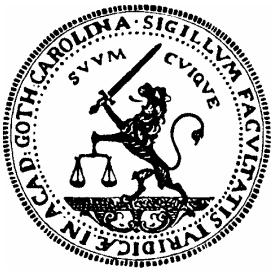

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Services of General Economic Interest and the Swedish Railway Monopoly

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Contents

Summary

Even though the Community is based upon the principle of an open market economy with free competition, there are certain exemptions to this notion. One of the exemptions is the fulfilment of services of general economic interest, an exemption that elucidates the delicate conflict of interest between Member States' prerogative to provide accessible and affordable public services, and the Community's interest to secure effective competition on the internal market.

The conflict is *inter alia* regulated through Article 86 (1) EC, which contains an obligation for the state not to uphold or create measures that are contrary to the Treaty, closely connected to Article 10 EC and the principle of loyal co-operation. Due to the political conflict of restricting Member States to ensure certain public needs, Article 86 (2) on the other hand, provides a derogation eliminating competition restrictions on services of an economic nature, which are considered essential to the general public.

After the general trend of liberalization in the early nineties in order to achieve the objective of the internal market by 1992, including the *Corbeau* ruling from the ECJ in 1993, which directly interfered with a Member State's right to organise its postal service without the Commission having to introduce any harmonisation measures, the Court has taken a more restrictive approach. The subsequent case law has resulted in a transposition from the general view of illegality for all exclusive rights by their very nature unless objectively justified towards a presumption of legality of all exclusive right unless it is evident that they are directly incompatible with the Treaty. Basically, when the financing of a service of general economic interest (SGEI) is threatened, there is very little to do in order to challenge the state measure. The current concept of SGEI is interpreted as the Member States' right to define what constitutes a SGEI as long as it clearly defines the objective of the service in advanced in order to ensure transparency. There has also been a regulatory reaction on the focus of economic objectives through Article 16 EC, introducing a principle of the need to balance economic goals with social needs, accentuating the importance of SGEI.

This development does however bring about a certain risk of increased protectionism and a risk of rending competition ineffective. Furthermore allowing the Member States once again to foreclose competition is most likely to be at the expense of the citizens unless the market actually has failed to provide such services. The conclusion I have made, base o this review and on the case study of the Swedish Railway monopoly are the need of a more strict proportionality test of the ECJ, a more active role of the Commission and a further assessment by the Community institution to create uniform European concept of SGEI, including a auxiliary control of cross-subsidisation.

Sammanfattning

Även om den Europeiska Gemenskapen grundas på en princip om en fri marknadsekonomi med fri konkurrens, finns det vissa undantag för denna regel. Ett av undantag gäller fullgörandet av tjänster i allmänhetens intresse, ett undantag som även tydliggör den komplicerade intressekonflikt som föreligger mellan medlemsstaternas möjlighet att tillhandahålla lättillgängliga och prisvärda offentliga tjänster och gemenskapens intresse att säkerställa en effektiv konkurrens på den inre marknaden.

Konflikten regleras bland annat genom artikel 86 (1) EG, som innehåller en skyldighet för staten att inte upprätthålla eller skapa lagar eller andra åtgärder som strider mot fördraget, en skyldighet nära knuten till artikel 10 i EG-fördraget. På grund av det politiska motståndet att begränsa medlemsstaternas möjligheter att fritt tillgodose offentliga behov, erbjuder artikel 86 (2) ett undantag från konkurrensreglerna för tjänster i allmänhetens intresse.

Efter den allmänna trenden av liberalisering i början av nittiotalet, samt EG-domstolens dom i *Corbeau*-målet, som direkt inverkade på en medlemsstats rätt att organisera en allmännyttig tjänst utan att Kommissionen infört några harmoniseringsåtgärder har en ändring i praxis skett. Efterföljande rättspraxis har inneburit en ändring av huvudregeln om att alla exklusiva rättigheter till sin natur skulle vara ogiltig, om de inte är sakligt motiverade och nödvändiga för att säkerställa fullgörandet av tjänster i allmänhetens intresse - till en presumtion för att all ensamrätt är rättfärdig om den inte är uppenbart oförenligt med fördraget. I grund och botten räcker det med att finansieringen av en tjänst i allmänhetens intresse hotas för att en exklusivitet ska anses vara rättfärdigad. Det nuvarande begreppet ”tjänster i allmänhetens intresse” tolkas som medlemsstaternas rätt att definiera vad som utgör en sådan tjänst så länge syftet med tjänsten i förväg är tydligt preciserad så tillbörlig insyn kan säkerställas. Detta synsätt på tjänster i allmänhetens intresse och en vilja att balansera gemenskapens ekonomiska fokus tydliggörs även i artikel 16 EG, som uttrycker en princip om behovet av balans mellan å ena sidan ekonomiska och å andra sidan sociala mål.

Denna utveckling innebär dock vissa risker, exempelvis ökad protektionism. Dessutom möjliggör det för medlemsstaterna att återigen utestänga effektiv konkurrens, sannolikt på medborgarnas bekostnad, utan att orsaken beror på att marknaden har misslyckats med att tillhandahålla tjänsten. Efter denna genomgång av rättsläget samt en analys av det svenska järnvägsmonopolet förespråkar jag en mer strikt proportionalitetsbedömning av EG-domstolen, en mer aktiv roll av Kommissionen och menar att det finns ett behov av att skapa ett enhetligt europeiskt begrepp av ”tjänster i allmänhetens intresse”, inklusive en reglering möjligheten till korssubventionering.

Preface

I wish to thank my supervisor, Dr Xavier Groussot, for good advice and fruitful discussions during the process. Furthermore, I would like to give special thanks to lawyer Björn Mullaart at the law firm Vinge.

I would also like to thank Karin Engström for invaluable support and precious friendship.

As this thesis will end my time as a student in Lund I want to direct a sincere thank you to all those who contributed to making this a splendid time. I also want to thank those who helped me at the final stage by proofreading the text. Any errors or omissions arising are however my own.

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Abbreviations

CFI	Court of First Instance
CFR	Charter of Fundamental Rights of the European Union
ECJ	European Court of Justice
SGEI	Service of General Economic Interest
TEC	Treaty of the European Community
TEU	Treaty of the European Union
ToA	Treaty of Amsterdam
ToL	Treaty of Lisbon

1 Introduction

Even though the Community is based upon the principle of an open market economy with free competition, there are certain exemptions to this notion. One of the exemptions is the fulfilment of services of general economic interest, an exemption which elucidates the delicate conflict of interest between Member States' prerogative to provide accessible and affordable public services and the Community's interest to secure effective competition on the internal market. The result of this exemption is a new form of governance, where traditional Community law objectives and new forms of socio-economic objectives have created a new direction.

After the general trend of liberalization in the early nineties and due to the political nature of SGEI, the ECJ has taken a more restrictive approach, leaving a considerable freedom to the Member States to identify what economic services need to be protected from the internal market and competition rules. The subsequent case law has resulted in a transposition from the general view of illegality for all exclusive rights by their very nature unless objectively justified towards a presumption of legality of all exclusive right unless it is evident that they are directly incompatible with the TEC. Basically, when the financing of a service of general economic interest is threatened, there is very little to do in order to challenge the state measure. The current concept of SGEI is interpreted as the Member States' right to define what constitutes a SGEI as long as it clearly defines the objective of the service in advanced in order to ensure transparency. The ECJ has also made it rather clear that the Commission should tackle Member States measures through legislation rather then through challenging the measure before the ECJ. This development is also in line with the rise of Union citizenship and the goal of economic, social and territorial cohesion found in Articles 16 TEC and 36 of the Charter of Fundamental Rights. An extended version of Article 16 TEC is found in Article 14 of the ToL.

As evident in the Swedish Railway monopoly, where the Swedish State upholds a monopoly contrary to the TEC, the risks of derogating from the economic objectives brings about a great risk of abusive and protectionist behaviour. The Swedish monopoly has created a situation where the undertaking SJ holds a dominant position on the relevant market of interregional passenger traffic in Sweden. Since the statutory dominance is not limited or restrained by any further commitments then profitability, SJ is put in a situation where it will abuses its dominance. The monopoly can neither be justified as a proportionate and necessary, mainly due to the lack of overall structural state control.

The result of this new form of governance is a risk of increased protectionism and a risk of rending competition ineffective. Furthermore allowing the Member States once again to foreclose competition is most likely to be at the expense of the citizens unless the market actually has

failed to provide such services. The conclusion I have made, base o this review and on the case study of the Swedish Railway monopoly are the need of a more strict proportionality test of the ECJ, a more active role of the Commission and a further assessment by the Community institution to create uniform European concept of SGEI, including a auxiliary control of cross-subsidisation.

1.1 Subject and Purpose

The essay aims to examine the development of EC law governing each Member State's right to entrust upon an undertaking to perform a service of general interest. Crucial to this investigation is the progress created by the European Court of Justice and the actions of the European Commission.

Furthermore, the paper aims to investigate the Swedish passenger railway monopoly, its compliance with Article 86 especially and the Treaty in general, including an assessment of SJ AB effects on ancillary market.

Finally, the paper aims to discuss future evolvement of the regulation of state measures within the Community and perhaps later in the Union.

This is based on the following issues:

- In what way has the regulation of state measures evolved in the competitive markets of the EU with a special focus on the case law from 1990 and onwards.

- How has the concept of services of general economic interest evolved compared to competition law in general? Has there been a change towards a more consenting view of the states' intervention on the market?

- How the Swedish passenger railway monopoly is organized and whether is it compatible with the TEC in general and Article 86 in particular. Can the Swedish monopoly on passenger traffic be considered to perform a service of general economic interest?

1.2 Method

In this thesis, I aim to make a legal analysis of the legal development of the regulation of state measures by applying a legal, dogmatic method. The method involves a review of European Community law, case law from national courts and the European Court of Justice, as well as relevant doctrine. I have also used preliminary work from the national legislation. These descriptive sections are followed by an analytical section, where I examine and express my own views regarding the above mentioned material and present arguments that underpin these arguments. I have also used a problem-based case study of the Swedish passenger railway monopoly in

order to describe the problems arising from the clashes between economic liberalisation and the performance of service of general interest.

It must be emphasized that the political nature of the issues at hand in the case renders a strictly legal analysis unsatisfactory. In fact, the different approaches taken by the ECJ shows how the political influences affect the legal sphere, and that is what, in my opinion, makes this area of law so interesting. In the main part of this thesis, I give an account of the relevant EC law *de lege lata*. In the analysis and conclusion sections, my aim is to analyse the development in a wider context and to present *de lege ferenda*.

1.3 Outline

Chapter 2 gives the reader a brief overview of the concept and objectives of EC competition law. The importance lies within the dual objectives of competition law, having both integral and economical aspects.

The following chapter contains an exposition of the relevant articles and case law concerning the regulation of state measures, such as Articles 10, 16, 31 and 86 which are the centre of the this thesis. The chapter also attempts to make a legal analysis of the case law.

Chapter 4 contains a descriptive part of the Swedish monopoly and a short comparative view of the difference in passenger railway traffic Community-wide. The chapter is concluded by an analysis of the monopoly and its compatibility with the TEC.

The final chapter aims to make a conclusion of the legal development and what issues must be addressed in a near future.

1.4 Delimitations

Even though the focus of this thesis has been guided by the Swedish monopoly, it also aims at providing a more general picture of the concept of service of general interest. The essay does not seek to provide a comprehensive picture of the regulation of monopolies in general.

Due to limited space, I have been forced to limit the scope of the thesis in a number of issues that otherwise would have been both relevant and interesting to the reader. Article 81 and 82, which are of great significance, are unfortunately discussed to a much limited extent. Similarly, the thesis does not deal with competition law aspects of the state measures from a socio-economic perspective. Even though the definition of service of general interest have been influence by case law of state aid law these thesis does not contain a discussion on state aid and state aid rules.

Since the thesis is focused on state measures and the granting of exclusivity from a competition law perspective using Article 86 as the starting platform

the question is not assed from a perspective of freedom of establishment under Article 49 which is another relevant perspective due to limited space.

The case study in chapter 4 has also been limited to a certain extent, where some dimensions could have been further developed, especially concerning economic arguments.

1.5 Materials

I have mainly examined primary sources of law, such as the TEC of the European Community, European Charter of Fundamental Rights; and European Court of Justice and the Court of First Instance case law for the descriptive parts of my text. In order to describe the *de lege lata* of the EC legal order in the field of state measures I have availed a number of books of a more general character by authors like Whish; Craig and De Búrca; Faull and Nikpay; and Jones and Sufrin. Of the more subject specific books, three authors should be especially be mentioned; Buendia Sierra; Prosser and; Szyszczak.

For the analysis of the case and the analysis *de lege ferenda* I have also used a number of articles from either well renowned authors or articles published in reliable, scholarly periodicals.

2 Objectives of competition law

2.1 Forms of Competition Law

The basic concept of competition law is to protect the progression of competition in order to maximise consumer welfare. The growth of competition law has, since the Sherman Act[1] in 1890, been enormous. Developed rules governing the rules of competition are now in force in over one hundred countries, including China and India from 2008. The development does not only effect the relations between undertakings but also economical areas that historically have been seen as natural state monopolies, such as postal services, energy, communications and transportation.[2]

In general, competition law governs four main types of harmful behaviour or arrangements. The first area is anti-competitive agreements which have been dealt with since Roman times and concerns agreements, between competing undertakings, that has as their object or effect to restrict competition. The second area regulates abusive behaviour by monopolists or firms in a dominant position (i.e. having a substantial market power). The third area normally regulated by competition law is merger control. The fourth and final area that most competition law jurisdiction covers is the regulation of public involvement on the market.

The regulation of the states as an actor on the common market is mainly regulated by Article 86 of the TEC but is closely linked with Article 10 of the TEC. Article 86 is addressed to the Member States, limiting the possibility for the state to give exclusive or special rights to private and public undertakings. The focus of this essay will be on the Member States' rights to act as players, directly and indirectly, on the economic market.

Since there has never been and probably never will be a true market economy, the essential question is to what extent a state shall control or regulate the market. This being a very political question, including allocation of wealth through fiscal charges and allowances, employment policy, states aids and other political and social agendas the solutions vary. However, all Member States of the European Community can, although in various forms, be seen as mixed economic systems. A mixed economic system is a market economy with extensive public features, economic- and anti-trust regulations. One of the most famous mixed economies was the Swedish way of mixing market and public economy during 1950-1970, also know as the Middle Way, which meant a big privately owned industrial

[1] The Sherman Antitrust Act, July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. § 1–7), one of the worlds first Competition legislation acts with the objective to limit cartels and monopolies.
[2] Whish, Richard, *Competition law*, sixth edition, Oxford University Press, 2008, p. 193 f.

sector, a large tax funded public sector, a very active employment policy and high equalizing ambition.[3]

Since Article 295 of the TEC states that the Treaty does not affect the system of property ownership all Member States can have a diverse structure of privately-owned and state-owned enterprises and combines elements of capitalism and socialism, or have a mix of market economy and planned economy characteristics. Even the EC legal order itself is affected by mixed economic systems with the idea of a common economic market without hindrance to the four freedoms while at the same time allow proportionate interventions i.e. for environmentalism and social welfare, or state ownership.[4] More evidence of this is found in Article 16 TEC, which introduced an alternative approach to the free interplay of market forces. [5]

Historically, states have had a much greater role on the market, where services like transport, energy, postal services and telecommunications have been provided by national organisations with exclusive rights to provide a given service.[6] Member States can still influence markets through legislation, acts or decisions by granting public or private undertakings special rights, including total exclusivity. The effect of such action can hinder or distort the competitive process and in the end cause the consumer to pay a higher price.[7]

In efforts to ensure proportionate state distortion of the market, the Community has given a large amount of its resource to create an extensive policy in the area of state involvement in competition. As a part of this policymaking, the two main articles governing EC Competition law, Articles 81 and 82 have been extended to include also public undertakings.

Furthermore, Member States have the fundamental obligation to take all appropriate measures to ensure fulfilment of the obligations arising out of this TEC or given by the institutions of the Community. This includes the obligation to ensure a high degree of competitiveness and convergence of economic performance. This is directly mentioned in Article 3 (1) (g) which contains a general obligation for Member States to refrain from any measure that could distort the competition on the internal market. Secondly, since the introduction of Article 16 by the ToA, the concept of SGEI and obligation to ensure its implementation has been strengthened, adding a non-economical perspective.

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[3] Eklund, Klas, *Vår Ekonomi – en introduktion till samhällsekonomi*, Norstedts Akademiska Förlag, 11th edition, 2007, p. 175-176; 387-388.
[4] Kitschelt, Herbert, Lange, Peter, Marks, Gary, and Stephens. John (editors), *Continuity and Change in Contemporary Capitalism*, Cambridge University Press, p 70-72.
[5] Craig, Paul and De Búrca, Gráinne, *EU Law, Text, Cases and Materials*, Fourth edition, Oxford University Press, 2008, p. 1071.
[6] http://ec.europa.eu/comm/competition/liberalisation/overview_en.html 2008-10-14.
[7] Van Bael, Ivo and Bellis, Jean-Francois, *Competition Law of the European Community*, Fourth edition, Kluwer Law International 2005, p. 979.

Moreover, Article 86 (1) states that Member States must refrain from any measure contrary to the TEC in general, and its competition rules in particular when having granted undertakings with special or exclusive rights.[8] Article 31 TEC obligates the Member States to adjust any state monopoly of a commercial character to avoid unjustifiable discrimination when offering goods. Article 157 establishes that the Community and the Member States shall ensure the conditions necessary for the competitiveness of the Community's industry, in order to encourage development and initiatives of undertakings, especially small and medium-sized undertakings.[9] The article does not, however, provide a basis for the introduction by the Community of any measure that could lead to a distortion of competition, making the article somewhat of a balancing act.

As a final instrument to control state involvement on the market the TEC pronounces a general prohibition of state aid. There are however certain conditions where state aid can be necessary in order to secure a well-functioning and equitable economy. The TEC, therefore, accepts a number of policy objectives for which state aid can be considered compatible. This will however not be further discussed as mentioned in the delimitation.

2.2 Competition and Integration

Community competition law has earlier been a fulcrum to the four freedoms of the TEC because it regulated certain behaviours of undertakings, with the aim of market integration and market efficiency. The ECJ early stated that competition law is one of the instruments towards the fundamental goal of the establishment of a common market.[10] The subordinate position of competition law has however changed and competition law now is more emphasised. The four freedoms and competition law are now seen as an important "layer" of Common market.[11] The role of competition has been further enhanced by Article 4 of the TEC establishing that in order to achieve a common market, Member States' and the Community's economic activities shall be "conducted in accordance with the principle of an open market economy with free competition". The ECJ has elevated competition law to be a fundamental provision of EC law, superior to national procedural rules.[12] In contrast to this development, there is still an opposition among the Member States to fully accept the superiority and need for EC competition law. An attitude chiefly governed by a national industrial policy to protect domestic companies against competition. Some even go as far as to claim that there is "a major reorientation on the objectives of the Union. Competition is no longer an objective of the Union

[8] Van Bael and Bellis, 2005, supra, p. 979.
[9] Craig and De Búrca, 2008, supra, p. 1071.
[10] Case 14/68 Walt Wilhelm v Bundeskartellamt [1969] ECR 1, paras 4-5.
[11] Szyszczak, Erika, *The regulation of the state in competitive markets in the EU*, Modern studies in European law 11, Hart Publishing, 2007, p 29.
[12] Case C-126/97 *Eco Swiss Time Ltd v Benetton International NV* [1999] ECR I-8207.

or an end in itself"[13] and should therefore be removed from Article 3 TEC. In the ToL, competition as a Union objective can now be found in protocol No 27 on the Internal Market and Competition rather than in the main objectives in Title 1. Furthermore, according to Article 3 (3) ToL the Union should aim to create an internal market with "a highly competitive social market economy". This rewording of Union objectives together with the introduction of protocol 26, which emphasises the essential role of SGEI and the wide discretion of national authorities to provide such services, can be seen as evidence of a more political development of competition law and an infirmity thereof. However, the political leaders of Europe, except France's Sarkozy, have all ensured that this reformulation is an editorial change without any real alteration of the importance of competition. Awaiting the outcome of the enactments procedure of the ToL and the future case law of the ECJ, there should nevertheless be a fear of politicized development of competition law.[14]

Meanwhile, EC competition rules have, in distinction to other jurisdictions, two different main goals or objectives. First of all, the purpose to provide the market integration objective with effective means to achieve that goal, referred to as the *integration goal*. Secondly, it has also the objective of promoting effective and undistorted competition, referred to as the *economic goal*.[15]

Having dual main objectives makes EC competition law a rather unique standing as a competition policy. Article 2 of the TEC establishes that in order to achieve market integration, a high degree of competitiveness and convergence of economic performance shall be promoted throughout the Community. This objective has been further ennobled by the four fundamental freedoms, which all have effectively removed barriers between the Member States allowing goods, services, persons and capital to flow freely across the borders. EC competition law must therefore not allow undertakings or Member States to rebuild those barriers between the Member States, unless they are justified in order to secure universal service of a proportionate character. The importance of EC competition law as a tool to ensure market integration is well illustrated by the Commission's aggressive approach to practises or agreements that hinders or obstructs cross-border trade.[16]

The second main objective is to enhance economic efficiency in order to achieve optimal allocation of resources and consumer welfare. Even though the first objective can be seen as the dominant over the two, the economic efficiency will still be given attention where a practise or agreement impedes cross-border trade. This is not only applicable to the economical

[13] Lidgard, Hans Henrik, *Efter 50 år – mindre principer och mer politik i konkurrensrätten,* Europarättslig Tidskrift TIO ÅR, s. 49, Europarättslig Tidskrift, 2008, p 57.
[14] Ibid., p 50.
[15] Whish, 2008, supra, p 2; Bishop Simon, Walker Mike, *The Economics of EC Competition Law, Second edition*, Sweet & Maxwell, 2002, p 3.
[16] Bishop, Walker, 2002, supra, p. 4-5.

goal of EC competition law; attention should be given to all other goals of EC competition law.[17]

[17] Craig and De Búrca, 2008, supra, p. 951.

3 EC Treaty Articles

3.1 Article 10 and the Principle of Loyal Co-operation

In the early days of the Community, the ECJ established that the Community is "…a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields…"[18] Being a new legal order created by its Members, the members also have an obligation to give full effect to Community laws. In order to achieve this obligation, the Member States have to ensure effectiveness and conformity through loyal co-operation. This obligation of loyal co-operation is found in Article 10 (1) and requires Member States to "take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this TEC or resulting from action taken by the institutions of the Community". It also obligates Member States to "abstain from any measure which could jeopardise the attainment of the objectives of this Treaty." The obligation applies to all areas, regardless of whether or not the competence is shared or exclusive. To illustrate the importance of the principle of loyal co-operation, which is only expressed in the TEC, it was stated in *Pupino* that in order for the Union to carry out its task the co-operation has to have effect in European Union law and the area of police and judicial cooperation in criminal matters.[19] The article has also been extended to apply to the Community Institutions.[20]

The principle of loyal co-operation has been the centre of debate on the limit of the economic sovereignty of the Member State. When used in a broad sense, it is an effective tool, to regulate state distortion of the market. Some scholars even go as far as saying that there is a general presumption of illegality of state intervention in the market due to Article 10 and the TEC in general.[21] Such a presumption is not however likely considering the development by the ECJ discussed below.

Article 10 has had a great impact on EC competition through the case law of the Court, especially in conjunction with Article 81 and 82.[22] Articles 81 and 82 TEC regulate only the actions of undertakings but read in conjunction with Article 10, the articles also affect states. If a state distorts

[18] Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration,* [1963] ECR 1.
[19] Case C-105/03 *Criminal proceedings against Maria Pupino*, [2005] ECR I-05285 and Craig and De Búrca, 2008 supra, p. 222.
[20] Case C-2/88 *Imm., J. J. Zwartveld and others*, [1990] ECR 3365.
[21] Szyszczak, 2007, supra, p 14.
[22] See among others Case 13/77 *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)*, [1977] ECR 2115; Case 267/86 *Pascal Van Eycke v ASPA NV*, [1988] ECR 4769; and Case C-198/01, *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Merca*, [2003] ECR I-08055.

competition by, for example, setting a minimum price on a type of product, or adopting discriminatory measures of taxation it can be challenged under Community law using Article 10 in conjunction with Article 81 or 82.[23] The trouble is, however, to establish whether the Member State can be held responsible for the behaviour of the undertaking in breach of competition law. The possibility of a successful challenge is also burdened with the fact that the Member States are often reluctant to weaken the national sovereignty. Some opponents of this possibility argue that the only proceedings that can be brought against a Member State are found in TEC explicitly. Although this might have been a valid argument from a legal certainty perspective, the consequence of not being able to challenge a Member State's anti-competitive behaviour would have been and still is contrary to the spirit of the TEC and Community concept, leaving Article 81 and 82 ineffective.[24] Article 86 is also closely related to Article 10 as emphasised by the ECJ in *Banchero*, where the obligations which Member States must perform in good faith under Article 10 include the obligation, set out in Article 86 (1).[25]

3.1.1 Case law of Article 10

Most cases concerning state measures and abusive behaviours according to Article 82 have been dealt with in the context of Article 86 (1). The case law on state liability in case where Article 81 has been infringed, however, has mostly arisen in the context of Article 10.[26]

In *GB-INNO*, the ECJ ruled that Articles 3 (1) (g), 10, 81 and 82 combined could hinder undertakings to hide from competition under a cloak of national legislation. The case concerned the Belgian taxation of cigarettes, where the excise duty was calculated on the retail selling price. According to the Belgian ministerial order of 1948 the cigarettes where not allowed to be sold at a price higher or lower than the price given on the tax label, in order to ensure state the tax revenue and to prevent concentration of retailers. [27]

The ECJ stated that the single market system, which the TEC seeks to create, excludes any national system of regulation hindering directly or indirectly, actually or potentially, trade within the Community. Articles 3 (1) (g) and 82 together with the obligation of co-operation imposes a duty upon Member States not to enact measures enabling private undertakings to escape from the constraints imposed by Competition policy. Article 82 prohibits any abuse by one or more undertakings of a dominant position, even if such abuse is encouraged by a national legislative provision. A

[23] Whish, 2008, supra, p 215; Case 267/86 *Van Eycke* supra.
[24] Whish, 2008, supra, p 215.
[25] Case C-387/93 *Criminal proceedings against Giorgio Domingo Banchero*, [1995] ECR I-04663.
[26] Whish, 2008, supra, p 215.
[27] Case 13/77, *G.B.-INNO-B.M.*, supra.

national measure which has the effect of facilitating the abuse of a dominant position capable of affecting trade between Member States will therefore generally be incompatible with Articles 28 and 29 TEC."[28]

Since *GB-INNO*, the following cases have been trying to refine when Member States' measures are contrary to the TEC. The first main key is to establish that there is an agreement, because without an agreement between undertakings there can be no responsibility for the state under the combined Articles 3 (1) (g), 10 and 81.[29] The doctrine created in *GB-INNO* has been successfully applied in several cases subsequent to the judgment.

In *BNIC v Clair*[30], a case referred to the ECJ by a French court concerning the setting of a minimum price by a trade organization, which was exalted by approval of a Ministerial decree, making it binding to the entire industry. The ECJ stated that the agreement setting the minimum price had, by its very nature, the purpose to distort competition contrary to Article 81. The fact that the agreement became binding first after the decree cannot remove the agreement from the scope of competition law.[31]

In *BNIC v Yves Aubert*[32], concerning market quotas, BNIC argued that the public authority set the quotas. The ECJ ruled the Ministerial decree only reinforced the BNIC agreement and therefore was contrary to France obligations under Article 81.[33]

In another case[34], an association of travel agents passed on commission paid by the tour operator to the customers, in order to cut prizes, contrary to Belgian law. The ECJ answered the referring court that a legislative provision that prohibits undertakings from sharing the commission with their costumers or giving any rebates on the basis that it is unfair commercial practise is incompatible with Article 10, in conjunction with Articles 3 (1) (g) and 81. This as long as the national rules reinforces the effect of agreements or concerted practice which are contrary to Article 81.[35]

In *Consorzio Industrie Fiammiferi* [36], the question arose if the Italian competition authority was required to disapply Italian law governing the production and sale of matches. The ECJ said that Articles 10 and 81 are

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[28] Ibid, para 28-35
[29] Case 231/83, *Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville*, [1985] ECR 305.
[30] Case 123/83, *Bureau national interprofessionnel du cognac v Guy Clair*, [1985] ECR 391.
[31] Ibid, paras 22-23.
[32] Case 136/86, *Bureau national interprofessionnel du cognac v Yves Aubert*, [1987] ECR 4789.
[33] Ibid, para 24.
[34] Case 311/85, *Vereniging van Vlaamse Reusbureaus and Social Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, [1987] ECR 3801.
[35] Ibid, para 24.
[36] Case C-198/01, *Consorzio Industrie Fiammiferi, supra.*.

infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 81 TEC or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operator's responsibility for taking decisions affecting the economic sphere.[37]

A more recent application of the GB-INNO doctrine can be found in *Italian Custom Agents*[38]. The case concerned the application for a declaration that Italy had failed to fulfil its obligations under Article 10 and 81 of the TEC. The action taken by Italy was a legislative act obligating the National Council of Custom Agents (NCCA) to set up compulsory tariffs for customs agents, approved by the Italian Minister for Finance.

The ECJ found that the Italian Republic had failed to fulfil its obligations under Article 10. The legislation maintained in force did first require the NCCA to compile compulsory uniform tariffs for the service of customs agents. Secondly, the legislation delegated the responsibility to set the tariffs upon private economic operators. Thirdly, the legislation did not leave any possibility to derogate from the tariff due to the sanctions of exclusion, suspension or removal from the Custom Agents register. Finally, the Italian Republic gave the tariffs an appearance of a public regulation through the ministerial decree and the yearly publication of the tariffs.[39]

3.1.2 Conclusion

To conclude the use of Article 10, in conjunction with Articles 3(1), 81 and 82, as a tool to establish state responsibility for not maintaining or introducing measures contrary to the TEC, one must first start by establishing if there is an agreement between undertakings. In many cases before the ECJ, challenging national legislation have failed because it could not be establish that the Member State required, favoured or reinforced an anti-competitive agreement or abandoned its own price-setting power by delegation to a private operator.[40] In *Meng*, a case concerning transfers of commissions between a financial adviser and his clients contrary to German law. The ECJ answered the referring court that the German law does not fall within the categories of state rules, which undermine the effectiveness of Articles 3(1) (g), or Article 81 of the TEC. In the absences of any causal link to the anti-competitive activities of undertakings, there is nothing to preclude the state from prohibiting insurance intermediaries from transferring to their client all or part of the commission paid by insurance companies. [41]

[37] Ibid, para 46.
[38] Case C-35/96 *Commission of the European Communities v Italian Republic* [1998] ECR I-3851.
[39] Ibid, paras 56-60.
[40] Whish, 2008, supra, p 215.
[41] Case C-2/91, *Criminal proceedings against Wolf W. Meng*, [1993] ECR I-5751.

The most important effect of the Meng case was the limitation of the use of the *effet utile* doctrine, limiting the states liability in relation to anti-competitive practices of undertakings. The judgment also ensures the Member States of their prerogative but also strengthens the principle of legal certainty, which is somewhat of a trend in case law of the Court at this time.[42] In other words, the limit of the state's liability for anti-competitive behaviour of undertakings stops when there is no agreement, practise or concerted practices to derivate from. The GB-INNO doctrine cannot be used simply to preclude Member States from adopting laws having a similar effect as cartels. Consequently, it is only when the state compels undertakings to behave anti-competitive that the state can be held liable instead of the undertakings. This form of undertaking-immunity is only valid until the national measure contrary to the TEC is disapplied.[43]

In order to establish whether or not a state bears responsibility for a distortion of competition the state's action may be measured by a test combining elements of Articles 3(1) (g), 10 and 81 (and 82 but as mentioned above this usually dealt with under Article 86). It is the primarily effect of state actions on competition which provokes a negative reaction in Community law, and not the specific form of action which undertaking may choose. The scrutiny of state action by the Community is not conditional upon the fulfilment of all elements of anti-competitive practices of undertakings as required by Article 81. What primarily has to be established is the causality between state action and distortion of competition, rather than concerted practices *strictu sensu*. If state action is such as to render unnecessary concert action because parallel activities by undertakings will be privileged, encouraged or favoured by state regulation, and reach the same effect as concerted action in otherwise unregulated markets, this should be adequate for it to be struck down as contravening the *effet utile* of Articles 81 (and 82) in conjunction with Articles 10 and 3.[44]

3.2 Article 16 and SGEI

The trend of increased liberalization started during the 1980s and 1990s, and thus the question arose to what extent competition law would limit the Member States' right to organize and maintain public services. As always, there were many different views on the functioning of public and private interest among the Member States. The Commission suggested that Article 86 (2) should be amended and presented it suggestion in a Communication on Services of General Interests in Europe, in which the need and importance of services of general interest was emphasised.[45] This need was especially important to the European citizens and for creating social and

[42] Reich, Norbert, *The "November Revolution" of the European Court of Justice: Keck, Meng and Audi Revisited*, (1994 31 CML Rev p. 468, 472.
[43] Case C-198/01 Consorzio Industrie Fiammiferi, supra.
[44] Craig and De Búrca, 2008, supra, p. 489.
[45] Commission Communication concerning services of general interest in Europe, [1996] OJ C281/3.

economic cohesion in the Community. The result of the discussion was Article 16, added through the ToA in which an obligation was put on the Member States and the Community to ensure that services of general interest should be able to function and fulfil their missions.[46]

The article is to be found in the Fundamental principles section of the TEC, which gives the provision a certain special statue and perhaps is a sign that it is not solely a "product of ambiguous drafting and political diplomacy"[47]. It is the Commission's view that Article 16 elucidates that there is a need to strike balance between competition rules and the need for SGEI. As Flynn mentions, Article 16 imposes a duty on the Member States and the Community to care for public service in the meaning of Article 86. This duty is dual, first a normative claim where the SGEI constitutes a common position but also the function of promoting territorial and social cohesion. Flynn argues that the introduction of Article 16 can be a sign of diminution of the traditional Community functionalistic and technocratic approach, and a development towards a political European Union.[48] Ross' view is that the article is a declaration of a new, modern endorsement of social objectives shielding certain public service provision. The article states that SGEI no longer are derogations and that the obligation consists of promoting SGEI.[49] Buendia Sierra believes that Article 16 does not modify the concept of SGEI as used together with Article 86, and that it only reaffirms the logic behind Article 86.[50] Prosser says that the article reinforces a growing recognition of the value associated with the public service, limiting the scope of competition while emphasizing the importance of SGEI for the citizens of the union.[51] Szyszczak sees Article 16 as an important step in order to create a European idea of SGEI, where such services can be delivered through competitive markets.[52]

3.2.1 Conclusion

These theses are all reasonable, since Article 16 actually makes it clear that there should be a balance between economic goals of the Community and those of a more social nature. I believe Article 16 to be a reaction to the development in the ECJ during the early 1990s, where many Member States felt terror-struck. Szyszczak who optimistically believes that the European

[46] Whish, 2008, supra, p 234.
[47] Ross, Malcom, *Article 16 E.C. and Services of General Interest: from derogation to obligation*, European Law Review 2000, 25(1), 22-38.
[48] O'Keeffe, David and Twomey, Patrick (eds), *Legal issues of the Amsterdam treaty*, Hart Publishing, 1999, p 197-199.
[49] Ross, EL Rev 2000, supra, p. 34.
[50] Buendia Sierra, José Luis, *Exclusive Rights and State Monopolies under EC Law Article 86 (formerly Article 90) of the EC Treaty*, translated from the Spanish by Andrew Reed, Oxford, Oxford University Press, 1999, p 313.
[51] Prosser, Tony, *The Limits of Competition Law*. Market and Public Services, Oxford University Press, 2005, p 161.
[52] Szyszczak, Erika, *Public Services in Competitive Markets*, (2001) 21 Yearbooks of European Law 35, p. 64.

concept of SGEI will mean universal services delivered in competition takes the most positive approach. Albeit, I concur with Flynn, that the article is a sign of an alteration of the technocratic approach, giving leeway to non-economical justification grounds. There has been a revision from a more circumscribing attitude of Member State prerogatives towards a balancing of economic, social, territorial and cultural interests.

The importance of Article 16 is further emphasised by Article 36 of the CFR, which is almost identical with the TEC article. The Charter elevates access to SGEI to the statues of fundamental right, bearing in mind that the Charter is not yet binding but serves as inspiration to the ECJ in order to establish fundamental principles of EU law.

3.3 Article 31 – State Monopolies of a Commercial Character

In order to achieve a balance in the treatment of private and public undertakings established in those Member States that embraced the idea of monopolies and those who do not, the Treaty of Rome included the now renumber Articles 31 and 86. These two articles regulate state monopolies within the Community and have as their objective to control infringements by the Member States in the normal functioning of competition system.[53] It is important to emphasize that neither of the two articles require the abolishment of state monopolies. Article 86 will be discussed below while this chapter deals briefly with Article 31.

Article 31 is located in the free movement of goods section of the TEC, mainly because it applies only to state monopolies holding exclusive rights in the procurement and distribution of goods. The article does not apply to regulatory activities of the state, such as licensing or taxation rules governing products only sold by monopolies. In other words, only state activities that are intrinsically connected with the specific business of the monopoly are included.[54] Article 31 may however, also affect undertakings, which through their monopoly status influence the import or export of goods between Member States.

The aim of the article is ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.[55] In contrast to Article 86, Article 31 has the inadequacy of not containing any possibility for an exemption, where a commercial monopoly can be found justified based upon public interest, even though it is in breach of Community policy. The ECJ has, however,

[53] Case 94-74,*Industria Gomma Articoli Vari IGAV v Ente nazionale per la cellulosa e per la carta ENCC*, [1975] ECR 699.
[54] Case 86/78, *SA des grandes distilleries Peureux v directeur des Services fiscaux de la Haute-Saône et du territoire de Belfort*, [1979] ECR 897.
[55] Case C-189/95, *Criminal proceedings against Harry Franzén*, [1997] I-05909.

allowed Article 86 (2) to be used in order to find justification and therefore disapply Article 31.[56]

3.4 Article 86

3.4.1 Introduction

The main article governing the delicate balancing act between competition policy and the need to uphold and operate services of general economic interest is Article 86. The article is divided into three provisions, which are interrelated. The first provision, 86 (1), contains a prohibition addressed to Member States only. In relation to public and private undertakings that have been granted special or exclusive rights, a Member State is obliged not to enact nor maintain in force any measure contrary to the rules contained in the TEC. The objective is to prevent Member States from depriving the Treaty of its effectiveness by removing services from the scrutiny of competition law.

The second provision, 86 (2), is addressed to the entrusted undertakings referred to in (1). It gives these undertakings a possible immunity from the TEC rules if they are entrusted with the operation of SGEI or having the character of a revenue-producing monopoly as far as it is necessary in order for them to carry out the entrusted task.

The third and final provision, 86 (3), gives the Commission a right to ensure the application of the above-mentioned provisions and to, where necessary, address appropriate directives or decisions to Member States. This enforcement mechanism makes an enforcement action more expedient then the general enforcement provision of Article 226. [57]

Article 86 is a reference provision, which means that it cannot be applied independently; therefore, it must be combined with another provision of the TEC.

3.4.2 Article 86 (1)

When addressing this provision one must first start looking at three prerequisites found in the text. The following three terms must be defined: "public undertaking", "special or exclusive rights" and, "measure".

3.4.2.1 Public Undertakings

The concept of undertaking within EC Competition law is a rather well developed concept, mostly deriving form the case law concerning Articles

[56] Szyszczak, 2007, supra, p 110.
[57] Jones, Alison and Sufrin, Brenda, *EC competition law : text, cases, and materials*, Third edition, Oxford University Press, 2007, p 621.

81 and 82 TEC. The concept is the same under Article 86.[58] The term was defined by the ECJ in *Höfner v Macrotron*[59], a case partly concerning whether a company could be seen as an undertaking even if it was operating contrary to a national monopoly. The ECJ held that "the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of legal status of the entity or the way in which it is financed"[60]. The obvious legal question is therefore what constitutes a "economic activity"?

Since the notion of an undertaking is a relative concept, the exact definition is not possible to establish but is more or less based upon the circumstances in each case. The interpretation of the ECJ case law varies to a certain extent. Jones and Sufrin mention some characteristics, which can be used to identify an economic activity. First, the offering of goods or services on the market. The second characteristic is, if the activity could be performed, at least in principle, by a private undertaking in order to make profits.[61] If these two requirements would be satisfied, it is, irrelevant whether the undertaking was not setup for an economic purpose or not making profit.[62] Another definition presented by Odudu is that there are three positive requirements for an activity to be seen as an economic activity. First, the undertaking must offer goods or services on the market; secondly, it must bear the economic or financial risk of the enterprise; finally, the undertaking must have the potential to make profit from the activity.[63] A third definition, given by Whish, is the offering of goods or services on a given market, not necessarily with any profit-motive or economic purpose. Furthermore, the legal status of the entity and the way in which it is financed is irrelevant for the assessment.[64] Accordingly, one should have a functional approach when determining if an entity is performing an economic activity or not. This fits the CFI's ruling in *SELEX* where the Court came to the conclusion that "various activities of an entity must be considered individually and the treatment of some of them as powers of a public authority does not mean that it must be concluded that the other activities are not economic".[65]

After establishing, briefly, what constitutes an undertaking we must now establish what a "public" undertaking is. In order to ensure coherent application of Article 86 and avoid the possible negative effect of letting the Member State choose arbitrarily the definition of public undertaking, the definition of "public undertaking" is a Community concept, defined by the

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[58] Ibid., p 128.
[59] Case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, [1991] ECR I-1970.
[60] Ibid, para 21.
[61] Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751.
[62] Jones and Sufrin, 2007, supra, p 129.
[63] Odudu, Okeoghene, *The Boundaries of EC Competition Law: The Scope of Article 81*, Oxford University Press, 2006, p. 26-45.
[64] Whish, 2008, supra, p. 84-85.
[65] Case T-155/04 *SELEX Sistemi Integrati SpA v Commission* [2006] ECR II-4797, para 54. The CFI ruling has been appeal but the ECJ has as of today 6 January 2009 not delivered the judgment.

Transparency Directive.[66] The definition used is "any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it." A dominant influence is presumed if "[public] authorities, directly or indirectly in relation to an undertaking: (a) hold the major part of the undertaking's subscribed capital; or (b) control the majority of the votes attaching to shares issued by the undertakings; or (c) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body."[67] This definition was upheld by the ECJ in the *Transparency case*, as the directive was challenged by France, Italy and the United Kingdom.[68]

France and Italy claimed that the directive treated private and public undertakings unequally, putting public undertakings at a disadvantage. The ECJ answered that in order to argue for an infringement of the principle of equality, the relationship between public and private undertakings must be of a comparable situation. This is not, however, the question. Private undertakings "determine their industrial and commercial strategy by taking into account in particular requirements of profitability… public undertaking, on the other hand, may be affected by factors of a different kind within the framework of the pursuit of objectives of public interest by public authorities which may exercise an influence over those decisions."[69] The Court established that the relationship between private and public undertakings are not comparable, especially since the economic and financial consequences of the impact of the public interest are not something that effectuates private undertakings while public undertakings sometimes even have as their objective to supply a service due to public interest without any financial consequences.

France and Italy also claimed that the Commission had exceeded its competence by amplifying the concept of public undertaking. The ECJ said that one of the reason for the existence of Article 86 (1) is the possible influence from public authorities over the commercial decisions of public undertakings. This influence may be exerted on financing of the undertaking or on the actual management. Consequently, the criteria used by the Commission to establish what constitutes a public undertaking are within the limits of the Commissions discretion.[70] This was further developed in *Sacchi*, which concerned the Italian broadcasting monopoly. [71] Since the Italian State could influence the operation of the broadcasting authority, it was deemed a public undertaking.[72]

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[66] Directive No 80/723/EEC on the Transparency of Financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35).
[67] Ibid., Article 2 (1) (2) and (2).
[68] Joined cases 188 to 190/80, *French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities*, [1982] ECR 2545.
[69] Ibid., para 21.
[70] Ibid., para 26.
[71] Case 155/73 *Giuseppe Sacchi*, [1974] ECR P 409.
[72] Craig and De Búrca, 2008, supra, p. 1074.

An undertaking can be both a public undertaking but also an undertaking with an exclusive right. As seen in Sacchi the Broadcasting Authority was seized by both limbs of Article 86 (1). A similar effect was established in *Muller*.[73]

As a conclusion of what constitutes a public undertaking, it must first be established whether the entity is an undertaking. A simplified solution is to establish whether or not the entity is offering goods or services on the market and if the activity could be performed, at least in principle, by a private undertaking in order to make profits. If these two questions are answered in the affirmative, then it has to be established whether it is a public undertaking. The key element is the concept control or influence held by the state. This control can take different forms such as direct ownership, contractual or financial control, or structural connection between the state and the undertaking.

3.4.2.2 Granted Special or Exclusive Rights

The second definition must be divided into two categories, "special rights" and "exclusive rights". Even though the two categories have to be discussed separately, both may be granted in the whole of national territory or in only part of it and that, the entities granted that right may or may not be public undertakings.[74]

3.4.2.3 Special rights

The definition of special rights has been driven mostly by the case law of the ECJ, through a series of challenges brought by Member States against Commission directives regarding liberalization of the telecommunication market. Initially, the concept of special rights did not differ from the concept of exclusive rights in the eyes of the Commission or many scholars.[75] When France challenged Directive 88/301[76], the ECJ did annul the directive as far as it concerned the withdrawal of special rights. This because the Commission had failed to specify what kind of rights that were included in the concept of special rights in this particular field. The ECJ did not give any guidance to how the concept of special rights was to be defined or how it differed from the concept of exclusive rights.[77]

[73] Case 10/71, *Ministère public luxembourgeois v Madeleine Muller, Veuve J.P. Hein and others*, [1971] ECR 723.
[74] Jones, Sufrin, 2007, supra, p 627.
[75] Buendia Sierra, 1999, supra, p 65-67.
[76] Directive 88/301 on competition in the markets in telecommunications terminal equipment [1988] OJ L131/73.
[77] Case C-202/88, *French Republic v Commission of the European Communities*, [1991] ECR I-01223.

In a similar case a year later, Spain, Belgium, and Italy challenged another Commission directive in the field of telecommunication services. [78] Once again the ECJ declared the provisions concerning the withdrawal of special rights to be void due to the fact that Commission had not [*adequately*] "determine[d] the type of special rights with which the directive is concerned or in what respect the existence of those rights is contrary to the various provisions of the Treaty."[79]

The Commission did consequently act in order to pursue the objective of liberalization of the telecommunication market. The Commission added an extended definition of the concept of "special right" in the Preamble to Directive 94/46[80]. The definition used for what constitutes a "special right" (in the field of Telecommunications) is: [81]

(1) a granted right to a limited number of undertakings,
(2) given through legislation, regulation or an administrative instrument,
(3) within a geographical area
(4)
    a. which limits two or more undertakings from offering that service which is encompassed in the special right, which cannot be justified by objective, proportional and non-discriminatory criteria;
    b. or if that special right, according to such criteria, is designated to give several competing undertakings an authorisation to provide such service;
    c. or give any undertaking or undertakings, on unjustifiable grounds, legal or regulatory advantages that affect other undertakings from not being able to provide the same [*telecommunication*] service under equivalent conditions.

The two first subcategories, 4 a-b, are closely connected through the term "limited number of undertakings", while the last subcategory, 4 c, is based on legal or regulatory advantages created by the granted right. Regarding 4 a-b, it is essential not only that there is a limited group of undertakings in order for it to be a special rights. The rights must also be the result of state discretion; e.g. the state must have selected the particular undertaking. If a Member State has not, through its discretionary powers, limited the number of undertakings or chosen the undertakings, no special rights granted. It should also be made clear that the Commissions definition, used in Directive 94/46, concludes that there is no special right where a number of undertakings and their identity is selected by the state's discretion, if the choice is based upon objective, proportional and non-discriminatory criteria. Even though this definition is found in a directive governing the area of

[78] Directive 90/388 on competition in the markets for telecommunications services [1990] OJ L192/10.
[79] Joined cases C-271, 281 and 289/90, *Kingdom of Spain, Kingdom of Belgium and Italian Republic v Commission of the European Communities [1992 ECR I-5833.*
[80] Directive amending Directive 88/301 and 90/388 in particular with regard to satellite communications [1994] OJ L268/15.
[81] Ibid., Article 2 (1) (ii).

telecommunications, its applicability in other areas is most likely.[82]

The ECJ ruling in *Copenhagen Waste*, where three undertakings chosen by the Municipality of Copenhagen was given the right to process environmentally non-hazardous building waste within the Copenhagen area, did however add some uncertainty to what the differences are between special and exclusive rights, because the ECJ said that the three held an exclusive right, creating a triopoly, without any further explanation.[83] The prior belief was that it was not possible to speak of exclusive rights unless the Member State had limited the number of undertakings to one.[84]

The second subcategory of the Commission's definition of special rights, which gives a legal or regulatory advantage over other undertakings, concerns cases where one undertaking among an unlimited group of undertakings is given a competitive edge through state discretion. This could be a former monopoly undertaking that inherits a privilege of, for example, owning the main telephone lines. As with the first subcategory, the essential point is if the advantages are based upon criteria, which are justifiable in terms of being objectivity, proportionality and non-discrimination.

3.4.2.4 Exclusive rights

The concept of an exclusive right is rather easy to grasp. The exclusive right exists when a state grants a monopoly to an entity or more to engage in a particular economic activity on exclusive basis. There are many examples, even some of a rather special kind, such as the exclusive right to provide bovine (cattle) insemination[85], or the right to offer funeral services[86] or the right to collect waste for recycling[87]. Furthermore, it must be emphasised that a grant of intellectual property rights does not mean the same as being granted an exclusive rights within the meaning of Article 86 (1).[88]

3.4.2.5 Measure

The third and final term is what types of measures are *contrary to the rules contained in this Treaty*. The term measures is not only found in Article 86 (1) but also in the relating Articles 10 and 28. Article 10, as discussed in detail above, contains the obligation of the Member States to act in loyalty with the Treaty. Article 28 concerns the prohibitions of measures having the

[82] Jones, Sufrin, 2007, supra p 628; Whish, 2008, supra, p 223; Buendia Sierra, 1999, supra, p 65-66.
[83] Case C-209/98, *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune*, [2000] ECR I-3743, para 54.
[84] Buendia Sierra, 1999, supra, p 68.
[85] Case C-323/93 *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne*, [1994] ECR I-5077.
[86] Case 30/87 *Bodson v Pompes Funèbres des Régions Libérées* [1988] ECR 2479.
[87] Case C-209/98 *FFAD*, supra.
[88] Jones, Sufrin, 2007, supra, p 627.

equivalent effect to quantitative restriction on trade between Member States. The concept of measures is rather broad, and the Commission used the following definition in Directive 70/50 “measures means laws, regulations, administrative provisions, administrative practices, and all instruments issuing from a public authority, including recommendations.”[89] The broad definition has been upheld by the ECJ in several cases. In a case referred from a Spanish court the ECJ said that definition includes "measures adopted by all the authorities of the Member States, be they the central authorities, the authorities of a federal state, or other territorial authorities.”[90] In another case, known as *Buy Irish*, the Irish state had taken a number of actions in order to promote Irish products on the national market. A council, whose management was controlled by the state, governed most of the action. Infringements proceedings was brought on by the Commission and the ECJ said that even measures which do not have binding effect could influence the conduct of traders and consumers and therefore be contrary to the aim of the TEC.[91] Even though the concept is broad, one must always bear in mind that it has to be a state measure in order for Article 86 to be applicable, otherwise Article 81 or 82 must be used in order to attack the measure.

Due to the need of establishing a Community definition of ”state measures” and bearing in mind that the Community law has always been rather reluctant to rely on formal criteria. What is decisive is the functional nature rather than the form. The borderline between Article 86 (1) and Article 81 and 82 is therefore made due to the functional nature rather than the legal form.[92]

3.4.3 Obligations on Member State under Article 86 (1)

As seen in the above mentioned Telecommunications cases, the question about granting special or exclusive rights by Member States is a very delicate question, encumbered with political and ideological values. Consequently, there is a conflict within the Community between the obligation of ensuring the fulfilment of the TEC and the right of Member States to make certain economic (and political) choices. In the above mentioned case where France partly successfully challenged the Telecommunication Terminal Directive, the ECJ stated the Commission has

[89] Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, OJ L013, 19/01/1970 P. 0029 – 0031, 1st recital of the Preamble.
[90] Joined cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior SA and Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña*, [1991] ECR I-04151, para 8.
[91] Case 249/81 *Commission of the European Communities v Ireland*, [1982] ECR 4005 para 28.
[92] Faull, Jonathan and Nikpay, Ali (eds), *the EC Law of Competition*, 2nd edition, Oxford University Press, 2007, p 605.

the power to specify the obligations under Article 86 and even though the article presupposes the existence of an undertaking with a special or exclusive right, it does not necessarily mean that any special or exclusive right is compatible with the TEC.[93] In order to try to establish the point where special or exclusive rights are rightly balanced with competition law I will assess the present development by the ECJ case law.

Höfner v. Macrotron concerned the German law on promotion of employment, which gave the Federal Office for Employment an exclusive right of recruitment services. The ECJ established that the granting of exclusive right is not as such an infringement of the TEC. In the case at hand, the monopoly did not only comprise ordinary recruitment services but also executive recruitment activities; a service not performed by the monopoly. ECJ explicitly pointed out that a Member State, which has conferred such an exclusive right as mentioned above, is in breach of Article 86 (1) if it creates a situation in which the grantee cannot avoid infringing Article 82, by not satisfying the markets demand for such services. The German state had created a situation where the agency could not avoid infringing the TEC obligation. [94]

In *ERT*, the Greek radio and television monopoly's conformity with competition policy was scrutinized. [95] The ECJ started of by stating that the TEC does not prevent a Member State from removing radio and television broadcasting from the field of competition by granting an exclusive right.[96] However, the exclusive right cannot create a monopoly that infringes the TEC, especially the four freedoms, and thereby the effectiveness of the EC competition policy.[97] In contrast to the Höfner case, the exclusive right given to ERT did not create a situation where ERT could not avoid infringing the TEC but instead led to the effect that ERT in the end would discriminate other companies by favouring its own productions.[98]

Another measure that infringed the TEC was pointed out by the ECJ in *Porto di Genova*. Once again, the ECJ stated that the creation of a dominant position by granting an exclusive right is not in itself an infringement of the TEC and Article 82. Nevertheless, if that monopoly makes it unavoidable for the undertaking not to abuse that given dominant position or when that right is liable to create a situation where that undertaking is induced to commit such abuse, then the Member States and the exclusive right is in breach of the TEC. The Italian monopoly lead to abuse through increased and disproportionate prices, longer and more costly goods handling and

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[93] Case C-202/88 *French Republic v Commission of the European Communities*, [1991] ECR I-01223, paras 21-22.
[94] Case C-41/90 *Höfner*, supra.
[95] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, [1991] ECR I-2925.
[96] Case 155/73 Sacchi, supra.
[97] See the above mentioned GB-INNO doctrine.
[98] Case C-260/89, supra, para 38.

discriminating price reductions to some customers and was therefore a measure contrary to the TEC. [99]

RTT v GB-INNO-BM concerned RTT's exclusive right to approve phones to be used on the Belgian telephone network. The ECJ started of by establishing that the objectives of RTT, to create an accessible telephone system, constituted a SGEI, at that time. However, RTT's dual role of both being an authority and an undertaking created a serious conflict of interest contrary to the maintenances of effective competition, and was therefore found to be in breach of the TEC. [100]

Corbeau concerned the Belgian Post monopoly and value-added services. As reply to the referring Court, the ECJ referred to the GB-INNO doctrine and Article 86 (1), which accordingly obligates the Member State not to adopt or maintain in force any measure which might deprive the TEC of its effectiveness.[101]

The Court then refers to Article 86 (2) and the exemption where undertakings entrusted with the operation of SGEI are to be subject to the rules of competition only as far as the application of those rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. This article allows a Member State to create a monopoly, which may distort competition by excluding all other economic operators, in order for the monopoly holder to perform the SGEI. The exemption given to these services must however, be justifiable and proportionate. The ECJ starts its proportionality assessment by looking if the premises of the undertakings exclusive right are to offset less profitable sectors against the profitable sectors, which would justify a restriction of competition from individual undertakings. The rationale for this assessment is that an undertaking given the responsibility to perform a service of general interest cannot compete with a "normal" undertaking, who can concentrate its operation to the economical profitable area and thereby offer more advantageous tariffs, without having the costs of the non-profitable areas. Nevertheless, a Member State cannot justifiably remove specific services dissociable from the SGEI completely from competition law when these do not compromise the economic equilibrium of the SGEI.[102] As examples of specific services dissociable from the service of general interest, the Court mentions the activities of Mr *Corbeau*, who collected mail directly from the senders and delivered them within the following day.

In conclusion, this judgment did not concern abusive behaviour de facto, or conflicts of interest or as in RTT a "bundling of regulatory functions and

[99] Case C-179/90, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA*, [1991] ECR I-5889.
[100] Case C-18/88, *Régie des télégraphes et des téléphones v GB-Inno-BM SA.*, [1991] ECR I-5973.
[101] Case C-320/91, *Criminal proceedings against Paul Corbeau* [1993] ECR I-2533.
[102] Ibid., para 19.

entrepreneurial activities"[103]. What it did concern was how far the state prerogative to define a service of general interest extends, but also that any legal monopoly must be reviewed from time to time in order not to violate Article 86. Another interesting aspect is that the Court used a proportionality test, quite similar to the one found in the free movement of goods. [104] Conversely to most of the case law of free movement of goods, and perhaps to mitigate the political effect of the case, it seems that the ECJ allowed the use of economical arguments to be used in order to show the proportionality of the state measure.[105]

Buendia Sierra's conclusion of the judgment is that the ECJ has changed the burden of proof and the way in which exclusive rights should be seen. This is, according to him, the final effect of the effect theory, in principle, where all exclusive rights are by their very nature illegal unless objectively justified or necessary to guarantee the effective carrying out of projects of general economic interest.[106] Edward and Hoskins argue that the case creates what they call "the limited competition approach" where the creation of a legal monopoly must be justified by a legitimate national objective and satisfying the principle of proportionality by not exceeding what is necessary to attain the objective.[107] They reject that the mere creation of a legal monopoly is contrary to Article 86 (1) and in order to avoid the possibility of Member States creating or maintain monopolies for reasons such as protectionism, the limited competition approach would be keeping within the purpose and aims of the TEC. Hancher argues that the *Corbeau* ruling is a liberal ruling, where competition rules only have to be limited if it is necessary to ensure suitable economic conditions for the performance of public duties. She looks at three effects of the ruling, first, that all forms of exclusive rights, which affect the fundamental freedoms guaranteed by the TEC, will have to be justified based on Article 86 (2). Secondly, that it seems to be enough for a national measure to be capable of restricting inter-state trade only by denying economic operators the possibility of establishment or offering services in that Member States . Finally, she highlights the fact that the rules governing the exclusive right was passed 30 till 40 years prior to the ruling and that the service offered by Mr *Corbeau* did not even exist at that time. This could be, she argues, an important knowledge to have while trying to interpret the ruling. She concludes that the abuse by the Member State lays in the failure to respond to the changes

[103] Jones, Sufrin, 2007, supra, p. 640.
[104] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649; Case C-145/88 *Torfaen Borough Council v B&Q plc*, [1989] ECR I-3851; or with EEA relevance Case E-9/00 *The EFTA Surveillance Authority v. Norway* [2002] EFTA Court Report 72, OJ 2001/C 49/15.
[105] Case 238/82 *Duphar BV and others v The Netherlands State*, [1984] ECR 523, concerning the Member States right to organise its welfare system.
[106] Faull and Nikpay, 2007, supra, 613-614.
[107] Edward, David and Hoskins, Mark, *Article 90: Deregulation and EC Law. Reflections Arising from the XVI FIDE Conference*, (1995) 32 Common Market Law Review p. 157-191, p 167-186.

in demand.[108] Such conclusion calls for a perpetual responsibility for all Member States to constantly keep their legal monopolies up to date with the ever-changing conditions on the market.

This far-reaching obligation introduced by *Corbeau* was however not upheld in the subsequent case *la Crespelle*. This judgment puts the development back to prior *Corbeau*. According to this case, that a Member State is free to create a dominant position through conferring exclusive rights to undertakings, as long as it does not render abuse unavoidable, or creates a situation whereby an undertaking, just by exercising its rights, leads it to commit an abuse within the meaning of Article 82. If an abuse is established, then it can only be justified under Article 86 (2). [109] However, this was not a definite nail in the coffin for the "automatic abuse doctrine".[110]

One-step forward was taken three years later in *Albany*[111], a case concerning the Dutch compulsory affiliation to pension funds. In reply to the Dutch court, the ECJ first established that, even though, the fund was non-profit-making and a manifestation of solidarity, it was still an undertaking granted an exclusive right. Secondly, the Court said that the exclusive right in question restricted competition and therefore had to be justified under Article 82 (2). The ECJ accentuates the fact that the funds fulfil an essential and complex social function, complementing the low state pension, reflecting a high solidarity where the payments made do not reflect the risks. Because of this the funds becomes less compatible, as competitors could accept low-risk insurants only, and thereby "pick the cherries". This would affect the financial equilibrium and make it impossible for the undertaking to perform the particular tasks entrusted. The final reason for notion of the Funds being justified was the wide margin of appreciation enjoyed by the Member States, especially with the financial stability of their pension system. This is a similar reason found in the case law relating free movement of goods, where the ECJ stated that Community law does not detract the Member States right to organize their social security system.[112]

The next case of relevance, *Deutsche Post*, concerned the Universal Postal Convention and the financing thereof. The ECJ found that *Deutsche Post* is an undertaking entrusted with the performance of service of general interest. All the same, the Court said that since the exclusive right may lead the *Deutsche Post* to abuse its position to encumbrance of the consumers, it has to be established whether it is a proportionate measure. The measure was

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[108] Hancher Leigh, *Case law: Case C-320/91 P, Procureur du Roi v. Paul Corbeau, Judgment of the full Court, 19* May 1993, Common Market Law Review, (1994) 31, p 110-122, p 112-122.
[109] Case C-323/93, *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne*, [1994] ECR I-5077.
[110] Faull and Nikpay, 2007, supra, p. 614.
[111] Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751.
[112] Case 238/82, *Duphar BV*, supra.

found to be proportionate due to that the task of general interest entrusted, would be impossible to carry out if it could not be done in economically balanced conditions. The ECJ found that it was not contrary to the TEC for the *Deutsche Post* to claim full internal fees for external post send in bulk, as long as a corresponding deduction was made for the terminal dues.[113]

In *Ambulanz Glöckner* a German court referred a question concerning the refusal to renew authorisation for the provision of ambulance transport services.[114] In reply to the question put forth by the referring court, regarding whether the German provision is liable to create a situation in which medical aid organisations are led to commit abuse of a dominant position contrary to Article 82 of the TEC, the ECJ assessed the case in a four-stage reply. First, it must be determined if there is a dominant position on a substantial part of the common market. In order to establish that, the service market and the geographical market has to be established in accordance with Article 82. After establishing the market, it must be established whether any individual dominant position or collective dominant position exist and whether such positions exit on a substantial part of the common market. Secondly, any possible abuse of that dominant position should be identified. As established in the earlier cases, a Member State creating a dominant position for an undertaking is only in breach of the TEC if that undertaking, merely by exercising its special or exclusive right leads or creates a situation, which leads to abuse. Applying the GB-INNO doctrine, the Court reaches the conclusion that the German provision led to abusive behaviour, in this case the limitation of the market to the prejudice of consumers.

Thirdly, the Court assessed whether the provision had an effect on trade between Member States. Regarding services, the Court said that a measure which prevents an undertaking from establishing itself in another Member State with a view to provide service on that market has an effect on trade because it partitions the common market, restricting the freedom to provide services contrary to the objectives of the TEC. The result was that the German provision created a dominant position on a substantial part of the common market, which was effecting trade between Member States, contrary to Article 86 (1) read in conjunction with Article 82. The next step taken by the ECJ was to see if the measure could be justified as need to perform a SGEI.

Article 86 (2), read in conjunction with (1), allows a Member State to confer on undertakings to which they entrust the operation of SGEI, exclusive rights which may restrict competition, or even exclude all competition, when necessary to ensure the performance of the particular tasks assigned to the undertakings.[115] This restrictive measure must, nevertheless, not go

[113] Joined cases C-147-148/97, *Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH GZS) (C-147/97) and Citicorp Kartenservice GmbH (C-148/97),* [2000] ECR I-825.
[114] Case C-475/99, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz,* [2001] ECR I-8089.
[115] Case C-320/91 *Corbeau*, supra, para 14.

beyond what is necessary in order enable the entrusted undertaking to perform the task entrusted. In prior cases the starting point for this test has been the premises that the obligation to perform its services in conditions of economic equilibrium, presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings in economically profitable sectors.[116]

The Court has held that exclusion of competition is not justified in certain cases involving specific services, severable from the service of general interest in question, if those services do not compromise the economic equilibrium of the SGEI performed by the holder of the exclusive rights.[117] This does not apply to this particular case, because of two reasons. The two services, emergency ambulance and transport ambulance are so closely linked, making it difficult to sever the transport ambulance from the task of general economic interest. Secondly, the transport ambulance service enables the entrusted undertakings to discharge the costs originating from the general-interest task of providing emergency transport, in conditions of economic equilibrium. The conclusion made by the ECJ is that the German provision was justifiable in order to run a SGEI, as far as those entrusted could, de facto, satisfy demand and fulfil their entrusted tasks.

In a more recent case, the ECJ assessed the Greek regulation of motor sports, a case a rising from proceedings between the Greek State and the Greek Motorcycling Federation (MOTOE). MOTOE claimed damages, suffered due to the indirect refusal by the Greek state to grant authorisation to organise motorcycling competitions. In order to organise such competitions, the organiser needed approval from ELPA, a legal person and non-profit making association, entrusted with the approving any motorcycling competition in Greece. ELPA was, however, not only the authoriser of all competitions but also an organiser of such, which meant that it not only had the legal means to limit competition but also an economic interest of doing so. The Court concluded that Articles 82 and 86 precludes a national rule conferring on a legal person, who also organises motorcycling events and enjoys the economic benefits thereof, the administrative power to approve such competitions, without that power being made subject to restrictions, obligations and review. The result of such measure is unequal conditions of competition contrary to Article 82 and the TEC in general. Furthermore, Greece could not seek justification under Article 86 (2) as the ECJ established that ELPA had been entrusted with a service of general interest, and not a SGEI.[118]

3.4.3.1 Conclusion

[116] Ibid, paras 16 and 17.
[117] Case C-320/91 *Corbeau*, para 19.
[118] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, [2008] N.Y.R.

As Article 86 (1) can only be infringed where there is a causal link between a Member State's legislative or administrative intervention on the one hand and anticompetitive behaviour of undertakings on the other hand, it is not easy to establish a clear definition what constitutes an infringement of the article. Unfortunately does not the case law of the ECJ give adequate guidance. Ross describes the case law as complex and hard to interpret.[119]

Advocate General looks at three types of infringements in the opinion to *Albany* to help in the assessment. In the ERT-type cases, it is not merely the monopoly in itself which infringes Article 86 (1) and 82 but the monopoly in conjunction with additional features which make abuses very likely. In *ERT*, the additional feature was that the exclusivity concerned both its own productions and the transmittance of others, which lead ERT to favour its own production discriminating all others, while in *MOTOE* the entrusted undertaking was given both a legal tool to limit competition while already having the economic incitement to do so. Even though no actual abuses has to be committed, it must still be shown that the measure will lead to abuse or is most likely. In the second type, Höfner-type cases, the infringement is created through a measure, which renders the undertaking to abuse its dominant position, merely by exercising the exclusive right. Contrary to the ERT-type cases, the state does nothing more than granting an exclusive right. Nevertheless, the monopolist could not avoid abusing its dominant position by e.g. constantly limiting production, markets or technical development to the prejudice of consumers' within the meaning of Article 82. As the ECJ established, when an undertaking is manifestly not in a position to satisfy demand, a marginal review of the legality of monopolies could be performed. In the third type, *Corbeau*-type cases, the ECJ does not clearly identify what features of the national legislation is contrary to Articles 86 (1) and 82 but instead seeks justification under Article 86 (2).[120]

Jacobs' three types does not give a final say whether it is the effects of the measure or the actual behaviours of the privileged undertaking, which is decisive when establishing the compatibility to Article 86 (1). Buendia Sierra argues that the trend given in *Ambulanz Glöckner*, is that the Court relied upon the actual behaviour of the undertaking rather then the effects of the measure.[121] The development has, however, renounced the automatic abuse presumption.

In the end, there are three forms of anti-competitive behaviour that are likely to be deemed to be contrary to Articles 86 (1) and 82. First, if the privileged undertaking cannot satisfy market demand, secondly, when the state grants

[119] Ross, EL Rev 2000, supra, p.23.
[120] Joined opinion of Mr Advocate General Jacobs delivered on 28 January 1999, Case C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie; Joined cases C-115/97 to C-117/97 Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen; Case C-219/97 Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven, [1999] ECR I-05751, paras 396-420.
[121] Faull and Nikpay, 2007, supra, p. 615.

an exclusive right to an undertaking in a situation of conflict of interest and, finally, if the exclusive right has the effect of discriminating undertakings established in other Member States. One must not, however, forget that the infringements can be justified under Article 86 (2) and therefore I suggest that the assessment should always be done in conjunction with Article 86 (2).

3.5 Article 86 (2)

3.5.1 The purpose of Article 86 (2)

Due to the political and delicate nature of restricting Member States to ensure certain public needs, Article 86 (2) provides a derogation from the obligation imposed on the Member States in the first paragraph of the article. The derogation applies to two forms of undertaking, revenue-producing monopolies and operators entrusted to perform a service of general interest. It also only applies when the normal rules would obstruct the performance of their given task. This exemption is addressed to undertakings themselves, contrary to Article 86 (1) which is addressed to the Member States. The paragraph is conversely limited not allowed to affect trade to an extent contrary to the interest of the Community.[122]

The article in question has a unique relation to Article 82, providing the only defence to the otherwise unreservedly Article 82 abuses. Since Articles 82 and 86 (1) can be used in conjunction, this gives Member States the indirect possibility to rely on Article 86 (2) for justification of state measures.

Even though the TEC does not specify what types of services or public needs are encompassed in the concept of SGEI. The early case law from the Court gives a narrowly construed concept with restrictive approach to derogation from the TEC.[123] The development has however been a less restrictive approach, leaving Member States to decide what service can be excluded based on being a general economic interest. In *Corbeau* the Court clearly indicated that some monopoly activities could be relieved of competition law restraints, allowing the undertaking to perform the relevant service in conditions of economic equilibrium.[124] In four cases concerning exclusive rights to import and export gas and electricity, the Court said that it is sufficient for an undertaking entrusted with a service of general interest to be exempted from competition law, if those rules obstruct the special obligations, without it being necessary for the survival of the undertaking itself to be under threat."[125] As these cases show, the Court now seems to

[122] Jones, Sufrin, 2007, supra, p. 640.
[123] Case 127-73 *Belgische Radio en Televisie v SV SABAM and NV Fonior, [1974] ECR 313*, para 19.
[124] Ross, E.L. Rev. 2000, 25(1), 22-38, supra.
[125] Case C-157/94, *Commission of the European Communities v Kingdom of the Netherlands*, [1997] ECR I-05699; Case C-158/94, *Commission of the European Communities v Italian Republic*, [1997] ECR I-05789; Case C-159/94, *Commission of the*

focus on the justifications for protecting the service, rather than if the exclusion is necessary for the undertakings economical survival. The concept of SGEI will further discussed below.

The direct effect of Article 86 (2) is still not with confidence confirmed. The ECJ has confirmed that the national courts can decide whether an undertaking has been entrusted with a SGEI or not.[126] In ERT the Court explicitly stated that it is for the national courts to decide whether the application of the TEC competition rules would obstruct the undertakings entrusted task.[127] The uncertainty is contained in whether or not it is for the national courts to determine if the interests of the Community would be adversely affected. The majority view is, however, that the whole of Article 86 (2) has direct effect.[128]

3.5.1.1 Revenue-producing Monopolies

Article 86 (2) also concerns revenue-producing monopolies, which are undertakings given exclusivity to raise revenue for the state. These monopolies can also be caught by Article 31 if they constitute commercial monopolies for the procurement or distribution of goods. The difference between revenue-producing monopolies and non-revenue-producing monopolies is the objectives of the operations. A revenue-producing monopoly is created with the purpose of generating revenue to the state and not, as it opposite, to offer a SGEI. Even though it is most likely that a holder of an exclusive right giving a revenue-producing monopoly, is a public undertaking. Both private and public undertakings will still be undertakings with an exclusive right and come within the scope of Article 86 (1). Consequently, a monopoly can fill two objectives, both that of performing a SGEI and producing revenue. A state is, for obvious reasons, more likely to justify a monopoly on grounds of SGEI then on purely economic reasons. A purely revenue-producing monopoly is usually contrary to Article 86 (1). The main reason for this is that the state can achieve the same effect through non-discriminatory taxation. Therefore the Member State or an undertaking cannot seek shelter under 86 (2) because the measure would only in "exceptional circumstance" be justifiable.[129]

3.5.1.2 Undertakings Entrusted with…

The concept of undertaking under Article 86 (2) is the same as defined under Articles 81, 82 and 86 (1), see chapter 3.4.2.1. The determining factor is not the legal status or if it is a public or private entity but where the state has assigned it a certain task by a positive act, which confers certain functions or by granting it a concession. An undertaking is not entrusted

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European Communities v French Republic, [1997] ECR I-05815; Case C-160/94, *Commission of the European Communities v Kingdom of Spain*, [1997] ECR I-05851.
[126] Case 127-73, *BRT-II*, supra.
[127] Case C-260/89 *ERT*, para 34.
[128] Faull and Nikpay, 2007, supra, p 643.
[129] Buendia-Sierra, 1999, supra p. 287-288.

with a service if the Member State just tolerates, generally approves or endorses the entities activities. Even a general obligation on all monopolies within a certain area does not with certainty constitute an entrustment upon one of the monopoly operators.[130] However, as Advocate General Jacobs argued, even though when a particular task has not been entrusted it can be encompassed in the greater entrusted SGEI. Accordingly, the undertaking is entrusted with a SGEI because certain obligations are imposed on it by the state in the general economic interest.[131]

3.5.1.3 Operation of Services of General Economic Interest

The term SGEI is not used in a uniform way throughout the EU. It has been used interchangeably in EU hard and soft law acts with other terms such as "service of general interest", "universal services obligations", "public services", and "public service obligations". To summarize, it has been used to describe forms of service historically carried out by the state for the use of individual, public bodies and commercial entities. Term is expressly used in Articles 86 (2) and 16 of TEC, but is not further defined in the articles. The requirement of being an economic nature is a rather negligible requirement according to the case law. The ECJ has almost given the same meaning to service of general interest and that of a general economic interest. The broad interpretation of the economic nature even includes cultural activities, such as those in *Sacchi*.[132]

Examples of SGEI would be services provided by network utility industries[133], broadcasting, education, social and health sector. Parallel with these services there are other services which in economical terms differs from regular SGEI. These services are by nature non-rivalrous, meaning that the goods can be consumed by one consumer without preventing simultaneous consumption by others. Such services are referred to as public goods, which cannot be financed through the consumption, and therefore must be founded by tax revenue. Streetlights and broadcasting are good examples of public goods.

Concurrently with the increased liberalisation of the internals market, the need for SGEI has evolved, becoming somewhat of a political mediation tool between the different political opinions of the Member States. The most fierce opponent of the liberalisation development has so far been France while the UK has been somewhat of a forerunner of privatization.[134] The need for the creation of the European idea of SGEI has above all been the

[130] Jones and Sufrin, 2007, supra, p 653.
[131] Opinion of Mr Advocate General Jacobs delivered on 23 October 1997 in Case C-203/96, *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, [1998] ECR I-04075, para 98.
[132] Case 155/73 Sacchi, supra.
[133] such as electricity, telephones, and gas, are public utilities that require a fixed network to deliver their services. Further definition see Newbery, David, Privatization, Restructuring, and Regulation of Network Utilities, MIT Press, 2002.
[134] Lidgard, 2008, supra, p 57.

product of the negative integration process, where state measures have been challenged under Article 86 (1) for distorting competition and defended arguing operation of SGEI under Article 86 (2). [135] However, the concept of SGEI has lately been developed in the field of state aid as discussed below.[136]

The Commission has issued a communication where the vital role of the SGEI has been described as a "key element in the European Model of Society" and that "general interest services are at the heart of the European Model of Society". In this communication, SGEI has been defined as "services of an *economic nature* which the Member States or the Community subject to specific public service obligations by virtue of a *general interest criterion*. The concept… covers in particular certain services… such as transport, postal services, energy and communications… the term also extends to any other economic activity subject to public service obligations."[137] (my italics) As of the meaning of "economic nature", the Commission refers to the Community concept of "undertaking". In other words, SGEI are services performed on the market but to which "non-market" values applies.[138] Szyszczak uses a more simple definition "economic services which are in the general interest".[139]

In order to assess the status of a service, the Commission uses a number of guiding principles. First, that the Commission accepts the Member States prerogative to establish what various services that can constitute a SGEI. However, the achievement of those public services objective must be reconciled with the concept of a competitive open market. The Commission accentuates the positive effects of competition regarding efficiency, increased supply and affordability. Secondly, the concept of universal service and the association to citizens' rights to access to essential services are at the heart of SGEI. Thirdly, it is emphasised that access to SGEI should be organized in such a way that it is accessible and affordable to all groups of the population, including special schemes for persons with low income. The SGEI should also be defined by reliability, continuity, high quality, choice, transparency and access to information from providers and regulators.[140]

In order to secure effective and necessary SGEI the Member States are free to define what needs can be served by granting undertaking exclusive or special rights. This is, however, a political and ideological decision, where different Member States have different opinions on how those need should be met. Some may argue that in order for the state to act there must be a market failure while other will argue that the state has a responsibility for a

[135] Szyszczak, 2007, supra p. 212.
[136] Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, [2003] ECR I-07747.
[137] Communication on service of general economic interest [2001] OJ C17/4, Annex I.
[138] Jones and Sufrin, 2007, supra, p. 621.
[139] Szyszczak, 2007, supra, p. 211.
[140] Communication on service of general economic interest [2001] OJ C17/4, Chapter 3.

great number of services that actually could be provided in competition. The vagueness of the terms SGEI should be viewed in the light of this political discretion, or as Prosser more dramatically expresses it "a fundamental conflict of values which results in different models for the treatment of public services"[141].

In order to fall within the scope of Article 86 (2) the service entrusted must be offered in general, not only to certain undertakings or economic sectors. The concept includes forms of regional policies, even though limited to a certain geographical area, especially if it concerns regional unbalances. The crucial point lies in the general nature of the measure.

The ECJ has established that following activities have been considered to be SGEI:s: the operation of major river ports and non-economically viable air routes; electricity; telephone; water distribution; the operation of the basic postal and television services; mooring services in ports; waste management; employment recruitment; operation of certain transport lines; sectoral supplementary pension funds; performances of obligations flowing from the Universal Postal Convention and to provide emergency ambulance services. To summarise, SGEI is a dynamic concept changing over time in accordance with political and ideological changes, and even though the list is long (and not exhaustive), it is not possible to present exactly what constitutes a SGEI.

3.5.1.4 Community concept of SGEI through State Aid Provisions

As with the definition of SGEI, Member States also enjoy discretion as to the method of financing. According to the Commission's Green Paper on services of general interest there are five different ways of financing a public service obligation.[142] First, through direct financial support through the state budget by subsidies or other financial advantages such as tax reductions; secondly, by granting special or exclusive rights leaving the operator to bare costs the but also the profits. Thirdly, by contributions by market participants; fourthly, by applying tariff averaging, which applies equally throughout a market in spite of differences in the cost of provision of the service; and finally through solidarity-based financing like social security contributions. The Member States must at the same time ensure that the chosen mechanism for the financing of the SGEI does not distort competition and the internal market unduly.[143]

This balancing act between financing a service of general interest entrusted to an undertaking and the concept of state aid has been scrutinized in a number of cases. Even though this thesis is not focus on the body of law on state aids or the financing of SGEI, the development within this are has had

[141] Prosser, Tony, *The Limits of Competition Law, Markets and Public Services*, Oxford University Press, 2005.
[142] Green Paper on Services of General Interest, COM(2003) 270 final.
[143] Ibid., paras 85-88.

a great impact in the concept of SGEI and that case law will therefore be discussed here. It was initially believed by the Commission that a Member State could not compensate an undertaking entrusted with a SGEI, without fulfilling the criteria of state aid rules in the TEC, unless the operation was entrusted through a public tender.[144] The ECJ, however, accepted that a system does not constitute a state aid, as long as the advantage does not exceed the costs of the public service obligations entrusted to them. All advantages exceeding the costs would consequently constitute state aid.[145]

In *Altmark*, a preliminary ruling concerning the entrustment of operating a regional bus passenger service, partly financed by the regional authorities. The judgment confirms the findings in *Ferring*, but adds a number of constraints on the Member States mechanisms of financing the operations of SGEI. The first condition imposed on the Member State is that any entrustment of an undertaking to perform a service of general interest must be done through a measure containing a clear definition of the objective. This obligation to clearly define the obligation *a priori* reduces the risk of the Member States to try to take advantage of their freedom to determine independently the activities that should be performed by *ex post facto* changing the objective of the operation. *Altmark* also adds an improved transparency in the assignment of SGEI, which is a most valuable security for non-protectionism actions cloaked as a public service obligation.[146] Furthermore, the conditions also correspond to the general duty of giving reason.

In February 2008, the CFI delivered its ruling in *BUPA*, concerning an application for annulment by a British insurance company active on the Irish market for private medical insurance of a Commissions decision[147] not to raise objection to a risk equalisation system for the private medical insurance sector in Ireland. The Irish scheme was designed to compensate the former monopoly holder for the obligation to insure "above average" risk policyholders (e.g. in the case of old and chronically sick patients) by providing them with the proceeds of a levy collected from undertakings not obligated to bare the burden of "above average" risk policyholders. BUPA objected to having to pay the levy and claimed that it had been imposed in breach of European state aid rules. The CFI ruling provides us with some useful guidance on the approach it will take, among other things, to the concept of SGEI.

The CFI starts off by stating the limitations of the Community institution's to review the definitions made by the Member States of SGEI. The Commission may only question a Member State's definition of a service as

[144] Commission decision of 6 July 1994 concerning the aid granted to TAP, OJ (1994) No L260, p 27.
[145] Case C-53/00 *Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS)*, [2001] ECR I-09067, paras 32-33.
[146] Case C-280/00 *Altmark*, *supra*.
[147] Decision C(2003) 1322 final of 13 May 2003.

an SGEI where there is a manifest error of assessment.[148] In order to determine whether the Member State has erred in the assessment, the CFI present a number of minimum criteria common to every SGEI mission. These are; the presence of an act of public authority, which entrusts an operator a SGEI mission of universal and compulsory nature. Furthermore the entrusting public authority must, in accordance with the 1st Altmark criterion, indicate why it considers the service in question, due to its special nature, to be seen as a SGEI and therefore be distinguished from other economic activities and clearly specify the service. The lack of proof or failure to observe these conditions can constitute a manifest error assessment that gives the Community Institutions the right to scrutinise the SGEI. Consequently, if no manifest error of assessment can be established there can be no control, not even a marginal review.[149]

The CFI goes on to clarify the concept of an act of public authority. The mere act of public authority in the general interest in a broad sense, imposing certain rules of authorisation or control does not constitute a SGEI mission. The Court also emphasised that a SGEI mission does not have to be entrusted through a granting of an exclusive or special right. A SGEI mission can consist in an obligation imposed on a large number of, or indeed on all, operators active on the same market. Moreover, the Court said that a SGEI must not constitute a universal service in the strict sense and that there is a certain leeway for the entrusted operator to set prices or the precise content of the service. According to Community law, the concept of universal service does not mean that the service in question must respond to a need common to the whole population or be supplied throughout a territory. Thus, obligations which have only a limited territorial or material application or which relate to services enjoyed by only a relatively limited group of users are not necessarily prevented from falling within the first *Altmark* criterion. Last, the CFI concluded that in order for a SGEI to be seen as compulsory, the operator must be under an obligation to provide the service to any user requesting it.[150]

The ruling in *BUPA* is a most Member State prerogative friendly judgment and it is with great expectations we await a future ECJ ruling since the *BUPA* was not appealed. Hopefully the ECJ will clarify the extent of the prerogative and perhaps widen the possibilities to challenge a SGEI.

3.5.1.5 Service of General Interest

The term service of general interest is broader than the term service of general economic interest and is defined by the Commission to "cover both market and non-market services which the public authorities class as being a

[148] As the Court already established in Case T-17/02, *Fred Olsen, SA v Commission of the European Communities*, [2005] ECR II-02031, para 216. The appeal of this case was dismissed by the ECJ in C-320/05 P.
[149] Case T-289/03, *BUPA*, supra, paras 172-173.
[150] Case T-289/03, *BUPA*, supra, paras 179-181 and 188-190.

general interest and subject to specific public service obligation"[151]. Even though SGEI can be found in the TEC, it is not defined in anyway. The term includes both services of general economic interest and non-market services, which are never caught by the TEC. If a service is to be defined as a SGEI or as a non-market service depends on whether or not it performs an economic activity. If the service is performed as a part of the state's prerogative, such as education or social security system, or those which operate on the basis of solidarity and therefore not an economic activity, are operating services of general interests and not SGEI.[152] Whether a service is economic or not has to be assessed on the facts of each case as mentioned above. It is easy to interpret the above definition as rather vague and the Commission added in their White Paper that the term of service of general interest is constantly evolving.[153]

3.5.1.6 Universal Service

The Commission has described universal services as "certain services that are made available, at a specified quality to all consumers and users throughout the territory of a Member State, independently of geographical location, and, in the light of specific national conditions, at an affordable price."[154] These services exist to ensure every citizen a right of access to certain services considered as essential, irrespectively of economic, social or geographical situation, at affordable prices and that the service quality is maintained and, where necessary, improved. This is further strengthened by the reorganisation of SGEI in Article 36 of the CFR. The concept of universal services is a dynamic concept, which has as its objective to ensure the citizens' evolving needs, taking into account political, social, economic and technological developments.[155] In reality, these universal services are however characterized by a certain level of practicability and often ensured through SGEI.

Universal services comprise all the traditional "natural" monopolies like water, railways, energy, telecommunication, postal services and broadcasting. Even though these services have been exposed to a great deal of liberalisation in the last years, including deregulation and competition, they are still nationally determined.[156]

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[151] Commission of the European Communities - White Paper on services of general interest COM(2004) 374 final Annex 1.
[152] Such as the principle of solidarity as defined in the joined cases C-264/01, 306/01, and 355/01, *AOK Bundesverband and Others v. Ichtyol-Gesellschaft Cordes and others* [2004] ECR I-02493, para 51.
[153] Ibid.
[154] The Commission referees to Cf. Article 3(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51
[155] COM (2003) 270 final. Green Paper on Service of General Interest, para 50-51
[156] Boeger, Nina, *Solidarity and EC Competition Law*, European Law Review, 2007, 32(3), 319-340.

3.5.1.7 Obstruct the Performance of the Particular Task Assigned to Them

Even if an activity has been established to be a SGEI, it must also be shown that compliance with the TEC will obstruct or make more difficult the performance of that particular task assigned to the undertaking. The burden of proof lies with the party claiming such fact.

The "obstruction of the performance" test used by the ECJ was initially a strict test. The case law has subsequently developed into a proportionality test, starting with *Corbeau*. The ECJ said that the key question is "the extent to which a restriction on competition or even the exclusion of all competition… is necessary in order to allow the holder of the exclusive right to perform its task of general economic interest and in particular to have the benefit of economically acceptable conditions"[157]. The starting point is the possibilities for the entrusted undertaking to be able to perform its service in conditions of economic counterpoise, where profit from profitable sectors can be offset in less profitable areas, also known as cross-subsidy and through the offset maintain an equable service level. For such economic counterpoise to work, competition may be restricted or even excluded, to avoid cherry picking. As the Court established, the exemption is only valid for the performance of the SGEI and not for "additional services not offered by the traditional… service."[158] As mentioned above, the judgment in the *Corbeau* case was the most extensive interpretation of Article 86 (2) given so far, but at the same time started process of creating the rather generous platform on which state monopolies can rely on today.

In a case brought on by the Commission against the Netherlands concerning exclusive rights to import electricity for public distribution, the Court said that in order to fulfil the requirements in Article 86 (2) the entrusted undertaking must be enable to perform under economically acceptable conditions. The Court also stated that the burden of proof lies upon the Member State that invokes Article 86 (2) but the burden is not so extensive that it requires the Member State, to prove that there is no other way those tasks could be performed under the same conditions.[159] In a subsequent case, the Court did however say the Member State had to show to the satisfaction of the national court that the objective could not be reached by other means.[160]

Even though the ECJ repeatedly has stated that it is for the national courts to decide whether the requirements of Article 86 (2) are met or not, it has in a number of cases assessed the conformity itself.[161] The rationale for leaving

[157] Case C320/91 *Corbeau*, supra, para 16.
[158] Ibid, para 19.
[159] Case C-157/94, supra note 124.
[160] Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting,Ruimtelijke Ordening en Milieubeheer*, [1998] ECR I-04075, para 67.
[161] Case C-67/96 *Albany*, supra; Case C-266/96, *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl, Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl and Ministero dei Trasporti e della Navigazione*, [1998] ECR I-03949.

it up to the national courts is basically that they are better suited to assess the specific facts of the case in main proceedings and that the party who relies on the provision has the burden of proof, which is more convenient to fulfil in the national courts.[162]

In *Deutsche Post*, mentioned above, the ECJ also found the requirement of Article 86 (2) to be fulfilled, as the Deutsche Post fulfilled its obligation under the Universal Post Office which was to be seen as a SGEI. The "excessive" charges were necessary in order to perform the task in economically balanced conditions. However, contrary to Advocate General La Pergola, the ECJ never examined whether *Deutsche Post* generated profits from other areas of activity also belonging to the universal service. This favourable treatment of *Deutsche Post* and the possibilities of cross-subsidization should have been more closely examined. Bartosch suggests that an undertaking should be allowed to use revenues from a service dissociable from the universal service entrusted, and use it to subsidize the entrusted service. First when this possibility is depleted would derogations from the TEC be possible. This would allow the ECJ to carryout a more individualized assessment over each part of the entrusted service of general interest. This will increase the transparency of state involvement and in the end, the effectiveness of Community competition law.

In *Ambulanz Glöckner*, the ECJ identified only the emergency ambulance to be a SGEI, but found the encompassing of the ancillary nonemergency transports, was justified because it supplied a possibility of cross-subsidization. The ECJ did not, in contrast to Bartoschs argument and the findings in *Corbeau*, establish the non-emergency transport to be separable from the emergency transport because of the close link between the two services and the possibility to discharge the costs of the emergency transport in the non-emergency transport. This argument must, however, been seen as greatly favouring the holder of the service.[163]

In conclusion, the burden to prove that the TEC rules obstruct the performance of the particular task assigned is not too burdensome. As long as it can be shown that the exclusive right is needed in order to give the entrusted undertaking economically acceptable conditions, the Member States' measures are necessary.[164]

3.5.1.7.1 Proportionality and Pre-emption

Since Article 86 (2) essentially contains an exception from the main concept of effective competition and free movement, is should be interpreted in a restrictive manner and must be invoked by the parties that seeks to benefit from it. A Member State or an undertaking seeking shelter within the

[162] Bartosch, Andreas, *Casenote on Case C-147-148/97, Deutsche Post AG v. Gesellschaft für Zahlungssysteme mbH (GZS) and Citicorp Kartenservice GmbH*, (2001) 38 Common Market Law Review 195-208.
[163] Jones, Sufrin, 2007, supra p. 665.
[164] Case C-340/99 *TNT Traco SpA v Poste Italiane SpA and Others*, [2001] ECR I-04109.

exception must invoke that possibility and accordingly bear the relevant burden of proof.

There are in principle two forms of proportionality test, one more strict than the other. The first one, the "*manifestly disproportionate test*", is the milder form of the two where it is sufficient to show that the measure is prima facie suitable to achieve the task at hand. The second one, known as the "*least restrictive means test*", ironically a stricter test, calls for a (hypothetical) test where the chosen measure must be the least restrictive of all imaginable measures that can be chosen. These two tests were distinguished in agriculture case where the ECJ, after affirming the importance of proportionality as a general principle of Community law, stated that in the absence of Community measures the Court is not suitable to judge whether other hypothetical solutions would reconcile better with the TEC.[165] In other words, if there is Community harmonization, only the least restrictive measure would constitute a proportionate measure. In the absences of Community harmonization, only a manifestly disproportionate measure would render a Member State measure to be disproportionate.[166]

Sauter mentions that this issue was discussed and resolved in *Corbeau*, *Almelo* and *Ambulanz Glöckner*, as the ECJ accepted that the monopolies ensuring the performance of SGEI can have a broader scope than the universal service concerned. The ECJ did accept that ancillary restraints was necessary for the performance of the service, while there where other possible means to finance or achieve the objective at hand, i.e. by funding through general tax revenue. However, in such cases the Member State had to show that the broader scope was necessary to perform the universal service, and not merely hinder or made it difficult. The author mentions that this calls for comparing the net cost of providing a universal service against the economic advantages inherent in the state measure at issue as well as any other forms of compensation received.[167] In *Commission v the Netherlands*, the ECJ used the manifestly disproportionate test, where it said that the burden of proof cannot be so extensive to require a Member State to prove "positively, that no other conceivable measure, which by definition would be hypothetical, could enable those tasks to be performed under the same conditions."[168] The case also manifests the ECJ's opinion that since Article 86 (3) provides the Commission to act in order to ensure the application of the article, they should use that power given in order to attack the problem. In order to pass the *manifestly disproportionate test* it must be shown that "the application of the rules of the Treaty obstructs the performance of the particular task assigned to the undertaking and that the interests of the Community are not affected."[169]

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[165] Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others*, [1990] ECR I-04023.
[166] Ibid., paras 12-13.
[167] Sauter, Wolf, *SGEI and Universal Service in EU Law*, European Law Review, 2008, 33(2), 167-193.
[168] Case C-157/94, *Commission v the Netherlands*, supra, para 58.
[169] Case C-179/90, *Porto di Genova*, supra, para 26.

In order to make the two tests more accessible, two or three criteria are used. Firstly, a casual link between the measures and the objective of general interest must be established. Secondly, to show that the restriction caused is balanced by the benefits obtained. Thirdly, which only has relevance for the stricter test, to establish whether the measure could have been obtained in a less restrictive mean or not. Even though the two forms of proportionality tests have been used by the Courts, there is still an on-going debate on the correctness of this conclusion. However, since the cases in the field of Article 86 have been resulting in a wide margin of appreciation for the Member States this is most probable conclusion because it affirms the Member States prerogative in the field of SGEI.

3.5.1.8 No Effect on Trade Contrary to the Interest of the Community

The final part of Article 86 (2) contains a restriction on the possibility to rely on the article, if the utilization has an affect on the development of trade which would be contrary to the interest of the Community. According to Whish, this means something more than the concept of effect on trade found in Article 81 and 82, since without such an effect the EC competition rules would not be applicable anyway. In *Commission v Netherlands*, the ECJ said that the Commission had to prove whether the exclusive right had affected and was effecting the development of Community trade to an extent, which is contrary to the interest of the Community. [170] Put frankly, it is for the challenger of the measure to prove the effect on trade is so extensive that it contrary to the interest of the Community. Buendia Sierra sees the second sentence of the article as a clarification concerning the proportionality requirement contained in the first sentence, providing additional guidance to the balancing act between competition rules and exemption thereof.[171]

In brief, the final requisite of Article 86 (2) has not been used to any great extent, the reason could be lack of importance compared to the closely related proviso in Article 30 concerning free movement of goods.[172] In future cases, the ECJ may be willing to consider Community liberalization legislation in order to determine the nature of "Community interests", especially within in sector-specific regulations.[173] Another reason for not acknowledging the last part could is most likely due to the wide margin of appreciation award to the Member States.

[170] Case C-157/94 *Commission v the Netherlands*, supra.
[171] Faull and Nikpay, 2007, supra, p 643.
[172] Jones and Sufrin, 2007, supra, p. 665.
[173] Van Bael and Bellis, 2005, supra, p. 1019.

3.6 Article 86 (3)

The final subparagraph of Article 86 provides that the Commission shall ensure the application of the article, entrusting a supervising and a regulating role in order to achieve the objective of the article. The rights conferred are additional to the other provisions in the TEC regarding the Commissions general powers. Article 86 (3) does not only give the Commission the right to survey the application of Member States coherence with the Article but also the right to create new policies regarding the Member States right to grant special or exclusive rights.[174]

The two possibilities applicable for the Commission in order to create new policies are directives and decisions addressed to Member States. The measures can deal with existing infringements of the TEC but can also deal with future potential infringements.[175]

3.6.1.1 Decisions

The general provision giving the Commission the possibility to enforce and supervise the observance of the TEC is found in Article 226. Even though the additional power granted by Article 86 (3) is additional to the general proviso, the Commission must, when using the powers based on Article 86 (3), comply with the general principles of Community law and the case law evolving from Article 226.

The Commission has adopted several successful and important decisions under Article 86 (3), making the article a powerful tool in the creation of a competitive market.[176] It should, however, be emphasised that the article does not obligate the Commission to bring proceedings against Member States based upon an individual complaint. This because individuals cannot require the Commission to take a position in a specific case. Even if an applicant has a direct and individual interest in annulment of the Commission's decision to refuse to act on its complaint is not such as to confer on it a right to challenge that decision.[177]

3.6.1.2 Directives

The second possible measure granted the Commission under Article 86 (3) is the possibility to adopt directives. This possibility gives the Commission

[174] Case C-202/88, *French Republic v Commission of the European Communities*, [1991] ECR I-01223, para 14.
[175] Jones and Sufrin, 2007, supra, p 668.
[176] 90/456/EEC: *Commission Decision of 1 August 1990 concerning the provision in Spain of international express courier services*, [1990] OJ L233/19; 94/119/EC; *Commission Decision of 21 December 1993 concerning a refusal to grant access to the facilities of the port of Rødby (Denmark)*, [1994] CMLR 457; Case C-163/99, *Portuguese Republic v Commission of the European Communities*,[2001] ECR I-02613.
[177] Case C-141/02 P, *Commission of the European Communities v T-Mobile Austria GmbH*, [2005] ECR I-01283.

the effective role of sole legislator, not having to use the normal legislative procedures found in Articles 249 to 252, which involves other Community institutions. Relying on these articles makes it possible for the Commission to legislation without a political consensus, since the Member States cannot vote against a proposed directive in the Council. This tool has been very valuable for the Commission in order to open up and liberalize markets. But since there is a thin line between harmonization under Articles 94 and 95 and achieving the objectives of Article 86, most directives adopted using Article 86 (3) have consequently been challenged by Member States. The very first time the article was used to adopt a directive three Member States challenged the use of the article but the ECJ held that the article empowers the Commission to adopt directives and general rules construing the binding obligations arising form the TEC.[178]

The use of Article 86 (3) is still a delicate question, where the Commission's powers to supervise and observe the coherence of Article 86 (3) has to be kept separate from harmonization measures under Articles 94 and 95. For instance, the Open Network Provision Directive[179], which had as its objective to bring about open and efficient access to and use of public telecommunications networks and, where applicable, public telecommunications services, was adopted under Article 95 as a harmonization measure instead of to preventing infringement on the telecommunication services market.

3.6.1.3 Cross-subsidization

A brief definition of the term cross-subsidization is a misallocation or reallocation of costs from an activity in one product or geographical market to another product or geographical market or by letting one activity finance a common cost. Common costs, as explained by Buendia Sierra and Hancher, are costs of resources that are used to produce different goods or service, e.g. when a postal worker distributes both normal mail (subject to exclusive rights) and parcels (open to competition) his salary constitutes a cost, which is common to both activities.[180] The issue relevant for this thesis is when an entrusted operator of a SGEI allocates cost generated by activities on the open market to the exclusive operation, giving it an advantage compared to competitors on the open market. The ramifications of cross-subsidization do also appear on liberalised market where the former monopoly holder still enjoys the benefits from its former exclusivity. To further complicate the concept of cross-subsidization, there is the economic dimension of how costs should be determined and how it should be correctly allocated.[181] As seen in chapter 3.5.1.4 there are also difficulties of

[178] Joined cases 188 to 190/80, *France, Italy and UK v Commission,* supra.
[179] Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (90/387/EEC), OJ L192/1.
[180] Hancher, Leigh and Buendia Sierra, Jose Luis, *Cross-Subsidization and EC Law*, (1998) 35 Common Market Law Review 901, 901-945.
[181] Ibid., p 907.

establishing when cross-subsidization constitutes state aid or a compensation for the performance of SGEI.

Due to the nature of the SGEI some types of cross-subsidization are needed in order to perform the entrusted tasks. For instance, by charging uniform tariffs for a service, an entrusted undertaking can offset less profitable sectors against the profitable sectors in order to perform the entrusted task in an economic equilibrium.[182] The rationale for allowing such misallocation of cost is that the entrusted operator must be able to cover its cost originating from operating non-commercial activities and to avoid cherry-picking from undertakings not obligated to perform a SGEI and therefore does not have to bare the costs thereof. A Member State must according to the established case law only prove that a firm entrusted with the performance of a SGEI cannot perform the task under acceptable economic conditions.[183]

Another conundrum are the actions of a monopoly holder before a liberalisation of the market. What actions prior to the abrogation can be seen as misallocation of cost from a reserved sector to a future competitive sector especially costs for establishment on a competitive market. This also concerns the strengthening of an undertakings position prior to a liberalization or privatization. In this case the funds have not been generated or earned under normal market conditions but will be used on in competition. These costs can however also be located to purely internal acts of an incumbent undertaking in order to prepare for competition without constituting misallocation. In order to ensure that this situation is not abusive, two things should be ensured. First of all, transparency facilitates the actions and investments to be scrutinized in an accessible manner. Secondly, as used by the ECJ, a market investor tests to establish if the actions by a monopolist would have been theoretically the same as for a private entity engaging in a new commercial activity during the start-up phase.[184] Hancher and Buendia Sierra criticise this test, and argue that the proper test to be used should be "whether a private investor in the absence of a captive market to which he/she can allocate all common costs, would have been prepared to tolerate the same level of losses over the same period in the non-reserved market." [185] This would allow for a more genuine control since it takes into consideration that even private undertakings, especially in the network industries, can enjoy benefits from former monopolies.

Edward and Hoskins argue that in future cases the cross-subsidization must be further examined, in order to establish its (in)compatibility with EC competition law. Cross-subsidization can lead to competition distortion,

[182] Case C-320/91 *Corbeau*, surpa.
[183] Cases C-157-160/94 *Commission of the European Communities v Kingdom of the Netherlands; Italian Republic, French Republic, and Kingdom of Spain.*
[184] Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others*, [1996] ECR I-03547.
[185] Hancher and Buendia Sierra, 1998, supra, p. 938.

enabling undertakings to provide services (or goods) at prices lower then their true market price. It must however be emphasised that cross-subsidization can be considered an abuse in itself, while the mere transfer of resources cannot constitute a violation of Article 86 (2). What constitute the abuse are the various effects, such as excessive prices or predatory pricing.[186] In the context of universal services and legal monopolies, the question of cross-subsidization is very complex. While being a fundamental component to the performance of a SGEI, it can at the same time be used anti-competitive when setting the price for a non-reserved value-added service lower than the competition, absorbing the shortfall through raised prices for the monopoly services. Another possible form of unfair advantages would be if the undertaking receives a loan more favourable due to its size as a monopoly holder.

In order to prevent such anti-competitive behaviour the authors recommend, in line with the Commission, that third party value-added service providers must have an equitable access to the network concerned. Furthermore, there is a great need for transparency in order to ensure the effective application of competition rules. These measures will positively ensure fair and effective competition but must achieved through legislation. Today the main legislation governing cross-subsidization is, save Article 86 (2), the rules on state aid within the TEC.[187]

[186] Ibid., 912-913.
[187] Edward and Hoskins, 1995, supra, p 179-191 and 182-186.

4 Casestudy

4.1 Community legislation

In order to achieve an integrated railway network in the European Union and to help achieve the goals and objectives set out in the TEC, the Council has adopted a Common Transport Policy, several regulations and directives. These Regulations and Directives contain provisions on the liberalization of the market for rail transport of freight and passengers; on the interoperability of high-speed and conventional rail systems; on the conditions under which state aids can be granted and public service obligations and contract can be concluded; on the access to the network.

It is the Commission's belief, that the Community can only achieve a more efficient transport market through opening up the transport sector to competition throughout the whole Union. As evidence of the positive effect of liberalization the Commission mentions that the transports costs are less in liberalized market then in non-liberalized, resulting in an increase of the citizens' mobility.[188] Another important reason for the Community to give the railway sector the condition to grow is environmental; moving goods and passengers by rail requires four times less energy than by road.[189]

The gradual opening of the railway market started with the Council of Ministers Directive 91/440/EEC, which introduced a degree of market opening into certain areas of rail transport and above all promoting the railways to concentrate more on competitiveness. In 1995, the Council of Minister adopted Directive 95/18/EC, setting out common criteria for licensing of railway undertakings established in the European Union.

In 1998, the Commission initiated the first of three Railway Infrastructure Packages. The first railway package contained three directives[190], all aimed at improving the effectiveness of existing legislation. The second railway package in 2002 contained one Regulation and three Directives, which separately created the European Railway Agency, the opening of the market for international freight transport to the entire European rail networks as of 1 January 2006 and the opening of the market for national freight transport as of 1 January 2007.[191] The third railway packages adopted in 2007 aims to

[188] European Commission White Paper, European Transport Policy until 2010, Brussels 12.09.2001 COM (2001) 370 final, 6-7.
[189] Stehman, Oliver and Zellhofer, Georg, "Dominant Rail Undertakings Under European Competition Policy, European Law Journal", Vol. 10, No. 3, May 2004, p. 328.
[190] Directive 2001/12 amending Directive 91/440; Directive 2001/13 amending Directive 95/18; Directive 2001/14.
[191] Directive 2004/49/EC (Railway Safety Directive); Directive 2004/50/EC amending Council Directive 96/48/EC; Directive 2004/51/EC amending Council Directive 91/440/EEC on the development of the Community's railways; Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency.

make the rail transport more competitive, harmonizing passengers rights and harmonizing train drivers qualification.[192] The greatest change of the third package will however be the opening of the market for international trains, including cabotage. The right for international cabotage will start latest on the 1 January 2010.[193]

4.2 Comparative description

Four broad types of deregulation approaches are apparent in the Member States. First, the UK's rationalist approach, secondly the Swedish incremental approach, the German and Dutch "wait and see" incremental approach and the French late compliance approach. In comparison with EU legislation, the UK deregulation has nearly always been substantially ahead, the Swedish deregulation in most cases ahead, the German and Dutch in tune with EU legislation and the late compliers significantly behind.[194]

4.2.1 United Kingdom

The Railway Act 1993 introduced an almost revolutionary reform of the railway. The act first of all divided traffic service from maintenance, just like in Sweden in 1988. The rolling stock was divided into three undertakings, Rolling Stock Companies, in order to provide a competitive market with rolling stock. This, however, created an oligopoly which hardly aided competition. Different from Sweden, the infrastructure was privatised, but after a number of serious incidences, the state control was increased. Today some twenty operators operate the railway traffic. The Department for Transport tenders all passenger traffic in accordance with rigorous details established by the Office of Rail Regulation. This means that each operator is limited by a strict number of service obligations, such as number of trains, minimum service levels, price of tickets etc. Depending on the

[192] Directive 2007/59/EC on the certification of train drivers operating locomotives and trains on the railway system in the Community; Directive 2007/58/EC amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure; Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, OJ L 315, 3.12.2007, p. 14–41.

[193] *The right for a railway operator from another Member State to pick up and set down passengers in another country without the need to cross a national border*; Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure, OJ L 315/48.

[193] Commission of inquiry, Betänkande från Järnvägsutredningen 2, *Konkurrens på spåret*, SOU 2008:92.

[194] Alexandersson, Gunnar and Hultén, Staffan, *The Swedish Railway Deregulation Path*,,Review of Network Economics Vol.7, Issue 1 – March 2008.

profitability of each route, the operators may either receive state funding for the operation or have to pay a fee for the right to operate.

The only real "free competition" on the UK railway is created by the interregional traffic partly operating on the local or regional traffic routes. The interregional traffic is however only operated by three undertakings. In conclusion, the UK railway network is subject to competition primarily through public procurement, where the state or local authorities in detail obligate the undertakings to perform service.[195]

4.2.2 Germany

Similarly to Sweden, Germany has performed a vertical separation between infrastructure and traffic service, a process mostly driven by the EC harmonization measures. In contrast to Sweden, both the infrastructure and the traffic service are still owned by the same holding company, Deutsche Bahn (DB). DB is the dominant operator of passenger- and goods traffic in Germany, with approximately 85 % of the passenger traffic. At the same time, in contradiction to DB's position, Germany is the Member States with the most private operators of railway traffic, operating mostly goods traffic but also some tendered traffic. However, since DB owns the infrastructure, maintenance establishments etc, competition is rather limited in the field of passenger traffic and competition advantages are mainly achieved by lower prices. The French transport company Veolia is DB's biggest competitor in Germany, operating certain routes in competition with DB.[196] SJ is active in Germany through the Malmö to Berlin night route.[197]

4.2.3 Italy

The Italian Railway is in accordance with the Community harmonization also vertically separated, but this has rendered very little liberalization effect on the market. The state operator Trenitalia is the super-dominant operator with approximately 98 % of the relevant product market.[198]

4.2.4 The Netherlands

Even though the Netherlands falls in the "Advanced group" in the yearly Rail Liberalisation Index together with Great Britain, Germany and Sweden there is no real competition in the domestic market for passenger traffic. However, due to its geographical location there are several competitors, such as the Belgian state operator SNCB, the French National Railway

[195] SOU, 2008:92, p. 62-63.
[196] Leipzig – Berlin (two times a day); Berlin – Magdeburg (weekend traffic).
[197] SOU 2008:92, supra, p. 63.
[198] Ibid., p. 64.

Company (SNCF) and DB on the international passenger traffic on the Dutch railroad, which creates national competition.[199]

4.2.5 Denmark

The main operator for all passenger traffic in Denmark is Danske Statsbaner (DSB) with a few exceptions for Veolia, which operates on one route on Jutland, and SJ who operates from Stockholm to København.[200] DSB does not operate any goods traffic since 2001 when it sold that operation to Railion, a joint venture between DB and Green Cargo AB. Similar to Sweden, DSB does not own or maintain any infrastructure, which is governed by Banedanmark. DSB operates two main international traffic routes, first the Copenhagen to Hamburg route (via Rødby-Puttgarden) together with DB and from 2009 the Helsingør- København-Malmö-Göteborg route in a joint venture together with the British First Group.[201]

4.3 The Swedish Railway Monopoly

The first period of railway in Sweden constituted mostly private enterprises, encouraged by the state. In 1939, the total Swedish Railway network made to 50% out of private railway. In the same year, mainly in order to render a more effective rail network, all railroads were nationalized, giving Statens Järnvägar a monopoly, owning all railways and controlling the utilization.[202] The first measure to liberalize the Swedish Railway was taken in June 1988 when the Swedish Parliament agreed on a new transport policy. Through the new transport policy, the former Statens Järnvägar (State Railways) was divided into a public service company (Affärsverket SJ) responsible for all train services and, into an administrative authority (Banverket) responsible for infrastructure. Affärsverket SJ has later incorporated several companies, such as Green Cargo AB that operates freight traffic and SJ AB that operates passenger traffic, both fully owned by the Swedish state. The overall responsibility for public transport on railway is today given to three different operators, Trafikhuvudmännen (responsible local authorities), Rikstrafiken (National Public Transport Agency) and SJ AB.[203]

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[199] Ibid., p. 64.
[200] Ibid., p. 65.
[201] Press release 2007-06-27 *"Öresundstrafiken AB kommer att bedriva Öresundstågstrafiken"* .http://www.skanetrafiken.se/templates/InformationPage.aspx?id=7999&epslanguage=SV 2008-12-13.
[202] SOU 2008:92, supra.
[203] Public transport can be divided into ordinary public transport, which can be used by anyone and specific public transport, transport which the State is responsible for by law, for example school transport, transportation service for old (disabled) persons or non-emergency transports.

The Trafikhuvudmännen are responsible for local and regional public passenger transport. Local and regional public transports of passenger traffic is ensured through public procurement in accordance with Lag (1997:734) om ansvar för viss kollektiv persontrafik (Law on the responsibility for certain public passenger transport) and Lag (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster (Law on procurement of the water, energy, transport and postal services).

The Rikstrafiken is a national authority, established under the Ministry of Enterprise, Energy and Communications. Rikstrafiken's task is to work for a coordinated long-distance public transport system from the traveller's perspective, as regards bus, boat, air, and train transports. The goal is to create an accessible high quality transport system, safe traffic, a good environment, and contribute to a positive regional development. On the state's behalf, Rikstrafiken also procures long-distance public transports not carried out by the local transport authorities or commercial transport operators, but which are motivated by transport policy.[204]

Finally, SJ AB is a fully state owned limited company, which according to national legislation has the exclusive right to operate and organize passenger traffic on the state owned railway.[205] The exclusivity has been succeeded from Affärsverket SJ through which the Swedish state controls SJ AB. SJ AB has the right to waive its exclusivity on certain sections if SJ AB find it not to be profitable. If SJ AB waives its exclusivity, then Rikstrafiken will conduct a public procurement. This exclusive right can also be limited by a decision of the Government to grant the Trafikhuvudmännen to organize cross-regional passenger traffic. This limitation of exclusivity is however only valid as long as SJ AB operations are not considerable effected. Such a decision was adopted on 6 December 2007, giving the Trafikhuvudmännen the right to operate the routes between Malmö-Göteborg and Malmö-Avesta, both routes on which SJ AB operates and prior had exclusivity to.[206]

The rationale given by the Swedish state for the granting SJ AB an exclusive right on certain routes is based on the special characteristics of railway traffic, as a highly complex technical system with a lack of capacity. Together with the fact that Sweden is a long stretched country and has low density in population renders it difficult to pursue profitable inter-regional passenger rail services.[207] In 2005, the Government, contrary to the findings of the Commissions of inquiry, still believed that in order to achieve stability on the public passenger transport market there was a need for monopoly. The Government said that any liberalization should follow the Community liberalization and in order to give SJ AB the possibility to develop into a commercially successful business the exclusivity was still

[204] http://www.rikstrafiken.se/Article.aspx?a=5&c=5, 2008-12-09.
[205] Järnvägslag (2004:519) 5 chapter 1 para, Järnvägsförordning (2004:526) 4 chapter 1 para.
[206] Regeringensbeslut 2007-12-06, dnr N2006/12020/TR.
[207] Freely translated from the Government Bill: Proposition 1997/98:56 – *Transportpolitik för en hållbar utveckling*.

needed. Finally, the Government returned to their rationale used in the former bill, there is a need of an exclusive right to ensure sustainable service on the inter-regional passenger rail market. If the market were liberalized, there would be a risk that a number of new operators would want to compete for the attractive routes and that they would disappear because of lack of profitability.[208]

4.4 Contrary to the Interests of the Community?

Even though Articles 31 and 86 (1) in conjunction with other TEC provision prohibit Member States from granting or maintaining exclusive rights in favour of certain undertakings, there are nevertheless several accessible exceptions as seen above. Other exceptions can be found in Articles 30 and 46 concerning free movement of goods and services respectively. State measures restricting the possibility to provide services are most likely to conflict with Article 49 and the rules on freedom to provide services while the same restrictions also are likely to be in conflict with Article 43 and the freedom of establishment. Article 49 used in combination with Article 86 (1) prohibits Member States from adopting or maintaining measures that unduly restrict the provision of cross-border services by undertakings in other Member States. The provision does not only restrict measures of a discriminatory nature, but also certain non-discriminatory measures contrary to certain mandatory requirements.[209] Measures like exclusive rights in the field of services would normally impede the access of foreign service providers to the relevant national market for services and will therefore be contrary to Article 49.

Since this thesis focuses on Article 86 and the service of providing passenger traffic, the second paragraph of that article will be used to assess the Swedish monopoly, and no further examination under Article 49 will be conducted. Furthermore, since Article 86 (2) is an important exception for services of general economic interest and the effects of indiscriminately prohibiting such monopolies could jeopardize the European Model of Society, it is important that the exception strikes a balance between Community economic objectives and national objectives of ensuring services in the general economic interest. Such balancing act is not performed when assessing a monopoly's conformity with Article 49.[210]

As seen above, the Swedish government has granted SJ the operation of commercial interregional passenger railway traffic in Sweden. The measure giving SJ the exclusive right is limited to commercial railway passenger traffic but is otherwise not further defined, restricted or connected with any public obligation, universal service obligation or service obligation. Since

[208] Government Bill: Proposition 2005/06:160 – *Moderna transporter*.
[209] Faull and Nikpay, 2007, p 624.
[210] Buendia Sierra, 1999, p 272-273.

SJ has the right to waive, at its own discretion, its exclusivity on interregional routes not believed to be profitable; it is SJ rather than the Swedish state that defines its exclusive right.

Public undertakings in Sweden are divided into two groups: those operating under market economy conditions and requirements and those primarily fulfilling a public interest. SJ belongs to the category of operating under market conditions and requirements and hence has no special public interest to fulfil. Therefore the obligations put on SJ is to, according to the Corporate Governance Policy Document 2008, maintain a sustainable, efficient, profitable operation with environmental and social responsibilities which are equal to other companies that operate commercial activities. The owner's long-term financial goal of SJ is a return on equity amounting to 10 percent.[211] This means that SJ only obligation is to provide passenger traffic service with profit without the financial responsibility of public service obligations.

It is evident from the Corporate Governance Report that SJ carries out an economic activity within the meaning of Article 86, by offering services on the market of passenger traffic. This offering of a service, is an activity that could, in the absence of the state measure conferring an exclusivity, be performed by one or several private undertakings. As mentioned by Jones and Sufrin this constitutes the performance of an economic activity.[212] It is also clear that SJ is a public undertaking, as it is a fully state owned limited company, without falling within the sphere of economic activities, which are excluded because they are intrinsically prerogatives of the state, such as education or social security schemes.[213]

The next part of the assessment of SJ's monopoly is the exclusive right given to the company and the effects created by this conferment. As mentioned above the exclusivity is given to SJ by national law further defined by government ordinance. According to the case law of the ECJ, SJ must therefore be deemed to be the holder of an exclusive right.[214] Nor the law or the ordinance limits the exclusivity geographically, making it, at least in theory national wide. The interesting twist of the exclusivity is the possibility to waive the right. This twist further complicates the situation, as the next step is to assess the creation of a domination position. In theory, SJ could actually regulate its position easily by waiving its exclusivity.

[211] Corporate Governance Report by June 30, 2008 for SJ AB, http://www.sj.se/static/rapporter/ar2005/sv/bolagsstyrning/agarstyrning/index.html 2008-12-13.
[212] Jones and Sufrin, 2007, p 129.
[213] Prosser, 2005, p 129.
[214] Ibid., 131.

4.4.1 Dominant Position

It is a well-established fact that an undertaking holding a statutory monopoly by being granted exclusive rights on a substantial part of the Common market is to be considered to occupy a dominant position within the meaning of Article 82 of the TEC.[215] However, it should be recalled that although merely creating a dominant position by granting exclusive rights within the meaning of Article 86 (1) is not in itself incompatible with Article 82.

A Member State will be in breach of the prohibitions laid down by those two provisions only if the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses.[216] According to settled case-law, for the purposes of applying Article 82 TEC, the relevant product or service market include products or services which are substitutable or sufficiently interchangeable with the product or service in question, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, but also in terms of the conditions of competition and the structure of supply and demand on the market in question.[217]

It must first be determined whether SJ actually occupies a dominant position on a substantial part of the common market, which presupposes a definition both of the market for the services in question and its geographical extent.[218] If an undertaking, such as SJ, does not hold a dominant position on the relevant market, Article 82 does not apply.[219] If the undertaking enjoys a statutory monopoly there is a strong presumption that the area of exclusivity is a substantial part of the common market. Such statutory monopolies are subject to Article 82 as long as not protected by Article 86 (2).[220]

4.4.2 Relevant Product Market

In a case from the Swedish Market Court in 2000, an appeal by Statens Järnvägar of a decision by the Swedish Competition Authority, the Court assessed the relevant product market for passenger traffic in Sweden.[221]

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[215] Case C-260/89 *ERT*, supra, para 28; Case C-41/90 *Höfner*, supra, para 31; Case C-320/91 *Corbeau*, supra, para 9; Case C-179/90 *Porto di Genova*, supra, para 14.
[216] Case C-475/99 *Ambulanz Glöckner*, supra.
[217] Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, paragraph 51.
[218] C-475/99, *Ambulanz Glöckner*, para 31.
[219] Whish, 2008, p. 186.
[220] Faul and Nikpay, 2007, Case T-229/94 *Deutsche Bahn AG v Commission* [1997] ECR II-1689.
[221] Swedish Market Court judgment, MD 2000:2, Statens Järnvägar v Konkurrensverket, pp. 22-139.

First, the Court established that there are two separately markets, one where Statens Järnvägar (today SJ AB) has an exclusive right to interregional passenger railway traffic on commercial basis and the tendered passenger railway service in Sweden. This includes all tender traffic, both the Trafikhuvudmännen and Rikstrafiken tendered traffic. The main argument of such partition is that the two markets are not homogeneous due to the difference in supply and demand in the non-competitive interregional market compared to the tendered traffic. The two markets are related, but still not interchangeable or substitutable by reason of their characteristics, their organisation or financing due to the exclusivity given to SJ, rather similar to the two types of services established by the ECJ in *Ambulanz Glöckner*.[222]

The composition of the two types of tendered traffic to one market is motivated by the fact the there is no significance between how the two procurements are organized, and that the Rikstrafiken and local authorities have to cooperate and coordinate their traffic in order to achieve a functioning service. Further, for a bidder there is not really a difference between bidding on regional traffic a non-commercial interregional traffic, because the costs, quality, rolling stock, competence, etc is almost similar.[223] The Commission of inquiry made the same conclusion in 2008.[224]

The Court continued to assess the market by assessing the interchangeability to other modes of transport. First, it found that railway and buses do not constitute the same product market as special features distinguish the Railway market from bus transport since it is only to a limited extent interchangeable. From a supply-side substitutability perspective, a bus operator cannot without difficulty bid on a tender for both interregional and regional passenger traffic due to high costs and lack of relevant competence, especially concerning safety measures. On demand-side substitutability, there is a great difference in comfort and time between travelling by bus and train, which prevents consumers from changing means of transport event at a small increase in price.[225] Recent evidence of this is the great deal of criticism direct towards SJ regarding ticket prices and reliability, despite this there has been an increase in the number of travellers. The Commission has also established that there is little interchangeability between passenger traffic by train and by bus.[226]

The Swedish Court also established that air travel and railway passenger travels does not constitute the same relevant product market. In terms of regional travels, the Swedish Competition Authority argued that for routes shorter then 300 km no air travel is profitable or even demanded. The Court

[222] C-475/99, *Ambulanz Glöckner*, para 33.
[223] SOU 2008:92, p. 123.
[224] Ibid., supra, p 39.
[225] MD 2000:2, supra, p. 43.
[226] Commission Decision of 20.07.2001 Case No. IV/M.2446 - *Govia/Connex South Central*; Case No IV/M.748 - *CGEA/NSC*.

upheld this. Regarding interregional travels longer then 300 kilometres there are similarities but not enough to constitute the same product market. On interregional routes by train, passengers board and descend along the routes. There is also a great difference in price, number of departures, reliability, number of airports, and travel time. The actual fair can not only be calculated on the actual ticket price but also include the transfer costs from the airport, which often are situated outside the cities.[227] In conclusion, air travel is not a substitute for an "ordinary" traveller due to mainly costs while business travellers values time over cost, and is hence less sensitive to high prices.[228]

On supply-side substitution, the undertakings are often "locked" in because of investment costs. For a bus operator without earlier experience, it would constitute a big risk and cost to enter the air travel market or the passenger traffic market.

Therefore, the conclusion must be that the relevant product market for this assessment is that of inter-regional passenger traffic where SJ holds an exclusive right to perform such transport.

4.4.3 Relevant Geographical Market

The definition of the relevant geographical market calls, just like the definition of the product or service market, for an economic assessment. Such an economic assessment will however not be performed in this thesis, instead the assessment will be based on the Swedish Market Courts ruling in 2000 and the Commissions prior assessments. The ECJ has established that the territory of a Member State can form a substantial part of the common market as long as it is capable of affecting patterns of trade and competition on the Common market.[229] The most evident barrier to enter the Swedish passenger railway market is the Swedish monopoly on the most profitable routes. This legal barrier limits the number of market participant, not solely due to the exclusive right directly, but also indirectly as tendered traffic not always is a question of offering the most economical competitive bid, but also depends on other variables. This could for example limit budget-alternative undertakings from entering the market as their competitive strength are limited, making expansion on the Swedish market to risky.

Since SJ exclusivity is limited to Sweden this has to constitute, at least the simplified, relevant geographical market. The relevant geographical market should not only be limited to Sweden due to Swedish national rules but also

[227] MD 2000:2, supra, p. 66.
[228] Case no. IV/M.1305 of 9 December 1998 – Eurostar, para 15.
[229] Case 322/81 *Michelin v Commission* [1983] ECR 3461, para 28; Case C-323/93 *la Crespelle*, supra, para 17; Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebs-gesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.*, [1998] ECR I-07791, para 36.

due to the regulations of other Member States concerning passenger transport by train as Swedish undertakings, like SJ, is limited to act on other markets, as seen in the comparative part above. This has the consequence that there is no pan-European market, yet, for passenger traffic. This conclusion might have to be reviewed after 2010 when the market is opened for international passenger traffic.

4.4.3.1 Abuse

After establishing that SJ has a dominant position on a substantial part of the common market and identifying the relevant product and geographical market it is now necessary to consider what action can be seen as constituting abuse of that position. There are several restrictions on dominant firms, limiting their behaviours. Article 82 gives examples of such restrictions, such as charging unfair prices, limiting production or discrimination. This list is however not exhaustive.[230]

Even though Article 82 only applies to anti-competitive behaviour of undertakings, a state measure can still be challenged under that very article. As established by the ECJ, the mere creation of a dominant position through the grant of special or exclusive rights within the meaning of Article 86 (1) is not in itself incompatible with Article 82. But a Member State will be in breach if an undertaking, merely by exercising the exclusive rights conferred upon it, leads to abuse of the dominant position or where such rights are liable to create a situation in which that undertaking is lead to commit such abuses.[231]

This because a Member States must not, by laws, regulations or administrative measures, put undertakings to which they grant special or exclusive rights in a position where they cannot act without infringing Article 82.[232] As concluded by the Commission of inquiry on railway transport in 2004 and 2008, the dominant position held by SJ in the tendered traffic is mainly due to the network benefits from the monopoly traffic, such as access to rolling stock, employees, booking system etc, does not result in bidding on equal terms. The Swedish Agency for Public Management has stated that today's rail market shows a regulatory failure presenting a real "risk of abuse of market powers and the distortion of competition in tender procurement".[233] The risk of abuse on the ancillary market of tendered traffic is even greater due to three things.

First, that SJ is not obligated to cooperate with other tenders. This leaves bidding competitors to rely on SJ's good will to cooperation regarding coordination of timetables and ticket booking systems. No refuse to cooperate by not providing timetables or not coordinating them is likely to

[230] Whish, 2008, p 188.
[231] C-475/99, *Ambulanz Glöckner*, para 39-40.
[232] Case C-18/88 *GB-Inno-BM SA*, supra.
[233] The Swedish Agency for Public Management report, *Avregleringen av sex marknader*, 2004:28 Del I, p 124.

be seen as an abusive behaviour under Article 82. As the liberalisation processes has evolved, the need for allowing third parties to gain access to physical infrastructures has become more evident.[234] In *Sealink/B&I-Holyhead*, the Commission held that Sealinks abused its dominance and was forced to change its schedules in order to avoid disrupting B&I's operations.[235] The other "essential facility" controlled by SJ, even though less physical, is the ticket reservation system. In *London European-Sabena* the Commission ordered that access be made available for competitors to a computerised reservation system in the air transport sector.[236] The same principles should apply in railway sector. This issue is also mentioned by Alexandersson and Hultén as a major complication, as the main booking system for train tickets today is operated by Linkon AB, a subsidiary to SJ.[237]

Secondly, the Swedish legislation creates a conflict of interest between SJ's commercial interregional services operated under the monopoly and its tenders for regional and interregional traffic. The dual role is most obvious when planning and optimising integration of the exclusive and non-exclusive traffic. Especially since it is SJ who decides which route that have been deemed unprofitable and therefore, in practice, exercises a major influence on the volume of tendered traffic. This conflict of interest leaves SJ in a position where it is very likely to discriminate in favour of its own operations. As established by the ECJ in *Van Eycke* and *Silvano Raso*, it is enough for a dominant undertaking to be put in such position to constitute an abuse without actually having to establish an abuse.[238] Alexandersson and Hultén also accentuate the risks of SJ's monopolistic behaviour, as offering very strategic bids after having waived their exclusivity and by the possibility to withdraw popular routes from competitive tendering.[239]

Finally, SJ's dominance also leaves a great risk for abusive behaviour through cross-subsidization between the exclusive and non-exclusive areas of operation. The earlier mentioned case from the Swedish Market Court established that, in that case, SJ had submitted the lowest bid due to its possibilities to finance the tendered traffic through its exclusive operations. Such behaviour, allocating cost to monopoly activities is mostly likely to distort competition in violation of Article 82 (2). The abuse does not have to take the form of predatory pricing, it can be construed of providing additional services or equipments at remuneration substantially lower than the market price.[240]

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[234] Whish, 2008, p 970.
[235] Commission Decision IV/34/174 of 11 June 1992, *Sealink/B&I-Holyhead*, OJ [1994] L 55/52.
[236] Commission Decision of 4 November 1988 IV/32.318, *London European - Sabena*.
[237] Alexandersson and Hultén, 2008, p. 24-25.
[238] Case 267/86, Van Eycke v. ASPA, [1988] ECR 4769 and Case C-163/96, *Criminal proceedings against Silvano Raso and Others*, [1998[ECR I-00533, para 30.
[239] Alexandersson, Gunnar and Hultén Staffan, *The Swedish Railway Deregulation Path, Review of Network Economics*, Volume 7, 2008, 18 -36.
[240] Faull and Nikpay, 2007, p. 392-393.

Another form of abuse created through the Swedish measures is SJ's manifest inability to meet demand. As stated by the ECJ in *Höfner*, when a Member States confers an exclusive right to carry out an activity upon an undertaking, such measure is in breach of Article 86 (1) if it creates a situation in which that entrusted undertaking cannot avoid infringing Article 82 (b) of the TEC, by being manifestly incapable of satisfying demand prevailing on the market for such activities. This type of situation is exactly the situation in Sweden and for SJ. Good evidence of this is the Swedish government preparatory work where the state mentions that "there are demands for traffic beyond what SJ AB offers customers on a commercial basis"[241]. Furthermore, as put by the Commission of Inquiry on Railway Transport "it is not excluded, perhaps even probable, that on a future liberalized market there will be commercial traffic carried out on many routes other than the one SJ AB has defined as profitable."[242] Another most real example of this are the night trains from Malmö, Göteborg and Stockholm to Åre during the winter season, a route found not to be commercial viable by SJ but which Connex found to be profitable.[243] This inability to meet demand depends on the lack of incentive created by a dysfunctional monopoly contrary to the concept of SGEI.

The problem with delegation of powers appears where the state and private operators cooperate in decision-making. Most forms of cooperation are necessary in order to secure effective utilization as the state or public authorities not necessarily have all relevant information or where the entrustment is a natural part of the task performed, such as bar association. However, allowing private operators to be a part of the regulator processes increases the risk that the operator will act in pursuance of its own economic interests rather the a public interest. This means that private operators could shield their anti-competitive behaviour as being "state measures" which are not subject to antitrust scrutiny.

As established by the ECJ in *Van Eycke*, private undertakings may be a part of the decision making process if it is ensured that the measure provides some kind of legal framework which ensures cooperation and hinders the undertaking to act solely in its own interest. Furthermore, the decision has to be approved or reviewed by the state, otherwise it is an act of a private undertaking and the Member State has failed to ensure the obligation of co-operation under Article 10.[244] Evidence of this was mentioned above, regarding the *Italian Customs Agents*. By giving SJ the right to set the limit of the monopoly based on their own economic interest rather than a public interest and without having any control over that choice, the Swedish state has failed to fulfil its obligations under Article 10. The case law clearly

[241] Freely translated from Governments proposition 2005/06:160, supra, p 183.
[242] Freely translated from SOU 2008:92, surpa, p 15.
[243] See the press release 061110 on http://www.connex.se/tmpl/NewsPageWithList 16961.aspx?epslanguage=ML&ListID=12633; and information about "Utmanartåget" på www.bokatag.se.
[244] Szoboszlai, Judit, Delegation of State Regulatory Powers to Private Parties Towards an Active Supervision Test, World Competition 29 (1): 73-87, 2006.

states that a Member State cannot delegate its powers of legislation to private economic operators' responsibility for taking decisions affecting the economic sphere without the possibility of being subject to a legal remedy.[245]

4.4.3.2 Effect on Trade between Member States

A measure which prevents an undertaking from establishing itself in another Member State with a view to provide service on that market has an effect on trade because it partitions the common market, restricting the freedom to provide service and is contrary to the objectives of the TEC. The SJ monopoly is no exception to this, where there are several undertakings willing to enter the Swedish market, as evident in the tenders for public passenger traffic and the night traffic.

The monopoly simply partitions the common market, which is a consequence contrary to the importance of creating a common European market for railway transportation services as established by the Commission. This is especially deplorable as railway transports compared to other modes of transport, is the most environmental sustainable mode and therefore should be the most competitive.

4.4.4 Does SJ perform a Service of General Economic Interest

As discussed in detail above, the right to define if a service constitutes a SGEI possessed by the Member States and the possibility to review is rather limited, even though this is decided indefinite.

Pending the ECJ ruling in *BUPA*, the Swedish monopoly will be assessed using the criteria mentioned by the CFI and which correlates to the Commissions examples of common elements to a Community concept of SGEI.[246] The first minimum criteria given in *BUPA* is the presence of a public act entrusting an operator with a SGEI mission. This criterion is fulfilled as far as the act concerns by Järnvägslag (Railway law) and Järnvägsförordning (Railway ordinance) which simply states that "SJ AB has the right to conduct and organize the passenger traffic on the rail network managed by state". However, neither the Railway law nor Railway ordinance does entrust SJ AB with a SGEI mission. In the Government issues guidelines for Railway traffic budget year 2008, the main goals of all railway traffic in Sweden is to provide socially and economically efficient and long-term sustainable transport supply which is accessible and satisfies the citizens and industries basic transport needs at high quality, with a high

[245] Case C-250/03 *Giorgio Emanuele Mauri v Ministero della Giustizia and Commissione per gli esami di avvocato presso la Corte d'appello di Milano,* [2005] ECR I-01267.
[246] T-289/03, *BUPA*, supra; Commissions Green Paper on services of general interest.

level of safety and to support regional development.[247] This, however, does not constitute an act entrusting an undertaking with the responsibility to perform a SGEI according to the CFI definition, as it only provides general aims of the transport policy. The Swedish measure to entrust SJ AB with a monopoly does not fulfill the criteria given by the CFI nor does it fulfill the first Altmark condition of prior clear definition of the mission entrusted. Conclusively, there is no universal obligation referred on SJ to provide all consumers throughout Sweden with the service of passenger traffic at affordable prices. This is instead ensured by the National Public Transport Agency. What SJ is allowed to do is rather to pick the cherry of the passenger traffic market, leaving the less attractive routes to be publicly tendered. This also means that SJ can avoid the costs for the less commercial valuable routes but still make profit on that route without having to take the economical risks. Furthermore, the lack of obligations results in failure to correspond to other common characteristics of what constitutes a SGEI, such absence of continuity. SJ can arbitrarily vary the level of service, price but most essentialy the routes. This goes beyond what the CFI refers as certain latitude being left to the operator on the market, this mainly due to the fact that possibility to arbitrarily waive the right to operate a route shows the non-compulsory nature of the measure. Finally, in contrast to the neatly adorn transport visions, SJ does not have a quality obligations which might lead to the consequence that neither consumers nor the public in general may benefit from the gains derived from the monopoly.[248] A similar conclusion was made by the Swedish Competition Authority in a report on monopolies, where they also point out SJ deficiency to ensure affordable service.[249]

At the end of the day, SJ is a formal but, essentially, unregulated monopoly - where, besides the requirement of financial return for the owner, no other clearly defined requirements provided for any SGEI mission can be found. The mission entrusted is rather that of revenue-producing monopoly and to improve SJ's possibilities to survive on the future open market.

4.4.5 The Non-Proportionality of SJ's exclusive rights

As a final assessment on SJ exclusivity, the proportionality of the state measure must be assessed. In principal, under the TEC and the conditions set out in Article 86(2), the effective performance of a general interest task prevails, in case of tension, over the application of TEC rules, resulting in

[247] Governments decision II 21 2007-12-19, Ministry of Enterprise, Energy and Communications N2007/9622/TR, N2007/10256/SAM, addressed to Swedish State Railways.
[248] The Swedish Agency for Public Management report 2005:8, Six deregulations - Liberalisation of the markets for electricity, postal services, telecommunications, domestic air traffic, rail and taxi services in Sweden, http://www.statskontoret.se/upload/Publikationer/2005/200508.pdf.
[249] Swedish Competition Authority report: 2004:3, *Monopolmarknader i förändring*, p. 17.

the protection of the mission rather then the way it is fulfilled.[250] The prevalence of the mission is, however, limited by the principle of proportionality, which connotes that, means used to fulfil the general interest mission shall not create unnecessary distortions of trade. Specifically, it has to be ensured that any restrictions to the rules of the TEC, and in particular, restrictions of competition and limitations of the freedoms of the internal market do not exceed what is necessary to guarantee effective fulfilment of the mission.[251]

Since *Corbeau,* it has been established that in order for an undertaking performing a SGEI to be excluded from competition rules, that the exclusion must be necessary in order to perform the mission. If an undertaking has an obligation to perform a SGEI, throughout a geographical area, it must be able to perform that service in conditions of economic equilibrium where it can offset less profitable sectors against the profitable sectors and hence justify a restriction of competition on individual undertakings. An argument to the contrary, would render the performance most ineffective since no obligated undertakings could concentrate on the economically profitable operations, offering more advantageous prices since they are not economically burdened with the entrusted responsibility.[252] In brief, to avoid cherry picking or "skimming the cream" which could jeopardise the quality and reliability of that service, it could be necessary to restrict competition or even exclude all competition.

Even though there are certain Community measures taken in the field of railway transport, as seen above, there are yet none in effect governing passenger traffic which makes the balancing act of SJ exclusivity as proportionate or not with somewhat dual. Should it be scrutinized using the least restrictive measure test, or should the manifestly disproportionate be used? Either way, SJ's right to decide the scope of its own rights freely and by not imposing a duty to cooperate with competing tenders in the adjacent market for tendered traffic or with the Trafikhuvudmännen shows that the Swedish government has failed to limit the restrictive effects of the monopoly. SJ is therefore able to limit competition and extend its dominance into areas that already have been subject to liberalization and where competitive conditions should apply. While at the same time, there are no objectives of universal services, or even the wider SGEI concept to be fulfilled the restrains on competitions cannot be seen a proportionate as they do not benefit a general interest except for state revenue.

[250] Communication from the Commission - *White Paper on services of general interest*, COM(2004) 374 final.
[251] Communication from the Commission - *Services of general interest in Europe* (2001/C 17/04), para 23.
[252] Comm., 2001/C 17/04, supra, para 17.

4.4.6 Conclusion

To conclude this case study of the Swedish Railway monopoly and SJ's role I first want to make a brief summary and then give some concluding remarks. SJ is a public undertaking performing an economic activity by offering passenger traffic on interregional route, an activity it operates exclusively due to Swedish law. The granting of the exclusive right to operate is not further defined in law or by government ordinance, and SJ has the right to waive its exclusivity on the basis of non-profitability. Due to this monopoly, SJ holds a dominant position on the relevant market of interregional passenger traffic in Sweden. Since the statutory dominance is not limited or restrained by any further commitments other the profitability, SJ is in a situation where it abuses the dominance. The abuse consists of not having to share essential facilities or in other ways cooperate, being unable to fulfil consumer demand and acting anti-competitive through the possibility of arbitrarily determining what routes it wants to operate exclusively. This shows that Sweden has failed to ensure effective competition since it does not have an overall control of the undertaking. This development has an effect on trade between Member States as several undertakings that are willing to enter the Swedish market by are restrained, directly by the monopoly and indirectly the risks of entering into tendered traffic only. Since SJ is not entrusted with a SGEI nor in fact performs such service it cannot be shielded from EC competition law. The monopoly can neither be justified as a proportionate or necessary, mainly due to the lack of overall structural control. Consequently, Sweden is in breach of the TEC, upholding an unnecessary and disproportionate monopoly.

The Swedish government argues for a reciprocate opening of the market accordingly with the Community liberation measures in order to prevent "cherry-picking" of the Swedish market from strong monopoly founded undertakings. This is, nevertheless, a corrupt argument since SJ does not bare the responsibility of performing a service of economic general interest as foreign operators often do. Even though Sweden has conducted several structural changes in the field of railway traffic, an assessment cannot be based on the fact that Sweden is a forerunner; instead the assessing Court must look at the unnecessary and disproportionate effects on the free movement of services which the monopoly creates. Since the monopoly lacks any structural guarantees to ensure that SJ does not abuse its dominance position it is in breach of the TEC, similar to the Swedish Pharmacy Monopoly that was found to be disproportionate by the ECJ due to this fact.[253] Perhaps an assessing Court should ask whether the monopoly is need at all, since it limits trade and fails to fulfil consumer demand.

It should further be mentioned that, even though the stepwise vertical and horizontal disintegration of SJ has lowered some of the barriers to entry there is still a great risk for the future of tendered traffic. Alexandersson and Hultén mention that undertakings often have problems winning tender for

[253] Case C-438/02, *Criminal proceedings against Krister Hanner*, [2005] ECR I-04551.

the same traffic two times in a row.[254] This could mean, in a long-term perspective, that it becomes hard to ensure effective competition as few bidders can afford bidding, creating yet another dominant position as SJ finances its activities, or lack thereof, through the monopoly, awaiting the retreat of other prospective tenders.

At the end of the day, Sweden should be the main promoter of a common railway market, not encouraging or upholding ineffective monopolies. It is important for a geographically isolated country as Sweden to ensure the creation of a common environmentally sustainable European railway market.

[254] Alexandersson and Hultén, 2008, p 32.

5 Final conclusion and analysis

Services of general economic interest cover a broad range of activities, essential for the daily life of citizens and enterprises, and reflect Europe's model of society. They play a major role in ensuring social, economic and territorial cohesion throughout the Union and are vital for the sustainable development of the EU in terms of higher levels of employment, social inclusion, economic growth and environmental quality. Despite the essential role of these services, they are still met by a certain scepticism, chiefly due to the lack of legal certainty and consistency of the concept of SGEI. The explanation of this uncertainty and consistency is primarily the consequence of the political delicacy of SGEI.

The political nature of SGEI has had an effect on the ECJ, which has retreated somewhat from its bold decision in *Corbeau*, now leaving a considerable freedom to the Member States to identify what economic services need to be protected from the internal market and competition rules. The ECJ has also made it rather clear that the Commission should tackle Member States measures through legislation rather then through challenging the measure before the ECJ. This is further evident when looking at how the proportionality tests can vary depending on where or not any harmonization measures has been introduced. I believe that the ECJ has taken a rather prudent approach when dealing with services of general interest, not only because of the political nature, but also due to the complexity of providing certain essential services and how these services boarder to non-economic services not encompassed in the TEC.

The ECJ's more recent approach has somewhat abandoned the goals of EC competition law in order to favour the freedom of the Member States. As applied of today, the exemption is becoming the principal rule and is not in a strict manner like all other exemption to the TEC objectives. Given that, it is more understandable why the ECJ has accepted economical justification grounds, such as profitability or cross-subsidisation arguments, in the field of SGEI. This development is also in line with the rise of Union citizenship and the goal of economic, social and territorial cohesion found in Articles 16 TEC and 36 of the CFR. An extended version of Article 16 TEC is found in Article 14 of the ToL.

At the same time, allowing Member States to act independently , without any other means than a formal assessment as advocated by the CFI in *BUPA* raises a number of questions, which in the end could be contrary to the spirit of the TEC. First, the Community has achieved an effective international legal body, dominated by the concept of an internal market where goods, service and capital can flow freely. This is mainly due to the ECJ activism removing hinders of the four freedoms created by the Members States, a development much need to ensure the objectives of the Community. However, allowing Member States, without restraint, to decide the concept

of SGEI can create a escalating uncertainty among the Member States as more and more services, possibly providable by undertakings in competition, disappear from the market, where no one wants to leave their markets open for competition and in the end effect the entire cooperation concept. Evidence of this risk can be seen in *Gas Natural/Endesa* where the Spanish Gas Natural launched a public bid for Endesa, another Spanish company, which was considered hostile. At this point, the German Company E.ON made a more favourable bid that was accepted by Endesa. However, the Spanish government accused Endesa for being unpatriotic and declared that Spain would do what it could to ensure that the Spanish energy company remained under Spanish control, stopped the merger. In the end, the merger was approved, but it elucidates that "patriotism" instead of "europeanism" that is prevalent in the Union when it comes to national champions.

In order to avoid such development I believe that the ECJ should take a more functionalistic approach when assessing the necessity and proportionality of services that have been given exclusive rights in order to fulfil a general economic interest. Such an approach minimizes the possibility of cloaking unjustifiable measures as SGEI, examining, not only to minimum criteria but also at the effects of such exclusivity. Consequently the ECJ must assess whether the objectives are being fulfilled in reality or not, and do a more strict proportionality test. At least the Court must be able to scrutinize the causality between the objective of the SGEI and the measures taken. Otherwise it is almost impossible to challenge state measures within Article 86 (2), unless there are harmonisation measures taken. The current legal situation makes it hard to ensure legitimacy of the monopolies when havened by Article 86 (2) without any effective measure to review.

There must also be further clarification within the field of cross-subsidization. This question must be a mandatory part in the review of a state measure seeking protection as a SGEI. I agree fully with Bartosch that the possibilities to cross-subsidisation from non-exclusive activities to exclusive activities performing a SGEI should be pre-empted before accepting public subsidies, especially concerning state owned or controlled companies. This line of argumentation is supported by the judgment in *Ambulanz Glöckner* where the ECJ stated that the ancillary activity was not separable from the SGEI since it was an important element of financing the entrusted task. Furthermore, there must be a substantial control of the entrusted undertakings advantage to be able to cross-subsidisation, to warrant the risks of abuse. The main cause for this risk is the dual nature of SGEI, being an economic activity in a non-market sphere and being allowed to function in an economic equilibrium, since there are no rules ensuring transparency regarding private undertakings, equivalent of those regulating public undertakings.

Further, I believe that the Commission must take a more active part to ensure that most services actually are be performed in competition at

affordable, high quality levels and being accessible. This has already been done in the field of energy, telecommunications and postal services where the result has been an improved consumer and user rights. If the Commission does not act, the internal market might not continue to evolve, creating an obstacle to the effectiveness of competition law in particular and EU law in general, especially in times of economic regression or when new Member States are enacted. It should not be forgotten that one of main goals of the liberalisation process is to benefit of the citizens. I therefore believe that it is important, as Szyszczak argues, for a new European idea of SGEI to be promoted, where most such services are provided for in competition. In order to promote such development the effectiveness of 86 (3) has to be protected from being further curtailed by the political power of the Member States.

The consequences of not upholding a strict control over the necessity and proportionality of Member States exclusivity have been described in the case study of the Swedish railway monopoly. Despite being a fully owned state undertaking, the state has no overall control of SJ's performance as a public service provider. SJ operates like any other undertaking but with the advantages of arbitrarily deciding to what extent it should operate exclusively. Such an arrangement, created through law, puts all other operators from other Member States at a disadvantage when bidding on the ancillary market of tendered traffic. Sweden simply lets an economic actor take the role of legislator or authority, deciding the extent of the SGEI, an arrangement contrary to the TEC. This means that SJ is not entrusted with a SGEI nor performs one in fact since the service is not accessible to most nor has any guarantee of continuance. In reality, the general economic service of railway passenger traffic is secured by Trafikhuvudmännen and Rikstrafiken, guaranteeing all other traffic motivated by the national transport policy. This is also an evidence of SJ's failure to meet consumers demand.

To further accentuate the need for a more active control by the EC institution by using SJ as an example, the case study revealed that SJ is also abusing its dominance on ancillary markets of tendered traffic. SJ also lacks the necessary transparency to ensure fair competition when deciding what routes to operate on and not. Additionally, since there is no obligation to cooperate, Sweden has not created a monopoly where the monopoly holder has any obligation to cooperate on ancillary competitive markets. The Swedish monopoly on passenger railway traffic is therefore affecting the development on trade between Member States as is ultimately contrary to not only Article 86 (2) but also to the TEC and the concept of the Community in general. Since it is my firm belief that the Swedish monopoly in not a unique phenomenon, as briefly shown in the comparative part 4.2, this calls for firm actions by the institutions and for the Member States to act responsible and in cooperation under Article 10, ensuring the objectives of the TEC such as effective competition. Likewise, since SGEI is a living concept there must be an obligation for Member States to keep any statutory monopoly entrusted which such service up-to-date.

In the end, it must be respected that there is a need for letting the Member States identify general needs and ensure the enforcement of such are carried out. The question is therefore how far the Member States prerogative should be extended. Could an undertaking providing rural areas with leasehold property be considered as a SGEI since it ensures survival of sparsely populated areas? Giving an undertaking such an exclusive right would not only create an unbalance on the market for property but would also increase the risk of Member States to introduce illegitimate objectives on fully functional markets, contrary to the spirit of the TEC and its market objectives.

To conclude this thesis, even though SGEI are necessary in order to ensure a high-level of quality services at affordable prices and accessible to most, baring the case study in mind, there must be an effective review mechanism by the EU institutions. This review mechanism must be not only effective but also ensuring the services defined really are services of general interest. The question whether the *BUPA* conditions will be upheld and if they are minimum requirements or maximum requirements has to be answered by the ECJ. Since the *BUPA* case was not appealed to the ECJ we must await a future judgment which, hopefully will give good guidance in the development of SGEI.

Effective competition is crucial to an open market economy. It brings about effectiveness, cutting prices, raises quality, expands and ensures diversity in customer choice and needs. These factors strengthen the competitive position of the EU towards the rest of the world. The competitive pressure ensures that efficiency improvements and cost reductions are passed on to customers and not retained as higher profits for the performers. However, since it has been established through the case law of the ECJ that a monopoly giving an undertaking a dominant position is not abusive per se. What must be ensured is control and further harmonisation in order to strengthen the competitiveness and effectiveness of the internal market. The evolution of the SGEI is conceivably a product of the Member States reluctance to limit their sovereign right further.

This evolution towards a less interfering role taken by the EC institution is perhaps necessary in order to secure the constituency of the Union after the fall of the Constitution and to improve the Unions reputation among its citizens. The introduction of Article 16 is a sign of an abatement of the traditional Community functionalistic and technocratic approach and a development towards a political and social European Union. Nonetheless, justification for depriving the public of the benefits of competition must be that it is necessary in order to achieve some other essential results in the general interest. There must thus be a direct and necessary link between the restriction on competition and the task and objective performed, to ensure economic welfare through effective markets.

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