

EUROPEAN PARLIAMENT



*Directorate-General for Research*

WORKING PAPER

**PUBLIC UNDERTAKINGS  
AND PUBLIC SERVICES  
IN THE EUROPEAN UNION**

SUMMARY

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## **FOREWORD**

The study summarized and partly updated here has been produced at the request of the European Parliament's Committee on Economic and Monetary Affairs and Industrial Policy. It was preceded by a preliminary study completed in February 1994 which served as a basis for the resolution tabled by Mr Speciale and adopted by Parliament on 6 May 1994. It covers the twelve countries which made up the European Union before the last enlargement.

The section of the study on the public service missions of undertakings was based on research on nine Member States conducted by the CIRIEC (International Centre for Research and Information on Collective Economy), a scientific body headed by Professor Thiry, which has at its disposal a network of experts in the various countries of the European Union. The author expresses his thanks to each of the nine experts for their patient research in response to his questions. The statistics on public undertakings were compiled and kindly provided by Mr Bizaguet of the European Centre of Undertakings with Public Participation. Two Robert Schuman scholars of the European Parliament's Directorate-General for Research, Ms Ebbers and Mr de Almeida, made valuable contributions to the research on public service undertakings in Germany and Portugal.

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## **INTRODUCTION**

The traditionally important place of both public undertakings and public service activities in European countries has declined in recent years. Public undertakings have undergone large-scale privatisation, which is still under way in several countries. At the same time the very idea of public service, i.e. an economic activity in the general interest and therefore accorded special rights and obligations by the public authorities whether carried out directly by these authorities, by public undertakings or by private firms, is being called into question by the trend towards 'deregulation' or 'liberalisation', which tends to the view that these activities are entirely a matter for the private sector and market forces. Although the Treaty of Rome is neutral with regard to the nature, public or private, of property, European unification has fostered liberalization: the very rationale of the customs union and the single market, namely the removal of all obstacles to intra-Community trade in goods and services, was bound to threaten the special rights created by Member States to protect their public services against market forces.

Looking beyond public undertakings, then, one has to address the 'public service' itself. The notion has to be examined in principle: its substance and the usual ways in which it is organized. It is also necessary to survey in detail the way in which it is implemented in the national economies. In practice, it applies mainly to the utilities or 'networked' activities and the survey can be confined to the most significant of these networks: electricity, gas, water, railways, local public transport, postal services and telecommunications.

In order to assess the European dimension of public services, the analysis has to consider the European Union's involvement; it must therefore cover the Union's legal competence, on the basis of the Treaties, to deal with these activities, how it uses this competence, in particular in the case of the Commission in its capacity as the Community's executive and initiator of Community law, and, finally, the possibility of a European consensus on what constitutes a public service and a policy that will accord it due importance, at least by establishing the general principles and rules applicable to national public services and possibly envisaging the creation of public services at the European level.

The study covers the following:

- I. The situation of public undertakings in the Union: how they are organised and their importance to the economy.
- II. Public services in Member States: general concept and how it is applied to the main utilities;
- III. Public services and Europe: competence and present attitude of the Union with regard to public services; substance and instruments of any future European public services policy.

## **PART I: THE SITUATION OF PUBLIC UNDERTAKINGS IN THE EUROPEAN UNION**

### **CHAPTER I: CONCEPT AND ORGANISATION OF PUBLIC UNDERTAKINGS**

The concept of public undertaking covers very different situations, primarily because of the many different reasons that have justified, for more than a century, the creation of public undertakings in European countries.

#### **I. Definition**

A. Various attempts have been made to define public undertakings; we have taken the definition used by the European Commission in Directive 80/723 of 25 June 1980 concerning the transparency of financial relations between Member States and public undertakings, since it is now the reference point for all Community legislation applicable to public undertakings. This text defines a public undertaking 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'.

B. It follows from this definition that dominant influence of a public authority and not public ownership is now considered to be the main criterion of the public undertaking, influence being exerted, irrespective of ownership, through the power to appoint top decision-makers in the undertaking or the ability to control major decisions through special rights for public authority representatives.

C. At the same time, a public undertaking must have:

- (1) a degree of autonomy vis-à-vis the public authorities;
- (2) an economic purpose: i.e. to produce and sell goods or services;
- (3) operating methods similar to those of private undertakings.

#### **II. Legal forms**

The main legal distinction among public undertakings is between:

A. Those governed mainly by special law, whether it be 'public law' or at least specific legislation. Whatever they are called (public corporation, national undertaking, state enterprise ...), they have the following features in common:

1. they generally belong to public authorities;
2. they are limited by law to a specific activity;
3. they are unable to go to arbitration or file for bankruptcy;

4. they are subject to stringent regulation by a public authority;
5. their staff are often governed by a specific legal regime as opposed to ordinary employment law.

**B. Those essentially governed by ordinary commercial law.**

Usually called State or national companies, they:

- comply with commercial law, are subject to the rules of private accountancy, use arbitration and can go bankrupt;
- have a staff governed by standard employment law.

**III. Relations with the public authorities**

**A. Intervention by public authorities in public undertakings**

- (1) The main instruments of intervention are the control exercised over the governing bodies of the undertaking, its financial operations, such as capital increases and subsidies, and control over decisions.
- (2) The organs responsible for using these instruments are administrative, legislative or judicial bodies.
- (3) The public authorities' influence is all the greater when they own the undertaking, or at least have a majority shareholding.

**B. Objectives of intervention by public authorities**

Public undertakings are deemed to have objectives which make them different from ordinary firms. Even those which operate in areas where they are in competition with the private sector, in manufacturing industry for instance, have some sort of public mission such as contributing to the government's industrial or social policy. But this is obviously much more true for those which have a genuine 'public service' mission, i.e. which produce goods or services of a general interest.

**CHAPTER II: POSITION OF PUBLIC UNDERTAKINGS IN THE ECONOMY**

Given the absence of a workable definition of public undertakings, the reliability of statistics in this area must be seen in perspective. Nevertheless, the figures published every three years by the CEEP (European Centre of Enterprises with Public Participation) are a good basis. These are the figures for 1997 with 1995 as the reference year.

**I. Global position**

The following table gives the percentage of public undertakings in the overall economy (excluding agriculture), by Member State, obtained from the average of three parameters: workforce, added value, gross fixed capital formation.



|                                |      |
|--------------------------------|------|
| Finland                        | 17.6 |
| Greece                         | 15.4 |
| France                         | 14.7 |
| Italy                          | 14.2 |
| Austria                        | 13.3 |
| Sweden                         | 12.9 |
| Portugal                       | 12.3 |
| Ireland                        | 11.8 |
| Belgium                        | 10.9 |
| Germany (excluding former GDR) | 10.7 |
| Denmark                        | 9.7  |
| Spain                          | 8    |
| Luxembourg                     | 6.4  |
| Netherlands                    | 5.7  |
| United Kingdom                 | 2.7  |
| European Union                 | 10.4 |

It can be seen from this table that in the Union as a whole public undertakings account for roughly 10% of the economy, but that there are marked national differences, with a figure of less than 3% in the United Kingdom, around 6% in the Netherlands and Luxembourg and about 15% in Finland Greece, France and Italy, while the others are around the average.

## II. Development

Over the past twenty years (more precisely between 1973 and 1993) the percentage of public undertakings in the economy went up, from roughly 14% to nearly 17%, in the first half of the period and subsequently declined to the present 10%. With the current trend towards privatisation, the figure is likely to fall further and stabilize around the 8 to 9% mark.

## III. Situation in various sectors

Subject to national differences, public undertakings can be said to account for the following percentage of the workforce:

- 56% in transport and telecommunications
- 55% in the energy sector

- 15% in financial services
- and only just above 3% in industry.

## **CONCLUSION**

Accounting for about 10% of the Union's economy and falling, public undertakings are organisations with various names and of a diverse legal nature, governed by ordinary law as well as special legislation. However, they are always created by public authorities which have a dominant influence on them and very often own them, although they retain a substantial degree of autonomy which is usually reflected in their having legal personality. They generally have a special mission which is fairly often a genuine public service role.

## **PART II PUBLIC SERVICE MISSIONS ATTRIBUTED TO UNDERTAKINGS IN THE MEMBER STATES**

The concept of 'public service' is not to be confused with that of 'public undertaking' since it concerns only some public undertakings and may also apply to many private firms. It therefore has to be studied as a separate concept.

### **CHAPTER I: THE BASIC MECHANISM OF PUBLIC SERVICES**

#### **I. The concept of public services**

Although this expression is mostly used in continental European countries, essentially the same concept is found elsewhere under different names such as 'public utility' or 'public interest'. It exists in the Treaty of Rome as a 'service of general economic interest'. It can thus be regarded as common to all countries in the Union.

##### **A. Definition**

A public service is an economic activity of general interest defined, created and controlled by the public authorities and subject, to varying degrees, to a special legal regime, irrespective of whether it is actually carried out by a public or private body.

1. As an activity, a public service differs from other forms of state intervention in the economy which do not involve production activities.
  - (a) the first difference relates to the regulations imposed on economic activities, for instance, to protect safety, health or the environment, but which do not cover how the economic activity is carried out. The public service is designed to make sure that an activity will be carried out on a permanent basis since it is considered essential for the public good: it is outside the scope of free enterprise since it stems not from private initiative but from the will of the public authorities.
  - (b) it is also different from state intervention in the general interest which does not entail production activities, in particular intervention to ensure a balanced economy and assistance to sectors in difficulty.
2. As an economic activity, a public service provides goods or services at a price and thus differs from administrative, social or cultural public services which are generally delivered free of charge.
3. It is based on a general interest requirement which is common and essential for all but which the private sector cannot or is unwilling to meet and therefore has to be taken over by the public authorities. Even when the authorities do not provide the service themselves but delegate the task to an external body, for instance a public or a private firm, they retain the responsibility for defining its substance and indeed its very existence since they may abolish it when the corresponding need has disappeared.

4. When a public authority contracts out a public service task, it generally imposes specific obligations on the body concerned and, as a quid pro quo, grants special rights such as exclusivity, the right to expropriate private landowners or access to public property.....

## B. Principles

On the basis of this definition, the three fundamental principles of public services are generally said to be:

- (1) equality or universality: it must be available to all under the same conditions; this generally takes the form of a requirement to provide a universal service at uniform prices;
- (2) continuity: the service must be provided on an uninterrupted and regular basis (supply obligation);
- (3) adaptation: it must be modified as needs change and, ultimately, abolished if it is no longer required.

## C. Variability of the content

Although the definition of public services is more or less universal, their content is essentially variable.

1. What is understood by general interest, or rather the activities classified as such, varies in space and time depending on the conception one has of society, which may be more or less liberal/collectivist. In theory the following two extremes might be envisaged:
  - undiluted liberalism in which the general interest, and consequently public service, is reduced to almost nothing; individual interests and private initiatives tend to fill the economic sphere;
  - undiluted collectivism where virtually every human need is seen as being of general interest and thus likely to justify the creation of a public service.

The reality is made up of a wide variety of situations that lie somewhere between these two extremes.

2. The substance of public service also varies depending on the economic level of society, since a given society will meet its citizens' needs by providing services proportionate to its resources.
3. The public service also responds to technical advances. Technical progress may lead to the creation of new public services, historical examples are the railways and the telephone which were not immediately perceived as being of public interest. But the reverse is also true, for instance, new telecommunications services provided by the market on a vast scale and at low cost are not regarded as requiring state intervention.
4. Finally, the principles of the public service apply differently to the various sectors concerned.

## **II. Definition of and responsibility for public services**

### **A. Definition**

In principle, the activities classified as public services are determined exclusively by the State, and, more specifically, the legislator. In a federation, however, the initial power to do so may be vested in the federated states.

### **B. Responsibility**

The power to actually establish the service (creation, organization, control) may lie with different public authorities:

- central government for 'national' public services;
- federated States;
- local authorities (regions, provinces, districts, municipalities) for 'local' public services.

## **III. How public services are managed**

A public authority that sets up a public service can always opt to manage that service itself; this is known as 'direct management'. Very often, however, it prefers to delegate the management to a public or private operator: this is 'indirect management' or 'delegation of public service'. In such cases, the public authority will determine the 'public service mission' of the operator and impose detailed 'public service obligations' to that effect.

A. Delegation of public services can be done by unilateral decisions of the public authorities, in other words by statute or regulation. This is generally the case where the operator is a public undertaking. In other cases, it is done by contract: the mission and obligations are included in an agreement between the authority and the operator.

1. In the most common contractual situations, the operator is a genuine contractor running the service for his own benefit and at his own risk. His income does not come from the public authority but from fees paid by customers. This situation has two variants:

(a) in the first (usually known as a 'public service concession'), the operator has a duty not only to provide the service but also to set it up, i.e. to build all the facilities required (for instance, pipes for water distribution);

(b) in the second (contracting out or 'affermage' in French), the operator only has to manage the service, the plant and equipment being provided by the public authority.

2. In less common situations, the operator is only a manager directly remunerated (in the form of a fee or a percentage of turnover) by the public authority which itself collects the fees charged to users.

3. Other contractual arrangements involve legislation giving a public undertaking a public service mission with various contractual instruments setting out detailed obligations.

B. A distinction must be drawn between the delegation of public services and public procurement.

- (1) In public procurement the public authority buys goods (vehicles, office equipment, etc.) or services (studies, leasing of equipment, etc.) primarily to meet its own operational requirements. No service is provided for the public as such. What matters is the best use of public money and consequently there are strict procedures for the award of contracts and public calls for tenders to ensure that the authority selects the firm which makes the lowest bid.
- (2) In the delegation of a public service, the authority does not normally buy anything but delegates to the co-contractor responsibility not for the administration as such but for providing a service to the public sometimes for a long period. Traditionally this has justified the authority having complete freedom of choice of its co-contractor. There is a recent tendency, however, to impose some prior publicity requirements to ensure a degree of competition between interested firms.

#### **IV. Public services and public undertakings**

An analysis of the way in which public services are organized confirms the distinction between the two concepts.

- (1) On the one hand, some public undertakings operate in areas which are entirely market based and where the public authorities play no part, for instance car manufacturing, aeronautics, steel, banks, insurance. These are clearly outside the scope of public services and not relevant to this study.
- (2) On the other hand, quite a number of private firms do carry out public service missions and, with the current drive towards privatisation, this is becoming more and more frequent.
- (3) The concept to be borne in mind is therefore that of 'public service undertaking' or 'public service operator'.

### **CHAPTER II: PUBLIC SERVICES IN THE MAIN UTILITIES**

#### **I. Scope of the study**

The study examines the position of public services in the Member States (Union of the Twelve). It focuses on the utilities which are characteristic of the public service sector by virtue of their major infrastructures, often entailing land use privileges and 'natural' monopolies, and the fact that they are used by the overwhelming majority of citizens. The study looks at the seven most important networks, which are mostly organised at national level and as 'public services', with variations depending on the services provided and the Member States. They are:

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

For each sector in the 12 countries, the study provides a monograph, detailing:

- the general legal framework, i.e. the role of the public authorities and the global concept of the service;
- the structure: operators actually providing the service;
- public service missions and obligations imposed on operators;
- special rights granted to them.

## **II. Results of the survey**

### **A. Diversity of organisation**

1. The organisation of these public service networks varies considerably from country to country and sector to sector in terms of:

- (a) the level of public authorities responsible:
  - central government,
  - federated states or regions,
  - local authorities.
- (b) the method of regulation by these authorities:
  - direct control by the administration itself (traditional 'continental' model);
  - control by an independent regulatory body appointed by government (new 'British' model).
- (c) the type of operator:
  - a public administration at national or local level;
  - a public or private firm with a national monopoly;
  - big oligopolistic private firms;
  - multiple small businesses with different legal status.
- (d) the framework of missions, obligations and special rights. These may be substantial and detailed or weak and vague, formal or implicit, based on public decisions (statutes, regulations, contracts), private agreements or simply on custom.

On the basis of these criteria, one could establish a sort of 'national typology' consisting of:

- (a) countries (Belgium, France, Greece, Italy, Luxembourg, Spain, Portugal) where the idea of public service is well established and where, in most of the network sectors, there is one large public undertaking with a national monopoly and strict statutory obligations;
- (b) countries (Ireland, United Kingdom) where up until about ten years ago the idea of public service was not substantially different, although not traditionally formalised, but where the recent drive towards privatisation and deregulation, particularly in the United Kingdom, has considerably changed the picture. Now the sector is essentially made up of private operators subject to regulators who are independent of the public authorities although substantial areas of public ownership, general interest considerations and special rights still exist;

(c) countries (Denmark, Germany, the Netherlands) where public operators, which were often the government administrations themselves (direct management), used to have an important role, although a good many sectors were the responsibility of the local authorities with a variety of operators but where the current trend is to privatise the activities concerned while maintaining a fairly high degree of public service.

## B. A common concept

Despite the differences of organisation, these 'network' activities have one thing in common - nowhere are they subject to the statutory provisions applying to the production of ordinary goods and services.

1. Ordinary economic activities are subject to the principle of 'free enterprise' or 'freedom of trade and industry'. This means that the public authorities do not intervene to create or define such activities, they leave the initiative in private hands, confining themselves to issuing regulations to ensure compliance with certain requirements such as safety, environmental protection and the health and safety of workers. To put it simply, none of the twelve countries has legislation aimed at ensuring the production of steel, shirts or chocolate. If there is no private initiative, the goods will not be produced. At the same time anyone is free to start up such an activity and to carry it out as he sees fit, provided he abides by the relevant legislation.

2. However, all EU countries have specific state intervention to ensure the existence of utilities such as electricity, gas and water distribution, railways, urban transport and postal and telecommunications services. Furthermore, this intervention almost always involves a degree of regulation of access to the activity and the way in which it is performed: ultimate control over investments and prices, imposition of general interest missions and objectives, granting of special rights. The effect of such intervention is to put the activity outside the market and competition to a greater or lesser extent .

3. There is undoubtedly a general trend, the pace of which may vary from one country to another, towards making the system less rigid and reducing public authority control by moving:

- from a service under direct public authority management to one with a minimum degree of autonomy, then to a public undertaking, and finally to privatisation;
- from government control to 'regulation' by an independent body;
- from monopoly situations to a degree of competition;
- towards a reduction in the obligations imposed on operators.

4. However, in all countries these activities are still governed by special rules giving the public authorities a certain role. For instance, the 'regulators', appointed by the public authorities, exercise control in the public interest, which is not really different in principle from the control formerly exercised by the government that they have replaced and which sometimes gives them considerable powers over operators. There is no 'regulator' for the production of cars or biscuits. Nowhere have the network activities become just like any other economic activities. Even if the term itself is not used, the idea and principle of public service still applies.



### **PART III: PUBLIC SERVICES AND EUROPE**

The concept of public service can be seen in various forms in all European countries but does it have a European dimension? Answering this question requires a survey of the Union's competence in this area and its attitude to activities which are organised as public services in the Member States. It may also be useful to consider the possibility of a European public services policy based on a common approach to the concept of public service and appropriate instruments.

#### **CHAPTER I: EUROPEAN COMPETENCE IN PUBLIC SERVICES**

##### **I. Competence as to the substance**

###### **A. In the Treaty of Rome**

(1) Without referring explicitly to the concept of public services, a number of important provisions of the Treaty concern public service activities in the Member States, first and foremost, the basic rules governing the internal market:

- free movement of goods (Articles 30 and 34);
- right of establishment and freedom to provide services (Articles 52 and 59);
- competition rules, including the prohibition of state aids (Articles 85, 86 and 92 to 94).

These regulations necessarily conflict with the arrangements introduced by Member States to protect certain activities in the general interest, all of which restrict the freedom to produce, buy, sell, transport or export goods and services.

(2) On the other hand, the derogations to these liberalization measures provided by the Treaty may serve to safeguard public services; these are:

- (a) derogations to the free movement of goods and services on the grounds of public security or public health (Articles 36 and 56);
- (b) derogations to rules on competition and state aids for reasons of general interest (technical progress, consumers' interests, social policy, regional policy, etc.);
- (c) the specific derogation for the transport sector provided by Article 77, which allows for aids corresponding to 'obligations inherent in the concept of public service' (this is the only explicit reference to the term in the Treaty).
- (d) above all the blanket derogation in Article 90. Although pursuant to Article 90 all the Treaty rules apply to undertakings which hold special or exclusive rights (§1), it allows for special treatment in favour of undertakings 'entrusted with the operation of services of general economic interest': which are subject to Treaty rules only in so far as this does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

- (3) Finally, the objective of 'economic and social cohesion' added by the 1986 Single Act and designed to reduce the backwardness of the least-favoured regions, can be regarded as an element of general interest and therefore a basis for a Community attitude favourable to public service.

#### B. In the Treaty of Maastricht

- (1) Two new objectives may have an impact on public service activities: consumer protection and protection of the environment (Titles XI and XVI).
- (2) A new competence given to the Community (Title XII), namely the establishment of trans-European networks in the areas of transport, telecommunications and energy infrastructures, is of special relevance to public service activities. These networks are designed to link island, landlocked and peripheral regions with the central areas and could gradually become the basis for public services on a European scale,

## II. Instruments and procedures

The Community's competence for public services under the Treaties is implemented through the usual ways and means available to the Community institutions:

#### A. Administrative action

Administrative action in respect of individual cases is the responsibility of the Commission which has:

- (1) a general power of intervention under Article 169 of the Treaty of Rome whereby it can, by a reasoned opinion, invite a Member State which has failed to fulfil an obligation to modify its behaviour.
- (2) special powers to enforce competition rules
  - (a) in the case of undertakings (Articles 85 and 88): granting an exemption or issuing an injunction to put an end to an unlawful practice;
  - (b) in the case of States (Articles 92 - 94): ruling that an aid is compatible or incompatible with the common market.
- (3) particular powers regarding public service activities (Article 90(3)): in applying the Treaty rules to public undertakings, undertakings with special or exclusive rights and undertakings entrusted with services of general economic interest, the Commission has a particular duty which includes the right to address appropriate directives or decisions to Member States.

#### B. Judicial action

A case involving a public service can be brought before the Court of Justice under the following procedures:

- Article 169 (initiative of the Commission)
- Article 170 (initiative of a Member State)
- Article 173 (initiative of an undertaking, a Member State, the Council or the Commission)
- Article 177 (preliminary ruling requested by a national court)

C. Legislation

- (1) Legislation on matters likely to concern public services will normally follow the usual Community legislative processes, which are based on a proposal from the Commission and a decision involving both the Council and Parliament under arrangements which vary according to the subject area:
  - (a) Transport (Article 75): codecision procedure involving Parliament and the Council (Article 189c).
  - (b) Approximation of laws with a view to achieving the common market (Article 100): unanimous decision by the Council after consulting Parliament;
  - (c) Harmonization of laws to achieve the internal market (Article 100a): cooperation procedure involving the Council and Parliament (Article 189b).
  - (d) Trans-European networks: cooperation or codecision.
- (2) The Treaty has also conferred legislative power on the Commission in the case of public services: the Commission can adopt directives concerning public service undertakings pursuant to Article 90(3).

## **CHAPTER II: THE EXERCISE OF THE EU'S COMPETENCE - THE COMMUNITY'S ATTITUDE TO PUBLIC SERVICES**

Despite the powers conferred on them by the Treaties, the Community institutions have, for almost thirty years, chosen not to take action relating to public services, partly because these activities were seen as being linked to public undertakings which, under Article 222, they were prohibited from touching and partly out of deference to national sovereignty which was highly sensitive to the issue. It was not until the mid-1980s with the decision on completion of the internal market, which by taking the logic of the internal market to its natural conclusion was bound to encompass activities where the concept of public service applied, that the Community turned its attention to this area. At the same time the Single European Act introduced the rule of majority voting in the Council for adoption of much of the internal market legislation, thus facilitating considerably Community intervention in these areas.

Community provisions were fairly neutral with regard to the public service, offering various options among which Community institutions could choose, namely:

- (1) drastically reducing the role of public service by strictly imposing the rules of economic liberalization on the activities concerned.
- (2) protecting national public services by making full use of all the possibilities of derogations from these rules.
- (3) creating a basis for public services at European level through the approximation of national legislation and the establishment of trans-European networks.

### **A. The administrative action of the Commission**

The Commission has used its executive powers (as listed above) to challenge the special and exclusive rights of public service undertakings, particularly in telecommunications, postal services and transport. Virtually non-existent up until the mid-1980s, and sporadic until about 1990, Commission action has become systematic and extended to all sectors, including energy. Generally speaking, the guiding principle behind Commission action seems to have been to allow the public service a minimal role and to take the view that any special rights should for the most part disappear.

### **B. The attitude of the Court of Justice**

The Court did not take a clear position on the concept of public service before the late eighties. Until then, it had simply confirmed that undertakings enjoying special or exclusive rights were subject to the rules of the Treaties. It then started to make use of the derogations provided by the Treaties for public services, initially adopting a cautious approach. It was not until recently that the Court accepted that full effect should be given to Article 90 §2. In the important 'Corbeau' and 'Almelo' rulings (1993 and 1994) the Court acknowledged the essential elements of the public service, including the economic balance aspect, i.e. as a system of more or less profitable services, where profits in some areas make up for losses elsewhere, although it excluded from the concept services which do not respond to a general interest requirement, except where they are necessary for the overall balance.

C. Community legislation

1. Essentially inspired by the ideas of the Commission and sometimes decided by it within the framework of its own powers, Community legislation on network activities has mainly been aimed at extending the principles of the internal market to these activities: free movement of goods, freedom to provide services, competition. It has therefore basically consisted of abolishing special or exclusive rights in order to 'open up the market' in these activities. The idea of public service is of course included but often in a limited and much narrower form than exists in several Member States. The concept is being dismantled in the following stages:
  - (a) separation of the regulatory and operational functions;
  - (b) application of the 'common carrier' concept which separates off the service from the infrastructure, which becomes the basis for several competing operators;
  - (c) breaking up the provision of the service itself;
  - (d) finally, liberalization of the activity with the abolition of all or most of the special rights and reducing the public service to isolated obligations, mainly of a social nature, or to a set of basic services for all which are classified as 'universal services'.
  
2. In this general picture, the situation varies from one sector to another:
  - (a) The greatest liberalisation is probably in telecommunications. A universal service has been maintained but in the form of relatively limited obligations. Special or exclusive rights will gradually be phased out since the opening up of the market to full competition will be extended to all services: even voice telephony, which is still protected for time being, will be liberalised in 1998.
  - (b) For energy, liberalisation is less advanced. The gas and electricity transportation monopolies have been restricted by the transit obligation giving operators access to the network. Legislation recently adopted for the electricity sector has also liberalized production. However, by restricting third party access to the network, transportation and distribution has only been opened up partially, and essentially to the benefit of the largest consumers.
  - (c) In the area of transport, Community legislation on railways, although opening the market to a certain extent, allows Member States to continue to give public service operators priority access to the networks. Air transport, however, will be totally open to competition in 1997 although the option of public service obligations will remain.
  - (d) Postal legislation is much more favourable to the public service: it gives a considerable substance to the 'universal service' by imposing clear standards and stringent requirements on Member States for customer services. By safeguarding Union citizens' entitlement to a high standard of postal services, it constitutes a major step towards creating a public service at Union level. It also guarantees the economic viability of the service to some extent by allowing Member States to 'reserve' certain services for public operators. It must be noted, however, that this possibility is guaranteed only until the year 2000.
  - (e) The Community has also begun to implement the trans-European networks introduced by the Maastricht Treaty. These networks are defined as the integration of national networks in the

interest of the Community and with a public service mission. Decisions are well advanced for transport but less so for energy and telecommunications.

**D. Overall positions**

1. For a long time Parliament was the only institution to attempt to define an overall view of the public service. Reference can be made to the following:
  - (a) the resolution of 12 February 1993 on the role of public sector in the completion of the internal market;
  - (b) the hearing on public undertakings held in April 1993;
  - (c) the resolution of 6 May 1994 on public undertakings, privatisations and public services in the Community (based on the Speciale report);
  - (d) the resolutions on the Intergovernmental Conference on the revision of the Treaty on European Union:
    - 17 May 1995 (Bourlanges/Martin report),
    - 14 December 1995,
    - 13 March 1996;
  - (e) the resolution of 15 October 1996 on the 25th Commission report on competition policy (Garcia Arias report).

In its various initiatives, Parliament has regularly defended the traditional concept of the public service as an economic activity taken over by the public authorities in the general interest. But it has above all supported the idea that there is a general European interest in the form of a right for all citizens of the Union to equal access to essential goods and services, that the Union has a duty to safeguard this access and that this forms the basis of a European public service. It has specifically advocated that this requirement should be formally recognized in a charter and in the treaty.

2. The Commission did not adopt an overall position on the public service until its communication of 11 September 1996 on services of general interest in Europe.
  - (a) Albeit somewhat late in coming, this document is significant in that it gives full recognition to the concept of public service:
    - in that it is defined traditionally as an economic activity covering essential needs of the population that cannot be met by the market and that the public authorities must therefore guarantee as social rights.
    - in the justifications cited for public services:  
solidarity and social cohesion

- . long-term interests of society (planning, conservation of scarce resources)
  - in the principles established:
    - . traditional - continuity, equality, adaptation
    - . or new - transparency, quality, regulation.
- (b) the document also expresses a real awareness of the European dimension of the public service. Services of general economic interest organized at national level are specified as a key element of the European model of society by virtue of the place they occupy in the shared values on which European societies are founded.
- Europe must maintain public services and improve their efficiency.
  - The general interest can also be assessed at European level, a public service must be seen as an integral aspect of economic and social cohesion at Union level and of European citizenship.
  - The Union must therefore take it into account in defining its actions and formulating its policies.
- (c) Finally the Commission has brought forward proposals which may contribute to implementing a European policy on public services:
- modification of the Treaty (Article 3) to add 'contribution to promotion of services of general interest' to the Union's competences;
  - establishing instruments to evaluate services of general interest, by sector;
  - coordination of national bodies of general interest, even going as far as to set up European bodies in some sectors;
  - development of trans-European networks.

**E. Conclusions on the attitude of the Community institutions**

- (1) The Commission had hitherto adopted a somewhat reticent attitude to the public service, showing a degree of concern for general interest requirements but limiting public intervention catering for these needs to a 'universal service' which is minimal in nature or to certain social obligations; it has given clear priority to opening up the market, which has involved reducing and even abolishing the special rights on which public services were often based. In its communication of September 1996, it now seems to have come round to recognizing the public service and in particular its European dimension.
- (2) The Court of Justice has generally tended to confirm the Commission's approach but has recently seemed to shift towards a conception which is more in favour of the public service.

- (3) The Council has a less clear attitude since the governments it represents have very diverse views on the matter. It has, however, usually watered down the Commission's proposals in order to safeguard special rights and public service obligations.
- (4) Finally, the Parliament is the institution that has given greatest support to the public service and its requirements in terms of special rights, both in specialised legislation (for instance, energy, with the Desama report, and postal services) and in general initiatives.
- (5) The undoubted curtailment of the scope allowed for national public services, which is probably here to stay, as a result of Community intervention has been offset to some degree by:
  - (a) the fact that the term 'public service', long in disuse if not challenged, is now well established in Community vocabulary.
  - (b) the emergence of a concept of European public service, based either on infrastructures and regulatory bodies, or in the form of minimum services guaranteed by the Union to all its citizens in specific sectors, such as telephone and postal services:

### **CHAPTER III: ELEMENTS OF A EUROPEAN POLICY FOR PUBLIC SERVICES**

Growing Community involvement in the utilities, as a consequence of completion of the internal market, has created a need for a policy on public services at European level based on a definition of the scope of the public service and appropriate instruments.

#### **I. Possible scope of a European policy for public services**

There is a need for a consensus on a common basic concept of what constitutes the public service and on the aim of maintaining an adequate level of public service in Europe. This should be feasible since, despite the many differences in terminology, legal forms, administrative and economic solutions, the concept is understood and applied in all Member States. Once the objective has been defined, it will be necessary to establish the means of attaining it; in the European context this means determining what is a matter for joint action and what should be left to the Member States.

##### **A. The general objective - maintaining an adequate level of public service in economic activity**

The idea is that certain economic activities are of public interest: put simply, this is what public service means.

##### **1. Definition of an economic activity of general interest**

The concern for the public interest is the justification for political power in a democratic society and at the root of government activity in all areas, including the economic sphere. State intervention includes the organisation of activities which have three characteristics:

- (a) they are considered vital for the population and must therefore be provided in all circumstances and at a price that is affordable for all,



- (b) by their very nature they are generally ill-suited to competition and tend to give rise to 'natural' monopolies,
- (c) their operation often requires special rights, such as restriction of competition, priority access to public property or private land, financial compensation,
- (d) on the other hand, they remain economic activities, the production of goods and services billed to the user at prices taking costs into account and usually performed by undertakings rather than administrations; this is what distinguishes them from social services based on the idea of free aid to the deprived; we are not talking here about disadvantaged groups but the public as a whole.

## 2. Public interest aspects

The concept of public interest covers a wide variety of elements which can be encapsulated in two main aims:

- (a) integration, which covers both people's well-being and their integration into society and which can be termed a concern for democratic citizenship. It includes the following considerations:
  - social cohesion which requires all citizens, irrespective of age, physical condition, economic position and geographical location, to have access to what are regarded as essential services so that they feel they are part of society, with a view to strengthening social unity and preventing fragmentation and exclusion.
  - regional cohesion means that entire areas cannot be left without the basic services on which modern economic and social life depends, and thus lagging behind the level of activity and living standards in the rest of the country; such a situation, especially in peripheral or island regions, would eventually threaten national unity (concepts of regional planning and territorial continuity).
  - facilities designed to guarantee genuine enjoyment of certain fundamental freedoms which are essential to participate in the life of society, such as the freedom to travel, which implies the existence of frequent, comprehensive and cheap transport; freedom of expression, which relies on a cheap and secure means of communication (postal services covered by the secrecy of the mail, public telephones, etc.); freedom of the press, which can be supported by certain facilities provided by the postal service.
- (b) a concern for collective efficiency, which covers:
  - overall economic efficiency implying a search for the most advantageous solutions for society as a whole (sometimes exclusive rights will achieve optimum performance).
  - long-termism which makes high investment acceptable, even though it is not profitable in the short term.

- management of non-renewable or scarce resources and protection of the environment.
  - public property management requirements: roads, railways, airspace, airwaves.
  - national security, which relies to some extent on the organisation of certain economic services, in particular communications.
3. All these concerns give rise to severe constraints:
- (a) providing the service in all circumstances, which presupposes forecasting demand and the corresponding investment.
  - (b) serving all users, including those in places and at times where demand cannot be met economically.
  - (c) affordable and, preferably, uniform pricing.

These constraints are often expressed in terms of the traditional principles of continuity, equality and adaptation. But economic and social change has created new requirements which reflect a greater concern for users: quality of the service, customer information, independent control and sound management.

#### 4. Identification of activities of general interest

The decision that a particular activity is to be regarded as being of general interest and hence the decision to set up a public service at a national or local level is, of course, a matter for the authorities concerned. But the relevance of Community law means that it is necessary to reach a consensus on the activities likely to be involved. In fact the legislation provides the answer. The activities concerned are essentially the major networks that affect the public as a whole: public transport, gas and electricity distribution, postal services, telecommunications.

One might imagine that the European consensus on what constitute public services would not be as broad as that current in the Member States with the strongest public service tradition. Whereas these States would see public service as an overall and unified concept, and as a whole activity entrusted to a single undertaking, the Community approach tends to be restricted to certain aspects of the activity concerned, primarily infrastructure and basic services which are often classified as a 'universal service'.

#### 5. Inability of private initiative to respond spontaneously to general interest requirements

There should be agreement on the principle that it is not the place of private enterprise to determine what constitutes the general interest or a public service:

- (a) It has no legitimate mandate to do so since it represents private interests,
- (b) Nor does it have the ability to do so. Its aim is to make profits. It is not concerned about social cohesion or regional planning. It generally has no interest in the longer-term and does

not voluntarily become involved in activities whose profitability is by definition uncertain or non-existent and which in many cases also require sizeable investment.

## 6. Need for state intervention

Only public authorities are entitled to speak on behalf of the public interest and can therefore decide to set up public services, define their scope, impose obligations on undertakings providing them, grant such undertakings any special rights required and establish appropriate regulatory bodies.

### B. Flexibility as to the means of providing public services

An agreement at European level on the principle of the public service must be matched by a considerable degree of flexibility in the means of providing the service. In other words, Member States, which, despite Community intervention, retain a major role in the organisation of the service, should be allowed the greatest possible freedom of choice. The division of responsibilities between European and national levels will, of course, vary depending on the sector.

#### 1. The role of the Union

This is essential for at least two reasons:

- the logic of the internal market which applies to public services like any others;
- the new objectives of economic and social cohesion, consumer protection and European citizenship, which require a definition of the general European interest and measures to ensure that all citizens of the Union enjoy equal access to a range of essential services, which could be termed a European citizen's right to public services.

The Union's role therefore comprises:

- (a) surveillance on a case-by-case basis to ensure that the Treaty rules (freedom of movement and competition) are applied to public service activities in the form of:
  - administrative action by the Commission,
  - judicial action.
- (b) harmonization of legislation in specific sectors, the approach to which may vary from one sector to another, for instance:
  - virtually abolishing the possibility of a public service (complete deregulation);
  - leaving the Member States complete freedom of choice;
  - requiring the Member States to comply with a number of public service obligations, which may include fixing in detail the minimum level of services to be provided to all citizens of the Union, thus creating the beginnings of a European public service in a given sector.
- (c) the creation of trans-European networks may also further such a process.

- (d) however, the emergence of real European public services would require the Union to go beyond a role of defining obligations and rights and to take upon itself the responsibility for putting in place and regulating the service. This would suppose:
- that the Union would itself select the operators responsible for providing the service, through European public service delegations,
  - that it would confer upon itself regulatory powers.

This possibility would have to be examined extremely carefully and would apply to certain activities only and probably not for some time to come.

## 2. Discretion left to the Member States

Pending the emergence of European public services, the Member States will retain the primary responsibility for putting in place and regulating public services and will therefore continue to require a great deal of room for manoeuvre:

- (a) to determine the requirements imposed on operators: when Community legislation imposes public service obligations in a given sector, they must not be seen as a ceiling but as a minimum; the Member States will be free to add further requirements dictated by national needs.
- (b) in the choice of operators which may be:
- the public authority itself,
  - a public undertaking,
  - one or more private firms.
- (c) in the choice of legal instruments used to lay down the obligations and rights of operators: legislation or contract (various procedures).
- (d) how the service is funded:
- by the user, either solely on the basis of costs or with a system of compensatory pricing,
  - by access fees paid by operators with no public service obligations to those who do have such obligations or through a guarantee fund paid for by everyone and managed independently,
  - by the public authorities themselves.
- (e) regulatory systems which may be provided by the public authorities, parliamentary or judicial bodies or independent regulators.

Of course the solutions will largely depend on the traditions of the Member States and on national constraints and will often vary from one sector to another. However, they will have to take account of Community law, which means that exceptions to Treaty provisions (particularly special and

exclusive rights) will have to be justified on the basis of the derogations allowed and subject to scrutiny by the Community authorities.

## **II. Instruments of a European policy on public services**

### **A. Making better use of existing instruments**

The Community institutions have paid a great deal of attention to the issue of public services, using their administrative, judicial and legislative powers. However, this action, far from reinforcing the concept has tended to take a limited view of it. The first thing to be done is therefore to target existing instruments at public services to a greater extent.

1. It is to be hoped that the Court of Justice will confirm its recent approach and give full effect to the exemption provided for by Article 90(2) of the Treaty in favour of services of general economic interest.
2. Such judicial support would certainly help to correct the Commission's tendency to apply Treaty rules to public services just as if they were ordinary economic activities.
3. Legislation proposed by the Commission should be examined by legislative institutions with vigilance. Since the Council is weakened by its internal divisions on the issue, Parliament has a vital role to play. It should exert pressure to:
  - (a) maintain an adequate level of public service in each sector by advocating a comprehensive concept of the public service: a system of substantial missions and obligations and of special or exclusive rights when they are needed to support the missions.
  - (b) support a move towards European public services:
    - either through legislation for specific sectors: by imposing obligations to provide a minimum level of identical services for all citizens of the Union (for instance: postal legislation);
    - or on the basis of trans-European networks.

### **B. New instruments.**

The existing Community machinery can only be used to promote the public service on two conditions:

- firstly, the establishment of a framework that makes the idea of public service one of the basic principles of the Union;
- secondly, the setting up of political/administrative structures that will be a factor of consistency and vigilance in the area of public services.

1. Framework establishing the public service at a 'constitutional' level

(a) Full recognition of public services in the Treaty

A large number of proposals have been made by the Community institutions, the Member States and other bodies. There will obviously be more in the run-up to the Intergovernmental Conference to revise the treaties.

Most of these proposals essentially seek to modify Article 90 of the Treaty or to add new articles, the aim being to establish the concept of public service as one of the essential principles of the internal market on a par with freedom of movement and competition by giving full recognition to the right to establish services of general interest and to confer exclusive or special rights on the undertakings responsible for providing such services.

This has been called for by:

- the European Parliament in its resolution of 13 March 1996 on the IGC, which also proposed an amendment to Article 100a.
- the French Government in its contribution of 17 September 1996 to the IGC.
- the European Centre of Enterprises with Public Participation (CEEP) adding the removal of the Commission's specific powers under paragraph 3 of Article 90 (in its June 1995 report, 'Europe, competition and public service').
- the European liaison committee on services of general interest (document of 24 November 1995 entitled 'Services of general interest and the Intergovernmental Conference').
- The Initiative for public utilities in Europe (ISUPE), which would like to insert in Title V of the Treaty a new chapter on activities of general economic interest designed to give public services a specific place in the Treaty and to promote the emergence of a European public service, and at the same time amend Article 100a.
- Some people would prefer to amend Article 3 to include the promotion of public services in the Community's objectives and actions. The Commission takes this view in its communication of 11 September 1996 referred to earlier (General interest services in Europe).
- Others are looking at the provisions on citizenship (Second part of the EC Treaty - Articles 8 and following) with a view to making access to essential public services a guaranteed right for all citizens of the Union. The European liaison committee on general interest services has explicitly called for this by linking the concept of public service with the fundamental rights of the individual. The European Parliament has done so implicitly by advocating provisions guaranteeing each citizen the right to equal access to services of general interest (resolution of 17 May 1995 on the IGC). Without specifying which provisions should be amended, Belgium has also called for the Treaty to recognize that

each physical person is entitled to public services (contribution of 1 August 1996 to the IGC). The European Trade Union Confederation (resolution on the challenges of the IGC of 14 and 15 December 1995) and Spain (position on the IGC of March 1996) have made similar proposals.

Among these various proposals the most relevant are:

- Amendment of Article 90 - this corresponds to a defensive stance, namely that of safeguarding the Member States' ability to maintain their public services by making the public service a principle of the internal market on a par with freedom of movement and competition, rather than merely a derogation from them;
- Amendment of Article 8 - this is a more constructive approach, whereby equal access to public services defined and guaranteed by the Union, at least in general terms, would become a right of Union citizens and a factor promoting European public services.

(b) Establishing a European public service charter

The aim of the charter would be to create what might be termed a European 'doctrine' for the public service specifying what it entails, i.e. the justification for it, its principles and its scope, to serve as a point of reference for administrative action and legislation.

The idea seems to have come first from the French Government in a memorandum of July 1993 and was endorsed by Parliament in its resolution of 6 May 1994 on public undertakings, privatisations and public services in the Community. The Commission appeared to be coming round to the idea but did not mention it in the communication of September 1996. The Belgian Government included it in its contribution to the IGC of 1 August 1996.

The Charter would take the form of a declaration of principles and would, like the Social Charter (Community Charter of the Fundamental Social Rights of Workers), be adopted by the European Council.

In content, it could comprise two parts:

- the justifications for the public service, i.e. the considerations of general interest which support the notion. For instance:
  - . the idea of integration and democratic citizenship i.e. social cohesion, regional balance, safeguarding certain fundamental freedoms;
  - . the idea of collective efficiency: global economic interest, taking a long-term approach and the management of scarce resources.
- the main principles with which public services must comply:
  - . equal access
  - . continuity
  - . adaptation or flexibility
  - . quality
  - . transparency

- . control
- the special rights that may be granted to operators.
- a list of the areas in which the public services concept should apply.

## 2. Political and administrative structures

In order to make this legal and policy framework really effective, it would be necessary to establish the following administrative and political structures to raise the profile of public services:

- (a) A standing committee of the European Parliament on public services, which would examine all relevant legislation.
- (b) A European 'public service council or committee', composed of representatives of both public service undertakings and users of such services and acting as an advisory body to the European Union.
- (c) A Commissioner and a Directorate-General with special responsibility for public services.

## CONCLUSION

Public services are not to be confused with public undertakings, which may carry out activities which are devoid of any general interest and generally derive from private initiatives, nor, of course, with the public service itself. Public services are not defined by specific ownership arrangements but by their function: for the public authorities, this function consists of ensuring that citizens have access to services of an economic nature which meet essential general interest requirements and that cannot be satisfactorily met by private initiatives; the services are defined, organized and regulated by the authorities which generally grant them special rights which are perceived as necessary for the service provision. Public services exist whenever a political community decides that a particular economic activity which is vital for the general interest cannot be provided by the market alone.

The concept of the public service is familiar to all European countries and is applied to activities that operate on the basis of major infrastructure networks (distribution of electricity, gas, water, railways, local public transport, postal services, telecommunications) even if not all countries use the term and the organization and level of service vary from one country to another, with the general trend being towards contracting out to private companies under the control of the public authorities or independent regulators.

The very logic of European integration has called into question national public services in so far as they may constitute obstacles to creation of the internal market. The Community institutions have thus taken administrative, judicial and legislative action to liberalize the major networks to a large extent. However, the Treaty of Rome includes derogations in favour of services of general economic interest (first and foremost Article 90(2)) which are now being used to safeguard national public services. Community legislation on networked services now makes provision for concerns of general



interest by enabling the Member States to maintain public service obligations or even, in some cases, exclusive rights. It has even gone as far as to guarantee all citizens of the Union equal access to minimum services, referred to as a universal service. In doing so it has created embryo European public services.

A genuine European public service policy is feasible subject to agreement on one objective, namely maintaining an adequate level of general interest in economic activity, and on the means of achieving it, which will depend on striking a balance between the responsibilities of the Union and those of the Member States. This balance will vary from sector to sector. Where the Member States are best placed to act, as in the case of local services, European intervention will be kept to a minimum; elsewhere the Union will be able to define the specific obligations and rights of the service in more or less detail and it will be up to the Member States to flesh out this definition and to determine in full the responsibilities for providing and regulating the services; finally in some cases (for instance on the basis of the trans-European networks) the Union will be able to go as far as assuming full responsibility and setting up European public services.

This policy would be greatly facilitated by 'constitutionalizing' public services at European level by enshrining the concept in the Treaty and in a Charter that will provide a framework for Community decision-makers, and by introducing political and administrative back-up structures.

Thus, following a period of dismantling of national public services, the Union can look forward to constructing a period of public services with a European dimension to meet the fundamental concerns of social and regional cohesion and collective efficiency. In return, the public services sector will help to give Europe an identity based on values shared by all its member countries and will lend it a legitimacy, by bringing the process of European integration closer to the needs of its citizens.