

## APPLICATION OF ADMINISTRATIVE LAW TO PRIVATIZATIONS IN THE NETHERLANDS

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### Preliminary remarks

Administrative law in the Netherlands is applicable to any action with regard to the execution of public law power. Public law power is defined as authority to decide on the behaviour of another person. Application of administrative law is not entrusted to governmental bodies only. It can be applicable via acts of privatised organisations as well. The most important matter is though, the application of administrative law with regard to privatised organisations. Privatised organisations are largely regulated by administrative law. In the process of conversion from a state organisation towards a privatised company, administrative law is applicable in all stages.

In this essay we will describe in what length and to what decree administrative law to protect the public interest is developed, as regulations on privatisation largely provide a mixture of private law and public law aspects. As regulations for privatisations are growing, a system of checks and balances is elaborating. Special supervisory bodies or special guarantees for private law bodies, obtaining a monopoly on a privatised market, are developing. These will be discussed as well.

### 1 General overview of administrative law

The Constitution of the Netherlands is written and, with all due respect, could be characterised as a pamphlet, under recognition of its broader meaning. It protects the right of property, but it does not contain detailed articles on issues as property, freedom of negotiation or administrative law. Property rights are not dependent on protection by the Constitution only, international treaties offer protection as well. Nowadays protection as is regulated in EC Treaties, is often called upon.

Furthermore a law with a nearly constitutional status is relevant within the context of privatisation, namely: the general administrative law Act. This Act contains general norms with regard to decisions of all administrative authorities and enforcement of public law power in the Netherlands.

A privatisation is regulated by a specific Act for the privatisation as such, enforced by many Decree-laws and ordinances, and an Act with regard to the supervision. Transition law is laid down in the Acts.

The legal way to privatise on state level is to design a Bill, laid out by the ministry that is charged with the policy upon the moment of privatisation. All ministries have been called upon to undertake privatisations. To enable the various ministries to fulfil the operation of privatisation successfully, a knowledge centre is vested in the ministry of Finance, Interdepartementale Begeleidingscommissie Privatisering (IBP), i.e. the interministerial advisory service for privatisation. Though consultation of this centre is not obligatory for other ministries, this centre is often approached. It published a guidebook, under the responsibility of the Minister of Finance, containing the main issues in privatisation. The guidebook suggests the

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use of a checklist, which mentions amongst other checks, the following:

- Is the state activity, taken into consideration the Constitution and the current laws, a suitable candidate for privatisation,
- Is influence of the Government necessary, after privatisation,
- Which conditions follow from the rule of law,
- Which conditions should be met from a legal and organisational point of view?

Though the limitations, set by the Constitution, are rather marginal, they offer indications about the level of regulating. Taxing, for example, could never be completely privatised, as the Constitution prescribes taxing by an Act.

The choice between different forms of government withdrawal could also be guided by the degree of the desirable ministerial accountability, indicated in the second checkpoint. In case of rejection, the parliament cannot hold ministers accountable for any aspect of activities, performed in the market. The choice for a complete withdrawal of the state is not unavoidable. Other forms of privatisation are in many cases to prefer, if some aspects of the activities have to remain under the influence of the government.

Knowledge of parties concerned should be timely called for, before starting the operation of privatisation as such. Looking for assistance facilitates acting in compliance with the last checkpoint of the guidebook, on legality. For example the minister of home affairs should always be given the opportunity to assess the effects of a privatisation for the legal position of civil servants, the minister of social affairs for the effects on pensions and labourconditions, et cetera.

## **2 The political and economic context**

States are recommended to limit their duties in order to perform fewer tasks better. Privatisation has been part of the political debate in the Netherlands since 1981. Elements of a centrally planned economy have been replaced by a market-oriented approach. Privatisation is supposed to generate a more effective management of the topic.

The continuing integration as is foreseen in the legal policy of the EC, forces to increase competition. Growing competition is anyhow a characteristic of the international market. The government of the Netherlands has to cut back its redistributive role, which was rather large. Furthermore considerations with regard to allocation of resources and productive use of activa are relevant.

The governmental administration is often stigmatised as a more or less ponderous body, slowing down the management of a topic instead of running it in a more economic way. By privatisation the obstacles, characteristic for governmental way of handling, vanish and make room for a more goal-oriented way of working. Making profit is not the main issue, but more or less the spin off, resulting from a more effective way of working. Privatisation might by the way reduce the complaints of private businesses about unfair competition by state-owned companies.

Comparable considerations are decisive in leaving a number of organizations in the private sphere. Only some of their activities will be regulated by statutory law. This was the case for example with *De Nederlandsche Bank N.V.* (The Bank of the Netherlands, u.c.) and *de Stichting Toezicht Effectenverkeer* (Foundation

Supervision Stake trading). In the end regulations are similar, be it to regulate a former state organization, or to regulate a traditionally private organization.

Three main forms of privatisation are used to focus on the differences:

- rejection: complete transition from the public sphere into the private sphere, be it gradually. Rejection can be achieved by selling a going concern to a private company or by selling stakes of which the state was the holder.
- Contracting-out: production of a good or a service is entrusted to a private company, possibly with the transference of staff,
- liberation: a profitable stateactivity is transubstantiated into a legal and economic autonomic body, which can be a private company or an agency under public law.

Rejection as such is in more complicated cases introduced by a process of gradually withdrawal of the government, as is usual with the third kind. Outplacement regards a way of handling only; it does not need special legislation.

### **3 Controlling agencies**

Privatisation is regulated per issue, though some general guidelines are now developed. Standards and controlling of actions by privatised companies have to be regulated. The methods to set standards are various and linked with the nature of the privatised activity.

In case of "outplacement" a form of private control only might be sufficient. If "liberation" is at stake, it is largely preferable to lay down some norms in an Act and to charge a Supervisory Board with most of the assignments of ruling and controlling. Minister are deemed to be less fit for the details of these tasks, while they might be influenced by political preferences, with a potential to affect the functioning of the open market. To minimise the negative effects of ministerial interference, an agency could be charged with the power to control the companies in certain markets. To ensure an independent control, instituting an independent supervisory Board might be the best way. Boards usually have the authority to regulate, recommend certain policies and to impose an administrative sanction on the legal body or bodies within its working field. Boards, composed of professionals, are granted with public law authority. Their decisions are contestable before the administrative law courts. Apart from these Boards, every legal person in private law shall have, in compliance with private law, its own organization that includes controlling committees.

### **4 The safeguarding of public interests**

#### *4.1 Methods*

The Research Council for Government policies (WRR) dedicated a study on the effects of privatisations on the public interests. The main issue was, in the view of the WRR: the contribution of public and private responsibilities should be established, with due respect for the obligation of the government to perform an overall responsibility for the public interest. What should be considered as the public interest is changeable, due to international relations, the development of technology

and political views. The preferences for certain methods of safeguarding and weighing them are therefore also changing.

Methodically speaking, safeguarding of public interest could be achieved by the following:

- rules (from Acts or contracts);
- competition;
- hierarchy;
- creating values.

Most cases of privatisation will need regulating by Acts, not only for the conversion itself, but to keep certain standards alive in the market as well. The necessary refining in the rules is dependent on the subject of the privatisations.

The public interest might be served by competition, but only under specific conditions. Even if the competition is real, the public interest might need more guarantees. If privatisation leads to competition *for* the market only and not to competition *in* an open market, competition is in fact void. The choice between several candidates for the rights of a monopolised market might be real the first time the market is available for a temporarily concession, but that will certainly not be the case the next time the concession will be put for auction in one way or another (for example the case of the Netherlands railway infrastructure). The position of the company that got the concession in the first place is almost unbeatable for other competitors in a second or next round.

Hierarchy as a safeguard includes supervision of a political authority over the actions of a privatised company. Statutory law should regulate powers for a minister, who is made accountable. This construction can only respect privatisation and safeguard the public interest as well, if the supervision is not prohibitive to the development of the privatised company. Too close supervision might mock the privatisation. Notable is also the fact that national authorities are losing their position in the ranking in favour of international authorities, in case of the Netherlands especially in favour of the EEC. Hierarchy will then involve other political levels.

A reliable condition for safeguarding the public interest might be also the professionalism of the employees. Some companies or institutions cannot function without people with a high education, like hospitals. In such a case the public interest will probably not be damaged, while the standard of the services will be sufficient. Professionals will likely develop values to maintain the standards of their profession.

A combination of two or more methods of safeguarding is in most cases the best way.

#### 4.2 *Checkpoints*

Reorganizing public and private responsibilities should always be started with the public interest in view. The best possible way to serve public interests should be the aim of such reorganisations. Though views on the best way to serve public interests, might differ: the debate on the *what* of privatisations should not prohibit the development of the best possible way *how* to do it. The WRR endeavours to contribute to good procedures in privatisations. It is for this reason, the WRR developed five main checkpoints for good governance in privatisation:

- democratic legitimisation,
- equity before the law,
- legal certainty,
- efficiency,
- efficacy.

Democratic legitimisation holds two items: democratic steering and democratic accountability. To accomplish his accountability towards parliament, a minister should have the power to give directions to the privatised company: without power no accountability (and v.v.). The necessary power can be contributed in various ways. Aside from the various methods in the public domain, other forms of founding democratic legitimisation are feasible. In a more traditional vision an immediate link between responsibility for the public interest and public domain, might be deemed as the only possible way. Though democratic legitimisation for the public interest is essential, accountability within the public domain is not the only way to achieve it. Other methods are feasible. It might be made obligatory for the companies to publish annual reports, to respond to special representative or independent councils and to operate with an objective supervisory board. With certain creativity democratic legitimisation might be provided in a different, but effective way. It can be seen as a challenge in privatisation to make privatised companies more responsible towards society. Guarantees should however not develop into a detailed network of rules, which will make the privatisation void.

The strains of the principle of equity before law might corner the options of a company too sharply and restrict it too much to operate effectively on an open market. And moreover, from the other hand, competition might lead companies into infringement of the principle. A commercial insurance company is to be expected to exclude risk groups, though behaviour like that is not socially correct. Of course an attitude like that could be prohibited by law, but making detailed rules on how to run a company might affect the company's position on the open market, or have more effects on the functioning of the open market as such. For these reasons the government might refrain from conversion of state activities into an open market system, if the principle of equity before the law is at stake.

Legal certainty is partly connected with predictability of actions of the administration. The administration is tied to public law rules and citizens know what to expect by reading the rules. To draw the conclusion that public law has a monopoly in legal certainty, would be incorrect however. Two remarks could be made. Private law companies are bound to produce certainty towards the public as well. And the public legal certainty is limited in itself. It cannot be denied, that rules leave room for interpretation and civil servants are partly free to act in compliance with their own common sense. This is a phenomenon known as the discretion of public authorities. The freedom of private companies is guided by law that can set minimum standards for quality and maximum levels for prices. With respect to the principle of legal certainty it might be possible in many cases to find a balance between the need for legal certainty and reasonable freedom for market options. If too many rules are needed however, the government should refrain from transformation of state activities into open market competition.

With regard to the last two checkpoints might be remarked: □a new mix

between government and market as coordination mechanisms<sup>1</sup> (Bovenberg, 1999) should be created. Whether a public or a private organisation of a service is effective or efficient depends mainly on the character of the service. Electricity was due to be traded on a monopoly market, because the infrastructure was technically too less sophisticated to allow competition (E.E. ten Heuvelhof, a.o.). Nowadays infrastructures with regard to electricity allow competition without losing the availability of electricity for everybody. This makes privatisation feasible. In theory social welfare might be privatised, with substantial financial support of the government. It is however not predictable that such a transformation will favour efficacy and efficiency. In situations like that a good reason to privatise is hard to find; the challenge is not in the decision to privatise or not, but to be sought in finding a good institutional frame for management of the product.

## 5 Private corporations with public tasks<sup>1</sup>

### 5.1 Introduction

Some forms of privatisation do not imply a total rejection by the government of the tasks which were formerly carried out by organs of the government themselves. The objective of privatisation of these tasks, which are still regarded as important in the general interest of society, is not as much to get rid of any government influence, but mainly to carry out these tasks in a way that is supposed to be more efficient or market conform<sup>2</sup>. The motives of privatisation are dealt with in chapter 1.

Being privatised, the form in which these tasks are carried out is those of private legal bodies, mainly public<sup>2</sup> companies limited by shares (NV) or private companies with limited liability (BV). Sometimes the form of a foundation (*stichting*) is used. These three legal persons are regulated in chapter 2 of the Civil Code (BW). Hereafter we will focus on the two types of companies and leave the foundation aside.

In a considerable amount of cases the government wants to maintain a certain degree of influence in the way these tasks with a general interest and therewith a public character are carried out by a private organisation.

In Dutch law organisations with a mixed character, such as in France *le société d'économie mixte*, are not developed. And apart from the public organisations governed by legislation prescribed in the Constitution, general rules on organisations with a public law character are underdeveloped. Of course there are a lot of so-called independent administrative bodies (*zelfstandige bestuursorganen*) more or less comparable with administrative agencies. But when we privatisation is at stake the form can only be a legal body according to private law.

This implies inherently a certain tension between the private form of the legal

<sup>1</sup> While preparing this chapter we heavily relied on the study of C.A. Schreuder, *Publiekrechtelijke taken, privaatrechtelijke rechtspersonen*, Kluwer, Deventer 1994

<sup>2</sup> The terms 'public' and 'private' are used here in a different sense than in the distinction between public and private law. Both the NV and the BV are legal persons according to private law. Public here has to do with 'openness' or 'transparency', private with the 'closed' structure of the BV.

body and the more or less public content of the tasks that have to be executed.

In general this has to do with the relation between private and public law in the Dutch legal system. Departing from the viewpoint that government can use private law to execute public tasks, the important notion is developed over the last decades in both case law and legislation, that when administrative authorities do so, a mix of private and public law is applicable.

In this respect – and not the least for the subject of this paper – it is important that we discern between two major fields of private law. I.e. contract law in general and the law governing private legal bodies.

Regarding contract law we have to keep in mind that in Dutch law we do not have public contract law to speak of. For Dutch lawyers a contract is a private contract. Connected with the notion we just mentioned, this does not mean that a government contract is governed by public law only. On the contrary, when a public authority uses a contract the applicable law is very often a mix of private and public law. Being a flexible instrument a contract very easily absorbs public law. To a great extent one can, so to speak, “colour” (pre) contractual relations with elements of public law or in another metaphor “fill” contracts with a “public” content.

In this respect the law concerning private legal bodies is different. This has to do with the structure of this part of law. Law concerning organisations has an internal structure. It has to deal with the different competences of the different organs of the organisation. In most cases the legal provisions bring about a certain balance of powers. Public rules can easily interfere with this balance and disturb it. Another aspect is that a private company has a specific interest, that cannot be equal with the general interest public authorities always have to keep in mind. We will elaborate on that point later on.

For now it is sufficient to make clear that law regarding private organisations is vulnerable for “alien” influences.

To use one other metaphor: one can compare contract law with a balloon, it is empty inside, you can fill it with different contents and only when the pressure becomes too high it will burst. Law on organisations you can compare with a honeycomb, it has an internal structure which can be damaged very easily.

So, coming back to our subject, it is probable that there are inherent legal limits to the way and extent to which public authorities are allowed to influence private corporations. And that goes also for private corporations executing tasks regarded important for the general interest.

In the following paragraphs we will discuss the possibilities (par 5.2) and the limits (par. 5.3) of government influence in private law companies. In par 5.4 we will give some attention to the influence of public law on the output of these companies. In par 5.5 we conclude with some conclusions.

## 5.2 Possibilities of government influence in public and private companies

In general public authorities with a regulatory competence can exercise influence on public and private companies in two different ways:

- a. by using the instruments of private law.
- b. by means of specific public law regulation

Ad.a Strictly the use of private law in exercising influence on privatised organisations is not a subject we should discuss in a paper devoted to the role of administrative law in privatisation. The use of private legal instruments per se is not a matter of administrative law. But it is obvious that the two ways are closely linked together in the sense that specific public law regulation is only appropriate when the regular instruments of the private law on legal persons are not sufficient. So since the two above mentioned ways have to be regarded as complementary, we cannot do without any attention to the first way of influence.

Important to note is that the regulation of Ch.2 CC is mandatory. The formal act, according to art. 177 *Comptabiliteitswet*, necessary for the government to found a company can theoretically vary the system of the legal person, but in general it is accepted that the State as a founder of a public or private company has to stay within the limits of Ch 2 CC.

In this respect we have to focus on two important bodies: the shareholders meeting and the supervisory board. The first is common to both the public and private company. The last is only optional for the regular public company and the private company, but obligatory for the statutory two-tier company (*structuurvennootschap*). Since major privatisations have taken place by founding a two-tier company the supervisory board is in this respect a common feature.

A common way of exercising influence is to participate in the company as a shareholder. The State or other public authorities can participate as a shareholder and have the same powers as "normal" shareholders. In this respect it is noteworthy that every shareholder may look after his own interests. For any public authority this interest has to be the common interest of society. This implies that, where normal shareholders mostly are only interested in making profit on their shares, a public authority mostly will be interested in the companies activities and policy decisions as such. In many cases this is reflected also in the formulation of the goal or mission statement in the formal act by which the company is founded.

This makes it more important for the public authority than for other shareholders that he can exercise influence on the decision of the appointment of executive board members (art. 2:132 CC) and on the decision making powers of the executive board, among others by reservation of the right of approval on certain decisions or reserving the authority to give instructions (art. 2:129 CC). These instructions however must not completely wipe out the discretion of decision-making the executive board normally has. Principally the power to give instruction cannot go further than for normal shareholders and can only be of a general nature. Instructions in concrete cases hamper the freedom to exercise the decision-making power of the executive board to much. Instructions of the shareholders meeting can only relate to more general aspects of the companies policy on financial, social economic and human resources issues.

Secondly representation of an administrative authority in the supervisory board can be an important method of influencing the policy of the company. The supervisory board decides on the annual account and has the right of approval of a number of executive decisions as stated in art. 2:164 BW ( a.o. financial structure company. This is especially the case in the statutory two-tier company, where the supervisory board has the authority to appoint the executive board, of the company, cooperation, investments, changes in the articles of

association).

Art 2:158 par 12 BW gives the opportunity that the articles of association provide for one or more special supervisory directors to be appointed by public authorities, mainly the national government. This right of appointment is an exception to the rule that the members of the supervisory board are appointed by the board himself. This opportunity is, according to the law, especially appropriate when the common interest is involved in the company in a special way. It is rather obvious that in cases of privatisation, where the government wants to maintain a certain degree of influence this will be the case. So almost all statutory acts by which in the framework of privatisation a company is founded, provide for a possibility for appointing one or more special supervisory board members.

As to the extent of the influence of the government can have through the special supervisor one can suppose that there is an inherent tension between the interest of the company as such on which the supervisory board has to focus and the public interest which has to be the focus of any public authority. We will deal with this problem when we discuss the limits of government influence in par. 5.3.

Ad b. Besides the instrument of the private law on legal persons the government can exercise influence by means of specific powers on the basis of public law. Basically this is only necessary when the possibilities inside the private law are deficient. In this sense specific rules based on public law are a complement to the instruments based on private law.

Obviously the government as legislator can and will have a substantive influence, since in the formal act, that is, as we mentioned before, necessary for founding a private legal body the goal and the tasks of the company will be defined and assigned. This assignment implies that the assigned tasks have to be executed. In this sense there is a direct influence of the government on the company, which can still be enforced by more detailed regulations and instructions in which conditions the company has to fulfil are laid down.

Where the instruments mentioned above are of a more general character, the government can retain also more concrete powers, such as the power to appoint executives, rights of approval of tariffs, the budget. It goes without saying that the more detailed those regulations and instructions are, the more they might interfere with the discretionary powers of the executive board of the company.

### 5.3 *Limits of government influence*

#### 5.3.1 Within the context of the private law on legal persons

When the influence is exercised by using the possibilities of the private law as elaborated in par 5.2 sub a the basic question to be answered is whether or not the government in his role as shareholder or represented by a member of the supervisory board holds a different position. To which extent can the government, representing the common interest influence the different decision making bodies in the company, whose decisions all have to be directed on the company's interest. This comes down to the essential question in which way the common interest and the interest of the company differ or (partly) coincide.

In recent days the interest of the company is regarded to be more than the interest of the shareholders in the maximum return on their shares. In prevailing opinions the interest of the company is regarded as the result of balancing the different interests of those involved in the activities of the company. When, as is the case in companies we are discussing here, public authorities are involved in the company, the common interest has at least to be regarded as one of the relevant interests to be balanced. Thus the common interest can be seen as a relevant part of the interest of the company, but cannot be identical with the company's interest. That means also that a public authority within the framework of the company cannot let the common interest play the same role as it would in an organisation governed by public law. Speaking of privatisation this should not be very surprising.

Still in another way the government has to respect a balance. This is the balance between the powers attributed to the different bodies within the company's structure. This balance is based on the Civil Code and public authorities, having chosen for a form based on private law have to stay within the given interdependence of the different organs. Basically does that mean that a public authority acting as a (member of a) body of a private legal person does have similar powers as any other organ or member thereof. Exercising his power he has to represent the common interest, but this cannot be a sufficient motive to disturb the company's internal structure.

### 5.3.2 Using specific regulations based on public law

Theoretically the government can by means of a formal act vary on the rules of Ch 2 of the Civil Code. Any formal act (enacted by the Crown and the parliament) has an equal status. And the axiom *lex specialis derogat legi generali* applies. In such a case a legal person *sui generis* is created.

Although not unimportant in the context of privatisation we will leave this aside. Here we will discuss the limits of influence by public regulations. This comes down to the question to which extent the  $\square$  as we saw, obligatory – rules of Ch 2 CC, limit the enactment of public rules as elaborated in par. 5.2 sub.b.

A more general limit follows from the viewpoint we mentioned above: public law regulation should be complementary to the possibilities of the private law on legal persons. Systematically it is preferable that in cases that the government uses private legal persons the methods of influence should stay as much as possible within the framework of the private construction that has been chosen. To many deviations from the regular structure brings about a hybrid organisation and it becomes unclear whether or not we have to do with a  $\square$ real $\square$  private company. If there is a need for many special rules the form of a private legal person is may not be suitable for the issue which is at stake. This general limit plays a role in the judgement of any public rule that is meant to influence the decisions of the competent bodies of the company, whether they are of a more general or a more specific nature.

But public regulation in order to be able to influence concrete decisions even more easily interferes with the discretion which is an inherent part of the executive power in a company. That goes for instance for the power to approve the budget or annual account. Also questionable are specific rules which allow public authorities

to give instructions as to content of specific decisions the executive board has to make.

So there is a need for restraint in making specific public rules in order to influence the company representing tasks in the common interest.

That does not mean that there is no reason for specific control by the public authority on such companies. Here has to be mentioned that the Chamber of Account has the authority to control any company in which the government holds a substantial amount of shares. When the quality of the representation of the public tasks of the company is concerned the financially orientated control of the Chamber of Account may however be insufficient. Special regulation on the obligation to give information may be appropriate in cases in which the information the government can get from the regular documents he is entitled to as a shareholder or a special supervisor do not give enough specific information he may need in view on the aspects of common interest he has to represent. Sometimes special bodies for control are formed or the administrative courts are declared competent.

#### 5.4 *Public law applicable on output of private corporations*

Until so far we have discussed what the role of public law is concerned, the influence thereof on the organisational structure and the division of powers within the organisation. In this par. we will discuss the role administrative law and especially the rule of the norms of the General Administrative Law Act (Awb) plays when legal acts of private companies are judged by the courts.

In this respect we have to discern between two situations:

1. In some cases a private organisation with a public task can be qualified as an administrative organ ex art.1.1 sub b Awb. When a private organisation is vested with public authority to represent his public task he has to be regarded as an administrative organ when – and only then – he exercises his public authority. In that case the rules of the Awb are fully applicable and the administrative courts are competent. Almost all examples of such private organisations are foundations. We will therefore leave them aside. We would only like to mention here that according to art 3.1 par.2 Awb the rules of the Awb concerning *besluiten* are also applicable on private legal acts of an administrative authority if this does not contradict with nature of these acts.

2. In other cases a private organisation with public tasks will represent them without exercising public authority but using instruments based on private law. Contracts are often used and as we mentioned before these contracts are principally regarded as private contracts. Nevertheless the influence of public law on these contractual relations is undeniable. In case law the applicability of the so called principles of fair administration *zorgplicht* meanwhile partly codified in the Awb – is accepted over the last 15 year or so in cases where a public authority uses private law so also in contract law. Less clear however is whether this is the case when a private organisation representing a public task, uses instruments based on private law. The relevance of public law for private legal acts in general is shown in art. 3.14 BW in which it is stated that the exercise of power based on private law must not contradict with codified or non-codified rules of public law. So based on that point

of view one can presume that in cases wherein this exercise of private law based powers are aimed at the representation of the public interest, the application of these principles of fair administration is feasible. An interesting question in this respect however is whether or not these principles of fair administration, being developed as requirements for the activities of public authorities can be applied identically for private organisations representing public tasks. As discussed before also in this respect there can be a tension between the representation of the own interest of a company and the common interest that company has to represent (also). Here can be referred at the development of the concept of general principles of fair company policy. This concept is derived from the concept of the general principles of fair administration but that does not imply that they are identical. Fair company policy can and shall in the situations we discuss in this paper be influenced by the fact that the company has to represent the common interest. Therefore the principles of fair administration will have an impact on what has to be regarded as fair company policy in a given case. The other way around the principles of fair company policy will have an impact on the implementation of a principle of fair administration in a given case because it is a private company representing the common interest. In still other situations the two types of principles will be fairly identical representing requirements applicable to the government organisation and private companies as bureaucratic organisations alike.

### 5.5 *Conclusions*

From what is said in the previous paragraphs one can conclude in Dutch law that private and public law give numerous opportunities to a public authority to influence a private corporation representing public tasks. At the same time it is shown that there is an inherent tension between the structure of the corporation based on private law and the specific methods the government wants to use to influence the activities of the corporation representing public tasks. The key problem seems to be that on one hand the government wants to place the representation of a public task at some distance and on the other hand still wants to exercise influence.

In the role of a shareholder or supervisor the public authority tends to be more interested in the specific activities of the company and the quality thereof than a regular official would be, putting the balance of powers between the different bodies within the company under pressure. Using the possibilities of creating specific rules based on public law there is an immanent danger of unclearness as to the nature of the structure of and the division of powers within the company. Sometimes resulting in organisations *[sui generis]*. Against a widespread use of such organisations, each different from each other should be warned. In general one should consider to abstain from the use of legal persons based on public law in cases where there is a substantive need for variations on the regular structure of such companies as stated in the BW. In such cases specific organisations based on public law are preferable and doubts can be raised about the usefulness of privatisation.

## 6 A brief description of the process of privatisations

6.1 Privatisation as a policy started in the early eighties. Among the first privatisations the privatisation of the inspection of weights and measures, the state lottery and the pilotage occur. They can be seen as try outs for later operations. From then on several general topics where more explicitly dealt with, such as the distinction between real and quasi-privatisation.

Privatisation (liberation) here is considered within the context of market competition (real privatisation). Privatisation in combination with the attribution of public law authority to a foundation is in most cases undertaken to create a quasi-market. The objectives of these operations are not to create a real open market, on which making profit is the main issue. They are to stimulate a competitive attitude between institutions. Privatisation can be used as an instrument to promote competition between institutions that cannot operate without a significant support of the state. This is the case with universities for example (quasi-privatisation). We do not consider these cases here.

Privatisation is systematically organised. Once in every three or four years an operation on privatisation is started. The first step is to select suitable candidates for privatising. Unavoidable, selection is a more or less political choice, tied as it is to the view on desirable state performances. Sometimes however, other than political criteria might offer a rather easy choice. So it is to be considered where the profit of a privatisation will turn out. If it is probable that nor the state nor the client will gain profit from it, the odds are against privatisation. A more than enthusiastic adept of market philosophy only, will favour privatisation for no other reason than potential profit for not yet existing companies. In most cases a simple cost benefit analysis will lead the choice to leaving things as they are.

As soon as a candidate for a real privatisation is selected, the scope of state responsibility should be agreed upon. To serve the overall state responsibility several options should be considered.

In case a real and fair market can be created and public interest is served well by the privatisation, several legal options are open (see 5 above). It might occur that the created entity is entrusted with some public law power, although this usually not seen as the preferred construction. This is slightly different when the privatisation does not create a company, but a non-commercial foundation.

6.2 On state level, in most cases an Act is needed to perform the privatisation. Statutory law is needed to empower the minister to found a special company, to guarantee the continuity of the exploitation and other regulations (see above). Furthermore statutory law for a special legal body might be required, while the selection of optional legal bodies in the Civil Code is limited.

Another Act is needed for the supervision on the operations on the new or liberated market. This Act might organize a supervisory Board and set norms for this board. Another option is to create rules in the statute of the Board. Statutes shall contain provisions with regard to the duties of the main organs of the Board. Transitional provisions on the legal position of civil servants, the selling of state properties, e.d. are usually laid down in the last part of the main Act, by which the privatisation is organized.

*Cases*

From now on we concentrate here on the following:

- privatising of organisations that are already blessed with a decree of independency and will continue to have a monopoly (railways, for example);
- privatising of activities that were a state monopoly and that will be performed on a competitive market (Post, for example).

**7 Post and Telecommunications**

*7.1 General remarks*

Post and Telecommunications used to be a state monopoly. Several Acts gradually privatise them, under guidance of the minister of Traffic and Water affairs and the OPTA, Independent Post and Telecommunication Authority. This Board is in charge of regulating the Dutch postal and telecommunications markets. OPTA is an agency, independent and trusted with public law authority. The OPTA Act regulates its duties and powers. The minister of Traffic is partly accountable for the activities of OPTA, though cannot force it to take a decision.

*7.2 Reasons*

The Post and Telecommunication market has been privatised to obtain a better and more up to date service. Notably in the field of Telecommunications no public interest was prohibitive for the transformation into the open market.

The Parliament demanded the creation of the OPTA, by wishing an independent board of supervision, in order to guarantee a separation between national politics and the execution of supervision. The separation between the function of the state and the function of the board of supervision was also desirable, because the state is an important shareholder in various companies. European competition law also requires an independent board of supervision.

Furthermore the installation of the Board promotes democratic legitimisation and legal certainty. It should be noticed that a special democratic legitimisation is not needed in this case, while the service itself is not tied to government administration by nature. The technical status only was the source of the monopolised state market. It is a public interest to guarantee the privacy of the communications via the networks or the post. For the enforcement of the protection of privacy, a minister is still accountable by law. The law sets also rules for the responsibilities for the companies in this respect. Thus the regulation provides a typical mixture of private and public responsibility.

The General administrative law Act is applicable to the actions of the OPTA. So also in that respect a democratic basis is guaranteed. One of the provisions of this Act holds the obligation to weigh the interests of the interested parties. This weighing should be done in a reasonable way. This prescription offers a safeguard for the principle of legal certainty. The aforementioned regards the relations between the state and the OPTA. As far as the customer is concerned, legal certainty can be found in the supervision of the OPTA on the companies. The OPTA functions as a

watchdog for the development of prices. Especially it forces the Holder of the network to give way to the companies on base of proportionality. Thus also the OPTA is creating the basis for reasonable prices and equal shares of the telephone numbers for the clientele of each company.

### 7.3 *Assignments*

OPTA was primarily charged with ensuring the transformation of the telecommunication market from a monopolised market into a market featuring competition.

Also the supervision on the legality of the actions of the companies, as far as the telecommunication and post legislation and privacy regulations are concerned, is assigned to the OPTA. The main duties and powers ensuing from the aforementioned legislation are as follows:

- designation of providers with significant market power;
- settlement of disputes between providers;
- interconnection and end user tariffs;
- issuing various types of telephone numbers;
- privacy protection;
- regulating the postal concession.

In a close relation with these tasks the assignment to maintain the European rules regarding non-discrimination, transparency and tariffs can be seen. The fulfilment of these tasks is carried out in co-operation with the Dutch Authority for open competition.

As a special assignment, linked with the characteristics of the market, are the resolutions of conflicts concerning the interconnection of networks of the telecom providers. A ruling of the OPTA in this respect can be contested before the administrative law courts.

Another special assignment is the issuing of ordinary telephone numbers as well as information numbers. It does so on the basis of number plans outlining the intended use of telephone numbers. OPTA maintains a public issue register available for inspection by the general public, and which shows which numbers have been issued and which remain available.

### 7.4 *Powers*

To enable the OPTA to perform in this field, several powers are entrusted, as:

- asking for information and gaining access to documentation;
- developing procedural rules in the event of disputes between providers;
- inquiring and call for co-operation;
- imposing fines, maximum 500.000 euro;
- imposing enforcement orders;
- cancellation of issued numbers.

### 7.5 *Process*

The changing of the market itself is achieved in phases. Gradually the monopoly

position of the state is changed into an open market. The beginning of the operation can be placed in 1989. A part of the market was then liberalised. Step by step all phases are passed and finally the last phase might be reached: an effective market under certain rules and supervision of the OPTA.

#### 7.6 *The organisation*

The OPTA Commission is charged with statutory duties and powers. The OPTA Bureau in the implementation of their duties assists the Commissioners. The Bureau is characterised by a non-hierarchical organisational structure. It is divided into seven departments, in compliance with the various assignments of the OPTA: strategy and coordination; business operations, end user market, interconnection and special access, numbers and registrations, legal affairs, communications.

#### 7.7 *Conclusions*

The privatisation of telecommunication is partly achieved by creating a new authority, on which all administrative laws are applicable. The Independent supervisory board is constituted of non-political experts, thus offering a safeguard for legal certainty and equity. The main issues regarding public law are regulated in an Act. Topics as privacy and compliance with EEC rules are democratically based in this way.

The foundation of the Independent board was necessary with regard to the unavoidable monopoly of one of the companies, concerning the network. So in this case the reach of administrative law is concentrated on the Supervisory Board, and in that respect without boundaries.

## **8 Railways**

### 8.1 *General remarks*

Since 1938 the Dutch Railways (*Nederlandse Spoorwegen*, NS) has been a public limited company. Until now the state has always been the only shareholder. Formerly, it was the NS itself that owned the infrastructure, exploited the train-services and allocated the capacity of the railway-network, with financial support of the government.

### 8.2 *Reasons*

In 1991 EU-Directive 91/440 was adopted on the liberalization of the railways in Europe. The directive prescribes the separation of the infrastructure from the exploitation of the transport-services. Railway-enterprises should be liberated from public administration, transport-activities should be performed in an open market. The conversion was meant to improve efficiency and quality of the services.

The Dutch government asked the Committee Wijffels to advice on a new structure for the railinfra-market based on the principles of the Directive. The Committee advocated a transparent relationship between the state-responsibilities

and the responsibilities of the NS. Development and maintenance of the infrastructure should be separated from the transport-services and be implemented in a legal body, financed by the government. The governmental financial contributions towards the exploitation-costs of the NS needed cutting back, while giving incentives to the railway-company in order to stimulate a more market and customer-oriented attitude.

In general, the government supported the ideas of the Committee Wijffels. Government and parliament agreed on a liberation of the Dutch Railways to give way to the development of a commercial enterprise. In the end the government would not decide on the tariffs and the details of the train-schedules anymore. The governmental competences would be developing a favorable policy on the subjects of planning and financing of infrastructure, price-policy and safeguarding of adequate transport services.

### 8.3 Process

In 1995 the Minister of Transport, Public Works and Water Management made a contract with the NS. The contract provided for the liberation of the railway-company and for a separation of the infrastructure and the exploitation in different organizations. For this purpose four separate bodies were established within the NS: *Railinfratrust*, *RailNed*, *Railinfrabeheer* en *Railverkeersleiding*. *Railinfratrust* representing the legal owner of the infrastructure, *Railned* for the allocation of the railtrack-capacity, *Railinfrabeheer* for the infrastructure and *Railverkeersleiding*, directing daily rail-traffic. Parties agreed upon the government's responsibility for the policies and investments regarding the rail-infrastructure and the NS's managing the infrastructure by order of the government. Principles of legal equity (transport for all) and legal certainty (reliability of the services) were at stake.

The NS obtained the competence on the tariffs and service-level. Next to that the government would acquire some specific uneconomic regular train-services (legal equity and legal certainty).

Parliament approved of the contract, but asked for legislation as well. An Act should provide for the outplacement of the specific tasks organizations from the NS. The ownership of the infrastructure should be transferred from the NS to the state. Due to a coming EU-directive on railways was, the government was preparing itself for a fundamental change of the existing Railway Act.

In 1999 the government issued a memorandum, called Third Century Railways, which contains an outline of a picture of the future. Firstly the memorandum reported the initial results of the liberation since 1995, which could be labeled as relatively positive. While the financial governmental aid was reduced with nearly 200 million Euro, the yield was raised. The memorandum stated that the policy of liberation needed to be extended and continued. The government choose for the option of competition *for* the main railway-network rather than competition *on* the main railway-network. The ownership of the rail-infrastructure needed to be handed over from the NS to the state, even as the task-organizations *Railned*, *Railinfrabeheer* en *Railverkeersleiding*. This model of competition was to be achieved by setting up a system of concessions. The main arguments for this option were:

- Interdependence of train-services on the main network-track;
- Experiences abroad which mainly concerned competition *for* the network;
- The fact that implementation of competition *on* the network is a very complicated process and results in a relatively large management burden for the government;
- Government is obligated to stipulate conditions when there is competition *for* the track, and finally
- Research proved that competition *on* the network did not necessarily result in more advantages for the travelers.

However, the carriage of goods and certain types of regional conveyance of passengers were to be made subject to competition *on* the railway-track.

Awaiting new legislation, the government extended the contract between the state and the NS of 1995 in the Transitional Contract II. This contract was totally based on output steering instead of input steering. It contained though agreements on performances, punctuality, consumer-protection, social safety and transparency. The enforcement-provisions concerned reports, publications, the possibility of fines, the obligation on a plan of improvement and in extreme cases annulment. The contract also contained agreements on the use of the capacity of the infrastructure.

#### 8.4 *Proposed legislation*

In March 2003 EU-Directive 2001/21/EG will entry into force. This Directive regulates the legal position of the manager of the infrastructure and the position of the transporter. The organization that manages the infrastructure is responsible for the allocation of the capacity of the infrastructure, the structural as well as the incidental, in a non-discriminatory way. Furthermore, the Directive prescribes that railway-companies are obliged to pay a reasonable access charge for the use of the track, and that the regulations should be under the surveillance of an independent board of supervision.

At this moment, the Railway Act and the Concession Act are in preparation. The bills aim to create a solid framework for a well functioning railway-network that provides for competition *for* the railway-track and good quality-transport.

The responsibility for the business-permits and the safeguarding and reinforcement of the safety of the railway-network remains with the Minister of Transport. These competences are executed by the Transport Inspectorate Netherlands. The major change is the notion that although the infrastructure is state property, the manager of the infrastructure is a private organization, which has a concession for that purpose. This concessionaire is responsible for the availability of the infrastructure, meeting the legal conditions and the conditions agreed upon by the transporters. The manager develops and maintains the infrastructure and allocates the capacity of the track, based on the specific legal provisions and on a long-term agreement with the transporter.

The bills also provide for a system of concessions for the domestic conveyance of passengers. There are specific concessions for the main railway-track, regional train-services and the High Speed Track (HSL). These concessions imply an exclusive right and at the same time an obligation to operate the train-services. The

government has the power to attach regulations to the concession, for example regarding performance, reliability, punctuality or consumer-protection. This way the government sets the basic conditions for railways in The Netherlands; private organizations are obliged to operate under these conditions. For the purpose of reinforcement the Minister of Transport has the competence to impose various administrative sanctions.

The relationship between the infrastructure-manager and the transporters exists of private admission contracts. These contracts are based on the notion of equality, interdependence and collective optimization. The contracts contain agreements on the assignment of capacity and the height of the access charges. The negotiations take place under surveillance of the Netherlands competition authority. Right now the Netherlands competition authority is equipped with a specific transport-chamber, which is assigned to the surveillance of appropriate and non-discriminatory management of the infrastructure and allocation of the capacity. Regulations for the three task-organizations of the NS (*Railned, Railverkeersleiding and Railinfrabeheer*) will create one management-organization, which is responsible for the infrastructure and the allocation of capacity. The shares of these bodies are going to be transferred from the NS to the state. In the future the state may gradually sell (part of the) shares.

#### 8.5 Conclusion

At this moment the Dutch Railways are in a process of liberation. The main aim is to separate the management of the infrastructure and the allocation of capacity from the exploitation of the railway-network. The state becomes owner of the infrastructure. At this moment the Dutch government has chosen for a model of competition *for* the railway-track instead of competition *on* the track. This model is organized by way of concessions, which are given to private organizations. The minister remains responsible for business-permits and safeguarding and reinforcement of the safety. Thus democratic legitimation for basis services is guaranteed.

An independent supervisory board is assigned, especially for the relationships between the manager of the infrastructure who decides on access and the transporter. This construction contributes to legal certainty and equity.

In 2001 the Dutch Railways were confronted with a lack of reliability, punctuality and availability of carriages. These problems caused a public discussion on the liberation of the railways. With reference to the problems with the railway-network in Great Britain, warning notes can be heard about liberation. On March 27<sup>th</sup>-29<sup>th</sup> 2002 the parliament will probably vote on the two bills on liberation. Surely, in this field liberation is not completed shortly.

## 9 Conclusions

In privatisation two main tracks are followed: safeguarding the public interest and promoting the open market, as far as competition could be real. The most important issues in administrative law are entrusting sufficient power to the accountable minister and the supervisory board and setting minimum standards for quality of services and transparency of prices.

As far as an open market can not be achieved, more guarantees should be created. This is at hand if conversions from a state monopoly regards competition *for* the market only.

The process of privatisation is under the conditions of democratic legitimation (influence of ministers, public control, transparency), equity before the law (essential service for all citizens), legal certainty (predictability and availability), efficiency, efficacy. The achievement of these conditions sometimes create a tension between the private form of the privatised company and the public nature of the tasks which have to be performed.

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