Legal status of public enterprises and commercial monopolies in the European Union

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Abstract

The public sector, represented mainly by public enterprises, is important because it provides the link between the private and public interests. The state support for public enterprises and trade monopolies may create discrimination between them and private companies. Because of the importance of this issue, it has been regulated at Community level.

Keywords: *public enterprises, commercial monopolies, transparency, financial relations.*

JEL Classification: K33, K40

Introduction

In general, European Union law is irrelevant to the operation of nationalization of enterprises, because the Treaty of Rome "does not affect anything system of property ownership in Member States" (Article 222 EEC and 83 ECSC). Each state is thus free to have a public and decide to extend it. These are fundamental freedoms guaranteed by the Treaty of Rome. Commission adopted a position of strict neutrality on the French nationalization in 1982, for banks controlled by the authorities of other Member States can carry out work in France or may decide to engage in such activity here. Nationalization has therefore the effect obstructing the free exercise right or liberty of provision of services[2].

After all, the powers of public enterprises, which are numerous and important, are not an obstacle to competition policy directives of the Community, although their particular mode of operation or management not cause harm to competition under the Common Market. Rules imposed by the Treaty are applicable, as happens when private companies and the Commission strives to be respected, especially when it comes to transparency of financial relations between the state and public enterprises.

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I. Public enterprise

I.1 The concept of public enterprise

There is no definition in EU law of public enterprises, but it is generally accepted that the defining element is subordinate to the public authorities. Situation of dependency in which the company is located across from the authority comes from all or most of the capital they hold authorities. In 1980, the Commission noted precisely this criterion, qualifying as public any undertaking over which the "public authorities may exercise directly or indirectly a dominant influence on the property, the financial participation or the rules they impose. Decisive characteristic is given by government rule and the possibility that they were not to take an account of the requirements of profitability leading industrial and commercial strategy of private enterprises in order to impose the contrary, public companies to meet their guidance purposes their own policies.

Public enterprises are the main component of the public sector, with mixed-enterprises (based on state ownership and private) and controlled in a more or less by public authorities.

The states give some protection through monopoly public enterprises.

Exclusive monopoly rights are granted for various reasons of public interest (security of supply, providing a service essential to the public, etc.). Such practices are common, especially in public enterprises (energy and water), postal services, broadcasting, telecommunications, air and sea transport, banking and insurance.

These exclusive rights can impede the creation of a genuine internal market in these sectors[3].

Court of Justice, in Case Corbeau, Belgian Post characterized as "service of general economic interest", arguing that it has „an obligation to ensure the collection, transport and distribution of mail, the benefit of all users throughout the Member State concerned, uniform prices and similar quality conditions, without taking into account the particular situation or the degree of economic profitability of each individual operation".

In a preliminary ruling of the Court of May 17, 1994 (Case Corsica Ferries Italia SRL v. Corpo di Pilots Porto di Genova) shows that the protection afforded through legislative measures of a Member State for a limited number of enterprises, can result in substantial impairment allowable capacity to other firms that economic activity in the same geographical areas, according to conditions largely equivalent[4].

Court of Justice (through the decision of April 23, 1991, in Case 41/90) indicated that the German Federal Office of Labour was not able to meet market demand (on placing senior) and hence, to meet the monopoly granted. Despite this situation, the monopoly was maintained, the Office of Labour abusing his position.

[3] N. Moussis, N., *Guide des politiques de l'Europe,* Ed. Pedone, Paris, 2001, p. 259
[4] J. M, Favret, *Droit communautaire du marche interieur,* Ed. Gualino, Paris: 2001, p. 145

As a result, the behavior of the state was declared incompatible with art. 86 (ex 90), par. 1 CE. In this situation conclude only need to eliminate the monopoly of placing senior executives[5].

I.2 Obligations of States to public enterprises

Article 86 (ex 90) EC prohibits Member States to take action on public business be contrary to competition rules[6].

This is to prevent public authorities to make use of dependency that are public companies, in order to remove the prohibited conduct in all enterprises, whether public or private. The state may thus require them to participate in the arrangements of Article 81 (ex 85) EC or abusing a dominant position which would have an under Article 82 (ex 86) EC nor to grant aid fall within Article 88 (ex 92) EC. Must, therefore, that both private companies and the public be given the same treatment, despite the great financial ties that bind the State government.

Commission has been, for example, to intervene on the activities of international flights transporting small packages, business papers or emergency supplies (medicines, tapes, etc), in special conditions of security and speed. Such activities, being considered in several Member States as part of the postal monopoly, private carriers were limited services as postal administrations were operating their express delivery service.

Following directions given by the Commission, the governments of Germany, Belgium and France agreed in 1985 (and later, in 1989 and Italian), competition between postal services and private flights. Same with Germany, in 1986, and Italy, in 1987, when they suppressed exclusive rights to import and marketing of modems[7].

The example of Renault is also significant in terms of state aid. The Commission accepted in March 1988 the French government aid to 20 billion francs, ie 12 billion of debt relief as the public company, provided a change of status, making directed national organization, like the other[8].

In general, the state must refrain from any maneuver that would lead a public undertaking to apply discriminatory measures on the products of other Member States.

EEC Treaty does not contain any provisions with reference to public markets, but the Commission has always considered as measures having equivalent effect to a quantitative restriction of the importance of national suppliers reserve public markets. Council even gave a directive on December 21, 1976, betting exchange coordination procedures furniture markets, whose purpose is to impose equal conditions of participation in these markets in all Member States, and another directive of March 22, 1988 tends to improve transparency. Implementation of

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[5] O. Manolache, *Drept comunitar*, Ed. All, Bucureşti, 2003, p. 361
[6] O. Manolache, *cited work*, p. 361
[7] G. Druesne, *cited work*, p. 202
[8] G. Druesne, G. Kremlis, *La politique de concurrence de la Communaute Economique Europeene*, Presses Universitaires du France, Paris, 1991, p. 96

competition law (the announcement of a tender in the Official Journal of the European Communities), however, is not binding only for markets whose ceiling is at least 200 000 Euro. In particular, the Directive on telecommunications, transportation or supply water or energy, involving numerous public companies, is excluded from the field of application of Council decisions from June 22, 1988[9].

Article 86 (ex. 90) EC recognizes that state enterprises can entrust certain private economic mission, which would be canceled if they would be fully subject to competition rules. Therefore, be allowed to circumvent, but only if they fail their task.

Companies that would benefit from a regime of exception are those responsible for management services of general economic interest-giving nature a monopoly and tax[10].

I.3 Transparency of financial relations between state and public enterprises

In order to enforce a power given by the Article 86 (ex 90) EC, the Commission adopted on June 25, 1980 a directive (80/723, OJ L 195 from 29 july 1980, amended last time by directive 2006/111 from 16 november 2006, OJ L 318 from 17 november 2006) which requires Member States to communicate, to request information about the nature and effect of their financial relations with public enterprises. This is to ensure transparency of these relations, to allow the Commission to distinguish among the public resources made available to a public company, those who constitute aid under Article 88 (ex 92) EC, the normal market economy.

Directive concerns the provision of public resources made by public entities, through public companies or financial institutions, and effective use of these resources[11].

Public entities means the state and other teritorial entities (colectivities).

The public enterprise is understood any undertaking over which public authorities may exercise directly or indirectly a dominant influence of that ownership, financial participation or the rules that drive.

Public enterprise manufacturing sector is any enterprise whose main activity, representing at least 50% of total annual turnover, is conducted in the manufacturing sector. The influence of public powers on business is considered dominant if the public authorities hold the majority of subscribed capital of the company, the majority of media attached units issued by the enterprise or can appoint more than half the members of the management body, the direction or supervision of the company.

Financial relations between public authorities and public undertakings whose transparency is ensured that the directive refers to[12]:

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[9] G. Druesne, G. Kremlis, *cited work*, p. 97
[10] G. Druesne, G. Kremlis, *cited work*, p. 98
[11] G. Druesne, G. Kremlis, *cited work*, p. 99
[12] G. Druesne, G. Kremlis, *cited work*, p. 100

1. compensating parties operating;
2. capital gains or facilities;
3. contributions to lost or borrowed funds on privileged terms;
4. concession in the form of non-financial benefits of collecting benefits or non - collection of receivables;
5. waiving the normal remuneration of public resources committed;
6. compensation of duties imposed by government.

Directive does not apply to financial relations between public authorities and:

1. public undertakings in respect of the benefits of services which are not obviously likely to affect trade between Member States;
2. central banks and the European Monetary Institute;
3. public credit establishments in the storage of public funds by public authorities, in normal market conditions;
4. public undertakings whose turnover outside the duty not reached a total of 40 million euros during the two annual exercises before that were made available or have used the resources covered by the first article. However, for the establishment of public credit, this threshold is 800 million euros of the total balance.

Member States shall take measures to ensure that data on financial relations remain concerned by the first article is kept by the Commission during the five years since the last financial year in which public resources were made available to the public enterprises concerned.

However, if public resources are used over a year later, the period of five years beginning with an end of the same year.

Upon request, and if it thinks necessary, Member States shall communicate the data set, and the factors necessary and especially objectives.

States whose public undertakings operating in the manufacturing sector communicate financial information to the Commission, on an annual basis and within a specified period.

Financial information provided for each public undertaking operating in the manufacturing system is the annual report and accounts, as defined in Council Directive 78/660/EEC (amended last time by Directive 2009/49/EC of the European Parliament and of the Council of 18 June 2009, OJ L 164 from 26 june 2009). The annual accounts and annual report includes balance sheet and profit and loss, Annex, and description of accounting principles, the declaration of the Management Board, the information sector and the activities report.

To the extent that they are not included in the annual report or annual accounts, the following information must be provided to each company:

1. capital gains or quasi-equity share capital assimilated;
2. non-refundable grants or refundable only under certain conditions;
3. concession loan company, is necessary to specify the interest charges, loan conditions and safety measures provided to those who borrow from that undertaking;
4. guarantees the business by public authorities for loans, and any premiums paid by the enterprise for such guarantees;

5. dividends paid and undistributed profits;

6. any other form of state intervention, especially the waiver rule to amounts owed to him by a public undertaking, or repayment of loans or grants, tax regulation on society, social charges and similar debt.

Targeted information is provided to all public companies have made over the most recent year, a turnover exceeding 250 million Euros.

The information required is provided separately for each public enterprise, ie those established in other Member States, and shall contain information on transactions conducted within the same group and between different groups of public enterprises, as those carried out directly between the state public enterprises. Capital shares and capital that includes a public undertaking specific actions provided directly by the state and from the public's holding of other public enterprises belonging to the same group or not. The relationship between the lessor and beneficiary funds must always be specified. Some public companies share the work between several different businesses legally. For these companies, the Commission accepts a consolidated report. This building should reflect the economic reality of a business group that operates in the same sector or related sectors. Easily consolidated financial reports of individual holdings is not sufficient information provided to the Commission on an annual basis.

The Commission must not disclose information which it has knowledge which, by their nature are professional secret. This does not preclude publication of general information or surveys which do not include individual guidance on public companies covered by this Directive. Shall inform the Member States regularly about the results of the directive.

Targeted financial relations cover both the active transfer of public funds to business (capital contribution or donations, or loans on privileged terms taken in charge by the parties) and passive transfer (not paying the benefits, does not cover claims or waiving the normal remuneration of public resources employers and compensation duties imposed by the public power company).

Obligation arising from this for states is to specify in the accounts of public enterprises, the ceiling and the intended use of public resources and providing them to the Commission, if it complains, during the five years following.

Commission adopted on May 16, 1988, a directive to free competition on the Community market for telecommunications terminal equipment (modems, telex machines, telephone boxes), and on June 22, 1989, a directive for the liberalization of telecommunications services[13].

Two decisions were made to Member States on April 24, 1985, namely Greece (decision relating to a law that promote public sector insurance companies), and on June 22, 1987, Spain, for measures to reductions of reserve air and sea residents of the Canary and Balearic islands, excluding them from the benefit of Member States on the other residents living in these islands[14].

[13] G. Druesne, G. Kremlis, *cited work*, p. 100
[14] G. Druesne, G. Kremlis, *cited work*, p. 100

II. Commercial (trade) monopolies

Article 31 (ex 37) EC on the "monopolies of which are commercial" appears in chapter devoted to elimination of quantitative restrictions between Member States, that a provision dealing with free movement of goods, and not in the chapter "competition rules". The authors of Treaty found that suppression of the Treaty, in intra-Community customs duties and taxes equivalent to equivalent restrictions would be sufficient to guarantee the free movement of goods on a national commercial monopoly. Famous Spaak Report, established after the Messina conference of April 21, 1956, noted that when the volume of imports resulting from the institutionalization of a monopoly buyer, given to a public or a private groups, "the resulting confusion with the very limited imports buyer. So you can not automatically apply a formula to extend the quotas, it is not recommended to buy certain products that are not necessarily required. It was envisaged simply end these monopolies, which often responded establishing purely political concerns. Thus Article 37 is part of a progressive organization requires Member States during the transitional period requirement has been met with delay and whose degree of achievement is still imperfect[15].

II.1 The notion of commercial monopoly

Court of Justice gave a general definition (decision of July 15, 1964, because Costa ENEL) in connection with nationalization in Italy the production and distribution of electricity. It considered that such monopolies "should on the one hand, must be intended transaction on a commercial product may be subject to competition and trade between Member States and, on the other hand, can play an effective role in the exchanges[16].

It will automatically exclude the application of Article 37 service activities, even if they are in the form of monopoly. For delivery of private teledistribution system that exists in Italy, the Court noted that the issue of televised messages (with advertising) is a provision of services not covered by the provisions of commercial monopoly, because it does not cover trade in goods (decision of April 30, 1974, case Sacchi). It should also be limited effects on intra-Community trade monopoly.

The objective of Article 31 (ex. 37) EC is to ensure free movement of goods within the Common Market, not valid for imports of goods from third countries (decision of March 13, 1979, case Hansen).

Article 31 (ex. 37) EC provides that its provisions "shall apply to any body through which a Member State, legally or *de facto* control, handles or influence, directly or indirectly, imports or exports between Member States There may be an administration of a State, of a public undertaking, on a national society or the private companies.

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[15] G. Druesne, G. Kremlis, *cited work*, p. 101
[16] G. Druesne, G. Kremlis, *cited work*, p. 103

In other words, it seeks to eliminate discrimination, particularly those consisting of exclusive rights.

II.2 Exclusive rights

Concerned with maintaining normal competitive conditions between Member States and equality of opportunity for products imported from other Member States, the law goes far enough considering the interpretation of the concept of discrimination, to the Italian tobacco monopoly, the exclusive right to import constitute discrimination, shown to exporters Community (Case of February 3, 1976, case Manghera).

So if the commercial monopolies can survive, the organization must not necessarily lead to the abolition of exclusive import rights of the State, but still the monopoly of one withdraws its essential components[17].

The same analysis can be applied in this case, although the Commission has not acted on that point. Since the free movement of goods concerns, after the period of transition, the products in monopoly, there is no reason to distinguish barriers affecting imports or exports. The exclusive right to export is comparable to a quantitative restriction on the export (Article 34)[18].

The problem is more delicate in this case, the case of products imported from other Member States to be marketed domestically. It is considered that raising import duties and that it automatically entails marketing Order to organize the monopoly power of state regulators allow very significant in terms of marketing, provided that not violate the rules of competition between economic operators in the retail price[19].

Article 31 (ex 37) EC states that a monopoly can retain the exclusive right to manufacture a product in terms of Article 222 of the Treaty. It is covers the exclusive right to market its own production state.

Obligation organization translates to monopolies in trade between Member States by the loss of exclusive rights to import and export and trading law by the disappearance of imported products. Instead, it is allowed to maintain the monopoly of production and marketing of domestic products[20].

Prohibition of discrimination applies not only to import and export operations themselves, but also other related to the existence of monopoly practices affecting trade between Member States. The taxation of imported products in terms different from those in the case of taxation of products national covered by Article 31 (ex 37) EC, and marketing a national product at a price far too low compared to that of a similar product imported from another Member State. However, nothing prohibits the Member State to another Member State impose unique product imported to compensate for the difference between the sales price of the product in their country and pay much higher prices because of monopoly, domestic

[17] G. Druesne, G. Kremlis, *cited work*, p. 104
[18] G. Druesne, G. Kremlis, *cited work*, p. 104
[19] G. Druesne, G. Kremlis, *cited work*, p. 107
[20] G. Druesne, G. Kremlis, *cited work*, p. 108

manufacturers of the same product (Case of 17 February 1976, case Miritz), and, conversely, to impose national products against similar imported products (decision of March 13, 1979, case Peureux).

III. Legal regime of existing monopolies

From a chronological point of view, some fields of activity, such as energy markets were considered fields of activity legally exempt from competition. As an effect of specific technical and economic characteristics of energy markets, they were considered to be natural monopolies[21].

Since then, their number has been reduced as an effect of mergers and takeovers by foreign suppliers. In Germany for example, there are four top energy companies, EnBW Energie Baden-Württemberg AG, E.ON AG, RWE AG, and Vattenfall Europe AG. These companies are not state-owned, having mixed capital participations or are mainly private enterprises. RWE AG has on a one-third participation of municipal governments. The Free State of Bavaria has a 2.5% participation of E.ON. The French state owned enterprise Electricité de France owns about 45% of EnBW AG. Swedish Vattenfall AB, also state-owned, owns 89% of Vattenfall Europe AG.

In theory, European Union competition law must apply just as well to state-owned companies as to private companies. Article 106 of the Treaty on the Functioning of the European Union says to the member states that the competition rules apply also to state-owned companies and that national laws limiting the effectiveness of the competition rules would be in violation of the Treaty. Article 106(1) in combination with Article 101 and 102 obliges the Member States to abstain from imposing anticompetitive behaviour on their public or privileged undertakings. [22]

The term "services of general economic interest" is not defined in the Treaty. It is refering obviously to the conventional utilities such as postal services, telecommunication services, gas, electricity, provision of services in the transport sector which are not viable on its own etc.

Services of general economic interest are regulated in arts. 14 and 106, para. 2 TFEU. Their main characteristics are the public service obligation and the universality of service[23].

Member states have an absolute power in identifying services of general economic interest.

Art. 1 of the Protocol no. 26 of the Treaty of Lisbon says that „the essential role and the wide discretion of national, regional and local authorities in providing,

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[21] T. von Danwitz, *Regulation and liberalization of the european energy market – A german view*, Energy Law Journal, Vol. 27/2006, p. 425

[22] H. Mittal, *Applicability of competition law principles on public sector undertakings: An analysis of CCI orders and other jurisdictions*, Internship report, 2013, p. 6

[23] N. Ruccia, *The legal framework of services of general economic interest in the European Union*, Fourth Annual Conference on competition and regulation in network industries, Brussels, 2011, p. 4

commissioning and organising services of general economic interest as closely as possible to the needs of the users"[24].

In the same time, the content of services of general economic interest has as source national traditions concerning public services. Protocol no. 26 of the Treaty of Lisbon recognises "the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations".

Liberalization of services of general economic interest and privatization of public enterprises providing them are necessary in order to maintain the proper functioning of competitive mechanisms. The defense of the public interest can be kept through the provision of instruments for Member States to control the privatized enterprises. The most important is represented by the golden shares. They are nominal shares, held by governments, giving them the right of decisive vote in a shareholders-meeting and in specified circumstances[25].

Golden shares have in general special (weighted voting) rights attached, and are kept by a selling entity to ensure they retain an element of influence over the company to be sold. In some privatisations cases in the EU, member states have retained golden shares in the privatised company. Even golden shares can take various forms, they mostly are veto rights which could be used to block the sale of shares or strategic assets, to limit the size of shareholdings, or to appoint directors to the board. As a result, they give to the member state a degree of control over the privatised company, in order to be in line with the member state's national interests[26].

The privatization types can be considered as 'proprietary privatization' and 'functional privatization'. Proprietary privatization is the transfer of property rights from the state to private persons, usually involving an act of sale. The most prominent and most common case is of course the sale of public enterprises.

Functional privatization is when the state delegates the exercise of a state to a private person without any property rights being transferred, involving some kind of an act of delegation[27].

Due to the differing degrees of legal protection of public services inside the member states of the European Union, there have been conflicts within the European Union as to the proportion to which public utility markets should be opened to competition. The Great Britain model of liberalization is considered as a threat to the values of public service, while France's model is seen in the Anglo-Saxon world as protecting inefficient state enterprises using a system of special privileges[28].

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[24] N. Ruccia, *cited work*, p. 4
[25] N. Ruccia, *cited work*, p. 10
[26] N. Ruccia, *cited work*, p. 10
[27] A. Kaidatzis, *A Typology of the Constitutional Limitations on Privatization*, VII World Congress of Constitutional Law "Rethinking the Boundaries of Constitutional Law", Athens, June 11-152007, p. 4
[28] T. Prosser, *Public service law: Privatization unexpected offspring*, Duke University Law Journal, no. 4/2000, p. 77

The objectives of competition law have been affected in a negative way by the Treaty of Lisbon.

This treaty modified the status of competition law by removing it from one of the activities of the European Union. The Treaty on European Union (TEU) setting out the fundamental principles on which the European Union is based. Article 3(3) TEU stipulates that "the Union shall establish an internal market." In the new legal order, references to a system of undistorted competition have been deleted in the treaties main texts[29].

Instead, competition is mentioned in Protocol No. 27 on the internal market and competition.

Conclusions

Public enterprises and trade monopolies should not have preferential treatment in competition. At the same time, to consider the fact that they serve the public interest. State measures taken in this area should be adequate to achieve the objectives. European Union policy towards public service must be oriented towards the implementation of competition policy.

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[29] E. Szyszczak, *Controlling Dominance in European Markets*, Fordham International Law Journal, no. 6/2011, p. 1748