OPINION OF ADVOCATE GENERAL LÉGER

delivered on 26 March 1998 *

1. The Korkein Hallinto-oikeus (Supreme Administrative Court), Finland, seeks a preliminary ruling from the Court on the interpretation of certain provisions of Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, [1] as amended by Council Regulation (EEC) No 1893/91 [2] of 20 June 1991 (hereinafter 'the Regulation').

In substance, the Court is asked to define the extent of the powers granted to Member States by the Regulation in the case of a request for partial termination of a public service obligation in the field of regional transport by road made by an undertaking entrusted with a public service mission.

Legal framework

The relevant provisions of the Regulation

2. The Regulation seeks to '... eliminate disparities liable to cause substantial distortion in the conditions inherent in the concept of a public service which are imposed on transport undertakings by Member States.' [3] It recognises, however, that their maintenance is essential, in certain cases, in order to ensure the provision of adequate transport services. [4]

3. The following three principles reflect the general scheme of this Regulation:

— Member States must terminate public service obligations in matters of transport except in so far as the maintenance of these obligations is essential in order to ensure the provision of adequate transport services;

— the maintenance of a public service obligation entails an obligation on the Member State to compensate the resulting financial burdens for undertakings;

* Original language: French.

1 — OJ, English Special Edition 1969 (I), p. 276.

2 — OJ 1991 L 169, p. 1.

3 — First recital of Regulation No 1191/69. See also the first recital of Regulation No 1893/91.

4 — Second recital of Regulation No 1191/69, and the first and third recitals of Regulation No 1893/91.

— this compensation for financial burdens is harmonised according to Community procedures.

4. The Regulation applies, according to the first subparagraph of Article 1(1), to transport undertakings which operate services in transport by rail, road and inland waterway. The second subparagraph of that paragraph provides that Member States may exclude from its scope any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services. This facility was not availed of by the Republic of Finland.

5. Article 1(3) and (4) provides that Member States shall 'terminate all obligations inherent in the concept of a public service ... imposed on transport by rail, road and inland waterway' unless their maintenance is indispensable '[i]n order to ensure adequate transport services'.

6. The public service obligations defined in Article 2(1) are those which 'the transport undertaking in question ... would not assume or would not assume to the same extent or under the same conditions' if it were considering its own commercial interests. They comprise the obligation to operate, the obligation to carry and tariff obligations. [5]

7. Article 3(1) states that: 'Where the competent authorities of the Member States decide to maintain, in whole or in part, a public service obligation, and where this can be done in more than one way, each capable of ensuring, while satisfying similar conditions, the provision of adequate transport services, the competent authorities shall select the way least costly to the community.'

8. Article 4(1) of the Regulation indicates that 'It shall be for transport undertakings to apply to the competent authorities of the Member States for the termination in whole or in part of any public service obligation where such obligation entails economic disadvantages for them'.

9. Article 5(1) states that 'Any obligation to operate or carry out shall be regarded as imposing economic disadvantages [6] where the reduction in the financial burden which would be possible as a result of the total or partial termination of the obligation in respect of an operation or a group of operations affected

5 — This concept was defined in Case 36/73 *Nederlandse Spoorwegen* v *Minister van Verkeer en Waterstaat* [1973] ECR 1299.

6 — Ditto.

by that obligation exceeds the reduction in revenue resulting from that termination.'

10. Article 6(2) provides that: 'Decisions to maintain a public service obligation or part thereof, or to terminate it at the end of a specified period, shall provide for compensation to be granted in respect of the financial burdens resulting therefrom; the amount of such compensation shall be determined in accordance with the common procedures laid down in Articles 10 to 13'.

The relevant provisions of national law

11. Law 343/1991 concerning road transport of passengers under licence, as amended by Law 662/1994 (hereinafter 'the Law'), applies and supplements the provisions of the Regulation.

12. In Finland, scheduled bus services are provided by transport undertakings holding either a public transport licence [7] in the form of services contracted for and financed by public funds, or a scheduled service licence, solely at issue in the present case, which presupposes the grant of a public transport licence. [8]

13. A scheduled service licence for bus operation is granted on application by transport undertakings to holders of a public transport licence by the authority competent to grant such licences. [9] The licence stipulates the traffic control centre, the route, and, in general, the timetable and the date of commencement of the service. [10]

14. The holder of the licence agrees to provide the service on the conditions set out in the licence and 'adequately in all other respects'. [11] He is thus obliged to operate the route on the basis of passenger revenue alone. In return for this, he has the exclusive right to serve the route in question.

15. A scheduled service licence may be withdrawn at the request of the holder by the competent authority or on the initiative of the latter if the holder of the scheduled service licence no longer satisfies the conditions required for the grant of the licence, if his public transport licence has been withdrawn or also where the public interest requires the

7 — According to Paragraph 9 of the Law, a public transport licence is granted to any applicant fulfilling the conditions of solvency, reputability and professional capability. This licence gives access to the sector and grants extensive operating rights to the carrier.

8 — *Ibidem*.

9 — *Ibidem*, Paragraph 9a.

10 — *Ibidem*, Paragraph 10(2).

11 — *Ibidem*, Paragraph 13.

reorganisation of the operation of the transport route. [12] This is the case where the holder of the scheduled service licence does not operate it in an 'adequate' fashion and, in particular, if the service becomes unprofitable.

16. The Law also allows the holder of a scheduled service licence to request the partial termination of his public service obligations. The competent authority is not however bound to accede to this. It is precisely the application of this latter provision which is at issue in the present case.

Factual framework

17. On 21 December 1993, the Finnish Ministry of Transport granted to Kainuun Liikenne Oy and Oy Pohjolan Liikenne Ab, two Finnish undertakings (hereinafter 'Kainuun Liikenne and Pohjolan Liikenne' or 'the applicants in the main proceedings'), a scheduled service licence for the Kajaani-Rukatunturi route, situated in the north of the country and covering a journey of about 275 kilometres, for the period from 1 January 1994 to 31 December 2003. This licence entitles the undertakings to carry on passenger transport by bus on that route in accordance with the timetable contained in the case-file.

18. After the entry into force of the Regulation on 1 January 1994, as a result of the accession of the Republic of Finland to the Agreement on the European Economic Area, the Finnish Ministry of Transport requested undertakings operating road traffic by bus to make applications concerning the withdrawal of services which the undertakings were not prepared to run on passenger revenue alone.

19. Kainuun Liikenne and Pohjolan Liikenne thus applied for the partial termination of their operating obligation on the Kajaani-Rukatunturi route, so as to cut back the operation of traffic to Kajaani-Peranka (around 180 kilometres) and to Kajaani-Suomussalmi (about 118 kilometres).

20. According to them, the line as a whole was unprofitable but they stated they were prepared to continue its operation and to negotiate with the Oulu provincial administration ('the Lääninhallitus') the setting-up of a public service contract with support from public funds for the part of the line for which they had sought termination (the Suomussalmi-Rukatunturi and Peranka-Rukatunturi services, the least profitable parts of the Kajaani-Rukatunturi route). In other words, they sought to continue their public service obligations for the southern part of the route while terminating those for the northern part.

12 — Ibidem, Paragraph 20.

21. By a decision of 9 January 1995 (hereinafter the 'contested decision'), the Lääninhallitus rejected the application on the grounds that it had not been demonstrated that, cutting back the workings in question to Peranka and Suomussalmi, an economically better result than that obtained by the continuation of the existing service in full could be achieved. It added that, in the circumstances of the present case, the Law did not allow for partial termination of the public service obligation, but only for its complete termination.

22. Kainuun Liikenne and Pohjolan Liikenne brought an appeal against the disputed decision before the Korkein Hallinto-oikeus. In support of this appeal, they submitted that, under the Regulation, the Lääninhallitus was obliged to grant them partial termination of the line since they had shown that they satisfied the requirements of Article 4 of the Regulation, relating to the existence of an economic disadvantage within the meaning of Article 5 of the Regulation.

23. According to the national court, the figures submitted by the applicants in the main proceedings satisfy the requirements of Articles 4 and 5 of the Regulation and thus they have indeed shown that they suffered an economic disadvantage in that the reduction in the financial burdens resulting from the termination requested for the section in question was greater than the reduction in revenue caused by the termination.

24. Moreover, the national court, adopting the reasoning of the contested decision, notes that in the circumstances of the present case the request for partial termination of the public service obligation put forward by the applicants in the main proceedings could only have been rejected. According to it, only the complete termination of this obligation — that is, the withdrawal of the licence — allows the administration to organise transport in a proper and rational manner while maintaining adequate transport services, with the lowest possible level of subsidies and creating effective competition between the transport undertakings for the operation of the former public service.

25. However, the Korkein Hallinto-oikeus, uncertain as to the interpretation of the provisions of the Regulation concerning the partial termination of a public service obligation, submits the following questions to the Court for a preliminary ruling:

'(1) Is the regulation on public service obligations (Regulation (EEC) No 1191/69, as amended by Regulation (EEC) No 1893/91), in particular Article 4 in conjunction with Article 1(3), to be interpreted as meaning that it entitles a transport undertaking to have a part, of whatever size, of its operating obligation terminated, for example, only a certain part of one route operated?

(2) If the answer to the first question is wholly or conditionally in the affirmative, in which case the Korkein Hallintooikeus may remit the case to the Läänihallitus for a fresh decision, in order to reach a final decision in the case the question arises whether it also follows, from the right given to transport undertakings in the regulation on public service obligations to have a service obligation partially terminated, that the authorities' power under national law to revoke a bus operator's licence for the purpose of reasonable reorganisation of transport is precluded or restricted where the need to reorganise results from a partial termination?'

28. Moreover, they submit that, contrary to the statement of the national court, Finland does not possess any special characteristics which would justify the power of the competent authority to reject a request for partial termination of public service obligations, or to revoke an operator's licence on its own initiative when the undertaking concerned has requested only a partial termination.

29. They therefore ask the Court to reply to the additional questions annexed to their written observations.

Preliminary remarks

26. The applicants in the main proceedings submit that the account of the national law by the national court is incorrect.

27. According to the applicants, in the circumstances of the case, and contrary to the statement of the national court, the Law allows them the partial termination requested.

30. In so far as the complaints concerning the incorrect interpretation of the Law by the national court are concerned, it will be recalled that the Court has consistently held [13] that the national courts and the Court constitute two distinct legal orders and that it is for the national court to provide to the Court the 'factual or legal material necessary to give a useful answer to the questions submitted to it.' [14]

31. Thus the account of the Law given by the national court should be regarded by the Court as an established fact.

13 — Since Case 13/61 *De Geus en Uitdenbogerd* v *Bosch and Van Rijn* [1962] ECR 45.

14 — Case C-291/96 *Grado and Bashir* [1997] ECR I-5531, paragraph 12.

32. In so far as the additional questions by the applicants in the main proceedings are concerned, the Court has consistently held that Article 177 of the Treaty institutes a system of direct and mutual cooperation between national courts and the Court [15] and that, as a result, the Court only replies to those questions which the referring court considers useful for the resolution of the dispute before it. [16] In this regard, the very wording of the Court's judgment in *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* should be recalled: [17]

'... in order to confer jurisdiction on the Court ... it is necessary only that the question raised should clearly be concerned with the interpretation of the Treaty. The considerations which may have led a national court or tribunal to its choice of questions as well as the relevance which it attributes to such questions in the context of a case before it are excluded from review by the Court of Justice.'

33. However, the Court has on occasion felt it necessary to extract from the order for reference the true subject-matter of the dispute in the main proceedings and the actual questions of the referring court in order to provide it with a useful answer. The Court has thus reformulated certain preliminary questions. [18]

34. Consequently, I will reply only to the questions submitted by the national court, after examining the subject-matter of the proceedings.

35. In the present case, the subject-matter is clearly defined by the order for reference. It concerns the correctness of the contested decision from the point of view of the Regulation.

36. It also follows from the order for reference that the Court is asked, by the first question, whether the Regulation requires the competent authority of a Member State to grant to an undertaking entrusted with a public service mission the partial termination of its public service obligation as soon as it produces proof that its maintenance results in economic disadvantage for it. The Court is further requested to state whether the answer to this first question should be qualified and, in particular, if the refusal of such a request is subject to specific rules.

15 — Since Case 16/65 *Schwarze* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1965] ECR 877.

16 — See, for example, Case 126/80 *Salonia* v *Poidomani and Giglio* [1981] ECR 1563.

17 — Case 26/62 [1963] ECR 1. See also points 27 to 29 of my Opinion in Case C-66/95 *R* v *Secretary of State for Social Security, ex parte Sutton* [1997] ECR I-2163 and the cases cited therein.

18 — See, in particular, Case 35/85 *Tissier* [1986] ECR 1207, paragraph 10.

37. Similarly, by its second question, regardless in my view of the answer given to the first, the national court seeks to know whether a Member State may decide on its own initiative to terminate the entire public service obligation imposed on an undertaking, when the latter has only requested partial termination, so as to reorganise the service in a rational manner.

Reply to the first question

38. The applicants in the main proceedings submit that the Regulation should be interpreted as meaning that the competent authorities of the Member States are obliged to accede to an application for termination of a part or the whole of a public service obligation where the applicant undertaking shows, in accordance with the provisions of Article 4 of the Regulation, that it suffers economic disadvantage as a result of the maintenance of part or the whole of this obligation.

39. I am of the opinion, as are the Finnish and Belgian Governments and the Commission, that the Regulation does not require Member States to accede to an application for termination of a part or the whole of a public service obligation. However, in my opinion, the rejection of such an application assumes that certain conditions are complied with.

40. It follows from the objective pursued by the Regulation and its general scheme, as well as the very wording of some of its provisions, that while undertakings may apply for the termination of a part or the whole of their public service obligations — only under certain conditions —, the competent authorities of the Member States may reject that application where the specific public interest of transport services so requires.

41. Thus, it follows from the very wording of the sixth recital in the preamble to Regulation No 1191/69 that the right to apply for the termination of public service obligations is reserved solely to those undertakings which suffer economic disadvantage, determined in accordance with defined rules, as a result of the maintenance of public service obligations.

42. Moreover, the second recital in the preamble to Regulation No 1191/69 states that '... it is essential in certain cases to maintain [the public service obligations defined in the Regulation] in order to ensure the provision of adequate transport services ...'. The same observation can be found in the first recital in the preamble to Regulation No 1893/91, which states: '... while maintaining the principle of the termination of public service obligations, the specific public interest of transport services may warrant the application of the concept of public service in this area'.

43. However, the 11th recital in the preamble to the Regulation provides that, where it is decided to maintain any public service obligation, the competent authorities must pay compensation for the financial burdens which may thereby devolve for transport undertakings.

44. Those rules reflect the wish of the Community legislature to enable transport undertakings to escape an economic situation weakening them compared to their competitors, and thus the priority given to rules capable of facilitating better functioning of the single market.

45. The very scheme of the Regulation — in particular Section II relating to the common principles for the termination or maintenance of public service obligations — confirms that the termination of public service obligations is possible although not as of right.

46. *Indeed*, while Articles 4 and 5 of the Regulation grant to undertakings entrusted with a public service mission the possibility to request termination of a part or the whole of a public service obligation where this obligation results in economic disadvantages for them, Articles 1(4) and 3 of the Regulation equally recognise the right of Member States to *maintain* an obligation considered necessary to guarantee the provision of adequate transport services.

47. *However*, the right to decide to maintain public service obligations is subject to observance of certain rules.

48. Thus, Article 3 of the Regulation obliges the competent authorities to choose, from a number of ways, each capable of ensuring, while satisfying similar conditions, the provision of adequate transport services, that which is the least costly to the community.

49. Similarly, Article 6(2) of the Regulation provides that a decision to *maintain* or to terminate gives rise to a right to compensation where financial burdens result from this decision.

50. In addition, Article 7 of the Regulation specifies that to the decision to *maintain* may be attached conditions designed to improve the yield of the operations affected by the obligation in question.

51. Finally, although Article 1(4) of the Regulation sets out the factors which the legislature must take into account when it decides to maintain public service obliga-

tions, [19] Regulation No 1191/69 does not define the concept of 'ensuring the provision of adequate transport services', no more than Regulation No 1893/91 does. In the latter regulation, the concept in question was merely replaced by that of 'specific public interest of transport services'.

52. According to the Economic and Social Committee, since a definition of the concept of 'provision of adequate transport services' is difficult to formulate by reason of the wide range of circumstances which may exist in the various Member States, the proposed regulation restricts itself to providing criteria for the assessment of this concept. [20]

53. Before explaining what are the 'criteria for assessment of this concept', it must be recalled that, according to the fourth recital in the preamble to Regulation No 1191/69, Article 2 of the Regulation defines the various public service obligations in the area of transport.

54. That article provides that they consist of the obligation to take all necessary measures to ensure the provision of a transport service satisfying fixed standards of continuity, regularity and capacity, the obligation to carry passengers or goods at specified rates and subject to specified conditions, and finally the obligation to apply rates fixed or approved by a public authority which are contrary to the commercial interests of the undertaking.

55. As regards the factors which help to define the parameters of this concept, the second recital in the preamble to Regulation No 1191/69 indicates that '... the adequacy of transport services must be assessed in the light of the state of *supply and demand in the transport sector and of the needs of the community*'. [21]

56. Article 3 of the Regulation emphasises, moreover, that the provision of adequate transport services is to be assessed having regard to the public interest, the possibility of having recourse to other forms of transport and the ability of such forms to meet the transport needs under consideration, and the transport rates and conditions which can be quoted to users.

57. In my opinion, once the requirements set out in Article 3 of the Regulation are satisfied, the competent authorities of the Member States retain a wide margin of discretion to

19 — This article provides that 'In order to ensure adequate transport services which in particular take into account social and environmental factors and town and country planning ...'.

20 — See the sixth recital of the Opinion given on the proposed Council Regulation on action by Member States concerning the obligations inherent in the concept of public service in transport by rail, road and inland waterway (OJ 1968 C 49, p. 15).

21 — My emphasis.

assess the needs of the users of these public transport services.

58. In the present case, the Finnish Government submits that, in accordance with Article 3 of the Regulation, the refusal by the Lääninhallitus to accede to the request of the applicants in the main proceedings is justified by reasons relating to the interests of the public transport service in a region where the population density is low (fewer than eight persons per square kilometre) and where transport by bus remains the most suited means of transport.

59. In its opinion, the ensuring of adequate and appropriate transport services in this type of region with low population density requires, in addition, overall transport planning. That is why, according to it, the Kajaani-Rukatunturi route cannot, as the applicants in the main proceedings claim, be split into several segments without prejudicing the principle of equal treatment of public service users and of non-discrimination between the transport companies wishing to operate the entire line. The Government illustrates this by putting forward a number of specific examples. [22]

22 — Such as the difficulty, for a transport undertaking, of arranging economically profitable workings if it can only operate the northern section of the line; or the additional constraints imposed on elderly people living on the northern part of the route if they have to change buses in mid-journey.

60. The applicants in the main proceedings do not dispute the need to reorganise public transport by bus on the Kajaani-Rukatunturi route, but put forward a different solution to that presented by the competent Finnish authorities.

61. The task of resolving this problem — and hence of assessing the most suitable solution —, having regard to the criteria of assessment set out in Article 3 of the Regulation, is the exclusive responsibility of the competent national courts.

62. To conclude, in my opinion the Regulation — and in particular Articles 1, 3 and 4 thereof — must be interpreted as meaning that it does not require the competent authority of a Member State to grant to an undertaking entrusted with a public service mission the partial termination of its public service obligation, even if it demonstrates that its maintenance results in economic disadvantages for it. However, such a refusal may only be based on the need to ensure adequate transport services. That concept is to be assessed having regard to the public interest, the possibilities of recourse to other forms of transport and the ability of such forms to meet the transport needs under consideration, and the transport rates and conditions which can be quoted to users; where there are several ways of ensuring, while satisfying similar conditions, the provision of adequate transport services, the competent national authority is to select the way least costly to the community.

Reply to the second question

63. By its second question, the national court asks this Court to decide whether the Regulation precludes a Member State from deciding on its own initiative to terminate the public service obligations imposed on undertakings with a view to rationalising the public service.

64. Similarly here, in my opinion it follows from the objective pursued by the Regulation, its general scheme, and also the wording of certain of its provisions that this question must be answered in the negative.

65. Even if the Community legislature accepts that the need to ensure the provision of adequate transport services may sometimes justify the maintenance of public service obligations, its objective is to terminate such obligations since they are likely substantially to distort the conditions of competition. The legislature therefore entrusts to Member States a wide margin of discretion in relation to termination of such constraints and requires them to compensate undertakings for the financial burdens that they suffer as a result of their maintenance. It is in this light that the 5th and 11th recitals in the preamble to Regulation No 1191/69 must be read, which respectively provide that:

'... it should be left to the Member States on their own initiative to take measures to terminate or to maintain public service obligations; whereas, however, these obligations being such as to entail financial burdens for transport undertakings, the latter must be able to apply for their termination to the competent authorities of the Member States;

... any decision by the competent authorities to maintain any public service obligation ... entails an obligation to pay compensation in respect of any financial burdens which may thereby devolve on transport undertakings'.

66. The general scheme and the very wording of certain of the provisions of the Regulation confirm this approach.

67. Thus, Article 1(3) of the Regulation states the principle that Member States are to terminate transport service obligations on their own initiative.

68. In the present case, the competent Finnish authorities decided that the public bus service on the route in question is actually unprofitable and that the operation of the public service, in an economically viable manner for the transport undertakings and at the least

cost to the community, necessitated the reorganisation of the entire line.

69. The contested decision can therefore be seen as a decision to terminate a public transport service obligation in a region of Finland and to reorganise that public service.

70. Not only does the Regulation recognise the right of Member States to terminate public service obligations, but, as I have already shown in the examination of the first question, it also recognises that they have a wide margin of discretion in the field of organisation — and consequently of reorganisation — of the public transport service.

71. I therefore suggest that the second question should be answered as meaning that the Regulation does not preclude a Member State from deciding of its own motion to terminate public service obligations with a view to reorganising that service in a rational manner.

Conclusion

72. In view of the foregoing, I propose to answer as follows the question referred by the Korkein Hallinto-oikeus:

(1) Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991, in particular Article 1(3) and Article 4 thereof, must be interpreted as meaning that it does not require a Member State to grant an undertaking entrusted with a public service mission the partial termination of its public service obligations, even if it demonstrates that their maintenance results in economic disadvantages for it, where such a refusal is based on the need to ensure adequate transport services.

The ensuring of adequate transport services is to be assessed, in accordance with Article 3 of the abovementioned regulation, having regard to the public interest, the possibility of having recourse to other forms of transport and the

ability of such forms to meet the transport needs under consideration, and the transport rates and conditions which can be quoted to users; where there are several ways of ensuring, while satisfying similar conditions, the provision of adequate transport services, the competent national authority is to select the way least costly to the community.

(2) The abovementioned regulation must be interpreted as meaning that it does not preclude a Member State from terminating a public service obligation with a view to reorganising that public service in a rational manner.