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SOCIAL LIMITS TO PRIVATIZATION

*Tony Prosser**

I. INTRODUCTION

A very extensive literature has developed over the last decade stating the justifications for privatization, to a large degree based on experience in the United Kingdom as the pioneer of a large privatization program. Little has been written, however, on the limits to the privatization process. I hope that this paper will go some way towards filling that gap.

I will not restrict myself to discussing the immediate social consequences of privatization; these are fairly well documented and need to be balanced against the necessity for privatization in particular economies. I will attempt instead something more ambitious. Drawing on material mainly from Western and Central Europe, I will suggest some of the general considerations which may limit the scope of successful privatization, and which broadly share a basis in distributional and other non-economic goals. It should be made clear at the outset that they do not represent absolute limits on privatization in the sense that where they are present transfer to the private sector *cannot* be successful. Nor should it be supposed that I am proposing that the problems which they raise can be resolved through old-style nationalization (though it should be borne in mind that, especially in Central and Eastern Europe, an extensive public sector of industry will remain with us for many years into the future).¹ Rather my aim will be to suggest matters which have to be balanced against the well-rehearsed arguments *for* privatization. There may be ways of resolving the problems which these social considerations raise whilst still engaging in successful sales, and I will suggest some of them in this paper.

Two further caveats must be made. My experience is of privatization in the United Kingdom, in the rest of Western

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1. For critiques of the forms of nationalization adopted in the United Kingdom, see TONY PROSSER, *NATIONALISED INDUSTRIES AND PUBLIC CONTROL* 19-74 (1986) and NATIONAL ECONOMIC DEVELOPMENT OFFICE, *A STUDY OF UK NATIONALISED INDUSTRIES* 22-41 (1976).

Europe, in Central Europe and to a limited degree in Eastern Europe. However, in the words of a distinguished proponent of the United Kingdom privatization program, "right-wing politicians and thinkers often argue as if privatization were part of some irreversible movement which will blaze around the globe from its original site in Britain. In reality, the prediction of social and economic events cannot be precise, especially that of their timing."² It now seems to be a unanimous view that it is extremely dangerous to assume that transnational application of experience in privatization is possible, and especially that experience gained from Western Europe can be applied to the marketizing economies of Central and Eastern Europe, let alone to the rest of the world.³ Thus, as leading surveys of Central European privatization have put it, "British-style methods of privatization were shown to be of little use in the largely *sui generis* situation of a post-communist economy,"⁴ and Western-style privatization "cannot serve as a model for privatization in Eastern Europe, where capital markets do not yet exist and the very structure of market economy is to be introduced precisely through the process of privatization."⁵ To mention only one of the serious problems of the privatization process in Central and Eastern Europe, the lack of financial institutions and sources of domestic capital has led to a major concern being to avoid forms of sale which result in control of enterprises passing to the criminal "mafia" or the "nomenklatura" of former managers and party officials, neither of which are likely to exercise pressures for the improvement of the economic efficiency of enterprises.⁶ This has not been a serious problem in nations with developed financial institutions and capital markets.⁷ As a result of these national peculiarities, every attempt to generalize about privatization across

2. C.D. FOSTER, PRIVATIZATION, PUBLIC OWNERSHIP AND THE REGULATION OF NATURAL MONOPOLY 361 (1992).

3. For accounts of the particularity of national privatization experience, see COSMO GRAHAM & TONY PROSSER, PRIVATIZING PUBLIC ENTERPRISES (1991); PRIVATIZATION AND REGULATORY CHANGE IN EUROPE (Michael Moran & Tony Prosser eds., 1994).

4. ROMAN FRYDMAN ET AL., THE PRIVATIZATION PROCESS IN CENTRAL EUROPE 177 (1993) (discussing privatization process in Poland).

5. ROMAN FRYDMAN & ANDRZEJ RAPACZYNSKI, PRIVATIZATION IN EASTERN EUROPE: IS THE STATE WITHERING AWAY? 21 (1994).

6. *Id.* at 22.

7. *Id.* at 21.

national boundaries is fraught with difficulty. Nevertheless, the very difficulty of applying Western experience elsewhere may be useful in revealing limits to the privatization process.

Secondly, in order to discuss the limits to the privatization process usefully, we should know the rationales for the adoption of a program of privatization in the first place. These are highly varied, even in individual nations. Thus, in the United Kingdom, the original impetus for privatization came from short-term budgetary concerns in the form of the reduction of the public sector borrowing requirement, soon accompanied by the political theme of widening share ownership.⁸ Increasing the efficiency of industrial enterprises also became of paramount importance as did reducing opportunities for governmental intervention, joined more recently by increasing the transparency of regulation and relations with government and the creation of more sophisticated regulatory institutions.⁹ In Central and Eastern Europe the rationales for privatization are equally varied, but are dominated by the need for fundamental economic reform:

The first thing to understand about the privatization process in Eastern Europe is that, in contrast to other countries, privatization, in the environment of the transitional economies, is not a simple transfer of ownership from the state to private individuals. It is rather a process by which the very institution of property, in the sense in which lawyers and economists employ the term, is reintroduced into East European Societies.¹⁰

This range of different reasons for privatization would not matter so much were it not for the fact that different rationales may have contradictory practical implications. Thus, the increasing of economic efficiency is normally seen as requiring improved corporate governance in which closer scrutiny of management takes place.¹¹ This is contradicted by the impulse towards wider share ownership in order to legitimate

8. MATHEW BISHOP & JOHN KAY, *DOES PRIVATIZATION WORK?* 4 (1988).

9. See GRAHAM & PROSSER, *supra* note 3, at 19-33; see also J. Kay & D. Thompson, *Privatisation: A Policy in Search of a Rationale*, 96 *ECON. J.* 18-32 (1986).

10. FRYDMAN & RAPACZYNSKI, *supra* note 5, at 10.

11. *Id.* at 60.

privatization, which may lead to a fragmentation of control and also make takeover of the enterprise more difficult. Again, this problem is more acute in the former Communist countries, where the fundamental problem may be the creation of effective corporate governance, yet the need to legitimize the privatization process may lead to mass privatization techniques which fragment control, or to the sale of enterprises to their former managers on preferential terms.¹² Neither is likely to lead to improved monitoring of enterprise performance nor to aid restructuring in order to face the demands of a developing market economy. Nor is this problem limited to the former Communist countries, for this conflict between a concentration of ownership to permit effective corporate control and the widening of share ownership has become a serious problem in the infant Italian privatization program.¹³

Having understood that any attempt to apply privatization experience across national boundaries is fraught with danger, and that this is reinforced by the different rationales for privatization, often with contradictory practical implications, we are in a position to attempt to suggest limits to the privatization process. The first alleged limit to be discussed is, however, one which is of questionable validity, yet is probably most important in the legal constraints which may hinder a privatization program.

II. A FALSE LIMIT TO PRIVATIZATION: THE INHERENT NATURE OF CERTAIN ENTERPRISES AND THE CONCEPT OF A CORE OF RESERVED STATE ACTIVITY

Especially during the early days of the United Kingdom privatization program, a familiar argument leveled against it was that certain enterprises were intrinsically the business of government and so should remain under public ownership. Examples were the public utilities such as telecommunications, gas, electricity, water, and enterprises closely linked to government such as those manufacturing armaments. In other na-

12. See *id.* at 23.

13. See Andrew Hill, *Catalyst for Change*, FIN. TIMES, July 7, 1994, at 36; Robert Preston, *An Intricate Web of Influence*, FIN. TIMES, June 20, 1994, at 17; Robert Preston, *Berlusconi Faces Clash with Banker on Sell-Off*, FIN. TIMES, June 20, 1994, at 1, 18; *Roman Prodi Gets on His Bike*, FIN. TIMES, June 6, 1994, at 20.

tions, these arguments can be found reflected in a number of constitutional provisions making the privatization of certain enterprises more difficult.¹⁴ The most familiar examples were of course the former constitutions of the Communist countries, but these provisions also exist elsewhere. For example, the Preamble to the Constitution of the French Fifth Republic provides that "[a]ll property and enterprises of which the running has, or acquires, the character of a national public service or of an actual monopoly are to become public property."¹⁵ In view of the loose definition of "public service" adopted by the constitutional court,¹⁶ and the limitation of the privatization program in France to competitive enterprises, this has not caused serious problems. However, in Germany the Federal Constitution makes special provision for the federal public services such as railways, posts, telecommunications and air traffic control. To achieve even partial privatization in these cases, constitutional amendment has proved necessary, in turn requiring a special Parliamentary majority. Consequently, deals must be made with the Parliamentary opposition. Indeed, some similarities with these provisions can be found in the uncertain doctrine in United States federal constitutional law restricting the delegation of governmental functions.¹⁷

These provisions may be of considerable importance in shaping the way in which privatization has to be carried out; indeed, by forcing a more demanding scrutiny for the most far-reaching and irreversible types of privatization they may play a role in increasing transparency and legitimacy in the privatization process.¹⁸ The basic doctrine of a core of industrial activity necessarily reserved to the state has, however, been exploded by experience in the United Kingdom. The privatization program extended fairly quickly to the utilities including telecommunications, gas and electricity and even (in England and

14. See Terence Daintith & Monica Sah, *Privatisation and the Economic Neutrality of the Constitution*, 1993 PUB. L. 465, 465-87.

15. GRAHAM & PROSSER, *supra* note 3, at 76 (translating the Preamble to the Constitution of the Fifth Republic); see also *id.* at 43-47, 75-78.

16. Judgment of June 25-26, 1986 (Decision No. 86-207 DC), Con. const., available in LEXIS, Public Library, Consti File.

17. Daintith & Sah, *supra* note 14, at 475-76; see also *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

18. GRAHAM & PROSSER, *supra* note 3, at 241-52.

Wales) to water distribution and supply, in which the retention of regional monopoly was inevitable. It is now being extended to the railways, another classic example of what in Europe has traditionally been seen as a core public service activity, and one where local monopolies are likely to continue indefinitely. With the sales of British Aerospace and Royal Ordnance, the manufacture of military equipment and of armaments has been successfully privatized, as has management of the Royal Dockyards. The internal operations of the civil service has been subjected to a program of "market testing" in which those in the service have been compelled to compete to retain their work against competition from private contractors,¹⁹ whilst prison operation and aspects of policing are also facing the possibility of operation by the private sector.

This is not to say that these privatizations have not been accompanied by serious problems; the rest of this paper will clearly demonstrate that such problems have occurred in many cases. It is also clear that the nature of the enterprise being sold or contracted out will be important in determining the type of privatization which is likely to prove successful. However, the United Kingdom experience shows quite clearly that there is no core of governmental activity which *cannot* be privatized.

III. IMPLEMENTING GOVERNMENT POLICY THROUGH PUBLIC AND PRIVATE ENTERPRISES

A related argument concerns enterprises which are going to be closely linked to the implementation of governmental policy. It has been argued that such enterprises are unsuitable for privatization simply because public control necessarily involves public ownership. Examples would include strategic industries of great national importance, such as the telecommunications and energy utilities, airports, or the national flag-carrying airline. In this respect as well, experience in the United Kingdom has shown that the equation of public control with public ownership is too simple; it is not impossible to privatize whilst retaining important means of governmental intervention, but problems are raised of how that intervention will take

19. See *COMPETING FOR QUALITY: BUYING BETTER PUBLIC SERVICES*, 1991, Cm 1730.

place and how it will be coordinated for the different enterprises.

One device adopted for maintaining a degree of governmental control of privatized enterprises has been that of the golden share which was present in the case of many United Kingdom sales, and is now being employed as a key feature of the French and Italian privatization programs.²⁰ To simplify some complex and flawed provisions, they have two major aims. The first is to provide a "breathing space" for companies to establish themselves after privatization without the threat of hostile takeover, and so cannot really be seen as an example of the implementation of public policy in the long term. The second is to keep the enterprise under national control in the longer term, and effectively takes the form of giving the government power to veto changes in restrictions on shareholding, thereby limiting hostile takeovers. In a few cases (British Aerospace, Rolls-Royce and British Airways) the provisions specifically incorporated restrictions on foreign ownership, though these are seriously limited for members of the European Union by Article 221 of the Treaty of Rome, which provides for equal treatment of nationals of member states as regards the participation in the capital of companies, subject to exceptions including the protection of essential interests of state security in connection with arms and munitions. In most cases, however, golden shares were temporary provisions to provide an initial freedom from the threat of hostile takeover for newly privatized companies. This was confirmed by the government's decision not to use its golden share in the electricity distribution companies to demand a share of the proceeds from their sale of the electricity grid on the ground that the share was only intended to prevent foreign ownership.²¹

The golden share provisions have been of very little effect in the United Kingdom, partly because of their limited nature, partly because of bad drafting, but perhaps more fundamentally because their existence contradicts an important justification for privatization in a United Kingdom context; that the

20. For the background to "golden shares," see GRAHAM & PROSSER, *supra* note 3, at 141-51; Cosmo Graham & Tony Prosser, *Golden Shares: Industrial Policy by Stealth?* 1988 PUB. L. 413, 413-31.

21. Roland Rudd, *Government to Forgo Profits from National Grid Sell-Off*, FIN. TIMES, Aug. 29, 1994, at 16.

market for corporate control, largely implemented through hostile takeovers, is a key mechanism for increasing enterprise efficiency. The limited role they have played may thus be largely attributed to two special national characteristics; firstly, the relatively important role played by hostile takeovers as a means of market control in the United Kingdom, and secondly a relatively open system of markets in which keeping out foreign capital is not an aim of government policy. The argument that the preservation of national independence is essential in privatization has thus played a very small role in the United Kingdom, but may be crucial elsewhere.²² Ironically, the one case where this did emerge as a key issue, that of the amassing of a substantial holding in British Petroleum by the Kuwait Investment Office, involved a privatized company in which no golden share had been retained. Nevertheless, it proved possible to require a reduction in the holding by using ordinary competition law.²³ Rather similarly, in considering the rival bids for the privatized submarine and warship building yard of VSEL from British Aerospace and GEC the Government has stated it will not use its golden share, and discussion of its role in the sale has concentrated on competition policy and government as purchaser rather than as holder of the golden share.²⁴ Criticisms have also been made of the lack of accountability provided by company law for the exercise or nonexercise of golden shares,²⁵ although in France the use of similar provisions was required by the constitutional court to be accompanied by the giving of reasons and the availability of judicial review.²⁶

22. See FRYDMAN & RAPACZYNSKI, *supra* note 5, at 24; Sabino Cassese, *Deregulation and Privatization in Italy*, in PRIVATIZATION AND REGULATORY CHANGE IN EUROPE, *supra* note 3, at 50, 63.

23. See GRAHAM & PROSSER, *supra* note 3, at 162-63.

24. See *Base Rate Basics: VSEL*, FIN. TIMES, Dec. 8, 1994, (the Lex Column) at 16; Bernard Gray, *Battle for VSEL Intensifies After GEC Offers £532m*, FIN. TIMES, Oct. 29/30, 1994, at 1, 6; Bernard Gray, *Bids For Submarine Maker to Face UK Monopolies Inquiry*, FIN. TIMES, Dec. 8, 1994, at 1; Bernard Gray, *Britain Puts Off a Tough Decision*, FIN. TIMES, Dec. 8, 1994, at 17; *Ministry Limits VSEL Takeover*, FIN. TIMES, Oct. 14, 1994, at 9.

25. GRAHAM & PROSSER, *supra* note 3, at 144-51; Graham & Prosser, *supra* note 20.

26. Judgment of July 4, 1989 (Decision No. 89-254 DC) (Loi Modifiant la Loi No 86-912 du 6 Août 1986 Relative aux Modalités d'Application des Privations), Con. const., available in LEXIS, Public Library, Consti File; see also GRAHAM & PROSSER, *supra* note 3, at 159.

Much more important than the use of golden shares in the United Kingdom has been the use of regulatory powers which permit governmental intervention after privatization. This is not the place for a detailed exposition of the regulatory arrangements which have been adopted for the utility enterprises, and some of the problems raised will be discussed later in this paper.²⁷ It should simply be noted that regulation has imposed serious constraints on the utility enterprises, particularly on pricing and on interconnection with other service providers. Indeed, such have been the constraints that at least one privatized industry chairman has been quoted as claiming that his enterprise now faces more intervention from the public authorities than was the case under nationalization.²⁸ The most important public face of regulation is that of the regulatory agencies established at arm's length from government; however, this should not disguise the fact that government itself has retained important regulatory powers. Thus, it issues licenses permitting enterprises to operate in such areas as telecommunications, electricity and gas, determining the degree of competition which will be faced by a privatized enterprise, and the initial license granted by the minister to the enterprise will contain the key regulatory provisions under which it must operate.²⁹ Government will also retain more particular powers of intervention. These are especially important in the case of the electricity and water industries. In the case of electricity, examples include the power to require the use of non-fossil fuel (mainly nuclear) generating capacity for a proportion of each electricity supplier's sources, the power to require the maintenance of coal stocks at specified levels at power stations and to direct generators to operate, or not operate, stations at specified levels of capacity or using specified fuels. In relation to the latter provision, "It is not too far-fetched to say that it would allow the Secretary of State to take over the operation of the [industry] or a large part of it notwithstanding its

27. For an outline, see Tony Prosser, *Regulation of Privatized Enterprises: Institutions and Procedures*, in CAPITALISM, CULTURE AND ECONOMIC REGULATION 135, 135-65 (Leigh Hancher & Michael Moran eds., 1989); see also GRAHAM & PROSSER, *supra* note 3, at 175-240.

28. See, e.g., CENTO VELJANOVSKI, THE FUTURE OF INDUSTRY REGULATION IN THE UK: A REPORT OF AN INDEPENDENT INQUIRY 23 (1993); cf. FOSTER, *supra* note 2, at 352.

29. For details, see Prosser, *supra* note 27, at 145-46.

privatization."³⁰ For water, key ministerial powers include those giving him or her the power to set water quality standards and objectives in relation to environmental pollution.³¹ Ministerial powers are not limited to the large utilities; thus, for example, in relation to airports, the minister has power to promulgate traffic distribution rules and to limit aircraft movements.³²

This brief summary suggests that it is possible for governments to retain wide-ranging powers after privatization which can be used when needed to impose important constraints on enterprises. However, policy implementation is rarely concerned with discrete questions which affect only one enterprise, and problems have been encountered where there has been a need for the coordination of various industries which are subject to different regulatory regimes and different forms of market pressures, notably in the field of energy.³³ The most striking example, in the United Kingdom, is the effect of the privatization of the electricity industry on the coal industry, of which it had long been the major consumer, purchasing over 80% of coal produced. After electricity privatization, a number of the regional electricity supply companies invested heavily in new gas turbine generation plant which was likely to increase its share of generation from a negligible one to 25% of the market by 1995-1996. (There was widespread controversy as to whether this was in reality a cheaper form of generation, or whether it represented a means of transferring profits from the regulated consumer market to unregulated equity participations in generation by the supply companies at the expense of captive consumers to whom generation costs could be passed on.)³⁴ There was also a concern that gas is too useful and versatile a fuel to be used in this way when alternatives were available, and that United Kingdom gas reserves could be

30. Electricity Act, 1989, ch. 29, §§ 32-34 & annot. § 34 (Current Law Statutes Annotated 1989) (Eng.).

31. Water Industry Act, 1991, ch. 51, §§ 67-69 (Eng.); Water Resources Act, 1991, ch. 57, §§ 82-84 (Eng.).

32. Airports Act, 1986, ch. 31, §§ 31-34 (Eng.).

33. See DAN CORRY ET AL., REGULATING OUR UTILITIES 30-34 (1994).

34. See HOUSE OF COMMONS TRADE AND INDUS. SELECT COMM., FIRST REPORT, BRITISH ENERGY POLICY AND THE MARKET FOR COAL, HC 237, 1992-1993 SESS. ¶ 80 (1993).

exhausted as a result, forcing dependence on imported gas.³⁵ The "rush to gas" represented one important reason for a sudden collapse in the coal market; sales to the generators were to fall from 65 million tons to 40 million tons in 1993-1994 and 30 million tons in the following years. As a result, thirty-one out of the fifty mines in the coal industry were to close, and an irreversible loss of energy supply, it was argued, was the price paid for short-term profit advantage.

The proposed closures produced a public outcry, and a report by a House of Commons Select Committee was highly critical of the lack of an overall energy policy creating a long-term framework for the operation of market forces.³⁶ The Government's response rejected the exercise of closer control over the development of gas generation; thus, its licensing was not to be restricted and questions of the need for gas generators, their capacity, and the choice of fuels and plant type were to be left to the applicants for generation licenses.³⁷ There was indeed no power to impose conditions relating to such matters where consent had already been granted, and in the case of future consents no such conditions would be imposed.

This was an unsurprising response from a government which believes that energy policy goals are achieved most fully through market mechanisms, and that the costs of adjustment are best dealt with by limited and brief subsidies for the individuals and communities affected.³⁸ However, not all governments will be content to take this approach, and the message from this experience will be that individual privatizations will affect whole sectors, and regulatory powers related to individual industries may not be able to deal adequately with the effects elsewhere. A government intending to implement a proactive energy policy is not likely to gain through privatizing the electricity industry in the way this was done in the United Kingdom. Even here though, it is worth noting that the power to refuse consent for gas generating stations was available to

35. *Id.* ¶ 168.

36. *Id.* ¶ 281.

37. DEPARTMENT OF TRADE AND INDUSTRY, THE PROSPECTS FOR COAL: CONCLUSIONS OF THE GOVERNMENT'S COAL REVIEW, 1993, Cm 2235, ¶¶ 13.24-26. For the licensing power, see the Electricity Act, 1989, ch. 29, § 36 (Eng.).

38. See discussion *infra* text accompanying notes 74-75 concerning governmental subsidies.

the government, and the failure to do so was an expression of its policies rather than an absence of legal means to do so.

In addition to golden shares and regulation, governments may also influence the behavior of privatized enterprises through contractual techniques. This is, of course, a phenomenon well-known in the United States, both in the form of "government by contract," the use of contractual techniques to implement policy goals, and in the day-to-day business of government procurement. Contractual relations between government and privatized enterprises have also assumed considerable importance in the United Kingdom, having previously been used as a means of reorganization of private industries in key sectors.³⁹ Special problems exist in this country, however, concerning accountability for contractual interventions;⁴⁰ neither the sophisticated procedural protection offered to the contracting process by United States federal law nor the special legal regimes for government contracts associated with Continental European jurisdictions exist, although European Community law is beginning to fill the gap.⁴¹

The use of the administrative contract is assuming one particularly important role as the privatization program advances: that of providing a framework for the privatization of enterprises which are not likely to be profitable. This is most apparent in the current process of privatization of the rail network. The new system is based around the separation of the running of the network, such as tracks and signals from the provision of services on it. The latter will be carried out by operators who hold franchise agreements, a form of administrative contract agreed by a franchising director in accordance with objectives laid down by the Secretary of State. The franchises will specify the service standards to be met by operators, and the director will provide funds for each operator (it is unlikely that more than one of the 25 operating companies will be profitable without the provision of public funds).⁴² The aim is to provide competition for the franchise while still permit-

39. See GRAHAM & PROSSER, *supra* note 3, at 54-56, 164-66.

40. For a survey of the legal position, see Terence Daintith, *Regulation by Contract: the New Prerogative*, 32 CURRENT LEGAL PROBS. 41 (1979).

41. See IAN HARDEN, *THE CONTRACTING STATE* 52-57 (1992).

42. For the highly complex system involved, see Railways Act, 1993, ch. 43 (Eng.); NEW OPPORTUNITIES FOR THE RAILWAYS: THE PRIVATIZATION OF BRITISH RAIL, 1992, Cm 2021.

ting the provision of public funds to ensure the continuation of services. It is hoped that competitive disciplines and the necessity of specifying costs for individual services will increase transparency and drive down operating costs, though considerable difficulties have been met in the allocation of joint costs between operators. It is also important that the prospect of continuing governmental support is a secure one, for otherwise uncertainty will deter bidders and drive up subsidy costs.⁴³

Despite these problems, the rail example shows that there is no reason of principle why unprofitable activities cannot be privatized, and this is indeed one important role for the use of contractual techniques by government to ensure the provision of public services after privatization. However, the fact that this is possible in principle does not mean that is always the best choice in practice, a point to which I shall return in discussing the matter of transaction costs below. It simply remains to be said that governments do possess a variety of techniques which can be used to implement policy after privatization, although the exercise of these techniques can raise a number of problems in practice. The need to continue to implement public policy is not in itself a limit to privatization, although the practical means of doing so will need careful assessment.

IV. THE SOCIAL COSTS OF PRIVATIZATION

The previous sections of this article have examined some of the issues raised by the nature of enterprises being privatized and their relationship with government. I will now examine more specifically social questions which directly raise distributional concerns and questions of how the privatization process can retain legitimacy, and the resolution of these concerns which are directly related to the potential success of privatization.

In the countries of Central and Eastern Europe, policies of privatization have become associated clearly in the public mind with increased unemployment. To give some examples of rises

43. See CHRISTOPHER FOSTER, *THE ECONOMICS OF RAIL PRIVATISATION* (Centre for the Study of Regulated Industries Discussion Paper No. 7, 1994); *BR Boss Backs Subsidies*, FIN. TIMES, Dec. 5, 1994, at 6 (speech of the Chairman of British Rail).

in the unemployment rate, the official rate rose from zero percent in 1989 to 11.4% at the end of 1991 in Poland,⁴⁴ from zero percent to 5.5% at the end of 1992 in the former Czechoslovakia (11.3% in the Slovak Republic),⁴⁵ and from zero percent to eight percent by the end of 1991 in Hungary.⁴⁶ This is, of course, highly misleading as an assessment of the impact of privatization, for large-scale privatization had barely got off the ground during this period, and a number of other economic changes were having serious effects on employment. Nevertheless, evidence from the United Kingdom suggests very clearly that both the preparation for privatization and privatization itself coincide with severe reductions in the numbers of employees. This is, of course, clearest in what can be seen as declining industries. Thus, in the case of coal, the nationalized coal enterprise employed 232,410 people in 1979,⁴⁷ a figure which dropped to 104,400 in 1988.⁴⁸ Upon privatization in 1994, it had an estimated 18,868 employees.⁴⁹ In British Steel, employment in 1979 was 186,000, falling to 54,000 at privatization in 1988⁵⁰ and 40,200 in 1993.⁵¹ Serious job losses can also be found, however, in enterprises in expanding markets. Thus, British Airways had 57,741 staff in 1979;⁵² this number was reduced to 40,271 at privatization in 1987, but by 1993 had climbed to 48,960.⁵³ British Telecom had 233,447 staff while within the Post Office in 1979, a figure which had risen to 238,384 at privatization in 1979, but which had fallen to 156,000 in 1994.⁵⁴

These figures must be treated with considerable caution

44. Andrew Berg & Oliver J. Blanchard, *Stabilization and Transition: Poland, 1990-91*, in 1 THE TRANSITION IN EASTERN EUROPE: COUNTRY STUDIES 54 (Oliver J. Blanchard et al. eds., 1994).

45. Karel Dyba & Jan Svejnar, *Stabilization and Transition in Czechoslovakia*, in 1 TRANSITION IN EASTERN EUROPE: COUNTRY STUDIES, *supra* note 44, at 93, 96.

46. Kemal Dervis & Timothy Condon, *Hungary-Partial Success and Removing Challenges: The Emergence of a "Gradualist" Success Story?*, in 1 TRANSITION IN EASTERN EUROPE: COUNTRY STUDIES, *supra* note 44, at 123, 134-35.

47. BISHOP & KAY, *supra* note 8, at 45.

48. *Id.*

49. BRITISH COAL CORPORATION, ANNUAL REPORT 1993/94, at 24 (1994).

50. BISHOP & KAY, *supra* note 8, at 45.

51. BRITISH STEEL PLC, REPORT & ACCOUNTS 1993/94, at 20 (1994).

52. BISHOP & KAY, *supra* note 8, at 45.

53. BRITISH AIRWAYS, BRITISH AIRWAYS PLC REPORT & ACCOUNTS 1992-93, at 1 (1993).

54. BRITISH TELECOMMUNICATIONS, REPORT & ACCOUNTS 38 (1994).

when it comes to allocating responsibility for job losses to privatization itself. Other influences have been responsible for the world wide decline in some basic manufacturing industries and technological change. It would be possible to argue, at considerable length, about the extent to which these job losses would have occurred without privatization, and the degree to which they represent a reallocation of labor to more efficient use elsewhere in the economy. Nevertheless, in some ways it is perception rather than the actual role of privatization which matters, and there is clear evidence that the privatization process has been blamed for threatening jobs. Even in the case of the water industry, where employment has increased since privatization due to diversification, a study of the workforce found "widespread and deeply felt fears for the future" concerning job security.⁵⁵ The association of privatization with the horrors of unemployment has been exacerbated by the fact that in many cases, such as coal and steel, the job losses have been concentrated in particular regions and even communities where there is a strong traditional loyalty to the public sector employer and minimal alternative employment opportunities. Thus, two issues must be confronted by privatizing governments: how to maintain popular consent for privatization, and the extent to which alternative economic measures may be used to maintain employment levels.

Maintaining popular consent for privatization has involved measures directed at both the population as a whole and at the management and workforce of the concerns being sold. From early on in the United Kingdom privatization program, the wide distribution of shares among the population was to have been achieved through large-scale flotations of the largest enterprises, and a number of mechanisms, including vouchers to be set against utility bills and free bonus shares were intended to attract private investors, for whom a proportion of the shares were reserved. This was backed up by popular advertising campaigns. Share purchases were also made more attractive by the fact that a number of the larger sales resulted in a large premium for the initial investors due to under-

55. PETER SAUNDERS & COLIN HARRIS, *PRIVATIZATION AND POPULAR CAPITALISM* 78-87 (1994).

pricing of shares.⁵⁶ Superficially, this policy appeared successful; the number of shareholders in the United Kingdom rose from 3 million in 1979 to around 11 million by the early 1990s. However, the *proportion* of shares owned by private investors declined during the privatization program, partly because of the major role played by institutions in the flotations and partly because of sales of shares by small investors after flotations to take advantage of what were sometimes very large premia. Thus privatization certainly did not represent a democratization of share ownership in the sense of increasing the overall role of the small investor. Recent survey work in the water industry suggests that, whilst fear of renationalization may have provided short term electoral help to the government, the spread of shareholding has done little to change overall social attitudes; moreover, popular hostility to privatization has grown since the mid-1980s. This has been due to a belief that essential services should remain in the public sector, that privatization increases prices, and that as public enterprises were owned by all citizens it was wrong to sell them.⁵⁷ The study concludes:

All the indications from our survey are that the spread of share ownership has been irrelevant and inconsequential in the government's desire to foster an enterprise culture in Britain. Share ownership does not change people's attitudes about "enterprise", capitalism, the market economy or the role of government. If Britain does become a "nation of shareholders" over the next decades, this is unlikely to have any impact on the national culture.⁵⁸

Steps were also taken through preferential terms, including free shares and discounts, to encourage the take-up of shares by the workforce and management of enterprises being privatized. In this case, what does seem to have been important is the freeing of senior management from the constraints of public sector pay control, resulting in huge increases in salary after privatization; between 1979 and 1988, top executive salaries in privatized concerns increased fourfold in real terms, a process which has continued since.⁵⁹ Once more, it

56. For details, see GRAHAM & PROSSER, *supra* note 3, at 89-97.

57. SAUNDERS & HARRIS, *supra* note 55, at 120-37, 138-67.

58. *Id.* at 161.

59. See BISHOP & KAY, *supra* note 8, at 64-68; SAUNDERS & HARRIS, *supra*

seems that there was very little success in creating a new corporate culture legitimating privatization throughout the privatized companies; indeed, in the case of water, the effect seems to have been to increase polarization between management and workforce, with the latter remaining largely hostile to the change in ownership.⁶⁰ Another technique for management and workforce involvement was to encourage management/employee buy-outs where disposal was by trade sale rather than flotation; this technique was used, for example, to dispose of most of the regional bus companies, and buy-out teams seem likely to be the most important bidders for the rail operating franchises.⁶¹ Sometimes preferential terms were adopted to assist such buy-outs, and contributions made to their organizational costs by government. The subsequent history of buy-outs has been mixed; in the case of successful businesses, they have been floated with large financial gains to buy-out participants, normally after considerable cuts in the labor force; other buy-outs have met with serious financial difficulties. Nevertheless, the prospect of gains on flotation later may be one way of attracting management support for sales.

Overall United Kingdom experience thus suggests that attempts to legitimize privatization through popular and workers shareholdings have had only limited success; they may have given the government some short-term electoral advantage, but did very little to change overall attitudes to business. Similar techniques have been used in Central Europe, and here they raise the question of corporate governance in an acute form. Partly to counter the shortage of domestic capital, but also in an attempt to make the privatization process more popular, mass privatization through the issue of vouchers has been employed, involving what is effectively the free distribution of shares. The technique was pioneered on a large scale in Czechoslovakia, and employed more recently in Poland and in Russia.⁶² The problem of corporate governance has arisen through the fact that the process can result, if uncontrolled, in

note 55, at 83-84.

60. SAUNDERS & HARRIS, *supra* note 55, ch. 4.

61. See Steve Thompson et al., *Management Buy-Outs from the Public Sector: Ownership Form and Incentive Issues*, FISCAL STUDS., Aug. 1990, at 71.

62. For details, see FRYDMAN ET AL., *supra* note 4, at 79-91, 194-97.

a fragmentation of ownership leaving management effectively uncontrolled and unscrutinized. One solution lies in the role of the investment funds which will act as intermediaries in managing holdings on behalf of individual investors. Although some degree of regulation was later introduced, these funds arose in a spontaneous and unregulated way in the former Czechoslovakia, and their possible failure to meet some of their more extravagant claims for the rise in value of the holdings they will manage is seen as a major problem for the privatization process, a point given extra poignancy by the collapse of the MMM investment fund in Russia during the summer of 1994.⁶³ In Poland, by contrast, intermediaries, in the form of National Investment Funds, were deliberately created as part of the privatization process, and 60% of shares will be distributed to them; they will be charged with monitoring the performance of companies in their portfolio and will be active in their management and restructuring, having membership on the supervisory boards.⁶⁴ This would appear to be a more effective way of combining popular participation in the privatization process and an improvement in corporate control through privatization.

The issue of preference for existing managers and workforce has also become a major issue in privatization in Eastern and Central Europe. An early phase of post-Communist development was that of "spontaneous privatization" in which enterprises were transferred to their management without central control of the process, and as a result, transfers were at artificially reduced prices which enriched managers, reinforced their control over the enterprises, and discredited the concept of privatization. In later stages of privatization, various forms of employee preference have been adopted in order to gain management support, especially in Russia.⁶⁵ Again, the result is to cement the role of previous management and to hinder prospects of restructuring and improved corporate control; this problem has been recognized in Russia, and

63. See Karel Dyba & Jan Svejnar, *Stabilization and Transition in Czechoslovakia*, in 1 THE TRANSITION IN EASTERN EUROPE: COUNTRY STUDIES, *supra* note 44, at 93, 115-16; Mejstrik & Sojka, *Privatization and Regulatory Change: The Case of Czechoslovakia*, in PRIVATIZATION AND REGULATORY CHANGE IN EUROPE, *supra* note 3, at 66, 78-79.

64. FRYDMAN ET AL., *supra* note 4, at 194-97.

65. See FRYDMAN & RAPACZYNSKI, *supra* note 5, at 179-83.

in the second round of sales, steps will be taken to increase the powers of shareholders to change management.⁶⁶

The message from the progress of privatization in Central and Eastern Europe is that, in the absence of the sort of mechanisms for effective corporate control which exist in the West, measures to make privatization more popular through widening popular shareholding and providing preferential terms for management and workforce may actually hinder the process of restructuring which is required by other types of economic reform. The position has been summarized succinctly by the leading commentators on the privatization process in Central Europe:

[L]ike some of the flawed sales plans, a program of free distribution to workers threatens to leave things much as they are and to impede the economic restructuring efforts. (This is not to say, of course, that the interests of the workers are not very important or that they should not be protected by some institutional arrangements. The appropriate institutional protection of the workers' interests, however, should come in the form of trade unions and governmental regulation of employment conditions, rather than worker ownership.)⁶⁷

One example of the sort of measure which can provide such a protection for employment measures is the Acquired Rights Directive which applies to member states of the European Union.⁶⁸ This aims to prevent restructuring being carried out to the detriment of employees by transferring existing terms and conditions of employment to a new employer to whom an enterprise is transferred and providing that such a transfer does not provide a ground for dismissal. The legal problems of the application of the Directive are considerable and controversial,⁶⁹ but it does provide one means of lessening the perceived threat to employment conditions posed by privatization.

Another question is the nature of the economic measures

66. John Lloyd, *Second Wave of Sell-offs Due Next Month*, FIN. TIMES, June 20, 1994, at 3.

67. FRYDMAN & RAPACZYNSKI, *supra* note 5, at 25.

68. Council Directive 77/187, 1977 O.J. (L 61) 26.

69. See generally Cases 382/92, 382/93, *Commission v. United Kingdom*, [1994] 1 E.C.R. 2435, 2479; BRIAN NAPIER, CCT, MARKET TESTING AND EMPLOYMENT RIGHTS: THE EFFECTS OF TUPE AND THE ACQUIRED RIGHTS DIRECTIVE (1993).

which can be taken to stave off redundancies or to lessen their effects. The former raises important questions of competition law and the role of state aids granted in the process of restructuring before privatization; for members of the European Union these are subject to the control of the European Commission which will scrutinize such aids to establish whether they are in conformity with the EC Treaty. The role of such aids is a highly controversial question, especially since the Commission ruled that the privatization of the United Kingdom car manufacturer Rover involved inducements to the purchaser which breached Community law and so had to be repaid.⁷⁰ Examples of critical examination by the Commission of pre-privatization restructuring plans involving state aid have also involved the French computer company Bull, and Air France. In the latter case the Commission permitted the granting of FFfr 20 billion of aid conditional on a restructuring plan and the commencement of privatization once recovery has been achieved, having regard to the situation in the financial markets; nevertheless, the approval of the aid provoked vehement protests from rival airlines and other governments and it is being challenged before the European Court of Justice by the United Kingdom government and seven rival airlines.⁷¹ The aid to Bull was also approved as a final payment to permit restructuring before privatization.⁷² Another illustrative example is that of the German Government whose aids to shipyards in the former East Germany were permitted only under strict conditions by the Commission, including a genuine and irreversible reduction in shipbuilding capacity. The Government now faces challenge by competing Danish shipbuilders on the basis that these conditions have been breached.⁷³ The use

70. Tony Prosser & Michael Moran, *Conclusion: From National Uniqueness to Supra-National Constitution*, in *PRIVATIZATION AND REGULATORY CHANGE IN EUROPE*, *supra* note 3, at 145, 152. See generally Case C-249/90, *British Aerospace plc v. Commission*, 1992 E.C.R. 493, [1992] 1 C.M.L.R. 853.

71. For a discussion of the role of the Commission in these circumstances, see Prosser & Moran, *supra* note 70, at 148-53. The Commission decision approving aid to Air France is Commission Decision 94/653, 1994 O.J. (L 254) 73. For the challenge to the aid, see *UK Joins European Airlines to Fight Aid for Air France*, *FIN. TIMES*, Oct. 5, 1994, at 1.

72. The Commission decision suspending aid to Bull is Commission Decision 94/220, 1994 O.J. (L 107) 61. For the final decision permitting it, see Emma Tucker & John Ridding, *Brussels Approves \$2.1 Bn Rescue for Bull*, *FIN. TIMES*, Oct. 13, 1994, at 2.

73. Hilary Barnes, *Danes Attack Brussels Over Ship Subsidies*, *FIN. TIMES*,

of state aids is likely to become even more controversial. The European Commission cannot require that an enterprise be privatized as such because of the requirement of neutrality as to rules governing property ownership in Article 222 of the Treaty of Rome. Nevertheless, in the future the use of such aids simply to preserve employment without restructuring leading to privatization will be seriously called into question, outside as well as within the European Union.⁷⁴

Rather different considerations apply to measures to relieve the effects of unemployment and local industrial decline caused by restructuring before and after privatization. These measures are well accepted and have been employed in many different cases. To return to the example of the United Kingdom coal industry, after the difficulties encountered with sale of coal for electricity generation described above, it was estimated that 30,000 jobs would be lost in the coal industry plus 20,000-25,000 in other industries in coal mining communities. Special redundancy terms were agreed which would result in payments to miners with 15 years service of an average of £23,000. Additional help would come from British Coal Enterprises, a subsidiary of the coal mining enterprise, which would provide financial support for job creating businesses, workspace for new businesses and job resettlement. The efforts were highly concentrated in the close-knit mining communities, for which £200 million was made available for regeneration, including training and inward investment.⁷⁵ Despite the serious controversy about the justifications for the running down of the coal industry, it was carried out relatively smoothly in these final stages with many miners voting to accept the redundancy terms offered in the absence of any alternative, although alternative employment growth in former mining areas has been disappointing. Similar provision has been made in the former East Germany where restructuring on privatization of the old heavy industries has also had devastating consequences for local communities. In this case the privatization agency, the Treuhand, has favored investors who are prepared to guarantee higher employment and continued invest-

July 18, 1994, at 3.

74. See Prosser & Moran, *supra* note 70, at 148-53.

75. PROSPECTS FOR COAL: CONCLUSIONS OF THE GOVERNMENT'S COAL REVIEW, *supra* note 37, ch. 5.

ment levels rather than simply those making the highest bids; it has also in effect accepted negative sale prices through funding restructuring or start-up funds or loss compensation.⁷⁶ This has not prevented extensive unemployment, but it has saved potentially viable jobs and eased the transition process.

The message from this section is a simple one; we must expect privatization and the preparation for privatization to result in serious social consequences. In the situation facing the former Communist nations this may be unavoidable anyway given the scale of the transition which has to be faced. So far it has been handled without massive social disruption, but some of the measures taken to maintain popular support for privatization programs in the face of these social consequences may undermine the underlying rationale of the programs, that of subjecting enterprises to more effective market controls and corporate governance. The balance between the different forces will depend on the state of particular economies and, not least, on the strength of political institutions.

V. REGULATORY ISSUES

Privatization is intimately bound up with the creation of new institutions for the regulation of corporate behavior, both in capital and product markets. A number of writers on Eastern and Central Europe have noted that in those regions "capitalism is viewed simplistically by those who would like to embrace it as a well-oiled system consisting only of private property ownership, pure laissez-faire, and a self-adjusting market mechanism, requiring no government interference."⁷⁷ More realistically, even in Western economies:

"[I]n every actual situation government presence is as pervasive as that of transaction costs. Moreover, the regulatory activity of the government does not follow some abstract and predetermined rules, but is basically reactive to the situation in the market, both in terms of the content of regulation and the process by which they are promulgated."⁷⁸

76. Rudiger Dornbusch & Holger Wolf, *East German Economic Reconstruction*, in 1 TRANSITION IN EASTERN EUROPE: COUNTRY STUDIES, *supra* note 44, at 155.

77. Michael Bruno, *Stabilization and Reform in Eastern Europe: A Preliminary Evaluation*, in 1 TRANSITION IN EASTERN EUROPE: COUNTRY STUDIES, *supra* note 44, at 46; see also FRYDMAN & RAPACZYNSKI, *supra* note 5, at 169.

78. FRYDMAN & RAPACZYNSKI, *supra* note 5, at 172.

On the one hand this applies to corporate governance and the establishment and support of institutions through which such governance can take place; it also applies to the necessity for competition law since a major lesson of the privatization programs in the United Kingdom and elsewhere is that privatization in itself does not necessarily create competition but may even reduce it through facilitating takeovers, something illustrated clearly for example in United Kingdom aviation.⁷⁹ These issues are outside the scope of a paper on the social limits to privatization, but other problems raised by the regulation of product markets do fall squarely within it.

These regulatory problems are of course most acute in relation to the public utilities which have a considerable degree of monopoly in their role. Thus, they have mainly arisen in the United Kingdom given the prominent role of the utilities in the privatization program, especially when compared to nations such as France. However, it is now clear that other nations are moving to privatize utilities; the example of Germany has already been mentioned, and other European nations are now selling parts of the utility sector, and even Russia is now drafting a law on regulating its utilities.⁸⁰ Most importantly, European Community policy concerned with liberalization of telecommunications, posts, energy and transport markets is seeking to open up markets through limiting exclusive rights for public enterprises and by requiring the separation of regulatory functions from the provision of services. This leads to a new model of European utility enterprise, which may be under private or public ownership, but which will be subject to regulation through forms and institutions not dissimilar to those adopted on privatization in the United Kingdom.⁸¹ The United Kingdom regulatory experience is thus of broader significance; and indeed a chief justification for both privatization there and liberalization in the European

79. For the relationship of privatization and competition in principle, see J.A. Kay & Z.A. Silberstrom, *The New Industrial Policy: Privatisation and Competition*, MIDLAND BANK REV., Spring 1994, at 8. For the aviation experience, see Mike Cronshaw & David Thompson, *Competitive Advantage in European Aviation - Or Whatever Happened to BCal?*, FISCAL STUDS., Feb. 1991, at 44.

80. John Thornhill, *Russia Draws Up Legislation to Regulate Monopoly Industries*, FIN. TIMES, Sept. 13, 1994, at 2.

81. See Prosser & Moran, *supra* note 70, at 148-50.

Community is the degree of transparency which independent regulation is believed to create when compared to the secretive relations between government and public enterprise. We must examine this more closely, however, as regulation is by no means a simple activity.⁸²

It is essential to understand that there are two very different sorts of justification for regulation. The first is that of enhancing economic efficiency through providing surrogates for market forces which would otherwise not come into play due to the existence of natural monopoly characteristics in parts of the enterprises' markets.⁸³ However, there are inevitably other regulatory rationales drawn not from the goal of efficiency maximization in the sense used by economists but from social concerns; and notably the principle of universal service. These principles prevail over efficiency maximization in particular circumstances and are founded on egalitarian rights of access for the whole community to the basic means of communication and of fuel.⁸⁴ The latter principles loom large in the statutory objectives for the United Kingdom regulators and the concept of "public service" through which they are expressed is central to debates on utility liberalization in the European Union.⁸⁵

Regulatory history in the United Kingdom has shown that the regulation of privatized utilities creates two particular sorts of problems. The first is clearly social in origin, and refers to the requirement that a universal service be provided at standard rates, a requirement based on distributive concerns. A problem is that under public ownership the pricing policies of utility enterprises were not closely aligned to costs, instead involving large cross-subsidies, largely in order to avoid geographical variations in rates and often providing an element of subsidy to economically underprivileged groups, especially small domestic consumers. These pricing policies often had strong public support in view of the perception that the services provided by the utilities were part of the necessities of life,

82. For the inevitable political background to privatization and regulation, see FRYDMAN & RAPACZYNSKI, *supra* note 5, at 168-77.

83. For a sophisticated defense of this as *the* role of the utility regulator, see generally FOSTER, *supra* note 2.

84. For a detailed defense of such rights-based regulatory principles, see Tony Prosser, *Privatisation, Regulation and Public Services*, JURID. REV., Mar. 1994, at 3-17.

85. *Id.* at 12-17.

particularly in the case of fuel and water. It has proved difficult to maintain such policies after privatization. The main reason is a simple one; to enhance economic efficiency, privatization has been accompanied by the encouragement of competition. However, where internal cross-subsidy exists within a firm, competitors will be able to engage in "cream-skimming" or "cherry-picking" by competing only in those areas of the market where the utilities' prices are above costs. The response to this involves preserving elements of monopoly to permit the cross-subsidy to continue, or applying regulatory constraints to all new entrants to preserve cross-subsidy (a highly complex solution in practice)⁸⁶ or permitting the utility to rebalance its prices to bring them more closely into line with costs, a highly politically controversial solution as it is seen as withdrawing entrenched provision for less well-off groups.

The problem was met early on in the case of telecommunications, where both statute and the license under which British Telecom operates contain important universal service elements.⁸⁷ An immediate problem which confronted the telecommunications regulator was permitting the rebalancing of the company's charges upon privatization to reflect costs more closely; this had far greater benefits for business customers than for domestic users. The solution adopted was, whilst largely permitting rebalancing, to treat low-income users of telephones as a special group needing protection through a special tariff, and to require contributions from competitors towards the cost of British Telecom's losses incurred in those areas priced below cost, a policy which has inevitably proved highly controversial and the details of which are currently the subject of litigation.⁸⁸ The same problem has arisen in the

86. See CORRY ET AL., *supra* note 33.

87. British Telecommunications Act, 1984, ch. 12, § 3(1)(a) (Eng.); OFFICE OF TELECOMMUNICATIONS, DEPARTMENT OF TRADE AND INDUSTRY, LICENCE GRANTED BY THE SECRETARY OF STATE FOR TRADE AND INDUSTRY TO BRITISH TELECOMMUNICATIONS UNDER SECTION 7 OF THE TELECOMMUNICATIONS ACT 1984, at 11, 17 (1991).

88. This policy is intimately tied up with the question of the terms of interconnection with competitors to the BT network. See OFFICE OF TELECOMMUNICATIONS, STATEMENT ISSUED BY THE DIRECTOR GENERAL OF TELECOMMUNICATIONS: INTERCONNECTION AND ACCOUNTING SEPARATION: THE NEXT STEPS (1994). A similar policy is proposed for European Union telecommunications liberalization by the European Commission. See Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee: Developing

case of gas, where proposals made by the Monopolies and Mergers Commission for the liberalization of the domestic gas market (continued as a British Gas monopoly on its privatization in 1986) have raised the likelihood of substantial increases in charges for small domestic users; indeed, it seems possible that the political implications of this may delay the introduction of legislation to end the monopoly.⁸⁹ The need to retain cross-subsidization seems to have lain behind the decision not to privatize the Scottish ferry network run by Caledonian MacBrayne and the proposal to privatize the Royal Mail was embarrassingly withdrawn by the United Kingdom government at an advanced stage, largely due to fears by backbench members of Parliament for the network of rural post offices and the geographically uniform letter rate.⁹⁰

The second major regulatory problem can be dealt with very briefly as it is to some degree outside the scope of this paper, being concerned with extending competition rather than specifically social issues. In many cases, the privatized utility enterprises own networks which have to be used by competitors; again the most important examples are British Telecom and British Gas, although in the case of electricity the transmission network was privatized as a separate company owned through a holding company by the twelve regional distribution and supply companies. Much regulatory attention has had to be paid to the question of how to ensure access on competitive terms to the network by competitors. In the case of British Telecom, this has been accomplished by detailed regulatory controls and the requirement of separate accounts for the network business.⁹¹ In the report on gas mentioned above, the Monopolies and Mergers Commission went so far as to recommend that British Gas be required to divest its supply operation in order to prevent a conflict between supply and

Universal Services for Telecommunications in a Competitive Environment, COM(93)543 final.

89. See MONOPOLIES AND MERGERS COMMISSION, GAS, 1993, Cm 2314. For proposed regulatory responses, see OFFICE OF GAS SUPPLY, COMPETITION AND CHOICE IN THE GAS MARKET (1994).

90. See generally THE FUTURE OF POSTAL SERVICES, 1994, Cm 2614. For the withdrawal of the proposals, see Kevin Brown, *Cabinet Forced to Cancel Post Office Sell-Off*, FIN. TIMES, Nov. 4, 1994, at 1. For the ferries decision, see James Buxton, *Scottish Ferry Line Sell-Off Rejected*, FIN. TIMES, Sept. 28, 1994, at 13.

91. See OFFICE OF TELECOMMUNICATIONS, DEPARTMENT OF TRADE AND INDUSTRY, *supra* note 87.

transmission of competitors' gas; however, this was rejected by the Government which instead will require full and strict separation of supply and transportation operations, policed by the regulator. Once more we find that regulatory problems are of considerable complexity where networks are involved.

The message of this section is that, where a public utility is privatized and part of the underlying rationale for this is to permit the development of competition in supply of some parts of its service (and this rationale is fundamental to programs in the European Union mentioned above), very difficult regulatory problems will be raised. At the least, they will involve regulatory institutions and guidance of a considerable degree of sophistication, and are also likely to lead to a diminution of the provision of universal services at standard rates. If a government is not able to provide such regulatory arrangements, or if such universal service is its central concern, privatization is not likely to be an attractive option unless the privatized enterprise retains its monopoly. This in turn undermines a key objective of privatization and leads to well-justified attacks to the effect that a public monopoly has simply been transferred into a private monopoly.

VI. TRANSACTION COSTS

The final potential limit to privatization concerns the issue of transaction costs where a public enterprise is split into a number of companies which compete and yet also have cooperative interrelationships; some of the problems have already been suggested by the networks problem, and problems of transaction costs may also arise where cross-subsidy is being ended having been previously supported by a universal service obligation. For example, differential prepaid postal rates raise the issue in an acute form. The most important and controversial United Kingdom example is that of the rail network, which is in the process of being split into about 100 companies, of which about 50 will be of importance.⁹² This is justified primarily on grounds of increased competition and of transparency; the creation of contractual relationships between the actors

92. See Railways Act, 1993, ch. 43 (Eng.); NEW OPPORTUNITIES FOR THE RAILWAYS: THE PRIVATIZATION OF BRITISH RAIL, *supra* note 42. On general economic issues, see CORRY ET AL., *supra* note 33, at 5, 122-28.

will force the costs of different parts of the network out into the open for the first time; the process also reflects a move within private business away from hierarchical relationships within large firms internalizing as many operations as possible towards "out-sourcing" and contractual relationships.⁹³ The danger however is that the division will seriously increase the complexity of the system and so increase transaction costs, particularly through the contractualization of relationships and the resulting litigation. Particular problems will be posed by the fact that the operating companies having franchises running services will be required to compensate passengers for delays and cancellations, yet the causes will often be outside their control. For example, many delays will be caused by the company running the network, which is responsible for track and signalling.

This move from hierarchy to contract contradicts much received wisdom about modernity and the move from contract to administration; indeed there is much sociological evidence to suggest that the use of contractual techniques and sanctions is precisely what businessmen have sought to avoid because of transaction costs and other effects such as loss of goodwill.⁹⁴ Much will depend on the ability of the participants in the system to construct simplified arrangements for the allocation of liabilities which avoid the need for litigation; such a scheme is now being negotiated although the relatively short duration of franchises (in some cases as short as seven years) may work against this. Indeed, industrial action by signal workers employed by the infrastructure company has already seriously threatened the plans for sale of the train operating companies, demonstrating the interdependent nature of the industry. Again the message is that the rationales for privatization of competition and transparency are dependent on the ability to create quite sophisticated regulatory or self-regulatory processes, and if these are not present transaction costs may outweigh any efficiency gains resulting from privatization.

93. See FOSTER, *supra* note 2.

94. Eugene Kamenka & Alice E. Tay, *Beyond Bourgeois Individualism: The Contemporary Crisis in Law and Legal Ideology*, in FEUDALISM, CAPITALISM AND BEYOND (Eugene Kamenka & R.S. Neale eds., 1976); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 58 (1963).

VII. CONCLUSIONS

Previous debate, at least at a popular level, on limits to privatization has tended to center around inherent limits to the nature of the enterprises which can be sold and whether a natural core of necessarily governmental activity exists, or on whether it is possible to privatize enterprises which undertake unprofitable activities. This paper has suggested a different approach, one more related to the purpose of privatization. No doubt a government bent on privatizing enterprises simply to gain the receipts of sales to assist its budget could dispose of any enterprise with a reasonable degree of financial health or which is promised continuing subsidies or contractual payments, leaving the problems to be faced by successor governments. However, the privatization program across the world has been presented as more than simply a solution to short-term budgetary constraints, and the other goals adopted suggest an approach based not on assessing whether the inherent nature of an enterprise makes it suitable for privatization, but whether it will succeed in these goals without imposing costs which outweigh the gains. Thus we should ask whether privatization can take place in a way which actually improves corporate governance rather than protecting insiders, whether the social costs can be successfully borne without discrediting the whole economic reform program, and whether the required degree of sophistication is possible in regulatory design, especially when we are thinking of privatizing enterprises which deliver what are regarded as basic services or run transmission networks.

Experience in different countries has illustrated different answers to these questions. In Poland and Hungary, for example, a backlash against the economic reforms with which privatization has become associated was widely credited with the success of the former Communists and their allies in the September 1993 and May 1994 elections, success which did not in fact stop the privatization program but which highlights the difficulty of ensuring its legitimation; despite the relative success of the Czech privatization program, something similar seems to have occurred in Slovakia.⁹⁵ In the United Kingdom,

95. Vincent Boland, *Slovakia Faces a Shift to Extremes of Government*, *FIN. TIMES*, Oct. 3, 1994, at 3.

on the other hand, the Thatcher and Major Governments were able to engage in privatization on an unprecedented scale without losing popular support, partly because of the extreme degree of flexibility offered to a United Kingdom Government with a Parliamentary majority to implement policy and the weakness of the Parliamentary opposition, partly because of short-term electoral advantage gained by promoting wider share ownership. This is not to say that there have been no problems in the privatization process, however, nor that serious regulatory difficulties have not emerged since. The message of this paper is that, whilst there are no inherent limitations to what can be privatized, there are limits of political and regulatory design which sometimes make privatization inappropriate.