entitled "Services of general economic interest". This new chapter would include:

– recognition of national powers for setting up services of general interest on the basis of common arguments (economic efficiency, social cohesion and preparation for sustainable development);

– a list of the obligations likely to be imposed on services of general economic interest on behalf of traditional principles (equality, continuity, adaptability and quality) or new ones (transparency and consultation);

– assertion of the possibility of granting special or exclusive rights for the proper execution of those obligations;

– assertion of the application of competition rules by reiterating the terms of the current Article 90;

– recognition of the European Union's role in the matter, both to harmonize the way in which these services function on a national scale and to coordinate those services on a Union scale with the prospect of establishing services of general interest at European level.

In April 1996, in an opinion on the IGC, the CEEP referred to this

proposal and added the following requests for amendments:

- addition, in Article 77, of the features of public service in the transport sector;
- extra provisions on an energy policy and telecommunications policy giving public service a place.

e) The Comité européen de liaison sur les services d'intérêt général also gave its view on 24 November 1995 in a document entitled "Services of general interest and the Intergovernmental Conference". It came out in favour of including the concept of public service or general interest services among "fundamental human rights" and the subsequent inclusion of the concept in a number of Treaty provisions:

- Article 3 (Community action)
- Part Two (citizenship of the Union)
- Article 37 (adjustment of State monopolies)
- Article 90 (competition)
- Title XI (consumer protection)
- Title XII (trans - European networks)
- Title XII (industry)
- Title XIV (economic and social cohesion)
- Title XVI (protection of the environment).

Of particular note is the proposed amendment to the second part of the Treaty by adding an Article 8f: "All citizens of the Union must have access to certain goods and services deemed vital and whose definition is covered by a system of services of general interest". By linking the right to services of general interest to citizenship, it is based on one of the surest foundations of the concept of public service. By making it a right of Union citizens, it lays the basis for a European public service.

f) All of these proposals vary in terms of their technical solutions (the choice of Treaty provisions to be amended or added to) but most of them agree on the aims which are invariably:

- on one hand, a "defensive" concern: putting public service on an equal footing to other Community principles (i.e. the freedoms of movement and competition), while preserving Member States' possibility to maintain their public services;
- on the other hand, a more "constructive" concern: putting forward the principle of equal access for all Union citizens to a minimum of essential services, fostering the emergence of European public services.

These two concerns are linked to the proposals for amendments to the Treaty which in the final analysis seem the most relevant:

- amending Article 90 to turn public service into a principle of the internal market on the same footing as the others rather than merely an exception to them.
- above all, possibly adding an article to the second part on "Union citizenship" making equal access to public services defined and guaranteed by the Union, at least in general terms, a right to be enjoyed by all European citizens.

2) A European public service charter

The next Treaty text would establish the public service at a "constitutional" level in the Union, both as a fundamental citizens' right and a principle of Community action and legislation on a par with the freedoms of movement and competition. But the content of that concept would still have to be specified, i.e. the arguments, principles, objectives and scope of the notion. This would then make available a sort of European "doctrine" on public service acting as a reference for administrative and judicial action and for legislation. That should be done in a single text of general scope, called a "charter".

The expression has a European precedent in another field: the Social Charter, or, to give it its official name, the "Community Charter of Workers' Fundamental Social Rights", adopted by the Heads of State and Government on 9 December 1989. In the sphere of public service it has several national precedents which tend to cover, however, a broader area than that of economic public services (administrative, social, health and cultural services, etc.):

- The French Government's Charter of public services (1992).
- The Citizen's Charter, presented by the British Government in the form of a statement to Parliament in 1991.
- The Italian Government's Public Services Charter (Prime Minister's directive) of 1994.

Without using the exact word, in 1993 the European Parliament asked the Commission to define public service and the Community to ensure all Union citizens equal access to goods and services of general economic interest (Resolution of 12 February 1993). The explicit request seems to have come firstly from the French Government in a memorandum of July 1993 calling for such a charter to set the general principles common to all public services. The European Parliament supported this idea in its Resolution on "public undertakings, privatization and public services", of 6 May 1994. The Commission seemed for a time to go along with it.

The main features of this charter could be as follows:

In its form, it would either be a declaration of principles adopted by the Council or rather, like the Social Charter, by the European Council.

In its content, it would comprise four parts:

a) a justification of public services (in the form of recitals, for example), i.e. considerations in favour of the very concept of public services and European public services developed above, in particular:

– a concern for integration and democratic citizenship including a number of ideas:

. the idea of social cohesion and the campaign against fragmentation and exclusion;

. the idea of territorial balance and equal access by European citizens, whatever their home region, to high – quality basic services;

. safeguarding certain fundamental freedoms.

– a concern for collective efficiency:

. collective economic interest;

. long – term planning;

. controlling rare resources.

b) The main principles and objectives with which public services set up by the Member States must comply:

– equal access;

– continuity;

– adaptability or flexibility;

– quality;

– transparency and responsibility;

– control.

c) The types of special rights likely to be granted to operators.

d) A list of the fields where the concept of public service applies:

- postal services;
- telecommunications;
- transport;
- water, gas and electricity distribution.

The scope of this charter would be political rather than legal. It would provide, in particular, a framework for legislation to be adopted in the various sectors, which would, of course, be binding on the Union and the Member States. But it would also act as a reference for interpreting the Treaty provisions by the Commission or the Court.

B. Prompting bodies

In order to lend efficiency to these doctrinal and legal guidelines set out in basic texts, political/administrative structures should be set up to guarantee their implementation and act as "advocates" for public services:

- 1) A European Parliament committee on public services called on to issue opinions on any relevant legislation.
- 2) A European public services committee, comprising representatives of public service undertakings and users: it would act as a consultative body for the Commission and an "observatory" of European and national public services, producing analyses, assessments and proposals.
- 3) A Commissioner and Commission Directorate with special responsibility for public services, in particular for preparing legislation.

CONCLUSION

Public services must not be confused with public undertakings. The latter are defined not by any special type of activity, but simply by the fact that they are controlled by the authorities, mainly through ownership. Therefore, there may be public undertakings exercising activities as a result of individual enterprise and, therefore, quite like those of private undertakings. In market economies these public undertakings may benefit from no particular privileges. They must abide by the ordinary legal rules applying to industry and trade, especially competition rules. Indeed nothing should stand in the way of their privatization, a basic trend in most Member States where, before long, public undertakings taken as a whole will probably only account for some 10% of the Union's non – agricultural economy.

Public services, on the other hand, are not linked to any type of ownership. They are characterized by the task they perform: ensuring an economic activity of general interest, as a result, therefore, of a defined public initiative, set up and controlled by the authorities which usually grant them special rights deemed necessary for their proper execution. They are not linked to any one type of operator: they may be provided directly by the public administration itself, entrusted to a public undertaking or, increasingly, to private undertakings. If we wanted to label the bodies in question, we might well choose that of public service operator or undertaking.

It is glaringly obvious that public services have even less in common with the civil service, i.e. those activities run by State employees and other official authorities. Many public service operators employ staff covered by labour law: this is by definition the case of private undertakings; but it is also that of public undertakings which, alongside civil servants, have always employed – and are increasingly employing – staff enjoying a special status or covered by "private law".

All European States recognise the concept of public service even if they do not all use the same expression to describe it. Everywhere it has been decided that certain economic activities are so vital for the population that they must be ensured, come what may, continuously and in a way that is accessible to everyone. It was not possible only to regulate their operation, as is the case of the production and provision of "ordinary" goods and services. Their existence had to be guaranteed, which meant that they had to be seen to by the authorities since there could be no certainty that private enterprise would take the risk. Of course, the specific nature of the activities in question could vary from place to place and time to time, according to the value systems of societies, their economic resources and technological developments. But in modern times and in European countries, this has always been the case of services relying on major infrastructure networks: electricity, gas and water distribution, railways, urban public transport, postal services, telecommunications. The organizational methods and level of these services may vary, sometimes wildly, from one country to another. But nowhere have they been left entirely to private initiative, nor have they fallen entirely under ordinary industrial and trade law. They have always been the subject of special legislation aimed at ensuring their proper operation in the public interest:

controls by the authorities over investment and prices, limits on the number of operators, the imposition on them of special obligations and sometimes the granting of rights falling outside ordinary law, permanent supervision ("regulation") by the public administration or independent bodies with restrictive powers. Whatever the terminology, the legal categories and practical methods used, public service occurs whenever a political community decides that an economic activity vital for the public interest cannot be ensured by the machinery of the market alone.

The special rights granted to public service operators in the Member States, when they are national obstacles to the rules of free movement and competition, had to be challenged by the very logic of European construction which aimed to establish a common market, and later on an internal market. All Treaty rules on the creation of that market were tantamount to powers given to the Community to act on public service activities. The Community has not shirked from doing so: acting through administrative, judicial and legislative channels, it has extensively liberalized the major networks. This phase of relative "destruction" of national public services was a necessity for Community integration, just as the Member States, over centuries of formation, had gradually phased out most of the public services that may have existed in any previously autonomous or independent political entities (fiefdoms and principalities) absorbed by national unification.

However, the Treaty of Rome does not ignore public services. Through special derogations to the rules on free movement and competition or the general derogation of Article 90(2), it allows "services of general economic interest", to an extent compatible with the proper functioning of the internal market, to enjoy those privileges absolutely necessary for the performance of their task. On this basis, the Court of Justice has recently shifted its case – law towards a recognition of the legitimacy of national public services. For its part, the Commission tended, in its administrative action, to use the rules on free movement and competition to restrict public services by "whittling them away"²⁷. But, partly with European Parliament backing, it has instigated Community legislation on network activities that lends the notion of general interest some importance, allowing Member States to establish public service obligations and even in certain cases to grant special rights to operators, although the means vary quite widely from sector to sector. The Community concept of public service, usually in the form of a "universal service" with fairly scanty content or obligations aimed at restricted user groups, is undoubtedly less ambitious than the one applied in several Member States. All the same, it emerges that the Community has moved away from a suspicious attitude towards public services, whose privileges were systematically regarded as infringements of the Treaty rules, towards an (at least partial) acceptance of national public services that States are now allowed to maintain in certain conditions.

The Community has gone further. More recent provisions of the Treaties (Single Act, European Union) give it objectives similar to those that presided over the constitution

27. Cf an article by Professor Kovar (see the bibliography)

of national public services: economic and social cohesion, consumer protection, environmental protection, European citizenship, objectives to be translated in particular by the creation of trans – European networks of energy, transport and telecommunications. Using these new powers, the Community has stopped just allowing Member States some possibility of preserving their public services. In certain cases it has imposed maintenance of those services and even their development, by setting minimum obligations sometimes superior to those existing in certain countries. Such is the case of the legislation being adopted on the postal services.

Through this extensive harmonization, the Community is creating the blueprint of a European public service. By narrowing the gap in the quality of services from country to country it is endeavouring to guarantee all Union citizens, wherever they live, equal access to those services regarded as vital. This is fully in keeping with the concept of public service, transposed to a European scale.

Europe could even go further still. It could pay more attention to general interest in its administrative action and legislation. In certain areas it could even consider setting up genuine European public services, which would mean no longer just defining the service while leaving responsibility for its creation and control to States, but assuming that responsibility itself by dealing directly with operators and creating European level regulation bodies. Progress made in legislative harmonization in certain sectors (postal services, telecommunications) could lead to this, just as the – albeit difficult – establishment of trans – European networks could lead to the appearance of European public services in railways or even the transportation and distribution of electricity and gas.

A European public service policy of this kind would require an agreement to maintain a sufficient level of general interest in economic activity. This agreement on the aim is possible since the very concept of general interest, its essential components, its traditional or new requirements and the activities to which it must apply are the subject of a fairly broad consensus among the Member States. Meeting this aim obviously calls for a balance of responsibilities to be struck between the Union and the States. This balance must in any case preserve the Commission and Court of Justice's role of supervising the case – by – case application of the Treaty provisions. Apart from that, i.e. the legislative harmonization, it should be established sector – by – sector on the basis of the principle of subsidiarity. Wherever the States are the best qualified to act, as is the case of local public services, European intervention should be minimal. In other sectors, the Union could define public service obligations and special rights with more or less precision, leaving it to States both to add to the definition and take full responsibility for setting up those services (choice of operators and financing) and controlling them. In certain cases, to be contemplated with caution, it could assume all responsibilities and create genuine European public services.

This policy would probably be greatly facilitated by a European "constitutionalization" of public service in the form of an enshrinement of the concept in the Treaty and a charter acting as a doctrinal guide for the legislator, the administration and the courts. It would also have to be given organized political and administrative support within

the European Parliament and the Commission.

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* *

After a phase of "destroying" any public service to be found in the States, the Union might contemplate a phase of "constructing" a public service with a European dimension, to respond on a wider scale to the two main concerns which in their day, originally motivated the creation of national public services:

– the concern for social and territorial cohesion, more vital than ever given the risk of social fragmentation and exclusion, and the casting aside of whole areas, remoter rural regions and marginalised urban neighbourhoods alike.

– the concern for collective efficiency, guaranteeing, in particular, the long – term supply and management of rare resources, a common asset.

It might, therefore, be said that, if we accept the logic and requirements of European construction, the public services thrown off balance by that construction can only be put back on a firm footing if they become European.

In turn, Europe might find in public services a factor of identity and legitimacy. First of all, it will be seen as true to itself by taking over a basic tradition found in all its component countries and distinguishing it from other parts of the world. Secondly, it would bring itself closer to its citizens. From the outset, European construction has greatly focused on trade and enterprise, the production of goods and services. As a result, the Community has tended to be more in contact with big business than with the public as a whole. This the public has made quite clear by recently showing a certain dissatisfaction with the European idea: witness the referendums on ratifying the Maastricht Treaty in certain Member States. One way of reconciling public opinion with Europe, making it more tangible for the bulk of the population, might well be to redirect European construction towards the concept of public service.

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- Council Decision 75/327/EEC of 20 June 1975 on reorganization of railway undertakings and harmonization of rules governing financial relations between these undertakings and States. OJ L 152 of 12.6.75.
- Council Directive 91/440/EEC of 29 July 1991 on the development of Community railways. OJ L 237 of 24.8.91, p 25.
- Council Directive 95/18/EC of 27.6.95, p 70.
- Council Directive 95/19/EC of 19 June 1995 on the shareout of railway infrastructure capacities and charges fees for use of the infrastructure. OJ L 143 of 27.6.95, p 75.
- Council Regulation 2408/92/EEC of 23 July 1992 on access by Community air carriers to air routes. OJ L 240 of 24.8.92.
- Council Regulation 3577/93/EEC of 7 December 1992 on application of the principle of free movement of services to sea transport within Member States. OJ L 364 of 12.12.92.

c) Telecommunications

- Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment. OJ L 131 of 27.5.88, p 73.
- Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network procurement. OJ L 192 of 24.7.90, p 1.
- Council Directive 90/388/EEC of 28 June 1990 on competition in telecommunications services markets. OJ L 192 of 24.7.90, p 10.
- Commission Directive 95/51/EC of 18 October 1995 amending directive 90/388 concerning the removal of restrictions on the use of cable television networks for

supplying telecommunications that have already been liberalized. OJ L 256 of 26.10.95, p 49.

- Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388 concerning mobile and personal communications. OJ L 20 of 26.1.96, p 59.
- Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388 concerning the achievement of full completion on the telecommunications market. OJ L 74 of 22.3.96, p 13.
- European Parliament and Council Directive of 13 December 1995 on application of the supply of a network open to vocal telephone connections. OJ L 321 of 30.12.95, p 6.
- Council Decision of 29 July 1993 on the creation of a single European emergency call number. OJ L 217 of 6.8.91, p 31.
- Council Resolution 93/C213/01 of 22 July 1993 on re-examination of the situation of the telecommunications sector and the need for new developments on that market. OJ C 213 of 6.8.93, p. 1.
- Council Resolution 94/C48/06 of 7 February 1994 on the principles for a universal service in the telecommunications sector. OJ C 48 of 16.2.94, p 8.
- Council Resolution 94/C379/03 of 22 December 1994 on the principles and timetable for liberalization of telecommunications infrastructures. OJ C 379 of 31.12.94, p 4.
- Council Resolution 95/C258/01 of 18 September 1995, on applying the future regulatory framework for telecommunications. OJ C 258 of 3.10.95, p 1.
- Proposal for a European Parliament and Council Directive on interconnection in the telecommunication sector and the guarantee of a universal service and interoperability by applying ONP principles. COM(95)379. OJ C 313 of 24.11.95, p 7.
- Proposal for a European Parliament and Council Directive on a common framework for general authorizations and individual licences in the telecommunication services sector. COM(95) 545, 27.11.95.

d) Postal services

- Council Resolution of 7 February 1994 on the development of Community postal services. OJ C 48 of 16.2.94, p 3.

- Proposal for a European Parliament and Council Directive on common rules for the development of Community postal services and improving service quality. COM(95) 0227. OJ C 322 of 2.12.95, p 22.