Legal aspects of privatisation

proceedings

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FOREWORD

The XXIst Colloquy on European Law, organised by the Council of Europe in collaboration with the Faculty of Law of Eötvos Lóránd University, and devoted to the theme "Legal Aspects of Privatisation" was held from 15 to 17 October 1991 in Budapest.

The Council of Europe which consists now of 27 Parliamentary democracies - since the XXth Colloquy, Czechoslovakia, Poland and Bulgaria have become members - presents an ideal forum for legal co-operation in Europe. As such, the Organisation has organised since 1969 each year, in a different country, colloquies on European law.

The aim of these gatherings is to promote a free exchange of information and ideas on a particular legal theme which is topical in Europe.

The profound changes in Central and Eastern Europe have thus naturally led the Council of Europe to organise the XXIst Colloquy on European Law in Hungary, the first Central European State to become a member of the Organisation, with a view to helping the new democracies to create a legal system allowing them to move from a State-controlled economy to a free-market.

The European Law colloquies represent for the Council of Europe an appreciable source of proposals for inclusion in its programme of intergovernmental activities, and the work currently being carried out by the Project Group on Administrative Law - the elaboration of a draft recommendation on privatisations - is one example.

The Budapest Colloquy brought together about seventy participants from all over the world, including experts from Bulgaria, Russia and the United States of America; the OECD was also represented by an observer.

The opening session which was attended by Mr. L. KECSKES, Under-Secretary of State at the Ministry of Justice, included speeches by Mr. F. MÁDL, Minister without Portfolio, President of the Advisory Board of the State Property Agency and Mrs. M.- O. WIEDERKEHR, Head of Division representing the Secretary General of the Council of Europe. Mr. G. DEMSZKY, Mayor of Budapest addressed the Colloquy during the same day.

Mr. L. VEKAS, Rector of the University of Budapest and Mrs. V. LAMM, Director of the Institute of Legal and Political Research of the Academy of Science of Hungary, participated also in the Colloquy.

During the closing session which took place in the presence of Mr. I. VÖRÖS, Judge at the Constitutional Court, Mr. J. MARTONYI, State Secretary at the Ministry of International Economic Relations was given the floor for a remarkable intervention.

The discussions during these three days were centered on the following themes:

- Law and privatisations - a general presentation of issues

Rapporteur: Mr. J.F. ROBERT, Professor of Law at the University of Paris II, Chancellor of the University, Member of the *Conseil constitutionnel*

Co-rapporteur: Mr. F. GÖLCÜKLÜ, Professor at the University of Ankara, Judge at the European Court of Human Rights

- Legal forms and techniques of privatisation

Rapporteur: Mr. T.C. DAINTITH, Director of the Institute of Advanced Legal Studies, Professor of Law at the University of London

Co-rapporteurs:
Mr. G.E. DOMAŃSKI, Professor of Business Law at the University of Warsaw
Mr. P. KOTÁB, Member of the Chamber of Commercial Lawyers, Karlovy University of Prague

- Privatisation of public enterprises: the impact on freedom of information

Rapporteur: Mr. J. SCHERER, Attorney-at-Law, Senior Lecturer at the University of Frankfurt

- Means for protecting the users and former employees of privatised activities

Rapporteur: Mr. E. SMITH, Professor of Public Law at the University of Oslo

Co-rapporteur: Mr. E. HONDIUS, Professor of Civil Law at the University of Utrecht

Papers on the following subjects were also made available to the participants:

- Privatisation and citizens' rights, by Mr. L.N.L. da SILVEIRA, Deputy Mediator of Portugal

- Reality aspects of privatisation law, by Mr. L.N. GEORGAKOPOULOS, Professor of Law at the University of Athens

- Techniques of privatisation in Italy, by Mr. A. GAMBINO, Professor of Commercial Law at the University of Rome.

After the discussions, a general report was presented by Mr. A. HARMATHY, Dean of the Law Faculty of Budapest.

The discussions during the Colloquy which were of a scientific high level, were considerably enriched by the contribution of the General Rapporteur who actively participated in all working sessions. Like all rapporteurs Mr. Harmathy as well examined the concept of privatisation; he then raised the question on the usefulness of definitions and in particular the notion of State-property, the reasons, the modalities, the decision-making process and the consequences of privatisation were largely developed.

The results of the Colloquy have been submitted to the Committee of Ministers of the Council of Europe through the European Committee on Legal Co-operation (CDCJ).

This volume contains the speeches of Mr. MÁDL, Mrs. WIEDERKEHR and Mr. DEMSZKY, the reports, co-reports and notes presented to the participants at the Colloquy together with the general report of Mr. HARMATHY. The proceedings also include the list of participants.

SPEECH

by

Mr. Ferenc MÁDL
Minister without Portfolio
President of the Advisory Board of the State Property Agency

Ladies and Gentlemen,

May I welcome you, on behalf of the Hungarian Government, to this Colloquy during which you are planning to discuss privatisation. This process is very important and historic in this region. I think a Colloquy on this subject matter is most useful both in terms of academic considerations and especially in terms of pragmatic policy making and governmental activity. The results of such a Colloquy surely are very important for all parties involved and therefore it is a special honour for us to host this Colloquy here. I wish you working days and a pleasant stay in Hungary. The weather is wonderful so nothing is missing, I hope, to have a really pleasant stay and very useful work during the coming days.

It is expected that I exploit the time allocated to me - about ten or fifteen minutes, if I am not mistaken, - to highlight the major governmental strategies concerning privatisation. In this understanding I would really talk very shortly about the main goals on the one hand and, on the other, what the Hungarian Government, the hungarian public, the hungarian legislation and the hungarian laws mean by privatisation.

As you know, there are different philosophies in different countries concerning this subject. As far as the goals of privatisation are concerned, they are very well known. The main one is efficiency in economy: to build up an efficient, competitive economy. A country like Hungary which is so much depending on international economic relationships and foreign trade must really be competitive. History has proved that a State-operated economy was not an alternative as against market economies. It is proved that it was a failure in fact and, as a consequence, the economies in these countries got in a crisis. Our aim is to get out of this crisis, to find the way out of it, to build up a social market economy. To this end, real owners, real interest and real incentives have to be present in the economy. This meant, as history again has witnessed and proved it, a property structure, an ownership structure based mainly on private property. This is the basic institution out of which real interest and real incentives develop and emanate. So in order to build up a market economy we have to transform the State-run, State-operated economy into a basically private-property base structure in the coming years. The Hungarian economy was, as most of the one-time socialist economies were, up to 90 % State-operated, operated basically

by State enterprises. This 90 % roughly speaking, has to be transformed into an enterprise structure of private entrepreneurs of private companies and it is to be done hopefully during the mandate of the Government so that we can break down the State-operated economy share to less than 50 %.

The other goal, consequently, is to encourage and build up entrepreneurial class or middle class which is able to carry the political and economic message or mission of these general goals of the country. Market economy on the one hand and middle class on the other hand are expected to carry pluralistic democracy and to stabilise political democracy. In short, these are the general goals shared by all political forces in this country, the general goals and strategic policy of the Government as far as privatisation is concerned. Of course, since Hungary adhered to different international organisations and in particular to the Council of Europe, we also had to subscribe - beyond internal exigencies, I mean beyond internal interests - to the European heritage in terms of honouring human rights and pluralistic democracy. Part of this European heritage is market economy shared also by the philosophy of the Council of Europe.

That is all, I think, for the general strategic goals and the general policy behind privatisation philosophy, legislation and practice in Hungary. As I am expected to say a few words about privatisation as we understand it, let me highlight a few items of the policy and philosophy. One of them is to settle the ownership relationships in Hungary. A few months ago the most important law in this respect was promulgated, the law on the compensation of previous owners deprived of their ownership in the past forty years. This law is a basic and very important one since it has promised about 1.5 million Hungarians compensation for the loss of their property. This is a so-called privatisation philosophy instead of a re-privatisation in Hungary. There was a big discussion during the debate of this law in the Parliament whether or not one should opt for re-privatisation or privatisation. Re-privatisation would mean to restore the property title of the original owners to their particular property assets; the ownership-title of those people who have lost their property due to different considerations in those decades, due to either nationalisation, forced collectivisation or whatever. Hungary has opted for privatisation; for compensation of those who lost their properties but not for re-privatisation of the original assets, not for restoration of the property ownership claimed to those assets. So, we think the debate on how the ownership relationships should look like and should be looked upon by foreign and Hungarian investors, has been settled. It is a very important part of privatisation since it concerns 1.5 million people who will be compensated and will get so-called "compensation vouchers". They are negotiable instruments which can be used either to buy land as far as the rural areas are concerned in order to build up a so-called farmers' agriculture or to buy - with the help of these compensation papers - assets shares in State enterprises which are to be privatised. In this way, compensated people will have purchasing power to invest either into agriculture or industrial and other business activities. At the same time, addressees, the passive addressees of State enterprises which are to be transformed into private enterprises, are forced to sell State property to people against their compensation vouchers. Agricultural economic entities are also subject to this law and are to sell certain amounts of land to those who show up with these papers in order to buy land and to start agricultural business. The whole

procedure is administered and supervised by the State Property Agency. This was one of the basic elements of the privatisation process and, we think, we have settled property relationships in Hungary.

Another element of privatisation, if I take privatisation in a broad sense, is the rapid development of the private sector in Hungary. Private sector already developed in the past, but more rapidly in the last one and a half years. One can trace it back, say, to the late seventies when the private sector started to be encouraged and promoted in Hungary. Since, however, the new Government took office, new legislation and other measures have really been encouraging and promoting private business in general. Among others, there is the law on entrepreneurial freedom which has eliminated all restrictions concerning private economic activity. Hence private sector is a dramatically developing part of the economy. Some say it is responsible for about 30 % of the national GDP activity.

The third one is foreign investment in Hungary which also brings in and ensures privatisation. Economy, the non-State economy and foreign investment, as you may know, are rapidly developing in Hungary. It is really accelerating, this year is especially successful: we have reached, so far this year only, one billion dollars for investment. There are about 10 thousand investments, I mean, foreign investments in Hungary. Among them quite a few big ones which you may have heard of as well. The really big ones are very important, of course, for Hungary, because they have broken - psychologically - the dikes of the sea. As soon as big ones like Suzuki, General Motors or Siemens showed up here with substantial investments, other came immediately and, due to this end, of course, to other circumstances, foreign investments in Hungary are seemingly accelerating.

In the process of building up private business and private economy to replace an economy which was operated by the State, important elements are those laws which allocate previously State-operated property to local governments. Big magnitudes, I would say, of property have been allocated to local governments for, e.g. the housing fund. It covers the houses which have been nationalised and are now being or have already been transformed by law to local governments in their ownership. They can administer and manage it, exploit and, of course, develop it, even sell it. So it is no more a centrally State-operated property and bias, so to say. Very important are those laws which will allocate State-operated assets to different institutions like social insurance, scientific, cultural and other institutions. The Academy of Sciences, this building, e.g. is also State-operated, belongs in principle to the State. The Academy is operating, for the time being, about 60 research institutes and has the land of big buildings which are still State owned. According to the law on the Academy which is under preparation and will be discussed, probably very soon, in the Parliament, most of these assets will be turned over to the ownership of the Academy.

Last but not least, what we call *stricto sensu* privatisation is the transformation of State enterprises into private companies with the participation of domestic and foreign investors, new owners. This is what now is being in process and administered by not a Ministry, but by a social organ called State Property Agency.

In Hungary there are about two thousand State enterprises; about 50 to 60 % of them are to be transformed - during the mandate of the Government - into private companies. Up until now, 500 enterprises have already been registered in the process of privatisation and 200 of them are already transformed into domestic or foreign private property. It has been accomplished by various technics which you are surely discussing during this Colloquy.

These are, very roughly, the main elements of privatisation as we see it. The various technics and regulations of the privatisation process in Hungary, along with other philosophies of other countries in this subject-matter, will surely be discussed here. It is in this understanding that I wish you a good comparative work and much success.

Once again, have a nice time in Budapest. Thank you very much for your attention.

SPEECH

by

Mrs. Marie-Odile WIEDERKEHR
Head of Division
on behalf of the Secretary General of the Council of Europe

1. I am pleased to extend greetings today on behalf of the Secretary General of the Council of Europe to all participants in the XXIst Colloquy on European Law. In particular, I would like to greet the two members of the Government who have honoured this meeting with their presence: Mr. Ferenc MÁDL, Minister without portfolio, and Mr. Lázló KECSKES, Secretary of State Ministry of Justice. I would like to thank the Eötvös Lorand University and its Rector Mr. Lazos VEKAS and Mrs. Vanda LAMM, Director of the Institute of Political and Legal Research of the Hungarian Academy of Science, who are our hosts today in the prestigious setting of the beautiful city of Budapest. We are deeply grateful to Professor Attila HARMATHY and all his colleagues for organising this Colloquy in co-operation with the Council of Europe. I would also like to extend greetings to participants from all the countries of Greater Europe, some of whom are taking part for the first time, and to the OECD representatives as well as observers from non-European countries and international organisations which work with us in the legal field.

2. This Colloquy is the 21st of a series dating back to 1969, but it is not quite like the others. Of course, like the twenty Colloquies which have preceded it, the Budapest Colloquy aims to bring together, under the auspices of a major European university, participants from the worlds of public administration and higher education with a view to exchanging knowledge and experience on a topical legal issue. Last year in Glasgow we discussed moral dilemmas affecting life and death. This theme generated considerable interest, as reflected in the number of requests received for the Proceedings of the Colloquy even prior to publication. The themes of previous Colloquies reflect considerable eclecticism in their range of subjects chosen for topicality and interest to the European legal profession. To give a few recent examples, sport and the law was the theme at the 1988 Colloquy in Maastricht; at Zaragoza in 1987 the topic was secrecy and openness. The Lund Colloquy in 1986 dealt with the law of asylum and refugees; at Lisbon in 1984 discussions centred on the law and information technology in tomorrow's society - which is the society of today - and the 1981 Colloquy in Messina dealt with unmarried couples. Apart from these social issues, Colloquies have examined basic legal issues, focusing in particular on liability (physicians, employers, public bodies, judicial power) or contracts (standard terms, abuse of rights).

There can be no doubt that this year's theme is no less topical than its predecessors. In any event, it is at the heart of the far-reaching changes which are under way in this part of Europe. It is a theme of major significance for the future of ordinary citizens and for action undertaken in the legal and political spheres by the authorities of several countries represented here today, members or non-members of the Council of Europe. Loyal to its aims and its specific role of promoting the rule of law, the Council of Europe wished this Colloquy to higlight certain legal aspects of privatisation which are important from the standpoint of public freedoms and protection of the individual.

3. What is new is that for the first time ever the Colloquy on European Law is taking place in Hungary, which became the 24th member of the Council of Europe in November 1990 (followed by Czechoslovakia, which became the 25th member last spring). Poland is expected to join the Council of Europe in the near future.

There is therefore a link between today's event and the new mission conferred on the Council of Europe on its 40th anniversary in May 1989. We are proud to have been entrusted with setting up particularly close co-operation with the countries of Central and Eastern Europe in the field of human rights and law reform. As part of this mission we set up the "Demosthenes" programme, which bore fruit in 1991 with the organisation of approximately 70 meetings with lawyers from the countries concerned. These meetings covered the main areas of law currently being re-examined in Central and Eastern Europe: criminal law, access to the courts, administrative law, data protection, etc. This week no fewer than six officials of the Directorate of Legal Affairs of the Council of Europe - of whom there are only 40 in total - are here in Budapest for this Colloquy, a Conference on legal data processing and data protection and a meeting of accountants. As you can see, we feel quite at home in Budapest.

4. Another peculiarity of this year's Colloquy is that the discussions held in the course of these three days will be put into practice in the Council of Europe's work as soon as the Colloquy is over. In view of the priority attached to the theme of privatisations by the European Committee on Legal Co-operation of the Council of Europe, on whose proposal this Colloquy was organised, a Project Group on Administrative Law will meet on Friday here in Budapest to decide how the work of the Colloquy should be followed up in its own field of administrative law. This group of administrative law specialists has been entrusted with drawing up legal instruments for the privatisation of public services and companies which emphasise the basic principles of public law and guarantee the rights and interests of public service users. The various aspects of privatisation to be discussed this week were chosen with the tasks of the Project Group on Administrative Law in mind.

5. Firstly, we need to agree on a definition of privatisation. It is noticeable that each rapporteur examined the concept and put forward his own definition. One cannot fail to observe that privatisation is a multi-faceted concept raising legal questions which are as varied as they are complex.

In his introductory report Mr. Jacques ROBERT raises the relevant issue of the motives underlying privatisation, and lays out the main reasons why various governments chose to embark upon privatisations. He goes on to examine how privatisation is carried out, dealing both with the different authorities responsible for taking privatisation decisions in various countries and with the conditions of sale. Finally, he examines whether any firm or activity whatsoever can be privatised.

As an initial reply to these questions Dr. Feyyaz GÖLCÜKLÜ, Judge at the European Court of Human Rights, will remind us of the contribution made by the Court to protecting the right of property, and Mr. Luis da SILVEIRA, Deputy Mediator of Portugal, will examine the principles which should be borne in mind when protecting citizens' rights in cases of privatisation, with frequent reference to Council of Europe recommendations.

Mr. Terence DAINTITH will present a broad panorama of privatisation experiences in and outside Europe, giving a detailed description of the various methods employed.

Mr. Grzegorz DOMAŃSKI and Mr. Petr KOTÁB will examine the Polish and Czechoslovak experiences respectively. Mr. Leonidas GEORGAKOPOULOS will describe the situation in Greece.

Mr. Joachim SCHERER will deal with the impact of privatisation on freedom of information and examine whether or not access to information is facilitated by privatisation.

Mr. Eivind SMITH will examine a question of vital importance for the protection of individuals, namely whether it is possible to provide effective protection for employees and users of privatised companies against the negative or undesirable effects of privatisation, and if so, how. Mr. Ewoud HONDIUS will draw our attention to a number of points which may be of interest for this protection.

Finally, Mr. Attila HARMATHY will have the formidable task of summarising all the legal points contained in the reports and raised in the course of these three days. We are confident that he will submit a general report to us which will enable the Council of Europe to continue its work in the field of privatisation in the most useful possible way for the citizens and public administrations of Greater Europe.

6. Before handing over to the first of our rapporteurs, I would like to express my hope that this Colloquy will be a resounding success, and in particular that the discussions will result in concrete proposals so that the Colloquy will bring tangible benefits in future to the citizens of all our countries.

SPEECH

by

Mr. Gábor DEMSZKY
Mayor of the Town of Budapest

Ladies and Gentlemen,

It is a pleasure and an honour for me to welcome you here at the City Hall. I am most happy, both as the Mayor of Budapest, and as a member of the Council of Europe, that I can be your host today at this reception and it is not my intention to keep you away very long from the more substantial part of the programme. I would therefore to be very brief and just give you a few hints about the problems we are facing at the local level in the field of privatisation, the subject of your Colloquy.

Perhaps the hottest issue here today is the privatisation of housing. About half of all the flats and houses in Budapest are owned by local government bodies, most of them by the district municipalities of the 22 districts of Budapest; only a very small portion of this type of property is owned by the municipality of the capital. The various district governments are free to decide about the fate of the houses and flats in their property and indeed, they follow very different policies in this respect; we feel however that it would be very important to reach an agreement between the capital and the districts to co-ordinate their divergent practices. In fact, privatisation of municipal rental flats has been going on all over Budapest for some years now, in such a way that flats have been sold to tenants well below market prices. People are usually very eager to buy the flats they are living in, even if it is clear that they will face immense financial problems when it comes to maintenance or renovation; at the same time they refuse the other option, the idea of paying higher rent instead. This is a highly controversial issue, much debated by politicians, experts and organisations; we are of the opinion that for economic, political and sociological reasons, the sale of residences to tenants should be continued, with some modification of the terms of sale; the price should be at half the market price because people living in these flats have invested large sums of money in them before, that is, they have actually bought them at usually half the price of a similar privately owned flat. We are of the opinion in the present situation that revenues from sales carried out this way will be more reliable than revenues from increased rent. As regards non-residential properties, we think that they must be sold at full market price.

A question closely related to housing is the problem of real-estate management. The centralised company responsible for the maintenance of municipal buildings has done a notoriously bad job for the past forty years, with the result that most residential buildings in the capital are in a seriously deteriorated condition. In

order to improve the quality of real- estate management, the only possible alternative is privatisation. In this area, we intend to separate two tasks: maintenance on the one hand, and rehabilitation on the other. For maintenance tasks, we suggest that the property management of certain city blocks are put to open tender for private entrepreneurs and then a general meeting of residents determine the award for management. For rehabilitation there would be separate tenders and the final selection would be made by the municipalities. The cost of rehabilitation would be covered by funds raised through an intelligent real-estate policy.

Another area where some form of privatisation must be considered is the public works companies. These companies differ greatly in many aspects, in the quality of services they provide, in the effectiveness of their financial management, and so on. Despite these differences, there were a few features which characterised all of these companies at the end of 1990 - when the local government of the capital was formed. We found that these companies, like of course almost all big companies in the soviet system, had badly organised financial management, without regard to the principles of profit and loss, working with a lot of waste; also their internal structure was strictly hierarchical, bureaucratic and inefficient; and there was a lot of redundant staff. Besides, we also found that most of these companies were involved in activities not closely related to public services, and that they had large real-estate assets with significant maintenance costs, which were unnecessary for public services. To find a cure for these ailments, our first step was to ask independent experts to make an assessment of the companies' operations. The first company to be examined was Budapest Transport, where a reorganisation followed suit. We do not think full privatisation of these companies would be an option for us at the moment, but partial privatisation will certainly be necessary. We certainly intend to separate and privatise all activities outside the realm of public services and also plan to privatise real-estate assets of public works companies and thus restructure losing assets into profitable ones. Furthermore, in the case of Budapest Transport for example, we intend to privatise certain minor branches very soon, like boat traffic on the Danube, chair-lift hill transport, and so on; and then consider further privatisation later.

We are also planning and currently negotiating another possible version of privatisation; it would mean privatisation of the operation of certain services, like for example, water works, sewerage systems, waste treatment, etc. In this construction, the works themselves would belong to the city but a foreign company would take over operating these works for 25 years, for charges agreed in a contract.

In executing all these tasks there are some very important principles which must be followed strictly; first is that revenue from privatisation must not be applied to maintenance expenses but towards development; secondly, is that the quality of service must improve and we also consider it of paramount importance that environmental damages inflicted by these companies must decrease significantly.

Ladies and Gentlemen, I would not like to take up too much of your time or talk about things you might already be acquainted with, so I will stop here and ask you not to hesitate to come up with any questions you wish.

LAW AND PRIVATISATIONS - A GENERAL PRESENTATION OF ISSUES

by

Mr. Jacques Frédéric ROBERT
Professor of Law at the University of Paris II
Honorary Vice-Chancellor of the University
Member of the *Conseil constitutionnel* (France)

INTRODUCTION

After the end of the Second World War, the public sector underwent a very marked expansion in most European countries. Now, however, no one can deny that the public sector is dwindling markedly.

There are many **reasons for this trend** towards a decline in the public sector's hold over the economy. On the one hand, there has been a relative loss of momentum in the public sector, with poorer economic and financial results, and, on the other, the government has indicated a determination to cut back the public sector and its activities in favour of private enterprise.

This trend towards a deliberate cutback is particularly interesting in that it has been universal since the mid-eighties and has not spared France, which was even prompted to set up a **Ministry of Economic Affairs, Finance and Privatisation** in 1986.

It is precisely the universal nature and scale of the current, or at least recent, trend towards privatisation that differentiate it from many past examples of limited transfers of public sector undertakings or their subsidiaries.

In recent years many countries have experienced a very strong trend towards the transfer of company ownership from the public sector to the competitive sector - a trend which is part of the wave of privatisation that has swept over both the most highly industrialised nations and those which are less advanced in technological and economic terms. Even the Eastern bloc has been affected by the phenomenon, and is now trying to find solutions to its own problems in the western capitalist examples. China, too, has been affected by the privatisation trend.

The trend has thus affected all countries, both those considered conservative, like the United States and Britain, and those governed by socialist majorities, such as Sweden and Italy.

Overall, if we ignore the states of the European Economic Community, since the mid-eighties, privatisation operations have been carried out or are on the drawing board in some 60 countries of all kinds - both the most highly industrialised countries, like Canada and Sweden, and such third world countries as Mexico, Brazil, Morocco, Algeria, the Congo, Niger, Chile and Argentina.

Asia is no exception, moreover, with India, South Korea - which has for instance privatised its entire banking sector - Singapore, and so on.

Even the two countries which epitomise capitalism and have only a symbolic public sector (namely the United States and Japan) have embarked on privatisation schemes.

The tendency to privatise is not, therefore, really linked to any particular ideological approach, but rather to a certain awareness on the part of governments. It is possible to pick out some features of the attitude of those responsible for decisions on the subject:

- they are prompted primarily by the imperative need to return to concepts of **productivity** and **profitability**: they believe that ordinary law methods and a legal system based on ordinary law are the only ways of fully restoring freedom of competition and of private enterprise;

- the second motive is the commonly expressed determination to **reduce state centralism** and combat the frequently criticized omnipotence of the government. This is the classic idea of "ever less state intervention", which entails as systematic as possible a withdrawal of the authorities;

- a third objective of privatisation stems from the craze for **popular capitalism** recently observed in a very large number of countries: privatisation makes it possible, indirectly, to attract new stock exchange investors.

Although the motives and justification for any privatisation trend are understandable, we cannot go along with the die-hard advocates of private enterprise, for the public sector has rendered a huge service to modern economies by pursuing objectives that differ from and complement those of the private sector.

Should we, therefore, systematically support public enterprise or be out-and-out advocates of private enterprise?

Fortunately, the question is not couched in those terms, but it can nevertheless be of crucial importance, for the companies in question often have hundreds of thousands of employees, and privatisation of any firm is liable eventually to lead to redundancies.

Moreover, any privatisation venture implies a change of philosophy in the firm or branch concerned, and certain changes in its structure, which has to be adapted to performance and profitability requirements.

Once privatised, the firm thus has to react like a private body; it has to acquire the reflexes and methods of such a body and can, in future, rely only on itself.

In addition, it seems that the privatisation programmes carried out in many countries often reflect a loss of confidence on the part of the country's leaders in the efficiency of public sector undertakings, or even in the efficiency of some of the public services. At the same time, the inveterate advocates of the market economy have fuelled this loss of confidence by going out of their way to show, with statistics in support of their arguments, that private undertakings obtain results that are identical to or even better than those of public sector undertakings, at lower cost.

If we are to try and understand the phenomenon of privatisation, we have to ask ourselves four main questions:

I. What does the concept of privatisation cover?

II. Why is privatisation carried out?

III. How is a company privatised?

IV. Can any firm or activity be privatised?

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I. WHAT DOES THE CONCEPT OF PRIVATISATION COVER?

The very idea of privatisation reflects a certain withdrawal of commitment on the part of the state. According to the supporters of economic liberalism, excessive state intervention and an unduly strong state hold over the nation's economy curb private initiative and hamper the workings of the laws of the market.

To take a restricted view, privatisation is the transfer to the private sector of the ownership of undertakings whose capital is held entirely or partly by the authorities, as symbolised by the state or any other public body.

Accordingly, the privatisation operation has a much broader significance than **"denationalisation"**, which contrasts with the concept inherent in nationalisation.

Privatisation is not, however, analogous to **"deregulation"** or **"removal from state control"** (*"désétatisation"*), which usually simply reflects the transfer of power from the state to decentralised authorities. It also entails a broader policy than that which consists in applying private-management-type rules to public sector firms without changing their ownership.

We must therefore try and define the very concept of privatisation, since the word has different meanings.

a. According to one definition, the term "privatisation" refers solely to the transfer of firms from the public sector to the private sector.

This first definition thus concerns **the actual ownership of the firms.** This rigorous approach is the one used in **France**, which sees privatisation as the transfer of a firm to the public from the private sector. It is also the **British** approach, although there is a degree of flexibility in Britain.

This first definition of privatisation can, however, be qualified, in so far as the transfer may be **total** or merely **partial**. Holding all the shares in a firm is not the same as merely holding a majority or even a minority large enough to put a stop to certain decisions.

Privatisation is thus partial if full ownership is not transferred.

Privatisation does not, therefore, only mean transferring a company from the public sector to the competitive sector, but also introducing in a public sector firm a number of features traditionally associated with the private sector. Here we are in a **mixed economy** situation, which can also vary appreciably, depending on whether the state or public corporation hands over the majority of its shares or keeps a majority holding. The **Federal Republic of Germany**, for instance, is particularly keen on the mixed economy approach.

A similar partial transfer of ownership occurs when public sector undertakings have subsidiaries. Although the central holding company obviously remains in the public sector, the subsidiaries may be wholly or only partially privatised.

A privatisation operation can be carried out on a public sector company that was set up as such or on one that has been nationalised.

In other words, privatisation may mean the return of assets to the private sector or the transfer to the private sector of assets or firms that have never been privately owned.

The powers of the authorities may also vary from one privatised company to another. In **France**, for instance, when firms have been transferred from the public sector to the private sector, the State has, by setting up "hard cores", retained a watching brief over newly privatised companies. The question is whether the philosophy behind the system has not been distorted or even destroyed.

The "golden shares" approach in **Britain** produces similar results, since it allows the Government to continue to influence a firm which has been privatised by means of shares which it holds and which carry special prerogatives.

b. Another definition of privatisation is not concerned with the ownership of the firm but applies to the transfer to private firms of activities previously carried out by public corporations.

This second trend is connected with the noticeable and widely acknowledged shrinkage in the public service sector.

In other words, traditional public sector activities are being privatised, and this trend is becoming widespread, if not nationally, at least at local level.

For instance, local authorities are tending to contract out street cleaning, the upkeep of parks and gardens, rubbish collection and many other activities of interest to only a limited geographical area.

Even though this trend is widespread, it is necessary to be aware of the fact that, here again, there are variations.

The activity can be transferred to an existing private body or to one set up specially for the purpose, in which case the public corporation can retain a watching brief over the activity that has been transferred.

There is also a degree of privatisation when the private sector and the public sector work together to perform common or parallel functions. This undeniably involves privatisation, in so far as the public corporation no longer carries out all its activities and calls on the services of a private firm.

On the other hand, issuing a license does not under any circumstances constitute privatisation: it is simply a way of managing a public service and is based on a completely different approach.

This type of privatisation of administrative activities is particularly common in the **Federal Republic of Germany**, where public administration is mainly the responsibility of the *Länder* and the municipalities. Many service activities have, for instance, been transferred to the private sector (for example, waste disposal and school transport for the disabled in Berlin; fire-fighting along the Elbe and tugging services in ports in Lower Saxony; cleaning services in the Rhineland-Palatinate, etc.).

Nowadays we find that the tendency is not so much to privatise entire activities as gradually to transfer to the private sector specific activities carried out in connection with administrative functions.

This is true in Berlin of the construction of some school buildings, and of certain service activities connected with information and advice on housing modernisation; in Hamburg it is true of land improvement work, and in Lower Saxony of forestry jobs.

An identical trend has emerged in the municipalities because of financial problems arising in connection with the traditional administrative tasks, which are tending to entail more and more work.

Many municipalities have thus entrusted rubbish collection to private firms and have contracted out administrative activities connected with town or road planning, the layout of parks and greenery, etc. to private individuals.

Even in the **United States**, the country with the least nationalised economy of all the industrialised countries, there has been a substantial trend towards the privatisation of local public services over the last twenty years or so.

The towns and individual states have, to a very large extent, privatised the water supply, land improvement, park upkeep, urban transport, fire-fighting and road maintenance services.

c. The third and last definition of privatisation is connected not with the firm or activity that is transferred but with the legal system governing its administrative activities and, more particularly, the conditions under which they are managed.

When **methods** which are, if not taken from the private sector, at least based on private sector systems are introduced for the performance of functions entrusted to the authorities and carried out by them, we are entering, whether we like it or not, the world of privatisation.

Profitability, the systematic pursuit of profit, flexible management and modern human management techniques are increasingly being applied to the activities of many public bodies.

Does this trend not reflect, as it were, a broad view of the scope of privatisation?

There is no doubt that when an authority begins to think and act like a private body it loses some of its **specific features** and inevitably takes on **characteristics** which make it more similar to a private firm.

When, in addition, it engages in an industrial or commercial activity, whether production or the provision of services, it comes to resemble a commercial company very closely. In that case, it would not seem to be going too far to talk of a form of privatisation.

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II. WHY IS PRIVATISATION CARRIED OUT ?

Privatisation primarily means rejecting and contesting administrative management conditions.

a. The main reason for privatisation is to obtain more flexible, high-performance structures.

Streamlining, productivity and financial profitability are objectives that are brandished on the open market, which is subject to relentless pressure from increasingly fierce competition between firms and between nations.

The public sector is currently suffering from a **poor image** which it cannot shake off and which is due to what are seen as an unduly rigid structure and undue protection from the authorities and to what is presumed to be a systematic failure adapt to technical progress and innovation.

This rejection is also found, although in different forms, in the East European democracies, which are coming to realise that they must find more flexible systems of management. Even the USSR is contemplating privatising certain firms and activities ...

Although these countries talk of privatisation only in veiled terms, the fact remains that they are tasting the delights of private management.

The actual legal nature of public sector undertakings does nothing to facilitate any attempts to associate or merge with other economic partners, particularly those on the competitive open market. Yet all companies must now co-operate and participate in collective activities carried out jointly with economic partners that are sometimes strange to them if they want economic success.

Unfortunately, public sector undertakings are ill-prepared to engage in ventures of this kind and suffer from synergistic effects that are detrimental to them.

Moreover, private entrepreneurs have difficulty in understanding the rigid approach and lack of flexibility of resources that characterise the public sector.

Indeed, the two sides are poles apart in practice, if only because the authorities exert too strong an influence on the firms in which they hold all or part of the capital. It is difficult to believe that a private firm would accept that it should not be allowed to increase its prices, that it should be pressurised to a greater or lesser degree into maintaining certain loss-making or unprofitable areas of activity on the basis of social considerations such as employment problems, that it should be required to obtain prior authorisation, which often causes delays that are damaging to its efficiency and management, and so on.

The advocates of privatisation are out-and-out critics of the cumbersomeness of **public sector management** and the inevitable inertia it breeds. They use this argument to explain why many public sector undertakings are incapable of reacting quickly and seizing the most advantageous opportunities.

Privatisation is clearly part of a policy of making public groups more independent of the authorities and it is clear that the **Thatcher Government**, from

1979 onwards and the **Chirac Government**, in 1986, made privatisation one of the key features of their policies, on the basis of financial and ideological considerations. Indeed, the two facets of the subject are closely interlinked. Once the government finances firms to a greater or lesser extent, they come within its sphere of influence and, to a greater or lesser degree, lose their independence.

The only way of breaking this spiral is for public sector undertakings to regain financial autonomy, and privatisation is one way for them to do so.

Yet there is no doubt that the widespread trend towards privatisation has been due to a large extent to the desire to make the management of a number of companies more flexible and more efficient.

As the Law and the Executive see it, **deregulation and the removal of state control lead to the reinstatement of the basic machinery of the market** and therefore make for free competition, which is the only means of boosting the economy.

Privatisation is thus one component of the action which all modern economies are taking to increase their flexibility - an objective which, moreover, entails removing some of the large public monopolies which prevent freedom of competition and distort the workings of the free market.

Privatisation, which removes the constraints on public sector firms, thus makes firms more efficient and hence more economically competitive on the **international market**.

The desire to pursue such an approach has been particularly obvious in the **Federal Republic of Germany**, which has reduced administrative supervision in a joint management context, with the aim of fostering responsibility and motivation among public sector managers. In Germany the trend towards partial privatisation has thus been matched by a genuine desire to free public sector undertakings from the constraints inherent in public services, to make the rules governing them more flexible and to give their managers more independence.

In **Britain** one of the main Thatcherite objectives was to improve the economic and financial performance of the public sector.

Instead of simply making public sector companies more independent from the State, the Prime Minister considered it more effective to transfer them to the private sector; this view was, moreover, borne out in practice, in so far as most of the privatised companies improved their economic and financial results.

It is also clear that in the collective unconscious there are **two stereotyped** figures advocating different sides.

On the one hand, there is the **technocrat**, indulging in the delights of bureaucracy, centralising decision-making to the extreme and eyeing the rest of

mankind with scorn simply because he knows he is responsible for a public service or at least an activity that is deemed to be in the public interest.

On the other hand, there is the brilliant **company manager**, young and dynamic, creating jobs and breeding hope.

Even when this black-and-white picture of the situation is far removed from reality, the co-existence of these two myths is, in the final analysis, undoubtedly one of the causes of privatisation trends.

The picture is, moreover, borne out in various studies, both in France and abroad, which have compared the efficiency of the two forms of management (public and private) as applied to competitive firms in the economy. They tend to show that private management is more efficient than management by a public corporation.

In addition, contrary to what is widely believed, private firms are, on the whole, more generous than public sector firms with their employees in terms of both direct pay and a wide range of social benefits. On average, their profits are higher than those in the private sector. In short, if they are carrying out identical activities under similar economic conditions, they are more profitable.

Lastly, privatisation undeniably has the advantage of **clarifying responsibilities.** As they are flung into the ordinary commercial law sector, managers of privatised companies are, in practice, governed by the accountability rule and the judgment criteria that usually apply to commercial companies. They are therefore subject to the constraints of budgets and financial results, and their activities are measured by the size of their turnover and profit margin.

These indicators hide nothing, and are identical for all companies, whether public or private sector.

These managers are thus no longer allowed to shelter, more or less artificially, behind orders from the government in order to play down the unfortunate consequences of some of their decisions which prove in practice to have been rash ones.

b. The second reason for privatising stems from budgetary considerations.

Budgetary factors are one of the most powerful motives for introducing a privatisation policy. All states endeavour, for reasons of austerity and rigour, to reduce their budget deficits, and very large numbers of public sector firms receive, in various forms (endowments, subsidies, loans, etc.) financial aid from the State, which places a burden on the national budget and increases public expenditure, to much criticism.

Transferring such firms to private shareholders obviously makes for an appreciable reduction in State contributions. This constitutes, as it were, a popular miracle solution for reducing the public sector deficit since, at the same time, it makes

it possible to reduce, or at least keep steady, compulsory deductions from wages and to replace them by resources from privatisation transactions.

The proceeds from the privatisation of firms are thus an extraordinarily large of revenue for the State, with which it can fill the public coffers and thereby reduce the debt.

Similarly, when these resources come from the sale of subsidiaries of public sector companies, they help to improve the financial soundness of public groups, and at the same time, relieve the budget of the State, since it can cut back its own financial support to the firms concerned.

Privatisation is therefore carried out in the hope of bringing private money into the public coffers, which have an unfortunate tendency to empty.

Indeed, the desire to do so was clearly announced when **Japan** privatised Nippon Telegraph and Telephone and the Japanese National Railways.

Similarly, in **Italy** the main objective of privatisation was to improve the finances of three large public sector groups, ENI, IRI and EFIM, even though the State arranged to keep majority control. Italy is, however, somewhat unusual, in that the money from privatisation does not go directly into the State budget, but into the budget of the holding company.

The State does not, therefore, benefit direct from privatisation, but it benefits indirectly in so far as the improvement in the balance sheet of the large public sector groups, which used to have a chronic deficit and are now more or less breaking even, means that they do not approach the public revenue department for assistance.

As in Italy, budget considerations were one of the main causes of the wave of privatisation carried out by the **Spanish** Socialists.

It seems that in **Britain**, too, privatisation policy is part of a more general policy of widespread reductions in the public sector borrowing requirement. One of the reasons for selling companies has undoubtedly been the desire to fill the public coffers, which were in deficit.

It is, moreover, flagrantly obvious that the increase in the pace of privatisation between 1986 and 1988 was a response not so much to the desire to increase the general efficiency of the economic system quickly as to financial concern at a time when the revenue from North Sea oil was beginning to dwindle.

Conversely, Germany is the exception that proves the rule, for budgetary considerations have, all in all, been of very little importance in the **Federal Republic of Germany**, where privatisation has, more than elsewhere, been based on ideological motives that transcended the purely pragmatic considerations referred to above.

c. **Lastly, the third reason for privatisation is the desire to create a shareholding public and encourage employee participation.**

Any privatisation policy tends to be matched by a more or less conscious campaign to launch popular capitalism, with the aim of opening the Stock Exchange, which is still all too often reserved for a small circle of initiated people with large financial resources, to a wider public. These measures to promote shareholding among the public overlap with the now widely accepted idea that employees should be involved in their own company, one of the classic means being a policy whereby they hold some of the capital.

In addition, the fact that any privatisation operation is exceptional and that the conditions are laid down direct by the State - the only shareholder - means that for these companies the traditional obstacles to any policy of extensive participation are removed.

This explains the very specific provisions incorporated in the various privatisation projects in order to benefit the privatised firms' own employees.

Indeed, we very often find that employee participation and privatisation take place at the same time as part of a strategy of solidarity. **It seems only natural that privatisation should complement the more general policy of employee participation in the firm**, which governments want to pursue in order to promote shareholding among employees.

In practical terms, there may be numerous incentives and advantages: a reduction in the unit purchase price of the share, the allocation of free shares, payment facilities, etc.

In the case of France, there were several forms of benefits for the employees of privatised firms, modelled on the British example and part of a more general policy of participation, as set out in the political manifesto of the majority that emerged from the 1986 general election:

- the State was to offer **shares**, accounting for up to 10% of the size of the transaction, to the employees of the company or the subsidiaries in which the company had a majority holding;

- there could be **price reductions** of up to 20%, provided the shares purchased under these conditions were not resold within two years if the reduction was greater than 15%;

- the State could, by a decree issued by the Minister of Finance, allocate **one additional free share** per share bought direct from the State, up to a ceiling of half the social security monthly ceiling, provided the shares purchased by the employees had been kept for at least a year after the date on which they could have been sold.

Two measures were taken in support of the strategy of promoting shareholding among the general public:

- French natural persons who did not request more than **ten shares** at the time of subscription had their requests met in full;

- these people were, subject to certain conditions, **allocated free shares.**

Comparatively speaking, the advantages accorded to British small shareholders were, overall, greater than those afforded under the French scheme (payment of shares in two or three instalments; a premium resulting from the difference between the purchase price of the share and its first stock-exchange rate of as much as 60% in some cases, etc.).

In Italy and the Federal Republic of Germany, on the other hand, small shareholders were deliberately ignored and did not enjoy any particular advantages.

There is thus a clear desire to **promote saving** and **channel it towards productive activities** which are beneficial to the country's economy. At the same time, this policy helps to accustom people to, and promote the virtues of, **popular capitalism.**

In **Britain**, for instance, privatisation has created nearly 8 million new shareholders. Although the **French** score is not as high, the Parisbas privatisation operation, for example, attracted nearly 4 million small investors.

Privatisation clearly gave a strong boost to shareholding among the general public in both these countries.

It is worth considering whether the wealth of precautions taken in France and Britain for the benefit of small shareholders does not reflect a vague desire on the part of the governments to transfer the ownership of public sector undertakings without enabling anyone to take actual control of them.

This can be explained by the fact that in practice the **"popular capitalism"** that is so much sought after is liable to lead to an unduly widely dispersed set of shareholders. From the purely managerial point of view, the fact that the shares are spread over a wide public does prevent the shareholders from exercising effective control over the company managers.

A scattered set of shareholders is thus contrary to the objective of requiring company managers to be more accountable in return for their newly acquired freedom of management.

Piecemeal shareholding, which leads to a dispersion of capital, also carries obvious financial risks for the privatised firm, which becomes more vulnerable to economic attack in the form, for instance, of takeover bids: a big company or a group

of powerful investors can very well buy a substantial holding in the capital of a privatised firm on the stock exchange, particularly if that capital is dispersed.

It is precisely in order to prevent such contingencies that **hard cores have been set up.**

Stable groups of shareholders are intended to prevent any surprises as regards control of the firm, particularly when small shareholders sell their shares on a huge scale.

It is also common for the authorities to make sure, during privatisation operations, that **foreign interests** do not exceed certain limits. This restriction on foreign involvement stems from the desire to protect national interests.

It seems surprising that the State, as shareholder, should in practice reserve the right to choose its successors when, at the same time, it pretends to be advocating liberalism. It has to be understood that certain potential buyers are purely and simply ruled out in favour of others, that quotas are reserved for certain categories of shareholders and that the State selling the company can thus predetermine the distribution of capital.

Is this approach really in keeping with the spirit of privatisation?

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III. HOW IS A COMPANY PRIVATISED?

When it comes to the conditions under which privatisation is carried out, the approaches are so diverse that it seems difficult to provide even a rough picture.

The form of privatisation will vary according to the definition; in addition, the authority responsible for privatisation will depend on the Constitution of the country concerned: the authority which takes the decision is not the same in a unitary state as in a federal or decentralised state.

a. The first question is which authority takes the decision to privatise.

The answers vary extremely widely.

In **France** and **Britain**, for instance, it is the Government itself, i.e. the national executive, which takes the decision to sell off a public sector undertaking.

It is, moreover, telling that, in these two large countries, specific ministerial machinery has been set up with responsibility for privatisation.

In the case of France it is the **Ministry for Economic Affairs, Finance and Privatisation** and in Britain it is the **Public Enterprise Group**, which is part of the Treasury.

Moreover, in both these countries parliamentary authorisation is needed for the sale of a public sector company. Indeed, there is a law in France which lists the companies to be privatised by name (Act No. 86.793 of 2 July 1986). In Britain special acts of Parliament have determined the establishments to be privatised.

In the Grand Duchy of **Luxembourg** it is also for the State, through the ministries, to take privatisation decisions. Thus the Ministry of the Post and Communications has entrusted the laying of cables for telecommunications purposes entirely to private firms, and the Ministry of Public Works has entrusted private entrepreneurs with planning and implementing large-scale infrastructure projects, but this concept of privatisation is not the same as ours.

In **Greece** every privatisation operation must be provided for by law, since it entails the transfer of ownership of part of the heritage of the State or its offshoots.

One of the original features of the Greek system is precisely that the law can provide for privatisation direct or, on the contrary, give administrative authorities or public legal entities responsibility for privatising a firm.

It should, however, be pointed out that the tendency in Greece is to extend the public sector, and that there has been no privatisation to date although there is provision for it in the case of what are referred to as "problem" firms.

In the **Federal Republic of Germany**, on the other hand, privatisation can be carried out by the Federation, particularly in industry, transport and the banking sector, by the Länder, in the case of banks and insurance companies, or by the municipalities - mainly in the building trade and the energy sector.

The situation is quite different in **Italy**, where it is the **holding company** or managing establishment that decides on the conditions under which the firm in question will be sold. The explanation for this state of affairs is very simple: the holding company is in fact, directly or through its subsidiaries, the owner of the shares in the company which is being put up for sale.

It is therefore only logical that the holding company should decide on the time, price and conditions of the sale.

Moreover, Italian holding companies decide themselves on the companies to privatise: they have been given this decision-making power by Parliament.

In **Spain** the choice of firms to be privatised also rests with the boards of public sector **holding companies**, which have a wide measure of discretion in this area.

b. The second question is the choice of privatisation procedure.

Here again, the diversity of solutions is blatant: they range from extremely meticulously established procedures to a situation in which there is virtually no set procedure.

France and **Britain**, for example, have drawn up extremely specific procedures.

In **France** they come under the general Act No. 86.912 of 6 August 1986, which sets out conditions for the implementation of privatisation, and which was passed after it had shuttled back and forth, as is the normal practice, between the two houses of Parliament and had come before a joint committee on which the two houses were equally represented.

Every case of privatisation provided for in Act No. 86.793 of 2 July 1986 was compulsorily referred to a **privatisation committee** set up under Section 3 of the Act of 6 August 1986 and comprising seven independent members appointed by a decree of 9 September 1986 for five years.

This ad hoc committee was responsible for deciding on the value of the firm to be privatised in the light of the stock-exchange value of the shares, the value of the assets, the profits, the existence of subsidiaries and future prospects.

Although the **Minister of Finance** was responsible for deciding on the final selling price, this could not under any circumstances be less than the committee's estimate.

Actual transfer operations had to take place in accordance with the procedures on the financial market, where the rules guarantee competition and publicity.

In the case of operations carried out outside the market, similar guarantees were required: Decree No. 86.1140 of 24 October 1986 applied to all sales and exchanges of public sector company shares or assets that took place by mutual agreement.

Britain has also introduced specific procedures, but case by case, with the result that they sometimes seem unco-ordinated.

They do, however, entail no fewer than 15 compulsory procedures, divided into four stages.

In the final analysis, the key feature of the British system is that there has been no Act of Parliament laying down rules for the entire privatisation process once and for all: a special Act setting out practical conditions has been passed for each privatisation operation.

Moreover, in many cases privatisation was carried out in several stages, with the result that it is difficult to produce a model on the basis of the processes used.

In **Italy**, on the other hand, there is no fixed privatisation procedure, and the power of the **Ministry of State Holdings** to authorise sales is extremely controversial.

The situation is complicated by the fact that the legal system applicable to the various **public holding companies** is not uniform.

For instance, if IRI wants to sell a firm, it can do so freely; ENI needs authorisation only if it is losing its control over the firm; EFIM, on the other hand, requires prior authorisation in any event.

This situation, which is complex to say the least, has been further complicated by the constant tension between the Ministry, which wants to extend its supervising role, and the holding companies, which are keen to reduce this indirect supervision. In practice, many firms have been sold without the Minister concerned even having been informed: the holding companies were able to do more or less as they liked, provided they had the tacit consent of the political parties represented in the Government.

It is therefore clear that there is no standard procedure in Italy and that the holding companies are mainly responsible for privatisation: they themselves define the procedure and do not have to follow special legislative or other statutory procedures.

Austria, like Italy, has no statutory procedure: privatisation operations are decided on their merits, and there is no need to follow a set legal procedure.

c. The third question concerns the establishment of the conditions under which the firm will be put up for sale.

The financial machinery of privatisation is designed to allow company ownership to be transferred from the state to private buyers.

The techniques used can be divided broadly into two processes:

- the first occurs **outside the market**, through transfer by mutual agreement or through the takeover of the firm by the employees;

- the second, which is by far the most commonly used, entails placing the shares to be transferred on the **stock exchange** in the form of a public offer of sale, a public offer of exchange or an increase in capital.

These two processes are often combined, the aim of the state being to ensure the stability of a proportion of the shareholders, who in fact control the company.

There are many examples in France (*Compagnie financière Paribas*, TF1, BBTP, *agence Havas, Société Générale, Compagnie financière de Suez*).

Any company sale on the stock exchange immediately raises the crucial problem of **setting the price** at which the shares will be sold.

1. A proper price

Is the company to be sold at the highest possible price - the **French** approach - or is it to be sold at a moderate price, in accordance with the procedure followed by the **British** authorities?

There is a flagrant contradiction between the French and British procedures. In **France**, the *Conseil constitutionnel* demanded that an independent committee be set up to assess and decide on the minimum value of firms to be privatised.

Clearly, the State has not been left free to decide on the value.

The *Conseil constitutionnel* took the opportunity to point out that it was "contrary to the Constitution for assets or firms belonging to the public heritage to be sold to people pursuing private interests at prices below their value".

This decision of 25-26 June 1986 was based on two constitutional principles:

- **the principle of equality**, which prohibits the unjustified advantages which would result from the sale of these firms at a low price to a few buyers, to the detriment of the public as a whole;

- **the protection of ownership**, which is as much in the interests of individuals as in the interests of the State.

The situation is different in **Britain**, where the assessment of the worth of the firms concerned is a subject of controversy. Some people consider that firms have been sold off too cheaply. The British have often sold firms by auction, with a reserve price.

It is understandable that the problem was exacerbated when firms were sold outside the market to individual buyers.

There are two reasons for selling a firm for less than its value:

- on the one hand, the Government may wish to **ensure that it is sold**, whatever the cost. Setting a fairly low price helps to ensure that the operation is a commercial success. It is therefore very common - as in the case of the partial privatisation of British Telecom - for the Government to set particularly low prices the first time firms are transferred to the private sector in order to ensure that the operation is a success;

- secondly, by setting a low price the Government enables a very large number of shareholders to experience the joys of **popular capitalism** and, at the same time, it elicits their political support.

By contrast, setting a proper price may discourage a number of potential buyers, particularly small shareholders.

On the other hand, the guiding principles behind the method for establishing the rate at which the shares will be offered on the stock exchange, if this is the procedure chosen, should be based on the concept of a fair price.

The price should be governed by principles designed to harm neither the State which is selling the company nor the new shareholders that are buying it, so that the interests of the Nation are defended and **the State heritage is not sold off cheaply.**

Quite apart from the price of the transfer, there is the problem of the people to whom the shares in the firm that has been privatised should be sold. The whole question of **sales** to **foreigners** is still highly controversial.

2. ***To whom should the shares be sold?***

Spain provides the most surprising example, since in some cases firms have purely and simply been sold to a single buyer, who has sometimes proved to be foreign.

The body managing the transaction - usually the INI - put on offer the majority, if not all, the share capital, in one or more stages, following an auction procedure which did not involve the financial market.

For instance, the INI sold the automobile group SEAT to the German firm VOLKSWAGEN, and a computer firm, SECOINSA, to the TELEFONICA Company and the Japanese multinational FUJITSU.

By contrast, the protection of national interests has always underpinned the actions of the **French** authorities. The idea behind certain provisions of the Privatisation Act is that privatised companies, or at least some of them, should on no account pass into "foreign" hands.

To accept the contrary would be tantamount to accepting that the country's independence should be undermined.

Restrictions on foreign financial holdings have thus been introduced. The Act of 6 August 1986 lays down a threshold of 20% of the company capital, which foreign holdings must not exceed.

Moreover, in the case of firms covered by Articles 55, 56 and 223 of the Treaty of Rome (defence, security, public security), holdings exceeding 5% of the capital require the authorisation of the Minister for Economic Affairs.

Mention should also be made of the practice whereby the Government assumes the power to **intervene in certain particularly important decisions** in firms.

By virtue of the system of special "golden shares", the Government has a veto which it uses in connection, in particular, with takeover bids.

The idea behind the system is that the free workings of the market should be replaced by direct negotiations with the Government in the fight for control over the company.

French law is based on this British system, which enables the Government, if the protection of national interests so requires, to have a share which it holds converted into a special share carrying special rights. Thus the Minister for Economic Affairs may oppose holdings exceeding 10% of the capital, whether by an individual or several people acting together. Failure to comply makes it impossible for the holders of these shares to exercise their right to vote, and they are obliged to return the shares within three months.

Lastly, although the **British** Government has used the "golden shares" system much more often than the French Government and has attached more extensive rights to the shares, it has made no use of the French system of **"stable cores"** or **"hard cores"**.

It has, however, on occasion, elicited **investment by institutions** in order to encourage a degree of stability in the system by reserving a percentage of shares for a specific category of buyers (55% of the shares of Aerospace, Britoil and British Telecom). With the same objective, many minority holdings were sold at a "round table" of members of institutions.

IV. CAN ANY FIRM OR ACTIVITY BE PRIVATISED?

This is undoubtedly the trickiest question, for it raises issues that are connected more with psychology and ideology than with purely economic arguments.

a. The first point to consider is whether it is reasonable and justifiable to privatise firms and activities which, by their very nature, are not subject to the requirements of financial profitability.

Some firms and activities are not motivated by profit but by the need to provide a public service. Clearly, in the case of a public service activity it is necessary to pursue a particular logic whereby services are provided free of charge. The most obvious case is social assistance, which by its very nature entails the allocation of subsidies. Nobody would think of privatising such a service. Then there is the slightly trickier issue of services which, although not free of charge, are of highly debatable profitability.

The classic example is the delivery of mail to isolated houses a long way from big cities. Obviously such a service cannot be economically profitable, but surely one of the merits of the public service is that it continues to provide such a service, financing it with the profits from the delivery of mail in geographical areas where this is more profitable?

It is clear that if unprofitable activities of this kind were entrusted to private managers, they would probably be abandoned very quickly.

This would be acceptable to no one.

It is therefore understandable that the profitability requirement should be of limited importance in the case of certain activities based on other criteria specific to those activities.

Clearly, the purpose of a public service is not to make a profit. There are therefore certain activities which there can be no question of privatising.

b. **When one considers the advisability of carrying out a privatisation operation entailing the transfer of company ownership, it is also necessary to consider the human and social implications.**

Unbridled competition can have drastic, unacceptable consequences in certain sectors.

It is acceptable that a privatisation operation should result in large-scale redundancies, even if they are likely to improve productivity, ensure economic development and improve the finances of the company concerned?

In other words, **does the profitability requirement justify payment of a high social price?**

The governments running the various countries have carefully avoided answering this question, since in most cases they have preferred to transfer to the private sector companies which were already profitable or potentially profitable.

What would have happened, though, if structurally unsound companies had been transferred - companies which the buyers would doubtless not have wanted unless they could be radically selective and shut down branches in difficulty?

The question remains open. The **British example** is particularly significant. When the financial situation of firms was such that they could not be denationalised in the ordinary way, the Thatcher government pursued a "hiving off" policy privatising only those activities of the firm which were likely to interest private investors (e.g. a telecommunications subsidiary of British Airways, AERODIA, a subsidiary of British Leyland, PRESCOLD, a British Steel factory).

c. **Quite apart from this approach, which is based on the fact that some activities are, by their very nature, ill-suited to being run by private bodies, it is necessary to consider whether there are activities which are quintessentially state activities and cannot under any circumstances be entrusted to private bodies.**

This is the classic approach of the regal duties of the state. Whether the state is a welfare state or a policeman, it must assume its duties as regards the protection of the territory and the population, international relations, diplomacy, justice, etc.

Nobody would think of entrusting the management of such activities to private individuals, for this would lead to an unacceptable removal of power from the state, if not to abdication on the part of the state.

We must therefore accept the fact that certain functions are "by nature" the responsibility of the state.

Clearly, it should be accepted that **it is only the competitive sector that is really suited to privatisation.**

Indeed, **the example of the west European countries** shows that various traditional public sector activities have not come under the influence of the privatisation trend.

This is generally true although there are a few exceptions which have escaped nobody, of public sector firms engaged in sensitive activities connected with **national defence** and **nuclear power**. The idea is that the state should, for the public good, have sole charge of all the components of national defence, in the broadest sense of the term.

Then there are establishments providing a **public service,** such as hospitals, or those which have a **monopoly**, such as the postal and telecommunications service or the railways (but here there are exceptions).

Lastly, there are, for obvious reasons, establishments providing services in response to a **demand** which normally **cannot make a profit**, such as social security institutions, employment authorities, etc.

Yet the **British** Government has responded differently to the question of what can be privatised, since it considers that no public sector undertaking is inherently impossible to privatise.

This is borne out by the privatisation of British Aerospace, British Rail hotels, British Telecom in 1984 and British Gas.

The British have had no hesitation in interfering with the monopolies on natural resources.

Similarly, the privatisation of companies in the defence sector, has not been a problem although defence is at the heart of the public sector.

The Royal Dockyards, which are responsible for the upkeep and repair of navy vessels, are now run by private companies.

Similarly, the army's main arms and explosives supplier was privatised after it being split up.

The principle of privatisation therefore seems to have been accepted for all types of public sector undertakings in Britain.

A study of privatisation operations in various countries does, however, throw up a number of **constant features**, with very few exceptions.

A very large number of transfers of public sector firms to the private sector have been carried out in highly specific sectors: industry, banking and a few services with a more or less strong tendency towards a monopoly.

Clearly, **industry is the key sector for privatisation**, and this is true of all branches.

For instance, the Federal Republic of Germany and Italy have transferred the assets of subsidiaries owned by public sector industrial holding companies.

There have been examples of transfers to the private sector in the motor industry (Volkswagen in the Federal Republic of Germany, Alpha Romeo in Italy). France has privatised huge companies that were nationalised in 1982 (Saint-Gobain, Rhône-Poulenc, C.G.E., Bull, etc.).

In Britain, where the privatisation programme serves as a standard, a strikingly wide range of branches of industry have been affected by privatisation.

Banking is also a sector in which there has been a great deal of privatisation, as is borne out by the French Act of 2 July 1986 privatising all the banks nationalised in 1945 and 1982.

Lastly, although certain services with a near **monopoly** have been affected by some trends towards privatisation, this remains the exception.

Britain is the only European country to have sold off firms with a monopoly (British Airways, British Petroleum, British Telecom, the water and gas supply services, and so on).

Japan has also privatised certain activities in which there was a monopoly (Japan Railways, Japan Airlines, the postal and telecommunications service, etc.).

We must now wake up to the fact that any public sector undertaking can be privatised and that privatisation has become a convenient way of solving the difficulties encountered by a number of firms.

What is striking is that each country is free to choose its own approach.

Thus, unlike Britain and Japan, France has never considered denationalising all or part of EDF (French Electricity Board) or GDF (French Gas Board). Nor have there ever been plans to transfer to the private sector such indisputably competitive companies as Air France.

CONCLUSION

After this general description of the various issues arising in connection with the concept of privatisation, one point should be made about the clear **absence of a privatisation model.**

The various experiments that have been carried out have different bases, and have taken place in different legal, economic and ideological contexts and by different processes.

While in France and Britain they seem to be based more strongly on liberal ideology, whereas they are founded mainly on practical considerations in Germany and pragmatic ones in Italy, there is a strict general legislative framework governing privatisation in France, in contrast to the case-by-case regulations in Britain and the use of the ordinary regulations in Italy and Germany.

While privatisation is usually total in France, the government authorities keep "golden shares" in Britain and holdings that can block decisions in Germany and Italy.

While small shareholders are favoured in France and Britain, they are ignored in Italy and Germany.

The pace of privatisation also differs: it is fast in France, gradual and planned in Britain, slow in Germany and irregular in Italy.

As for the **future, the public sector** is undoubtedly doomed to dwindle to a small number of economic activities considered to be fundamental because they symbolise the state and are connected with security and national independence.

The public sector will doubtless also keep symbolic firms in branches considered sensitive, such as the audio-visual industry, information and sophisticated technology.

It will not, however, be able to abandon sectors in difficulty, for two basic reasons:

- the lack of a buyer;
- the high social cost of privatisation.

PRIVATISATION: THE RIGHT OF PROPERTY AND THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS[1]

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I. GENERAL OBSERVATIONS

1. Since privatisation means the total or partial transfer of property and the control of resources or services from the public sector to the private sector, it is therefore in a sense the opposite of the process of nationalisation, a movement in the other direction, a return to the starting-point, in the liberal democracies. We can on this ground say that although these two concepts are closely linked, private ownership may be seen as an outcome of the process of privatisation and hence is subsequent to the "act" and the "related operations". My report to this Colloquy on privatisation will therefore be concerned exclusively with the safeguarding of the "aims" of privatisation once it has been achieved.

2. This right to own private property, individual freedom by opposition to public liberties - notwithstanding its character, for in some quarters it is described as an "economic" right and in others as a "civil" right - is enshrined in most international human rights instruments and, of course, in national constitutions, apart from those of marxist inspiration, as one of the fundamental human rights (United Nations Universal Declaration of 1948, Article 17; 1965 Convention on the Elimination of All Forms of Racial Descrimination, Article 5 (d - v); African Charter, Article 14; Inter-American Convention of 1969, Article 21). However the two United Nations International Covenants (1966) on "Civil and Political Rights" and "Economic, Social and Cultural Rights" do not mention this right, the reason undoubtedly lying in the concern to ensure a consensus between the two opposing worlds that existed at the time. As for the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (Convention), to which my remarks will be confined, it included this right only belatedly, and also cautiously, through its Protocol No. 1 in 1952, which came into force on 18 May 1954. This was not because of ill will but on account of the difficulty involved in arriving at a substantive definition of that right, having regard to the

[1] *The author alone is responsible for the opinions expressed in this document.*

post-war needs of states for the reconstruction of a Europe in ruins. The trend at the time was, perhaps rightly, towards "nationalisation" just as it is today towards "privatisation". This outlook pervades the present formulation of Article 1 of the aforementioned Protocol. The *Travaux préparatoires* are highly instructive in this connection.

In the short space of time available to me, I shall try to sum up the case law of the European Court of Human Rights with regard to a right regarded as "sacred" at the time of the French Revolution, while bearing in mind that this is a Colloquium devoted to "privatisation".

II. THE RIGHT OF PROPERTY

1. The concept

3. Article 1 of Protocol No. 1 is worded as follows:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

4. Are we dealing here with the right of property? For the Court, this is not open to doubt: it states that:

> " ... By recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property. ... the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property (cf. the Handyside judgment of 7 December 1976, Series A n° 24, p. 29, para. 62)" (Marckx judgment, pp. 27-28, para. 63).

5. This provision relates not to an economic "right to property", making the individual a creditor of society, but to the right of property. That being so, the Convention adopts a neutral position in regard to certain human or economic arguments concerning the aims of privatisation, which are said to be "to enable a larger number of the population to own property", or "to distribute scant resources more effectively throughout society" or again "to develop savings for the benefit of productive activities" (economic efficiency). According to the European Commission of Human Rights, the individual's entitlement to peaceful enjoyment of his possessions does not imply any right to claim financial assistance from the State in order to make possible the enjoyment of his possessions (Decision of 19.12.1974, application No. 6776/74, Decisions and Reports, Vol. 2, p. 123).

6. The possessions protected under Article 1 are movable or immovable, material or immaterial possessions having economic value (see judgments Tre Traktörer AB, p. 21, para. 53; Van Marle and Others, p. 13, para. 41; Van der Mussele, p. 23, para. 48; Marckx, p. 23, para. 50; Inze, pp. 17-18, paras. 38-40).

2. Protection of the right of property

7. The system of protection established by the Convention is well known. The relevant Article first lays down the principle or the rule: the right or freedom in question is thus recognised. Exceptions to the rule are then set out (restriction, limitation or derogation), along with the conditions governing such exceptions. This is also true in the case of the right to own property.

8. In the case of Sporrong and Lönnroth (p. 24, para. 61), the Court analysed the content of Article 1. According to the Court, this Article " ... comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest ...". The judgment then goes on to note that "However, the rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. They must therefore be construed in the light of the general principle laid down in the first rule...". This is the key conclusion or starting point and summing up of the Court's entire doctrine with regard to the right of property and its protection. This paragraph is included in nearly all of the Court's judgments in view of its importance (see most recently Fredin judgment, p.14, para. 41). What conclusion should be drawn from this?

9. First, the right of property is not protected by the Convention in absolute terms: it comprises restrictions in the general interest.

10. Secondly, it is the "principle of peaceful enjoyment of property", an implicit rule derived by the Court from the first sentence of the Article, which ensures general protection of that right against all interference with the exception of "particular instances" which are explicitly authorised (deprivation and control of use) and which are themselves subject to conditions of legality explicitly or implicitly contained in the Article. Consequently, this principle of "peaceful enjoyment of property" is the general rule, the reference rule which is rightly described as "residual". (F. SUDRE, *"La protection du droit de propriété par la Cour européenne des Droits de l'Homme"*, *Recueil* Dalloz-Sirey, 1988, p. 73); by virtue of this rule "all disputed measures that cannot be regarded as deprivation of possessions or control of the use of property, but affecting the very essence of the right, may be censured" (J. VELU-R. ERGEC, *Répertoire pratique du droit belge, Complément*, Vol. VII, October 1990, "*Conv. eur. des D.H.*", para. 828). The Court must indeed "determine, before considering whether the first rule was complied with, whether the last two are applicable" (judgments

Sporrong and Lönnroth, p.24, para. 61; James and Others, pp. 29-30, para. 37; most recently, Mellacher and Others, p. 27, para. 48 and Fredin, p. 26, para. 51).

11. In the cases of Sporrong and Lönnroth (involving a long-term expropriation permit, accompanied by prohibitions on construction which was not acted upon for a very long period), Erkner and Hofauer (pp. 64-65, para. 71) and Poiss (p. 108, para. 64) (involving land-
consolidation measures for the purposes of land reform), the Court found there to be neither *de jure* or *de facto* expropriation nor control of the use of property, and therefore judged those cases with reference to the "principle of peaceful enjoyment of property".

III. FORMS OF INTERFERENCE WITH THE RIGHT OF PROPERTY AND THE CONDITIONS UNDER WHICH THEY ARE LAWFUL

12. We may conclude from the foregoing that interference with the right of property may be classified under three heads: privatisation of property, control of the use of property and other interferences with the essence of the said right. For it to be considered to be legitimate, the interference in question must fulfil the conditions of lawfulness provided for in Article 1. These are: pursuit of a legitimate aim; observance of the principle of "proportionality", the lawfulness of the interference, the existence of compensation and compliance with the general principles of international law in the event of deprivation of possessions. These three conditions are subject to the Strasbourg bodies' power of review, having regard, as we shall see, to the "wide margin of appreciation" which, as is recognised by the Court, States enjoy.

Pursuit of a legitimate aim. This requirement is expressed, in the case of deprivation of possessions, by the concept of "public interest", and, in the case of control of the use of property, by that of "general interest". In the case of other forms of interference, it merges with the principle of "proportionality".

13. It should be admitted from the outset that it is very difficult to draw a distinction between the "public interest" and the "general interest" although the Court has employed the wording "... even if there could be differences between the [two] concepts ..." (James and Others judgment, p. 31, para. 43). It understood this in a very wide sense, particularly since the "legitimate aim" is measured by the yardstick of the doctrine of "wide margin of appreciation". The Court thus recognised that "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'." and "finding it natural that the margin of appreciation available to the [national] legislature in implementing social and economic policies should be a wide one, [it] will respect the legislature's judgment as to what is 'in the public interest'..." (ibid., para. 46; see also judgments Sporrong and Lönnroth, p. 26, para. 69; Erkner and Hofauer, p. 66, para. 78; Poiss, p. 109, para. 68). This concept could therefore cover any social or economic policy - provided that it does not run counter to the other provisions of the Convention, for example Article 14 - " ... even if the community at large has no direct use or enjoyment of the property ..." (ibid., pp. 30-31, paras. 39-41 and pp. 31-32, para. 45).

14. The same considerations also apply to the concept of the "general interest", subject only to this being generally understood in a less restrictive way. The cases of Lithgow and Others (nationalisation of aircraft and shipbuilding industries in the United Kingdom), James and Others (compulsory sale of certain properties in the United Kingdom) and Håkansson and Sturesson (compulsory sale of an agriculture estate with a view to the rationalisation of agriculture) were considered with respect to deprivation of property. However, in the cases of Erkner and Hofauer, and Poiss, which were similar to the case of Håkansson and Sturesson, the measures taken to ensure that land could be continuously and economically farmed were considered by the Court to be "in the general interest" (for examples of the "general interest", see judgments Marckx, p. 28, para. 64; Handyside, pp. 29-30, para. 62; Van Marle and Others, p. 13, para. 43; Agosi, p. 18, para. 52; Tre Traktörer AB, p. 22, para. 57; Allan Jacobsson, p. 17, para. 57; Mellacher and Others, pp. 25-27, paras. 45-47; Fredin, p. 16, para. 48).

15. Considerations of the same kind may also be brought to bear on the process of privatisation. It is almost unanimously held that certain services of fundamental importance to the community by virtue of their character (health, justice, defence, etc.) or certain areas where state participation or control proves necessary (because of the scale of investments or the importance of the services provided) should not be privatised. It is also held that there are cases where "social considerations might prevail over the desire to increase efficiency". In such cases, a decision whether or not to privatise becomes "eminently political" (see Af Ugglas, Report on privatisation, Council of Europe, Parliamentary Assembly, Doc. 6274, 18 July 1990, pp. 13-22; and Doc. 6351, 12 December 1990, Parliamentary Assembly). In nearly all countries, including France by virtue of the decision of the Constitutional Council (25-26 June 1986, AJDA 1986), it is recognised that the legislature has a margin of appreciation in deciding the dividing line between the public and the private sectors.

16. The "principle of proportionality" or the requirement of a "fair balance" is another condition governing the legitimacy of the interference. The Court has expressed its views on the subject as follows: "Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest', but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, amongst others, and *mutatis mutandis*, Ashingdane judgment of 28 May 1985, Series A n° 93, p. 24, para. 57). This latter requirement was expressed in other terms in the Sporrong and Lönnroth judgment by the notion of the 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individuals' fundamental rights (p. 26, para. 69). The requisite balance will not be found if the person concerned has had to bear 'an individual and excessive burden' (ibid., p. 28, para. 73). Although the Court was speaking in that judgment in the context of the general rule of peaceful enjoyment of property enunciated in the first sentence of the first paragraph, it pointed out that "the search for this balance ... is ... reflected in the structure of Article 1" as a whole (ibid., p. 26, para. 69). The Court then reached the following conclusion: "The Court considers that a measure must be both appropriate for achieving its aim and not disproportionate thereto." (James and Others judgment, p. 34, para. 50; see also judgments Lithgow and Others, p. 50, para. 120; Tre Traktörer AB, p. 23, para. 59 and most recently, Poiss,

pp. 108-109, paras. 65 and 69; Erkner and Hofauer, pp. 66-67, para. 79; Fredin, p.17, para. 51; Håkansson and Sturesson, p. 18, para. 54). In short, the principle of "proportionality", whether explicitly or implicitly, general by underpins the application of the Convention as a whole. "Consequently, an interference must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights ... . There must be a reasonable relationship of proportionality between the means employed and the aim pursued ..." (see judgments Allan Jacobsson, p. 17, para. 55; Mellacher and Others, p. 27, para. 48).

17. Thus in the cases of Sporrong and Lönnroth (pp. 27-28, paras. 71 and 73), Erkner and Hofauer (pp. 66-67, paras. 77 and 79), and Poiss (p.109, paras. 67 and 69), the Court concluded that the rule of peaceful enjoyment of one's possessions had been violated because a "disproportionate and excessive" burden had been imposed on the applicants, thereby upsetting the requisite balance; whereas in the case of Mellacher and Others (p. 29, para. 55), it held that there had been no violation because it could not be said that measures taken were "... so inappropriate or disproportionate as to take them outside the [...] margin of appreciation." (see also Agosi judgment, pp. 18-19, para. 54).

18. As for the lawfulness of the interference, this requirement is explicitly provided for in the Article in question. In order to guard against arbitrariness, the interference must always have a legal basis or, in other words, be justified by domestic law. We know that for the Court, the term "law" in the Convention requires the existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions in keeping with the spirit of the Convention (judgments James and Others, pp. 40-41, para. 67; Lithgow and Others, p. 47, para. 110; see also, amongst others, Malone, pp. 32-33, paras. 66-68).

19. The right to compensation in the case of the person concerned having suffered a prejudice as a result of unjustified interference with his right of property is not provided for in the Article except in compliance with the general principles of international law (in the event of deprivation of property), and exclusively, according to the Court, for foreigners. The requirement is for prompt, adequate and effective compensation (see judgments James and Others, pp. 38 et seq., paras. 58 et seq.; Lithgow and Others, pp. 47 et seq., paras. 111 et seq.).

20. In its Sporrong and Lönnroth judgment, the Court concluded that the principle of peaceful enjoyment of property had been violated because the "fair balance" had been upset, having regard amongst other things to the lack of possibility to claim compensation for the prejudice sustained (pp. 27-28, paras. 71-73; see also judgments Erkner and Hofauer, p. 66, para. 77; Poiss, p. 109, para. 67). This is then a factor of lawfulness, no less essential in the protection of the right of property, and for the Court a natural consequence of the principle of proportionality. Thus, according to the Court, "... the obligation to pay compensation derives from an implicit condition in Article 1 of Protocol No. 1 read as a whole...", failing which the required balance would be upset, and the protection afforded by Article 1 would be "... illusory and ineffective..."

(see especially judgments James and Others, p. 36, para. 54; Lithgow and Others, pp. 47 et 50 paras. 109 and 120).

Reference to compliance with the "general principles of international law" has thus lost much of its force.

21. However, it should be immediately added that this "obligation" has not been regarded as absolute: the Court goes on to note that the standard of compensation might differ according to the particular circumstances (according, for instance, to whether nationals or non-nationals are involved, or according to the scale and purpose or nature and form of the interference; see judgments James and Others, pp. 39-40, para. 64; Lithgow and Others, pp. 48-49, para. 116). In "certain exceptional circumstances", there might be no obligation to pay compensation; in certain others, partial compensation would be "fair". Here too the Court recognises that states enjoy a wide margin of appreciation. However, in all cases, the standard of compensation must be "reasonably related to (the) value (of the property)" (judgments James and Others, p. 36, para. 54; Lithgow and Others, pp. 50-51, paras. 121-122; Håkansson and Sturesson, p.18, para. 54).

22. Before concluding this section it would be opportune for us to consider whether the deliberations of the Court and the conclusions it reached in respect of the factor of "lawfulness" and the "entitlement to compensation" may be of some use or provide guidance in determining the authority that will take the decision to privatise and in assessing the selling price of the enterprise, the unit purchase price of shares, in a word the "fair price", these being two difficult problems raised by privatisation in almost every country.

23. Concerning the first problem, there are two possibilities: privatisation terms and methods may be determined either by a legislative act (law) or by an administrative decision. The legislative method seems a safer way of guarding against political favouritism on the part of the administrative authorities. In all cases where the enterprises have been established by legislative act, the decision to privatise should be taken by the same authority. Irrespective of the method adopted, which states are free to choose, the enabling act should be "adequately accessible and sufficiently precise".

24. With regard to the matter of assessing the selling price, again two solutions are possible: either to sell the enterprise at the highest price, or to determine the selling price without regard for the real value of the establishment.

In my opinion, both positions can be defended. The French Constitutional Council, invoking two constitutional principles - "the principle of equality" which prohibits unjustified advantages to the benefit of a group of citizens, and "protection of the right of property" which is equally valid and relevant in the case of public property (Article 17 of the Declaration of 1789) - has stated that the Constitution forbids "the sale of public property to persons pursuing private interests for prices lower than their value" (decision of 25-26 June 1986 AJDA). Everything depends on the considerations behind the decision to privatise, in other words the aim pursued. If the considerations are ones of "financial profitability", the enterprise should be sold at

the highest price. If, however, the aim is to "open shareholding to the people" or to encourage "grass roots capitalism" or to "promote participation by wage-earners", if in a word we are talking about social or economic policy designs, the second alternative will be opted for. In this case, the "fair price" will be something in the spirit of "fair balance", in the order of the "reasonable compensation" advocated by the Court.

IV. THE MARGIN OF APPRECIATION AND THE POWER OF REVIEW OF THE STRASBOURG BODIES

25. We have already seen that in determining the aforementioned factors of lawfulness, the Court recognised that states have a "wide margin of appreciation" both with regard to the "legitimate aim" (see judgments Mellacher and Others, pp. 25-26, para. 45; James and Others, pp. 32-33, 35, paras. 46, 47, 51; Lithgow and Others, pp. 51-58, 60-61, paras. 122, 143, 149) and as to the "fair balance" (see judgments Sporrong and Lönnroth, p. 26, para. 69; Ashingdane, pp. 24-25, para. 57; Van Marle and Others, p. 13, para. 43; Agosi, p. 18, para. 52; Tre Traktörer AB, p. 24, para. 62; Allan Jacobsson, pp. 17 et 19, paras. 55 and 63; Fredin, p. 17, para. 51), having regard both to the "means employed" (see judgments Handyside, p. 22, para. 48; Klass and Others, p. 23, para. 49; Mellacher and Others, p. 28, para. 53) and to the "standard of compensation" (see judgments James and Others, p. 36, para. 54; Lithgow and Others, p. 51, para. 122; Håkansson and Sturesson, pp. 17-18, paras. 51 and 54) or the existence of "objective and reasonable justification" in cases of the application of Article 14 (see judgments Lithgow and Others, pp. 66-67, para. 177; Inze, p. 18, para. 41; Darby, p. 12, para. 31). What are the limits of this margin of appreciation and what is the degree of the power of review exercised by the organs of the Convention?

26. First, the Court is not very demanding in the matter of compliance with domestic law, especially since it does not regard itself as a supervisory body over the national authorities: the Court has only limited jurisdiction. It falls essentially to the national authorities to interpret and apply their laws (judgments Eriksson, p. 25, para. 62 and Tre Traktörer AB, p. 22, para. 57) unless such "application" is manifestly contrary to domestic legislation (see most recently judgments Allan Jacobsson, p. 17, para. 57; Håkansson and Sturesson, p. 16, para. 47; Fredin, pp. 16-17, para. 50).

27. Recognition of this wide margin of appreciation in no way means that the Court can refrain from exercising its power of review (Sporrong and Lönnroth judgment, p. 26, para. 69). In all matters included within the State's margin of appreciation, the Court generally respects the State's judgment "unless that judgment be manifestly without reasonable foundation" or if the state "does not act unreasonably" (judgments James and Others, pp. 32 and 33-34, paras. 46 and 49; Lithgow and Others, pp. 51 and 60, paras. 122 and 149) or if the measure taken is not disproportionate to the aim pursued or if the standard of compensation is not reasonbly related to the value of the property (judgments James and Others, pp. 34 and 36, paras. 50 and 54; Lithgow and Others, pp. 56-60, paras. 138-143, 144-147 and 149). In short, this power of review consists essentially in the circumstances in verifying the reasonableness of the appreciation of the domestic authorities and therefore in reviewing the "appropriateness" of the interference, but not of the "necessity" for it as in certain other provisions (Articles 8-11) of the Convention.

28. However, the situation seems at first sight somewhat different as regards the second paragraph of the Article 1 of Protocol No. 1 which stipulates that the State is free "... to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ...".

29. In its Handyside judgment, the Court stated that this provision "sets ... States up as sole judges of the 'necessity' for an interference. Consequently, the Court must restrict itself to supervising the lawfulness and the purpose of the restriction in question ..." (p. 29, para. 62). There is therefore no scope for European supervision.

30. In the Marckx judgment, the formulation changed: this provision sets States up "... as sole judges of the 'necessity' for such a law ..." (p. 28, para. 64). This change, albeit a subtle one, has been interpreted by legal opinion as recognition of the Court's power of review (see in particular VELU-ERGEC, *op. cit.*, para. 834).

31. Lastly, in its Allan Jacobsson judgment, the Court was more explicit. It specified that as the provision in question "... is to be construed in the light of the general principle enunciated in the first sentence of the first paragraph, there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised ..." (p. 17, para. 55) and this acquirement of proportionality falls, as we have already seen, within the scope of the Court's power of review (see also judgments Van Marle and Others, p. 13, para. 43; Agosi, pp. 18-19, paras. 52-54).

32. It is clear that the Court has shown understandable caution in respect of its power of review in this regard so as to guard against any inappropriate interference with the social and economic policies of States; and has done so at the risk of relativising the protection of a right that the Convention was designed to safeguard. Out of 16 cases considered under Article 1 of Protocol No. 1, in only three cases has the Court held there to be a violation of the "principle of peaceful enjoyment of property". In the others, the Court concluded that the States concerned had remained within the limits of their margin of appreciation.

33. We may note in conclusion that for an interference to be considered legitimate it must also be consonant with the other general requirements of the Convention, as for instance in Articles 14, 17 and 18 (see judgments Marckx, pp. 27 et seq., paras. 63 et seq.; Inze, pp. 18 et seq., paras. 41 et seq.; Darby, p. 13, paras. 33, 34).

Judgments of the European Court of Human Rights concerning Article 1 of Protocol No. 1

1. **Handyside** judgment of 7 December 1976, Series A no. 24.
2. **Marckx** judgment of 13 June 1979, Series A no. 31.
3. **Sporrong and Lönnroth** judgment of 23 September 1982, Series A no. 52.
4. **Van der Mussele judgment** of 23 November 1983, Series A no. 70.
5. **James and Others** judgment of 21 February 1986, Series A no. 98.
6. **Van Marle and Others** judgment of 26 June 1986, Series A no. 101.
7. **Lithgow and Others** judgment of 8 July 1986, Series A no. 102.
8. **Agosi** judgment of 24 October 1986, Series A no. 108.
9. **Poiss** judgment of 23 April 1987, Series A no. 117.
10. **Erkner and Hofauer** judgment of 23 April 1987, Series A no. 117.
11. **Inze** judgment of 28 October 1987, Series A no. 126.
12. **Tre Traktörer AB** judgment of 7 July 1989, Series A no. 159.
13. **Allan Jacobsson** judgment of 25 October 1989, Series A no. 163.
14. **Mellacher and Others** judgment of 19 December 1989, Series A no. 169.
15. **Håkansson and Sturesson** judgment of 21 February 1990, Series A no. 171.
16. **Darby** judgment of 23 October 1990, Series A no. 187.
17. **Fredin** judgment of 18 February 1991, Series A no. 192.

LEGAL FORMS AND TECHNIQUES OF PRIVATISATION

by

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I. INTRODUCTION

The nesting behaviour of the blackbird and the use of day nurseries are both manifestations of "motherhood"; but we do not for this reason treat ornithologists as authorities on pre-school educational provision. We should be careful to ensure that we are no less cautious when it comes to writing about privatisation, a term about as broad and elastic as motherhood and one which seems to induce, in some quarters at least, a tide of comparably warm and uncritical sentiments. Privatisation is coming to mean all things to all men (and women) as it is adopted in different countries as a conveniently topical and attractive label for a wide variety of steps in economic and social policy. These range from the sales of publicly-owned assets and enterprises, the activity perhaps first brought to mind by the term "privatisation", to the shifting of regulatory and welfare responsibilities from the public to the private sector. Some idea of the actual or potential richness of the field may be gleaned from the classifications of forms or techniques of privatisation that some authors have sought to develop.

Rapp, one of the leading French legal commentators on privatisation, offers ten broad types: sale of assets; sale of shares; dilution of public ownership by creation of shares; transfer of shares to workers; privatisation of management (as by changing managerial objectives); liquidation; privatisation of subsidiaries; dismantling of monopolies; concessions; and deregulation (Rapp, 1986). Though this scheme encompasses a number of sub-categories, it may still seem broad-brush beside that proposed by the American political scientist Madsen Pirie, whose book Privatisation in Theory and Practice (Pirie, 1988) offers the reader no less than twenty-one methods, from Method One, selling the whole [public enterprise] by public share issue, to Method Twenty-one, the right to private substitution [of private supply of services for defective public supply]. Pirie writes as a fervent advocate of privatisation, and some of his methods might be described in other terms by less sympathetic commentators. Thus Vincent Wright, in listing, in a much shorter account, eleven "dimensions" of privatisation, begins with "the abolition or severe reduction of public services on the

* Thanks go to Tamara HOULOUBKOVA and Wolfgang KOPF, for information and research on Czechoslovakia and Germany respectively.

assumption that private voluntary provision will fill the gap" (Wright, 1988, p. 87; cf. Euzeby and van Langendonck, 1989), a somewhat different way of describing Pirie's Methods Nineteen ("Applying Closure Proceedings") and Twenty ("Withdrawal from the Activity") (Pirie, 1988, p. 241). Likewise Wright's "squeezing the financial resources of publicly-funded bodies in the hope of inducing them to seek more private funding" (Wright, 1988, p. 87) employs the same example - compression of United Kingdom university finances - as Pirie's Method Twelve, the much more attractive "Encouraging Alternative Institutions" (Pirie, 1988, p. 193). While valuable for their demonstration of the remarkable variety of policies that can be brought within the rubric of privatisation, these classifications also indicate that the description and analysis of privatisation experience will vary according to the standpoint of the author.

This present account has a different purpose and context from the other works cited. It is offered as a comparative legal analysis of one phase within the privatisation process, that of the techniques through which privatisation - whatever its type - is brought about. Unlike the national approaches on which we drew above, comparative legal technique demands some common element or unit of measurement as a basis for comparison. This becomes all the more important in this subject area, where we must take into account a phenomenon which writers on national systems need not address, that is to say, the enormous variance in the role hitherto played by the public sector in the economies of different States. While the countries with the best-documented experience of privatisation - perhaps the United Kingdom and France for sales of State assets and the United States for contracting out of public services - have been addressing important and visible sectors of their national economies, their experience pales into insignificance when placed alongside the tasks facing those central European economies for which privatisation expresses a complete change in the mode of organisation of economic life and of the role of the State in relation to it.

An example, admittedly extreme, is afforded by a problem encountered by the *Treuhandanstalt*, the body created in March 1990 by the Government of the then independent East Germany with the task of privatising[1] at least 10,000 enterprises grouped into 214 "Kombinate". That process, involving the conversion of all these enterprises into joint stock companies, had scarcely begun when it was overtaken by monetary union between East and West Germany, taking effect on July 1, 1990. It was thought essential to complete the process of conversion before the East German enterprises were exposed by the new monetary system to the rigours of the world money market, and the East German law on the Treuhand of June 17, 1990 therefore provided for the notional conversion of all remaining enterprises remaining in the hands of the Treuhand in the old form into joint-stock companies, notwithstanding the absence of final and opening balances on their accounts, Memoranda and Articles of

[1]The original mission of the *Treuhand*, as set out in the Law of March 1, 1990, was to administer the State-owned assets in the interest of the general public, but with the Law of June 17, 1990 it received the mandate to sell the companies it was administering as quickly as it could.

Association, and other legal requirements (Buchholz, 1991, p. 180). Western policy makers and lawyers have little, if any, experience of such problems.

A comparative legal analysis of privatisation techniques should not therefore be seen as some kind of instructional manual for central European privatisers. Instead, the objective here is to elaborate a structure for the analysis of these techniques which will be sensitive to legal conceptions of the economic and political processes involved in privatisation, processes which, as we have already seen, are immensely varied. Evidence capable of linking the use of particular legal devices in the process of privatisation with particular economic results is as yet extremely limited, so that for the moment we can do little more than sketch relationships between processes, rules and institutions within the framework of different legal systems. The disclosure of regularities and irregularities in these relationships may nonetheless have an intrinsic interest.

Our approach is articulated around the object of privatisation: that is, the public enterprise which is to be affected by the privatisation measure. From this starting-point we can group privatisation techniques into types of change affecting the public enterprise or service. The following appear to us to be the key categories of change:

(a) change of ownership, from public, or predominantly public, to private, or predominantly private;

(b) change of activities or assets (*ex hypothesi*, in the direction of reduction);

(c) change of legal status;

(d) liquidation;

(e) change of economic status (as from direct producer to indirect provider by way of contracting out [Ascher, 1987; Kolderie, 1990]); and

(f) change of competitive environment (as by withdrawal of monopoly rights).

Different legal issues present themselves in relation to these modes of change. To take only one example, albeit a fundamental one, a change in the legal environment of an enterprise, as by the withdrawal of its monopoly rights, can only be brought about by the legislator. All other changes, however, may in most systems of law be initiated by the enterprise itself or by its owners. In relation to these methods, therefore, a key question is whether, in any given case, the process of privatisation is self-initiated by the enterprise ("spontaneous"), or imposed upon it by the State ("directed") - which will not, we should note, necessarily be the owner of the enterprise to be privatised. In the case of directed privatisations where the State is not the owner, our first two types of privatisation (change of ownership and disposal of assets) may

raise difficult questions of who is to receive the proceeds. In this paper, we shall attempt to move from the general to the particular, looking first at legal issues common to all or several modes of privatisation, and then at legal issues specific to the different modes. Space precludes comprehensive coverage under this latter head, and we confine ourselves in this report to the first four of the above-listed categories of change.

II. COMMON PROBLEMS

1. International legal constraints

This may seem an odd place to start. After all, the choice of how best to organise the economic life of its people is reckoned to be one of the key elements of State sovereignty, figuring in the very first Article of the Charter of Economic Rights and Duties of States[2]. Treaties that regulate international economic relations have generally taken free and undistorted trade as their objective, and have seen State enterprise and trading as more problematic in this respect than private economic activity. The treatment of State trading in Article XVII of the General Agreement on Tariffs and Trade (GATT), and GATT's difficulties in offering Socialist countries membership (Baban, 1977; Benedek and Ginther, 1988), bear witness to this. Treaties on human rights, like the European Convention on Human Rights, may offer protection for property rights, but this is likely to be an obstacle - if at all - to nationalisation, not to privatisation (van Dijk and van Hoof, 1990)[3]. Even the most ambitious scheme of international economic ordering, the European Community, seems to take an explicitly neutral stance on the question of property regimes in the Member States: Article 222 of the EEC Treaty provides that the Treaty "*shall in no way prejudice the rules in Member States governing the system of property ownership*". It looks as though privatisation is the solution, not the problem.

Broadly speaking this is true, but this does not mean that these international instruments set no limits on the techniques of privatisation. Three kinds of rules are relevant: those which promote free trade by ensuring non-discriminatory access to economic activities; those which promote undistorted trade by seeking to control or eliminate subsidies; and those which, with both aims, regulate public procurement. Such rules are to be found in myriad bilateral agreements, such as trade, commerce and navigation agreements or investment promotion and protection agreements, and in multilateral agreements such as GATT and the associated Tokyo Round Codes, or in regional instruments such as the Convention on Establishment of 1955 of the Council of Europe. Their most developed expression, and their most forceful impact, are however to be found in European Community law, and we shall briefly explore their operation in this context.

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[2] United Nations General Assembly Resolution 3281 (XXIX) of 1974.

[3] Legal problems attaching to nationalisation may, however, cloud subsequent privatisation attempts: see below, pp. 62-63.

Avoidance of discrimination on grounds of nationality is fundamental to the programme of the Community (Article 7 of the EEC Treaty), and manifests itself in the field of company law in Article 221, requiring that Member States accord nationals of other Member States the same rights as their own nationals in regard to participation in the capital of companies based in the Community in terms of Article 58. Article 52 outlaws this kind of discrimination in relation to the right of establishment, and would apply in relation to the acquisition of a controlling interest in such a company. These provisions are such as to constrain any attempt by Member States to favour their own nationals in any privatisation by way of a public offering of shares, or to restrict the degree of control obtainable by non-nationals, whether at the time of privatisation or later[4]. Their invocation by the Commission of the Community led to the weakening (though not the total elimination) of provisions of this type in the French privatisation law of 6 August 1986 (d'Ormesson and Martin, 1987, pp. 437-440; Boutard-Labarde, 1987, pp. 500-502), and to the increase of limits on foreign ownership inserted by the United Kingdom Government in the Articles of Association of the privatised British Aerospace and Rolls-Royce companies (Graham and Prosser, 1991, p. 144). The latter case is expressive of the impact of Community pressure, in that the Government had good grounds for arguing for total exemption from the rule by reference to Articles 56 and 223 of the Treaty, providing exceptions where public security or military materials are involved.

It is, of course, much harder to identify discrimination of this type when privatisation is by way of private sale of the State-owned enterprise to a single corporate buyer or group of buyers. Such sales have been common in European Community countries (Graham and Prosser, 1991, Ch. 4; Debbasch, 1989; Fraser, 1988, pp. 107-123, 127-140), and though they have often clearly had a protectionist purpose, the Commission has not intervened. Its main concern in such cases has rather been to ensure that the sale arrangement should not include any element of trade-distorting subsidy, contrary to Article 92 of the Treaty (Schina, 1987; Pappalardo, 1988). The Commission is in a powerful position by reason of the fact that failure to notify a new State aid is a breach of Community law (Article 93), and it has exploited this so as to secure what amount to routine powers of *ex ante* review of private sale privatisations by Member States, demanding reductions of pre-sale write-offs of debt by Government, imposing restructuring requirements as a condition of approval, and even achieving repayments by purchasers to Government of illegal subsidies (Graham and Prosser, 1991, pp. 126-129; Prosser, 1991, pp. 12-17; Fraser, 1988, pp. 132-133). There can be little doubt that these controls are fiercer than any which Member States' own laws or constitution might offer.

A third area of Community law which is of special relevance to the techniques of privatisation is its regulation of public procurement, again in the interests of open markets and non-discrimination (Weiss, 1988). The rules apply not only to the central Government, but to all public authorities, and extend to procurement of services as well as of goods. They therefore need to be respected in any programme of contracting-out

[4] As to how "national independence" considerations influence privatisation methods and asset valuations, see below, pp. 69-70.

of public services, such as that required of United Kingdom local authorities under the Local Government Act 1988, Part I (Paddon, 1991).

These three sets of rules by no means exhaust the impact which Community law may have on Member States' privatisation programmes. The Community's general competition regime is clearly of relevance to the conduct of privatised enterprises; the specialised rules it is developing in areas like public utilities and other sectors of imperfect competition may add to the regulatory discipline of privatised companies in these sectors, and affect the behaviour of the State towards them (Prosser, 1991); the most diverse elements in Community law may be found to have a - sometimes inconvenient - impact[5]. To examine such further areas in any detail would, however, take us beyond our particular concern here with the techniques of privatisation.

2. Constitutional issues

Some commentators have pointed to the advantage afforded to the United Kingdom, in carrying through its privatisation programme, by the fact that its flexible and unwritten constitution posed few if any constraints (d'Ormesson and Martin, 1987, p. 424; Graham and Prosser, 1991, Ch 2). Certainly it is the case that the apparently slow and burdensome method of privatisation chosen by the United Kingdom Government, under which almost every transfer of an enterprise to the private sector has been the subject of separate legislation, has owed as much to the need to legislate for the post-privatisation regulation of enterprises in the nature of public utilities as to tenderness for the idea of Parliamentary supremacy[6]. At the same time, formal constitutional constraints seldom seem to have raised serious obstacles to privatisation programmes. Where the socialisation of all property, or all productive property, has been raised to the level of constitutional principle, privatisation is unlikely to be a live issue . When fundamental changes in the politico-economic principles governing such a society occur, as in central and eastern European countries in 1989-90, they are likely involve the sweeping away of the old constitutional order, so that privatisation can take place as desired. A more delicate problem was however posed in Portugal, where the centre-right Government of Cavaco de Silva that took office in 1986 on a platform including privatisation was faced with Article 83 (1) of the 1976 Constitution, providing that "*All nationalisation measures carried out since 25th April 1974 are irreversible conquests by the working class*". Only the most limited exceptions to this principle of an inalienable public sector were contemplated by Article 83.

[5] See Karella v. Minister of Industry, Energy and Technology (European Court of Justice, 1991), below, text above note 25.

[6] Treasury proposals published in December 1984 in fact envisaged general legislation which would give each responsible Minister the power to require that activities and assets of public enterprises be privatised. The powers would be exercised by regulation (statutory instrument), subject to very limited Parliamentary control. Lack of Parliamentary time was the main reason why the proposals were not proceeded with: see Graham and Prosser, 1991, pp. 48, 109.

Constitutional amendment had to be sought, and was obtained in 1987, to remove this embarrassment.

Elsewhere, explicit constitutional constraints have fallen into two groups: those that protect certain kinds of public property or activity from privatisation; and those that impose "manner and form" requirements on the privatisation process.

(a) Constitutional protection of certain types of property

This phenomenon is perhaps most frequently encountered in central and southern America, where a sense of exploitation by foreign interests - in particular, of exploitation of natural resources by United States capital - led a number of countries to enshrine in the constitution a prohibition on the alienation of such resources, property in which, in their natural state, would ordinarily inhere in the State under the regalian system of mineral rights received in those countries by reason of Spanish conquest. Examples are offered by the Constitutions of Mexico and Brazil. Article 27 of the Mexican Constitution of 1917 declares subsoil hydrocarbons to be the imprescriptible and inalienable property of the State, and forbids the granting of contracts or concessions to private persons to exploit these resources (Murphy, 1991). The Brazilian Constitution of 1988, which is generally restrictive of State activity in the economic sector[7], vests all mineral deposits in the Federation (Article 176) and grants it a monopoly over oil production and most downstream activities, a monopoly expressed to include "*the risks and results flowing from the activities mentioned*" (Article 177) (Borromeu de Andrade, 1989).

This formulation in the new Brazilian Constitution directly reflects debates in the nineteen-sixties and seventies about the constitutionality of the Government's practice of granting foreign oil companies what were called "risk service contracts" as a way of attracting foreign investment to the oil industry notwithstanding the State monopoly on production mandated by the then Constitution. Risk service contracts, it was argued, were legitimate because the foreign companies, who were called upon to undertake exploration and production at their own risk, were rewarded not with rights to the oil they might discover but in cash - though the amount of cash was linked to the quantity and value of oil produced and the companies were given rights to purchase oil (Coelho Neto, 1985). The new formulation is designed to block this exit, as also are the broad terms of Article 27 of the Mexican Constitution, though even here it has been suggested that legal ingenuity might permit the introduction of private risk capital (Murphy, 1991).

The interest of these examples is that they show the difficulty of framing, in specific sectors of an otherwise capitalist or mixed economy, absolute prohibitions of private activity, and hence of privatisation. The modes of privatising are, as we have seen, too varied to be easily contained by simple formulae. In particular, production

[7] Article 173 provides that except as provided by the Constitution, the State may engage directly in an activity only when necessary because of imperatives of national security or in a vital collective interest, as defined by law.

of goods or services may readily be privatised by contracting-out even while responsibility for their provision remains firmly in the public sector (Kolderie, 1990). Contracting-out is, of course, the form of privatisation most widely practised in the United States, particularly in relation to State and local public services (Clarkson, 1989)[8]. The reasons for preferring this technique to more radical approaches such as simple withdrawal of public provision and reliance on market solutions are essentially political, but we should note that choices may sometimes be constitutionally constrained even in the United States. Thus the California Constitution, in Article IX, section 5, requires the State to provide "common schools", while the New Jersey Constitution, Article VIII (1), calls on the State to provide "*a thorough and efficient system of free public schools*". Such clauses leave open to argument the constitutionality of a policy of contracting-out all or part of State educational provision (Ellickson, 1988, p. 161; Cass., 1988, pp. 516-517), but they would certainly outlaw an abandonment of State educational responsibilities to the private sector.

A different kind of substantive constraint on privatisation is to be found in the French Constitution of 1958, whose Preamble gives constitutional force to the principles of the Preamble of the Constitution of October 27, 1946. Among these we find (alinea 9):

> "*Tout bien, toute entreprise dont l'exploitation a ou acquiert les caractéristiques d'un service public national ou d'un monopole de fait doit devenir la propriété de la collectivité.*"

Inconsistency with this provision was one of the grounds on which the basic French privatisation law of July 2, 1986 was referred to the *Conseil constitutionnel* by a number of Socialist deputies and senators. Though the ruling of the *Conseil* was highly restrictive in a number of other respects[9], its response on this point confirms one's doubts as to the efficacity of substantive constraints. It found that only those public services whose existence derived from constitutional rules and principles, as opposed to those erected by legislation[10], were protected from privatisation - but did

[8] It should not be assumed that this is because there is no State enterprise on the European model, see MacAvoy and McIsaac (1989) at p. 77: "There are at least fifty major federal enterprises. They employ over a million people, generate annual revenues of $22 billion, and in fiscal year 1983 received as subsidies federal outlays of at least $3.5 billion." But compare Zeckhauser and Horn (1989) at p. 15 (note 15) stating that 1978 data collected by Short (1984) show "the atypically low share of SOEs [State-owned enterprises] in the United States and the broad similarities across [other] countries."

[9] Decision no. 86-207, J.O.R.F. 27 June 1986; AJDA 1986.575, note J. Rivero, and see below pp. 56, 70-72.

[10] Compare the distinction between *services publics* "by nature" and other public services, Trib. Confl. 22 January 1921, Bac d'Eloka, D.1921.III.1, concl. Matter; and unsuccessful US attempts to identify "essential" governmental functions, *infra*, note 14.

not define them; and that a *de facto* monopoly in terms of the Preamble should only be found to exist having regard to the market as a whole and the competition the given enterprises faced in it, whatever might be "the privileged positions" they enjoyed at any given moment. On this basis it found that none of the enterprises to be privatised fell into either of these categories. Its reasoning has been criticised (d'Ormesson and Martin, 1987, pp. 422-423), but even had it been more rigorous, it would not have formed an absolute barrier to privatisation of these enterprises. Contracting-out, as opposed to sale, would remain possible, and sale of a public de facto monopoly could be accomplished via the expedient of introducing competition before privatisation (Rapp, 1986, p. 81).

A notable contrast is offered by the provisions of the German Constitution (*Grundgesetz*) on Federal public services such as railways, posts and telecommunications, and air traffic control (Article 87). These form a *lex specialis* in that administrative functions in Germany are ordinarily discharged by the *Länder*. Article 87 simply says that these services are federally administered with a distinct administrative structure. Though the *Grudgesetz* has been authoritatively stated to be economically neutral (*"wirtschaftspolitische Neutralität des Grundgesetzes"*)[11] with regard to nationalisation and privatisation (Püttner, 1990, pp. 257-258), Article 87 has been taken not just as an assignment of competence, but as the expression of an institutional guarantee preventing privatisation of these services save through a constitutional amendment (König, 1988, pp. 24-27; Maunz and Düring, 1989, Article 87, Rdnr 25, 26, 31).

(b) Constitutional requirements as to the manner and form of privatisation

Constitutions may require that privatisations - or privatisations by particular methods, such as asset sales - be authorised by Government, or regulated by legislation. Thus in the French Constitution, which distinguishes spheres of operation for Parliamentary legislation *(loi)* and Governmental regulation *(règlement)*, Article 34 provides:

> *"La loi fixe les règles concernant (...) les transferts de propriété d'entreprises du secteur public au secteur privé."*

This apparently simple provision has greatly complicated the process of privatisation in France, by reason of the doubts it leaves as to what constitute transfers of property from one sector to the other, and just what degree of legislative intervention is contemplated. This type of constraint may exist in a less obvious form in other constitutions. The position of legislation at the apex of the constitutional hierarchy of norms in the United Kingdom means that legislation is likewise required for the

[11] The expression used by the Federal Constitutional Court in *Bundesverfassungsgerichtsentscheidungen* (BVerfGE), 4, p. 7; see also BVerfGE, 12, p. 354, on the first Volkswagen privatisation.

privatisation of the major public enterprises there, since they have been directly constituted by Acts of Parliament which make no provision for their dissolution or change of status. A similar constraint operates in Germany with regard to the privatisation of public enterprises which have been created as public law bodies based on statute (Püttner, 1990, pp. 257-258).

Important constraints on manner and form may also arise indirectly. In Yugoslavia, it has been argued that the protection of "social property" in the Federal Constitution of 1974, Article 129, means that privatisation of such property can only be initiated by the social property-holders themselves, that is, management and workers of the relevant enterprises. The privatisation programmes of some Republics within the Federation do not respect this rule (Kuharic, 1991). In France, the *Conseil constitutionnel* has erected on the basis of the principles of equality and of respect for the right of property contained in the Declaration of 1789 on the Rights of Man and the Citizen the requirements that public sector goods and enterprises must not be transferred to the private sector for less than their true value; that such valuation must be provided by experts wholly independent of the purchasers, and carried out according to objective techniques normally employed in relation to sales of corporate assets; that the choice among purchasers is to be unbiased; and that national independence is to be preserved[12]. Again, these requirements have not proved easy to satisfy in practice. In particular, the last of these has been difficult to reconcile with the European Community law prohibition on discrimination among Community citizens on grounds of nationality (d'Ormesson and Martin, 1987, pp. 437-440, 443-444). In the United States, there is uncertainty as to the impact and present value of constitutional doctrine restricting delegation of Governmental functions, enunciated by the Supreme Court in striking down New Deal legislation in the nineteen-thirties[13]. In the absence of agreement as to what essential Governmental functions are, or even as to how to identify them[14], the anti-delegation doctrine is unlikely to pose a practical barrier[15], though it has been suggested, in a transatlantic echo of the *Conseil constitutionnel*'s decision, that a line might perhaps be drawn around the Governmental functions that the Constitution itself describes, such as the judicial power as set out in Article III (Cass., 1988, pp. 497-502). Nonetheless, the possibility of initiating obstructive

[12] Decision no. 86-207, *supra* note 9, and see Prosser, 1990, pp. 313-314, d'Ormesson and Martin, 1987, pp. 423-425.

[13] Carter v. Carter Coal Co., 298 U.S. 238 (1935), Schechter Poultry Corpn. v. United States, 295 U.S. 495 (1935).

[14] Compare National League of Cities v. Usery, 426 U.S. 833 (1976), at pp. 851-852, with Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528 (1985), where the distinction was abandoned.

[15] The Supreme Court has acquiesced in the exercise by private parties of both rule-making functions - Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973) - and adjudicatory functions - Thomas v. Union Carbide Agricultural Production Co., 473 U.S. 568 (1985).

litigation based on such constitutional principles is still a powerful weapon in the hands of opponents of privatisation in the United States, a weapon which will be shared in varying measure by objectors in other jurisdictions in function of the existence and accessibility of procedures for judicial enforcement of the constitution (d'Ormesson and Martin, 1987, pp. 409-412, 419-426, for France).

3. Spontaneous" or "directed" privatisation

We have already noted that one of the most general privatisation issues, affecting all methods except that of changing the external environment of public enterprises (a process which such enterprises are unlikely to wish, or even to be able, to initiate of their own accord) is that of whether the process is to be spontaneous, initiated by the affected enterprises themselves, or directed, according to a programme drawn up and implemented by the State. The two approaches may of course be combined; indeed, it is unusual to find effective programmes of privatisation in which there is no element of co-operation between the enterprises subject to privatisation and the State. Nonetheless, the mixture of elements varies continuously over a very broad spectrum.

At the one end we find the United Kingdom, where a Government-devised programme of privatisation is being implemented by means of separate legislative authorisations for each enterprise, or group of enterprises, to be privatised[16], a technique which requires direct Government initiative and involvement in every phase of the process, including the detailed ordering and timing of the programme. Even here, it should be noted, it is clear that enterprises have had some input to the process, in private negotiations with Government as to their place on the calendar, the terms of their privatisation and so on (Buxton, 1987), or in being required to submit schemes under the privatisation statute for their own restructuring or division[17]. Not so far away is France, likewise with a comprehensive and detailed Government programme,

[16] Exceptions to this generalisation are:

(a) State-owned enterprises already in the form of companies limited by shares, as in the cases of Jaguar and Rolls-Royce, and the minority Government shareholding in BP, though note that some privatisations of this type have ben legislatively authorised, e.g. Cable and Wireless (by the British Telecommunications Act 1981, section 79) and Amersham International British Nuclear Fuels Ltd and the National Nuclear Corporation (by the Atomic Energy (Miscellaneous Provisions) Act 1981: see generally Graham and Prosser, 1991, p. 83: and

(b) contracting-out by local and othe public authorities, regulated by the Local Government, Planning and Land Act 1980, Part III, and the Local Government Act 1988, Part 1.

[17] As with the National Bus Company under the Transport Act 1985, or the British Airports Authority under the Airports Act 1986; compare the Scottish Transport Act 1989, requiring the Minister himself to draw up the restructing plan for the Scottish Transport Group after consultation with the Group: see generally Graham and Prosser, 1991, pp. 81-82.

differing from that of its neighbour essentially in that a single legislative enactment was used to authorise the privatisation of 65 listed enterprises in the programme, while a second set out the procedures and principles to regulate the bringing of these enterprises to market by the Government[18]. Again, however, the whole process was to remain firmly under the active control of the State.

At the other end of the spectrum we find Italy, where privatisation was until very recently so spontaneous as to raise the question of whether it should be regarded as genuine privatisation at all, as opposed to the natural process by which public enterprises adjust their activities to economic circumstances - a process which in France is graphically termed *"respiration du secteur public"* (Rapp, 1987). While there has been some tentative following in Italy of fashions set elsewhere, such as Government-initiated changes of status for the railways (from direct Government operation to separate *ente pubblico*) and for some existing *enti pubblici* (such as ENEL, the public electricity supplier), and for public credit institutions into holding or joint-stock companies (Cassese, 1988, pp. 32-33; Gambino, 1991), the major asset and enterprise transfers into the private sector have been accomplished by the major State holdings, IRI (*Istituto di Riconstruzione Industriale*), ENI (*Ente Nazionale d'Idrocarburi*), and EFIM (*Ente Finanziamento Industria Manufatturiera*). These are massive industrial groups, whose control over member companies may often be exercised by strategic minority holdings, as opposed to total or majority ownership, and in which restructuring of activities and assets is a continuous process. Governmental powers of initiative in this respect are limited to the giving directives within the framework of general economic policy programmes, directives which bind the holding compagnies but which do not create rights or duties vis-à-vis third parties (Gambino, 1991). The major programme of disposals by IRI in the mid-nineteen-eighties, which realised £2.5bn in 1984-86 (de Jonquieres, 1986)[19] was, however, undertaken in pursuance of its own "privatisation policy" (Segnana, 1991, p. 17); privatisation was absent from the programme of the then Socialist-led Government. Indeed even negative control by Government proved difficult and controversial: Governmental consent to IRI's disposals is legally required only where the sale will result in its withdrawal from an entire sector of economic activity, and there was dispute between Government and IRI as to whether this was the result of its intended disposal of the food company SME (Cassese, 1988, pp. 34-37; Gambino, 1991)[20].

[18] See *Loi no. 86-793 du 2 juillet 1986*, *Loi no. 86-912 du 6 août 1986*, and generally d'Ormesson and Martin, 1987, pp. 412-417 and 426-455.

[19] UK privatisations in the same period realised £5.9bn: Vickers and Yarrow, 1989, p. 210.

[20] Different rules apply to EFIM, where the consent of the Minister of State Participations is needed for disposals, and to ENI, where consent is needed if a disposal engenders a loss of control of the company by ENI. After the SME dispute, both IRI and ENI have referred major disposals to the *Comitato di Ministri per il Coordinamento della Politica Industriale* (CIPI), established by Law no. 675 of 12 August 1977 (Cassese, 1988, p. 37). See further below, p. 62.

Neither British nor Italian writers on their respective systems have, to our knowledge, expressed themselves in this vocabulary of "directed" and "spontaneous" privatisation. That seems rather to be a central European categorisation, one that reflects the amplitude of the task of privatisation that these countries face, by suggesting the value of diffusion of initiative and effort, and the availability of different modes of approach to the problem which may, however, be pursued in combination or simultaneously. Their chosen positions on this spectrum present interesting variations.

The German (formerly East German) technique of decanting all State enterprises into the lap of the *Treuhandanstalt*, and giving it plenary powers to dispose of them as quickly as possible (Dornberger and Dornberger, 1990; Buchholz, 1991, Müller, 1991), may be seen, from the standpoint of the enterprises themselves, as highly directed, even though the Government has denied itself any role in individual privatisation decisions and legislative regulation of the privatisation process does not appear unduly restrictive. Czechoslovakia, Hungary and Poland have each created structures in which there is room both for a Government-initiated programme of privatisations and the commencement of processes of transfer to private ownership at the instance of enterprises themselves.

Of these three, Czechoslovakia appears to lean most strongly towards structured solutions. The so-called Small Privatisation Law of October 25, 1990 (Law 427/1990) provides for the sale of small businesses (retail outlets, restaurants, and so on) by way of a series of local auctions, in which, clearly, Government must decide what goes under the hammer (Kotáb, 1991; Izak, 1991)[21]. Privatisation of larger businesses, excepting public utilities and some other key industries, is now regulated by the Large Privatisation Law of February 26, 1991 (Law 92/1991). Like the East German law this Large Privatisation Law envisages that the assets of enterprises in course of privatisation will be held by a specialised public agency, the Privatisation Fund (Article 11 and Part V; separate similar agencies are being set up by the Federated Czech and Slovak Republics); this, however, is not accomplished *en masse* but by way of individual "privatisation projects" (Article 6) which the Law envisages as normally initiated by the enterprises themselves (Article 7 (2)). At the same time, however, the Law provides for the initiation of a project by the Ministry responsible for the enterprise, after consultation with the latter, and for the drawing up by Government of strategic choices for privatisation and a list of the enterprises to be privatised (Articles 43, 44); and it restricts individual disposals of property by State entreprises (Article 47). One commentator, writing in August 1991, saw this scheme as a *de facto* acknowledgment of the political and economic strengths of managers of State enterprises, to whom all real decision-making power had been given (Izak, 1991, p. 5). Since he wrote, Law 92/1991 has been amended so as to speed the pace of privatisation by requiring enterprises to present privatisation projects by November 1, 1991 or May 31, 1992 (Genillard, 1991). Managers still have the task of preparing the

[21] Similar arrangements are made by the Hungarian Pre-Privatisation Act 1990 (Act No. LXXIV of 1990), under which 10,000 shops and restaurants are being sold by auction according to the Retail Privatisation Plan.

projects, but this amendment represents a marked shift in the direction of directed privatisation.

Hungary appears to be moving in the opposite direction, towards a larger role for enterprise managements. Its first legislation, the Transformation Act 1989, Act No. XIII of 1989, envisaged that privatisation would normally be initiated either by the enterprise itself or by its "founding body", which would ordinarily be the responsible Ministry, through an application to the State Property Agency. While the Agency - which by the State Property Agency Act 1990, Act No. VII of 1990, was given a legislative mandate to promote, facilitate and regulate the orderly privatisation of State-owned enterprises - is empowered to fix the privatisation method, the mode of valuation, and other conditions, or indeed to reject the proposal[22], enterprise initiative is emphasised by provision for deemed approval should SPA fail to pronounce within 90 days of the completion of the dossier of a proposal. At the same time SPA is expected to develop and carry out an active programme of privatisation. Its First Privatisation Programme involved twenty "flagship" businesses, with forty to sixty more in the Second Programme; it has powers to change the management of enterprises which object to privatisation; it may receive proposals by domestic and foreign investors for the privatisation of particular enterprises, which may be carried through without the consent of the affected enterprise, though not without consultation. Certain types of enterprise, notably public utilities and financial institutions, are excluded from this procedure (Sulkowski et al., 1991, p. 35). These arrangements have proved slow and cumbersome. SPA has been understaffed and cautious; not one of the first 20 flagship compagnies had been privatised by the end of October 1991. A simplified procedure called "self-privatisation" has been installed under which SPA's only control will be over the approval of consultants retained to advise a firm on its privatisation, but fear of fraud and oportunism by managers has limited its application to the smaller State enterprises (Denton, 1991b).

Poland appears in practice to be relying more heavily on "spontaneous" privatisation that either of its near neighbours (Wolf, 1991; du Vall and Sroczyski, 1990). A part of the reason for this may be the previous, Solidarity-inspired, recognition of employee rights to control State enterprises, via an employee council, having rights to elect, hire and dismiss the general managers of the enterprise (Domański, 1991). Though these rights are not constitutionally protected as in Yugoslavia, the fact that directed privatisation necessarily implies their limitation or disappearance clearly puts additional obstacles in its path. Poland's Act on the Privatization of State-Owned Enterprises of 13th July 1990 envisages two routes to privatisation through transfer of assets to the private sector; the first involving the transformation of a State-owned enterprise into a joint-stock company (and its subsequent sale), the second the liquidation of the enterprise followed either by the sale of its assets, their transfer to a newly-formed joint-stock company, or a

[22] Political controversy in fact led in 1990 to great hesitancy on SPA's part in approving proposals. SPA has now been transferred from Parliamentary supervision to supervision by the Council of Ministers and the State Audit Office, and the rate of approvals has risen: Sulkowski, 1991, p. 32; Denton 1991.

management-worker buy-out procedure. The second method, which builds on a procedure originated in 1981 for the winding-up of unsuccessful state enterprises, and is principally intended for smaller enterprises, is by far the commoner. Between 500 and 900 such liquidations are expected in 1991 (Wolf, 1991). It has almost always been initiated by the management and workers of an enterprise, though the responsible Ministry or other public authority may also do so. For employees, the great attraction of the process is that private sector enterprises are not subject to the Excess Income Tax, a tax imposed on public enterprises to curb inflationary wage increases by penal taxation of above-norm awards. Poland has created a Ministry of Ownership Transformation, which closely supervises, and may initiate, privatisation via the transformation method; but the system places primary responsibility for supervising the process of "privatisation through liquidation" not in its hands, but in those of the different Ministries responsible for the enterprises. There appears to be little restriction of the opportunistic use of the device even though the authorities recognise a serious risk that numerous under-capitalised enterprises will be created.

The Romanian privatisation programme has had two main legislative stages (Glick et al., 1991; Seward et al., 1991). Law 15/1990 provided for the transformation of all the country's State-owned enterprises into joint-stock or limited liability companies. A second law, the Draft Privatization Law laid before the legislature on June 9, 1991 and approved in August, provides for ownership of these companies to be transferred as to 30 per cent to a number of Private Ownership Funds through which a scheme of free distribution of ownership vouchers to citizens will be implemented, and as to 70 per cent to a State Ownership Fund, with the task of holding shares and preparing enterprises for privatisation wherever possible. Pending the creation of these Funds, a Governmental Commission will select companies for early privatisation through sale of shares. This looks a highly "directed" system, but in practice it is expected that companies themselves will initiate plans for privatisation under the supervision of the Funds. In addition, Chapter VII of the draft law provides for sales of assets, forming free-standing economic units, by commercial companies in certain fields of activity. These may be initiated and carried through by the companies themselves; a list of assets to be offered for sale will also be prepared by the Governmental Commission.

In Yugoslavia, finally, "spontaneous" privatisation may be said to enjoy constitutional status. Legislatures and courts, including constitutional courts, are enjoined to ensure special social protection for the self-management rights of the working people and social property[23], and most major industrial enterprises are constituted as socially-owned property subject to this regime. Directed privatisation, it is argued, would thus constitute an infringement of these protected self-management rights (Madzar, 1991). The basic Federal law on privatisation, the Law on Circulation and Management of Social Capital of December 1989 (Vasiljevic, 1990), as amended in August 1990, respects this constraint, providing for privatisation by way of

[23] Constitution of the Socialist Federal Republic of Yugoslavia 1974, Article 129; see also Introductory Part, Principles, Section III.

management-employee buy-outs through the distribution of "internal shares" in the enterprise. Payment may be spread over ten years and the transferees enjoy discounts, on the valuation of the shares they receive, of up to 70 per cent. 1100 out of 2500 enterprises of this type in Yugoslavia have already been "privatised", in whole or in part, by this means (Madzar, 1991). As in Poland, privatisation by this means has given rise to fears of under-capitalisation followed by stagnation or failure of the enterprises, and some Republican Governments, albeit with contestable legality, have pursued a different path. Croatia has enacted a law on April 1991 which provides for the transfer of enterprises of socially-owned property into companies, at first only on worker and management initiative, but as from July 1992, on the initiative of the Privatization Agency. This Croatian law is modelled on Slovenian legislative proposals (Kuharic, 1991) which were abandoned at about the time of its enactment in favour of a much more "directed" approach dictated by a desire for speedy and systematic privatisation and the avoidance of "insider" gains to managers and workers. A new Slovenian legislative proposal along these lines has since been brought forward[24].

If we turn our attention back at this point to Western States we find that, in general, they practise a more directive form of privatisation than do their central European counterparts. With much smaller public sectors, often populated by public utilities and other natural monopolies, the need and the scope for enterprise initiative are alike much reduced. Exceptions have been afforded by Italy, as already noted, and Spain (Moderne, 1989), where large public holdings have pursued independent policies. Even in Italy, however, the situation is now changing, and under pressure of State budgetary difficulties, legislation is in passage which would provide a general framework for the transformation of public enterprises and the subsequent sale of shares (Gambino, 1991). Separate laws with similar effect have already been passed for public credit institutions and for local public enterprises (Gambino, 1991). Though financial rather than ideological considerations are driving Italian policy, these developments reinforce the sense that for reasons of scale and urgency, the debate on spontaneous versus directed privatisation must be approached quite differently in western, and in central and eastern, Europe.

4. Property rights in public enterprises

While constitutional and political factors are certainly powerful shapers of privatisation technique, we should not neglect another factor which has particular significance for the choice of legal instruments through which those techniques may be operated. This is the factor of property rights: more precisely, of who, if anyone, may claim to hold property rights in a "public" enterprise prior to its privatisation. Important aspects of the foregoing discussions can be seen, in fact, as reflections of this issue. This is most obvious in relation to Yugoslavia, where the fundamental notions of social property and of self-management clearly give the workers a claim in relation to the property of their enterprise, even if it is not one that can be disaggregated into individual property rights. The Constitution itself provides the link between this claim and the preference for spontaneous privatisation. Linkage between property issues and

[24] Stiblar, 1991, pp. 9-11.

privatisation methods, while seldom so obvious, is, however, widespread, and may be analysed under three headings: cases where the property right of the State in the relevant enterprise is contested; cases where this property right is diffused; and cases where it is indirect.

(a) Contested property rights

The clearest illustrations of the problems stemming from contested property rights are afforded by those central European States which, in turning away from Communism, have wished both to compensate those who suffered, either in body or goods, at the hands of the previous regime, and to re-introduce a private economic order. Pursuing the former objective impedes achievement of the latter, as the title to State assets and enterprises earmarked for privatisation becomes clouded by hundreds or thousands of claims for compensation or restitution by previously expropriated owners or their heirs. East Germany and Czechoslovakia, both of which have legal provisions contemplating restitution in kind, have experienced considerable difficulties in privatisation for this reason (Müller, 1991; Eder, 1991; Financial Times, 1991). Poland is likewise being pressed by a small but influential lobby to offer restitution in kind, which must be expected to lead to similar results (Ostrowski, 1991), while Hungary and Slovenia are in the process of passing restitution bills which will limit successful claimants to financial compensation. Though the scale of the problem here clearly outruns any Western experience, central European Governments have at least had the chance to work out - and legally implement - the balance they or their supporters desired between these two objectives.

For Western Governments, contests over rights appear to have popped up as unexpected obstacles to particular privatisations, sometimes rooted - as in central Europe - in the alleged illegitimacy of earlier expropriations, sometimes not. In Greece, for example, important parts of the privatisation programme have been stalled by litigation referred by Greek courts to the European Court of Justice. In Karella v. Minister of Industry, Energy and Technology[25], shareholders in enterprises which the State is now seeking to sell off successfully argued before the European Court of Justice that the State's acquisition of a majority of the shares was contrary to European Community law. Under Law No. 1386/1983 of 5 August 1983, the company, like many others in financial difficulty, was placed under the temporary administration of the OAE (*Organismo Anasygkrotiseos Epicheiriseon* A.E.), a State-created "rescue" body which injected new finance into the company through the creation, and issue to it, of additional shares. Though existing shareholders were given preferential rights to acquire these shares, the arrangement contravened the Community's Second Company Law Directive (Council Directive 77/91), whose Article 25 requires the consent of the general assembly of shareholders for any such increase of capital.

[25] European Court of Justice, Joined cases 19 and 20/90, Judgment of May 30, 1991, unreported. See also Opinion of Advocate-General Tesauro, January 30, 1991, unreported.

In the United Kingdom, the problem has arisen out of an unclear allocation of property rights in the enterprise to be privatised. When in 1985 the Government wished to privatise the Trustee Savings Banks it found that the legislation which had set them up left it unclear who owned their assets. Advised that it was not their owner, it allowed the Banks themselves to retain the proceeds of their own privatisation, producing a windfall for the new shareholders and provoking litigation by the depositors in the Scottish Trustee Savings Bank, whose claim that the founding legislation gave them title to the residual assets was rejected by the highest judicial authority, the House of Lords[26]. If the depositors did not own the Bank, however, who did? The Law Lords thought it was "the State", and the Government glossed this by suggesting that the State referred to a broader concept than the Government, lacking in legal personality but to which assets could be said to belong in the more general sense that they were ultimately at the disposal of Parliament. In itself this may perhaps be regarded as a "relatively trivial" legal issue (Graham and Prosser, 1991, p. 81), but it is worth noting that it might be no easier to say who owns (or owned) the major statutory corporations through which almost all United Kingdom nationalised industry was run and most of which have now been privatised. That issue will not be litigated because there are no rival claimants, but it does suggest that English (and Scottish) legal concepts on ownership of public property may be too idiosyncratic, not to say archaic, to be of service in comparative studies.

(b) Diffused property rights

The familiar British statutory corporation, which exists as a legal person, created by Parliament, distinct from "the Crown" which is the recognised legal embodiment of the State in the United Kingdom, may be seen as an example of the diffusion of State ownership. Such a phenomenon, whereby enterprises and assets are held not by the State itself but by distinct public legal persons, is in Western economies the rule rather than the exception. The statutory corporation in Britain, the *établissement public* in France, the *ente pubblico* in Italy, have all been generally preferred, for the purpose of running industrial and commercial enterprises, to direct management by Government departments; and enterprises organised in this latter form, whether for historical or other reasons, are now often being transformed into separate public bodies, with a view to privatisation, if not of assets, then at least of management style and disciplines (Cassese, 1988; van de Ven, 1991; Tsukamoto, 1991; Gambino, 1991). Another form of diffusion is the holding of enterprises and economic assets by regional and local public entities, a phenomenon whose importance varies from country to country, but which is seldom wholly absent.

The significance of such diffusion for our current discussion is that any privatisation steps which are not spontaneous will require the exercise of regulatory

[26] Ross v. Lord Advocate [1986] 1 WLR 1077, discussed in Percival, 1987; and in Graham and Prosser, 1991, pp. 34-35 and 80-81. Banks have also proved tricky to privatise in Germany, as is shown by complex legislation on the *Deutsche Siedlungs- und Landesrentenbank*: see the *DSL-Bank Gesetz vom 11 Juli 1989, Bundesgesetzblatt*, 1989, I, p. 1421; Schmidt, 1989.

authority by the State, insofar as a legally separate entity is being required to divest itself of assets or activities, whether by outright sale or other disposition, or by contracting out. The State cannot use its proprietary authority to achieve this end, as it might do where the enterprise was integrated into a Government department or, more commonly, operated by a joint-stock company whose shares were held directly by Government. Unless, therefore, it can rely on existing general or special legal powers entitling it to dispose of the assets or activities of such distinct national, regional or local entities, the Government is likely to need to secure legislative authority to carry through this kind of privatisation, even in the absence of specialised constitutional provision, as in France, calling explicitly for this (d'Ormesson and Martin, 1987; Graham and Prosser, 1991, pp. 43-47 and 84-88). Thus the United Kingdom Government needed Parliamentary legislation, in order to make local authorities sell their housing stock to their tenants, and to promote and regulate the process of contracting-out local authority services[27], but was able to force the then British Gas Corporation to dispose of a profitable oil field against its will by invoking powers under its parent statute, the Gas Act 1972 (Graham and Prosser, 1991, pp. 111-112).

Formal constitutional arrangements may operate to put the property of State public entities beyond the reach of Federal privatisation programmes. It is notable that United States authors do not discuss whether the Federal Government could compel State Governments to privatise entities owned by them, through Congressional legislation based, for example, on the Commerce Clause. Were this constitutionally thinkable, one assumes it would be discussed, particularly since the abandonment by the Supreme Court of any attempt to define a set of essential Governmental functions in respect of which States are immune from interference by Federal legislation[28]. Federal dispersion of the public sector may have obstructed, or at least complicated, privatisation in West Germany also (König, 1988, pp. 17-34; Püttner, 1988, pp. 262-263).

(c) Indirect property rights

From the standpoint of privatisation technique, it is helpful to make a distinction between the diffusion of State property rights among different public entities, and the indirect holding of such rights, at one remove from the State itself, through shareholdings of public entities in companies constituted under the ordinary forms of company law. Such subsidiaries, whether wholly or partly owned, are of course the property of the relevant enteprises, not of the State. They may form a significant part of the potential mass of public property for which privatisation is feasible: Italy presents a clear example of this type, as does Spain (Moderne, 1989; White, 1987; Fraser 1988, pp. 136-140), and the phenomenon is also important in France (Rapp, 1986, pp. 48-73). They present to the legislator a problem analogous to that faced by central European Governments meditating the right mix of spontaneous

[27] Housing Act 1980, Part I; Local Government, Planning and Land Act 1980, Part III; Local Government Act 1988, Part I.

[28] See note 14, *supra*, and associated text.

and directed privatisation. Should he treat the privatising activities of the parent bodies in relation to these subsidiaries as a matter of their general management, as the necessary "respiration" of the public sector, and hence as the object of only limited control and direction? Or should these activities be seen, by virtue of the central place in the public sector occupied by these holdings, as the leading edge of the privatisation effort, strongly directed and hence worthy of extensive political and constitutional attention?

Much, clearly, will depend on whether the approach of the relevant public bodies is in tune with State policy. In the United Kingdom, for example, most statutes setting up industrial and commercial public corporations conferred broad powers on them to create, acquire, and dispose of such subsidiaries within their general area of competence; sometimes subject to Ministerial consent, but more often not (Daintith, 1974, pp. 219-223). The Government was, however, clearly not convinced that these powers would be exercised in sympathy with its privatisation objectives, or with sufficient despatch, and in several cases sought through legislation additional powers by which the appropriate Minister could compel the disposal of such subsidiaries to the private sector[29]. The use of such powers gave a much greater political significance to the disposals that took place, and brought about greater political accountability, in that the new provisions, unlike the old, required in most cases that Parliament be informed of disposals.

Where privatisation is less loaded with ideological significance than in the United Kingdom, other considerations may shape the degree of control the State seeks to exercise over disposals (and retention) of subsidiaries. Entities like the Italian IRI or the Spanish INI, which have over an extended period operated as quasi-autonomous public holding companies, buying and selling shareholdings according to their own corporate logic, may be difficult to enlist as instruments of a privatisation policy determined elsewhere, or to restrain if they adopt a privatisation policy of their own (Cassese, 1988; Moderne, 1989).

In France, the constitutional requirement that Parliamentary legislation authorise the transfer of property to the private sector has made it impossible for Government to adopt a hands-off attitude even where it wished to. Its former practice of administrative authorisation of acquisition and disposal of subsidiaries by *arrêté* of the Minister of Finance and the sponsoring Minister or Ministers was by implication held unconstitutional by the *Conseil d'Etat* in two 1978 decisions[30], whose effect, in

[29] See for example British Telecommunications Act 1981, section 62 (3); Transport Act 1981, section 3; Industry Act 1980, section 1 (1)(b); British Shipbuilders Act 1983, sections 1, 2; and for pre-1974 examples, representing an earlier wave of privatisation, see Daintith, 1974, pp. 231-234. In a number of cases, of course, the obtaining and use of these powers has just been an interim step on the way to the full privatisation of the parent entity itself.

[30] C.E. *24 novembre 1978, Syndicat national du personnel de l'énergie atomique* CFDT, AJDA 1979.42; C.E. *24 novembre 1978*, Schwartz, AJDA 1979.42.

conjunction with later decisions, was to require legislative authorisation for any transfer of a subsidiary into the private sector, no matter how small and no matter how far down the holding chain from the parent body. Public enterprises nonetheless went on conducting disposals on a purely administrative basis, often having to offer substantial indemnities to buyers against risks of subsequent annulment of the sales; and a 1982 proposal by the Socialist Government for legislation to regularise the situation made no progress in Parliament (d'Ormesson and Martin, 1987, pp. 408-412; Durupty, 1988, pp. 56-59, with a table of selected illegal privatisations). It was therefore natural that the Chirac Government, in drawing up its privatisation legislation, should pay careful attention to the problem of subsidiaries.

The principles are laid down in the Law of July 2, 1986, Article 7. This requires a legislative authorisation for the transfer to the private sector of enterprises in which the State directly holds more than half the capital, i.e. parent enterprises. For subsidiaries, a legislative authorisation is also required if the enterprise was brought into the public sector by means of a law; this has been the situation of a large number of nationalised enterprises which, following restructuring within the public sector, have become subsidiaries of others, such as the *Société Nationale Elf-Aquitaine*, which became a subsidiary of the State oil company ERAP. Subsidiaries otherwise acquired may be disposed of by administrative means: a decree for the larger enterprises, simple Ministerial consent for the rest[31]. The required legislative authorisation was for a large number of subsidiaries provided directly by the list of enterprises for privatisation appearing as the Annexe to Article 4 of the Law of July 2, 1986. Even this did not resolve all difficulties. The following year the *Conseil d'Etat*[32] held that the privatisation procedures for the listed enterprises applied even to partial disposals of interests in listed subsidiaries such as Elf-Aquitaine, on the footing that such disposals (here, of 11 per cent of ERAP's holding) could be seen as stages in the achievement of the privatisation goal set by the legislation. The case illustrates the likely difficulties of drawing clear borderlines, both between "spontaneous" and "directed" privatisation, and between privatisation and "*respiration du secteur public*".

III. CHANGES OF OWNERSHIP, ACTIVITIES, AND ASSETS

We turn now to look at some issues which are more particularly related to privatisations in the first two categories mentioned earlier: those which involve a change in the ownership of the enterprise from public to private, or the disposal of activities or assets to the private sector.

1. Specialised privatisation agencies

[31] See Articles 20 and 21 of the *Loi no. 86-912 du 6 août 1986* for details.In the case of smaller subsidiaries, consent will be assumed unless the Minister objects.

[32] In C.E. *2 février 1987*, Joxe et Bollon, *Rev. Fr. Dr. Admin.*, 1987, p. 176, concl. Massot.

One of the first questions to be considered by any government contemplating a programme of privatisation is whether it should set up any specialised agency for this purpose, and if so, what the remit of the agency (or agencies) should be. Practice has varied widely. Some countries, like the United Kingdom, have set up no specialised machinery: there, each privatisation has been carried through by the Ministry responsible for the enterprise in question. Others have set up several agencies: Romania, for example, has created a specialised Government Department, the National Agency for Privatisation and Small and Medium-Sized Enterprises Development, whose role is essentially one of policy formulation, methodology, and supervision; five Private Ownership Funds, joint stock companies created to organise the participation of individual citizens in privatised companies
through free distribution of vouchers; and a State Ownership Fund, to hold and eventually to dispose of the residue of interests in such companies (Romania, 1991; Glick et al., 1991). The Romanian example indicates some of the purposes such specialised bodies may serve. Generally they might be schematised as follows:

(a) Policy development, co-ordination and oversight

Examples are the Romanian National Agency (above); the Costa Rica National Commission (replaced after a short time by an asset-holding body) (Berenson, 1990, p. 163); the Hungarian State Property Agency, which also has an executory role (Sulkowski et al., 1991); and the Slovenian Agency for Privatisation (Kuharic, 1991). There is a clear correlation here with States where privatisation is a major enterprise requiring strong political leadership and organisation; Western European countries seem to have felt no need for such a device.

(b) Holding and disposal of property for privatisation

Specialised bodies have been much more widely used in this role. They enable Government to distance itself from the details of the privatisation process; to avoid accusations of favouritism and discrimination; to secure expertise and independence in the process of disposal, notably in valuation; and to facilitate the transformation and restructuring of enterprises and the regrouping of assets for disposal. Where privatisation is enterprise-initiated, they may perform vital functions of assessment of proposals and control of the regularity of sales procedures. The best-known example is perhaps the *Treuhandanstalt* in Germany (Müller, 1991; Buchholz, 1991), but similar machinery is also to be found elsewhere in central Europe (the Federal and Republican Privatisation Funds set up under the Czechoslovak Large Privatisation Law 1991; the Romanian State Ownership Fund; the Hungarian State Property Agency); in Asia (the Philippine Asset Privatization Trust (Santis, 1990)); and in Latin America (the *Fiduciaria de Inversiones Transitorias of Costa Rica* (Berenson, 1990)). In the current (post-1980) wave of privatisation, no Western European

examples of this type have been noted[33]: there, existing publicly-owned joint-stock companies have been sold directly to the private sector. Often, of course, these sales have been by public holding companies like IRI in Italy, INI in Spain and OAE in Greece, which resemble the new East European privatisation funds in so far as their general mission includes the resale to the private sector of the companies with which they were originally entrusted. West European public enterprises taking other forms have generally been the object of transformation on an individual basis organised by the sponsoring Ministry. Regrouping and division of assets, where necessary, has been done in the same way (Graham and Prosser, 1991, chapters 3 and 4, on the United Kingdom and France).

(c) Independent advice and evaluation

Some governments, while not seeing the need to pass the enterprises they privatise through a specialised holding agency, have still wanted the advantages of independent advice on and evaluation of privatisation proposals that such an agency can offer. In a few cases, therefore, agencies without executive functions have been set up. The most notable of these is the French Privatisation Commission (now called the *Commission française d'évaluation des entreprises publiques*) (Graham and Prosser, 1991, pp. 99-103; Durupty, 1988, pp. 60-67; Prosser, 1990, pp. 313-315) established by Law 86-912 of 6 August 1986 with the task of providing a valuation for the companies to be privatised under the Law of 2 July 1986, and of giving an opinion on the price fixed, on the basis of its valuation, by the Minister. The Commission's valuation - which is published - is binding, in that the price must not be lower (though it may be higher, and in fact has usually been so (Durupty, 1988, p. 65)). No other case has been found in which the law imposes a binding valuation by a non-executive body, and it is clear that the French Government would have opted for a purely advisory body had the *Conseil constitutionnel* not held that privatisation, to be constitutional, must involve independent valuation (d'Ormesson and Martin, 1987, pp. 427-428).

While the success of policy development bodies is probably dependent on political factors, such as the relative strength of reformist and conservative factions in Government, the ability of the other types of agency to serve the ends for which they were created is in large measure a function of the legal status and powers which they enjoy and the legal obligations to which they are subject. Framers of privatisation laws in central Europe have clearly been aware of the need to ensure that the agencies are both independent and politically responsible, as is evidenced by the elaborate provisions in the Czechoslovak Large Privatisation Law 1991 and the Romanian Privatization Law of 1991, Chapter III, and by the Hungarian argument about the accountability of the State Property Agency (Sulkowski et al., 1991). Commentary on these provisions is not possible here, not least because their significance will depend greatly on the general

[33] The earliest United Kingdom privatisations, however, used this method on a sectoral basis, creating disposal agencies for State-owned transport and steel undertakings: Transport Act 1953, Iron and Steel Act 1953.

approach to legal ordering which is followed in these "new market economies". Western experience, moreover, offers little to indicate what practical problems such bodies might encounter. The French Privatisation Commission appears to have enjoyed the legal means to carry out the more limited tasks assigned to it, though there has been argument both about the adequacy of its material resources and about the efficacy of its action (Durupty, 1988, pp. 60-67; Graham and Prosser, 1991, p. 105).

2. Valuation, pricing, and methods of sale

These complaints lead us directly to the question of whether law can be an effective means of ensuring a fair valuation of the enterprises or assets for privatisation. The question is complex, because maximisation of the yield to the public purse is not the only policy of Governments, nor necessarily even a dominant one. Importance may also be attached to such diverse objectives as "promoting a share-holding democracy" (United Kingdom, France); "national independence" (France); "promotion of competition" (East Germany); "facilitation of employee share-ownership" (Yugoslavia, France); "preservation of employment" (East Germany). The fact that such objectives may be mutually conflicting has frequently been noted (Graham and Prosser, 1991, pp. 19-33; Vickers and Yarrow, 1989, pp. 212-224, and compare Walters, 1989, pp. 248-255). The objectives may operate both to shape choices about methods of disposal of enterprises or assets, and to determine rules or criteria according to which given methods are to be carried out. The price to be obtained for the enterprise or assets will be a function both of the method of sale and of how and subject to what conditions it is carried out.

(a) French and British practice compared

Despite this complexity, it may in this field be possible to say something about the effects of legalisation of the sale and valuation process, by comparison of the French and United Kingdom practice. Prosser and Graham (1991, especially pp. 91-93) have drawn attention to the strong contrast between the highly legalised French system and that operating in Britain where, despite elaborate legislative prescription of the processes for preparing public enterprises for sale, the sales themselves are left entirely to the procedures of the general law appropriate to the chosen technique, such as share flotation or private sale of assets. Which country has done better in blending privatisation objectives with high financial rewards?

Wider shareholding, national independence, and employee shareholding, all figure among French privatisation objectives. The first of these aims suggests that shares be sold on the Stock Exchange, to which all can have access; the third argues for direct sales to employees (employee buyouts) or at least a privileged position for employees in any Stock Exchange sales; while the second is most easily achieved if private sales are made to buyers who will protect "national independence". While the enabling Law of 2 July 1986 makes no stipulations as to method, that of 6 August 1986 establishes Stock Exchange sale as the normal method (Article 4 (1)). Most such sales have employed the technique of "*offre publique de vente*" (the public offering of shares at a fixed price). As compared with a tender offer with a floor price, which is the more normal mode of initial private offerings of shares on the French Bourse

(Jenkinson and Mayer, 1988), the OPV creates a greater risk of under-pricing, a risk arguably accentuated in privatisations, where under-subscription spells political failure and will therefore be avoided by Ministers if at all possible[34]. Yet as d'Ormesson and Martin explain (1987, p. 445), legal requirements reflecting the objectives of favouring small investors and employees in these sales (Articles 11, 12 and 13) made it impracticable to proceed by way of tender offers. Moreover the rule imposed by the *Conseil constitutionnel* of "no sale at an under-value" deprives the Government even of the possibility of lowering the price should the market fall between the publication of the OPV and the first trading day, as happened with the Suez issue in 1987 (Graham and Prosser, 1991, p. 103). With this exception prices fixed in OPVs in France have all been below (in some cases considerably below) the market price emerging at the end of the first day of trading.

The French prices have not, however, been as far below market prices as has generally been the case with United Kingdom privatisations by way of public offerings of shares at fixed price (Jenkinson and Mayer, 1988). This has likewise been the normal offer method in the United Kingdom, and for the same reason: small investors are thought to be deterred by the complexity of tender offers (Graham and Prosser, 1991, p. 96). While it is tempting for lawyers to suggest (Graham and Prosser, 1991, pp. 102-103) that the discrepancy in OPV discounts has something to do with the existence of the Privatisation Commission in France, operating according to formal legal criteria, in contrast with British reliance on "private" valuation methods lacking legal support or control, we should note that the prices set by the Finance Minister in France have generally been higher than those indicated by the Commission's valuation, and that valuation has sometimes been lower than any yielded by the diverse methods of valuation ordinarily in use (Durupty, 1988, pp. 64-65). It seems hard, therefore, to assign any clear effect to the French legal structure in this case.

"National independence", as noted above, argues for a different method of sale, and for the major public enterprises listed in the Law of 2 July 1986 this is provided, by way of exception, by Article 4 (2) of the Law of 6 August 1986. The paragraph authorises private sale of all or part of the capital of an enterprise for privatisation. Sales of the whole under this provision have been rare; the normal use has been to sell a part of the capital of an enterprise to selected investors who will constitute a trusty hard core ("*noyau dur*") of shareholders[35], with the remainder being the subject of an OPV (Durupty, 1988, pp. 76-83). The procedure is regulated by Decree[36], which

[34] Bishop and Kay (1988, p. 30) say in relation to the United Kingdom: "Ministers appear to regard the level of oversubscription as a measure of the popularity of the policy, so fix the price to ensure an excess of applications."

[35] The *noyau dur* device has also been employed in Italy, for the sale of shares in *Mediobanca* by IRI (Fraser ,1988, p. 133), and in Japan, for the sale of Japan Air Lines (Fraser, 1988, p. 148). In France the succeeding Socialist Government sought to break up the *noyaux*: Graham and Prosser, 1991, pp. 154-160.

[36] Decree No. 86-1140 of 24 October 1986.

requires valuation by the Privatisation Commission, and provides that each sale will be made according to a set of conditions to be published in advance by the Minister. These conditions have stipulated that investors must hold the shares so acquired for a minimum period of time, and have fixed a premium - ranging from 2 to 10 per cent - over the OPV price to reflect the possibilities of control obtained by the chosen investors. This premium provision reflects another ruling of the *Conseil constitutionnel* as to the implications of constitutional protections of equality and property, in a decision arising out of separate legislation regarding the partial privatisation of the television channel TF1[37]. For enterprises not covered by Article 4, such as subsidiaries not listed in the Law of 2 July[38], the procedure is likewise laid down by the October 1986 Decree, but is simpler: the enterprise chooses its own expert valuers, but they must act independently; their valuation need not be made public, but is still binding as a floor price (Graham and Prosser, 1991, p. 121).

National independence has not been an explicit criterion for privatisation in the United Kingdom. Major disposals have been made, both via share sales and private sales, to overseas buyers. Restrictions on the size of individual shareholdings, contained in Articles of Association of privatised companies and normally protected by a Government-held "golden share" (Graham and Prosser, 1988), have in the great majority of cases applied indifferently to foreign and domestic holdings (Graham and Prosser, 1991, p. 144). In some cases, however, maintenance of a company in British hands does appear to have been an important factor in the mind of Government - the sales of the Royal Ordnance factories and of the Rover car group (formerly British Leyland) offer examples - and where this has been the case, there is ample evidence to suggest that early disposal to an acceptable buyer has been more important to the Government than adequacy of price (Graham and Prosser, 1991, pp. 112-113 and 122-129).

Employee share ownership is promoted in France principally by Articles 11 and 12 of the Law of 6 August 1986, giving employees an advantageous position in relation to OPVs, notably by way of the reservation to them of 10 per cent of the offer; a discount of up to 20 per cent on the offer price; extended payment terms; and the attribution of free shares (d'Ormesson and Martin, 1987, pp. 446-448). The United Kingdom has no comparable legal provisions, but in every flotation employees have in fact been offered advantages analogous to those available in France, to a value which has generally been in the range of £400-600 per employee (Fraser, 1988, pp. 19-56). These arrangements do not impose any special problems of valuation[39]. Nor, of

[37] Decision 86-217 DC, 18 September 1986.

[38] See above p. 66.

[39] Though see Article 3 (8) of the Law of 6 August 1986, making it clear that the general price for shares in the OPV is fixed so as to take account of the value of these advantages and thus to ensure - in accordance with the decision of the *Conseil Constitutionnel* of 25-26 June 1986 - that the total valuation of the enterprise fixed by the Minister is achieved (d'Ormesson and Martin, 1987, p. 424).

course, do they permit employee control. In France, that can only be achieved by private sale under Article 4 (2) or 20 of the Law. Only one such sale has been carried through notwithstanding express legislative encouragement by the Law of 9 July 1984, and even in that case it appears that the inability of Government to offer any discount on the price by reason of the statutory valuation rules created serious obstacles (Durupty, 1988, pp. 83-85). The practice is commoner in the United Kingdom, where it was in one case helped along, in the sale of subsidiaries of the National Bus Company, by a discount of 5 per cent to employee bidders as against others. In this case two-thirds of the 72 subsidiaries went to management buy-out consortia and a further one to an Employee Share Ownership Plan (Graham and Prosser, 1991, p. 130). Graham and Prosser note, however, that even with the full discretion as to pricing left to Ministers under United Kingdom legislation, the sheer size of enterprises for privatisation - or their future needs for capital - will often make employee acquisition an unlikely proposition (1991, p. 131).

It is not clear from this account that the more legalistic French approach produced better results in substantive terms, or even results closer to legislative expectations. What it offered was *ex ante* constraints on implementation of privatisation in the form of enforceable legal requirements, whereas the British approach provides only *ex post facto* scrutiny, through Parliamentary audit, of a highly discretionary decision-making process (Graham and Prosser, 1991, pp. 59-64). Since reasonable results can be obtained under either type of system, general national preferences as to forms of control and accountability should be the chief guide to legislative design in this field.

(b) Other experience

Looking around more widely, there is little evidence that national legislatures are imposing legal constraints on pricing on the French model. Generally the discretionary United Kingdom pattern appears to prevail, whether the privatisation is in the hands of a Government department or of a specialised agency like the *Treuhandanstalt*. An attempt has been made, in the German Unity Treaty of October 1990, to provide a clear baseline for pricing by equipping each East German enterprise with a DM opening balance (Buchholz, 1991, p. 180). This however is not designed to tie the hands of the Treuhand, which clearly exercises a very broad discretion in relation to pricing, taking into account such factors as the extent of warranties it gives against insecurity of title, "hidden" environmental liabilities, and other risks; guarantees by purchasers of maintenance of employment or new investment; effects of the sale on competition in the relevant sector; and so on (Buchholz, 1991; Müller, 1991). In the central European context of large-scale privatisation conducted in a climate of economic uncertainty[40] it is hard to conceive of any legal rules on pricing, other than the most general obligations of good faith, which would not risk obstructing desirable

[40] Notwithstanding its flexibility in deal-making (above), the *Treuhand* still finds it advisable to provide in its sales contracts for the revaluation of the enterprise at the request of either party after 3 years, and the consequent renegotiation of the price: Müller, 1991.

sales by limiting the public seller's ability to bargain. While legal provisions may establish principles of valuation [41], only the Czechoslovakian legislation appears explicitly to lay down pricing restraints: the Small Privatisation Law sets a reserve price of 50 per cent of valuation on businesses at their first offering by auction under the Law (Article 10), and a reserve of 20 per cent at any subsequent offering (Article 13), while the Large Privatisation Law of 1991 requires the special permission of the responsible Ministry for any sale, other than by public tender, at a price below the valuation stipulated in the privatisation project (Article 13 (2)).

This last provision may serve to remind us of a significant difference between privatisation in central Europe and elsewhere. Czechoslovakia, it may be remembered, appeared to have the most "directed" approach to privatisation among these formerly Socialist States, yet even there, the reliance on enterprise initiative is far greater than in "Western" States. This shifts the emphasis of the under-valuation problem: away from the risk of hasty give-aways by a government in search of political advantage, which appears to have been the preoccupation of the *Conseil constitutionnel* in France and of the Government's critics in Britain; and towards the control of opportunistic conduct by managers and workers in the enterprise itself. Hence the attempt to create independent privatisation funds and agencies in these countries, capable of harnessing, but also of disciplining, such initiative in order to carry through large programmes against doubtless widespread bureaucratic and other resistance.

IV. TRANSFORMATION AND LIQUIDATION

There is room for argument as to whether transformation of enterprises, by way of changes in their legal form, and liquidation of enterprises, should be seen as distinct techniques of privatisation. We have already seen for example, that the Polish Act on the Privatization of State-Owned Enterprises of 1990 contemplates the use of these two techniques as alternative paths for the progression of enterprises from the public to the private sector (above). Today, the change of a public body's legal status towards forms more closely resembling those used in the private sector may more often than not be seen by its promoters as one step in a process, possibly long, leading to private ownership. It was not always thus: in the United Kingdom and France, the debate about forms for public enterprise was, until recently, an element of the search for efficiency and responsiveness in a public sector whose legitimacy was not called in question (Robson, 1962, Chapters 1-3; Delion, 1963, Chapter 1; cf. Ghai, 1977, pp. 15-48). Two reasons justify the separate treatment of these topics under the changed political conditions of today.

First, few governments share the British belief that almost any governmental activity can be privatised by way of outright sale, yet many are convinced of the value of market, or market-like, disciplines for the public sector. For such governments, transformation into more "commercial" forms may be the only step towards privatisation that some types of public enterprise should take. Italy (Cassese, 1988, pp. 32-33) and Germany (König, 1988, pp. 24-27; 1990, pp. 441-442) offer some typical

[41] For practice elsewhere, and advice, see Berenson, 1990, p. 163.

recent examples of this sort. Second, whether or not these processes are seen as steps along the way to some more radical privatisation, or as ends in themselves, they give rise to issues of particular difficulty by reason of the legal discontinuities that they embody. These may be purely technical, such as the efficient transfer of a bundle of rights and duties from the "old" entity to a new entity of a different type; or they may involve crucial conflicts of interest, as where the new status implies a reallocation of rights and opportunities as between different groups of stakeholders in the entity, such as workers and contributors of capital.

1. Corporatisation

This ugly word has been adopted as a convenient term to describe the transfer of an activity previously operated as an integral part of a public authority, and subject to the general rules governing it, to a separate entity with corporate personality. The normal aim is to secure legal and organisational independence for the activity, and thereby to promote accountability and efficiency, though avoidance of constraints associated with public authority status may sometimes be the dominant motive. Thus the United Kingdom Government has alleged that in the nineteen-eighties some local authorities set up sections of their own workforces as limited companies as a means of evading legislative obligations to admit private firms to compete with such workforces for the right to provide services[42]. Over the same period Swedish municipalities engaged heavily in the creation of joint-stock companies to the point where such entities now have assets equal to those of the municipalities themselves; one motive, again, was protection of these activities from public control (Lane, 1990).

National law may provide a variety of forms for such entities. In the Netherlands, for example, available alternatives are corporations established under public law; foundations *stichtingen*); public limited companies; or private companies (van de Ven, 1991). The chosen vehicle may depend in part upon the commercial or non-commercial nature of the activity, in part upon whether the introduction of private capital figures at any point in the Government's plans. Social or service activities may be more suitably carried on by public law corporations, or foundations operating in what has been called the "intermediate" or non-profit sector (Fromont and Siedentopf, 1989). If any contribution of private capital is desired, then the company form is most likely to be chosen, by reason of the fact that public law corporate forms are not well adapted to the holding of shares of capital.

Enterprises may thus pass through different stages with varying degrees of rapidity. Japanese National Railways were a Government department until 1949, were then transformed into a State corporation to promote efficiency, and in 1987 were restructured as a number of separate joint-stock companies with a view to early privatisation (Tsukamoto, 1991). The United Kingdom Post Office was a Government department until 1969; it survived as a single State corporation till 1981, when its posts and telecommunications businesses were transferred to separate State corporations; and

[42] See Local Government Act 1988, sections 33 and 493, House of Lords Debates, col. 377(February 11, 1988) (Earl of Caithness).

telecommunications was transformed into a limited company, and partially privatised, in 1984 (Fraser, 1988, pp. 36-38). Corporatisation of the German Federal railways has proceeded no further than the withdrawal of civil service staus from its governing board; the status of railway employees as civil servants remains untouched (Fromm, 1981). Even partial steps in privatisation can be difficult.

2. Legal discontinuities

The transformation step is likely to be especially difficult because, as noted above, it represents a discontinuity in the legal existence of the activity or enterprise. It implies and embraces liquidation, in that the legal person responsible for the activity ceases to exist in respect of it, and a new legal person takes over. Contractual and other rights possessed against the "old" legal person must thus be made applicable to the new one, or else reorganised, or exchanged for new rights. If these are less attractive to the holders than the rights formerly possessed, then resistance may be expected.

Rights of employees offer the most obvious example. One of the gains often expected from corporatisation is the escape it offers from civil service practices, including rigid civil service employment structures. These, of course, may be highly prized by employees. Where employees enjoy security of tenure, such structures may need to be "bought off" with alternative arrangements of equal value, assuring promotion, guaranteeing pensions, and so on (van de Ven, 1991, pp. 16-17). At the other extreme, transformation may bring an automatic end to employees' civil service status, as appears to be the case with employees of enterprises sold by the Asset Privatization Trust of the Philippines (Santis, 1990, p. 315).

Special legislative arrangements may also be needed even in relation to employees of State corporations who do not enjoy civil service status, by reason of the inapplicability of general liquidation procedures in which employees might assert their rights, especially where the transformation is seen as an occasion for major employment adjustments. Thus the "second corporatisation" of Japanese National Railways in 1987 was accompanied by a massive shedding of labour (61000 staff out of 277000), accomplished through special legislation (the Law on the Special Measures for the Promotion of Re-employment of Early Retirees and Displaced Workers of JNR, 1987), imposing quotas on Ministries for the hiring of redundant railway staff, and setting up a JNR Settlement Corporation to which the contracts of the remaining workers were transferred for a maximum of three years (Tsukamoto, 1991). In less dramatic cases, protection can be afforded by contractual arrangements as well as by legislation, as by the building of maintenance of employment guarantees into a contract between the old entity and the new one (Berenson, 1990, p. 164). Within the European Community, Directive 77/187/EEC (the Acquired Rights Directive) requires consultation with trade unions about the employment effects of transfers of undertakings, but experience both from the United Kingdom and from France leaves room for doubt as to whether national laws have faithfully applied its requirements where transformation of the type we are discussing is involved (Graham and Prosser, 1991, pp. 131-136). United Kingdom legislation effecting these transformations, both from private companies to State corporations and back again, has customarily included

detailed provisions for the transfer of individual employment and pension rights, but the rights transferred may do little or nothing to protect against redundancy or changes in working conditions.

The greatest threats from discontinuity to the interests of employees arise, of course, in central European countries, all of whose privatisation programmes incorporate large-scale transformations of State enterprises into joint-stock or similar companies, whether *en masse*, as in East Germany (Buchholz, 1991) and Romania (Romania, 1991; Glick, 1991), or on the basis of individual privatisation proposals, as in Czechoslovakia, Hungary, Poland, and Yugoslavia. While these schemes may provide for the transfer of employment rights or union consultation (see the Czechoslovak Large Privatisation Law 1991, Articles 7 (4) and 17; du Vall and Sroczyski, 1990) they offer no general employment guarantees; the legislative emphasis is rather on advantages in relation to share and asset purchase afforded to employees[43]. Unsurprising in the light of the broad political direction being pursued by these countries, this aspect of their programmes nonetheless places a daunting responsibility for employment protection on the shoulders of the various privatisation agencies.

Employee rights, though most important, may not be the only type of rights to cause problems on transformation or liquidation. On liquidation, even straightforward supply contracts can present Gordian knots, as the United Kingdom Government found out when it set out in 1985 to wind up the British National Oil Corporation (BNOC), whose oil trading activities had become unprofitable because of the dominance of spot market pricing for oil. BNOC, created ten years earlier, had acquired rights to 51 per cent of all oil produced from the United Kingdom Continental Shelf, under "voluntary" agreements reached with producers subject to a great deal of Government pressure. Some small producers ceded these rights in the form of contracts covering the entire life of their oilfields, lives which in 1985 might have ten or more years to run. When Government sought to terminate these contracts in 1985 so as to enable BNOC to be dissolved, the producers refused, because their life-of-field contracts were now far more profitable than anything they could expect from the spot market. The last thing a privatising Government wants to be seen doing is expropriating private property without adequate compensation; and it was not until 1991 that the Oil and Pipelines Agency, the residuary body which assumed BNOC's obligations, was able to report that the last of its supply agreements had been terminated (Daintith and Willoughby, 1984, paras 1-132 to 135, 3-192 to 203).

CONCLUSION

This incomplete survey of the legal techniques of privatisation will have served mainly to indicate the remarkable variety of method and experience that can be

[43] For a recent example see Articles 47-49 (share sales) and 59 and 60 (asset sales) of the Romanian Privatization Law 1991.

subsumed under this head. Most of this variety is engendered by the multiform shapes and sizes assumed by the public sector in different countries, from the 97 per cent of net material product reported for Czechoslovakia in 1986 to the 1.3 per cent, on the same basis, for the United States in 1983 (Mejstrik and Sojka, 1991, p. 23). There is nothing surprising about the fact that the "new" economies of central Europe should have developed a legal order for privatisation with important features - such as the presence of powerful specialised executive agencies and heavy reliance on enterprise initiative - which mark them off from the privatisation "pioneers", the United Kingdom and France. The scale of the central European undertaking, the fact that it is shaping, rather than being shaped by, its economic environment, compel such differences. National technique must also reflect the form of the public sector: a predominance of State corporations, as in the United Kingdom, may call for more elaborate legislative treatment than a mass of shareholdings in the hands of a State holding company, as in Spain or Italy. The anecdote on BNOC with which we concluded the previous section points up the lesson, reinforced at a various stages of this survey, that the forms and techniques through which activities have been brought into the public sector may frequently influence, and may sometimes obstruct, attempts to privatise them again.

Indeed, we would suggest that, as a rule, such inherited legal structures for the public sector are likely to exercise a much greater influence on privatisation technique than are any overarching constraints such as might be found in the Constitution or in international law. At certain times or in certain places such legal constraints may impede, or even effectively prevent, a privatisation, as cited examples from France and Germany show, but these may be seen as minor eddies in a broad and fast stream whose source and tributaries are fixed by the antecedent legal structure, and whose destination is a matter of political decision. This is not to say that the form and appearance of privatisation law may not be strongly influenced by the general Governmental and legal style of a given State. The multiple contrasts between French and British privatisation technique, whether framed in terms of legalisation versus discretion, *ex ante* versus *ex post* control, or public law versus private law, give ample support to this view. Yet as we have seen, it is extremely difficult, on the evidence presently available, to discern any effects produced by these differences of style on the substantive interests in play in the privatisation process. This suggests that there can be no one privatisation rulebook which legislators everywhere can use with profit. Rather, it is for legislators to address without preconceptions the delicate task of matching the basic financial and economic procedures of privatisation to the legal structure of their country's public sector and to the demands of its legal system.

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THE LEGAL CONCEPT OF PRIVATISING THE STATE-OWNED ENTERPRISES IN POLAND

Co-report presented by

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1. Introductory remarks

Until recently, although the State (State Treasury) was not, under the statutes, liable for debts incurred by the State-owned legal persons, no such entity had ever been declared bankrupt. It was only in 1983 that a law on bankruptcy of State-owned enterprises was passed and there have been very few cases of its implementation since.

1st February 1989 was a turnpoint in legal position of the State-owned enterprises. Since that date, due to the amendment of the Civil Code of 1964, legal entities which disposed of State-owned assets have explicitly been recognised owners of assets at their disposal. Their internal structure does not yet correspond, however, with that of a business law company and remains specific according to the State-Owned Enterprises Act of 1981, as amended. First of all, within such structures there is no single body representing the owner of the enterprise capital, i.e. the State itself as an original capital investor. Instead, the decision-making process has been dominated by the employee council, this having been the result of a political achievement of the first Solidarity move of 1980 against the Stalinist dogma of unity of the State authority and property. Due to the then enacted State-Owned Enterprise Employee Self-Management Act of 1981, as amended, a State-owned enterprise became a new creature dependent upon decisions of its manpower representatives, including the distribution of the net profits. The State is represented vis-à-vis each individual enterprise by the so-called founding organ, i.e. a Ministry or a legal administration acting rather *ratione imperii* within the framework of the statutes providing for legal independence of those enterprises as juridical persons. Paradoxically as it may be, now in order to "commercialise" State-owned enterprises one has first to legally re-structure them by restoring the State dominium rights exercised by the State Treasury as an owner of capital. Without having a State-owned enterprise "commercialised" (i.e. converted into a commercial law company the stock of which is exclusively State-owned) its assets are not liquid and cannot be offered on the capital market. Such conversion, however, leads inevitably to eliminating the economic prerogatives of the employees by reducing

their powers to co-determination only. In particular, one should bear in mind that at present the employee council enjoys the right to elect, hire and fire the general managers in most of the State-owned enterprises. Obviously, returning to commerce and to commercial law in a post-communist State sector gets highly political. On the other hand anything related to legal restructuring of State-owned enterprises should be viewed as a preliminary stage of privatisation.

2. The dilemma of State-owned real estate

The most precious assets which are now at the disposal of the State-owned enterprises is real estate: land, buildings, underground facilities, etc. Until the end of 1990, there was uncertainty whether the State give up its land ownership to the benefit of its enterprises which are separate juridical persons. The problem arose because of the then effective provisions of the Land Economy Act of 1985 that could have been relied upon as excluding the transfer of land ownership by operation of law at the moment the Civil Code amendment of 1989 took effect. The Supreme Court decision of 13 December 1989, favourable for the State-owned enterprises, has simply not been observed in the administrative practice. The Government was of the opinion that under no circumstances the State Treasury had to relinquish its land ownership in order to retain control over the use of land and to derive long-lasting profits from leasing lots to various investors, be it in the course of privatisation. This premise has led to proposing in June 1990 the immediate amendment of the Land Economy Act by expressly granting the State juridical persons a long-term lease known as "perpetual usufruct" for at least 40 to 99 years. According to the Civil Code, such a lease is freely assignable and may serve a mortgage collateral. State-owned enterprises could, for instance, bring in such a lease as part of a company's capital or otherwise dispose of it according to market conditions. Long-term lease of State-owned land creates some difficulty in evaluating the assets of a given entity. However, for the first time in the post-war history of the Polish State economy, the value of a land use was to appear in the balance sheet of a State-owned enterprise.

Finally, since 5 December 1990, the Land Economy Act has provided for the long-term lease as acquired by the State-owned enterprises by operation of law. This, of course, has entailed various payments to the State Treasury due from the leaseholder. The property of the goods attached to the leased land could be transferred only jointly with the lease itelf. State-owned enterprises may also acquire land if conveyed by third parties and thus become owners of such land. Through having such an enterprise converted into a corporation, the latter "inherits" the long-term lease or the ownership of land, and the ownership of buildings. It should be emphasised that without having the use of State-owned land commercialised no privatisation through capital market would ever be possible.

3. Converting a State-owned enterprise into a business corporation

3.1 We are discussing here the process of a juridical conversion, i.e. the ways of capitalising the assets that belong to a State-owned enterprise without actually winding it up. The purpose of the whole procedure is to change the legal and organisational structure of an entity without interrupting its activities. Therefore we are not

considering the case of either bankruptcy or an asset liquidation due to winding-up. It should be stressed, however, that it is equally possible for a founding organ to declare winding-up of an enterprise in instances determined by the 1991 amendments of the State-owned Enterprise Act. Once wound-up the enterprise ceases to exist as a juridical person after having its assets liquidated according to a prescribed procedure. The surplus assets, if any, fall into the disposal of the founding organ representing the State Treasury, and may be sold or re-invested including the contribution in kind to a newly formed or already existing company. In addition, under the Privatisation Act of 1990, the founding organ can order winding-up of a State-owned enterprise upon approval of the Minister of Ownership Transformation. In that case the sole purpose of the winding-up is the privatisation of assets, and the decision is discretionnary. No liquidation procedure is envisaged; assets may be sold, contributed to a company or leased, but creditors' rights are protected. Employees enjoy a "right of pre-emption" regarding the leasing of assets to a company formed with their participation provided the detailed conditions of the Act are met. Strange enough, the decision on winding-up may be questioned by the employee council before the court of law, this being a consequence of the policy of self-management whereby the fate of an enterprise does not lie in the sole hands of the capital owners but where the employees have a say. This is a clear example of an unsuccessful attempt to reconcile the function of the State as a formal owner and the economic independence of the State-owned enterprises.

3.2 Since 1988, a State-owned enterprise could be converted into a commercial company (limited liability company or joint-stock corporation) upon a concerted motion of its director and the employee council. The approval of a founding organ was required, and the procedure largely resembles that of a liquidation. It should be stressed that such motion be withdrawn any time before the company was entered into a commercial register. Creditors had to be paid or otherwise satisfied, and the closing balance sheet made ready for auditing. Within such proceedings, new parties could join the State Treasury as partners by contributing to the capital of a newly-formed company. Net assets of an enterprise formed a capital contribution of the State Treasury, whereas third parties - be it employees, local or foreign investors, natural persons, etc. - had to contribute in proportion to the value of shares thus acquired. Apart from the specific provisions of the law on State-owned enterprises such a replacement of an enterprise by a company was governed by the provisions of the Commercial Code of 1934, as amended. In addition, whenever a foreign party stepped in, the rules of the Foreign Capital Investment Act of 1988 had to be complied with, therefore in that case at the outcome a joint venture company had to be formed. It is therefore quite evident that converting a State-owned enterprise into a business corporation could bring about a partial privatisation of its assets. Of course, at the outset the State Treasury remained a shareholder (usually holding a majority of stock) but private parties could acquire more shares afterwards either by buying them from the State Treasury or by subscribing to a new issue.

The above solution has been strongly criticised for its inadequately protecting the public interest. What the Government did not like was the fact that both phases, conversion and privatisation, were merged, and that there was no room for a public offer of shares, neither a chance for applying a sophisticated method of evaluation of assets to be privatised. The danger of a bad business for the Government was reduced

if the joint venture rules 77applied since they provided for feasibility studies which a government agency supervised. As a general proposition, however, it was hardly debatable that a public offer and the finding of a market price of the assets (not a book value, as it had been the case) would have been more appropriate.

3.3 In response to that criticism an alternative form of converting a State-owned enterprise was elaborated in the (State-Owned Enterprises) Privatisation Act of 1990. Under this Act, in contrast to the previous regulation, no dissolution proceedings are required any longer, and the conversion may take place even though the enterprise itself is opposing such a move. Disputes, if any, between the State Treasury (Minister for Ownership Transformation) as capital owner and the internal bodies of the enterprise are referred to the courts. There are no administrative decisions, and the Minister for Ownership Transformation acts solely on behalf of the Treasury exercising its property rights. There is no room for a dispute arising out of the property relationship, since the State has been restored in its rights as an owner of the capital, whereas the enterprise itself enjoys full legal capacity and ownership of its assets. There is no need for forming a new commercial law entity; there is merely a transformation of an existing juridical person without any change in its external relations. At the first stage we are going to have a single-shareholder (State Treasury) corporation under the Commercial Code. Privatisation is the second and separate stage: State-owned shares are going to be publicly offered or a new issue is going to be made in order to enable investors to subscribe to them, or, private placements may take place as a government-authorised exception. In spite of a long and tough political debate in the Parliament, the Government maintained the opinion that there must not be any room left for individual or collective claims of ownership by the employees. State-owned enterprises are State property and the ownership of their assets has nothing to do with the State corporate powers in terms of equity. This does not mean, however, that the non-proprietory interest of the employees is neglected. On the contrary, it was made obligatory for the State Treasury to offer up to 20 percent of its total initial shareholding to the employees at a 50 percent discount in quantity agreed upon while instituting the tranformation proceedings. There are, of course, limits envisaged as to the time for exercising the statutory right of those so privileged.

It follows that the underlying idea of the Polish privatisation law has been a citizen buy-out, as opposed to the idea of an employee buy-out. No ESOP concept has been accepted, although nothing could legally stop the employees from buying out a total shareholding of "their" enterprise on the secondary market. Foreign parties may also acquire as much of equity as they ask for and are offered, provided the Foreign Investment Agency has authorised the foreign bid (or private placement) exceeding 10 percent of the shares issued. The latter requirement will be soon abrogated by the new Companies wit77h Foreign Participation Act. However, sometimes different classes of shares and the go77lden share device are envisaged in the statutes of companies in order to enable the authorities to monitor the taking over of the controlling share on the secondary market. There may be also time limits imposed on the dividend and capital gains repatriation; again, the draft law on companies with Foreign Participation is intended to further eliminate legal restrictions as to inflow and outflow of foreign capital while privatisation progresses. In general, instead of - by necessity - two different channels of foreign privatisation investment, Poland is going to have a

uniform foreign investment law applicable to primary as well as secondary foreign acquisitions. Needless to mention that statutory regulations of foreign acquisitions apply only to the extent not regulated otherwise by the international treaties on mutual protection of capital investment and on avoidance of double taxation.

4. Concluding remarks

Since 25 April 1991, the privatisation of the State-owned enterprises should be viewed also in the light of the Securities Act. The statute serves a basis for setting up, i.e. the Securities Commission and the stock exchanges. On the other hand, recently State-owned enterprises have been made subordinate to the general rules of the Bankuptcy Act of 1934, as amended, and one can expect quite a number of them soon undergoing bankruptcy dissolution due to insolvency. Experience has shown, however, that privatisation via dissolution and selling out the assets is most frequently used for its lower cost and simplicity. Under the Privatisation Act of 1990, until June 1991 some 200 smaller units have been privatised via dissolution, whereas the shares of only 8 larger ones have been offered on the capital market. With regard to the capital market privatisation the policy of the Government has been so far according to the rule "the best comes first".

LEGAL FORMS AND TECHNIQUES OF PRIVATISATION IN CZECHOSLOVAKIA

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After the deep, revolutionary socio-political changes in Czechoslovakia connected with the date of 17 november 1989 and the term "velvet revolution", an urgent question of rectification of the ownership-related conditions and circumstances emerged.

The general inefficiency and decline of the socialistic centrally planned economy based on the idea of State or collective ownership which was carried nearly to a perfection in Czechoslovakia brought along the need of transfer of the State or quasi-State property to non-State (private) subjects as part of the healing treatment of the post-socialistic economy. Some of the property transfers were affected by the moral motives of rectification or abatement of the harms and injustices which occurred during the socialistic era. Such restitutions of the once-seized property can also be included in the general term of privatisation in the broad sense.

The mentioned broad privatisation or de-etatisation has been implemented in Czechoslovakia by a number of legal forms and legal acts. A concise list of the most important rules of law, the legal documents of the top legal force, i.e. acts of the Czechoslovak Federal Parliament includes:

1. Acts regarding restitution:

- Act No. 403/1990 Coll., Providing for Abatement of Consequences of Certain Injustices Affecting Property (Small Restitution Act)

- Act No. 87/1991 Coll. on the Out-of-Court Rehabilitations (Big Restitution Act)

- Act No. 229/1991 Coll. on Adjustment of Property Titles to Land and other Agricultural Property

- Acts on restitutions of Properties of the Church and Religious Orders (Nos. 298/1990 Coll. and 338/1991 Coll.).

2. Acts regarding privatisation:

- Act No. 427/1990 Coll. on Transfers of the State ownership of Certain Things to Other Legal or Natural Persons (Small Privatisation Act)

- Act No. 92/1991 Coll. on the Conditions of Transfer of State Property to Other Persons (Big Privatisation Act).

The legal regulation of the process of privatisation is supplemented by a number of additional rules of law in the form of acts of the parliaments of individual republics (Czech and Slovak), governmental decrees and ministerial regulations. However since especially the process of big privatisation is only at its beginning and as there is no experience with a similar phenomenon, certain confusion and many imperfections of the legislation can be observed.

In general there is no strict distinction line between the properties subject to the small privatisation and the big privatisation. Despite the fact that the small privatisation has been typically meant for the small and medium-sized shops, stores and workshops there is no limitation in the law as to the size of the privatised property the only legal definition of what may be subject to the small privatisation being the following: "State ownership of ... movables and immovables which, as an asset of operational parts of the organizations acting in the sphere of services, trade and other than agricultural production, form or may form a complex that is a rounded-off economic or property unit". Thus a small-sized one-room greengrocer's shop may be privatised by the same way and pursuant to the same law as a relatively big machinery producing factory.

The only technique of the small privatisation is public auction. A privatised unit must be chosen and assigned for the auction by the District Privatisation Commission (a special *ad hoc* body composed of the representatives of the local authorities and entrepreneurs'associations, businesspeople and professional lawyers and economists) and confirmed by the Ministry of Privatisation (which also appoints members of the Privatisation Commissions). When a part of a State enterprise or another State entity is to be auctioned this entity is obligated to supply the required operational and bookkeeping data and it has no legal means how to prevent the auction. Thus even a prospering State enterprise can be gradually deprived of its most lucrative units (plants, shops) the rest of it remaining completely unattractive for possible private buyers.

The auctioned unit may consist of the land and buildings, fixtures and equipment of the privatised shop, workshop, etc., but a more usual case in today's Czechoslovakia is a unit auctioned without any real property. This is so when the unit operated in leased premises, or in other words when the land and buildings did not

belong to the same entity as the auctioned unit. This situation occurs when the auctioned unit occupies only a part of a building which
is quite frequent e.g. in bigger cities where most of the shops are located in the groundfloors of multipurpose buildings owned by someone else. As the inventory belonging to the unit is always sold separately to the auction winner for the bookkeeping price and is not included in the auction price the sometimes relatively high auction prices may be paid only for some minor fixtures and the right to lease the premises in which the unit is located for a minimum period of two (now to be extended to five) years. The lease contract is to be concluded with the real proprerty owner separately and the rent is to be paid in addition to the auctioned price.

The auctioned unit may be bought in the first auction round or it may fall through to the second round. For the first auction round the following persons are qualified as participants:

> Natural persons who are subjets of the Czech and Slovak Federative Republic or who were Czechoslovak subjects after February 25, 1948 and legal persons whose partners or participants are exclusively the said natural persons.
>
> In the second auction round the following persons may participate in addition to those attending the first round:
>
> Other natural persons and legal entities the participants or partners of which are exclusively natural persons.

The auction may be organized both as an "English auction" or as a "Dutch auction". In the former the auction participants increase their bids over the bidding price (down to 50-80 percent of the bidding price as a minimum) until there is at least one interested bidder. In case there are more bidders in one instant of the "Dutch auction" the auction turns upward in the "English" way.

Unlike the small privatisation, the big privatisation is not limited to one privatisation technique only. In fact there are many privatisation techniques directly applicable to the assets previously owned by the State enterprises as e.g.:

- direct sale of assets to the specified buyer,
- sale of assets in a public aution,
- sale of assets to the winner of a public tender.

The other possibility is the termination of a State enterprise without liquidation and incorporation of a commercial company (e.g. a joint stock company) on its place. The shares of the newly incorporated company can then be:

- directy sold to the specifed buyer,
- indirectly sold through stock exchange (yet not existing in Czechoslovakia) or through banks,
- tranferred for free to the municipalities, health care and pension funds or to the banks and savings institutes in order to augment their credit resources.

Another technique is the "non-classical" way of voucher (coupon) privatisation in which the shares of the newly established or already existing State-owned joint stock companies are exchanged for vouchers. Every Czechoslovak citizen is entitled to 1,000 voucher investment points for which he must pay a more or less symbolical sum of 1,000 Czechoslovak crowns (about 33 US dollars). The investment points are then exchanged for shares of companies at the "voucher investor's" own discretion the amount of shares received for each investment point varying according to the other investors' interest in the same company. Depending on the relation between demand and supply of shares of certain compagny the investor may get only a couple of shares of standard par value (1,000 CSK) for all his investment points in case of a much asked-for company, or a considerable number of shares of the total par value exceeding 100,000 CSK in case of an unknown and undemanded company.

The inside information can of course help very much with choosing and deciding in which compagny to invest one's voucher investment points, however, a majority of eligible population feel rather embarrassed and undecided. Those people may take the benefit of newly established investment privatisation funds which collect the investment vouchers from the undecided population and use them for creation of a deliberately structured portfolio of shares of the privatised entities. The investors then receive the shares of the investment privatisation fund and share in its assets.

The privatisation procedure under the Big Privatisation Act is executed in case of each individual privatised unit pursuant to an approved privatisation project in which one, or more privatisation methods at the same time, are proposed. The project is usually prepared by the privatised subject (State enterprise, State-owned joint stock company, State banking institution, etc.) itself but according to the law anyone else can submit the "alternative" or "competitive" privatisation project. After the founder of the privatised entity (usually the Ministry of Industry, Ministry of Trade and Tourism, Ministry of Agriculture, etc.) has expressed its opinion, the project is approved either by the Ministry of Privatisation (in case of a federal privatised entity by the Federal Ministry of Finance) or by the national or federal Government (in all cases of direct sales). The privatised property is then transferred to the Fund of the National Property which will implement the steps foreseen in the approved privatisation project.

Unlike the small privatisation where the State property is transferred free from any obligations or liabilities, in the big privatisation some liabilities (e.g. an outstanding credit), obligations (e.g. to finish a commenced construction or to continue the established manufacturing programme), and encumbrances (e.g. a mortgage) may be tranferred to the new owner along with the privatised assets.

The inexperience and unfamiliar nature of the phenomenon called privatisation is reflected in rather fumbling manner of legal regulation of the privatisation techniques and procedures. Although being in force for not even the whole year both the Small Privatisation Act and the Big Privatisation Act have ben recently amended and are kept being supplemented by additional rules of law of lower legal power and derived nature bringing more details and also more light to the unfathomed way of privatisation.

PRIVATISATION OF PUBLIC ENTERPRISES: THE IMPACT ON FREEDOM OF INFORMATION

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Europe is presently being swept by a wave of privatisations of public enterprises.

Privatisation in the United Kingdom (1)*, France (2) and West Germany (3) was accompanied by a political and economic debate about the comparative economic efficiency of public and private enterprises. More recent economic analyses have focused on the differences in property rights as one contributing factor of the performance of public and private enterprises (4).

The "new political economy" approach (5) has widened the property rights perspective to encompass the whole institutional (legal) framework of public and private enterprises in a given sector of industry (6).

In Central and Eastern Europe, privatisation of State-owned ("public") enterprises is part of a dual institutional change: the transformation of centrally planned economies into more market-oriented, mixed economies (7) and the replacement of monocratic by democratic structures. From the perspective of institutional choice (8), privatisation in Central and Eastern Europe marks the end of one field trial and the beginning of a new one under different institutional arrangements.

One facet of the institutional arrangements surrounding both public and private/privatised enterprises is the transparency of such enterprises. "Public" enterprises, if owned and operated by democratic governments, would seem to be by necessity transparent and thus subject to public scrutiny.

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* The footnotes are reproduced at the end of this report.

This paper examines the hypothesis that privatiation of public enterprises leads to a loss of transparency, i.e. a restriction of "freedom of information" about such enterprises.

In a first step, the field of analysis is defined: "Privatisation" is an elusive concept. It embraces a wide variety of institutional alternatives to the public provision of goods and services (part 1.1). Similarly, the term "public enterprises" designates a broad range of organisational entities and may be defined with regard to the "public interest" goals which they pursue or with regard to their ownership structure (part 1.2). Finally, "freedom of information", as a legislative concept, encompasses a multitude of legal mechanisms of public access to information, including information from and about public as well as private enterprises (part 1.3).

Part 2 of this paper will categorize the various types of public enterprises and provides a comparative assessment of their varying degrees of transparency.

Part 3 analyses the transparency of private enterprises and the mechanisms which enable the public to obtain access to information from and about such enterprises.

1. "PRIVATISATION", "PUBLIC ENTERPRISES" AND "FREEDOM OF INFORMATION" - DEFINITIONS AND CONCEPTS

1.1 Privatisation

"Privatisation" designates a broad range of institutional changes from "public" to "private" control over certain activities. Pirie has identified, from a British perspective, no less than 21 methods of privatisation, ranging from the sale of whole enterprises by public share issue to allowing consumers "to turn to private businesses" for insufficient public monopoly services "and to bill the state for the cost of the job" (9).

For the purposes of this analysis of the effects of privatisation on the transparency of enterprises, the concept of privatisation will be narrowed down to the privatisation of public enterprises through change of ownership.

This group of privatisation methods includes the total or partial sale of shares to the private sector, the sale of the entire business to the private sector as a going concern (where the public entity is not incorporated by shares) and the sale or transfer of shares to the work force or to management (10).

With regard to this group of privatisation methods, the hypothesis that privatisation of public enterprises leads to a loss of transparency, is predicated upon the assumption that public enterprises are subject to more stringent freedom of information requirements than private enterprises.

1.2 "Public enterprises"

"Public enterprises" may be defined in terms of their tasks (only enterprises fulfilling a "public" task are public enterprises) or in terms of the institutional public influence upon certain organisational entities (11).

Comparative studies of "public" or "government" enterprises have focused, inter alia, on their functions, their legal forms and structures and on their management (12), and have found public ownership to be the most workable criterion for the boundary line between public and private enterprises.

Within the European Community, a certain harmonization of the legal concept of public enterprises has been brought about by the Commission Directive on the transparency of financial relations between Member States and public undertakings of 25 June 1980 (13). This Directive which is aimed at facilitating the Commission's supervisory function with regard to the financial relations between national and public authorities and public undertakings, defines public undertakings 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*" (14).

Under the Directive, a dominant influence on the part of the public authorities shall be presumed when these authorities directly or indirectly in relation to an undertaking:

- hold the major part of the undertakings subscribed capital; or
- control the majority of the votes attaching to shares issued by the undertakings; or
- can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body (Article 2, paras. 1 and 2).

Privatisation of public enterprises, then, for the purposes of this report, is the change of ownership from the public to the private sector of enterprises over which public authorities exercise a dominant influence.

1.3 Freedom of information

"Freedom of information" is both a constitutional and a statutory concept in most European States and under European law.

As a constitutional concept, "freedom of information" designates the right of the individual to receive information from publicly accessible sources without governmental interference (15).

Several constitutions of European States contain explicit guarantees of the individual's right to receive information (16).

Article 10 of the European Convention on Human Rights of the Council of Europe provides that the right to free speech "*include[s the] freedom ... to receive and impart information and ideas without interference by public authority and regardless of frontiers.*."

Whether or not the right to receive information encompasses a general right of access to government information, is an open question: the European Commission of Human Rights has indicated that under certain circumstances a right of access to government information which is not generally accessible might exist:

> *"....[T]he Commission notes that although this part of Article 10 [i.e. the right to receive information] is primarily intended to guarantee access to general sources of information it cannot be excluded that in certain circumstances it includes a right of access to documents which are not generally accessible" (17).*

In the Leander case, which concerned the non-accessibility of a police register containing information about an individual's political behaviour, the European Court of Human Rights has defined the scope of the right to information with specific reference to the "circumstances ... of the present case", without excluding the possibility that a right of access to certain types of governmentally held data might exist:

> *"The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual"* (18).

The majority of representatives of the Council of Europe member States and legal literature, while recognising, in principle, the duty of public authorities to make available information on government and administrative activities (19), do not support a citizen's right, under Article 10 of the European Convention, to access to governmentally held information (20).

Notwithstanding the limited scope of constitutional freedom of information rights, freedom of information legislation is increasingly pervasive.

As a statutory concept on the legislative level below the constitutions, "freedom of information" designates a wide variety of procedural, organisational and substantive rules which enable the general public to obtain access to governmentally held information, including information about public and private enterprises.

Freedom of information legislation in Europe is characterised by two opposing regulatory principles (21):

- the transparency principle, which provides that governmentally held information shall be publicly accessible unless otherwise provided by specific legal provisions and

- the principle of government secrecy, which provides that governmentally held information shall be kept secret unless otherwise provided by specific legal provisions.

The transparency principle has traditionally been applicable in Sweden. Under Sweden's Freedom of the Press Act, which dates back to 1766 and has the status of a fundamental law, Swedish citizens and aliens have a right of access to documents on file with Government and local agencies (22).

More recently, following the examples of Sweden, Finland (23) and the United States (24), the transparency principle was introduced in Denmark (25), Norway (26), France (27), the Netherlands (28) and in Austria (29).

The freedom of information legislation ["FOI Legislation"] of these countries is characterised by three elements:

- an individual, enforceable right of access to government files,

- adoption of the principle of transparency: exemptions from the rule of access to government files must be defined by specific legal provisions,

- procedural safeguards with a view to ensure fast and unhindered access to government files (30).

The legal systems which still abide by the principle of government secrecy - notably Germany (31) and the United Kingdom (32) - are characterized by numerous laws providing for public access to government information in specific sectors or with regard to specific types of files.

In the United Kingdom, central Government is under few legal obligations to disclose information. Several Acts provide for access to personal information by the data subject concerned; these Acts include the Consumer Credit Act of 1974, the Data Protection Act of 1984, the Access to Personal Files Act of 1987 and the Access to Medical Records Act of 1988 (33). Other Acts provide for the establishment of registers, such as the land registers, the registers of planning applications and decisions and the water registers, which are open to public inspection (34).

Local Government is under numerous statutory duties to publish information to the public (35). The Local Government (Access to Information) Act of 1985, which has amended the Local Government Act of 1972, has opened up the meetings of

numerous local public authorities to the public and allows the inspection of certain documents of such public authorities (36).

In the Federal Republic of Germany, the right of access to administrative files is, in principle, restricted to the participants of an administrative proceeding (37). Numerous federal and State laws, however, provide for rights to obtain governmentally held information by establishing public (administrative) procedures, public registers or public meetings of administrative bodies.

In licensing procedures under the Federal Clean Air Act and under the Nuclear Energy Act, anybody has a right of access to the administrative files concerning the project in question, subject to the administration's discretion (38).

Certain registers (39), including the trade register, data protection registers, and the cartel register, are publicly accessible (40), others, such as the land register and the register of craftsmen (*Handwerksrolle*) are accessible to anybody who can establish a legitimate interest (41). Water books, i.e. the register of licences and other water usage permits, are publicly accessible or accessible to anybody with a legitimate interest, depending upon the applicable State Water Act (42).

Federal and State laws provide for public meetings of certain administrative entities, including local council meetings (43).

In spite of the opposing regulatory principles of government secrecy on the one hand and freedom of information on the other hand, the areas of government activities which are covered by secrecy provisions and by public access rules, respectively, appear to be largely identical in most Western European States.

Whereas countries abiding by the principles of government secrecy, e.g. the United Kingdom and the Federal Republic of Germany, have adopted - as indicated above - numerous laws providing for public access to government information in specific sectors or with regard to specific types of files, the transparency principle, as implemented in several European countries, is restricted by sometimes very far reaching exceptions.

Under the existing European freedom of information legislation, access restrictions exist with regard to information concerning national security (44), external affairs (45), criminal investigations (46), business secrets (47), and personal data of third parties (48).

This is not to say, however, that the political and legal option for the transparency principle or the principle of government secrecy is irrelevant. To the contrary, the choice of the applicable regulatory principle determines the burden of justification. In the case of the transparency principle, it is the government which has to justify its secrecy claims - if necessary before a court. In the case of the principle of government secrecy, it is the citizen who has to justify his or her claim to access to information.

In order to assess the impact of privatisation on public access to information about privatised enterprises, it does not suffice to merely analyse the scope of those legislative acts which grant public access to governmentally held files.

Transparency of (public and private) enterprises can be created by numerous, functionally equivalent legal mechanisms, including

- public registers, e.g. commercial registers, land registers, etc.;
- public accessibility of governmentally held files concerning individual enterprises;
- public proceedings involving enterprises, e.g. administrative proceedings, public board meetings in the case of public enterprises; public court proceedings;
- public reporting duties of enterprises.

For the purposes of a comparative evaluation of the transparency of public and private enterprises, it will be essential to seek out these functionally equivalent freedom of information mechanisms and to examine their applicability to public and to private enterprises.

2. TRANSPARENCY OF PUBLIC ENTERPRISES

A comparative study of the transparency of public enterprises in Europe meets with two difficulties.

i. The wide variety of organisational structures and types of public enterprises which exist in the EC and, to an even larger extent, in the Council of Europe Member States.

ii. The ensuing panoply of transparency mechanisms, which are a function of

- the type of public enterprise,
- the implementation of the transparency principle or the principle of government secrecy and
- sector-specific transparency requirements.

To date, neither the organisational structures nor the public disclosure and transparency requirements of public enterprises are subject to EC legislation or to harmonization attempts of the Council of Europe.

As a first step towards a comparative study of the transparency of public enterprises in Europe, three types of public enterprises, which appear to exist in most European jurisdictions, should be distinguished (49).

2.1 Type I enterprises

Type I enterprises are public enterprises which are part of the public administration. Typically, type I enterprises are not legal persons, although they may be financially separated from the public administration.

In the United Kingdom, type I enterprises are known as "unincorporated undertakings" (50), in France and Belgium, they take the form of the *régie* (51), in the Netherlands they are known as *Staatsbedrijven* (52) and in Germany they exist as so-called *Eigenbetriebe* both on the Federal and on the communal levels (53).

Generally speaking, type I enterprises are subject to the same transparency requirements as any other governmental authority. Where freedom of information legislation establishes governmental obligations to provide public access to files, such obligations also apply to type I enterprises.

In Austria, Article 20 (4) of the *Bundesverfassung* obliges all agents entrusted with *Bund, Länder und Gemeinden* administrative duties as well as agents of other bodies incorporated under public law to make available information as to matters pertaining to their scope of activities in so far as this is not in conflict with their statutory obligation of confidentiality.

The Swedish *Tryckfrihetsförordning* provides for access to **official** documents and Chapter 2 of Article 3 of the *Tryckfrihetsförordning* considers a document to be official if it is kept by a public authority (54).

In Denmark, all types of agencies in the governmental, county, and municipal administration are covered by the *Lov om offentlighed i forvaltningen* [chapter 1, section 1 (1)] (55).

In France, "*les documents administratifs sont de plein droit communicables aux personnes qui en font la demande, qu'ils émanent des administrations de l'Etat, des collectivités territoriales, des établissements publics ou des organismes, fussent-ils de droit privé, chargé de la gestion d'un service public" (loi n° 78/753, article 2)* (56).

Article 1 of the WOB in the Netherlands obliges every governmental body to give access to information. Governmental bodies are the Ministers, administrative bodies of Provinces and Municipalities, and any other bodies designated by a general order in council (Article 1, 2nd sentence) (57).

Since type I enterprises are part of the administration, even if they are financially separated, the FOI legislation is either directly applicable to them or at least to the governmental body to which they belong.

Type I enterprises, being part of government and not legal persons, are generally not subject to trade register and other corporate filing requirements. Their financial situation and their business activities are, however, scrutinised by the

legislative branches of government and are thus open to a form of indirect public control.

2.2 Type II enterprises

Type II enterprises are organisationally separated from the public authorities. Typically, they are established by legislative act and are organised as legal persons under public law.

In France, these enterprises are known as *établissements publics industriels et commerciaux*. This type of enterprise is defined as *une personne publique spécialement constituée pour la gestion d'un service public industriel et commercial ou encore comme un service public industriel et commercial érigé en personne publique spéciale* (58).

In Belgium, the *régies d'Etat* and the *établissements publics* can be regarded as type II enterprises. The *régies d'Etat* would seem to be on the borderline to type I enterprises. They have the status of legal persons but are incorporated into the administrative hierarchy of the public body that created the *régie*. The *établissements publics* are organizationally separated with agencies of their own (59).

In the United Kingdom, the "public corporation" fulfils the requirements of a type II enterprise. A "public corporation" might be defined as "a legal entity established normally by Parliament and always by legal authority (usually in the form of a special statute) charged with the duty of carrying out specified Governmental functions (more or less precisely defined) in the national interest, those functions being confined to a comparatively restricted field, and subjected to some degree of control by the executive, while the corporation remains juristically an independent entity not directly responsible to Parliament" (60). It has to be noted though, that in the United Kingdom there is no distinction between public and private law and that therefore public corporations are subject to the ordinary rules of law (61).

In Italy, the *enti pubblici* can be categorized as type II enterprises. *Enti pubblici* have a legal personality and are financially autonomous (62). An Italian peculiarity is the existence of several large holdings organised as *enti pubblici* and entirely concerned with the management of a number of enterprises (63).

In Germany, the *Anstalten des öffentlichen Rechts* are type II enterprises to the extent that they are organizationally separated as legal persons under public law (64). *Anstalten des öffentlichen Rechts* with legal personality are for example certain credit entities on the Federal and State levels and the savings banks (*Sparkassen*) on the communal level. The German Federal Railroad (*Deutsche Bundesbahn*), although not a legal person, has partial legal personality and an organizational structure which is set forth by law and contains more characteristics of an *Anstalt des öffentlichen Rechts* than of a private company (65). The *Treuhandanstalt* (Privatisation Agency), which is the holding entity for the former East German state-owned enterprises, is organised as a federal *Anstalt des öffentlichen Rechts* with own legal personality (66).

The transparency requirements of type II enterprises appear to be among the most stringent of the three types of public enterprises.

As public law entities, type II enterprises are subject to freedom of information legislation (67). Additionally, they are subject to publicity requirements which are comparable to those under the law of private corporations.

In the United Kingdom, the public corporations are subject to (limited) public scrutiny by Parliament. In particular, questions about the day-to-day administration of the nationalized industries can be put to the responsible minister, provided that the questions raise matters of urgent public importance. Furthermore, the annual reports and accounts of the public corporations are submitted to Parliament and may thus become subjects of public debate (68).

On the whole, however, "the internal flow of information within the executive, rather than the public provision of information, has characterised the world of public corporations such as those that run nationalised industries" (69).

In Germany, type II enterprises that are considered to be merchants within the meaning of the German Commercial Code are required by law to set up annual reports similar to those of private companies (70).

2.3 Type III enterprises

Type III enterprises are corporations under "civil law", such as limited liability companies or stock companies, which are wholly owned or dominated by public authorities.

These forms of public enterprises are known in most Western European countries.

Public shareholding in privately owned companies in the United Kingdom dates back to 1875 when Benjamin Disraeli purchased shares in the newly formed Suez Canal Company (71). Since then, the British Government has taken over (and sold) majority or minority shareholdings in many privately owned companies. Government shareholding is often connected with the right to appoint directors. As a consequence of such arrangements structure and organisation of public corporations and stock companies are sometimes very similar (72).

In Italy, State shareholding by the above mentioned *enti pubblici* as holdings is very common. The three largest holdings (IRI - *Istituto per la ricostruzione industriale*, ENI - *Ente nazionale idrocarburi* and EFIM - *Ente partecipazione e finanziamento industria manifattureria*) have control over 20 % of the Italian economy, comprising more than 200,000 employees and 1,000 enterprises (73).

The Belgian airline Sabena may serve as an example for State share-holding in Belgium (74). In France there are various *entreprises publiques*, that belong to type

III enterprises. The French railway, the S.N.C.F., is established as such an *entreprise publique*. Further examples are the Air France, Air Inter, the mining companies *Charbonnages de France et Houillères de bassin*, and various enterprises in the field of energy supply. The nationalized industries are also categorized as *entreprises publiques* (75). They are called *sociétés nationales*, if the State owns all shares or the whole capital, or *sociétés d'économie mixte*, if the State owns only part of the shares and the rest is privately owned (76).

In Germany, the Federal Government, the State (*Länder*) governments as well as the local governments use the legal structures of limited liability companies (*Gesellschaften mit beschränkter Haftung*) and of stock corporations (*Aktiengesellschaften*) for their enterprises, which are then subject to company law (77).

As a consequence of public ownership and control, type III enterprises are generally more transparent than comparable privately owned enterprises.

In France and Denmark, even certain entities under private law are explicitly covered by the access to information provisions. This is true in France for *organismes, fussent-ils de droit privé, chargé de la gestion d'un service public* (78), and in Denmark for certain energy supply enterprises (79). In addition to that, in Denmark, the Minister in charge in accordance with the Minister of Justice may extend the scope of the Act to specified companies, if they are mainly financed by State or are entitled to decide on behalf of the State (80). Generally, however, type III enterprises are not subject to freedom of information legislation.

Additional transparency of type III enterprises is brought about in particular by parliamentary control of the public authority which exercises ownership functions (81).

In Germany, for example, federal type III enterprises are subject to control by the Federal Court of Audit (*Bundesrechnungshof*) (82), which submits its (publicly available) reports to Parliament. Furthermore, Members of Parliament have the right to ask questions concerning any aspect of the administration of Federal shareholding, including specific activities of the companies (83).

The Federal Government publishes annual reports on the shareholding to inform the public on capital and shareholders of the companies, the objects of the enterprises, the balance sheets and profit and loss accounts, employees, composition of the companies' organs and salaries paid to officials (84).

In Italy, Parliament is informed about type III enterprises and their activities through reports of the Court of Accounts, and through reports of the public holdings - *enti pubblici* - themselves. These latter reports include information on the dependant private companies. The Italian Parliament has the right to request information from the Government about type III enterprises (85).

In France, similar mechanisms for Parliament to obtain information are provided for. In addition, a representative of a public enterprise is obliged to appear personally before a Parliamentary Committee on request to describe the situation of the enterprise (86). Furthermore, the French *Cour des Comptes* publishes every second year a general report on public enterprises and their activities (87).

2.4 Transparency of public enterprises: a neglected topic

In sum, freedom of information legislation does not establish a systematic, coherent framework of transparency rules for the various types of public enterprises. Similarly, the national legislation governing type I and type II enterprises lacks type-specific transparency rules.

European Community law, which has harmonized and enhanced the transparency of private companies (including type III public enterprises), has not yet established the principle of public transparency for public enterprises: the EC Commission's Directive on the transparency of financial relations between Member States and public undertakings (88), hardly provides for public transparency: it obligates the Member States to inform the Commission of certain aspects of the financial relations between public authorities and public undertakings, e.g. the setting-off of operating losses, the provision of capital, non-refundable grants or loans on privileged terms, etc. The Commission, however, is obligated not to disclose the information which it receives, to the extent that it is covered by an obligation of professional secrecy.

A partial explanation for the lack of harmonized transparency rules for public enterprises is the emphasis which has traditionally been placed on indirect (governmental/parliamentary) control of public enterprises.

Legal studies of public enterprises on the national levels (89) as well as comparative studies (90) have focused on *gestion* and *contrôle*, that is on the internal structure of public enterprises and on the organizational and procedural mechanisms which ensure governmental control of public enterprises and on the perennial conflict between entrepreneurial freedom and governmental supervision (91).

As a consequence, public transparency of public enterprises has neither been systematically examined nor enhanced by type-specific legislation.

3. TRANSPARENCY OF PRIVATE ENTERPRISES

The transparency of private enterprises is primarily governed by corporate law, which requires the disclosure of specific corporate data and establishes public reporting requirements. In the European Community, these corporate transparency rules (which apply to private companies, irrespective of their public or private ownership), have been harmonized, to a large extent, by European Community law (3.1).

Additionally, corporate behaviour is increasingly subjected to sector-specific transparency requirements. Public and private enterprises alike are obligated to inform

the public about their products and about certain socially relevant activities, including activities involving the processing of personal data and, in particular, activities affecting the environment (3.2).

3.1 Access to corporate information

The corporate disclosure requirements of certain types of companies in Europe have been harmonized, to a considerable extent, by European Community law.

The legal basis of and the rationale for this harmonization can be found in Article 54, para. 3 (g) of the EEC-Treaty which provides for the adoption of Community law

> *"... coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms ... with a view to making such safeguards equivalent throughout the Community;".*

A first major step towards the Community-wide harmonization of public disclosure requirements was the adoption of the First Company Law Directive of 1968 (92). This Directive has established and coordinated disclosure obligations for all stock corporations and limited liability companies in the EC. In particular, the EC Member States were obligated to provide for compulsory disclosure, in a central register, of:

- the company's constitution or articles of incorporation and amendments thereof,

- the appointment, termination of office and particulars of certain representatives and officers of the company,

- the amount of capital subscribed,

and

- the balance sheet and the profit and loss account for each financial year.

The Directive also contains organizational and procedural rules for the registration and public accessibility of the documents and particulars to be disclosed. The Member States are required to open a file in a central register, commercial register or company register, for each of the companies registered therein (Article 3, para. 1). All documents and particulars which must be disclosed under the Directive shall be kept in the file or entered in the register.

A copy of the documents or particulars which are subject to disclosure must be obtainable by application in writing at a price not exceeding the administrative cost thereof (Article 3, para. 3). Furthermore, the disclosed documents or particulars or at least a reference to the document shall be published in a national gazette (Article 3, para. 4).

The Fourth Company Law Directive of 1978 (93), has harmonised the rules on the annual accounts (comprising the balance sheet and the profit and loss account), which are subject to public disclosure, and has established annual reporting requirements. It has established rules concerning the obligatory contents and the layout of the balance sheet and of the profit and loss account (Articles 3-27) and provides for specific "notes on the account", which set out additional information about the enterprise (Articles 43-45). This information includes: the valuation methods used, the description of material financial commitment not included in the balance sheet, the net turnover, the number of persons employed, and details of participation in affiliated companies.

The Directive also sets forth basic rules on the contents of annual reports (Article 46). They must include at least a fair review of the development of the company's business and of its position. The annual report shall also give an indication of:

- any important events that have occured since the end of the financial year,

- the company's likely future development,

- activities in the field of research and development,

and

- information concerning the acquisition of own shares.

In principle, the annual accounts and the annual report are subject to public access via central, commercial or company registers (Article 47, para. 1). The laws of the Member States may provide, instead, for accessibility of the annual report free of charge upon request from the company's registered office. Furthermore, the Directive allows Member States to provide, by way of derogation, for the publication of abridged balance sheets (Article 47, paras. 2 and 3).

The Fourth Company Law Directive was amended in November 1990 by two directives (94), one of which has broadened the range of enterprises which are subject to disclosure obligations by bringing limited partnerships within the scope of the Directive.

Further extensions of public reporting duties were brought about by the 7th Company Law Directive (95) and the Eleventh Company Law Directive (96), respectively. The 7th Company Law Directive lays down harmonized rules for the consolidation of accounts of groups of companies where the parent company and/or one or more of the subsidiary companies are limited liability companies. The Eleventh Company Law Directive has extended the harmonised disclosure requirements of the First Company Law Directive to branches of companies established in another Member State. With regard to branches of companies from non-EC countries, certain

information has to be published, including the company's articles of incorporation, the legal form of the company, its seat, name and object, and the amount of its capital. Furthermore, the Eleventh Directive provides for the publication of annual accounts of branches of companies from other EC Member States as well as branches of third country companies (Articles 3-9).

3.2 Sector-specific transparency rules

Apart from the rules providing for public access to corporate information, enterprises in Europe are increasingly subjected to sector-specific transparency rules, in particular under EC law (97). Their objective is to provide publicly available information about:

- specific products,

- specific entrepreneurial activities, in particular the processing of personal data,

- the environmental effects of entrepreneurial activities.

In general, these sector-specific transparency rules are applicable to both private and public enterprises; the legislative purposes of the sectorial transparency rules apply irrespective of the ownership of a given enterprise.

3.2.1 *Product-related transparency rules*

European Community law has established numerous provisions regarding the labelling of foodstuffs (98), cosmetics (99), pharmaceutical products (100) and hazardous substances (101). The objective of these labelling provisions is to protect the public, and in particular the consumers or - in the case of hazardous substances - the workers using them (102).

3.2.2 *Activity-related transparency rules*

Among the legal provisions providing for the transparency of certain entrepreneurial activities, data protection rules have been the object of considerable European harmonization (103). The objective of data protection legislation is to protect fundamental human rights, in particular the right to privacy which is recognized both in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of European Community law (104). This objective is achieved, *inter alia*, by subjecting the processing of personal data to specific transparency requirements.

The Council of Europe's Convention for the protection of individuals with regard to automatic processing of personal data, which is applicable to automated personal data files and automatic processing of personal data in the public and private sectors (Article 3, para. 1), provides for two transparency mechanisms with a view to safeguard the individual's right to privacy:

Any person shall be enabled:

- to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file;

and

- to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him are stored in the automated data file as well as communication to him of such data in an intelligible form (Article 8, lit. a and b).

The EC Commission's proposal for a Council directive concerning the protection of individuals in relation to the processing of personal data of 27 July 1990 (105) applies to files in the public and private sectors with the exception of files in the public sector where the activities of that sector do not fall within the scope of Community law (Article 3, para. 1).

The "private sector" encompasses

"any natural or legal person or association, including public sector authorities, organizations and entities in so far as they carry on an industrial or commercial activity" (Article 2, lit. h).

The "public sector", in turn, comprises

"all the authorities, organizations and entities of a Member State that are governed by public law, with the exception of those which carry on an industrial or commercial activity, and bodies and entities governed by private law where they take part in the exercise of official authority" (Article 2, lit. g).

By including, in the private sector, also public sector authorities which carry on an industrial or commercial activity, the proposed directive extends the scope of applicability of its "private sector" provisions (Articles 8 et seq.) to most, if not all, public enterprises.

Transparency of data processing in the private sector is ensured by the following obligations of the controller of the file:

- Obligation to inform the data subject: the controller of the file is obligated, in principle, to inform the data subject at the time of first communication or of the affording of an opportunity for on-line consultation (Article 9, para. 1).

- Obligation to notify the supervisory authority: the controller of the file shall notify to the supervisory authority the creation of a personal data file where

the data are intended to be communicated and do not come from sources generally accessible to the public (Article 11, para. 1).

Transparency is further established, in the proposed draft directive, by the right of the individual from whom personal data are collected to be informed, *inter alia*, about the purposes of the file for which the information is intended and the recipients of the information (Article 13, para. 1). Furthermore, the data subject has the right to know of the existence of a file, its main purposes and the identity of the controller of the file (Article 14, para. 3) and to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him are stored and communication of such data (Article 14, para. 4).

3.2.3 *Transparency rules concerning environmental effects of entrepreneurial behaviour*

Entrepreneurial behaviour affecting the environment is subject to fairly stringent and far-reaching transparency rules, in particular rules of European Community law.

The transparency mechanisms in the environmental field comprise

- public reporting duties of enterprises,

- public proceedings in environmental matters

and

- access to information.

3.2.3.1 Public reporting duties

An example of public reporting duties of enterprises may be found in the Council Directive of 24 June 1982 on the major-accident hazards of certain industrial activities (the "Seveso Directive") (106).

The Directive applies to certain industrial activities, irrespective of the legal structure or the ownership of the entity ("manufacturer") in charge of such activity (107). The Directive establishes obligations of the manufacturer to notify the competent authorities of information on dangerous substances stored or used in connection with the industrial activity concerned, information relating to the location, the conditions and the safety measures and information relating to possible major-accidents situations (emergency plans, etc.).

Above and beyond this information obligation vis-à-vis the competent authorities, the Directive establishes public information duties, which were strengthened by a 1988 amendment: information on safety measures and on the correct behaviour to adopt in the case of an accident shall be supplied, in an appropriate manner, "to persons liable to be affected by a major accident". The information must be provided

without request and shall be repeated and updated at appropriate intervals. The type of information to be made accessible is defined, in some detail, in an Annex to the Directive (108).

Furthermore, the information must be made publicly available (109).

3.2.3.2 Public proceedings

Community law has not yet systematically harmonized the national provisions governing the publicity of administrative proceedings (110).

In the field of environmental law, certain applications for authorizations and the administrative decisions must be made available to the public concerned "in accordance with procedures provided for in the national law" (111).

The Council Directive on the assessment of the effects of certain public and private projects on the environment (112) provides for Community-wide public transparency of the environmental impact assessment proceeding which precedes the administrative decision on a given project. The Directive applies to both public and private projects of "developers", who may be private entities or public authorities (113). The request, by a developer, for development consent, including the supporting information, must be made available to the (general) public; the "public concerned" then has the right to express an opinion before the project is initiated (114). The "public concerned" must also be informed of the decision taken by the competent public authority (115).

3.2.3.3 Access to information on the environment

A major step toward more transparency of entrepreneurial behaviour regarding the environment is the Council Directive of 7 June 1990 on the freedom of access to information on the environment (116).

The main purpose of this Directive is to enhance environmental protection by ensuring freedom of access to, and dissemination of information on the environment held by public authorities. "Public authorities" are defined as

> *"any public administration at national, regional or local level with responsibilities, and possessing information, relating to the environment with the exception of bodies acting in a judicial or legislative capacity" (Article 2, lit.b).*

It is irrelevant where the "information on the environment held by public authorities" has originated. Consequently, the right of access to information encompasses also information which has been supplied to public authorities by individual (public or private) enterprises.

The Directive establishes the transparency principle (117) for a policy sector where public scrutiny and societal control are deemed to be an important component of the implementation of laws.

The right of access is intended to serve as an instrument for public monitoring of environmental compliance, i.e. of preneurial measures adversely affecting, or likely so to affect, the environment (118).

Exceptions to the right of access to information are contained in Article 3, paragraph 2 which provides that a request for information may be refused, *inter alia*, where it affects

- commercial and industrial confidentiality,

- the confidentiality of personal data and/or files,

- material supplied by a third party without that party being under a legal obligation to do so.

Again, these exceptions apply to both private and public enterprises. Behaviour affecting the environment is not a function of ownership of enterprises.

4. CONCLUSIONS

Public enterprises in Europe are subject to numerous transparency requirements. In sum, their entrepreneurial behaviour is subject to more stringent transparency rules than the behaviour of privately owned enterprises.

European law, in particular EC law, has not yet systematically harmonized and enhanced the diverging legal provisions governing the transparency of public enterprises as such.

Harmonization has occurred with regard to the corporate law transparency rules concerning "civil law" companies, including those which are governmentally owned.

Furthermore, sector-specific and activity-oriented transparency rules are increasingly being established on the basis of EC administrative law. They apply to both public and private enterprises, thus taking into account that certain sectors and entrepreneurial activities should be subject to public scrutiny, irrespective of the "public" or "private" nature of the actor. Obviously, privatisation does not lead to losses of transparency where such rules exist.

Privatisation is not tantamount to deregulation. In fact, many privatised enterprises remain or become subject to governmental regulation, in particular where the privatised enterprise remains a dominant firm or where the privatised enterprise is obligated to fulfil certain public interest obligations (119).

The replacement of public ownership by a regulatory scheme opens new opportunities to enhance transparency and public control of corporate behaviour, provided that government regulation - the preparation, adoption and implementation of regulatory measures - is subject to stringent freedom of information rules.

FOOTNOTES

1) See Beesly/Littlechild, Privatisation: Principles, Problems and Priorities, in Privatisation and Regulation - The U.K. Experience, pp. 34-57 (J. Kay/C. Mayer/D. Thompson eds. 1986); Heald/Steel, Privatising Public Enterprises: An Analysis of the Government's Case, id. at pp. 58-77; from a legal viewpoint P.P. Craig, Administrative Law, pp. 87-90 (1989); see also M. Pirie, Privatisation (1988).

2) See Borde/Toffler, Privatisations in France, 1988 International Business Lawyer [I.B.L.], p. 155; for a comparative analysis see Prosser, Constitutions and Political Economy: The Privatisation of Public Enterprises in France and Great Britain, 53, The Modern Law Review, pp. 304-320 (1990).

3) C. Hüttig, *Gemeinwirtschaft im Sozialstaat* (jur. diss. 1986); A. von Loesch, *Privatisierung öffentlicher Unternehmen* (1983); for a historical perspective, see G. Ambrosius, *Der Staat als Unternehmer: Öffentliche Wirtschaft und Kapitalismus seit dem 19. Jahrhundert* (1984).

4) See, e.g., Caves/Christensen, The Relative Efficiency of Public and Private Firms in a Competitive Environment: The Case of Canadian Railroads, 88, Journal of Political Economy, pp. 958-976 (1980); Davies, Property Rights and Economic Behavior in Private and Government Enterprises: The Case of Australia's Banking System, 3, Research in Law and Economics, pp. 111-142 (1981); Frech, The Property Rights Theory of the Firm: Empirical Results from a National Experiment, 84, Journal of Political Economy, pp. 143-152 (1976); Frech, Health Insurance: Private, Mutuals, or Government, 1, Research in Law and Economics, pp. 61-73 (1980); Pryke, The Comparative Performance of Public and Private Enterprise, in Privatisation and Regulation - The U.K. Experience, supra note 1, at pp. 101-148. For a summary of property rights comparisons of private and public enterprises see Stauss, *Private und öffentliche Unternehmen im Effizienzvergleich. Unternehmensverfassungen "im Lichte" der Property Rights-Theorie, 6 Zeitschrift für öffentliche und gemeinwirtschaftliche Unternehmen*, pp. 278-298 (1983).

5) For an overview see the contributions in *Neue Politische Ökonomie als Ordnungstheorie* (E. Boettcher/P. Herder-Dorneich/K.-E. Schenk eds. 1980).

6) For comparative studies of public and private garbage collection, see Bennett/Johnson, Public versus Private Provision of Collective Goods and Services: Garbage Collection Revisited, 37, Public Choice, pp. 55-63 (1978); Pommerehne, *Private versus öffentliche Müllabfuhr: Ein theoretischer und empirischer Vergleich*, 35, *Finanzarchiv*, pp. 272-294 (1976); see also McGuire/Van Cott, Public versus private economic activity: A new look at school bus transportation, 43, Public Choice, pp. 25-43 (1984). For a comparative summary of various studies, see Millward, The

Comparative Performance of Public and Private Ownership, in Privatisation and Regulation - The U.K. Experience, supra note 1, at pp. 118-144.

7) See also report on economic reform in Central and Eastern Europe: A challenge for all Europe, Council of Europe Parliamentary Assembly, doc. no. 6351 (12 December 1990). For a description of the Polish privatisation and its legal basis, see Slupinski, Polish Privatisation Law of 1990, 1990 I.B.L., pp. 456-458; see also for Poland Whisenand/Menendez-Cambo, One more Step towards Capitalism, 9, International Financial Law Review, pp. 38-40 (1990) and Banasinski, *Privatisierung der polnischen Wirtschaft*, 1991, *Recht der internationalen Wirtschaft*, pp. 386-391; with regard to Czechoslovakia, see Haas/Foltynova, Foreign Investment in Czechoslovakia, 1991 I.B.L., pp. 21-25; for Hungary see the First Privatisation Plan (State Property Agency ed. September 1990) and Pogany, Hungary Welcomes Foreign Investors, 10, International Financial Law Review, pp. 9-10 (1991).

8) For a concise analysis of the theoretical approaches to the economic analysis of institutional change, see Gäfgen, *Konstitutioneller Wandel und ökonomische Erklärung*, in 2, *Jahrbuch für Neue Politische Ökonomie*, pp. 19-49 (E. Boettcher/P. Herder-Dorneich/K.-E. Schenk eds. 1983).

9) M. Pirie, supra note 1, at p. 249; for more detailed examinations of specific techniques see Domberger, Economic Regulation Through Franchise Contracts, in Privatisation and Regulation - The U.K. Experience, supra note 1, at pp. 269-283; Hartley/Huby, Contracting-Out Policy: Theory and Evidence, in Privatisation and Regulation - The U.K. Experience, supra note 1, at pp. 284-296; Mayer/Meadowcroft, Selling Public Assets: Techniques and Financial Implications, in Privatisation and Regulation - The U.K. Experience, supra note 1, at pp. 322-340.

10) For a brief description of these methods, see M. Pirie, supra note 1, at pp. 69-136; cf. also the Hungarian First Privatisation Plan (State Property Agency ed. September 1990).

11) B. Janson, *Rechtsformen öffentlicher Unternehmen in der Europäischen Gemeinschaft*, pp. 22-23 (1980).

12) Cf. the contributions by Pelkmans, Spiliotopoulos and Garner, in *Les entreprises du secteur public dans les pays de la Communauté Européenne* (G. Timsit ed. 1987); see also Government Enterprise (W. Friedmann/J. F. Garner, eds. 1970).

13) Directive 80/723/EEC, 1980 O.J. No. L 195/35.

14) See also B. Janson, supra note 11, at pp. 22-24; G. Püttner, *Die öffentlichen Unternehmen*, pp. 23-26 (2nd ed. 1985).

15) J. A. Frowein, in EMRK-Kommentar, Article 10, para. 13 (J.A. Frowein/W. Peukert eds. 1985); I. Laeuchli-Bosshard, *Die Meinungsfreiheit gem.*, Article 10 *EMRK unter Berücksichtigung der neueren Entscheide und der neuen Medien* 28, p. 31 (jur. diss. 1990); for an analysis of the scope of freedom of information under the German Constitution (*Grundgesetz*) see R. Herzog, in *Grundgesetz-Kommentar*, Article 5, paras. 1 and 2, section 81 (T. Maunz/G. Dürig/R. Herzog, eds. 1990).

16) See, e.g., *Grundgesetz* [GG] Article 5 (1), which provides that anybody shall have the right to information from publicly accessible sources; see also Constitution of Portugal, Article 37 (1); Constitution of Spain, Article 20 (1) lit. d); cf. also *Bundesverfassung* [BV] Article 20 (4) (Austria), as amended by Federal Constitutional Act of May 15, 1987, which provides that all agents entrusted with *Bund, Länder and Gemeinde* administrative duties as well as agents of other bodies incorporated under public law shall be obliged to make available information as to matters pertaining to their scope of activities.

17) Decision of the European Commission of Human Rights No. 8878/80 of 7 December 1981, in 3 Digest of Strasbourg Case-Law relating to the European Convention on Human Rights, Articles 7-12, at p. 428 (1984).

18) Leander case, judgment of 26 March 1987, European Court of Human Rights, Series A no. 116, para. 74.

19) Cf. Recommendation 854 (1979) of the Parliamentary Assembly of the Council of Europe, 13th session, reprinted in European Convention on Human Rights, 2, Texts and Documents, pp. 96-100 (H. Miehsler/H. Petzold eds. 1982) and Recommendation No. R (81) 19 of the Committee of Ministers of the Council of Europe on the access to information held by public authorities (340th meeting on 25 November 1981), reprinted in ibid. at pp. 272-276, that contain an appeal to the Member States to provide for access to publicly held information; Proceedings of the Colloquy of the Council of Europe on Freedom of Information and the Duty for the Public Authorities to make available Information, Graz 21-23 September 1976 (unpublished, available from Council of Europe); G. Cohen-Jonathan, *La Convention européenne des Droits de l'Homme*, p. 451 (1989).

20) Leander case, judgement of 26 March 1987, European Court of Human Rights, Series A no. 116, para. 74, Decision of European Commission of Human Rights No. 11854/85 of 15 October 1987 (unpublished); J. A. Frowein, supra note 15; I. Laeuchli-Bosshard, supra note 15, at pp. 33-37; F. Sudre, *Droit international et européen des droits de l'homme*, p. 162 (1989); see also Proceedings of the Colloquy of the Council of Europe on Freedom of Information and the Duty for the Public Authorities to make available Information, supra note 19, at pp. 54-55, 59; cf. Winter, *Zusammenfassender Bericht, in Öffentlichkeit von Umweltinformationen* 27 (G. Winter ed. 1990) with regard to the constitutions of different countries; I. v. Münch, in 1 *Grundgesetz-Kommentar*, Article 5, para. 11 (I.v. Münch, 3rd ed. 1985) with regard to the *German Grundgesetz*.

21) For brief summaries of the access to information legislation of Austria, France, Germany, the Netherlands, Sweden, Switzerland and the United Kingdom, see documents of the Council of Europe, Working Party No. 11 (freedom of information

and data protection) of the Committee of Experts on Data Protection (CJ-PD-GT 11); see also PUBLAW Country reports (Commission of the EC ed. 1991) for the EC Member States.

22) Present legislation on this matter is Chapter 2 of the Freedom of the Press Act of 1976 - *Tryckfrihetsförordningen*; for a survey see Askelöf/Heurgren, *Akteneinsicht in Schweden*, in *Öffentlichkeit von Umweltinformationen*, supra note 20, pp. at 473-510; see also C. Rotta, *Nachrichtensperre und Recht auf Information*, pp. 125-127 (1986).

23) Act on the Openness of General Files of 9 February 1951 - *Lag om allmänna handlingars offenlighet*; cf. C. Rotta, supra note 22, at pp. 128-130 (1986).

24) Freedom of Information Act, 5 U.S.C. § 552 (1966) as last amended by Pub. L. No. 99-570, 100 Stat. pp. 3207-48 and pp. 3207-49 (1986); for a survey see Litigation under the Federal Freedom of Information Act and Privacy Act (American Civil Liberties Union Foundation, ed. 1988); Gurlit, *Akteneinsicht in den Vereinigten Staaten, in Öffentlichkeit von Umweltinformationen*, supra note 20, at pp. 511-551; see also J. Scherer, *Verwaltung und Öffentlichkeit*, pp. 41-46 (1978).

25) Access to Public Administration Files Act (Act No. 572) of 19 December 1985 - *Lov om offentlighed i forvaltningen*; for a survey see Peschel, *Akteneinsicht in Dänemark, in Öffentlichkeit von Umweltinformationen*, supra note 20 at pp. 159-173; see also E. Schwan, *Amtsgeheimnis oder Aktenöffentlichkeit*, pp. 130-133 (1984).

26) Openness of Administration Act of 19 June 1970; for a brief summary see E. Schwan, supra note 25, at pp. 128-130.

27) *Loi* no. 78/753 of 17 July 1978; for a survey see Winter, *Akteneinsicht in Frankreich, in Öffentlichkeit von Umweltinformationen*, supra note 20, at pp. 175-209.

28) Openness of Administration Act of 9 November 1978 - *Wetopenbaarheid van Bestuur [WOB]*; for a survey see Jans, *Akteneinsicht in den Niederlanden, in Öffentlichkeit von Umweltinformationen*, supra note 20, at pp. 357-417; see also E. Schwan, supra note 25, at pp. 133-135.

29) Embodied into the Constitution, Article 20 (4) BV, by Federal Constitutional Act of 15 May 1987.

30) Cf. document of the Council of Europe, supra note 21, information submitted by Switzerland, doc. CJ-PD-GT 11 (88) 9, Chapter 422.1 at p. 64.

31) For a comparative study of administrative secrecy in the Federal Republic of Germany and the U.S. Freedom of Information Act see J. Scherer, *Verwaltung und Öffentlichkeit* (1978); see also - for an analysis of German access to information legislation - W. Hirschberger, *Zugang des Bürgers zu staatlichen Informationen* (jur. diss. 1983).

32) For a comprehensive analysis of the law relating to information access and disclosure in the U.K., see P. Birkinshaw, Government and Information (1990); see also P. Birkinshaw, Grievances, Remedies and the State, pp. 21-23 (1985); for a comparative study of administrative secrecy in the United Kingdom, the U.S.A. and South Africa, see A. Mathews, The Darker Reaches of Government (1978).

33) For a summary of the access provisions of these Acts, see P. Birkinshaw, Government and Information, supra note 32, at pp. 173-209.

34) Cf. Land Registration Act of 1988, section 112; Town and Country Planning Act of 1990, section 69; Water Act of 1989, section 117.

35) For a listing of the publication duties see P. Birkinshaw, Government and Information, supra note 32, at pp. 68-74.

36) See in particular, Local Government Act, sections 100A-100K and Schedule 12A (Access to Information: Exempt Information). For an analysis of the Act, see P. Birkinshaw, Government and Information, supra note 32, at pp. 145-147 and 154-172.

37) Administrative Procedure Act of 25 May 1976 - *Verwaltungsverfahrensgesetz*, § 29 (1).

38) 9th Ordinance for the Implementation of the Federal Clean Air Act of 15 February 1977 - 9. *Verordnung zur Durchführung des Bundes-Immissionsschutzgesetzes*, § 10 (4); Ordinance for the Licensing Procedure for Nuclear Plants of 31 March 1982 - *Atomrechtliche Verfahrensverordnung*, § 6.

39) For an analysis of the German legislation on public registers, see U. Schmidt-Aßmann, *Öffentliche Bücher und Register* (jur. diss. 1977).

40) Commercial Code of 10 May 1987 - *Handelsgesetzbuch*, paras. 9 and 10; Federal Data Protection Act of 20 December 1990 - *Bundesdatenschutzgesetz*, § 26 (5); Act Against Restraints of Competition of 24 September 1980 - *Gesetz gegen Wettbewerbsbeschränkungen*, § 9 (6).

41) Land Register Act of 24 March 1897 - *Grundbuchordnung*, § 12; Craftsmen's Code of 28 December 1965 - *Handwerksordnung*, § 6 (3).

42) The Federal Water Resources Act of 23 September 1986 - *Wasserhaushaltsgesetz*, § 37, merely provides that the water authorities shall establish water books; the State (= *Länder*) Water Acts contain detailed provisions on the accessibility of these water books: public accessiblity in the States of Bavaria, Bremen, Hamburg, and Hesse; accessiblity in cases of legitimate interest in Lower Saxony, North Rhine Westphalia, Rhineland Palatinate, Saarland, Schleswig-Holstein, Baden-Württemberg.

43) For a comprehensive analysis of the various State laws, see W. Hirschberger, supra note 31, at pp. 55-68.

44) Denmark: Act No. 572 of 19 December 1985, § 13 (1) No. 1; France: *Loi* No. 78/753 of 17 July 1978, Article 6; Netherlands: WOB of 9 November 1978, Article 4 (a), (b); Sweden: *Sekretesslag* of 20 March 1980, chapter 2, section 2.

45) Denmark: Act No. 572 of 19 December 1985, § 13 (1) No. 2; France: *Loi* No. 78/753 of 17 July 1978, Article 6; Netherlands: WOB of 9 November 1978, Article 4 (b); Sweden: *Sekretesslag* of 20 March 1980, chapter 2, section 1.

46) Denmark: Act No. 572 of 19 December 1985, § 13 (1) No. 3; France: *Loi* No. 78/753 of 17 July 1978, Article 6; Netherlands: WOB of 9 November 1978, Article 4 (f); Sweden: *Sekretesslag* of 20 March 1980; chapter, 5 section 1.

47) Denmark: Act No. 572 of 19 December 1985, § 12 (1); France: *Loi* No. 78/753 of 17 July 1978, Article 6; Netherlands: WOB of 9 November 1978, Article 4 (c); Sweden: Sekretesslag of 20 March 1980, chapter 8, section 6.

48) Denmark: Act 572 of 19 December 1985, §§ 12 (1) No. 1, 13 (1) No. 6; France: *Loi* No. 78/753 of 17 July 1978, Article 6; Netherlands: WOB of 9 November 1978, Article 4 (h); Sweden: *Sekretesslag* of 20 March 1980, chapter 7.

49) The categorization has been suggested by B. Janson, supra note 11, at p. 195; for a German perspective, see G. Püttner, supra note 14, at pp. 59-62; a similar distinction has been made by Deom, *Les Entreprises du Secteur Public en Belgique*, in *Les Entreprises du Secteur Public dans les Pays de la Communauté Européenne*, supra note 12, at pp. 31, 44-47 for the Belgian situation; and by Le Mire, *L'Evolution du Secteur Public en Italie*, in *Les Entreprises du Secteur Public dans les Pays de la Communauté Européenne*, supra note 12, at pp. 263, 265-268 for Italy.

50) E.g. the Forestry Commission, the Royal Ordinance Factories and various undertakings of local authorities; cf. Timsit, *L'Evolution du Secteur Public au Royaume-Uni*, in *Les Entreprises du Secteur Public dans les Pays de la Communauté Européenne*, supra note 12, at pp. 463, 465-466; B. Janson, supra note 11, at p. 184.

51) A. de Laubadère/P. Delvolvé, *Droit Public Economique*, pp. 675-677 (5th ed. 1986); Jarass, *Der staatliche Einfluß auf die öffentlichen Unternehmen in Frankreich*, 106 *Archiv des Öffentlichen Rechts* [AöR] 403, p. 403 note 4 for France; for Belgium, Deom, supra note 49, at pp. 44-45.

52) Ziller, *Les Entreprises du Secteur Public aux Pays-Bas*, in *Les Entreprises du Secteur Public dans les Pays de la Communauté Européenne*, supra note 12, at pp. 349, 356-357.

53) W. Rüfner, *Formen öffentlicher Verwaltung im Bereich der Wirtschaft*, p. 237 (1967); B. Janson, supra note 11, at pp. 151-160; G. Püttner, supra note 14, at pp. 59-61.

54) See also Askelöf/Heurgren, supra note 22, at p. 483.

55) See also PUBLAW Country Report Denmark 4 (Commission of the EC, ed. 1991).

56) See also Winter, supra note 27, at p. 185.

57) See also document of the Council of Europe, supra note 21, information submitted by the Netherlands, CJ-PD-GT 11 (88) 26; PUBLAW Country report Netherlands 3 (Commission of the EC, ed. 1991); Jans, supra note 28, at p. 380.

58) A. de Laubadère/P. Delvolvé, supra note 51, at p. 678; see also B. Janson, supra note 11, at p. 180; Jarass, supra note 51, at p. 403.

59) Deom, supra note 49, at pp. 45-46.

60) Garner, Public Corporations in the United Kingdom, in Government Enterprise, supra note 12, at pp. 3, 4-5; see also S. De Smith/R. Brazier, Constitutional and Administrative Law, pp. 217-225 (1989).

61) Garner, supra note 60, at p. 5; see also B. Janson, supra note 11, at p. 184.

62) Le Mire, supra note 49, at pp. 266-267 with numerous examples; see also Treves, The Public Corporation in Italy, in Government Enterprise, supra note 12, at pp. 133, 137-140; B. Janson, supra note 11, at p. 177; J. Backhaus, *Öffentliche Unternehmen*, p. 369 (1977).

63) Treves, supra note 62, at p. 138; see also Le Mire, supra note 49, at p. 267; B. Janson, supra note 11, at p. 177.

64) B. Janson, supra note 11, at pp. 160-166; G. Püttner, supra note 14, at p. 61; for functional categorizations of "*Anstalten des öffentlichen Rechts*", see Lange and Breuer, *Die öffentlichrechtliche Anstalt*, in 44 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, pp. 169-210 and 211-247 (1986).

65) See Breuer, supra note 64, at p. 225; G. Püttner, supra note 14, at p. 61; B. Janson, supra note 11, at pp. 160-166 for further examples. The public broadcasting entities (*Rundfunkanstalten*) are, "*Anstalten des öffentlichen Rechts*" which, as a matter of constitutional law, must be kept separated from and independent of government in order to ensure freedom of speech.

66) *Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands* of 31 August

1990, Article 25 (1), 1990 BGBl. II, p. 889; see generally Bärwaldt, *Die Treuhandanstalt nach dem Inkrafttreten des Einigungsvertrages, 1990 Deutsch-deutsche Rechtszeitschrift*, 347, p. 347.

67) Cf. supra.

68) Cf. S. De Smith/R. Brazier, supra note 60; for an analysis of the public control mechanisms regarding public corporations, see P.P. Craig, Administrative Law, pp. 84-86 (1989).

69) P. Birkinshaw, Government and Information, supra note 32, at p. 151; for an analysis of parliamentary control of public corporations, see S. De Smith/R. Brazier, supra note 60, at pp. 222-225.

70) *Publizitätsgesetz* of 15 August 1969 BGBl. I, 1189, as last amended by Act of 25 July 1988 BGBl. I, 1136, § 3 (1) no. 5; for an analysis of that Act, see M. Adler, *Die Rechnungslegung der Kapitalgesellschaften und öffentlich-rechtlichen Unternehmen nach dem Publizitätsgesetz* (jur. diss. 1976).

71) J. D. Derbyshire, An Introduction to Public Administration, p. 174 (2d ed. 1984).

72) Cf. S. De Smith/R. Brazier, supra note 60, at pp. 216-217; B. Janson, supra note 11, at p. 185.

73) Le Mire, supra note 49, at p. 268; for a survey on state shareholding in Italy, see also Treves, supra note 62, at pp. 140-144; for a brief description, see B. Janson, supra note 11, at pp. 177-178.

74) See generally Deom, supra note 49, at p. 47.

75) See A. de Laubadère/P. Delvolvé, supra note 51, at pp. 719-723 with numerous further examples; see also B. Janson, supra note 11, at p. 181.

76) Cf. A. de Laubadère/P. Delvolvé, supra note 51, at pp. 720, 722; see also B. Janson, supra note 11, at p. 181; Jarass, supra note 51, at p. 404.

77) See generally G. Püttner, supra note 14, at pp. 61-62; also B. Janson, supra note 11, at pp. 141-149. The Federal Government holds majority shares in 35 enterprises, among them e.g. the *Saarbergwerke* AG, the *Industrieverwaltungsgesellschaft AG*, the *Treuhandanstalt für Wiederaufbau and the Deutsche Lufthansa* AG; for more details, see *Bericht über die Beteiligungen des Bundes im Jahre 1989* (*Bundesminister der Finanzen*, ed. 1990).

78) *Loi* no. 78/753, Article 2.

79) Act No. 572, chapter 1, section 1 (2).

80) Act No. 572 chapter 1, section 1 (3).

81) For a brief summary of the control mechanisms with regard to companies controlled by local authorities in the U.K., see P. Birkinshaw, Government and information, supra note 32, at pp. 106-107.

82) *Bundeshaushaltsordnung* [BHO] of 19 August 1969 BGBl. III, p. 63, as last amended by (Federal Amendment) Act of 6 August 1986 BGBl. I, p. 1275, section 92.

83) Cf. the listing of parliamentary questions regarding public enterprises in Germany in Knauss, *Zur Kontrolle der Beteiligungen der Bundesrepublik Deutschland und ihrer Sondervermögen, in Kontrolle öffentlicher Unternehmen* 33, p. 57 note 12 (1980); see also B. Janson, supra note 11, at p. 249.

84) The *Bericht über die Beteiligungen des Bundes*, supra note 77; see also Knauss, supra note 85, at p. 59.

85) Treves, supra note 62, at p. 145; see also B. Janson, supra note 11, at p. 249.

86) A. de Laubadère/P. Delvolvé, supra note 51, at pp. 825-826; see also B. Janson, supra note 11, at p. 250.

87) See Jarass, supra note 51, at p. 421.

88) Directive 80/723/EEC of 25 June 1980, O.J. No. L 195/35.

89) See e.g. the contributions in *Kontrolle öffentlicher Unternehmen* (1980); G. Püttner, supra note 14; W. Rüfner, supra note 53, for Germany. M. Durupty, 2, *Les entreprises publiques* (1986), for France.

90) See e.g. the contributions in Government Enterprise, supra note 12, especially Robson, Ministerial Control of the Nationalised Industries, at pp. 53-78 with regard to the U.K., and Lévy, Control of Public Enterprises in France, at pp. 107-122 for France; see also the contributions in *Les entreprises du secteur public dans les pays de la Communauté Européenne*, supra note 12, especially the essays of Spiliotopoulos, Garner and Cassese; B. Janson, supra note 11, at pp. 137-272.

91) See, for example, M. Durupty, supra note 89, which is subtitled "*Gestion-Contrôle*"; see also P. P. Craig, supra note 68, at pp. 84-86.

92) Directive 68/151/EEC of 9 March 1968, O.J. No. L 65/8.

93) Directive 78/660/EEC of 25 July 1978, O.J. No. L 222/11.

94) Directive 90/604/EEC of 8 November 1990, O.J. No. L 317/57 and Directive 90/605/EEC of the same date, O.J. No. L 317/60.

95) Directive 83/349/EEC of 13 June 1983, O.J. No. L 193/1.

96) Directive 89/666/EEC of 21 December 1989, O.J. No. L 389/36.

97) For an analysis of comparable "mandatory disclosure" rules in the United States as an alternative to direct regulation, see E. Bardach/R.A. Kagan, Going by the Book: The Problem of Regulatory Unreasonableness, pp. 242-270 (1982).

98) Directive 79/112/EEC of 18 December 1978, O.J. No. L 33/1 as last amended by Directive 89/395/EEC of 14 June 1989, O.J. No. L 186/17.

99) Directive 76/768/EEC of 27 July 1976, O.J. No. L 262/169 as last amended by Directive 90/121/EEC of 20 February 1990, O.J. No. L 71/40.

100) Directive 65/65/EEC of January 1965, O.J. No. 22/369 as last amended by Directive 89/381/EEC of 14 June 1989, O.J. No. L 181/44; and Directive 75/319/EEC of 20 May 1975, O.J. No. L 147/13 as last amended by Directive 89/381/EEC of 14 June 1989, O.J. No. L 181/44.

101) Directive 67/548/EEC of 27 June 1967, O.J. No. 196/1 as amended by Directive 79/831/EEC of 18 September 1979, O.J. No. L 259/190.

102) See Directive 67/548/EEC of 27 June 1967, O.J. No. 196/1.

103) See, in particular, Council of Europe, Convention for the protection of individuals with regard to automatic processing of personal data, European Treaty Series No. 108 and International Legal Materials, 20, pp. 317-325 (1981).

104) On the basis of Article 8 of the European Convention on Human Rights, the European Court of Human Rights has recognized data protection rights of the individual, *inter alia*, in its judgment of 6 September 1978 in the Klass and Others case (European Court of Human rights, Series A no. 28); in the Malone case (judgment of 2 August 1984, Series A no. 82); in the Leander case (judgment of 26 March 1987, Series A no. 116); in the Gaskin case (judgment of 7 July 1989, Series A no. 160). The European Court of Justice has indirectly recognized the importance of the right to privacy in case 29/69, judgment of 12 November, ECJ 1969, no. 419, Stauder vs. City of Ulm.

105) COM (90) 315 final - SYN 287 of 5 November 1990, O.J. No. C 277/3.

106) Directive 82/501/EEC, O.J. No. L 230/1 as amended by Directive 88/610/EEC of 24 November 1988, O.J. No. L 336/14.

107) Cf. Article 1, para. 1 and para 2 (a) and (b).

108) Annex B to Directive 82/501/EEC and Annex VII to Directive 88/610/EEC, Information includes, e.g.:

- an explanation of the activity undertaken on the site,
- the names or general danger classification of the substances and preparations involved on site which could give rise to a major accident, with an indication of their principal dangerous characteristics,
- adequate information on how the population concerned will be warned and kept informed in the event of an accident,
and
- details of where further relevant information can be obtained.

109) Article 8, para. 1 as amended by Directive 88/610/EEC of 24 November 1988, O.J. No. L 336/14.

110) For an overview of the administrative procedure rules of the Member States, see J. Schwarze, 2, *Europäisches Verwaltungsrecht*, pp. 1135-1378 (1988).

111) Article 9, para. 1 of the Council Directive of 28 June 1984 on the combating of air pollution from industrial plants, 84/360/EEC, O.J. No. L 188/20.

112) Of 27 June 1985, 85/337/EEC, O.J. No. L 175/40.

113) Cf. Article 1, para. 2 of the Directive: "'Developer' means: the applicant for authorization for a private project or the public authority which initiates a project."

114) Article 6, para. 2.

115) Article 9.

116) 90/313/EEC, O.J. No. L 158/56.

117) Cf. supra.

118) Cf. 8th and 10th grounds: "Whereas access to information on the environment held by public authorities will improve environmental protection; ... Whereas it is necessary to guarantee to any natural or legal person throughout the Community free access to available information on the environment ... concerning the state of the environment, activities or measures adversely affecting or likely so to affect the environment and those designed to protect it".

119) Cf. the contributions by Vickers/Yarrow, Telecommunications: Liberalisation and the Privatisation of British Telecom, in Privatisation and Regulation - The U.K. Experience, supra note 1, at pp. 221-240; Hammond/Helm/Thompson, British Gas: Options for Privatisation, ibid., at pp. 241-266; see also P.P. Craig, supra note 68, at pp. 87-90.

MEANS FOR PROTECTING THE USERS AND FORMER EMPLOYEES OF PRIVATISED ACTIVITIES

by

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I. PRIVATISATION - POLITICAL AND TECHNICAL CONCEPT

In the vocabulary of politics, the concept of privatisation is one which can give rise to strong emotions. This is true both within traditional mixed economies in Europe and in countries which are abandoning their former command economies.

The symbolic value attached, therefore, to this concept can complicate any impartial discussion of the different forms which instances of privatisation may take and of their possible legal implications. There is no point in denying - or regretting - the political power which the concept of privatisation has unquestionably acquired in different countries. But, as a result of this situation, the need to base our work on attempts to analyse the concept of privatisation and considerations underlying current trends in this field becomes even more obvious.

The attention which is normally paid to these questions is explained by various considerations. However, a common feature is undoubtedly the growing feeling that the influence of the State and the authorities in general has become too great. Those who feel like this, therefore, believe that a better balance must be sought between the public and private sectors of the economy or of social life in general by giving preference to the latter.

This common feature, however, conceals major differences as regards the origins of current trends in favour of the private sector. In Western Europe these feelings have developed within a more or less mixed economy and administration, i.e. ones which are marked by extensive contacts between the two basic sectors. For the former members of COMECON, by contrast, the point of departure is clearly a society where it is known that the State - not to mention the Party - wanted to be involved in everything.

Despite the common ideological features linking them, these two situations are far from identical. Thus, it is far easier to understand the temptation to carry out radical privatisation in societies where the situation was previously more or less monolithic than in those which have long experienced more balanced contacts between the public and private sectors. In this connection, it should be stressed, among other things, that in most countries with mixed economies there has never been a serious threat that the private sector would disappear.

These considerations help to explain why the moral connotation of the concept of privatisation may be particularly strong in the former socialist countries. But they are not the only countries where the political value of that concept is sometimes considerable. As a matter of fact, in all of our countries one could have the impression of facing with two fundamentally different approaches to the phenomena associated with the general trend of privatisation.

These two approaches may be described, simplifying the situation, as "ideological" and "pragmatic". One view is that a reduction in the relative role of the public sector is an end in itself, which must, therefore, be pursued almost at any cost. The other view is that this is only one special aspect of the continuous effort being made to make the public sector more responsive to current needs.

The questions raised in the title of this report will mainly appeal to those favouring a pragmatic approach and who, therefore, consider the various instances of privatisation as a means among other means rather than an independent end.

These questions, however, should have a wider audience. It is difficult to see how the need to protect interests which are affected by a case of privatisation without being directly covered by it can be ignored even by the *idéologues*. In seeking a larger private sector and an economically more effective public sector, account should be taken of the material and social effects of the action proposed: what will the quality and availability of products be like, the situation of consumers, the effects of the activities in question on the environment, etc. Situations in which the "efficiency" of a number of financial or social measures can be gauged by a single unique criterion are rare.

On the following pages we shall endeavour to ignore those emotions to which the political and moral aspect of the concept of privatisation may give rise. Such feelings - as has already been said - may make discussion of the legal aspects of these phenomena more complicated.

On the other hand, the fact that certain emotions are involved is clearly likely to make the proposed attempts at an analysis even more valuable. And although this is intended to represent a "technical" approach, it should in no way be assumed that the real challenges of the discussion have been forgotten. Quite the contrary, it may be assumed that a better knowledge of the technical aspects of a question is likely to make the basic problems easier to solve.

II. COMMENTS ON THE SUBJECT OF THE REPORT

The title adopted for this report mentions two interest groups whose protection will be our main concern.

The second of these categories, the former employees of privatised activities, forms a distinct group whose problems are relatively uniform; we shall have an opportunity to come back to this later (see V below).

In the case of the other group, the approach is far more complicated. The concept of "user" presupposes a relatively precise idea of what is actually "used". The term makes us think, in the main, of those who use privatised commercial (gas, water and electricity), social and health "services", etc. But other examples may also be envisaged.

Those who walk in public parks for whose upkeep, in some towns, private gardening companies are responsible are undoubtedly also "users". But how should one regard the ordinary citizen who finds himself subject to a body search required by the authorities - eg in airports - but carried out by the staff of a private company ("Securitas", etc.)? And what should one say of someone who has no direct relationship with a privatised activity but who uses facilities (e.g. a motorway) which have been built by a private company on the basis of an invitation to tender issued by the relevant authorities and who - as a "user" - has every interest in knowing that the quality and upkeep of these facilities are adequate?

This line of reasoning inevitably leads us to two basic observations:

- In order to avoid abrupt exclusions, our attention should turn to protection of the *public interest* to the extent where this may be jeopardised by privatisation. The protection of a specific group of "users" represents only a limited instance of this general approach.

- The subject necessarily involves close consideration of the substance of the concept of privatisation. This is essential in order to enable us to lay the necessary foundations for a reasonable debate on certain effects of the current trend towards the private sector.

It will clearly not be a question of recommending such and such a definition as the only valid one. But it may be hoped that the analytical work required will lead to a deeper understanding of these phenomena and of the many opportunities available in this connection in each of our societies.

Before the concept of privatisation is dealt with (see III below), however, some preliminary parameters relating to protection against privatisation, as the expression will be used here, should be established.

Firstly, the questions which may be raised by privatisation procedures are primarily a matter for the previous report on the legal forms and techniques of

privatisation (*Daintith*). But the dividing line between the two reports cannot be drawn very clearly. Thus, no privatisation exercise can be carried out without some attempt being made to anticipate - and possibly forestall - the special problems which it is likely to cause. And the transformation may itself give rise to some cases where protection is needed; here, cases which affect the situation of the employees of a company which is being privatised are clearly included.

Secondly, there will be no question, in the following pages, of going into the very special legal problems which may be raised by campaigns in favour of the restoration to former owners (or their descendants) of "collectivised" goods which are under way in some of the former socialist countries. And discussion of the questions which may be raised by the various forms of privatisation generally entailed by the agricultural reforms proposed or under way in the same countries (dismantling of the collective farms, etc.) would also fall outside the framework of this report.

Thirdly, so-called "deregulation" cases, which are partly, it is true, linked to the privatisation trend, raise a number of special questions which it is not possible to go into here. It should be noted, however, that some privatisation measures, instead of simplifying the web of legal regulations, may increase the need for protection through laws or regulations.

A final aspect of the limitation of the subject which must be mentioned here concerns the commercial, social or other character of the activities likely to be privatised. - It goes without saying that privatisation on regional or municipal level should be taken into account on the same basis as privatisation involving the State.

Current trends in this field undoubtedly involve, for the most part, activities concerned with the provision of services (treatment, training, transport, etc.) - whether compulsory or not - and those which are only concerned with the production of goods. Exceptions (security services in airports, etc.) aside, the activities which are more directly connected with the exercise of public authority proper are generally less affected. It is also services which are, more or less necessarily, connected with the operation of the central powers of the community in question (parliament, government, justice, prisons, etc.) which are likely to raise the most sensitive problems in the event of radical privatisation.

A fairly broad definition should be adopted here in order to permit an overall view of the questions raised by the need for protection. That is why the only areas which should be excluded are certain measures involving privatisation of the unilateral exercise of public authority.

In many countries, such tasks have been given, for example, to an association or trade union governed by private law which brings together - or is open to - those who carry out some specific activity (farmers, fishermen, sportsmen, lawyers, etc.). Frequently, what one sees, therefore, is a kind of compulsory self-regulatory power. The applicability of the guarantees offered by public law (the *audi alteram partem* rules, the right of appeal, etc.) is normally included, in the countries of Western Europe, among the very first legal questions which arise; we also believe that at least

some features of public law are tending to follow the movement of decision-making power towards the private or semi-public body responsible for its implementation (see also IV.2 below).

These aspects of the general problem of privatisation are too specific to be dealt with independently here.

III. THE CONCEPT OF PRIVATISATION

1. Points of departure

It is clear from the previous remarks that the cases with which we have to deal are very varied. Consequently, the question of protecting the public interest - or that of users - can only be dealt with reasonably on the basis of some attempt to analyse the privatisation concept itself.

Quite often one has the impression that the debate in this area only involves cases where a completely public activity is wholly transferred to the private sector. Many examples of this kind may be cited from the well-known sale of nationalised companies which have taken place in recent years in countries such as the United Kingdom and France. And, on an even greater scale, similar operations are envisaged or under way in most of the former socialist countries.

Perhaps the most bitter controversies on this subject arise precisely from such a conception of things. In fact, this represents an extremely simplified approach. It is true that the complete transfer of certain activities from public to private sector is the most radical form of privatisation. But it is only one possible form of a much broader - and certainly much more realistic - idea of the concept of privatisation.

A more realistic and more pragmatic approach to these developments in our modern societies presupposes that the various key functions which may be entrusted either to public bodies or to subjects belonging to the private sector are taken into consideration. It is the whole dichotomy between "public" and "private" which should be taken into account.

A start should be made, therefore, by noting a number of key criteria which can be used to define whether an organisation or an activity belongs to the public or private sectors. As a general rule, it must be assumed that the activity in question may be classified on the basis of the replies, taken together, to at least the following four questions:

1) Who decides on the character, the quantities, etc., of the services to be provided?
2) Who provides the services in question?
3) Who is responsible for financing them?
4) Who supervises their implementation?

The questions raised by supervision - such as its form, its intensity and its public or private character - are closely connected with the main subject of this report, i.e. the protection of users and other public interests. These questions will, therefore, be at the heart of the comments made in the following section (see IV below).

Consequently, we shall mainly restrict ourselves, in the following pages, to the first three of the above criteria (in the text, these criteria are simply referred to by the numbers (1), (2) and (3).

2. "Total" privatisation

A privatisation operation which consists of transferring the whole of a public activity to the private sector embraces all three factors which are to be taken into account first in accordance with our conception of privatisation: private capital is used to buy all the titles to ownership (shares, etc.) (3). The purchase of all these securities gives access to positions of authority (1) and to the means of production (2).

At first sight, therefore, this is a very simple and clear-cut example. But this impression is deceptive because even here some qualifications are possible. Thus, where a fairly large proportion of the products of the former public activity (company, etc.) was intended for the private market, both the power to take decisions (1) and the burden of financing (3) were already shared, to some extent, by both sectors, i.e. by the owners and/or the management of the (public) company and the (private) consumers.

Clearly, it is also still possible to maintain (or even introduce) fairly extensive public supervision of the company in question. Privatisation - even fairly complete privatisation, as here - should never be planned in such a way as to place the activity concerned outside the social environment of that State.

3. Intermediate assumptions

Between the 100% public or private solutions, there is clearly the possibility of selling only part of a company to the private sector. But there are also many other possibilities to be considered between the two extreme solutions.

The criteria which have been mentioned may be combined or compounded in very different ways. Here we shall simply make a quick list of six possible combinations; moreover, some of them are not wholly different from the others. The six represent types of partial privatisation whose practical importance in many of our societies is considerable.

a. A very widespread form of partial privatisation involves **payment by the customer in accordance with his actual use of the goods in question.** There are clearly many examples of this in, *inter alia*, the Post Office, the State railways, motorways with tolls and health services.

In such cases, it is the customers themselves - in addition to financing (3) - who decide, by themselves or in part, on the number of products (services, etc.) to be

supplied and on what terms (1). The provision of services (2) and a fairly substantial share of the decision-making power (1) are still, however, in the hands of the public organisation which is responsible for them. The latter will also be able to contribute by partial financing in various ways (subsidies, social security, etc.).

b. In the case of authorisation granted by the authorities for activities which would otherwise be prohibited (**concessions**), it is normally the public authority in question which determines the organisation or which, in any case, decides on the broad outlines (1) of the activities concerned.

On the other hand, the means of production (transport, etc.) (2) as well as the financing (3) are normally conceded over either to the concession-holder himself or to the public as users. It quite often happens, however, that subsidies (3) are paid out of public funds, for example, to provide additional financing for some public transport services which must be retained despite the risk of a deficit. And, naturally, it would be necessary to subject regularly various aspects of the activity in question (road safety, etc.) to some kind of public supervision (4).

c. A third intermediate form of privatisation consists of the direct payment, out of public funds, of "user" **subsidies** to natural or legal persons under private law in order to facilitate either the maintenance of an adequate standard of living or the attainment of more specific goals (vocational training, etc.).

In such cases, then, financing (3) - whether in full or in part - is still in the hands of the public authority in question, whereas the basic decisions (choice of establishment, etc.) (1) and the organisation of the "production" in question (2) may be left in the hands of the private sector. Thus, the provision of some services may be conceded by the private person (the "user") concerned, for example, to charitable associations or foundations operating in the area of private education, but also to particular public establishments (for example a university).

d. In the case of a fourth form, which is common, *inter alia*, in the field of public works and contracts, the public authority continues to determine the tasks to be accomplished (1) and their financing (3). Subsequently, the work (2) is carried out by a person covered by private law and appointed, for example, on the basis of an **invitation to tender**.

e. A fifth form involves the **freedom to choose** between various public (or even private) institutions or services provided more or less free of charge to those concerned; in many countries, for example, this is the case with young people at the point when they must choose between different higher education options.

In such a case, the public sector is normally concerned only with the "production" (2) and financing (3) of the institutions or services in question. To a certain extent, at any rate, the basic decision-making power (1) is reserved for the "customers" themselves.

f. Finally, notice should be taken of situations in which the citizen, as user, finds himself compelled to contribute to the direct financing (3) of a public institution (for example, a television channel) without any account being taken of the actual use he makes of the services offered.

A minimum condition for the imposition of such an obligation **to contribute to costs** is, however, that the services in question should - normally at least - be accessible to the citizen in question. Thus, someone who does not have a television set can only, as a taxpayer, be obliged to pay for the operation of the available channel.

4. "Mixed administration"

The line of reasoning behind the preceding remarks leads directly to what may be called here the "grey" sector. This is that part of economic and social life which is situated between the public and private sectors; for reasons which are evident, this area may also be described as "semi-public" or "semi-private".

With the countless gradations with which we are familiar, the systems which it is agreed to term the "mixed economy" - with its different implications for management - involve situations which are well known in most member countries of the Council of Europe. And we believe that it is essential to stress that the current trend towards privatisation may be situated within a framework of "mixed (or joint) administration" - or of a mixed economy - quite as well as in the context of that sharp break with the pre-existing situation of which one tends to think.

It will not be possible to go into the details of these systems here. We shall simply note, therefore, that many forms of co-existence between the two basic sectors have developed over the course of this century. From a historical point of view, this development is connected with increased intervention by the authorities. But there is nothing to prevent some of the processes which assisted this development from proving equally useful in a situation where the tread is in the opposite direction. The total transfer of certain activities from public to private sector cannot be considered as the only interesting kind of privatisation.

This observation may open up a wider range of possibilities for action by our governments. But a reply to the question of what kinds of privatisation are - or should become - most important can clearly not be given without considering the country in question and its current or future structure.

5. Activities undertaken or abandoned

The relations between the two social sectors with which we are concerned here are not measured simply on the basis of actual movements in one direction or another. In the longer term, the boundary between the public and private sectors is also defined on the basis of the activities undertaken or abandoned by one of them without being adopted (or prohibited) by the other.

In the first place, we find cases where the public sector has abandoned a particular activity without anything being assumed in its place. To a certain extent, this phenomenon is connected with the fact that considerable involvement by the authorities in economic and social life often takes the form, in societies with mixed economies, of intervention which is superposed on private activities; instances of expropriation (or other forms of "collectivisation") are far from being the only bases for the development of the public sector. And, in addition, in the case of many kinds of intervention, ways have been found to enable representatives of the private sector to contribute to the definition and/or implementation of the policy in question (systems of representation, delegation, subsidies for the private sector, etc.).

On the other hand, examples of private initiatives designed to fill gaps in the range of services offered by public authorities may be common. They include, for example, the setting up by parents of nursery schools in districts which are poorly served by the local authority network.

Behind such initiatives there is always the possibility of intervention by the authorities. Thus, provision should normally be made to supervise the health standards proposed for a nursery school, just as additional public action of this kind may be envisaged, for example, in the form of a system of direct or indirect subsidies to the private management. Depending on the situation, even a policy of laissez-faire may encourage or discourage a particular type of private initiative.

Anyone who proposes to study relations between the public and private sectors must also take account of the facts which have been mentioned here and which may raise some of the same questions as the trend towards privatisation in general. There is no point, therefore, in seeking in this report an exact delimitation on this point.

However, since nothing is transferred from public to private sector, we shall not deal here with those special questions which may be raised when an activity previously undertaken by a legal person under public law is simply abandoned.

6. "Formal privatisation"

Finally, account should be taken of a situation which, while it is closely connected with the subject of this report, cannot really be covered by it. This is the use by public authorities or the public sector of methods of organisation or management techniques borrowed from the private sector ("formal privatisation" made through a modification of the legal system).

The use of typically private methods of organisation (different companies, etc.) is undoubtedly the best known form of this. Nowadays, however, there are also many other kinds of such "privatisation". Thus, consideration may be given to using "internal prices" for transactions between the various components of a State "group" (e.g. the railways). Or else there will be conscious movements towards increased liberalisation in the management of staff and finances, particularly - but not exclusively - in administrative sectors which are somewhat removed from the political and administrative centre.

On the other hand, the object may be to divide up former public monopolies into several more or less independent parts. The aim of this may be to subject those activities which are less vital to the smooth running of the monopoly to increased competition or to open the way to more active involvement by monopolised activities in the market.

In the longer term, such steps may prepare the way for real privatisation of the activities concerned; the intention may be, for example, to sell all or some of the shares of a company whose creation, in the first place, was simply a technical operation. But it is also possible that the efforts made will produce satisfactory results. And if this is the case, the decisive step towards real privatisation may never be taken.

The normal goal of "formal privatisation" measures is increased mastery of internal problems involving efficiency and accounting which may be found in the public sector (as well as in the private sector). This aim is mainly pursued by exempting at least some of the activities involved from the legal and other constraints to which the various branches of the public sector are normally subject.

IV. MEANS FOR PROTECTING THE PUBLIC INTEREST, INCLUDING THAT OF THE USERS OF PRIVATISED ACTIVITIES

1. The primacy of general protective measures

Of the four aspects of the concept of privatisation which we have mentioned, the last is the one which affects the forms, the intensity, the public or private character, etc., of the supervision exercised over a privatised institution or activity. This aspect is closely connected with the protection of users and other interests which may be affected by a privatisation exercise. To a large extent, questions of protection parallel with those involving supervision of the privatised activity.

Protection against the possible untoward effects of any privatisation exercise should mainly be provided by general measures of protection which are applicable in the society in question. Even the market cannot be exempted from all supervision either by the authorities or - quite clearly - by those who carry out an activity within it (customers, competitors, etc.). And the problems related to those areas of the market which - *de facto* or *de jure* - are subject to a monopoly do not involve the public or privatised sectors exclusively.

Those who propose to launch a privatisation operation should, therefore, first study the legal environment in which the activities in question will take place once their complete or partial privatisation has been concluded. The purpose of such a study will be to check whether the protection offered by pre-existing measures can meet requirements of protection as these are perceived by the authors of the operation.

If the adoption of additional protective measures is required, new measures should not necessarily be envisaged only in connection with the particular privatisation exercise in question. It is equally possible that it would be better to employ general

measures either by adapting pre-existing protective methods or by introducing some new machinery for a particular category of activity, whether privatised or not.

Regardless of the choice made between general or specific solutions, however, one should never lose sight of the need to ensure appropriate protection for each kind of privatisation proposed (see III above). It becomes clear, therefore, that protective needs may vary considerably from one case to another. Such is clearly the case also with the need to take account of the more or less vital character - for users and for society in general - of the activity in question and so of the need for protection that is correspondingly extensive.

2. Protection before and after a privatisation exercise

The subject of this report derives, at least in part, from the idea that users, etc., are usually better protected when activity is managed by a public organisation than after its privatisation.

This idea, which is undoubtedly fairly widespread in most of the member countries of the Council of Europe, is not necessarily wrong. A distinction should be made, however, regarding the sort of privatisation that is involved. Particularly in cases where the extent of the step taken towards the private sector is relatively limited, the difference in the level of protection is not necessarily enormous. The truth of this basic idea also depends on the supervision actually exercised before the privatisation of an activity.

As regards the latter point, the answer can clearly not be the same for all our societies. For example, it is enough to think of the very different state of administrative law in different countries and of the extent to which the very idea of administrative legality has been accepted as a principle superior to the wishes of governments of the day. In addition, even in States where the principle of administrative legality is fully acknowledged, there is the question of the applicability of administrative law to institutions and activities which are rather marginal by comparison with the central authorities which it is usually proposed to privatise.

In addition, even an administrative law which is theoretically applicable is not always applied with all the efficiency or fairness that is desirable. And, in any case, the guarantees offered by administrative law may remain dead letters if efficient and accessible supervision of administrative legality - through the courts and by other means - is not ensured; there is no point here in stressing the problems which will easily have to be faced in this connection.

Even more generally, the democratic machinery upon which member States of the Council of Europe are based is not necessarily capable of ensuring adequate protection for interests which may be threatened by privatisation operations. Even the most open democratic process can only concern itself with a limited number of the questions which arise. And the votes cast in general elections must necessarily relate to the general thrust of the policy to be adopted so that, very often, the consequences

to be drawn for any political question raised before the following elections are uncertain.

In addition, there is nothing to guarantee that all legitimate interests - including those of a particular minority - will be duly taken into account by successive political majorities. And the real opening up of the political debate to different arguments does not always reflect the high standard of the basic ideas on which a democratic society should be based; this is often the case, in particular, with information and arguments coming from outside the various political cliques which tend to form.

Moreover, there are the often considerable effects of the adaptation and sifting of political choices required at administrative (or even legal) levels. And, more generally, there are no grounds for assuming that the services provided by a public organisation will automatically be of higher quality or less expensive than those which a private company might offer in its place.

The fairly widespread feeling that the required protection is always better provided within the public sector is without foundation. But the fact that this is so should not leave the door wide open for the opposite fallacy. The risk of various conflicts of interests and abuse is present everywhere in human life; who would say, for example, that a private *de jure* or *de facto* monopoly is less dangerous than a monopoly held by a public or a semi-public organisation?

All depends, therefore, on the need for and the means of protection in question. That is why a solution appropriate to each case can be obtained most easily if opinions which are too deeply entrenched in favour of the all-embracing State or the all-embracing market are put aside.

3. General protective measures

We have already pointed out that, in the first place, the question of legal protection for the public interest - that of users and others - refers to measures of protection that are applicable, in a given society, to a particular kind of activity in general. That is why it is both pointless and impossible, in a short paper such as this, to review all the measures intended to protect interests which may be jeopardised by different privatisation exercises. But some additional comments are clearly required.

In our modern States, economic and financial life is regulated by an impressive number of public measures designed to offset the various excesses which may result from a market freed from all supervision (anti-trust regulations, price controls, etc.). But, at the same time, some basic measures of protection are normally inherent in the very operation of the market. Thus, freedom of contract - which, after all, only exists as a result of the basic legal system - is there, *inter alia*, to thwart, in the long-term, those who try to sell products of poor quality or whose price is too high. And, on the other hand, it is there to help those who prove better adapted to competition to succeed.

The interplay of supply and demand may give great freedom of action and choice to those involved. To a certain extent, this system may be able to operate while

still ensuring a generally adequate level of protection for the interests affected. And, where this is the case, even the complete take-over by the private market of a previously public activity is not likely to result in a particular need for additional protection.

On the other hand, it is well known that the market may also entail a number of more important disadvantages than the possible bad luck and incompetence which are inherent in any social system. Among these many risks we shall refer firstly to the often precarious position of the simple consumer when confronted with a business, whether it be professional or of little consequence, or the position of any party when confronted with an activity which enjoys a *de facto* or *de jure* monopoly. Nowadays there are not many people who are prepared to maintain that the concept of perfect competition dear to political economy enthusiasts always corresponds to reality as we experience it.

In addition, the market, even where it is operating correctly, may have an undesirable impact on the social or natural environment. Thus, a supermarket in the suburbs may be economically more effective than a hundred small shops in a town centre. But if a broader view is taken, the assessment may be different: what would be the impact on the social environment in the town centre, who would undertake to provide the roads or other means of transport required, what would be the pollution effects of the necessary customer traffic and what would be the situation of those who did not have a car?

More generally, the market is not necessarily capable of taking account of everything which is important in life. It is hardly possible for the authorities to manage the natural environment without correcting some of the effects of the market. And how is it possible for market mechanisms alone to ensure a decent old age for those who do not have the means to pay the true cost of living in an old people's home or staying in hospital?

Despite these disadvantages, 100% privatisation may appear to be the necessary or even ideal way to make an activity sufficiently effective. But the possibility of combined solutions should not be ignored; this is true, if for no other reason, because the retention of some means of supervision by the authorities may prove necessary even after the privatisation exercise has taken place.

Let us take the example of an old people's home: the invitation to tender procedure is normally used for the construction of a building of this kind. But similar procedures are also conceivable in the case of some of the services provided for customers in the home (washing, cleaning, canteen facilities, etc.) or, quite simply, in the case of the management of such institutions. In such cases, all that remains for the authorities to do is to assume responsibility for financing and - in any case - for some supervision of the way in which the old people's home is used.

These examples represent only a small number of the very many combined operations which are possible between the so-called mechanisms of the private market, on the one hand, and those which are covered by public law or belong to the public

sector, on the other. We find here again all the influence of the concept of privatisation that we have just described (see III above).

This concept covers possibilities for protecting the interests of users and others that are too varied and too numerous to be reviewed here. For the purposes of our attempts at analysis, however, a distinction must be made between a number of categories of possible protective measures. Thus, distinctions may be made between situations where protection is ensured by (1) public or private regulations and (2) direct or indirect measures. In addition, (3) responsibility for maintaining the measures adopted may be assumed by a public or private body.

These factors may be combined in different ways. It goes without saying that any one of the possible combinations does not necessarily rule out the others.

The legal system as derived from the body of laws or regulations constitutes the basis for protecting the public interest. The market itself is only conceivable within the legal framework of a particular time; thus, it is necessary to refer to this framework in order to determine both the means and extent of freedom of contract and the forms permitted for a particular commercial activity.

In daily economic life, however, standards of private origin tend to dominate. The most usual form of this is clearly the individual contract. But, increasingly, even the content of such acts tends to be determined by texts drawn up unilaterally either by a particular individual operator whose position on the market is strong or by groups of industrialists or businessmen. Thus, someone who goes to a bank or an insurance company usually has little chance to conduct genuine negotiations on the content of the contract into which he seeks to enter. And from one bank to another the terms proposed tend to be more or less identical.

In the best of situations, therefore, the "consumer" may be compelled to choose from a very small number of pre-determined proposals. And, in other cases, as far as the essential conditions are concerned, there is only a single contract available; the consumer's choice is limited, therefore, to deciding whether or not to go ahead on the basis of the sole proposition which is made to him.

The current trend of using standardised documents has many arguments in its favour. However, they may also reinforce the inequalities that exist between those involved in the market or may create new ones. Such inequalities include some clear risks of abuse which the authorities may feel obliged to prevent.

In such a case, the introduction of detailed restrictive legislation in place of standard contracts is not the only method available. The authorities are also able to subject the content of the terms of contract imposed to some measures of supervision. Such supervision may be exercised preventively (authorisation, etc.) or punitively. The tasks of supervision may be entrusted to a public or semi-public organisation responsible for safeguarding the interests involved (consumer ombudsman, various boards, supervising authorities responsible for anti-trust or anti-pollution measures, etc.). But there is also the possibility of associating organisations governed by private

law with the exercise of supervision; thus, it may be proposed to authorise standardised contracts only where they have been drawn up in negotiations between the company or commercial group in question and a representative of the consumers (approved association of consumers' various trade unions or other organised groups).

A certain amount of supervision by representatives of some private interests may also be encouraged by other means. Thus, the payment of subsidies to consumer associations or other users will normally help increasing their influence in relation to commercial interests. And increased access to justice for particular types of activity should be one of a number of other measures capable of having similar effects.

In addition, there is clearly also the group of fairly classic measures involving direct and indirect public supervision over the establishment and operation of particular types of private or privatised activity (concessions, contribution to financing, taxation policy, purchase of shares, representation on boards, etc.).

It goes without saying that the possible range of such measures is very big. We shall simply point out here that quite often the success of efforts to protect particular interests may be increased when they are made in conjunction with those who feel most directly affected (individual or group users, nature conservation societies, etc.). The authorities have many ways of facilitating or directing such activities.

4. Measures adopted in connection with a particular privatisation operation

When any privatisation exercise is carried out, the activity involved will be subject to a number of general protective measures. Where these measures as a whole are able to ensure an adequate level of protection, additional efforts are not required.

It is clearly also possible that a particular privatisation exercise may reveal a defect in the previous arrangements and so lead to corresponding additional measures.

Where, in such a case, it is a new measure of a general character which proves desirable, reference may simply be made to what has just been said (see 3 above). The following comments, therefore, will be restricted to protective measures related to the particular privatised activity which give rise to them. However, even in this area, we come up against distinctions to which we have already referred in connection with the general measures. Special protection may also be based on public (legislation, etc.) or private (contractual) norms or standards and may be ensured by direct or indirect measures. Observance of the measures adopted may be ensured by public or private bodies acting alone or together.

One form of privatisation may be cited to illustrate some key aspects in this line of reasoning (see also III above): responsibility for providing some services or undertaking certain public works is currently given to persons governed by private law. The cost of such operations may be covered directly by the relevant public fund or else the payment procedures are determined by them (fixing of the unit price to be paid by customers, etc.). And, in particular, the content of the tasks delegated is defined in advance by the public organisation involved.

In all these cases, the attempts to protect the interests at stake should begin at the moment when the projects to be delegated are chosen and defined. Here the whole interplay of democracy and non-contentious administrative procedures should be considered, but that is outside the framework of this report.

Once the project has begun and been carried out, the most important basis for specific supervision lies in the parameters which have been established - in tender specifications or in other ways - for the management of the privatised activity. In particular, subsequent specific supervision may be based only on those same conditions. Comparison with the basic procedures for mutual supervision by the parties to a contract may be quite justified.

However, complete confidence should not be placed in this basic system. As in the private sector, the public bodies which, as "parties", are supposed to maintain the conditions set sometimes lack the technical competence or even financial means required for that task. And the attention, in particular, of those responsible for preparing and carrying out a privatisation exercise easily tends to shift towards those technical aspects of the operation with which they are usually concerned. If such an organisation alone is responsible for the task of determining the conditions to be observed and of checking whether they have been met, a number of major considerations - e.g. ecological, aesthetic or social - may be ignored.

Generally speaking, therefore, an adequate level of openness and adequate rights of expression should be ensured in connection with the activities in question. In the first place, such measures should cover the interests of potential users in the decision-making process. But an objective which is just as important must be to open the way to participation by groups which can speak for the widest possible range of legitimate interests, particularly those which will not necessarily be covered by the organisation directly responsible for the privatisation exercise.

Such measures of administrative openness are also important - before and after privatisation - in laying the basis for genuine competition between those who propose to bid for a particular activity which is to be privatised (e.g. between the applicants for a public works contract).

In addition, where there is as much openness as possible, this could help restrict the possibilities for corruption which are inherent in any administrative or political department. It is generally well known that staff in departments which must deal directly with commercial interests (procurement departments, buildings department, etc.) are those most exposed to possibilities of this kind. The current trend in favour of total or partial privatisation, therefore, will tend to lead to an increase in the number of situations exposed to such risks.

Where the conditions laid down for a particular case of privatisation are breached, the question of sanctions arises. In the last resort, outright withdrawal of the concession, etc., in question may be considered, with or without additional measures, such as restitution of the goods which have been granted.

Better means to mastery of situations where conditions are breached than those provided by general legal mechanisms should perhaps be sought here. To this end, special clauses may be included in the contract (tender specifications, etc.) drawn up for each case of privatisation. Thus, a clause providing for immediate cancellation where it is duly established that some key features of the contract have not been observed may prove effective, even if this involves agreeing to an additional legal guarantee against any abuse of such measures (right of appeal, etc.).

However, the real possibilities for taking action to counter unacceptable behaviour may depend on the existence of effective competition in this segment of the market. Even a clause allowing for immediate cancellation may prove useless in practice in cases where a private operator holds a *de facto* monopoly. General legal measures - e.g. in terms of criminal law - are not always so weak.

In this respect, it should be noted that some privatisation measures may help upset the balance of a market whose good health is often a condition for their own success. Thus, where a company is given responsibility for all the public transport in a town or where responsibility for the whole of a household refuse collection service is given to one private company, it is to be assumed that these contracts have been granted to those who have offered the best price and the best guarantees that they will do the job properly. But if they continue to do this work for a long time, true competition in the current segment of the market may

disappear simply because potential competitors no longer have adequate conceptual or technical means of production. And the situation may deteriorate yet further if the public organisation itself has given up all the production facilities which it had in that area.

For other reasons, too, the objectives sought may limit the possibility of setting special conditions for a privatisation exercise. Where the activity in question may be subject to very strict legal constraints, some of the advantages which the prospects of its privatisation is supposed to offer may be reduced. Not only, therefore, may such constraints limit the possibilities of obtaining valid offers in response to the prices set, but the quality of the services offered may also be influenced by them. It is conceivable, therefore, that a maximum level of protection is not desirable.

Strict measures of protection are easier to imagine where they cover only a transitional period between the previous condition and the privatised condition of the activity in question. In the following section (V), we shall come back to this point.

We may add, finally, that the introduction of special provisions is usually pointless where they duplicate the general system of protection in the sector concerned. In the long term, the accent should be placed on the need to maintain a satisfactory level of protection in society as a whole.

V. MEANS OF PROTECTING FORMER EMPLOYEES OF PRIVATISED ACTIVITIES

In this part of the report also the question raised by the title may be interpreted in such a way as to suggest that protection is better *before* than *after* a privatisation exercise. And this view is easier to accept in the case of protection of employees than in general. While civil service employment has traditionally involved special duties, some protective measures giving exemption from ordinary law have also benefited civil servants.

Everything depends however, on the time and the country which it is proposed to consider. This is already due to the fact that not all employees of the public sector benefit from the same safeguards as civil servants under permanent appointment, as it may be the case for employees of some kinds of State-enterprises operating in the industrial or commercial sector.

A satisfactory answer to the basic question can not be given either without considering the different forms of privatisation. The following comments will be restricted to cases of privatisation which may significantly alter the condition of employees. Such a definition, which is far from being clear-cut, may rule out a large number of partial privatisation exercises.

Normally, the main object of a privatisation trend is to make the activities in question easier and less costly to undertake and so - in short - more effective. And where a fairly substantial transfer from public to private sector is considered necessary to achieve this aim, this is usually because the legal and staffing constraints of the public activity involved are considered to be too cumbrous and restrictive.

In this connection also the main obstacle to special measures of protection may, therefore, reside in the very aim of the privatisation. If the exercise in question is intended to lighten the financial burden represented by a staff complement that is considered too large, it would hardly be reasonable to exclude the possibility of dismissing a number of people. And if the recruitment of staff with certain abilities that are badly represented within the company is thought to be urgent, it is not possible to consider keeping all the career guarantees normally given to the employees.

A fairly pessimistic approach should be adopted, therefore, towards the possibilities of protecting the former employees of an activity privatised in the way indicated here. But this approach calls for some qualifications, to only two or three of which we shall refer here.

Although it is necessary, at the outset, to assume that a large number of measures of protection which give exemption from ordinary law will be contrary to the main objectives of a particular privatisation exercise, special protection, but for a more or less long transitional period only, may, nevertheless, prove desirable. In the case of privatisation exercises where it would be possible to keep former employees in their normal jobs, they may, for example, be guaranteed their normal work provided that they agree to go on a course to update their skills. In this way, they will at least be

given a choice between continuing their careers and becoming unemployed, which will easily appear to be the only alternative solution.

If dismissals are necessary, they may be carried out with greater or lesser abruptness. Thus, it may be a good idea to give those affected some time to find new jobs or at least to give them some financial compensation, e.g. paid early retirement. And for the youngest of them, an offer of in-service training, guaranteeing them a certain standard of living while it is going on, may appear to be a humane measure which, at the same time, is likely to raise the general standard of training in the given society.

In the third place, it is possible to consider giving preference to former employees when posts fall vacant elsewhere in the public sector provided, clearly, that they have an adequate level of training, etc.

The point of departure for any attempt to find additional types of protection must be that those involved may be victims of dismissal regardless of their behaviour or their personal performance. These decisions come in the wake of deliberate movements which are not binding on the authorities involved in the same way as, for example, bankruptcy.

In addition to those who are the victims of an exercise to privatise a previously public activity, however, there are those who become unemployed as a result of problems experienced in the economic life of the country in general. Special measures to assist the former rather than the latter can only be justified if they are temporary. It should be assumed, therefore, that, in the longer term, more general considerations will have to be taken into account even where the aim is to protect the former employees of privatised activities.

VI. CONCLUSION

In the previous paper, much emphasis was laid on the need to start with a relative concept of privatisation. Between the two extreme solutions - i.e. those where the activity in question is 100% public or private - there are a large number of intermediate possibilities. These are likely to provide as many possibilities for governments that wish to make the operation of the public sector - and that of the whole of society - more efficient without denying the need to find appropriate solutions in each case.

In fact, partly as a result of the need to protect a particular interest, most cases of privatisation will be included in one of the many intermediate categories rather than under the extreme solution.

In addition, attempts at protection should mainly focus on developing the general system of protection for different categories of interest. The existence of an adequate level of general protection removes some of the point of special measures

giving exemption from ordinary law. In addition, the possibility of imposing such measures during a particular privatisation exercise may prove limited, given the purpose of that exercise. Thus, privatisation designed to reduce the cost of an activity cannot be envisaged where the possibility of an appropriate number of dismissals is ruled out.

Finally, the current trends in favour of the private sector do not always entail a corresponding cut-back by the authorities. Quite often, they may give rise to new requirements for protection and supervision, which may even call for more complex forms of state intervention than was the case previously.

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In different countries the literature dealing with the topics tackled in this report is too voluminous for even a selective reference to it to be considered here.

However, the author of this report has made some points analysing the concept of privatisation in two different texts edited by *Charles Debbasch* : *Les Privatisations en Europe* (Paris, 1989 (CNRS), pp. 143 et seq.; *Les Privatisations en Norvège*) and in the *Revue internationale de droit comparé - Journées de la Société de législation comparée*, 1990 (Paris), pp. 341 et seq., - (*Remarques sur la notion de "privatisation"*).

PRIVATISATION AND CONSUMER PROTECTION

Co-report presented by

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1. INTRODUCTION

Twenty five years ago, while a student at the Law School of Columbia University (New York), I was invited by the late Professor Wolfgang Friedmann to write a paper on the position of consumers in nationalised industries in France and Great Britain. In this paper for the XXIst Colloquy on European Law, I will try to present what appears to be the opposite figure: the position of employees and - mainly - consumers in privatised industries in - some - European countries.

The change from nationalisation to privatisation marks one of the most important developments of present society, both in Eastern and Western Europe. "Privatisation, it seems [to Cosmo Graham and Tony Prosser, Privatizing Public Enterprises/Constitutions, the State, and Regulation in Comparative Perspective, Oxford, 1991, p. 1], is sweeping the world". In many countries of the third world, the success or failure of privatisation nowadays is often quitessential for the survival of a nation.

In this report I shall not deal with privatisation world-wide. Rather, I shall concentrate on the question what lessons Eastern Europe may draw from Western Europe's experience with privatisation. In keeping with the title of my report, I shall emphasize the position of the consumer.

In Eastern Europe, experience with privatisation is as yet limited. One of the most successful efforts seems to be the work of the German *Treuhandanstalt*. Created in March 1990 by the former German Democratic Republic to manage some 10,000 enterprises, grouped together in 214 *Kombinate*, its task was converted by Act of 17 June 1990, to privatise these very enterprises[1]. By the end of 1991, some 5,000 enterprises had been sold off; another 6,000 were awaiting a decision.

[1]W. Buchholz, East Germany: the Privatisation of State-owned Companies, 5 Butterworths Journal of International Banking and Financial Law, pp. 179-180 (1991).

This paper is divided into nine paragraphs. Paragraph 2 will be devoted to some general observations concerning the areas, objects and techniques of privatisation. In the following paragraphs, substantive law (para 3), enforcement and procedural law (para 4), representation of the employees interest (para 6), representation of the citizen's interest (para 7) and constitutional law (para 8) will be dealt with, before I arrive at some conclusions (para 9).

2. AREAS, OBJECTS AND TECHNIQUES OF PRIVATISATION

Privatisation is often associated with business activities. Business activities in a broad sense, that is. Thus, Anne Drumaux mentions nine areas in which privatisation may take place: (a) air transport, (b) railways and local transport, (c) post service and telecommunication, (d) maritime transport, (e) radio and television, (f) energy, (g) financial institutions, (h) health, pensions, (i) education[2].

I would argue that privatisation is part of a wider process. This process includes the non-profit sector of the economy and even covers such intangibles as crime prevention. This is in line with the professed goals of privatisation, which include maximisation of the yield to the public purse, promoting a share-holding democracy, national independence, promotion of competition, facilitation of employee share-ownership, and preservation of employment. These objectives may be mutually conflicting[3].

In line with this diversity, the techniques of privatisation also vary widely. Privatisation is usually considered to cover selling off State-enterprises. Most authors agree that there is more to privatisation. Thus, Professor Smith argues that making customers pay for services provided by public enterprises, granting licences and concessions for activities which would otherwise not be allowed, subsidising private organisations or individuals with public funds, subcontracting, offering customers a choice between public and private schools, and making citizens pay a contribution to television channels all are possibilities between the two extremes of 100% public and 100% private solutions. The French author Rapp mentions ten types: sale of assets, sale of shares, dilution of public ownership by creation of shares, transfer of shares to workers, privatisation of management, liquidation, privatisation of subsidiaries, dismantling of monopolies, concessions and deregulation[4]. Vincent Wright lists eleven dimensions of privatisation[5]. The American political scientist Madsen Pirie even offers

[2]Anne Drumaux, *Privatisation = moins d'Etat?, thèse ULB 1985, Bruxelles*, 1988, pp. 136-143.

[3]C. Graham, T. Prosser, Privatizing Public Enterprises; Constitutions, the State and Regulation in Comparative Perspective, Oxford 1991, pp. 19-33.

[4]L. Rapp, *Techniques de privatisation des entreprises publiques*, Paris, 1986.

[5]V. Wright, *Le privatizzazioni in Gran Bretagna, Rivista Trimestrale di Diritto Pubblico*, 1988, pp. 86-87.

twenty-one methods[6]. In this sense the election programme of Great Britain's Conservative Party, which is to make public enterprise responsible and liable for bad service, may be seen as a privatisation effort.

One of the most astonishing techniques of privatisation is described in Dr. Petr Kotáb's report to this Colloquy:

> "Every Czechoslovak citizen is entitled to 1,000 voucher investment points for which he must pay a more or less symbolical sum of 1,000 Czechoslovak crowns (about 33 US dollars). The investment points are then exchanged for shares of companies at the "voucher investor's" own discretion, the amount of shares received for each investment point varying according to the other investors' interest in the same company."

[One aspect which has been of considerable interest to the growth of the private sector, is legislation aimed at enabling groups to be formed and act. Some examples of such legislation are the laws on incorporation of companies, the laws on the establishment of associations, the granting of the right to go to court, to trade unions, and - more recently - to consumers' and environmental organisations. Although such developments have sometimes been introduced by the courts, it is usually the legislature which introduces them. Anyway, both the courts and the legislature belong to the public sector and therefore these developments may be compared to the privatisation in its narrower sense as set out above.]

[It is appropriate at this point to mention yet another development which touches the privatisation discussion. In North America, Law & Economics has proven to be a popular approach to many legal issues, including the public/private sector debate. Thus, even criminal law questions such as whether or not prisons should be privatised and on the effectiveness of anti-drinking legislation have been discussed under this heading. The Law & Economics approach has become increasingly popular in Western Europe in the last decade.]

3. FROM CITIZEN TO CONSUMER

A major impact of privatisation on the users of nationalised industries lies in the applicable substantive rules. Throughout Europe, the traditional State sector is to a greater or lesser extent deemed to be governed by what in continental European terminology is called public law as opposed to the private law which deals with relations between private citizens. It has always been a highly debated question where to draw the line between public law and private law. Should the criterion be the nature of the activity concerned, the supply of goods and services belonging to the private law sector and specific activities to the public law? Or should the question whether or not one of the parties concerned is a State agency be decisive?

[6]Madsen Pirie, Privatisation in Theory and Practice, Aldershot, 1988.

I shall look into this question in an area in which I have been doing research during the past years: unfair contract terms. A large number of West European countries have recently adopted legislation on unfair contract terms. The question rises whether or not this legislation applies to relationships between consumers/citizens and public enterprises. I shall take the Dutch situation as an example. When the relation is of a private law nature, the producer/retailer being the State, it usually is not doubted that the legislation applies[7].

What is more: there may lie upon the State a special duty of care which an ordinary contracting party will not have to live up to[8]. The case in which this rule was set out also teaches us that public policy is not a valid defence for a public agency when it is accused of imposing unfair contract terms. In the case concerned, the public policy invoked by a municipality which forced house buyers to subscribe to a cable television scheme sponsored by the municipality was to free the community from the forests of television antennae which were so frequent in pre-cable days.

A more interesting question is whether the unfair contract terms legislation applies in the public law sector. The question may also be phrased differently: should a public entity be allowed to escape employee and consumer protection by using a public law rather than a private law way. In the Netherlands, the question is heavily debated[9]. However, even those authors such as Jongeneel[10] who argue that unfair contracts legislation does not apply to the public law sector concede that the norms of this legislation have an indirect effect in that they are relevant when checking whether or not a public entity has committed *abus de pouvoir*. This view has been adhered to by the Dutch Government[11].

[7]As to Dutch law, see F.J. van Ommeren, *Nederlands Juristenblad*, 1990, pp. 132-137 and R.H.C. Jongeneel, *De Wet algemene voorwaarden en het AGB-Gesetz*, thesis VU Amsterdam, Deventer, 1991, p. 74.

[8]*Hoge Raad*, 25 April 1986, *Nederlandse Jurisprudentie*, 1986, Nr. 714 (Note W.C.L. van der Grinten).

[9]B. Wessels, *Weekblad voor Fiscaal Recht*, 1989, p. 1303, argues that the law also applies to public law contracts.

[10]Jongeneel, thesis, at p. 38. In this sense also J.B.M. Vranken, in: J.A.F. Kobussen and M.H. Peters (eds.), *Bestuursrecht en Nieuw BW, Zwolle*, 1988, p. 37.

[11]Parlementaire *geschiedenis Nieuw Burgerlijk Wetboek boeken*, 3,5 en 6, *Invoeringswet*, p. 1570.

4. COUNTERMOVEMENT: DOES THE PRIVATE SECTOR TURN PUBLIC?

Perhaps less visible, there is another current which in the long run proves to be of interest. It is that large - and perhaps even small - companies are to some extent restricted in their traditional freedom to contract by public law considerations. This is once again not a recent phenomenon. Long before European legislation laid down the transport industry's obligation to take on any passenger, the common law doctrine of the common carrier had adopted this view. But in recent years, there has been a growing body of case-law and legal writing arguing for the extension of this doctrine to for instance, banking services.

The legal technique most often used to reach this result is that of direct or horizontal effect of human rights, as it has been elaborated especially in Germany.

5. FROM OMBUDSMAN TO COMPLAINTS BOARDS

In the area of procedure, citizens/consumers who enter into contracts with privatised industries in most countries are no longer entitled to address the (Parliamentary) ombudsman of their country. Instead, they are now completely free to address one of scores of private arbitration tribunals which have sprung up all over the Benelux.

Not in all countries is access to an ombudsman limited to the public sector. In British Columbia, the ombudsman is authorised to recommend standards of trade practices to private enterprises during a certain period following privatisation[12]. And in Portugal, the *Provedor de Justiça* controls not only public enterprises, but also private enterprises the shares of which are in majority publicly held or which operate in the public domain[13].

6. REPRESENTATION OF THE EMPLOYEE INTEREST

There is little doubt that employees are better off in private industry. For one, they are entitled to participate in the corporate management by way of worker's councils. In the public sector, such councils are usually absent. The one drawback for employees is that the private sector does not offer the same level of job security as does the public sector.

> "Although nationalisation was perceived as a victory for working-class interests, little institutional machinery was provided for the incorporation of such interests into the industries' policy-making processes. At a later date, in the early 1970s, some experimentation was made in appointing worker-directors to boards at various levels in the steel industry and the Post Office, but these were half-hearted and had disappointingly minimal results (Graham, Prosser, p. 9)."

Employee share ownership is promoted in France principally by Articles 11 and 12 of the Law of 6 August 1986, giving employees an advantageous position in relation to OPVs, notably by way of the reservation to them of 10 per cent of the offer; a discount of up to 20 per cent on the offer price; extended payment terms; and the attribution of fee shares[14]. The United Kingdom has not comparable legal provisions, but in every flotation employees have in fact been offered advantages analogous to those available in France, to a value which has generally been in the range of £400 to £600 per employee.

7. REPRESENTATION OF THE CITIZEN'S INTEREST

Once an industry has been nationalised, the interest of users and employees is well protected. This fallacy has often led former socialist countries to believe they did not need worker protection, or for that matter, consumer protection. Unfortunately, theory and practice do not conform. The public entities which govern nationalised industries, often have a better eye for profits than for extending the protection of their employees, let alone that of consumers.

There are many techniques for solving this problem. One such technique is giving consumers their own platform on which they may advance their position. Giving consumers a representative on the Board of Directors is perhaps somewhat far-fetched, but providing for this interest by the introduction of consumer marketing may well be the key to regular business success.

8. CONSTITUTIONAL LAW

Privatisation has raised a number of constitutional issues in European countries. *Vaak geven grondwetten bepalingen over wat de overhildstaak is. Bijv. Duitse grondwet.* Thus, in France the *Conseil constitutionnel* has subordinated the constitutionality of privatisations to preserving national independence[15].

An example of issues left out is the question whether some privatisation processes which favour a nation's own nationals do not run counter to the anti-discrimination provisions in the Treaty[16].

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[12]M. Luis Silveira, Privatisation and citizen's rights, Note presented to the XXIst Colloquy on European Law, Budapest 15-17 October 1991 (III.B.2).

[13]M. Luis Silveira, *ibidem.*

[14]O. d'Ormesson, M. Martin, *L'élaboration des lois de privatisation: présentation générale du cadre juridique, Droit et pratique du commerce international*, 1987, pp. 405, 446-448.

[15]Decision of 25 and 26 June 1986.

[16]Marie-Chantal Boutard-Labarde, *Droit Communautaire et Privatisation*, DPCI 1987, pp. 493-504.

"L'incidence du droit communautaire sur les opérations de privatisation n'a guère retenu l'attention de la doctrine", as one author observes[17]. The author attributes this lack of interest to the relative novelty of the subject and the prevailing idea that privatisation is a natural ally of the EEC's economic principles[18].

Three of the questions which however have been raised in this regard concern Articles 52, 221 and 86 of the EC Treaty[19]. The efforts of most Member States to keep shares in privatised industries in the hands of their own citizens may be in breach of the freedom of establishment of Article 52. Article 221 similarly prohibits discriminating against citizens of other Member States in the area of shareholding. Finally, Article 86 of the EC Treaty, as interpreted in the Continental Can case[20], may prevent a State from selling off to a company which already has a dominant market position.

All of these issues only have an indirect effect upon employees and consumers. Employees already employed may arguably benefit from being part of a company with a dominant position. Consumers, on the contrary, will usually benefit from competition.

9. CONCLUSIONS

This paper has dealt with some legal aspects of privatisation with reference to the consumer and the employee interest. Before arriving at conclusions, we should perhaps be aware that there is also a non-legal side to the coin. Privatisation, whatever its defects and virtues, stands for developments which are widely applauded nowadays. Especially when appreciated in its broad sense, many procedures which we may not have thought of as privatisation in the first place, bring new life to old government services.

Within the bounds of legal action, it is clear that privatisation is today's magical catchword. What it exactly stands for, however, is less than clear. This paper has set out to explore the regulation and legislation concerning privatisation. It will have become apparent that both employee and consumer interest may benefit from privatisation efforts.

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[17]Robert Kovar, *Nationalisations - privatisations et droit communautaire* in: Jürgen Schwarze (ed.), Discretionary Powers of the Member States in the Field of Economic Policies and their Limits under the EEC Treaty, Baden-Baden 1988, pp. 97, 113.

[18]*Ibidem.*

[19]Marie-Chantal Boutard-Labarde, *Droit Communautaire et Privatisation*, DPCI 1987, pp. 493-504.

[20]Rec. 1973, p. 215.

PRIVATISATION AND CITIZENS' RIGHTS

Note presented by

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I. INTRODUCTION

This brief communication is intended only as a summary of the questions that should be considered in connection with the changes resulting from privatisation as they affect citizens' rights.

As a general remark, one might begin by pointing out that the word "privatisation" has more than one meaning, since it includes legal transactions that differ in scope.

The most typical of these operations are:

- transformation of a public service into a private corporate entity;

- transformation of a public enterprise into a private enterprise.

We shall attempt to draw a distinction between these two aspects of privatisation in the note that follows.

II. MAIN RELEVANT ASPECTS

A. General criteria for administrative action

In most Council of Europe countries, legislation (sometimes even the Constitution) and case-law embody general criteria for action by the public administration in its relations with individuals.

These include the principles of justice, equality of treatment, impartiality, proportionality, and, expressed negatively, prohibition of arbitrary or unreasonable procedures.

This applies particularly to the exercise of discretionary powers by administrative authorities. That is why the Council of Europe Committee of Ministers, in its Recommendation No. R (80) 2 adopted on 11 March 1980, deemed it necessary

to state (Principle II., paras 2, 3 and 4) that in exercising discretionary powers, the administrative authorities must act with impartiality and objectivity, observing the principle of equality before the law, and maintaining a proper balance between the purpose of the decision and any adverse effects it may have on the rights, liberties or interests of persons.

These principles may also be applicable (though less strict in their requirements) vis-à-vis public enterprises - particularly those which, like banks or insurance companies, not only carry on a productive activity but also enter into frequent contact with citizens, to whom they provide services of a general interest.

However, compliance with these general principles and rules can no longer be required of public entities once they have become private corporate entities (companies or associations).

B. Transparency

Most countries have already accepted transparency as one of the fundamental requirements for a modern public administration.

Thus, the majority of Council of Europe States accept and incorporate this principle in their domestic law, at legislative or even at constitutional level.

This also reflects the practices specifically advocated by the Council of Europe, in recommendations adopted more than a decade ago.

Thus, Principle II of Resolution (77) 31, adopted by the Council of Europe Committee of Ministers on 28 September 1977, provides that the individual must have access to administrative files and information.

Moreover, in pursuit of a still broader objective, in accordance with the "open file" or "open government" criterion, Recommendation No. R (81) 19, adopted on 25 November 1981 by the Council of Europe Committee of Ministers, affirms the principle of access to administrative documents and files, even by persons having no specific interest in the matter.

However, it is acceptable that such rules should not be imposed on private individuals, or on public enterprises in general, given their profit motive and the fact that such access to their documents and information might compromise their competitiveness in the market.

C. Participation

One characteristic of any democratic public administration is of course participation by citizens at various levels.

Several constitutions already expressly provide for such participation.

Furthermore, many domestic legal orders embody it in concrete form, either as regards provision of information to citizens and consequent acceptance of arguments and evidence provided by them, or as regards involvement in decision-making through participation in consultative or even decision-making organs.

While some forms of participation by citizens (particularly as consumers) may be applied to public enterprises, it would seem that it cannot be adapted to private enterprise.

D. Civil liability

Rules governing the civil liability of the administration for administrative acts are typically - at least in the legal orders of the so-called "continental" system - more favourable to citizens than those applicable to the acts of private individuals (including corporate entities).

This can be seen in various fields:

1. Liability for lawful acts

It is very much the exception for private individuals to be held liable in civil law for lawful acts.

On the other hand, many national systems of law assign a general scope to this principle in situations where damage of an exceptional nature suffered by limited numbers of persons has been caused by the public authorities.

The Council of Europe clearly upholds this solution in Principle II of Recommendation No. R (84) 15, adopted on 18 September 1984.

2. *Establishment of fault*

Establishment of the civil liability of the public administration normally implies the concepts of fault established by objective evidence, which naturally contribute to protecting the position of the injured parties.

Thus:

a. many legal orders admit the concept of a "fault committed by an official in the course of his duties", thereby eliminating the need to prove negligence by a specific individual (the official);

b. very often, too, the fault, or failure, of the public authority is presumed (as accepted by Principle I of Recommendation No. R (84) 15 of the Committee of Ministers);

c. in any case, the fault is normally established through recourse to an objective criterion, in particular that of reasonable, prudent and responsible conduct (*bonus paterfamilias*).

On the other hand, in order for civil liability of private individuals (and normally also of the public enterprises, which are subject to the general rules of civil law) to arise, the injured party must prove actual fault on the part of a specific individual.

3. Liability arising from erroneous information

Increasingly, countries are adopting legislation establishing liability of the public authorities for erroneous information given to individuals by their officials or agents.

This principle has not yet been accepted, at least to the same extent, where the liability of private individuals is concerned.

E. Procedure

Preparation of the decisions taken by private entities, even corporate entities, is not normally subject to strict norms.

By contrast the main aspects of preparation and formulation of decisions by the administrative authorities are currently regulated by law in the majority of States.

Recognition that we are here dealing with one of the most important guarantees for citizens vis-à-vis the public administration has also led increasingly to systematisation of such rules in codes of administrative procedure.

Among the most important principles governing administrative procedure, one may single out:

1. Guarantees of impartiality

The law very often provides for guarantees of impartiality of the persons responsible for taking decisions on behalf of the administration.

With this in view, an attempt is made to ensure that the person taking the decision does not have family or other close links with the persons concerned, or at least that he should not be under pressure from subjective factors likely to influence his decision either positively or negatively.

2. Time limits

So as to ensure that the person concerned does not remain powerless, doomed to wait indefinitely for the administration to take a decision on a given situation,

national law often sets time limits for the duration of the administrative procedure and for some of its principal stages.

Since this problem is more pronounced where the exercise of discretionary powers is concerned, Recommendation No. R (80) 2 of the Council of Europe Committee of Ministers makes specific reference to it in Principle IV.10.

3. Rights of the defence

The key element and the touchstone of any open and democratic administrative procedure is undoubtedly the right of the defence and the right to be heard before the public authority takes a final decision.

Accordingly, some States have even enshrined it in their constitutions.

For the same reason, Resolution (77) 31 of the Council of Europe Committee of Ministers accorded it special prominence, embodying it in its Principle I, at the very beginning of this international instrument.

4. Statement of reasons for decisions

When the public administration affects citizens' rights or interests, it must give reasons for its decision and communicate its reasons to those concerned.

This rule is a requirement, not only for a reasonable and well considered administrative action, but also for a procedure enabling the citizens affected to respond in full knowledge of the facts to acts by the authorities that are injurious to them.

Particularly in recent years, domestic legal orders have been tending to impose such a rule, the scope of which may vary.

Resolution (77) 31, which we have already cited several times, defines it in Principle IV.

Recommendation No. R (80) 2 corroborates it with regard to the exercise of discretionary powers, in cases where the administrative authority's decision departs from a previous guideline, thereby affecting citizens' rights or interests.

Conversely, however, as a general rule it will not be possible to apply to private individuals, subject to the ordinary law, the requirement that they should state specific reasons for their acts and decisions.

5. Publication and notification of decisions

Acts of the public administration must in principle be communicated to the persons concerned in an official and reliable manner, by public announcement or notification.

Such a requirement is not normally laid down as binding on the acts of private individuals.

F. Control

1. Internal control

Normally, there is an organised or institutionalised system of internal control within the public administration, the purpose of which is to review its acts, not only in terms of their lawfulness, but also according to the criteria of justice and expediency.

This control is exercised, *inter alia*, by means of a complaints procedure (a request for the act to be reviewed, addressed to its author) and of appeal to a higher authority (a request for examination submitted to the immediate superior of the author of the act).

This type of control does not exist where private and even public enterprises are concerned.

While it is of course possible to request the enterprise to amend a decision it has taken, this possibility is not organised in the form of an institutionalised control procedure - giving rise, *inter alia*, to subjective rights for the person directly interested.

2. Control by the courts

Control of the public administration by the courts, at least in the countries with the so-called "continental" system, has a more restricted scope than control by the courts of the acts of private individuals (or of public enterprises, which are normally subject to the ordinary law).

In fact, ordinary legal proceedings are still predominantly proceedings to have an act set aside. This is still fundamentally true, despite certain actions and appeals aimed at recognition of a right or obtaining judgment against the administration for performing a certain act. Such actions are exceptional or suppletive, or at any rate limited in scope.

3. Control by the ombudsman

Traditionally, ombudsmen are a non-judicial means of controlling the public administration.

This reflects the original structure of the institution, going back to its Scandinavian roots.

It was also against that background that the Council of Europe suggested, in Recommendation No. R (85) 8, adopted on 23 September 1985 by the Committee of Ministers, the generalised introduction of this institution by member States.

As a result, the terms of reference of the majority of ombudsmen grant them no powers of direct control over private individuals (although they may instigate the intervention of the public inspection or supervisory bodies for that purpose).

In the case of the public enterprises, solutions vary, though the most frequent is to accept that they may be controlled by the ombudsmen.

III. PROSPECTS

A. General comment

Leaving aside the positive or negative economic arguments about privatisation, it seems possible to affirm that, in general, the rights and interests of citizens are better protected vis-à-vis the public administration than vis-à-vis private entities.

Except as regards control by the courts, from the other standpoints considered above protection of citizens is better under public law than under private law.

In any case, this should be one of the factors to be considered when taking a decision regarding privatisation.

Furthermore, if a decision to privatise is taken, measures, if necessary of an innovative nature, should be adopted to compensate for the lesser protection afforded by privatisation.

B. Possible ways and means

1. Consumer protection

The integration of privatised enterprises into private legal dealings should lead to compensatory increased protection of citizens as consumers, to safeguard their position.

This should take place, in particular, in the field of jurisdictional or parajurisdictional guarantees for "small claims": institutionalisation of appropriate systems for appraisal by the courts, mandatory arbitration and/or mediation.

2. Broader powers for ombudsmen

The traditional powers of the ombudsmen might also be reviewed, in the light of the new requirements resulting from privatisation.

In fact there have already been some interesting examples of this. In particular, mention should be made of:

a. the granting to the Ombudsman of British Columbia (Canada) of powers to recommend models or standards of conduct to privatised enterprises, for a certain period after privatisation;

b. the recent terms of reference of the Portuguese Ombudsman (*Provedor de Justiça*), which subjects to his control not only public enterprises, but also private enterprises with a majority public holding, and those operating services under licence or administering assets in the public domain.

3. A new overall approach

But what above all merits discussion is the possible justification for adopting a quite new general approach to the protection of citizens vis-à-vis privatised enterprises.

In adopting such an approach, one would simply be following the wise example of the old Islamic kingdoms which granted the *Madhalin* - a sort of combination of administrative judges and ombudsmen - powers of control, not only over the authorities and officials, but also over men whose social power led them to commit abuses (Ben Achour - *Justice des Madhalin et justice administrative moderne*; in Rev. Int. Sc. Adm., Vol. LI, 1985, No. 2, pp. 109 et seq.).

On this question, one would thus take as a starting point a consideration similar to that which lies at the root of the concept of *Drittwirkung*, or the legal effect of human rights on relations between individuals. This concept seems justifiable where such persons have a *de facto* dominant economic or social position, upsetting the formal legal balance of their relations with ordinary citizens.

The task would thus be to weigh up the possibility of applying all or some of the legal institutions hitherto reserved for relations between citizens and the administration to relations between citizens and privatised enterprises holding a *de jure* or *de facto*, real or virtual monopoly, or to which citizens are in any case obliged to have recourse in order to obtain the goods and services necessary for their lives and normal needs.

If we ignore this aspect, we may attract criticism similar to that already so acutely expressed by Jean Rivero with regard to the *Drittwirkung* of human rights: "To escape the arbitrary acts of the State only to fall beneath the domination of private individuals would simply be to exchange one form of servitude for another" (in *La protection des Droits de l'Homme dans les rapports entre personnes privées* - René Cassin *Amicorum Liber*, Vol. III, p. 322).

REALITY ASPECTS OF PRIVATISATION LAW
The Greek example

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I. OBJECTIVES AND OBJECTIONS

1. Objectives

The objectives have come up in the discussion started mainly in the electoral period of 1989; they may be summarized and divided into political, electoral, administrative and trade union objectives.

a. Political

Political objectives are those referring to the general program of parties and their corresponding ideologies. They go beyond the following special objectives and include as a separate value the axiomatic belief in the private economy. In this respect they incorporate the utilitarian objective as well as the ethical objective of personality development. They can be considered, historically, as a direct effect of English or Angloamerican politics.

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b. Electoral

Electoral objectives refer to the equality of political opportunity between a ruling party and opposition parties in coming elections. Ruling parties use the State apparatus as a means of vote attraction through appointments of voters as State employees and civil servants. The bigger the State apparatus is, the bigger is the possibility for the ruling party to appoint voters as employees and civil servants. It has been remarked that the growth of the State apparatus and of the State sector of the economy was to supply to the ruling party an increase of possibility of such appointments.

The ruling parties have additional reasons for enlarging the public sector of the economy, namely the difficulty of appointing public servants in the public services and the saturation of the public services with personnel.

The difficulties of appointing civil servants in the public services refer to the duration, the formalities and the material prerequisites of such appointments, depending upon the existence of vacant plan positions, of succeeding in admission examinations and in publication of such appointments in the Official Gazette.

On the contrary, the appointment in the private sector of the State - the public sector of the economy - is free of the prerequisite of a vacant plan position, is free from the prerequisite of succeeding in an examination and is free of publication. It can happen therefore quickly, without material prerequisites and without the disclosure of the massive appointments in years of coming elections. A strict system of State budget and expense auditing, which does not exist in the private sector of the State, mainly in State corporations, has made the growth of the private sector of the State more attractive to party politics. Parties in the opposition have made this misuse of appointments a basic point of departure in favour of privatisation.

c. Administrative

Administrative purposes can be characterized as the most essential situation. State economic units in all sectors of the Greek economy have performed in a negative way. Cost and quality of their services and goods, managerial scandals and inefficiencies, and distorting effects of the State sector of the economy on the rest of the economy, especially a tendency of the Greek State to regard its State sector as a sector which has to be subsidized by State assignments, as if it were a huge closed economy, have led to a global bottleneck in the State sector not only of the economy but of the whole State apparatus in general. Public utilities and social security services, both belonging to the State apparatus, started to accumulate huge debts of the other State entities as a form of financing. The managerial inefficiencies and shortcomings were not in a position to be controlled by the ruling party, since most managers belonged to its members and were not really chosen according to efficiency. Any disclosure of managerial inefficiency was a disclosure of inefficiency of the ruling party and therefore painful. Working moral in State economy decreased easily and often. All these failures were so big, as big was the State economy in itself. The more property, the more personnel, the more services and goods production the State had to

administer, the more frequent and extended were the administrative inefficiencies of the State sector of the economy. The malaise of the State sector of the economy passed easily to the public services themselves, where conditions of work and remuneration of personnel were harder, but not acceptable, so long as a more favorable private sector of the State was accessible. A tendency appeared therefore that public services were turned to private entities of the State in order to avoid the discrepancy of working conditions between public services and the private sector of the State. The task of administering the private sector was beyond the power of the State apparatus and made the task of administering the public services even more difficult.

d. Trade unions

Trade unionist objectives refer to the special appearance of trade union power in the private sector of the State economy. This was the result not only of real politics and real forces in the various sectors of the State economy, but also to the different legal status of strikes in the public services and in the private sector of the State. The frequency and duration of strikes in the private sector of the State was exceeding both the public services strike rate and well as the strike rate of the private sector of the whole economy.

2. Objections to privatisation

Opposition to privatisation comes mainly from the trade unions. The three considerations mentioned are the following:

The first is that the administrative inefficiency of the State economy was not due to the public or private character of the economy but due to the niveau of prices of their goods or services. They state that if prices have to be maintained for these services or goods at the same levels, then either the State economy will be subsidised through coverage of their deficits by the State budget or the private economy, which shall undertake the same task at the same prices, shall be directly subsidised by the State, which is the same effect.

A second consideration is that the strategic character of the State economy requires a State control in its administration for political and other State objectives, which cannot be ascertained if the respective activity is not exercised by a State entitiy or if the private entity carrying on such activity is not supervised by the State, which is practically the same.

A third consideration is that the privatising State economy means practically reconstructing and reorganising the efficiency of such economy through reduction of personnel. Such a measure however shall have as a result that State economy will be charged with social expenses for social security or social welfare policies and that therefore the economic result will be the same.

II. DUTY OR POLICY ?

1. The state of the law

Although the actual policy of the Government is to privatise the State economy and some public utilities, no legislation has been enacted providing for such a duty. Even in the law for restrictive business practices i.e. Law No. 703 of 1977 on monopolies, oligopolies and protection of the free competition or in the application of the said law, no question of a privatisation of State economy under aspects of State monopoly reduction has been discussed. The State as a monopoly mammoth enterprise or group of enterprises has not come up in the broad discussion in Greece.

Indirectly the effect of a duty to privatise could be deduced from the European Community Treaty and its derivative law concerning State monopolies. Abolishment of State monopolies has been enacted in Greece, but the respective State activity has not been interrupted up to now. It lost only its monopolistic character. The non monopolistic activity of the State in said sectors remains as it was.

Legislation has been enacted however in a direction of reducing possibilities of private enterprises passing over to the State in the future. The State Agency for enterprise reconstruction, a corporation solely of the Greek State established by the law No. 1386 (1983), cannot acquire the management and shares of bankrupt or overdebted companies in the future as it could happen and has happened in the past.

2. Consequences

The fact that no legal duty is governing privatisation, has two consequences:

First, the extent of privatisation and its timing is not fixed.

Second, the decision to sell at a specific price a specific company or share is opposed by privatisation opponents, especially trade unions, as a sale damaging to the interest of the entity selling and administrated by the people taking that decision. Companies owned by the State and willing to sell a daughter company faced such opposition.

III. FORMS AND ORIGINS OF STATE ECONOMIC ACTIVITY

1. Actual economic activity of the State

The two kinds of State economic activity, namely the economic activity in a form of public law, and the economic activity in the form of private law enterprises or legal entities of private law owned by the State, appeared in Greek legal history in three main phases.

The first phase was at the end of the 19th century. In the last decade of it, in a treaty with Turkey after a lost war of 1897 and after the State bankruptcy declaration of the Greek Prime Minister Charilaos Trikoupis in the Parliament on 12

December 1896, an international economic control was imposed on Greek State revenues. This control should ensure the payment of the loans and the war reparations. According to this control treaty, the Greek State introduced and submitted to such control a monopoly on many items of that period, namely light petroleum, salt, cigarettes, paper and matches. The Greek State formed a company of the so-called monopoly items which lasted even after the abolishment or expiration of the treaty and even after the expiration of the monopoly according to European Community law some years ago.

The second phase includes establishment of companies and legal entities of public law during the decade 1928-1938. The Bank of Greece as a private law company with extending powers of the State concerning its administration, the Agricultural Bank of Greece, an entity of public law administered by the State and exercising agricultural credit all over Greece, the take-over of the Railway for Southern Greece by the Greek State in the form of a State enterprise, the Broadcasting Agency, and some minor cases are the examples of this phase of the recent legal history in Greece. Within the same period, the Agency for Social Insurance was established and gradually started to incorporate the various parts of the country and the various groups of population, beginning with the bigger cities and the industrial workers and commercial employees.

The third phase was the period after the Second World War. It started with the nationalisation of electric power production and distribution in the late forties, as well as of telecommunications in the same period, plus a State corporation for industrial finance through U.S. monies, which was followed by a longer period of stability in the extent of the Greek State economic activity.

In the fifties an agency for tourism was established and started an extended activity in hotels, fast development and festivals organisation. The main bulk of State economic activity came however later, and more specifically in the seventies and early eighties. During the seventies, after the collapse of the dictatorship, an accrued number of State concessions expired. Partly because of political voices and partly because of the bad terms of commerce in the country, either the State was willing or compelled to take over these concessions. The Olympic Airways concession, the underground city communications in Athens and Piraeus concession, and the water supply to Athens and Piraeus one, passed over to the State, in the same way as formerly the canal of Corinth concession, while a compulsory increase of capital of the second biggest bank in Greece in favour of entities of public law, and not of the old shareholders, put the Commercial Bank of Greece under State control, since the Greek State was the only allowed representative of these entities in the General Assembly of the Bank. In the seventies belong some further transformation of public services into companies governed by private law but owned by the State, such as the Post Service and the State railways.

As already said, the terms of commerce in Greece were not favorable to many private business. They were artificial. In that respect, during the seventies already and more critically in the early eighties, big business of the private sector started to show signs of actual or coming collapse. Soaring foreign currency prices, soaring local

factors of inflation and a strict police regulation of market prices and profits were detrimental to the city bus communications, which passed over to the State, or were initially covered by extended borrowing of these businesses, mainly from the two big banks, which belong more or less to the State. Thus, a law was enacted in 1983, which allowed the Minister of National Economy to decide that a specific business of social interest could be taken over for management and reorganisation purposes by a State Agency of reorganisation of businesses, under which law some fifty big companies were taken over by the Agency which was and is a corporation owned totally by the State. The Agency financed the initial expenses of these companies through compulsory increases of capital subscribed by the Agency. Shareholders did not exercise their priority rights. The reorganisation consisted later in the conversion of loans granted to these companies by the State banks to share capital: the banks exchanged the biggest part of the shares against long term bonds of the Agency for business reconstruction, guaranteed by the State. The amount of share capital increases in said companies exceeds actually (including the losses of the years 1983 up to now) half a trillion drachmas or almost three billion dollars. The Agency for business reorganisation and the State banks are now practically the only shareholders of the 45 companies.

2. Potential economic activity of the State

In the third phase of State economic activity history, extended granting of loans by State banks to private enterprises, especially to cooperatives, means that the State banks can acquire the respective properties in case of failing payment of the outstanding loans. Co-operatives owe to the Agricultural Bank of Greece some 800 billion drachmas or 4 billion dollars, out of which more than a half is overdue. Similar numbers could be valid for the other State banks both to co-operatives and other entities. The debt burden of the Greek economy to the State banks is a potential extension of the Greek State economy. This is confirmed by experience. Excessive granting of loans by the State or by State banks or excessive creation of debts to the State or to the social insurance agencies is the first step to passing over of the borrower enterprise into State ownership.

3. State activity and State property

A privatisation of State property, especially land, has come up in the discussion, but remains a separate question in comparison with the privatisation of State activity.

IV. PRIVATISATION LAW PROBLEMS

1. The debts

State enterprises are most frequently overcharged with loans or debts of any kind to the State and other State enterprises. These debts are either actual debts or latent debts in the sense that special tax laws in Greece allow the State to proceed to tax audits with serious delays. An audit can create tax debts much later that the

respective business fiscal exercise or year. A tax audit of a State enterprise can even be delayed because of the economic difficulties of the enterprise. The same applies for delaying enforcement of actual tax debts.

A very important provision in the so-called Development Law No. 1892 of 1989 provides therefore that the debtor and the creditor can agree on a compromise concerning debts and that this compromise, if agreed with the consent of 60% of the debts and 40% of the mortgage debts, can be confirmed by the Court of Appeals. If this happens, the agreement binds all remaining creditors, namely those who had not participated in the agreement and existed at the time of the consent. For tax audits, a special provision makes tax arrangements possible.

These agreements between creditors and debtor companies are most probable in cases in which the creditor is the shareholder or an affiliated or parent company to the debtor company and wants through this arrangement to facilitate this sale or privatisation. At the same time it can facilitate however, a reconstruction of the company, since such agreement may leave the debtor the time necessary to recover from a difficult period of its operation.

2. The personnel

The personnel of business enterprise is automatically transferred as personnel of the new owner in case he continues the enterprise. The provision of Law No. 2112 of 1920 in this respect is much broader that the general provision of Article 479 of Civil Code, providing that the successor of an enterprise is liable for the debts of the enterprise up to the worth of the enterprise property acquired by contract. The difference is that the Article 479 of the Civil Code applies only in cases of contractual succession and not for instance in cases of a enforcement of debts leading to an action of the enterprise or in cases of a bankruptcy or similar collective procedure, because in these cases the transfer of the property is not made by contract with the old owner but in the form of a transaction with a public officer.

This transfer of personnel contracts and all respective obligations, deriving from such a contract, mainly social insurance debts and obligations, makes acquisition of enterprises in the course of privatisation or similar procedures to a heavy burden for the buyer. To avoid this disadvantage, recent legislation has introduced a possibility to dismiss personnel of overdebted enterprises through payment of an increased dismissal indemnity, namely of an indemnity amounting to double the usual legal indemnity in cases of dismissal. The limit of massive or collective dismissals fixed in the labor legislation does not apply to sold enterprises if they are continued and not liquidated or interrupted and work as an obstacle to acquiring an enterprise for continuation. The limit is fixed and can be changed by ministerial decision to enable a higher percentage of collective dismissal in every semester beyond the actual limit of 2%, but such ministerial decision has not been issued. This is especially important in cases in which the privatisation has the form of a transfer of shares and not of a share transfer of enterprise as a property conglomerate.

3. Forms of privatisation

There are two main forms, namely the transfer of shares of the company under privatisation and the transfer of an enterprise as a business or property conglomerate. The State or State companies, especially the Agency for Business Reconstruction SA, established in 1983, are holding shares, especially majority shares in many companies listed on the Athens Stock Exchange or not. They can sell respectively either in the Stock Exchange or outside it. This sale of shares can refer either to the totality of the shares owned by the State or to a specific percentage, eventually the majority percentage, in cases where the State or State companies own such a majority. The transfer of majority shares faces problems of calculation of price, especially if the State or other State company owning the shares is of the opinion that the stock exchange price is either an over-evaluated or an under-evaluated price. This evaluation problem is crucial, since officers of the State or of the State company selling at a price lower that the value of the share could be considered as jeopardising public property and damaging State interests. Up to now, only small objects (totally 3.6 billion drs) have been sold by the Agency for Business Reconstruction or its affiliates and the problem of evaluation has been faced through a procedure of public calls for offers of brokerage services in selling a specific business or share minority or majority in a specific company, in which case the sale goes through a bidding organised by the banks or bank chosen and through this bidding procedure, if not a transparency, at least a seriousity of the brokerage and price fixing is obtained. For bigger objects this procedure has not been applied up to now, since such objects have not yet been called for submission of offers. The main major objects could be the Heracles Cement Co, the mining group of Eleusis Bauxite SA, the Piraiki Patraiki Cotton Mill and the Athens Paper Mill SA. The participation of the State in public utilities (electricity, petroleum, telegraph and telephone) and big banks (National Bank of Greece, Commercial Bank of Greece), around a trillion drachmas and open the possibility of another philosophy in selling (especially not to one, but to more buyers widely dispersed). These major objects have the peculiarity that they are not single companies but conglomerates, as parent companies with many affiliates, which affiliates make the total value to a huge object and lead eventually to a previous dismantling of the conglomerate to a prerequisite of the transfer of the parent company.

4. Transformation problems

The distinction of legal entities of public law and private law has enabled the State to operate many parts of its economic activity in forms of legal entities of public law, which makes their sale depending first from a change of the status of their activity from a public law one to a private law one and second from the change of the organisation operating these activities from a public law to a private law entity, namely company. To this effect the transformation of the respective public law entity has to be accomplished before privatisation and eventually a change of the law applicable has to be enacted too. This has been the case with the Agricultural Bank of Greece, which was a public law entity from 1930, the year of its establishment until this year, the year of its transformation into a company by shares owned by the State.

5. Extent of privatisations

No definite list of the privatisations exists. The policy declarations include the privatisation of (a) the affiliated companies of the Agency for Business Reconstruction SA, out of which a small number of big companies are eligible for sale and the rest - some 40 or 50 companies - are not eligible for sale and may be liquidated; (b) the affiliated companies of the State banks; and (c) Olympic Airways, the Electricity and Telegraph and Telephone public utilities. The question of privatisation may arise for Radio and Television SA, Oil Distillery SA, the Athens and Piraeus Water Supply SA etc. Further, city bus agencies are discussed either for privatisation or for reconstruction and continuation, mainly because of trade union opposition.

This list of privatisation candidates is a policy question, since no legal duty to privatise has been enacted. This lack of a legal duty to privatise lets the policy application depend on the political and other interests involved.

6. Individual legislation cases

State rescue of big business has often the form of individual legislation in Greek State tradition. Bank of Crete is the most recent example.

Bank of Crete SA operated a hundred and twenty branches over Greece with total assets and liabilities or balance sheet value of approximately one billion dollars in the year 1988. Its main shareholder and executive had a very substantial participation in a leading football company and in a leading newspaper, magazine and printing company. He was holding the shares of the Bank of Crete SA through two companies of Luxembourg. The small remaining percentage of the shares were listed in the Athens Stock Exchange. In 1988 the appeal of the management of the bank to a bank deposits secrecy law of 1971 in order to avoid audits by the Bank of Greece SA led to a replacement of the management by an officer of the Bank of Greece, who according to law could and did replace the Board of Directors of the Bank of Crete SA. His job was to investigate the activities of the Bank of Crete SA and led indeed to disclosure of huge withdrawals of funds from this Bank either to the printing company or to the football company or to foreign currency accounts in various countries of the world in amounts totalling between 150 and 200 million dollars or thirty two billion drachmas. The Bank of Greece SA was authorised and instructed by special law to finance the withdrawals of deposits of the said Bank by the public and finances to this effect the Bank of Crete with some thirty billion drachmas or practically the whole amount of funds missing from that Bank. The funds withdrawn were used by George Koskotas partially as personal loans to the printing company and to the football company and partially for undisclosed uses, since entire transactions were dissimulated in transactions between the branches of the Bank of Crete SA and were not disclosed in forms of accounts of specific persons.

A special Act of Parliament has been issued, which annulated the totality of the shares of the Bank of Crete SA, because of loss of all its assets, granted a long period of grace and a very low interest for the remaining of the funds advanced by the Bank of Crete SA to the bank and provide that for an amount of twenty billion

drachmas new shares of equal nominal value shall be issued by the Bank of Crete SA and be offered partially to the public and partially to big institutional investors for subscription. In the year 1988 a huge increase of deposits by state companies and state agencies with the Bank of Crete SA had taken place and therefore the main losers were these State agencies or State companies. A part of these deposits has been transformed to preferential shares for an amount of 10 billion drachmas. The anticipated capitalisation of the Bank of Crete SA amounts roughly to 30 billion drachmas, the amount equivalent to the funds withdrawn. The voting shares, i.e. 20 billion dracs shall be offered to the public and to institutional investors in equal percentage. It is the only case in Greek privatisation law, which obliges the privatisation to go first through an offer of the shares to the public, with some limits for every personal subscription.

The fact that an act of Parliament authorises the officer now managing the Bank of Crete to issue the shares and replace the resolution of an assembly general to increase the capital makes it possible that his bank shall have to face the same European community law problems as those faced by the companies in next paragraph. There can be no doubt however that this individual legislation is an equivalent to a comprehensive bankruptcy procedure, falling within the jurisdiction of the national competence according to EEC Treaty.

7. EEC law complications. Another group of cases

Greece was associated with the European Communities in 1962 and became a member 1979, effective 1981. When Law No. 1386/1983 was enacted and enabled the Minister of National Economy and the Agency of Business Reconstruction SA to proceed to the reconstruction of companies without the consent or the resolution of the General Assembly of the shareholders, increase the share capital and convert into shares the debts of the company to the State or State banks or the Agency for business reconstruction, it seems that the company law directives of EEC, were neither considered as directly applicable, i.e. applicable without a national act of parliament transforming them into national law, nor construed to be an obstacle to national bankruptcy and reconstruction law. The direct application of said directives was adopted in a 1990 jurisdiction of a chamber of the Court of European Communities, just on the eve of hearings on Greek shareholders petitions, alleging that said compulsory increases of capital were contrary to the rule of the 2nd Directive providing that an increase of capital has to emanate from the General Assembly (like No. 179 German Company law).

It is known that the Court had accepted in some case prior to 1983 that a directive of the European Community, if complete and detailed enough to be directly applicable within the territories of the member States, had the effect of direct application and validity in these territories since the respective State has failed within the time limits set for in the directive to transform it into national law. This jurisprudence is based upon arguments that want to assist on the one hand the respect of community law by the States and on the other hand to protect the individual of such State in obedience to community law.

Although this doctrine of direct application has up the end of 1990 been applied only in minor cases of directives concerning administrative, especially tax and custom rules of the community, and denied a direct application in cases of complicated topics of private law, especially labour legislation, the direct effect has been extended in the year 1990/1991 to the first company law directive and the second one, the latter concerning a case of Greece. The two decisions are not well known. The second (C-19 and C-20/1990 or Carella case, decision 30.5.1991, weekly report of the Court 11-91) was a case of a Greek overdebted company, for which national Greek court has referred to the Court of European Communities the prejudicial question of the compatibility of those increases of capital of overdebted companies by act of minister with the EC directives and especially the second company law directive, which provides for an increase of capital upon the decision of the general shareholders. The Greek State, with the intervention of the Agency of Business Reconstruction, argued that the company law directive is not directly applicable and has no effect in cases of bankruptcy and similar collective procedures, since the European Community has no jurisdiction in the law of bankruptcy or collective procedures and therefore cannot issue rules overruling the national bankruptcy and collective procedure legislation. The Court did not answer the first argument concerning the inapplicability in such complicated matters as company law legislation and replied concerning bankruptcy and collective procedures that the second company law directive of EC did not include any reserve or exception concerning bankruptcy and collective procedures.

Another Greek case is pending before the Court of EEC in plenary session, where the same problems has to be judged, eventually with detailed supporting argumentation and memorandum. I am afraid that if courts shall not deny such direct application of the EEC directive or apply the general principles of European law, accepted to the Court of the European Communities and reject the respective petitions, the acquisition of the shares of the overdebted companies by the Agency for enterprise reconstruction and the State banks, so far based on decisions of the Minister of National Economy, cannot lead to a valid acquisition and therefore to a valid sale of them for privatisation purposes. The abuse of right argument could be based on the fact that these shareholders have requested with submission of their companies of the Law No. 1386/1983 or were managing the companies during the years in which the companies have the losses and excessive problems with their personnel, their creditors and the State, which led to the decisions of the Ministry of National Economy. These shareholders were mostly guarantors of the old debts of the companies which were converted to shares.

Even if the outcome of such proceedings shall be favourable for the validity of the increases of capital, the duration of the proceedings will be so long that the privatisation of these companies will most probably be delayed accordingly. In the meantime, injunctions by courts have been issued prohibiting such companies to sell property in view of the outcome of the proceedings concerning the validity of the increases. On the other hand, the Government has announced that it will guarantee to buyers of shares the validity of the shares in order to facilitate privatisation.

8. Litigations with the management: another difficulty

Two types of litigations have arisen in the course of acquisition or increases of capital in the companies subject to application of Law No. 1386/1983. One group includes litigations of the companies management during the period 1984 to 1989 against the management of same company prior to the take over of the management by the State, i.e. against the previous shareholders as managers of the company, and this litigation alleges that this management was possible for the collapse or the losses of the company. For one company, the Heracles Cement Co, this litigation amounts to 60 million dollars and refers to many proceedings in England, Luxembourg and Greece.

The second group of litigations involving mismanagement of companies during the years 1984/1989, in which the approximately 50 companies subject to application of the Law No. 1386/1983 made annually a total loss of approximately 50 to 100 billion drachmas or 200 to 500 million dollars. It is not this total amount of losses which is in litigation, but specific acts of management. But even for these concrete acts of management the litigations are pending, partially in civil and partially in criminal courts, and the termination is slow or uncertain, something which is not facilitating the sale of the respective shares or business, since the evaluation of shares may depend upon them.

9. Procedures

Procedures of privatisation can be divided in two main arts.

Privatisation (sale) effected by the State or a legal entity of public law is subject to formal rules of public offers and biddings.

Privatisation (sale) by State Companies, i.e. legal entities of private law, is subject to the forms and rules of private law. Public offerings and biddings rules have been followed however even in this latter group of cases, being represented by the conglomerates of the State banks and the holdings of the Agency for business reconstruction SA.

10. The legal status of the company privatised

Privatisation of a company means the change of its legal status, no more being subject to rules governing State companies. Partial privatisation may mean too, that the status of the company is changed so, that it be subject to special rules, specially against the creation of big portfolios of shares or of foreign participation or the maintenance of the shares character as people's or popular shares in the sense of postwar privatisation in West Germany and Austria.

V. GENERAL REMARKS

1. Privatisation and reconstruction

A first impression is that the Greek cases have to be divided in two major groups. One group is the real privatisation and refers to state economic activities which can operate in a more or less favorable way. The other group includes all case, in which the State has undertaken private activity as a result of the bankruptcy or economic inefficiency of private companies, which continue to operate in an inefficient way under State management. In this second group of cases, there is no problem of privatisation, or at least the problem of privatisation is not the first in importance. The first problem in importance is liquidation or sale for reconstruction purposes. It is my impression that privatisation in cases of this latter group is either not possible or combined with price reductions in favour of the buyer, which make the decision to sell very difficult. The State has to liquidate and sell only assets or privatisation depends upon the reasons of deprivatisation, which precedes any privatisation.

2. Privatisation and pending litigations

Cases of companies in which litigations concerning the validity of the State participation are pending, especially because of EEC law problems, have to be distinguished from all other privatisation groups and be subject according to my personal opinion to an understanding with the European Community, which is in a position through an authentic interpretation or an additional act to the second company law directive to State that these directives do not apply in collective procedures in bankruptcies and bankruptcies of companies in the member States. These new provisions shall not have an impact on existing indemnity claims, if the old shareholders have been damaged by an illegal act of the Government of any third party.

From the side of the Greek State too, an act of Parliament would be required which should cover the problems arising out of the impact of EEC legislation, in case the previous provision of Community law does not take place.

If such measures are not taken, privatisation of such companies will be possible only in cases in which the State and State companies or State Agency will be holding shares from previous participation enabling them to confirm the increases of capital decided by the Minister of national Economy and therefore evade the EEC law.

3. Privatisations and reality

Privatisation in Greece can be considered with reasonable prospects of success only for not subject to reconstruction and litigation, namely for all other companies except those falling under the scope of the Law No. 1386/1983 and under the reserve that these companies have no participation of the State or State agencies enabling them to confirm the later decisions of the Minister of national Economy. Practically all companies falling under 1386 Law are problematic for privatisation, except in the form of a sale of enterprise or property,

not of a sale of shares. For companies falling under this law, the privatisation procedure has to go the way of sale of property or enterprise, not of selling of shares. Some special provisions for protection of the officers deciding such sale will be according to my opinion equally necessary.

4. Privatisation and deregulation

It seems to be underestimated that privatisation is of no optimistic outcome, if the whole economy is not adapted to the necessities of a free economy and the law is not deregulated in a sense to enable private business to prosper. No private individual or entity is obliged to exercise an enterprise or business and to acquire or continue such a business. If the reasons therefore, which led to inefficiency of private enterprises are not abolished, the privatisation has no future. It is hard to say, but State economic activity has been a bad medicine to private inefficiency, which was due to State inefficiency. If State inefficiency is reproduced or not abolished, the inefficiency of the private sector or the lack of interest of the private sector are sure.

The deregulation has two aspects. For total privatisations, i.e. for sale of the share or assets totality, it is the deregulation of the whole economy which is crucial. For partial privatisation, namely the sale of minority shares in public utility companies, whose majority is maintained by the State, the deregulation of State economic activity, especially of the public utilities will be crucial and shall be connected with the real curse of voters appointments in the State as an electoral policy of ruling parties.

5. Restrictions to private activity

A necessary and special deregulation is the abolishment of constitutional or other rules restricting private economic activity and stating that specific activities can be operated only by the State or legal entities of public law, e.g. education.

6. Privatisation and the future

A last, but not least point is whether privatisation is definitive, since no law exists and no law is probable, putting an end to future returns or expansions of the State in economic activity, especially in State economic activity under a form of private law or in State subsidies to private economic activity. The only optimism in this respect is, I think, the EC law. I cannot hope that there can be found a legislation not allowing the State to operate companies or other legal entities of private law and respect the distinction of private and public law. If privatisation is ultimately a question of justice, the confinement of the State in the public law is a question of justice too. Closely bound to legal history and reality however.

TECHNIQUES OF PRIVATISATION IN ITALY

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1. INTRODUCTION

It is necessary to define the concept of privatisation in order to indicate and analyse recent privatisation developments in Italy.

In order to avoid any misunderstanding, the scope of the investigation should not be restricted to formal criteria: the term should be given its broadest meaning. In other words, if the object is to grasp all the implications of this phenomenon, privatisation must be deemed to occur whenever:

- the State or public organisations sell goods belonging to them (e.g. buildings);

- the State or public organisations sell (controlling or minority) shares in capital;

- public organisations or undertakings are converted into companies with share capital or organisations with a similar structure;

- the legal arrangements governing the exercise of a particular activity are altered (e.g. the abolition of a monopoly).

An analysis of privatisation phenomena in other European countries has shown not only transfers of property from the public to the private sector but also phenomena involving the transfer of activities, alterations to the legal status of the public entity, and a change in the economic conditions and legal regulations laid down in connection with the exercise of a particular activity[1].

[1]As emerges from the report submitted to this Colloquy, Legal forms and techniques of privatisation, T. DAINTITH (third page of the report).

In Italy, transfers from the public to the private sector have had certain distinctive features and have had different results depending on the various legal techniques employed.

Using the above classification, I shall indicate not only the most significant of recent privatisation developments in Italy but also the resulting legislative upheaval, which is likely to become more marked. Some laws have already come into force, while other important bills, still going through Parliament, indicate that body's renewed interest in the phenomenon of privatisation.

2. SHORT SUMMARY OF THE INSTITUTIONAL FRAMEWORK

Currently, under the Italian system, there are no general rules governing privatisation and no standards applicable to privatisation procedures have yet been devised[2].

Nor can more precise details be obtained from constitutional principles.

The Constitution refers to the opposite phenomenon - nationalisation - laying down the principle that the State has the right to expropriate undertakings or categories of undertaking which administer essential public services or sources of energy or carry out activities involving a public monopoly, are of general interest and merit priority consideration (Article 43 of the Constitution).

However, the interest aroused in Italy by the problem of privatisation primarily reflects practical considerations. One of the most serious problems affecting the Italian economy is the increase in the national debt. This is a phenomenon caused by major imbalances in public finances which originated in the seventies. During that period, big deficits in the balance between revenue and final expenditure resulted in the initial increase in public requirements. Such deficits were covered by issuing national debt stock and interest rates increased over the past decade. The national debt subsequently triggered a process of expansion which proved difficult to control. The rise in the annual interest burden resulted in a two-fold increase: a big increase in expenditure and a gradual increase in the volume of annual public requirements, which had been covered, until then, by other debt.

In order to try, if not to eliminate, then at least to check this increase and to start an operation to stabilise public finances, the authorities appear to be convinced of the value and necessity of privatising some of the State's assets and some of the capital of public undertakings[3].

[2]S. CASSESE, *Privatisation in Italy*, in the Quarterly Review of Public Law, 88, p. 36.

[3]Document on Economic and Financial Planning in connection with the public finance, measures for the years 1992 - 1994 (submitted by the Prime Minister and the Ministers for the Treasury, the Budget and Finance, p. 17, paragraph 1.3.2.

In addition to this undoubtedly key argument, there is a second one involving, as will be made clear later, a new concept of the organisational problems of public undertakings, which has led to the search for standards which are different from those that apply to public bodies and which are better suited to the activities of such undertakings.

That is why attention is turning to the study of types of organisation involving companies with share capital.

The arguments mentioned reflect the number of directions in which the phenomenon may develop. It will be worthwhile discovering, therefore, in connection with the different types of privatisation, whether undertaken or contemplated, who takes the decisions and who receives the proceeds of the privatised property or undertaking.

3. SALE OF PROPERTY

The first type of privatisation to be considered is, conceptually, the most simple one. It is the sale of property by the State to private individuals.

This type of operation is unprecedented - just as, until now, the problem of using public assets to deal, in part, with the public deficit has never seriously been raised.

The problem has, however, been pointed out and two legislative measures should be mentioned which have not yet been completed but which show that the Government and, generally speaking, Parliament want to work out the strategies to be adopted to reduce the national debt, which the Government itself has referred to in terms of planning, economic and financial objectives[4].

On the initiative of a group of Members of Parliament, a well-designed bill[5] has been introduced providing - as regards the question which concerns us here - for the establishment of a national collegiate body (consisting of officials of the Court of Auditors and the Council of State). The property which may be sold has been identified as that belonging to the State, the ownership of which is not justified by economic criteria, or property which is not intended to provide a public service or whose use for such a purpose may be ended without prejudice to the public interest. In order to establish the legal conditions required for the sale of public property, a special procedure has been laid down whereby orders may be made abolishing the national character of property intended for sale or transferring it from the State's non-

[4]See previous note.

[5]Bill introduced on 14 April 1989 by a group of Members of Parliament: "Regulations for the reduction of the national debt and measures in connection with the capital of public organizations in the economic field" (Chamber of Deputies - Doc. No. 3816).

disposable to its disposable assets. Rules have been laid down subsequently to counter a risk involved in any privatisation exercise, i.e. underpricing.

For this purpose, property to be sold must be valued by the relevant Treasury departments and must be auctioned off on the basis of confidential tenders when its value is below a certain minimum (except where there are no bids, in which case private negotiations are allowed). Depending on the value of the contract, the sales are subject to approval by the district financial authority or the Minister for Finance.

A centralised system for administering the sale of public property to private individuals would thus be established, together with complex selection arrangements in which local branches of the State administration would also take part. To the same end and on the basis of similar ideas, a bill which was approved by the Senate on 25 July 1990 and which is currently being considered by the other house of Parliament was drafted by the Government[6].

There are some significant differences between this text and the other bill considered above. In particular, the property which may be privatised is identified more precisely as real estate belonging to the State and to independent State undertakings (which represent one of the ways in which the Italian State carries out directly the activities of an undertaking). There follows a description of property which should, in all cases, be excluded from privatisation operations, such as the seaside, beaches, harbours, ports, rivers, public waters, woods, forest, parks, etc.

Under this bill privatisation may be carried out through sales or exchanges as well as by acts establishing a change of use for buildings which are not intended to satisfy general public interests and which cannot be managed as efficiently as their nature and specific purpose requires.

Exchanges may be carried out with national debt stock, but the possibility that they may also be carried out with other buildings is not explicitly ruled out, subject, where appropriate, to an adjustment in the payment made to the State.

The Government is responsible for identifying property which should be sold so that it can be the subject of alienation or exchange procedures or any other acts of use. In particular, the Minister for Finance with the agreement of the Ministers for the Treasury, the Budget, Economic Planning and Cultural Assets and the Environment have proposed that a three-year sales programme be drawn up.

Such three-year programmes form part of a broader framework of regulation designed to ensure more effective management of the real estate belonging to the State or its independent undertakings (e.g. a swifter review of the rules for granting public

[6]Bill introduced by the Prime Minister and the Minister for Finance with the agreement of the Ministers for the Interior, the Budget, Economic Planning, the Treasury, Public Works, the Environment and urban areas (Chamber of Deputies - Doc. No. 5000).

property to private individuals and the agreed transfer to specialised companies of public property which cannot be used directly by the State or independent undertakings).

The procedures for a sale or change of use will be laid down in a ministerial decree following consultation of all the ministers involved and after hearing the opinion of the Council of State. The Bill gives the broad outline of such a decree. In particular, it will be necessary to ensure greater openness and respect for the rules of competition in respect of sales and to set criteria for a valuation which must reflect commercial value, subject to very strict exceptions.

What emerges, therefore, from this account is greater decentralisation in the management of sales, together with the need for a minimum of planning and for changes in the criteria for managing that real estate which remains the property of the State.

Both of these legislative proposals are characterised by the fact that the decision to privatise is made by government bodies and it is the State which directly benefits therefrom.

These are measures, therefore, which may be translated with greater flexibility from the political sphere to economic and financial operations which are seen as a way of dealing with the problems of the national debt.

4. SALE OF SHARES

4.1. In considering the phenomenon of the administration, and hence sale, of company shareholdings by public groups in Italy, reference must be made to the shareholdings of the State. It is through the acquisition of shares in private law companies that undertakings have been nationalised over the last thirty years, although the last major nationalisation in the proper sense of the term (Article 43 of the Constitution) took place in 1962 when the National Energy Agency (ENEL - *Ente Nazionale per l'Energia Elettrica*) was set up.

In this connection, a brief reminder of the facts is needed to illustrate the history of the different functions which were gradually assigned to the system of State shareholdings.

In 1933 the IRI was set up as a temporary public organisation responsible for selling the movable assets which the State had acquired after bailing out the big general banks. The rescue operation was carried out through the acquisition by the IRI of the banks' industrial shares. The banks had become industrial holding companies proper and, as such, had suffered the effects of the crisis which affected stock markets at the end of the twenties. The creation of the IRI signalled approval for the organisation of public shareholdings on the basis of a model which gave existing firms the form of joint stock companies.

These arrangements remained in force even when, in 1936, the IRI became a permanent body - although the State's shareholdings at the time did not become permanent. However, the fact that it was necessary and desirable for the State to have permanently at its disposal an organisation which could manage as well as negotiate the sale and acquisition of these shareholdings was recognised[7].

Other management organisations were set up after the IRI, e.g. the ENI (*Ente Nazionale Idrocarburi*), the EFIM and the *Ente Gestione Cinema*.

Following the major crisis in the early seventies, the system of State shareholdings was given objectives which had nothing to do with the original idea behind it. The State shareholdings, and the IRI in particular, were given responsibility for allaying social tensions, in particular by rescuing private companies that were in crisis by acquiring their shares. The result was that the management organisations suffered serious losses and had levels of indebtedness that were incompatible with the financial balance that undertakings require. They were in constant need of State financing[8].

The development of the management organisation model may be put down to two causes. In particular, in the context of an economy characterised by reconstruction and then growth (especially after the Second World War), the IRI model was thought to be the best medium for public intervention in the economy.

It reflected the determination not to upset the market but to balance and encourage it, while also protecting employee interests. Secondly, the management organisation seemed particularly suited to meet the planning needs of the economy.

In addition to the legal aspect of government powers over the sale of management organisation shareholdings, to which I shall refer later, State shareholdings have, in all cases, been devised and used as a sector with varying limits. Confirmation of this is provided by the fact that in 1933 and 1958 the IRI sold 60%-70% of its original assets and, from 1983 onwards, some four to five undertakings a year were privatised[9], producing a total of 45 non-strategic undertakings, which brought about 10 billion lire into the IRI's coffers[10].

[7]P. BARATTA, Contributions to the Proceedings of the Study Seminar, Roma, 23 October 1990, in *La politica delle privatizzazioni e delle alienazioni del patrimonio pubblico in Italia*, Roma, 1991, p. 65.

[8]F. NOBILI, Contribution to the Proceedings of the Congress which took place in Roma on 23 October 1990, *op. cit.*, pp. 52-53.

[9]S. CASSESE, *op. cit.*, pp. 34-35.

[10]F. NOBILI, *op. loc. ult. cit.*

Account must finally be taken of the fact that today the global context in which State shareholdings operate has been transformed.

The new approaches required as a result of the deterioration in public finances, the disappearance of the rigid ideological demand for economic planning, which, in the end, simply amounted to last-ditch and indiscriminate bailing-out operations and dependence on assistance, and finally integration in the European free market are decisive factors in the new prospects facing State shareholdings.

4.2. When the rules in accordance with which the management organisations may sell their shareholdings and thus bring about complete or partial privatisation, are identified, account must be taken of the fact that there is no established procedure which covers the different stages of a sale[11]. An attempt may be made, however, to outline the scope of the principles and rules in force in connection with privatisation.

Firstly, attention should be paid to the powers of direction of the political authorities, which are reflected in directives on the sale (as well as the acquisition) of State shareholdings (Articles 2 and 4 of Act 1589 of 22 December 1956, Articles 2 and 3 of Presidential Decree No. 554 of 14 June 1967 and subparagraph (d) in the third paragraph of Article 13 of Act No. 675 of 2 August 1977)[12]. Through these directives, the Minister responsible for State shareholdings specifies, on each occasion, the public goals to be pursued in accordance with the general programmes approved by the Interministerial Committees for Economic Planning (CIPE) and Industrial Planning (CIPI). In particular, he forwards the general directives to the management organisations, draws up all the specific directives required to apply them and - in every case - supervises their implementation.

The legal value of these directives was recognised in a decision by the Supreme Court of Cassation in a dispute which resulted, as it happened, from a planned privatisation operation (it involved the SME, a financial company with IRI shareholdings covering all the group's shareholdings in the food sector)[13].

According to the Court of Cassation, the directives are mandatory in the case of management organisations in view of the fact that these are formed by agreement. There exists an informal procedure under which the Government and the public organisation come to a mutual decision, in the area with which we are concerned, on a particular privatisation operation in order to achieve a kind of co-determination of the

[11]S. CASSESE, *op. cit.*, p. 36.

[12]If one considers that it is only in the case of these directives that an express report has to be sent to the Committee of members from both Houses of Parliament, it may be concluded that Parliament has recognised the special political importance of these decisions.

[13]Civil Cass., First Section, 11 July 1988, No. 4570 in *Giur. Comm.*, 1989, II, p. 376.

directive's content reflecting self-restraint by the management organisation. This means that, as a result of the dialectical relationship arrangement between politicians and the managers of shareholdings, the directive can be amended at any time and hence can be tailored to meet any specific requirement which may occur when carrying out planned privatisation.

The content of some general directives which are set out in circulars and which, in the area with which we are concerned, involve a kind of regulation of the relationships - so far as sales are concerned - between all the management organisations and the Ministry responsible for State shareholdings, is of particular importance.

Under Circular 784 of 1983, the Minister can carry out his supervisory and directive activities only where the management organisations must give prior notice of the sales which they have made either directly or through the companies they control.

It is specified that transfers may be made not only through sales but also through mergers or take-overs and the disposal of option rights involving loss of control over a particular company. It is also laid down that all sales which may significantly alter government programmes are subject to notification.

Finally, a procedure is provided for under which, following notification by an organisation, the Ministry has 20 days in which to make its comments. The organisation must take account of these in taking its final decisions. Once that delay has expired, tacit assent arrangments come into play.

The succeeding Circular of 19 October 1984 supplements that part of the previous Circular which states that the organisation must also give notice before any agreements, understandings or negotiations in connection with the sale of shareholdings are formalised.

The Circular contained in the ministerial decree of 15 June 1985 amends the section of the 1983 Circular which stipulates that, in the light of the complexity and economic importance of the sale referred to him, the Minister may suspend the 20-day deadline, thus holding up the tacit assent procedure.

Finally, the Circular of 10 May 1988 reiterates the requirement that notification of the proposed sale should be given before any negotiations begin.

The general directives on privatisation programmes, the specific directives on each sale and the directives contained in the circulars are, it is true, binding on the management organisations, but only in respect of the internal relations between the State and the organisation. In other words, if the sale of a particular shareholding to private individuals infringes a directive, this does not affect the validity or effectiveness

of the act of sale but makes the authors of the infringement publicly responsible for it to the Minister[14].

4.3. The situation regarding authorisation, where it is required by law, is quite different (Article 3 of Presidential Decree 554/1967 asserts that the sale of a State shareholding is subject to authorisation only in cases laid down in the provisions in force). The act or contract by which a management organisation privatises a shareholding without the authorisation explicitly required by law is void if one of the conditions of its lawfulness is absent.

4.3.1. Sales of shareholdings in the *Ente Gestione Cinema* and the EFIM are subject to authorisation.

The last paragraph of Article 4 of Act No. 1330 of 2 December 1961 and Articles 2 and 3 of Act No. 1176 of 5 November 1964 lay down the need for authorisation in the case of all sales of shareholdings, without making any distinction between the sale of controlling or minority interests.

This means that, after identifying the company to be privatised (exercising their entrepreneurial independence in accordance with the directives received) as well as the purchaser, both of these organisations must ensure the full effectiveness of the act of sale by obtaining ministerial authorisation, the absence of which is demurrable outside.

4.3.2. The situation with the ENI is slightly different. In accordance with the last paragraph of Article 4 of Act No. 136 of 10 February 1953 (supplemented by the second paragraph of Article 2 of Act No. 1589 of 22 December 1956), the sale of shareholdings is subject to authorisation by the Minister responsible for State shareholdings only where loss of control over the company will result. In other words, decisions on the sale of minority interests may be taken completely independently, subject to existing directives.

One example of the sale of a controlling interest by the ENI is the sale of Lanerossi s.p.a. (textiles sector), which took place in 1987. The CIPI and the Ministry laid down the general conditions for the purchaser, entailing a guarantee that the company would grow, that the brand would be developed and that employment levels would be maintained.

In the absence of an existing procedure, the ENI conducted the negotiations independently: firstly, it asked a bank to notify it of companies whose size met the required conditions and which were interested in the purchase, then it organised an initial unofficial tender on the basis of confidential information about Lanerossi, and, after making a selection, concluded the process with a call for secret tenders, following

[14]This principle was also laid down in the aforementioned Cass., 11 July 1988, No. 4570, p. 383.

which it put forward the purchaser chosen (the Marzotto Group) for ministerial authorisation.

4.3.3. So far as the IRI is concerned, it was thought for some time that this group was also subject to ministerial authorisation in respect of sales. However, following the complex legal case, mentioned above, involving the SME, the Court of Cassation felt that the Government had no general power to authorise the sale of shares by the IRI[15]. The Court of Cassation itself[16] subsequently affirmed the existence of another major principle to the effect that sales (of controlling interests) are not all of the same importance. The decision to privatise a complete sector and to transfer it to a public corporation (as in the SME case) is a political decision which the IRI may not take independently as it must follow the instructions given by the Government. In other words, IRI is prohibited from privatising complete sectors of production and so from selling strategic shareholdings where the directives do not take provision for an such operation.

Moreover, the SME privatisation was not undertaken for specific reasons as the Court of Cassation itself recognised that, in that particular case, IRI did not indicate definitively its wish (to privatise).

Examples of the sale of shareholdings deemed non-strategic include the sale of shares in Alfa Romeo s.p.a. (vehicle sector) to Fiat in 1987. In its decision on this, the CIPI had asserted that the vehicle sector "did not involve primary strategic interests" and note was taken of the commitment entered into by the purchaser, Fiat, to protect employment.

In that case, the decision taken by Government bodies had already referred to the purchaser, while the negotiations took place quite informally and had also been preceded by contacts between the management organisation and Ford.

4.4. Having considered the institutional procedures to be followed by privatisation operations, we can now also analyse the phenomenon from the point of view of the negotiating techniques adopted to effect the sale.

What is particularly noteworthy is the widespread recourse to straightforward sales, whereby the management organisation sells the shareholding in exchange for the payment of a sum of money by the private purchaser. This is what happened in the case of Lanerossi and Alfa Romeo and it should also have happened in the case of SME.

[15]Cassation, United Sections, 25 March 1986, No. 2091, in *Rev. dir. com.*, 1986, II, p. 67.

[16]Civil cassation, First Section, 11 July 1988, as referred to in footnote 13.

What characterised these operations and many others is the fact that the purchasers were always big groups or major undertakings in the sector to which the company sold belonged.

So far, however, the method of distributing shareholdings so as to encourage share ownership among the public has not been used. This idea or other similar ideas should be taken seriously today as Italy now has its own anti-trust legislation. The sale of controlling interests to an economic entity which already exists is equivalent to integration and its lawfulness should be considered under Article 4 of Act No. 287 of 10 October 1990.

It is not by chance that the clear purpose of the recent legislation to which we shall refer in section 4.6 is to encourage the distribution of shares among the public.

4.4.1. However, there are many examples of different sales techniques. Among the most interesting is the establishment of joint ventures between the public and private sectors.

The most interesting operation of this kind is undoubtedly the famous ENIMONT case. This began in 1988 with the drafting - with the agreement of the Government - of an agreement to set up a national chemical centre in order to relaunch this sector of production. This goal was to have been pursued by setting up a joint venture involving the ENI and Montedison (the biggest private chemical company), with each of them holding 40% of the capital. As part of the joint venture, the ENI gave up its controlling interest in the Enichem company. A control agreement between both partners had been drawn up to ensure joint management and to prohibit any increase in their shareholdings. Already at this stage, however, it was pointed out that two years after the agreement came into force most or all of the ENIMONT capital could be tranferred to one of the two partners (ENI or Montedison). This possible transfer of direction was covered by the same control agreement, which enabled the private partner to acquire ownership of an absolute majority of ENIMONT shares simply by providing ENIMONT with new undertakings.

By degrees, Montedison, the private shareholder, allied itself firmly with the private owners of the remaining 20% of the ENIMONT capital (which it had traced on the Stock Exchange) and so it virtually acquired control of most of the shares without waiting until the end of the two year period laid down in the control agreement. Following an attempt at arbitration, which was unsuccessful, at the end of 1990 it was realised that the assumptions behind the joint management of the joint venture no longer held good as a result of differences over the implementation of industrial strategies. In the meantime, by means of a directive, the Minister responsible for State shareholdings and the CIPI instructed the ENI (5 September 1990) to reintroduce conditions of parity in the ENIMONT management or else either sell its own shareholding in ENIMONT or buy that of Montedison. In view of the deterioration in relations between the ENI and Montedison, the second alternative contained in the directive, which involved the need to choose between total privatisation of the chemical sector or its complete reacquisition by the State, was adopted. After a series of decisions, the impoundment of shares and company meetings, the affair ended with a

private arrangement whereby, after obtaining the required authorisation, the ENI set the price, leaving Montedison to choose between the purchase or sale of 40% of the ENIMONT capital. On 22 November 1990, Montedison decided to sell to the ENI and privatisation was abandoned definitively.

Other attempts to set up joint ventures between the public and private sectors were just as unlucky and quietly failed. They included the idea proposed between 1985 and 1987 for a joint venture (called TELIT) between the IRI (through the STET company which it controlled) and Fiat in the telecommunications sector. In this case, there was an immediate dispute over the appointment of people to represent the future company. Fiat believed that the appointments were not made on the basis of competence and did not reflect the entrepreneurial sprit.

As a result of such experiences, it can be concluded that joint initiatives between the public and private sectors do not work in Italy.

Public and private businesses operate in accordance with different philosophies and their ultimate goals are different philosophies and their ultimate goals are different. Moreover, the private entrepreneur has shown that he is prepared to invest huge amounts of capital in an undertaking only if he can manage that undertaking; the compromise of joint management clearly does not meet that requirement.

4.4.2. To conclude this short survey of sales negotiation techniques, we may mention the non-strategic operation whereby, in 1989, the complete controlling interest in VM (engineering sector), which belonged to the IRI group (via the Finmeccanica subholding company), was sold to private individuals.

In that case, the private individuals acquired their shareholding by means of a complex financial operation known as a leveraged buyout. A group of private individuals interested in the purchase set up a company, which subsequently turned out to be the formal purchaser of VM.

The company borrowed from the banking system to pay cash for the VM shareholding. It then merged with VM so as to benefit from the tax concessions that resulted from the reduction in income as a result of the debt incurred in order to make the purchase.

4.5. The common feature of all privatisation operations (carried out by the sale of shareholdings) examined so far is that the recipient of the sale proceeds, or, at any rate, the beneficiary of the economic consequences of the operation is, either directly or through companies in which it has shareholdings, the public management undertaking.

This means that nothing accrues to the State as a result of sales by the management organisations.

The full extent to which the State fails to share in the profits emerges from the paradoxical case in which the State bought the Circumvesuviana (the local railway which serves the area around Naples) from the IRI.

The only benefit to the State, therefore, is indirect in that an improvement in the budgetary circumstances of the management organisations means that they do not seek funds from the Treasury. In the light of the current situation in respect of public finances, it may be thought that this type of operation will gradually replace the traditional form of public financing for such organisations. Until now, this has reflected increases in the funds allocated to them. It is in this sense that we can interpret the recent statement made by the IRI Chairman to the effect that the IRI intended to sell, on the London market, a large quantity of non-convertible savings shares (i.e. without voting rights) in Italian Credit, a bank of national significance controlled by the IRI.

4.6. The urgent requirements of public finance make it necessary, in addition, to use other methods of carrying out privatisation in order that the State may benefit from it directly.

Accordingly, the procedures governing the privatisation carried out so far are being queried and it is probable that the institutional framework will also be altered.

The first key step in this direction has been taken. While this report was being drafted, on 30 September 1991, as part of the economic measures contained in the Financial Act for 1992, the Government approved an order in council (which has not yet been published) on the "conversion of public organisations and the sale of public shareholdings"[17].

This legislative measure must become law within sixty days but it represents concrete evidence of positions already adopted at political level on the problems and goals of privatisation.

In a single article, the order stipulates that the organisations responsible for managing State shareholdings, other public economic organisations (public organisations other than the State which carry out economic activities) and independent State undertakings (agency undertakings through which the State carries out directly its entrepreneurial activities) may be converted into joint stock companies in accordance with the criteria of efficiency and economy drawn up by the CIPE (the Interministerial Committee for Economic Planning) and on a proposal from the Minister for the Budget and the other Ministers concerned. An exemption to this measure is allowed in the case of public law credit undertakings, provided that rules already exist for their sector (see section 5 below), and organisations with regional participation or which are governed by the first paragraph of Act No. 142 of 8 June 1990 (see section 6 below)(paragraph 1).

The operations and the resulting statutory amendments will be decided by the relevant bodies within two months from the date on which notification is given of the

[17]This text had already been submitted as a bill for examination by the Senate in a Cabinet decision on 11 May 1991 (Senate Doc. - No. 2863).

criteria set by the CIPE (paragraph 2) and the decisions are subject to approval by the Minister for the Treasury and the other Ministers concerned (paragraph 3).

It is stipulated that all or some of the shareholdings resulting from the conversion may be sold, subject to guidelines set by the CIPE. These guidelines must also deal with publicity for the sales as well as the restrictions and procedures which must be observed in valuing, investing and selling the shareholdings (paragraph 8).

It is stipulated henceforth that, as a general rule, investment and sales should be undertaken in such a way as to ensure the widest and most lasting distribution possible to the public, in order, *inter alia*, to prevent integration or the formation of dominant positions, even indirectly (paragraph 10).

The provision which sets the goal of making good the public deficit stipulates that revenue from the sale of State shareholdings should be credited to the assets side of the balance sheet in accordance with the procedure laid down by the Minister for the Treasury (paragraph 12).

Tax concessions and other special provisions specifying the procedural aspects of operations are also prescribed.

The order also lays down protective measures in the event of complete privatisation, i.e. where the State loses control over the undertakings converted.

It is stipulated that sales or other operations which involve the loss of majority control, both in the case of the joint stock company into which the organisation is converted and that of companies which are controlled by the latter, must be approved by Parliament in a vote by the relevant parliamentary Committees[18].

This means that, in the case of the complete privatisation not only of the organisations converted but also of the companies which they control, a new generalised system of authorisation at Italy's highest level of political representation has been introduced.

In the case of the joint stock companies which result from the conversion process, the rules in the civil code are applied, with some minor exemptions.

[18]The very first draft of this order stipulated that approval of the complete privatisation of the organisations converted was a matter for the Government acting in accordance with the model for regulations in Act No. 218/1990, for which see section 5 below. An immediate decision was taken, however, resulting in the version set out in the text.

There might be a parliamentary dispute over this point when the measure is enacted.

There is a clear determination, therefore, not to create atypical entities or companies with particular rights (paragraph 5).

If this legislative measure were to be confirmed at the time of its enactment, it would produce major changes in the system of State shareholdings and, consequently, in privatising procedures. In addition, the ministerial arrangements by the State to manage its shareholdings may be seriously jeopardised.

Finally, the measures introduced at the same time as this year's financial exercise include a bill (which has not yet been published) that goes so far as to propose the abolition of the Ministry for State shareholdings in July 1992. *Inter alia*, this proposal comes a few days after the submission of a proposal for a referendum to repeal the Act which set up the Ministry.

5. Another type of privatisation is what might be described as "structural privatisation".

For some years now, we have been witnessing a process which has led to changes in the structural organisation of the most varied public undertakings. The structure of public undertakings in their many forms is often at variance with the need for flexibility which is characteristic of entrepreneurial activities. It has been noted, rightly, that in the eighties there has been a general shift from the undertaking as an agency (i.e. a public undertaking directly managed by the State) to the undertaking as a public organisation (in other words, publicly managed through a public organisation separate from the State) and from the public organisation to the joint stock company[19].

There is a general conviction that the organisational model offered by the joint stock company represents the best solution as regards the exercise of entrepreneurial activities. Hence, it has become a key objective, or at any rate a trend, in any restructuring of public organisations. However, unlike what is proposed in the order examined in the previous section, this process, in other cases, has been gradual, so that before a decision is taken on privatisation structures which can be privatised are set up.

The first case which should be mentioned is that of the State Railways. This was an agency undertaking and has been converted into a public organisation by Act No. 210 of 17 May 1985.

In addition, the same Act (Article 2, subparagraph h) broadly stipulates that the organisation, in its new form, may acquire a shareholding, even where it is in a minority, in joint stock companies which operate in related areas or which, at least, are of interest to the organisation.

[19]S. CASSESE, *Il disegno dei provvedimenti di ristrutturazione delle banche pubbliche* (speech at the study session on 8 February 1991) in *Ristrutturazione degli enti creditizi pubblici*, co-ordinated by ABI, Roma, 1991, p. 121.

Taking advantage of this opportunity, which the Act provided, by agreement with the Minister for Transport and as part of a railways development programme[20], the organisation has planned to convert some of its activities into companies. Such activities include shipping (the carriage of trains on ferries serving the islands), computing and the management of real estate. These activities, which were previously carried out directly by the organisation, will be carried out by companies. At the beginning of this year the joint stock company which will carry out the Italian high-speed train programme was set up. Moreover, the possibility that the Railways may end up having a minority shareholding suggests the need for effective legal conditions governing "functional" privatisation by such companies.

Another field in which the operation of the process referred to at the beginning of this section can be understood more clearly is that of the public banks.

In the seventies an attempt had been made to meet some of the recapitalisation requirements of the public banks and particularly the savings banks by issuing shares. However, these shares were not liked by the market because the rights attached to them, given the context of a public organisation, were ill-defined.

At the same time, the constraints affecting the public structure restricted the exercise of entrepreneurial activities.

In the light of these requirements, Parliament passed Act No. 218 of 30 July 1990 and implementing Decree No. 356 of 20 November 1990 which, for convenience, we shall treat together as the Amato Act (after the name of the Minister for the Treasury who proposed them). These legislative measures represent the first systematic legislation on privatising the structure of public organisations, although it applies to a special sector like banking.

The Amato Act, therefore, represented a model and some of the principles and technical situations featured in it have been adopted in the order in council on the privatisation of all public economic organisations and independent State undertakings.

The existence of special regulations for the banking sector, moreover, justifies excluding public banks (which are also public economic organisations) from the proposed general regulations on the conversion and privatisation of public organisations.

One of the initial advantages of the regulations governing public banks is that the process is not mandatory but left to the discretion of each organisation.

From the technical point of view, account has had to be taken of the diversity of public banks, which may be classified as corporations (when their capital is owned

[20]As emerges from a planning agreement for the two years 1991 - 1992 concluded between the Minister and the organisation.

by other public organisations, e.g. *Banca Nazionale del Lavoro*) or as foundations (when their capital is not owned by other public organisations, e.g. the savings banks).

The public corporate (credit) organisations may be converted into joint stock companies, merge with another banking company that already exists or engage in an atypical merger with another public corporate (credit) organisation, which will result in a joint stock company.

In such cases, the public organisation is abolished and the company shares resulting from the merger and conversion are granted to the public entity which took part in the original organisation.

Standard organisations may also sell their banking businesses to joint stock companies which already exist or which have to be set up for the purpose. In such a case, by way of exception to ordinary law, such a company may even be set up by unilateral action on the part of the organisation which is selling. After the sale, the corporate organisation still exists and continues to pursue the aims laid down in its original articles of association under which, as a general rule, those participating are entitled to receive the profits from banking activities carried out by the joint stock company.

The foundation credit organisations, by contrast, may sell their banking businesses only to a joint stock company which already exists or which has been set up for that purpose.

The reason for this restriction has technical as well as political origins. From a technical point of view, it was considered that organisations of this type could not engage in operations which would entail their abolition as soon as they did not have an owner (in terms of a foundation), so that one would not know who should be given the shares in the joint stock company.

At a political level, the choice is justified because if the organisation is allowed to continue in existence, its presence in the locality and its independence will be protected. The organs of these organisations are the (direct or indirect) expression of local authorities, local organisations, legal persons, cultural institutions and organisations. The organisation thus continues to be a focus for interests with some local bearing, although its independence is not jeopardised.

Another interesting aspect is the regulations governing the objectives of foundation organisations following the sale of the banking business. Such organisations do not simply manage, as partners, the shareholding in the company to which they have been sold; they may thus devote themselves to the pursuit of their original goal of providing services (charitable work and public service activities).

When the latter were set up (almost all around the middle of the last century) they also provided services - an activity which subsequently became marginal. The Amato Act, however, uses the opportunity to extend the public service function of foundation organisations by requiring them to undertake additional initiatives in the

fields of education, culture, health and art. The result is a dual system whereby the selling organisation provides services and the company to which that organisation is sold carries out banking activities.

Another interesting aspect of this question is the fact that only the minority interest in the banking company (equivalent to 49% of ordinary shares) may be sold to private individuals by the foundation organisation in its role as a partner. Government approval is required for the sale of most (or all) of the ordinary shares to private individuals, i.e. in the case of complete privatisation.

In such a case also, legal conditions and rules governing the process of privatisation are laid down. As far as the final decision is concerned, the question is once again a political one and so directly involves the Government.

6. With the help of similar techniques, the process of "privatisation", whereby local public organisations convert organisations in accordance with the supply of services, has been established.

The phenomenon which has been of most importance during the past decade is that which has led local organisations to abandon the direct management of undertakings which provide public services (i.e. municipal undertakings) and to provide for the same functions through more effective structures with entrepreneurial objectives.

In this way, former municipal undertakings (as laid down in Single Text No. 2578/1925, which followed Act No. 43 of 27 february 1978) have been gradually converted into organisations with a legal personality and their own entrepreneurial independence[21]. At the same time there has been greater recourse to the company form, since this can offer the operational flexibility which is essential to the performance of entrepreneurial activities and gives access to the capital markets, thus achieving self-financing and obtaining the co-operation of private individuals in managing the public service.

The company model has undergone considerable development. Examples include joint stock companies responsible for managing airports (Turin, Reggio Emilia and Florence), exhibition services (Bologna) and municipal milk depots (Varese, Florence and Genoa), managing and distributing gas and water supplies (Trent), managing wholesale markets (Milan and Reggio Emilia) and organising the disposal of solid urban waste (Perugia, Bologna and Brescia)[22].

[21]G. ORSINI and G. VESPERINI, *Privatizzare: esperienze degli enti locali sull'adozione del modulo societario per pubblici servizi local* (Privatisation: the experiences of local organisations with respect to the adoption of the company form for local public services), in *Queste istituzioni*, Nos. 83-84 of 1990, p. 45.

[22] G. ORSINI and G. VESPERINI, *op. cit.*, p. 46.

Specific regulations were subsequently drawn up in Act No. 142 of 8 June 1990, which generalised and formalised the right of local organisations to use the joint stock company model for the production and supply of public services by changing the arrangements governing their operation. It also defined the articles of association of such joint stock companies and set only two conditions, the first being a majority shareholding by the local organisation, the second being the complete management and entrepreneurial independence of the joint stock company, which was thus removed from the influence of the local organisation. The latter simply owns the company rights granted to shareholders in accordance with the provisions of ordinary law.

Since private individuals will not be authorised to hold a majority shareholding nor, subsequently, to become involved in the joint management of the undertaking, it is impossible to make forecasts about the expected inflow of capital to such companies or the effective contribution from the private undertaking's experience. However, it will be possible to consider the use of private measures, such as quasi-social agreements between the local organisation and the private partners, to develop the non-public shareholding, even in the case of representation on the boards of directors, in order to provide the private capital market with an opportunity for investment that is reasonably profitable.

Furthermore, we cannot rule out the possibility that, in the future, such companies may be involved, in accordance with the law, in ownership privatisation procedures in order, *inter alia*, to provide local organisations with non-public sources of finance.

7. CONCLUSIONS

The picture which emerges from an examination of the need and prospects for privatisation in Italy makes it possible to lay down certain guidelines.

Firstly, it must be recognised that the disturbing public deficit situation makes privatisation an unavoidable necessity.

Hence the existence of a process which leads from the functional privatisation of management organisations for their own benefit (in the context of their entrepreneurial activities and in order to supplement public sources of finance) to privatisation designed to supplement the State's budget. This approach justifies the possible sale of real estate belonging to the State. It also requires the State to undertake a review of the criteria for managing its assets, whose value is equivalent to that of the national debt.

When non-instrumental real estate attains its maximum profitability, it may be sold. However, it is essential to ensure that such operations are carried out with precise planning and are adequately staggered over time. This is necessary to prevent the market from being distorted by a supply which could cause a fall in sale prices.

At the same time, a process of renewing the structures through which the State has hitherto carried out public intervention in the economy and provided public services, is currently under way.

It has been understood, therefore, that there is a need to cut back the areas of inefficiency which have resulted in pointless outlays to be paid for out of public finances. These can no longer be borne in future.

Throughout this process, it will be necessary to take account of the negative experience gained as a result of attempts to involve private individuals on a joint basis in operations to restructure undertakings or sectors of the economy.

Moreover, many of the ideological assumptions which justified public intervention in the economy for planning purposes and in order to protect all the interests involved, even where these were at variance, have now had their day.

To conclude, the combined effects of various factors connected with privatisation makes it possible to secure a change in the State's relationship to the economy.

Furthermore, this process is facilitated by Italy's membership of the European Economic Community, within which there is clearly a choice in favour of the free market and the rejection of a large number of assistance arrangements and subsidies by means of which the Italian State has until now intervened on the market in order to make up (or to try to make up) the "requisite" balances.

From the point of view of the institutional changes resulting from the experience of recent years and the position of Italy in the European economy, it may be said that the need to provide scope for the free (unmanaged and unplanned) market has proved to be the symbol of a genuine democratic system. Hence, on the basis of Italy's experience and that of the whole world in recent years, the free market and the very form of the democratic State are ultimately identical.

GENERAL REPORT

by

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1. Privatisation has become one of the important questions discussed in Western and Eastern European countries as well as in many other countries in the world. There are several aspects of privatisation to be analysed, legal aspects have a non-negligible role among them. In countries of Central and Eastern Europe whose economies used to be characterised as economies of comprehensive planning based on State-ownership of means of production, privatisation is a central task and the legal implementation of privatisation programmes raises particularly complicated questions during the period of transition to a market system requiring the transformation of a great part of the whole legal system of these countries.

The Council of Europe took into consideration both the importance of privatisation for Europe in general and the special role of privatisation in the process of transition of Central and Eastern European countries when deciding the topic of the XXIst Colloquy on European Law in Budapest.

2. Four papers were presented and discussed during the Colloquy. Prof. Jacques Robert gave a general presentation of the law and privatisation. Prof. Terence Daintith focused upon analysis of legal forms and techniques of privatisation. Dr. Joachim Scherer, Senior University Lecturer, presented a not well-known but very important part of privatisation problems, its impact on freedom of information. Prof. Eivind Smith's paper examined and explained the interest of the users and employees of utilities to be privatised and means of their protection.

In this paper an overview of legal aspects of privatisation is given referring to the four reports mentioned above and to some other papers also presented at the Colloquy analysing some parts of the problems in detail. Four main questions are tackled in the following report formulating in a somewhat different way the topics of the four reports. These four questions are:

- what is privatisation?
- what is the reason for privatisation?
- what are the ways and means of privatisation?
- what are the aims and consequences of privatisation?

I. Notion of privatisation

3. There are different views on the notion of privatisation. Some authors understand it extensively, e.g. Prof. Daintith mentions Madsen Pirie's book listing 21 methods in his paper accepting only six categories of change as privatisation techniques. Contrary to this approach there is a restrictive interpretation of privatisation. In Prof. Robert's report only three different kinds of change are covered by the notion of privatisation excluding among others deregulation and decentralisation. Prof. Smith's report shares a restricted understanding of the notion and underlines the ideological and political element of the phenomenon. Dr. Scherer has accepted for the purpose of his report only one meaning of privatisation - thus presenting the narrowest sense of the notion -, namely the change of ownership. Similarly to Prof. Smith, he refers to political elements, mentioning the former COMECON countries, but he went further and combined the definition of privatisation with that of public enterprise.

Privatisation is a complex phenomenon. It cannot be understood without its background and factors influencing it. Political and other elements are, however, not parts of the notion itself. It has not been asserted by Prof. Smith and Dr. Scherer either. So they will be dealt with when considering reasons of privatisation.

There is no doubt that Prof. Daintith is right when he states that legal issues are different in relation to different modes of changes affecting public enterprises, i.e. to different notions of privatisation. Consequently, it is inevitable to come to an understanding on the kind of changes considered by at least the majority as privatisation.

4. There is a point of the notion of privatisation that everyone agrees upon : the change of ownership. It is generally admitted that privatisation takes place if property is transmitted wholly or partially from the ownership of the State into that of private economic actors. The change may take place, however, in other forms than the transfer of property by sale. The question can be asked whether transfer of ownership is necessary for privatisation or if it is sufficient to transfer control. In Prof. Domanski's paper lease is mentioned without saying that he considers it as privatisation. If we think of leased flats, it is evident that no privatisation, no fundamental changes take place. In general, it can be said that the transfer of an exclusive right - excluding everyone else - is required.

When examining cases of transfer of ownership the question arises whether privatisation takes place if a legal entity, not being a private actor of the economic life, acquires the ownership. In Central and Eastern European countries an important part of the transformation is that self-governments get property from central State agencies. Although this transfer of property is an essential element of abolishing centralised State-economy it cannot be considered as privatisation. The legal position of the property of self-governments has not been clarified, it is uncertain in these countries, nevertheless, their position is not the same as that of private persons, undertakings. So the transfer to private actors seems to be an important element of the notion.

Returning to the element of transfer it can be noticed that not only sale and similar contracts can result in important changes but the use of company law means as well, e.g. the use of the technique of recapitalisation of companies by allowing participation of new - in this case private - investors, or the sale of shares[1]. Although partners' rights are not identical to those of the owners of the property of the company, indirectly they are in a similar position. Therefore, it is admitted that privatisation takes place if a State-"owned" one-man company changes over to a company with participation of the State and one or more private actors of economic life.

Some theories call the value of ownership in question - partly in connection with new company forms - in modern economy in the XXth century. To give only one example, in Peter Drucker's opinion the old concept of ownership may no longer be relevant as an economy with autonomous markets for goods, labour and capital can be imagined today without ownership of the means of production[2]. This statement can be argued but here is no place for going into the debate. From the point of view of privatisation, it is remarkable that State-monopolies do not mean ownership and partners' rights in companies only. In constitutions of the former socialist countries it could be observed that objects of exclusive State-ownership and activities that might be pursued only by the State were intermingled[3]. As privatisation in the sense of change of ownership often means a reduction of State- monopolies, it is no wonder that in countries aiming at reducing State-monopolies several authors enlarge the notion of activities as well[4]. The rapporteurs of the Colloquy expressed a similar opinion - with the exception of Dr. Scherer - which can be explained by the topic of the report and probably not by a different theory.

5. It seems to me that in the cases mentioned above there is a common core : the exclusive right of the State is replaced by the rights of private economic actors either totally or partially. The exclusive right may present itself as ownership of property, or a sole partner's right in a company or a monopolistic right of specified activities. Privatisation in this sense covers cases where the common element - replacing

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[1]J. Vickers, V. Wright, The Politics of Industrial Privatisation in Western Europe: an Overview, West European Politics, 1988, 4, p. 4.

[2]P. F. Drucker, The Age of Discontinuity, Guidelines to Our Changing Society, London, 1969, pp. 185-186.

[3]A. Harmathy, Right to Own Property, in: Human Rights in today's Hungary, ed. M. Katona Soltész, Budapest, 1990, points 15, 17, 18.

[4]H.J. de Ru, R. Wettenhall: Progress, Benefits and Costs of Privatisation, an Introduction, International Review of Administrative Sciences, 1990, 1, p. 9; W. Möschel, *Privatisierung, Deregulierung und Wettbewerbsordnung*, *Juristenzeitung*, 1988, 19, p. 886; C. Veljanovski, Selling the State, Privatisation in Britain, London, 1988, p. 2.

exclusive rights of the State by rights of private economic actors totally or partially - is present.

This rather narrow understanding of privatisation excludes many other cases listed by several authors under the heading of privatisation. I mention here only one of the cases considered by both Prof. Daintith and Prof. Robert as privatisation : the change of legal status of public enterprise. In some countries the status of State-enterprise - a form having several public law elements - is changed to that of companies - a form of commercial law. The change is important from the point of view of the style of State-activity and it has considerable legal consequences. It may even be a necessary step in the process of changing property rights. Nevertheless, until the State remains the owner of the firm, there is no other partner but the State, the application of the company law form does not lead to the radical change of abolishing the exclusive character of the given right of the State. Therefore, I would suggest not to qualify the change of legal status as a form of privatisation.

II. Motives for privatisation

6. Privatisation is a complex phenomenon. It has political, ideological, economic, social implications. As political, ideological, economic and social conditions and their relative importance vary from country to country, different elements come to the foreground in different countries. The significance of some factors may change even in the same country with the passing of a period of time. Therefore, the motives of privatisation may be different in different countries and at different times. It happens that some of the reasons are not openly admitted. All this means that a list of reasons can be given and the items are more or less important, or even non-existent in different countries.

When trying to overview the motives for privatisation it seems to help a better understanding if the grounds and reasons of nationalisation are summarised, as we can find it in Prof. Georgakopoulos' paper. Therefore, nationalisation will firstly be dealt with and privatisation will be discussed afterwards.

7. Nationalisation is an essential element in the Marxist theory. According to this theory, there is a contradiction between the social character of production and the private ownership on means of production. This contradiction should be abolished - and so the exploitation of workers based on private ownership as well - by way of nationalisation. In countries where Marxist theory was the official ideology, several interpretations of socialisation, nationalisation were admitted but the common feature was that nationalisation was an essential part of creating new systems[5]. It means that political - and ideological - aspects were decisive.

8. The real situation was not so simple in the socialist countries. Although political and ideological arguments were mentioned all the time, there were other

[5]There is an abundant literature on Marxist concept on property and nationalisation. Here I refer only Gy. Eörsi, Comparative Civil Law, Budapest, 1979, para. 1, ch. VII.

reasons as well, even if they were usually not spoken of. The other reasons were in many respects similar to those we can find in less developed countries. The statement is too general in this formulation as the countries considered less developed are different and factors of nationalisation vary here too in countries and over time. Nevertheless, in many of these countries some similar political, economic and social factors are influential[6].

It is not easy to discern these factors, to distinguish their character. In some factors economic and political elements are mixed. So public enterprises seem to be apt at advancing economic development in general and industrialisation in particular. It may play a role when nationalising or creating large-scale enterprises - e.g. steel industry, mining, etc. - and enterprises having linkage effects in development - performing catalyst functions. Other reason of nationalisation is in other cases the enforcement of independence acquiring enterprises of "commanding heights" activities and/or counterweighting foreign ownership and influence. In some cases social and political reasons prevail: these are cases of nationalisation for distributional goals. After nationalisation, State-enterprises set low prices aiding low-income population and the enterprises get State subsidies. Similar factors play a role when nationalisation serves the implementation of employment policies. There are cases where economic reasons prevail, so when market imperfections require interference and the establishment of a public enterprise is expected to solve problems. In some branches of the economy investment requirements are so high that private enterprises cannot fulfill them. Both mentioned economic reasons may be present in cases of monopolies where public ownership is expected to be an instrument against the abuse of the position. In less developed countries, the unwillingness of people to take important risks and the low level of financial market activity is one of the reasons of nationalising or establishing public enterprises[7].

9. When we study developments in the great legal systems of Europe we can already find public enterprises in the 17th and 18th centuries and their number was increasing in the 19th century. In France, the aim of giving more glory to the King by means of manufacturing, and the fiscal reasons or the need for creating better administration by means of establishing public enterprises in the 19th and the early 20th centuries differed from the reasons of nationalisation after 1936[8]. It may be true that political ideas concerning State-enterprises were not the same, nevertheless common features can be observed for creating State-enterprises both at the time of the industrial revolution and in the 20th century. Economic historians have pointed out that the State was active in industrial development in different countries of Europe, mainly

[6]The remarks are based mainly on C.H. Kirkpatrick, N. Lee, F.I. Nixson: Industrial Structure and Policy in Less Developed Countries, London, 1984, pp. 156-161; Privatisation in Less Developed Countries, ed. P. Cook, C. Kirkpatrick, London, 1988, pp. 3-8.

[7]Kirkpatrick, Lee, Nixson, cf. note 6, pp. 156-158.

[8]A.G. Delion, *L'Etat et les entreprises publiques*, Paris, 1958, pp. 5-6.

in France, Prussia and Austria in the 17th and 18th centuries. The objectives were to promote development and political expansion. State-enterprises produced arms, decorative furniture and porcelain. Later direct investment was replaced by indirect means[9].

In contrast with the British and French industrial development, the German industrialisation since the middle of the 19th century has been dependent on political factors. Similarly to other late-comers to the industrial stage and following the Prussian tradition, the German State had an important role in economic development. It was particularly remarkable in railways where the greater part of the network soon became State-owned - in railway system the French public enterprise grew considerably also in the second part of the 19th century[10]. We do not deal with the questions of the rights of Princes of different German States and the changes of these rights, it is sufficient to note that the general concept of public administration and its tasks did not back at that time a forgoing nationalisation. It should be noted, nevertheless, that, at the end of the 19th century, the socialist parties in Germany required social ownership over means of production while the Christian-Socialist Workers' Party declared in its programme the aim of nationalisation and State-ownership[11].

A new era started in Germany by World War I. In August 1914, 16 Acts were adopted regulating the economy in a systematic way and reflecting the concept that the State is responsible for organising the economy. The same idea was expressed in the Weimar Constitution where the right to property was formulated as a kind of obligation and socialising property without paying compensation was mentioned as a possibility. Though socialisation did not take place, "public interest" economic units were created[12]. The National Socialist regime did not change property relations, instead it directed the economy by means of detailed regulation. An important factor of the system was the organised character, the centrally co-ordinated style of German business. Thus without nationalisation private enterprises were considered as public

[9]The Cambridge Economic History of Europe, vol. VI, ed. H.J. Habakkuk, M. Postan, Cambridge, 1966, pp. 363-365.

[10] The Cambridge Economic History, cf. note 9, vol. VI, pp. 17-18, 237-238, 263, 264.

[11]E. Forsthoff, *Lehrbuch des Verwaltungsrechts, Allgemeiner Teil, München-Berlin, 9. Aufl. 1966*, p. 61; G. Püttner, *Die öffentlichen Unternehmen, Stuttgart/München/Hannover, 2. Aufl. 1985*, pp. 9-12.

[12]R. Schmidt, *Staatliche Verantwortung für die Wirtschaft, in: Handbuch des Staatsrechts, hrg.* J. Isensee, P. Kirchhof, B.III, Heidelberg, 1988, p. 1143; A. von Brünneck, *Die Eigentumsgarantie des Grundgesetzes*, Baden-Baden, 1984, pp. 27-28.

trusts and the State could be partner in every German enterprise without having any share[13].

In Europe, in general, the understanding of the role of the State changed as a consequence of the Depression. The crisis and the unemployment led to a commitment to the welfare State[14]. This acceptance of the increasing role of the State backed by the need for preparing for the war resulted in France in the expropriation of enterprises producing war materials, airplanes, construction and railways in 1936-1937. The Trade Union CGT programme of nationalisation of 1919 had a minor importance in the process[15].

In Britain, Labour Party politicians worked out theories of socialisation dealing with practical questions of its implementation. Socialisation was later discussed by Trade Unions but no further step was taken as before the end of World War II the enlargement of public authority was an object of suspicion. The large-scale nationalisation realised by the Labour Government after the war was characterised as a sharp break with the trend of previous economic policy[16]. This change seems to have other foundations as well, not only the Labour Party concept.

Since the 1930's, an important factor started to influence development trends in Europe and even in the USA. The factor was of English origin, it was Keynes' theory of money, investment and employment. As Schumpeter put it, the basis of the theory is characteristic of England's aging capitalism in the 1930's as seen from the standpoint of an English intellectual. Nevertheless, his message - in its bearings upon saving, interests and unemployment - seemed to reveal a novel view of the capitalist process and created almost immediately a new atmosphere[17]. In the summary of the General Theory Keynes accentuated the need of the State's guiding influence on the propensity to consume partly by taxation, partly by the role of interest, partly in other ways. He envisaged "a comprehensive socialisation of investment" as means of securing

[13]The New Cambridge Modern History, vol. XII, ed. D. Thomson, Cambridge, 1960, p. 523.

[14]The Golden Age of Capitalism, ed. S.A. Marglin, J.B. Schor, Oxford, 1990, p. 4.

[15]Delion, cf. note 8, pp. 6-7.

[16]A. Shonfield, Modern Capitalism, London/Oxford/New York, 1969, p. 88. See also H. Morrison, Government and Parliament, London/New York/Toronto, pp. 248-249.

[17]J.A. Schumpeter, History of Economic Analysis, ed. E.B. Schumpeter, New York, 1954, pp. 41-42, 1180-1181.

an approximation to full employment without nevertheless a system of State socialism[18]. Keynes' theory concerned with problems of 1930's became a decisive factor of State activity after the Second World War[19].

10. The new period started, however, in a different way and not by implementing Keynesian ideas. In the immediate post-war years a direct State intervention was needed for the reconstruction of the economy. Stuart Holland seems to be right saying that the development took place in two consecutive phases. In his opinion, in the first phase the first generation of public enterprises was influenced by the direct role of the State, while in the second phase, after the mid-1950's, Keynesian ideas gained ground resulting in the use of instruments of indirect State intervention and the second generation of State enterprises was such an instrument[20].

After the war, in the first phase, nationalisation in France reflected both socialist-marxist and Christian socialist ideas. The ideas were expressed by the programme of the *Conseil national de la Résistance* setting the objective of returning to the monopolistic Nation's means of production. Although an additional reason of punishing collaborators with Nazis had a minor role, the objective of the programme was the basis. Connected with the objective mentioned, there were additional aims as well, such as to have an employee participation in reconstruction and to have a control over the financial sector[21]. The Preamble of the Constitution of 1946 expressed these ideas:

> *"Tout bien, toute entreprise, dont l'exploitation a ou acquiert les caractères d'un service public national ou d'un monopole de fait, doit devenir la propriété de la collectivité."*

The formulation is clear but at the same time vague, leaving room for discretion mainly in considering what public service is. Several years later, the *Conseil constitutionnel*, in a decision of 16 January 1982, declared that the legislator would be limited but in exceptional cases in its discretion concerning nationalisation serving the interest of promoting economic growth and struggling with unemployment[22]. Thus behind the general formulation of the Preamble of the Constitution there were several reasons for nationalisation in France.

[18]J.M. Keynes, The General Theory of Employment, Interest and Money, San Diego/New York/London, 1964, p. 378.

[19]Shonfield, cf. note 16, pp. 63-65.

[20]S. Holland, Europe's new Public Enterprises, in: Big Business and the State, ed. R. Vernon, Cambridge, Mass. 1974, pp. 23-41.

[21]Delion, cf. note 8, p. 7.

[22]A. de Laubadère, P. Delvolvé, *Droit public économique, Paris, 4e éd.*, 1983, pp. 246-249.

The situation seems to be more complex in Great Britain. Here, case by case decisions were made and although the idea of nationalising public utilities was present, its role was not the same as in France. So, in the case of nationalising the system of public transport, the aim of modernisation, improvement of organisation, in the case of air services the requirement of pooling national resources, with gas and electricity, the need for improving organisation and efficiency, with coal mining the salvage of the industry, with the Bank of England the cooperation with the Treasury and ensuring an integrated and coherent system of financial institutions, with the iron and steel industry the importance for the British economy as a whole and so the requirement of having it under public control was emphasised[23].

The different reasoning of nationalisation may be in connection with different economic policies as well. It has been pointed out that the French nationalisation was a part of an economic system where an anticyclical and dynamic development policy prevailed while in Great Britain a more modest, anticyclical policy with less State intervention was implemented[24]. In the 1960's, literature grew up seeing nationalisation as a response to market failures and referring to arguments of natural monopolies, "externalities", income distribution. Nevertheless, the view of some authors stressing that the main reason for nationalisation has been political rather than economic is convincing[25].

In Germany, the political background of State enterprises was not clear. Since the First World War, parties were, in general, for private property admitting at the same time strong State intervention in the economy and public enterprises, particularly the municipal ones. The same tendency was observable after the Second World War. It took some time until the idea of the market economy got to the forefront in the programmes of the Christian Democratic Party and of the Free Democratic Party, to a great extent as an opposition to the practice in the Soviet zone of Germany[26]. Neo-liberal ideas of economic policy gained ground, these ideas were reactions to the Nazi regime with strong State intervention and planning. Eucken's economic theory, worked out in opposition to the Nazis, became influential. It underlined the importance of free market, competition and monetary control. In contrast to the theory, the State had an important role in the economy during the reconstruction period and the control eased

[23]W.A. Robson, Nationalised Industry and Public Ownership, London, 1960, pp. 29-41.

[24]H. van der Wee, *Der gebremste Wohlstand, Geschichte der Weltwirtschaft im 20. Jahrhundert, Bd. 6. München*, 1984, pp. 532-533.

[25]Nationalised Industries, ed. G.L. Reid, K. Allen, Harmondsworth, 1970, p. 17; J.R. Shackleton, Privatisation, in: M. Bornstein, Comparative Economic Systems, Homewood/Boston, 6th ed., 1989, pp. 113-114.

[26]Püttner, cf. note 11, pp. 12-13.

only step-by-step after the early 1950's[27]. The theoretical, political approach has not influenced much State enterprises in practice. After 1945, there was no nationalisation in Germany, the State enterprises created before the Second World War remained in general without serious changes until the 1950's when the question of privatisation was raised[28].

11. Neo-liberal thinking and theories were present not only in Germany but in Great Britain and in the USA, too. A prominent representative of neo-liberal thought was Friedrich A. Hayek, whose works became widely known and cited. In The Road to Serfdom, written during the years of the Second World War, Hayek sharply criticised planning without mentioning nationalisation, but as he explained in the Preface to the 1976 edition of the book, nationalisation and planning were closely connected at the time of the writing of the book[29].

Neo-liberalism opposing State intervention in the economy could not have, however, a decisive role for some time after 1945. Hayek himself admitted that for several years "younger Keynesian doctrinaires" guided State policy of Britain and most of the rest of the world[30]. Another outstanding personality of neo-liberalism, Milton Friedman characterised the atmosphere of the early 1960's, the years when he wrote the book, later often quoted, Capitalism and Freedom, saying that those who were against the growth of government, welfare State and Keynesian ideas were "a small beleaguered minority regarded as excentrics"[31].

The statements of Hayek and Friedman reflected correctly the public opinion of the post-war years. It was characteristic that government changes had no important consequences in the economic policy. In Great Britain the Conservatives won the election and took office in 1951. The consequence was the privatisation of the steel industry, but no other serious change took place. Conservatives tolerated nationalisation of declining industries and of public utilities but they were against further nationalisation particularly against nationalisation of prosperous industries. The Labour

[27]M. Maclennen, M. Forsyth, G. Denton, Economic Planning and Politics in Britain, France and Germany, New York/Washington, 1968, pp. 35-44, 50-54.

[28]G. Püttner, *Die öffentlichen Unternehmen*, Berlin/Zürich, 1969, pp. 32-33; G. Ress, Government and Industry in the Federal Republic of Germany, International and Comparative Law Quarterly, 1980, 1, pp. 101-102.

[29]F.A. Hayek, The Road to Serfdom, Chicago/London, p. XX.

[30]F.A. Hayek, The Keynes Centenary, reprinted in: The Essence of Hayek, ed. Ch. Nishiyama, K.R. Leube, Stanford, 1984, p. 50.

[31]M. Friedman, Capitalism and Freedom, Chicago/London, re-issued in 1982, p. VI.

Party, on the contrary, immediately declared that they would renationalise steel industry when returning to power[32].

In Britain, up to the late 1970's, the problem was the lack of a policy towards nationalised industries and there was no firm economic foundation. With the exception of the steel industry there was no important change, irrespective of which party was in power. There was no systematic control, no real guidance. Nationalised industries faced different problems with changing structure and demand, had a common need for investment and produced deficit. Because of the growing concern, the Government formulated an official doctrine in the 1961 White Paper. It was regarded as a step in the direction of applying commercial standards, and the requirement of efficiency did no longer consider nationalised industries as social services absolved from economic justification. At that time it was not called privatisation. It is worth noting that it was the Labour Government which took several steps in order to promote efficiency during the 1960's[33]. The Labour policy was not amended by the Conservatives and in 1971, it was the Conservative Government which nationalised Rolls Royce and the Upper Clyde Shipbuilders yards because of the incompetent management[34].

In France, the situation was similar to a great extent. The public sector continued to expand under right-wing governments in the 1950's and later. Public enterprises played a major role as agents of growth at national and regional levels - the regional development was connected with decentralisation. In the 1960's, large deficits caused, however, serious problems. In 1966, a committee of the Prime Minister started examining the situation and presented in 1967 the so-called Nora report and formulated the aim that more competitive public enterprises were needed for an activity on the Common Market. In 1972, the Socialist and the Communist Parties in opposition published a common nationalisation programme, envisaging new public enterprises in strategic sectors promoting growth, innovation, productivity. In 1981, the left-wing parties got to power and an important nationalisation took place in 1982. The Government began, however, privatisation, without declaring principles, already in 1983[35].

[32]Robson, cf. note 23, pp. 38-40.

[33]Nationalised Industries, cf. note 25, pp. 18-21; British Economic Policy, 1960-1974, ed. B.T. Blackaby, Cambridge, 1978, pp. 486-495.

[34]Big Business, cf. note 20, p. 41; The British Economy in the 1970's, ed. P. Maunder, London, 1980, pp. 194-195.

[35]A. Delion, Public Enterprises: Privatisation or Reform? International Review of Administrative Sciences, 1990, pp. 66-67; A. Bizaguet, *Le secteur public et les privatisations*, Paris, 1988, pp. 21-25; Vickers, Wright, cf. note 1, p. 13; M. Bauer, The politics of State-directed Privatisation, The Case of France, West European Politics, 1988, 4, pp. 50-51; Big Business, cf. note 20, pp. 35-37.

In Germany, some steps were taken for privatisation in 1959 and 1965 but they were only of minor importance. A privatisation programme was announced only in the 1980's.

12. Examining the reasons and the process of nationalisation has led to the commencement of privatisation. There have been several factors which have changed the atmosphere and have backed privatisation. One of the most important political aim was after 1945 to maintain a high level of employment. Starting from the mid 1960's in many countries growing unemployment caused concerns particularly because at the same time there was a serious inflation. The problem became particularly troublesome during the 1970's, when usual means of Keynesian economic policy remained ineffective[36]. The internal problems were reinforced with international market problems. The erosion of the American hegemony, the fact that the US dollar ceased to be convertible into gold, that the Bretton Woods agreement could no more function and that the US Federal Reserve Bank introduced restrictive monetary policy had widespread consequences[37].

The changes in the economic situation were interpreted in economic literature as signs of de-industrialisation. De-industrialisation is explained in different ways by different economists. It is often pointed out, however, that since the early 1960's difficulties have resulted from a structural shift away from industry, accompanied with a steady loss of jobs. The role of the services has become more and more important, services have increased public employment and the growing costs of the public sector has led to a large increase in the ratio of public expenditure to GDP and, at the same time, to higher taxes and higher wage claims[38]. It has been stated convincingly by some economists that de-industrialisation can be positive and negative, in the negative case the economy experiences severe recessions[39], it does not remain only a problem of unemployment but presents itself as a fiscal crisis of the State. Economic analysis has shown that the process of de-industrialisation itself cannot be blamed for the recession as in reality there are long-term widespread structural problems[40].

In conclusion, it seems that the real issue was not neo-Keynesian policy but long-term trends and structural problems in the economies of different countries. The growing internationalisation of economic life brought to the surface problems in the same period. The explanation of the situation by later analyses did not hinder people thinking in terms of neo-Keynesian policy - "by the 1960's, policy-makers everywhere

[36]van der Wee, cf. note 24, pp. 373-381.

[37]The Golden Age, cf. note 14, pp. 21-24.

[38]De-industrialisation, ed. F. Blackaby, London, 1979, pp. 34-47, 234-239, 252-254.

[39]R.E. Rowthorn, J.R. Wels, De-industrialisation and Foreign Trade, Cambridge, 1987, pp. 5-7, 24-25.

[40]De-industrialisation, cf. note 38, pp. 46, 254-256, 265.

were claiming to be Keynesian, most significantly perhaps in the United States[41]" - and turning against the policy thought to be the most important cause of the problems, demanding a new policy, with less State involvement.

13. When speaking of privatisation, economic reasons are usually discussed although economic factors are not the only ones playing a role in decreasing State activity and State property. There are social, political, ideological factors as well. De-industrialisation is connected with social changes, with the formation of the post-industrial society. In the literature of sociology the change of society since the 19th century has been discussed for many years. Decomposition of capital and labour, the emergence of a - decomposed - "new middle class", the recognition of social rights supposing State activity, persistence of conflicting interests, functioning of interest groups, institutionalisation of class conflits are considered important features of the new society[42]. In the 1960's, the conflicts assumed new forms, diverse protest groups appeared, including student and minority movements, the ideological debate including the new individualism revived. At the end of 1960's-beginning the 1970's, the American situation was characterised by saying that a deligitimation of formal - governmental - organisations, a crisis of institutions emerged, traditional religious and national values broke up, the youth protest, the New Left and the New Right and even movement led by the Pope helped the progress of the new individualism[43].

The success of individualist theory was due to additional political factors, too. In the USA an influential factor had its origin at the time of the New Deal. The New Deal resulted in a rearrangement of authority from local to State level in consequence of federal financial and administrative initiatives. It was contested since the New Deal and during the election campaign Reagan made use of the sentiment promising a minimalist government. He made an agreement with the Easter establishmentarian wing and made statements in the spirit of individualist, *laissez-faire* market politics. In Great Britain, the factor helping in a similar way the success of individual thought was in part economic, in part political. The economic element was the exchange-rate problem which British governments had to face several times after 1957 and which led to stop-go cycles without success and forcing the Labour Government to a commitment - towards IMF - to reduce budget deficit and to implement a monetarist policy, inconsistent with its general ideas. It was the Conservative Party which had a coherent market-based monetarist programme. The political element was the feeling against the role of Trade Union Congress which could exert influence on Government for more public expenditure. The failure of the Government to find a solution stopping inflation reducing unemployment and not being able to avoid TUC constraint favoured the

[41]The Golden Age, cf. note 14, p. 62.

[42]R. Dahrendorf, Class and Class Conflict in Industrial Society, Stanford, 1959, pp. 48-56, 62-67, 253-259.

[43]Politics in Post-welfare State, ed. D. Hancock, G. Sjoberg, New York/London, 1972, pp. 1-7, 16-19.

Conservative Party market-oriented, individualist approach, Mrs Thatcher's programme[44].

As a result of the effect of different factors, Reagan and Thatcher won the elections respectively in the USA and in Britain. The ideology of new-individualism, neo-liberalism gained ground. It has been pointed out that neo-liberal thoughts had been present - cf. points 10 and 11 - and they became influential in the 1970's.

The change of the atmosphere, the influence of market-economy centered neo-liberalism can be demonstrated also by the fact that economics-based approaches came to be applied in law and public administration. The new approach in public administration reflected attemps to apply the competitive model to the operation of the public sector[45]. It shows that not only the general "outside" conditions for privatisation have been built but the "inside" part, the organizational element of privatising public sector has been born as well.

14. In the previous point, I have tried to sum up the changing atmosphere, serving as a general background for privatisation. Similarly to nationalisation, specific reasons were referred to in the case of privatisation as well. Considering the general background it is understandable that the authors who analyse privatisation usually mention political reasons on the first place.

It is interesting to note why political motives get such an eminent position. Alan Walters, Chief Economic Advisor to Prime Minister Thatcher writing on the Government's privatisation policy put that among the various considerations concerning privatisation the political factors - political advantages - are the most important and that while it is impossible to discern different motives, political effects can always be pointed out[46]. Other commentators refer, however, to other factors which in my opinion can be the ground of ranking political factors so highly. The fact is that there is no evidence of a superior performance, higher effectivity of privatised firms and further there were not happy experiences got at a rather early wave of privatisation - between 1959 and 1965 - in Germany[47].

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[44]K. Hoover, R. Plant, Conservative Capitalism in Britain and the United States, London/New York, 1989, pp. 6-8, 76-86, 145-147.

[45]Bureaucracy and Public Choices, ed. J.E. Lane, London/Beverly Hills, 1987, pp. 146-147.

[46]A. Walters, Deregulation and Privatisation, in: The Law and Economics of Competition Policy, ed. F. Mathewson, M. Trebilcock, M. Walker, Vancouver, 1990, pp. 160-163.

[47]Veljanovski, cf. note 4, pp. 17, 83, 111; J. Esser, Symbolic Privatisation, West European Politics, 1988, 4, pp. 66, 72.

It has been stated that there are several political aims. Some of them are general - such as the struggle against dirigiste State activity -, others are specific - e.g. limiting the power of the trade unions, gaining votes of people who could buy publicly owned houses at discount prices. Beside political motives economic aims are important. Perhaps the most important practical advantage of privatisation is that the State can raise money when selling assets. This advantage is, however, not mentioned as the first aim of privatisation. Instead, reference is made to the struggle against inflation, State deficit that should be cut. It is also stressed that State enterprises are not efficient and it can only be changed by privatisation. Sometimes it is mentioned, too, that some reasons of nationalisation have ceased to exist. So the changing structure of economy and technological changes have created new situations and there is no more ground for State monopoly in telecommunication, the commanding heights argument is unconvincing in the case of coal and steel industry, road transport, each of them being in a deep crisis. An important motive is breaking up monopolies and creating more competition. Among the economic reasons the growing importance of international markets, including financial markets, which are more easily accessible for private firms, has a special role.

Privatisation has political reasons in the former socialist countries as well. The centrally directed economy was a part of a political system admitting only one power and liquidating every possible sources of independence. As a result of the privatisation not only the economic monopoly is broken down but the political system is changing as well. Here the privatisation campaign means more than in other countries of Europe, it is a part of the process of democratisation. At the same time, privatisation is more complex and more complicated in these countries. One of the preconditions of privatisation is answering the question whether factories, land, houses, etc., should be given back to previous owners - or to their heirs - as they were deprived from their property without compensation. Economic aims of privatisation comprise the restructuring of the whole economy built on non-market principles, the reception of new technologies from abroad as well as managerial skills. Privatisation in Central and Eastern European countries needs, however, further and deeper analysis.

III. Legal means of privatisation

15. Problems of the legal forms and techniques of privatisation have been analysed in the report of Prof. Daintith. Therefore, I limit myself to making only brief remarks.

Firstly, it is to be noted that the use of different legal instruments for privatisation is influenced by various factors. One of the factors is the economic situation of the country concerned. To give an example of the effect of economic conditions, it is sufficient to mention the development of the capital market and the population's habits of investment. State enterprises can be brought to stock exchange for privatisation if there is a rather developed capital market and people are willing to invest in shares. Another decisive factor is, of course, the lack or the abundance of capital in the country. The lack of capital has serious consequences on choosing legal instruments as well - it can be observed in Central and Eastern European countries.

Tradition, political and legal history of the country are important factors, too. Spontaneous or directed character of privatisation is influenced to a great extent by traditions. At the same time traditions can be re-inforced or weakened by existing conditions. The re-inforced traditions and their role can be observed in Central and Eastern European countries. The economy built on State property and State monopolies cannot be abandoned from one moment to another, the State must be rather active in setting the framework and bringing privatisation into movement. Here traditions and conditions go side by side in the same direction. It does not exclude, however, that some parts, processes of privatisation will take place in a spontaneous way.

Legal rules on privatisation will depend, to a certain degree, on the aims of the privatisation. In order to explain the role of the aim, I would refer to two cases. In the first case, the economic structure will be changed by privatisation and a market without monopoly position will be created. Here rules concerning competition will have a central role. In the second case, the aim is easing budgetary problems by selling State-owned enterprises. Here rules on competition will have hardly any role in privatisation, the process and the actors involved in privatisation will be different.

16. Legal means of privatisation will be influenced by the involvement and relative importance of different branches of law. Privatisation is an important political issue. Therefore, rules of constitutional law can have a central role. The role is influenced by the level of development of the constitutional law and its relation to other branches of law. It is, of course, influenced by other factors as well. So the question whether Parliament will have an *ex ante* or an *ex post* control will be dependent on several factors. In a similar way the role of the Constitutional Court will be the result of various factors - partly of the development of constitutional law.

The level of development of other branches of law can have an influence on legal instruments of privatisation as well. So the low level of administrative law can be one of the reasons why a market-concentrated way of privatisation is accepted in some countries, while in other countries the high level of administrative law solutions and practice will mean at least a temptation for opting for an administrative law method. It is particularly true if we accept a wider notion of privatisation not limiting it to the transfer of ownership but embracing cases of contracting out as well.

IV. Consequences of privatisation

17. It may be suprising that not much is known about consequences of privatisation. Perhaps this was one of the reasons why both Dr. Scherer and Prof. Smith dealt in their reports with some consequences. I shall not repeat their statements but limit myself to a few remarks.

It is understandable that privatisation is a too recent phenomenon to have elaborated analyses in the literature on its consequences. Direct, short-term consequences and dangers are discussed but more time is needed for collecting and studying data on long-term consequences. Direct, nearly immediate consequences may equally be pleasant and unpleasant. Getting shares at a relatively low price by a rather large proportion of the population may result in votes for the ruling government and

so people's capitalism seems to be started. Unpleasant consequence may be rising unemployment and price increase, reduction of welfare services, problems in the field of education, health care, social security - as it can be seen in the previous socialist countries. An unpleasant consequence can be the replacement of State monopoly to private monopoly.

The above consequences are not caused necessarily and exclusively by privatisation. For example, in Eastern and Central European countries unemployment and inflation are due to the previous system and not to privatisation. On the other hand, it has been stressed that privatisation does not necessarily mean a change in the corporate structure. In some countries, privatisation, which led to a greater concentration of private economic power and private economic monopolies, might be an obstacle to liberalisation. Therefore, some authors emphasise that rhetoric may be far removed from the reality when speaking of consequences of privatisation[48].

The State has normally no other choice but to regulate the market, especially in the case of privatisation of public utilities. The strong regulation may question the importance of privatisation as the control remains in the government's hand. It has been pointed out that the State does not leave the market as a result of privatisation, it retains important powers and as the British example has shown, privatisation does not even mean decentralisation[49].

Social consequences of privatisation may be serious as well. They are usually a hidden part of privatisation. It is obvious, however, how important the question is, who will be the beneficiary of the transformation, a large part of the population, a few managers or people in key positions close to the government. Social consequences of privatisation may have long-term effects in the social, economic and political fields.

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[48]D. Heald, The United Kingdom: Privatisation and its political context, West European Politics, 1988, 4, pp. 43-44; Vickers, Wright, cf. note 1, pp. 24-25.

[49]T. Prosser, Constitutions and political economy, The privatisation of public enterprises in France and Great Britain, The modern law Review, May 1990, pp. 305-316; Bureaucracy, cf. note 45, pp. 152-153, 168; B. Sas, Regulation and privatised electricity supply industry, The modern law Review, July 1990, p. 488.

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