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Exclusive Rights under Article 86(1) EC

Master thesis
20 points

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European Community Law

Spring 2006

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Summary

Over the past few decades, the progressive elimination of Member State involvement in competition has been considered as essential for the establishment of the common market. State involvement in competition can take many forms and may have the effect of privileging undertakings in which Member States maintain ownership. A Member State may through its legislation or acts, take steps to manipulate markets and thereby preclude the competitive process. The purpose with Article 86 is to prevent that from taking place.

Under Article 86(1) EC, there are two categories of undertakings mentioned, *public undertakings* and *undertakings granted with exclusive or special rights*. Exclusive rights can, in a concise way, be described as ‘rights granted to more than one undertaking operating in the same market where their number is limited and they are chosen upon discriminatory and subjective criteria.’

Since Article 86 is a reference provision, it does not have an independent application, therefore it must be combined with another provision of the EC Treaty, in order for it to be applicable. In this thesis, its relation to Article 82 will be examined.

There is an extensive case law by the Court of Justice concerning the granting of exclusive rights by Member States to undertakings, which is neither considered consistent nor predictable. Many authors have expressed that there is a difficulty with these cases and with ECJ’s subsequent judgments to determine the circumstances in which a Member State can be liable under Article 86(1) for an infringement of Article 82.

While some cases have led most authors to draw the conclusion that the granting of exclusive rights is prohibited *per se*, the Court changed its approach by *La Crespelle* case, and took some steps backwards from its previous case law.

Despite the judgment delivered in *La Crespelle*, the overall view in the doctrine is that the Court has taken a liberalization process by restricting the legality of measures taken by the Member States. The liberalization of the public sector has been viewed by many as an unavoidable consequence of the establishment of the internal market.

Preface

Four and a half years have passed and the time for graduation is approaching. I feel satisfaction for the past and excitement for the future.

I would like to thank my family for all their support and endurance during these years, I know they desired this moment to come, as much as I was.

I would also like to thank my friends and people in my immediate surroundings who believed in my attempts from the first moment.

Finally, I would like to thank my supervisor Henrik Norinder for all his support and good advice. I am very grateful.

Helsingborg den 27 April 2006

Elisabeth Seferidis

Abbreviations

AG	Advocate General
EC	European Community
ECJ	European Court of Justice
CMLRev	Common Market Law Review
ECLR	European Competition Law Review
ELRev	European Law Review
EU	European Union
FCLI	Fordham Corporate Law Institute
OJ	Official Journal
Para	Paragraph

1 Introduction

1.1 Purpose

Traditionally, competition law has been seen as dealing only with the behaviour of undertakings, however it is obvious that State measures imposing anticompetitive behaviours may easily undermine the effectiveness of EC competition rules.¹

The aim of Article 86 EC is therefore, to guarantee that Member States act towards public undertakings in a manner compatible with Community law and to secure the proper functioning of the common market by maintaining equality of competitive conditions between public and private undertakings.²

Article 86(1) states that '*Member States shall neither enact nor maintain in force any measures contrary to the rules contained in this Treaty*', however it must be noted that Article 86 is a reference provision. By this it is meant that in order for Article 86 to be infringed, another provision of the Treaty must also have been infringed.³ Therefore, this thesis is based upon the applicability of Article 86(1) combined with Article 82 EC, which regulates abuse of a dominant position.

On several occasions, the European Court of Justice, has explained that the granting of exclusive rights is not prohibited *per se*, however, its conclusions have been pointing at an opposite direction. This is also the common opinion in the doctrine, that the case law in this field of law is neither clear nor consistent, thus there is an uncommonly fine line between a lawful grant of exclusive right and a breach of the EC Treaty under the combined provisions of Articles 86(1) and 82 EC.

The purpose of this thesis is to examine how fine this line is, to try to categorize the judgments delivered by the Court of Justice and explain the reasons for its way of acting from the perspective of the European Community.

¹ Faull, Nikpay, *The EC Law of Competition*, p. 274.

² Page C. Alan, *Member States, Public Undertakings and Article 90*, *ELRev.* 1982, 24, 19-35.

³ Pappalardo A, *State Measures and Public Undertakings: Article 90 of the EEC Treaty revisited*, *ECLR* 1991, 12(1), 29-39.

1.2 Disposition

The first part of the thesis describes the purpose with Article 86 and the different steps to be taken in order to decide its applicability, with the emphasis added at the granting of exclusive rights within Article 86(1) EC. Subsequently, a brief presentation of the case law concerning the granting of exclusive rights is presented, the cases mentioned in this part of the thesis will also constitute the ground for the analysis.

The second part of the thesis deals with Article 86(1) in conjunction with Article 82, since Article 86 (1) has to be combined with another provision of the Treaty in order to constitute an infringement. It continues by explaining in what situations these two provisions are combined, and what requirements have to be satisfied in order for Article 82 to be applicable.

The next part of the thesis, describes the case law of the exclusivity, in depth, thus it is the main question of this thesis to examine how the Court of Justice has reasoned. By a discussion after each case based on the various opinions expressed in the doctrine, commenting the reasoning by the Court of Justice, in the final part, conclusions are drawn and presented in order to answer the question whether exclusive rights are prohibited *per se*.

1.3 Delimitation

This thesis concentrates on the granting of exclusive rights by the Member States to undertakings in Article 86(1) EC therefore, I have decided not to include any further discussion about Article 86(2) and 86(3). I have also tried to limit the discussion dealing with Article 82 which concerns the abuse of dominant position and only focus on the parts that are of relevance from the perspective of Article 86(1).

Article 86(1) may be infringed in combination with other Treaty provisions as well, besides Article 82. However, those aspects have been left out of this thesis, since they concern other areas of competition law.

In section 2.4, I decided to examine what measures have been taken by the Commission in accordance with Article 86(3) in order to make a comparison possible with the case law by the Court of Justice. However, I had to limit myself and only mention the Directives adopted by the Commission in the postal sector and in the telecommunications sector, and therefore exclude the rest of the sectors. Mentioning all of them would go beyond the scope of this thesis which concerns the granting of exclusive rights in general and not for a certain service sector.

1.4 Method and Material

The method that has been used in this thesis is the traditional legal method, therefore the materials it consists of are legislation, case law and doctrine. In particular the case law is of importance, since that is the basis for the discussions in the literature.

In order to examine the aspects of Article 86, in the first part, Craig and De Búrca's *EU Law, Text Cases and Materials* has been of importance as a starting point.

As for the analysis part, Buendia Sierras *Exclusive Rights and State Monopolies under EC Law Article 86 (formerly Article 90) of the EC Treaty*, has been a valuable source since he has an exceptional way of analysing the judgments by the Court of Justice and expressing his view, despite the fact that it quite often contravenes with the rest. I have also turned to various articles that have been published, commenting the case law in this field of law, though they consist of a limited number. I have done my best to find as many views as possible to be able to reach a comprehensive conclusion.

2 Article 86

2.1 The purpose of Article 86

It is not only by legislative or executive acts that Member States become involved in interference with the competition provisions. Member States may be involved in the provision of public services in many ways, either through nationalized industries or public undertakings of many kinds.⁴ Despite that the Member States according to Article 295 may decide on matters on property and thus are entitled to own public undertakings, they may not exclude those undertakings from being exposed to normal market conditions, thereby putting private undertakings at a disadvantage. The exposure of public and/or privileged undertakings to normal market conditions under effective competition is the main objective of Article 86.⁵

It is however undoubtable that if public undertakings were treated by Member States more favourably than other enterprises, the establishment and functioning of the common market would be jeopardized, thus there would be no equality of competitive conditions between the public and private sector.⁶ Damages would take place to the process of competition in national markets in a way that would affect trade between Member States. With reason to the latter, Article 86 was included in this part of the Treaty; unlike Articles 81 and 82, this provision is specifically aimed at Member States, however its function is to clarify the application of the competition rules to them, rather than to restrict their application.⁷

The Article is concerned with the legislation or regulation through which the Member States permit, encourage or compel the undertakings to distort competition. This is a function of the '*autonomous conduct of undertaking*' required in order for Articles 81 and 82 to be joined. The last mentioned one lead us to the conclusion that in the absence of public law regulation, Article 86 is not of relevance.⁸

Furthermore, Article 86 applies not only to competition rules but to a number of other Treaty obligations of Member States, e.g. the adjustment of State monopolies (Article 31), free movement of labour (Article 39), the right of establishment (Article 43), and freedom of services (Article 49).⁹ As mentioned before, these parts will be left out of this thesis, and only the combination of Article 86 with 82 will be examined.

⁴ Goyder, EC Competition Law, p. 482.

⁵ Von Quitzow, State Measures Distorting Free Competition in the EC, p. 57.

⁶ Page, p. 20.

⁷ Goyder, p. 483.

⁸ Lane, EC Competition Law, p. 227.

⁹ Goyder, p. 483.

The fact that the specific article is placed in the chapter of competition law indicates the awareness of the potential for Member States to distort competition through legislative and other measures that they adopt. The importance of Article 86(1) in relation to the competition rules is that in certain circumstances, a Member State can be held responsible for the abuses that have been, or would be, carried out by undertakings.¹⁰

Article 86(1) is enforced in two different ways. The first way, is that the Commission may by decision adopted by Article 86(3), address to the Member State that is responsible for the infringement to repeal the offending legislation. However, the specific paragraph will be discussed in subsection 2.4. Secondly, Article 86(1) is directly effective in concert with some other Treaty provision. Article 86 does not have an independent application, so its applicability comes to question only in conjunction with another Article of the Treaty, in particular in connection with the provisions in Articles 81 and 82.¹¹

Article 86 reads as follows:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measures contrary to the rules contained in this Treaty, in particular to those rules provided for in Article [12] and Articles [81 to 90].

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

2.2 Article 86(1)

The prohibition in Article 86(1) is addressed to Member States, not to undertakings. Article 86(1) requires that a Member State shall neither enact nor maintain in force any measure that is contrary to the Treaty. That means that a State has both a duty not to enact any measure which is contrary to the Treaty, but also a positive obligation to remove any such existing measure.

¹⁰ Whish, Competition Law, p. 218.

¹¹ Lane, p. 229-230.

Therefore, the State may be responsible even if it has failed to correct an infringement of the Treaty.¹²

Article 86(1) is designed to prevent Member States from depriving the Treaty rules of their effectiveness through the measure they adopt in respect of public undertakings or through measures which enable private undertakings to escape the constraints of the competition provisions.¹³

The Article affects two categories of undertakings, namely '*public undertakings*' or private undertakings to which '*special or exclusive rights*' have been granted.

2.2.1 'Public undertakings'

The question whether an undertaking is a '*public undertaking*' is a Community concept, because Article 86(1) would be deprived of its effect if Member States were free to choose their own conception of 'public undertaking'.¹⁴

The definition of the term 'public undertaking' in Article 86(1) is obtained from Article 2 of the Commission Directive 80/723 of 25 June 1980 on 'transparency of relationships'; and reads as follows:

'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 to be presumed when the public authority holds the major part of the undertaking's subscribed capital, controls the majority of votes attached to the shares issued or can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body'.¹⁵

This definition has a wide extent, including large-scale nationalized industries responsible for the production and distribution of gas and electricity, national railway authorities and many other public bodies, engaged in public economy activity.

Different Member States challenged the Directive, among other reasons, on the ground that the Commission was not entitled to expand the concept of public undertaking contained in Article 86(1).

In the *Transparency Directive*¹⁶ case the ECJ stated that the Commission did not set out in the Directive to define 'public undertakings' for the

¹² Craig and De Búrca, EU Law, Text, cases and Materials, p. 1125.

¹³ Jones, Sufrin, EC Competition Law, p. 542.

¹⁴ Ibid, p. 543.

¹⁵ Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, OJ 1980 L195/35, art. 2.

¹⁶ Cases 188-190/80, France, Italy and the United Kingdom v. Commission [1982] ECR 2545.

purpose of Article 90, (now Article 86) but it none the less approved the definition.¹⁷

The existence of a state influence in one of the mentioned ways will therefore be sufficient ground for an undertaking to be characterized as public.¹⁸

In *Muller*¹⁹ the State had power to nominate half of the members of the management and supervisory board of a company which controlled port facilities in Luxembourg. The specific company had certain privileges, among others, being consulted before the development of any other port facilities within a certain area was undertaken.

For this kind of undertakings, when granted monopoly rights, they become statutory monopoly undertakings, because a Member State is frequently a substantial part of the common market and a statutory monopoly within it precludes all competition; they usually enjoy a dominant position and that is how Article 82 comes at question.²⁰

2.2.2 Undertakings granted special or exclusive rights

The second category of undertaking mentioned in Article 86 (1) is narrower and the phrase refers to undertakings not actually public but which have still been granted such special privileges in order to perform functions which are regarded as important by Member State governments.²¹ These kind of undertakings are under the close influence of the State, by the granting of the special or exclusive rights, however the public authorities neither participate in them nor control their management.²²

The special or exclusive rights are defined by legislation for purposes of the telecommunications sector as: ‘the rights granted by a Member State or a public authority to one or more public or private bodies through any legal, regulatory or administrative instrument reserving them the right to provide a service or undertake an activity’.²³

The grant of an exclusive right is straightforward and exist where a monopoly has been granted by the State to one entity to engage in a

¹⁷ Goyder, p. 483-484.

¹⁸ Craig and De Búrca, p. 1124-1125.

¹⁹ Case 10/71, *Ministère Public of Luxembourg v. Muller* [1971] ECR 723.

²⁰ Lane, p. 228.

²¹ Goyder, p. 483-484.

²² Blum, Logue, *State Monopolies under EC law*, p. 9.

²³ Directive 90/388/EEC on competition in the markets for telecommunications services, OJ 1990 L 233/19, art. 1.

particular economic activity on an exclusive basis.²⁴ However, the special rights (in the field of telecommunications services) are;

‘Rights that are granted by a Member State to a limited number of undertakings through any legislative, regulatory or administrative instruments which, within a given geographical area, limits to two or more, otherwise than according to objective, proportional and non-discriminatory criteria, the number of undertakings which are authorised to provide any such service, or designates, otherwise than according to such service, or confers on any undertaking or undertakings otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide that same telecommunications service in the same geographical area under substantially equivalent conditions.’²⁵

Although this definition is set out in a Directive relating to telecommunications, there is no reason to prevent it from being used in other fields as well. In a concise way, it is rights granted to more than one undertaking operating in the same market where their number is limited and they are chosen upon discriminatory and subjective criteria.²⁶

As long as a State itself does not infringe Article 86 and as long as the undertaking does not exercise its exclusive rights so as to constitute an abuse of a dominant position under Article 82, then there is no breach of Community law. The exclusivity does not in itself infringe Article 82 but the exercise of such rights may do so if it can be said to be abusive, according to the case law by the Court of Justice.

The question that arise is how fine is the line between infringement of Article 86(1) and 82 by the granting of exclusive rights and non-infringement.²⁷

2.2.3 The exclusivity under Article 86(1)

There is an extensive case law concerning the granting of exclusive rights under Article 86(1), below the most important ones will be mentioned. Many authors are referring to the *Sacchi*²⁸ case as a starting point in this certain field of law. In that case the Court of Justice held that Article 90(1) (now Article 86(1)) permits Member States to grant special or exclusive rights to undertakings.

In *Höfner*²⁹ a German public employment agency engaged in the business of employment recruitment was reviewed. Persons looking for work were placed in contact with potential employers through a state-licensed agency,

²⁴ Jones, Sufrin, p. 544.

²⁵ Preamble to Directive, 94/46 amending Directive EEC 88/301 and Directive EEC 90/388 in particular with regard to satellite communications, OJ L268/15-21.

²⁶ Jones, Sufrin, p. 545.

²⁷ Craig and De Búrca, p. 1127.

²⁸ Case C-155/73 *Sacchi* [1974] ECR 409.

²⁹ Case C-41/90, *Höfner and Elser v. Macrotron GmbH* [1991] ECR I-1979.

and this agency was given exclusive powers in the relevant area. The effect of this monopoly was to suppress the activities of independent employment consultants. The question in this case was whether the monopoly of employment procurement in respect of business executives granted to a public employment agency constituted an abuse of a dominant position within the meaning of Article 86 (now Article 82), having regard to Article 90(2) (now Article 86(2)). The Court of Justice ruled that the grant of exclusive rights was not by itself incompatible with Article 86, however, a Member State is in breach of the prohibition only if the undertaking in question, merely by exercising the exclusive right granted to it, *cannot avoid abusing its dominant position*.

Exclusivity was also an issue in the *ERT*³⁰ case. The Greek broadcasting company enjoyed exclusive rights to broadcast its own programmes and programmes made abroad. It enjoyed in essence an exclusive right to determine at its own discretion certain conditions for entry into a market where it operated in competition with other companies. The Court stated in this case that the exclusive rights granted by the Greek State *were liable in this case, to create a situation in which the undertaking was led to infringe Article 86* (now Article 82) because of a discriminatory broadcasting policy.

In the *Porto di Genoa*³¹ case The Italian private company *Merci Convenzionali Porto di Genova SpA*, enjoyed an exclusive concession for the handling of loading operations in the harbour of Genoa. Due to a strike at *Merci*, the unloading of goods imported from Germany by steel trader had been delayed. The trader, who was not even allowed to take care of the unloading himself, took *Merci* to court. Here, the Court cited both mentioned judgments but referred to exclusive rights which are *liable to create a situation in which that undertaking is induced to commit such abuses*.

The ECJ delivered a further judgment in December 1991, in *RTT v GB-Inno-BM*³². *RTT* had exclusive right in Belgium for the operation of telephone services and for the approval of telecommunications terminal equipment such as telephones; it was also a supplier of telephones itself. *GB-Inno* sold telephones in Belgium which had been imported from the Far East. *RTT* asked for an injunction to prevent such sales, since this encouraged people to connect equipment which had not been approved according to Belgian law. In this case, the Court observed that the exclusive rights *conferred a clear competitive advantage upon its holder vis-à-vis its competitors*.

³⁰ Case C-260/89, *Elliniki Radiophonia Tileorassi AE (ERT) v. Dimotiki Etairia Pliroforissis (DEP) and Sotirios Kouvelas* [1991] ECR I-2925.

³¹ Case C-179/90, *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA* [1991] ECR I-5889.

³² Case C-18/88 *RTT v GB-Inno-BM* [1991] ECR I-5941.

Yet another case of importance related to the discussed above is the *Corbeau*³³ case. Corbeau set up his own postal service for the City of Liège; he collected letters from the sender's home address to be delivered into a local area by the next morning. For deliveries outside this area he collected post but sent it on via the normal postal services. He was prosecuted under Belgian law which gave the official post office exclusive right to collect, transport and deliver all mail in Belgium. The question was whether this constituted a breach of Article 90 (now Article 86). Surprisingly, the Court did not refer one single time to Article 86 (now Article 82), instead it stated that Article 90(1) (now Article 86(1)) must be read in conjunction with Article 90(2) (now Article 86(2)).

In the *La Crespelle case*³⁴ French law conferred on certain bovine insemination centres the exclusive right to provide insemination services over a particular geographical area. It was alleged that the centres charged excessively for their services. The question examined in this case was whether such a practice, constituting the alleged abuse was a direct consequence of the national law. The specific law, allowed insemination centres to require breeders who request the centres to provide them with semen from other production centres to pay the additional costs entailed by that choice. The Court of Justice stated that although the Member State leaves to the insemination centres the task of calculating those costs, such a provision *does not lead* the centres to charge disproportionate costs and thereby abuse their dominant position.

The same approach can be seen in *Corsica Ferries*³⁵, where the Court held that the grant of the exclusive right to offer compulsory piloting services in a port was not in itself an infringement of Article 86(1), but the approval of the discriminatory tariffs, which were contrary to Article 82(c), was an infringement.

The *Albany case*³⁶, concerned the Dutch law pension provision which included a system whereby, at the request of the representatives of employers and employees in a particular sector of the economy, affiliation to a sectoral pension fund was made compulsory for all undertakings in that sector. This was to provide a pension supplementary to the basic State pension. Various undertakings brought proceedings in the Dutch courts challenging the compulsory affiliation regime on the grounds that they provided equivalent supplementary pension schemes themselves. Once again the Court said that the granting of exclusive rights is not contrary to the Treaty unless merely by exercising the right the undertaking is led to commit an abuse or unless the abuse is unavoidable. However, the Court did

³³ Case C-320/91, Procureur du Roi v. Paul Corbeau [1993] ECR I -2533.

³⁴ Case C-323/93, Société Civile Agricole du Centre d'Insémination de la Crespelle v. Coopérative d'Élevage et d'Insemination Artificielle du Département de la Mayenne [1994] ECR I-5077.

³⁵ Case C-18/93, Corsica Ferries Italia Srl v. Corpo dei Piloti del Porto di Genova [1994] ECR I-1783.

³⁶ Case C-67/96, Albany International BV v. Stichting Bedrijfspensioenfondsv. Textielindustrie [1999] ECR I-5751.

not proceed to consider whether the undertaking here was put in such a position, but instead went on to see whether the justification in Article 86(2) applied.

In the following cases the Court has assumed a breach of Article 86(1) and then decided whether the exclusivity could be justified under Article 86(2).

In *Traco*³⁷ it was held that the grant of exclusive right to Poste Italiana, to carry the post violated Article 86(1). It could not avoid abusing its dominant position and was caught by Article 86(1). The next step was to seek justification under Article 86(2).

Finally, in *Ambulanz Glöckner*³⁸ the emergency transport was entrusted to two medical aid organizations which also ran a non-emergency service. Ambulanz Glöckner had previously also provided a non-emergency service. However, when it applied to the relevant public authority for a renewal of its permit, the two medical aid organizations objected, claiming that competition on the non-emergency market would affect their ability to provide the emergency service. As a result, the public authority refused Ambulanz Glöckner a permit. The ECJ concluded that the national legislature gave an advantage to those organisations, which already had an exclusive right on the urgent transport market, by also allowing them to provide such services exclusively. This has the effect of limiting markets to the prejudice of consumers within the meaning of Article 82(b) by reserving to those medical aid organisations an ancillary transport activity which could be carried on by independent operators. The Court then went on to consider whether Article 86(2) applied.

As we can see, the case law by the Court of Justice is neither clear nor consistent concerning the question whether the mere granting of exclusive rights is prohibited. In chapter 4, a deeper analysis on most of the mentioned cases will take place in order to try to see a pattern of the reasoning of the Court of Justice.

While Article 86(1) prohibits national law which induces an undertaking to breach the Treaty, by Article 86(2) there is no breach of the Treaty if the privileged undertaking can successfully refer to the exception in the latter Article.³⁹

2.3 The exception in Article 86(2)

Whereas Article 86(1) is addressed to the Member States, Article 86(2) is intended for undertakings and provides to them a degree of immunity from

³⁷ Case C-340/99, TNT Traco SpA v. Poste Italiane SpA [2001] ECR I-4109.

³⁸ Case C- 475/99, Ambulanz Glöckner v. Landkreis Sundwestpfalz [2001] ECR I-8089.

³⁹ Lane, p. 230.

the Treaty rules on competition, since the application of those rules would prevent the performance of their tasks.⁴⁰

The ECJ has stated that since this is an exception which results in the non-application of Articles 81 and 82 it must be interpreted restrictively.⁴¹ Article 86(2) is particularly important in relation to the application of Article 82, to which no other exception or derogation applies (unlike Article 81, which contains an exception in Article 81(3)). Article 86(2) is therefore the only defence to an Article 82 abuse.⁴² Article 86(2) falls into three parts. It begins by stressing that undertakings entrusted with the operation of services of *general economic interest*, or which have the character of a *revenue-producing monopoly*, are subject to the Treaty, and in particular to the competition rules. It then excludes the application of these rules where the performance of the tasks assigned to such undertakings is liable to be *obstructed*. This exception is then subject to a proviso that the *development of trade must not be affected* to such an extent that it would be contrary to the interest of the Community.⁴³

2.3.1 First step: Services of general economic interest or revenue-producing monopoly

The first step is to determine whether an undertaking is one of the kinds mentioned above. For the application of this provision, the undertaking can be public or private, but the important thing is that the State has assigned it certain tasks by a positive act conferring on it certain functions or by granting it a concession. The merely fact that the State is tolerating, approving or endorsing its activities is insufficient.⁴⁴

An undertaking which has the character of a *revenue-producing monopoly* is one on which the State has conferred a monopoly over a particular economic activity for the purpose of raising revenue for itself. Examples include monopolies for the sale of tobacco and alcohol.⁴⁵

Concerning the second kind of undertakings, the Court has held that *services of general economic interest* is a Community concept and must be applied with uniformity by the Member States.⁴⁶ In a broad sense, this term applies to activities that affect and are essential to a large degree of the population, both of individual Member States and the Community as a whole. Public services that are performed on an ongoing, regular basis in the interest of the general public fall within this category.⁴⁷ However, the Commission has stressed that Article 86(2) applies only to economic

⁴⁰ Lane, p. 230.

⁴¹ Goyder, p. 486-487.

⁴² Jones, Sufrin, p. 568.

⁴³ Craig, De Búrca, p. 1131.

⁴⁴ Jones, Sufrin, p. 569.

⁴⁵ Wainwright R, Public Undertakings under Article 90, FCLI 1989 p. 239.

⁴⁶ Case 10/71, Ministère Public of Luxembourg v. Muller [1971] ECR 723.

⁴⁷ Bael, Bellis, Competition Law of the European Community, p. 1011.

activities, and by this, excepting public services such as education, social security and matters of vital national interest.⁴⁸

The Commission has also adopted a Green Paper,⁴⁹ where it states that the term *services of general economic interest*:

‘ Refers to services of an economic nature which the Member States of the Community subject to specific public service obligations by virtue of a general interest criterion. The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications. However, the term also extends to any other economic activity subject to public service obligations. ‘

In the *Telecommunications Equipment*⁵⁰ case the Court explained that Article 86(2) reconciles the interests of Member States and Community and stated that in allowing derogations to be made from the general rules of the Treaty in certain circumstances, that provision seeks to reconcile the Member States’ interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community’s interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market.

The leading cases in what amounts to a service of general economic interest will be discussed below, as they also deal with the question of whether non-compliance with the Treaty rules is essential to the fulfilment of the entrusted tasks.

2.3.2 Second step: Obstruct the performance of the particular tasks assigned to them

The second step is to determine whether the exception in Article 86(2) applies. An exception under Article 86(2) can only be given to an undertaking insofar as the application of the Treaty rules would obstruct the performance of its task of providing services of general economic interest. In this regard, it is not sufficient that compliance with the Treaty rules would make the performance of the task more difficult.⁵¹ The Commission has stated that an exception is only possible if the undertaking concerned has no other technically and economically viable means of performing its tasks.⁵²

⁴⁸ Communication from the Commission: Services of General Interest in Europe, OJ 1996 C281/3.

⁴⁹ Commission, Green Paper on Services of General Interest.

⁵⁰ Case C-202/88, France v. Commission [1991] ECR I-2223 (the Telecommunications Equipment case).

⁵¹ Bael, Bellis, p. 1014.

⁵² NANEWA-ANSEAU, OJ 1982 L 167/39.

In *Commission v. Netherlands*⁵³, the ECJ held that for Article 90(2) (now Article 86(2)) to apply it was sufficient if the application of the Treaty rules obstructed the performance, in law or in fact, of the special obligations incumbent on the undertaking. It was not necessary for the survival of the undertaking itself to be threatened.

Until 1993, the Court took a very strict view of the ‘obstruct the performance’ test. In *Höfner*, the Court accepted that the Bundesanstalt had been entrusted with services of general economic interest but said that such an undertaking remained subject to the competition rules, unless and to the extent to which it is shown that their application is incompatible with the discharge of its duties.

In *Porto di Genoa*, the ECJ stated that even if services of general economic interest had been involved it would not have been necessary for the undertaking to infringe the Treaty rules.

In *British Telecom*⁵⁴, the Commission had made a decision stating that certain practices relating to the transmission of messages to be in breach of Article 86 (now Article 82). Italy challenged this decision and argued that the measures adopted by British Telecom should be excepted from the competition provisions because of Article 90(2) (now Article 86(2)). The ECJ found that Italy had failed to establish that the application of these rules to the British Telecom would prejudice the accomplishment of the tasks assigned to it.

While it has been difficult to successfully invoke the exception in Article 86(2), the Court changed its approach in *Corbeau*, and we can now discern that ECJ is more willing to admit the applicability of the exception in other cases. The common element in these cases is that the undertaking granted exclusivity has universal service obligations and that the tasks it is required to perform are not in themselves profitable. The monopoly’s ability to provide these universal services would be jeopardized if competition were allowed.⁵⁵

The Court stated in the *Corbeau* case that the operation of a basic postal system providing a universal service, is a service of general economic interest. The ECJ ruled that the conditions for Article 90(2) were met if the maintenance of the exclusive rights was necessary to enable the holder to perform the tasks of general economic interest assigned to it under economically acceptable conditions. The undertaking must have economically acceptable conditions and be able to perform its task in conditions of economic equilibrium. If competitors are allowed to come in and cherry-pick the most profitable parts of the system, since they do not have corresponding obligation to perform lossmaking activities, the holder of the exclusive rights, cannot operate under economically acceptable

⁵³ Case C-157/94 *Commission v. Netherlands* [1997] ECR I-5699.

⁵⁴ Case C-41/83 *Re British Telecommunications Italy v. Commission* [1985] ECR 873.

⁵⁵ Bael, Bellis, p. 1015.

conditions. However, this does not justify the exclusion of competition from additional services, not offered by the traditional postal service, if these could be offered by other undertakings without compromising the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right.

In *Albany*, the Court decided that the exclusivity was justified under Article 86(2). The compulsory pension scheme was obliged to accept all workers without a prior medical examination, and contributions did not reflect risk. If the exclusive right of the fund to manage the supplementary pension scheme was removed, then undertakings with young employees in good health engaged in non-dangerous activities would seek more advantageous terms from private insurers. The progressive departure of these good risks would leave the pension fund with an increasing share of bad risks. This would lead to an increase in premiums for these workers, since the fund would not be able to offer pensions at the previous cost.

The Court did not demand that the economic viability of the entrusted undertaking should be threatened without the exclusive right. Article 86(2) can apply where it is necessary to provide economically acceptable conditions. Once more, this meant preventing ‘cherry-picking’, which in this case would take place without the exclusive rights, since other insurers would be able to offer a better deal to companies with predominantly young healthy workforces.⁵⁶

2.3.3 Third step: No effect on trade contrary to the interests of the Community

Even though the exception is applicable, the third step that should not be forgotten is that the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.⁵⁷ The burden is on the Commission or third party complainants to prove this.⁵⁸

So far, this proviso has not been of importance. It was pleaded by the Commission in the electricity cases⁵⁹, but the Court held that the Commission had provided no explanation to demonstrate such an effect on trade. The proviso must mean something more than the phrase ‘affect trade between Member States’ in Article 82 because without such an effect on trade this Article cannot apply.⁶⁰

⁵⁶ Jones, Sufrin, p. 580.

⁵⁷ Craig and De Búrca, p. 1132-1133.

⁵⁸ Whish, p. 231.

⁵⁹ Case 157/94, *Commission v. Netherlands* [1997] ECR I-5699, Case C-159/94, *Commission v. France* [1997] ECR I-5815.

⁶⁰ Jones, Sufrin, p. 583.

2.4 Article 86(3)

The importance of this provision has increased over the last years, as the Commission has realized that if Article 86 is to be effective for the improvement of the competitiveness, then it will need to use its powers to address appropriated directives and decisions to the Member States. According to this provision the Commission has freedom to act without the requirement of the formal consent of the Council or any other Community institution.⁶¹ By this the Commission has direct legislative competence. In doing so, it is not subject to any particular procedural framework, although it must of course comply with the general principles of EC law, and must provide adequate reasons for its actions, in accordance with Article 253.

However, this is not the only way in which Article 86 can be enforced. Other ways of applying Article 86 is by Article 226, but also by Article 234 references. If the Commission did not have its powers granted by Article 86(3), it would be able to proceed against measures offending Article 86(1) only by initiating proceedings under Article 226 or by persuading the Council of Ministers to adopt the measures it desires.⁶²

In the *Telecommunications Terminal Equipment* case the Court stated that Article 90(3) empowered the Commission to specify the obligations arising under Article 90(1) by adopting directives.

The same approach was chosen in the *Koninklijke PTT Netherland NV*⁶³ case however, it concerned the power to make decisions under Article 90(3). The Court held that the power under Article 90(3) to make decisions could be used to find that a particular Member State was in breach of Article 90 and the decision could specify the measure which had to be taken, to comply with Community law.

A decision can be adopted, establishing that a Member State is in breach of a Community obligation, however, a directive goes further and may legislate for the elimination of any existing infringement of the Treaty and the prevention of future ones.⁶⁴

Below, we will examine briefly, measures taken by the Commission in two different sectors, namely the postal sector and the telecommunication sector.

⁶¹ Goyder, p. 490.

⁶² Whish, p. 238.

⁶³ Cases C-48 & 66/90, Netherlands, Koninklijke PTT Nederland NV and PTT Post BV v. Commission [1992] ECR I-565

⁶⁴ Whish, p. 238.

2.4.1 Postal Sector

In 1992, the European Community laid down guidelines for the reform of the postal sector in a Green Paper,⁶⁵ whose final aim was the complete liberalization of postal services throughout the Community. Directive 97/67/EEC⁶⁶ set 2003 as the year by which this objective was to be achieved and the recent Commission Notice laid down methods and procedures for achieving it.⁶⁷ This date has been declared invalid by the European Parliament⁶⁸ because it considered that the studies prepared by the Commission were lacking of clear results. Despite the strong pressures to liberalize the market, a few industrialized countries have abolished, on their own initiative the postal monopoly.

According to Vincenzo Visco Comandini, there are at least three reasons why the postal monopoly has come to be questioned. First, increasing customer dissatisfaction with the quality and the efficiency of the service which monopolist providers have often little incentive to improve. Second, a gradual reduction as a consequence of the increased usage of telephone, fax and e-mail services.

Third, national governments are not willing anymore to put up with postal operators that run the service inefficiently and no longer appear to be prepared to cover their losses. This pressure, increased by the threat of cutting of aid has driven operators to improve their performance and to accept the prospect of liberalization.⁶⁹

2.4.2 Telecommunication sector

By looking at the homepage of the European Commission concerning the legislation adopted for the liberalization process in the telecommunication sector, one can easily realize that the Commission has been active in this field.

The first Directive of this ‘new wave’ was the Directive EC 94/46 on Satellite Communications⁷⁰ adopted by the Commission in October 1994. One year later the Commission approved the Directive EC 95/51 on Cable

⁶⁵ European Commission Green Paper on the development of the single market for postal services, COM(91) 476.

⁶⁶ Directive 97/67/EEC on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ 1998 L15/14.

⁶⁷ Notice from the Commission on the application of the competition rules to the postal sector and the assessment of certain State measures to postal services, OJ 1998 C39/2.

⁶⁸ Resolution of the European Parliament on the European postal services, adopted the 15th January 1999.

⁶⁹ Vincenzo Visco Comandini, Postal Services in Gerardin D, The liberalization of State Monopolies in the European Union and Beyond, p. 136.

⁷⁰ Commission Directive EC 94/46 amending Directive EEC 88/301 and Directive EEC 90/388 in particular with regard to satellite communications [1994] OJ at L268/15-21.

Television Networks.⁷¹ In January 1996 it adopted the Directive EC 96/2 on Mobile and Personal Communications,⁷² followed in March of the same year by the Directive EC 96/19 on Full Competition.⁷³ The most recent Directive in this field is the EC 1999/64 aimed at guaranteeing that cable television networks and telecommunications networks owned by the same operator are legally separate entities.⁷⁴ By these Directives, full liberalization was achieved within the EC, although progressively.⁷⁵

⁷¹ Commission Directive EC 95/51 amending Commission Directive EEC 90/338 with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services [1995] OJ at L256/49-54.

⁷² Commission Directive EC 96/2 amending Directive EEC 90/228 with regard to mobile and personal communications [1996] OJ at L20/59-66.

⁷³ Commission Directive EC 96/19 amending Directive EEC 90/338 with regard to the implementation of full competition telecommunications markets [1996] OJ at L74/13-24.

⁷⁴ Commission Directive EC 99/64 amending Directive EEC 90/338 in order to ensure that cable television networks and telecommunications networks owned by the same operator are legally separate entities OJ L175/39-42.

⁷⁵ Larouche P, Telecommunications, in Geradin D, *The liberalization of State Monopolies in the European Union and Beyond*, p. 47.

3 Application of Article 86(1) in Conjunction with Article 82

Article 86(1) is not limited to reminding Member States that the prohibitions imposed on them by the Treaty, must also be respected as regards public and privileged undertakings. Additionally, it also prohibits Member States from adopting or maintaining measures contrary to Article 81 and 82 of the Treaty, provisions which are directed at undertakings and not public authorities.

In the following pages the application of Article 86(1) in combination with Article 82 will be examined, taking into account the case law in this field of law.⁷⁶

Any interpretation of Article 86(1) in combination with Article 82 is obliged to confront a difficult legal problem: to make sense of combining a rule directed at Member States with a rule directed at undertakings. As far as Article 82 is concerned, the rule in Article 86(1) cannot simply be a reminder of pre-existing prohibitions directed at Member States, but instead that, in combination with Article 82, it has additional content. This additional content consists in some form of extension of the original scope of Article 82 to cover not only the behaviour of undertakings but also State measures. Different theories were developed in order to explain the application of Article 86(1) in combination with Article 82 of the Treaty. Nowadays, it is accepted without discussion that Article 82 imposes direct obligations on public and privileged undertakings, to which Article 86(1) adds complementary State responsibility.⁷⁷

The purpose of Article 82 is to prevent businesses in a dominant position from distorting competition within the single market. The protection of competition is supporting the four freedoms from the damaging effects which may occur by the use and abuse of the undertakings within the Community.

Article 82 states as follows:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

⁷⁶ Buendia Sierra, Exclusive Rights and State Monopolies under EC Law Article 86 (formerly Article 90) of the EC Treaty, p.147.

⁷⁷ Ibid, p.148-149.

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The list of abuses in paragraphs (a) to (d) is simply an indicative list.⁷⁸ It can be seen, that before Article 82 can be applied, certain conditions must be present. These are the following ones.

3.1 Dominant position

An undertaking is dominant if it enjoys a position of economic strength which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.⁷⁹

Whether a dominant position under Article 82 exists depends on the facts, it does not necessarily have to correspond to an exclusive right, although in most cases it does. According to Buendia Sierra, it is an error to confuse a legal concept (exclusive rights) with a factual situation (dominant position). According to this idea, an undertaking which has received a legal monopoly will automatically be considered to have a dominant position under Article 82. This confusion was a result of an incorrect reading of the judgment in *Télémarketing*⁸⁰.

An undertaking occupies a dominant position for the purposes of Article 86 [now Article 82] where it enjoys a position of economic strength...The fact that the absence of competition or its restriction on the relevant market is brought about or encouraged by provisions laid down by law in no way precludes the application of Article 86 [now Article 82].

According to Buendia Sierra, the Court of Justice affirmed that the existence of a legal monopoly did not impede the application of Article 86 (now Article 82) if the required conditions in that provision were fulfilled. However, the Court did not state that the mere presence of a legal monopoly

⁷⁸ Middleton, Rodger, MacCulloch, Cases and Materials on UK & EC Competition Law, p. 297.

⁷⁹ Case 85/76 Hoffman la Roche & Co. AG v. Commission [1979] ECR 461.

⁸⁰ Case 311/84 Centre belge d'études de marché-Télémarketing (CBEM) v. SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB) (Télémarketing) [1985] ECR 3275, para. 16.

automatically implied the existence of a dominant position. It is therefore possible for an undertaking that has been granted a legal monopoly not to have a dominant position in a relevant market. Let us presume a company is granted the monopoly for air passenger transport between two cities. The two cities are 300 kilometres apart and are connected by motorway and rail. The relevant market for the application of Article 82 will probably be wider than just air transport services, since the specific company may very well not have a dominant position in the relevant market, despite having legal monopoly.

Accordingly, one should not draw the conclusion that the mere fact of a legal monopoly implies the existence of a dominant position. The Court of Justice though, has recently moved away from its previous position to one where it automatically identifies exclusive rights and dominant position. In *Höfner*, *ERT* and in *Port of Genoa*, the Court changed the doctrine it had established in *Télémarketing* and consequently the constant case law regard undertakings vested with a monopoly as having a dominant position. For the moment, the presumption is that the existence of exclusive rights implies the existence of a dominant position within the meaning of Article 82 of the Treaty. The criticism that has been raised is that the dominant position to which Article 82 refers is a factual situation (the existence of market power) which will normally coincide in cases where the authorities have granted an exclusive right. However, the only situation that this will occur is if the scope of the activity which is state protected, coincides with the relevant market or covers a substantial part of it. If the relevant market is greater than the exclusive right then we cannot speak of dominant position in the market.⁸¹

3.2 Substantial Part of the Common Market

For the applicability of Article 82 it is required that the dominant position arise 'within the common market or in a substantial part of it'. The joint application of Articles 86(1) and 82 does not create particular problems. The territory of one Member State has on several occasions been deemed to be sufficiently large to be a substantial part. An undertaking which is dominant in a Member State would be dominant within a substantial part of the Common Market.

In *Continental Can*,⁸² Germany was held to be a substantial part of the Common Market, as was the United Kingdom in *AKZO*⁸³. Further, in the *Sugar Cartel*⁸⁴ case, Holland on its own and Belgium and Luxembourg

⁸¹ Buendia Sierra, p. 153-155.

⁸² Case C-6/72, *Europemballage Corporation & Continental Can Co. Inc. v. Commission*, [1973] ECR-215.

⁸³ Case C-62/86, *Akzo Chemie BV v. Commission* [1991] ECR I-3359.

⁸⁴ Cases C-40-48 etc./73, *Cooperatieve Vereniging 'Suiker Unie' UA v. Commission (Sugar Cartel)*, [1975] ECR 1663.

taken together have also been held to be substantial parts. It is however clear from the latter case that the size of the geographical area is not the only criterion for determining a substantial part of the Common Market, the pattern and volume of the production and consumption, as well as the habits and economic opportunities of vendors and purchasers must be considered.⁸⁵ Finally, the Court held that the *Port of Genoa* constituted a substantial part of the Common Market because of the significant volume of traffic in the port and its importance for maritime import and export operations for Italy as a whole.

3.3 Effect on Trade between Member States

For this condition to be fulfilled it is sufficient that the situation of dominance or monopoly should be capable of affecting trade between Member States. A potential effect on trade between Member States is sufficient and it is not necessary to prove an actual effect.⁸⁶ This was also stated in *Höfner*, where it was made clear that the requirement of the effect on trade between Member States is fulfilled if the activities which are the object of the exclusive right can be extended to nationals or territories of other Member States.

It should be pointed out that the requirement on trade does not mean that Articles 86(1) and 82 can only be invoked by undertakings situated in a different Member State from the one in which the infringement is committed. Unlike the rules on the free movement of goods, the competition rules can be invoked by nationals of a Member State in actions against undertakings and the public authorities of that same Member State. The undertakings established in a Member State may invoke Article 86(1) in combination with Article 82 against an exclusive right granted by the authorities of that Member State. The specific requirement is an objective requirement which does not limit the legal rights of nationals of the Member State which has granted the exclusive right.⁸⁷

3.4 Abusive Behaviour

A breach of Articles 86(1) and 82 requires public undertakings or undertakings benefiting from special or exclusive rights, to engage in abusive behaviour. The most common types of behaviour within this provision, relate to price. Abusive behaviour in relation to price do usually take one of three forms: discrimination between types of clients, excessive

⁸⁵ Agnew, *Competition Law*, p. 86.

⁸⁶ Blum, Logue, p. 64.

⁸⁷ Buendia Sierra, p. 157.

pricing, or predatory pricing. Other forms of abuse that can be mentioned are for example, refusal to deal, ‘tying’, or limiting the market to the detriment of consumers.

As it was stated above, abusive behaviour is required in order for an infringement of Articles 86(1) and 82 to exist. However, it is not necessary that an infringement of Article 82 by the undertaking has taken place. The reason is that the autonomous behaviour of the undertaking, which is a requirement for the independent application of Article 82, does not arise when Article 86(1) is involved. In many cases the undertaking does not function independently but instead is obliged to behave according to the demands of the State. When such a situation takes place, an independent breach of Article 82 cannot exist, however an infringement of Articles 86(1) and 82 together would presumably exist.

When the State intervention does not have the form of an obligation, but is limited to provoke the undertaking to behave in a certain way or just favouring it, Article 82 will be independently applied to the behaviour of the undertaking, while Article 86(1) and 82 will regulate the State measure in question. Whereas the behaviour doctrine requires abuse to have actually taken place, in order for a breach of Article 86(1) and 82, the practice of the Commission and the case law of the Court of Justice have chosen a more flexible view. Recently, we can discern a different approach compared to the traditional one.⁸⁸

The change in the interpretation of the mentioned Articles combined was first advocated by the Commission in the *Telecommunications Terminal Equipment* and *Telecommunications Services Directives*. In these Directives the Commission stated that exclusive rights were illegal, not only because they infringed the rules on free movement of goods, but also because they infringed former Articles 90(1) and 86. The Commission’s reasoning was that exclusive rights produced similar effects to those which would have been produced by abuses by undertakings in dominant positions. If such abuses had occurred they would have been contrary to Articles 86 (now Art. 82), accordingly, exclusive rights were contrary to former Articles 90(1) and 86 of the Treaty. The following year, four further judgments on this issue were passed and the matter was now in the centre of the legal and political debate.⁸⁹

The questions that arise are, in what situations does the granting of an exclusive right lead the undertaking to abuse its dominant position? How has the Court of Justice chosen to deal with the exclusivity? Is there a difference in its approach? In the following chapter, the case law of the Court of Justice will be analyzed, since it is a prerequisite to be able to answer among others, the above questions.

⁸⁸ Buendia Sierra, p. 158.

⁸⁹ Ibid, p. 160-161.

4 Analysis of the case law of the Court of Justice

By this point, it is of importance to examine the case law by the Court of Justice concerning the granting of exclusive rights in depth and mention the various opinions that have been expressed for each case, in order to be able to draw some conclusions in the final part.

4.1 The *Höfner* case

As it has already been stated earlier, the *Höfner*⁹⁰ case concerned the activity of personnel recruitment in Germany, which was reserved by German legislation to the public entity, the Federal Employment Office. The exclusivity granted, prohibited private undertakings from having access to the activity of executive recruitment. The question referred to the Court of Justice was whether the monopoly enjoyed by the Bundesanstalt für Arbeit (Federal Employment Office), was compatible with Community law. The task of the Court was to examine whether the grant to a public entity of the exclusive right in the selection of executive personnel was contrary to Articles 90(1) and 86 (now Articles 86(1) and 82) of the Treaty.

The exclusive rights granted to the Bundesanstalt für Arbeit placed it in a dominant position in the specific market. The abuse consisted in not satisfying the demand that existed in the market, and therefore was within Article 86(b) (now Article 82(b)): ‘limiting production, markets or technical development to the prejudice of consumers’.

The Advocate General’s Jacobs Opinion mentions that the Bundesanstalt only dealt with 28 per cent of vacancies. The defendants, reported during the hearing that there were between seven and eight hundred private consultants for the placement of senior employees in Germany. The Advocate General also stated that consumers did not receive the quality of service that they were entitled to expect and would receive if the sector in question was open to free competition. These facts demonstrates that there was a serious need for other operators and that the Bundesanstalt was not able to satisfy the demand on the market.⁹¹ The Advocate General continues by stating that a distinction might be drawn between the present case and a deliberate refusal to provide services, the latter alone falling within the prohibition of Article 86 (now Article 82). However, the notion of abuse is not so limited and the concept of abuse is an objective concept relating to the behaviour of a dominant undertaking and Article 86 (now Article 82) will apply where, for example the effect of that behaviour is to hinder the maintenance of the degree of competition still existing in the market or the growth of that

⁹⁰ Case C-41/90, *Höfner and Elser v. Macrotron GmbH* [1991] ECR I-1979.

⁹¹ *Höfner*, AG opinion para. 44-45.

competition. As an objective notion, an abuse may exist independently of any element of fault on the part of the dominant undertaking. Article 86 is therefore, in AG Jacob's view, capable of being properly applied to a situation such as the present one. Article 86 (now Article 82) seeks to ensure, so far as possible, that the behaviour of the dominant undertaking does not result in the consumer being deprived of the benefits which could be expected to result from the normal play of market forces.⁹² Where the law of a Member State establishes such a monopoly and the body entrusted with its operation manifestly fails to satisfy the demand for the services in question, that failure constitutes an abuse of a dominant position within the meaning of Article 86 (now Article 82) thereof, in so far as it is capable of affecting trade between Member States.

The Court stated that the grant of the exclusive rights by a public authority to an undertaking did not necessarily amount to a breach of former Article 90(1), however when the exclusivity creates a situation where the undertaking *cannot avoid abusing its dominant position*, that constitutes a breach of former Article 90(1) in combination with former Article 86. In this case, Germany created such a situation, since the undertaking in question was not capable of satisfying the existing demand in the market for this type of activity and was put in a situation where it had no alternative but to abuse its dominant position and thus breach Article 82 (formerly Article 86).⁹³

In this case, the only infringement of the last mentioned article was produced not by the conduct of the monopolist, but by the action of the State in establishing a monopoly under those conditions.⁹⁴ Accordingly, the reasoning of the Court agreed with the AG Jacob's Opinion.

The conclusions that can be drawn from this case is that the undertaking benefiting from the exclusive rights does not have to be *legally obliged* to breach Article 82, it is sufficient that the undertaking is *placed in a situation* where it has no alternative, in this case because it was not in a position to supply the demand in the market, and therefore breached Article 82.⁹⁵

According to the doctrens, the judgment in *Höfner* is striking because the Federal Employment Office sought to exercise its monopoly rights in a responsible manner and although it was not compelled by the German law to allow the activites of private recruitment undertakings, it chose to tolerate them. According to Anthony Gardner, it appears that the Court of Justice considered this tolerance as an evidence that the Federal Employment Office was not capable of *satisfying the market demand*.⁹⁶

⁹² Höfner, AG opinion paragraph 47.

⁹³ Buendia Sierra, p. 163.

⁹⁴ Bacon, K, State Regulation of the Market and EC Competition Rules: Articles 85 and 86 compared, ECLR 1997, 18(5), 283-291.

⁹⁵ Buendia Sierra, p. 164.

⁹⁶ Gardner, A, The Velvet Revolution: Article 90 and the Triumph of the Free Market Europe's Regulated Sectors, ECLR 2 1995, 78-86.

4.2 The *ERT* case

The *ERT*⁹⁷ case was between the Greek television monopoly, Elliniki Radiophonia Tileorassi-Anonimi Etairia (ERT), a Greek radio and television undertaking to which the Greek State had granted exclusive rights for carrying out its activities and Dimotiki Etairia Pliroforissis (DEP), a municipal information company. Notwithstanding the exclusive rights enjoyed by ERT, DEP set up a television station which began to broadcast television programmes. The Greek authorities had granted ERT the exclusive right to broadcast both programmes produced by itself and programmes produced abroad.

Advocate General Lenz repeats that it is not unlawful to create a monopoly and to establish a dominant position, however the State cannot create a structure which if it were created by an undertaking holding a dominant position on the market, would be regarded as an abuse within the meaning of Article 86 (now Article 82). He continued by making reference to the judgment in the *Télémarketing* case in which it was held that it was an abuse within the meaning of Article 86 (now Article 82) for an undertaking in a dominant position to reserve for itself an ancillary task which could be carried out by a third undertaking.⁹⁸ According to the AG's Opinion, in the light of the case law, one may express reservations regarding the fact that the applicant has been granted a comprehensive monopoly in areas with divergent interests, namely the broadcasting of its own programmes and the retransmission of foreign broadcasts. An undertaking in a dominant position can not, in conformity with Article 86 (now Article 82), itself create such a situation because, there is a danger of discrimination against foreign products and because this must be regarded as a kind of *limitation of production* contrary to Article 86(b) (now Article 82(b)), since it must be assumed that the undertaking favours its own products.⁹⁹ Accordingly, the Advocate General suggests that if one undertaking is vested with both exclusive broadcasting rights and retransmission rights, that must be regarded as an illegal measure by virtue of the combined provisions of Articles 90 and 86 (now Articles 86 and 82) and cannot be justified by Article 90(2) (now Article 86(2)).

The Court stressed that Article 90(1) [now Article 86(1)] of the Treaty prohibits the granting of an exclusive right to retransmit television broadcasts to an undertaking which has an exclusive right to transmit broadcast, where those rights are liable to *create a situation in which that undertaking is led* to infringe Article 86 [now Article 82] of the Treaty by

⁹⁷ Case C-260/89, Elliniki Radiophonia Tileorassi AE (ERT) v. Dimotiki Etairia Pliroforissis (DEP) and Sotirios Kouvelas [1991] ECR I-2925.

⁹⁸ ERT, AG Opinion, paras. 38-39.

⁹⁹ ERT, AG Opinion, para. 40.

virtue of a discriminatory broadcasting policy which favours its own programmes.¹⁰⁰

The Court followed the Advocate General's Opinion what concerns the danger of discrimination, though without relating it to former Article 86(b) which is the limitation of production. However, it followed the approach chosen by the Advocate General and considered the action taken by the Greek State as an infringement of former Article 90(1), unless the application of former Article 86 obstructs the performance of the particular tasks entrusted to it.

In this case, although the grant of the exclusive rights did not legally oblige ERT to discriminate in favour of its own programmes, the Court assumed that the temptation would be difficult to resist. The grant of exclusivity by the Greek State, placed ERT in a *conflict of interest situation*.¹⁰¹

By the *ERT* case, the Court of Justice approached one step to the finding that the mere existence of a dominant position of a privileged undertaking may be abusive, without regard to the actual behaviour of the undertaking in question. What is remarkable in this case is that, according to the Court, discrimination need only to be *likely* rather than *proven*. It was not necessary to show that the Greek television monopoly actively discriminated against foreign programmes; it was sufficient that the exclusive rights granted to ERT, would *probably* lead it to favour its own programmes and therefore abuse its dominant position.¹⁰²

In other words, the Court found that the scope of the monopoly granted to ERT was enough extended to make it possible for ERT to discriminate in favour of its own programmes, especially because there was no safeguards to prevent it. The Court's conclusion is that the monopoly itself can be contrary to the Treaty. A shift in the Court's analysis can be established, from the *exercise* of the monopoly which can be discriminatory, to the *grant* of the monopoly which makes discrimination possible and which itself may constitute an infringement of Treaty rules. The statement by the Court in paragraph 37 indicates that the mere grant of an exclusive right or monopoly can constitute a measure contrary to Article 86(1) and Article 82.¹⁰³

4.3 The *Port of Genoa* case

The judgment in *Port of Genoa*,¹⁰⁴ was another case of significance in the new approach of the case law. The proceedings before the Italian court were between *Merci Convenzionali Porto di Genova SpA* (*Merci*), who was the holder of exclusive rights for the organization of dock works, and *Siderurgica Gabrielli SpA* (*Siderurgica*). The latter undertaking had applied to *Merci* for a ship to be unloaded in the port of Genoa. Various problems

¹⁰⁰ *ERT*, paragraph 37.

¹⁰¹ Buendia Sierra, p. 165-166.

¹⁰² Gardner, A.

¹⁰³ Blum, Logue, p. 74-75.

¹⁰⁴ Case C-179/90, *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA* [1991] ECR I-5889.

took place, including a strike in the company responsible for carrying out the dock works and as a result, delays occurred and Siderurgica suffered losses. The question to the Court of Justice concerned the compatibility of the exclusive rights enjoyed by *Merci* and *Compagnia* with Articles 90(1) and 86 (now Articles 86(1) and 82).

The Opinion of Advocate General Van Gerven was that there can be little doubt about whether the abuses were imposed or facilitated or made inevitable by the relevant national legislation. He considered that the abuses were made possible by the Italian legislation and mentioned among others the scale of charges, other contractual conditions applied by *Merci* and *Compagnia* and the dissimilar treatment of trading parties. National legislation which encourages, requires or inevitably induces an undertaking referred to in Article 90(1) to abuse a dominant position in the ways mentioned in the Opinion is incompatible with Article 90(1) (now Article 86(1)) in conjunction with Article 86 (now Article 82).¹⁰⁵

The Court began by stating that the Port of Genoa was the relevant market and that the undertaking had a dominant position by the granting of the exclusive rights which as such is not incompatible with Article 82. It continued by making reference to the *Höfner* and the *ERT* case stated that the undertakings enjoying exclusive rights by the national rules in question are as a result *induced* either to demand payment for services which have not been requested, to charge disproportionate prices, to refuse to have recourse to modern technology, or to grant price reductions to certain consumers and at the same time to offset such reductions by an increase in the charges to other consumers. In these circumstances it must be held that a Member State creates a situation contrary to Article 82 when it adopts rules of such a kind as those at issue.¹⁰⁶

What is surprising in this case is how the Court changed its position from stating that certain serious abuses of a dominant position had taken place, to reaching the conclusion that the abuses were the result of the exclusive rights.

However, the definition of the word *induce* is of importance. The reasoning of the ECJ comes close to the conclusion that, because the holder of the exclusive right possessed market power which enabled it to price in an abusive manner, therefore it was induced to do so. On this hypothesis it could be said that the grantee of exclusivity would be induced to price abusively, with the consequence that exclusive rights would be rendered illegal. It might be countered that this is to misread the Court's reasoning, and that it ignores the fact that the holder of the exclusive right had in fact priced in an abusive manner. If this was indeed so then *Merci* itself should have been condemned on this basis alone. The Court chose the word *induce* because it wished to make a point about the consequences of forms of economic organization adopted by the State. What is differential about the grant of statutory monopoly is the fact that the grantee obtains a protected

¹⁰⁵ Porto di Genoa, AG Opinion, para. 22.

¹⁰⁶ Porto di Genoa, paras. 16-20.

sphere of activity which is immune from the normal rules of competition. This makes the statutory monopolies different from other firms with a dominant position. They cannot price too high since it will act as an incentive for others to enter the market. The holder of the statutory exclusive right does not have the same rationale for self-restraint. On these grounds, such firms might be induced to charge disproportionate prices and still feel secure that such excessive pricing cannot bring new entrants into the market. It is for this reason that ECJ was concerned about monopoly power in the specific form, and according to Craig and De Búrca this is understandable from the Community's point of view, however, that does not change the fact that the Court's reasoning comes too close to regarding the grant of exclusive rights as abusive by itself.¹⁰⁷

According to Buendia Sierra, the Court in *Port of Genoa*, considered that those undertakings which have been granted exclusive rights are *necessarily induced* to carry out abusive behaviour.¹⁰⁸ On the other hand, David Edward and Mark Hoskins interpret the judgment by the Court as, that a Member State is in breach of Article 90(1) if it creates a situation in which an undertaking is *induced* to commit abuses and that there is no clear indication in the judgment that the Italian law *necessarily* led to an abuse of a dominant position under Article 86, they simply created a situation in which such an abuse was possible.¹⁰⁹

Exclusive rights confer dominant positions, and therefore the fact that they make possible abuses of a dominant position is obvious. However, in the absence of other factors (e.g. those mentioned above in *Höfner* and *ERT*) the mere existence of exclusive rights does not necessarily lead to abuses being committed by the undertakings benefiting from such rights.¹¹⁰

In the *Port of Genoa*, the Court went further than it did in *Höfner* and in *ERT*. In these two judgments the grant of exclusive rights was only illegal because it was accompanied by other circumstances (incapacity of the monopolist, conflict of interest) which led the undertaking to engage in abusive behaviour, whereas in *Port of Genoa*, no such accompanying circumstances existed. All that existed was, on the one hand, certain exclusive rights and on the other hand, abuses which were committed by undertakings benefiting from such rights, without taking into consideration the causal relationship between them.¹¹¹

¹⁰⁷ Craig and De Búrca, p. 1129-1130.

¹⁰⁸ Buendia Sierra, p. 167.

¹⁰⁹ Edward, Hoskins, Article 90: Deregulation and EC Law, Reflections Arising from the XVI FIDE CONFERENCE, CMLRev 32, 1995, 157-186.

¹¹⁰ Gyselen, L., Commentary on the Port of Genoa, and RTT cases (1992) 29 CMLRev. 1239.

¹¹¹ Buendia Sierra, p. 167.

However, it can be argued that abuses are favoured by the grant of exclusive rights. The question of importance is whether all exclusive rights favour undertakings engaging in abusive behaviour and are therefore contrary to Article 86(1) in combination with Article 82. According to Buendia Sierra, it seems from the judgment that the Court rejects this statement by stating that ‘the simple fact of creating a dominant position by granting exclusive rights within the meaning of Article 90(1) (now Article 86(1)) of the Treaty is not as such incompatible with Article 86 (now Article 82).¹¹²

The quotation from the judgment continues though, ‘...a Member State infringes Article 90, in conjunction with Article 86, when that undertaking is led by the simple exercise of its rights to abuse its dominance or when those rights are capable of creating a situation in which the undertaking is led to commit such an abuse.’ According to Anthony Gardner, the above statement by the Court of Justice, can be interpreted in two different ways. One possible interpretation is that the *existence* of rights granted by a Member State to an undertaking *may inevitably* lead that undertaking to abuse its dominance in certain circumstances. Merely by operating with the exclusive rights granted to the undertaking, it may have no choice but to act in an abusive manner. The difficulty with this interpretation is that it does not correspond with the facts of the case, since neither *Merci Convenzionali* nor the dockers’ company was inevitably led by its exclusive rights to contest implementing the modern unloading techniques. They simply chose to do so, because there was no competition in the market in their field. By reading the judgment more restrictively, the alternative interpretation is, that the existence of monopoly or special rights may be likely to lead the public or privileged undertaking to abuse its dominant position in certain circumstances. However, it is reasonable that the existence of the exclusive rights enjoyed by *Merci Convenzionali* and the dockers’ company were likely to lead them to use their dominance in an abusive manner: an undertaking whose business, and profits, are guaranteed by the absence of competition is unlikely to provide high quality and low cost service. This interpretation would amount to a silent revolution thought, where monopoly or special rights would be presumed to be illegal unless the undertakings concerned could prove that the rights granted to them have been exercised in a legal way. It seems that the Court have chosen the following approach: a public or privileged undertaking may *passively exercise* its special or exclusive rights in an abusive manner. *Merci Convenzionali* and the dockers’ company failed to install modern technology which would have reduced the cost and increased the speed of unloading operations. Therefore, they were unable to satisfy the market demand for its services. Anthony Gardner considers that, if this interpretation is correct, the judgment has far-reaching consequences. By finding that inefficient public monopolies may abuse their exclusive rights by exercising them passively, the Court set a stricter standard than the one applying to private monopolies whose exclusive rights have never been considered as abusive on the fact of efficiency.¹¹³

¹¹² Buendia Sierra, p. 167-168.

¹¹³ Gardner, A.

In both *Höfner* and *Port of Genoa*, the Court had the opportunity to choose the more limited approach of saying that the particular exploitation of the exclusive right was an infringement, rather than saying that the infringement was inherent in the right. Consequently, the Court chose to challenge the right itself.¹¹⁴

In 1991, a further judgment was delivered, three days after the judgment was given in *Port of Genoa*. In this case, the Court based its judgment for the first time on the similarity between the actual effects of the grant of an exclusive right with the effects which hypothetical abusive behaviour would have produced.¹¹⁵

4.4 The *RTT* case

The parties in the *RTT*¹¹⁶ case, were the Belgian telecommunications monopoly, RTT and GB-Inno-BM, a major undertaking in the store sector, which had imported and sold telephones without sending them for approval by RTT. RTT demanded GB-Inno-BM to cease selling non-approved telephones, and GB-Inno-BM responded that the Belgian rules were incompatible with Community law. They argued that the rules in question, gave RTT, which also sold telephone equipment, the power to decide whether its competitors' equipment should be connected to the network.

The Advocate General Darmon phrased the question in the following way: can the State appoint a trader to decide, by means of a technical type-approval procedure, whether products offered by other traders may compete with his own? The Advocate General's Opinion was that it is important to preserve the distinction between the dominant position and abuse and that the concept of abuse of a dominant position covers only conduct or positive action without embracing the mere possibility of such conduct or such action. He concluded that the answer to be given should be that the grant to an undertaking such as the RTT of a power of approval of equipment not supplied or sold by it, is *not* in itself contrary to Article 90 and 86 (now Articles 86 and 82) of the Treaty but that the *exercise* of the power of approval by that undertaking *with a purpose* other than that of checking compatibility with the network could lead to an abuse of a dominant position prohibited by Article 86 (now Article 82) of the Treaty. According to the Advocate General's Opinion, the delegation by the State of a power of approval does in itself constitute an abuse.¹¹⁷

The judgment in *RTT* has been considered as conspicuous for various reasons. First because, the question referred to the Court of Justice,

¹¹⁴ Bright, C, Article 90, Economic Policy and the Duties of Member States, ECLR, 1993, 14(6), 263-272.

¹¹⁵ Buendia Sierra, p. 168.

¹¹⁶ Case C-18/88 RTT v GB-Inno-BM [1991] ECR I-5941.

¹¹⁷ RTT, AG Opinion, paras. 43-44.

concerned largely, the rules to the free movement of goods, whereas the Court in purpose chose to analyze the problem from the perspective of Articles 90(1) and 86 (now Articles 86(1) and 82) of the Treaty. Secondly, the facts of the case have similarities with the *ERT* case, and by that reason the Court could easily have followed the doctrine set down in *ERT*, based on abusive behaviour, and not formulate a new doctrine, based on the effects of the measure. *ERT*, the Greek television operator faced, as it was stated above, a conflict of interest situation, which led it to favour to broadcast its own programmes. The same process took place in *RTT*, while the Belgian telecommunications operator was led to impede, delay or make approvals of telephone equipment more difficult, to the benefit of its own products. The exclusive rights to control the public telecommunications network and to approve telephone equipment were both under the responsibility of *RTT*. Thus, it was in a conflict of interests situation, as *ERT*.

However, the Court chose a different approach, by referring to the *Télémarketing* case:¹¹⁸

The Court has also held that an abuse within the meaning of Article 86 [now Article 82] is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking...

Therefore an undertaking holding a monopoly in the market for the establishment and operation of the network will breach Article 86 [now Art. 82] if it reserves to itself a neighbouring but separate market, without any objective need to do so, thereby eliminating all possible competition. In this particular case the separate market was the one for the import, marketing, connection, commissioning, and maintenance of equipment for connection to the said network.

The above statement, indicates that the *RTT* abused its dominant position, and therefore infringed former Article 86 by excluding competitors. *RTT* already enjoyed a monopoly in the operation of the network (which was a legal monopoly according to the judgment) and then received from the State a second exclusive right for the sale of telephones, which was considered as an *extension of the dominant position* of *RTT* from one market to another.

The Court ruled that: ‘Articles 90 and 86 preclude a Member State from granting to the undertaking which operates the public telecommunications network the power to lay down standards for telephone equipment and to check that economic operators meet those standards when it is itself competing with those operators on the market for that equipment.’¹¹⁹

The extension was not the result of abuses committed by *RTT*, but instead was due to the State that granted *RTT* the exclusive right to approve competitors’ telephones. This extension of the dominant position, was

¹¹⁸ Buendia Sierra, p. 168-169.

¹¹⁹ *RTT*, para. 28.

considered to be illegal, not because it induced abuse, but rather because it produced identical *effects* to those which would be produced by abusive behaviour contrary to Article 86 (now Article 82). By this case, the Court established the doctrine of the *extension of the dominant position*. This doctrine means that the grant, to an undertaking which is already dominant in one market, of exclusive rights in another contiguous but separate market is contrary to Articles 86(1) and 82, unless it can be objectively justified.¹²⁰

To sum up, *RTT* takes the concept of extension of a dominant position, further in three respects:

- (1) *Sole power to control the quality of a competitors' products may constitute an extension of a dominant position.*
- (2) *The restriction, as opposed to elimination of competition, may give rise to an extension of a dominant position:* it was not necessary that the entire market should be reserved to RTT and that RTT should have excluded all other competitors, for the market to be regarded as reserved to it. It was sufficient that the market should be restricted.
- (3) *The mere possibility to discriminate others may give rise to an abuse:* it was not necessary to show that this power had actually been used, the mere possibility was enough.¹²¹

4.5 The *Corbeau* case

The *Corbeau*¹²² case is considered as a revolution in the case law concerning the application of former Articles 90(1) and 86. Until this judgment, the Court had continually stated that the mere creation of a dominant position through the grant of exclusive rights was not in itself illegal.¹²³

The case was about Paul Corbeau, a Belgian citizen, who provided services by collecting and delivering mail in the city of Liège, Belgium. The services that he offered was differing from the State postal service, since Mr Corbeau provided door to door delivery, faster service etc. Despite these services were superior, the charges were lower, compared to the State postal service. The Belgian legislation imposed on the Régies des Postes a universal obligation to ensure basic postal services within the Belgian territory at a uniform tariff. In exchange, the Régie des Postes was granted an exclusive right over the postal services. The question referred to the Court of Justice concerned the compatibility of the Belgian legislation with Articles 90 and 86 (now Articles 86 and 82) of the Treaty.

¹²⁰ Buendia Sierra, p. 170-171.

¹²¹ Blum, Logue, p. 78-80.

¹²² Case C-320/91P, Procureur du Roi v. Paul Corbeau [1993] ECR I-2533.

¹²³ Buendia Sierra, p. 173.

The Advocate General Tesouro after mentioning the different services that Mr Corbeau provided, concluded that all those services are objectively additional services and are capable of representing genuine added value compared with the normal postal service. Therefore, he stated that the provisions of Article 90(1) (now Article 86(1)) of the Treaty, in conjunction with Article 86 (now Article 82), prevent a Member State from applying the statutory monopoly established for the basic postal service also to rapid delivery services such as those at issue in the main proceedings, since they present an actual added value compared with the operations of the basic postal service.¹²⁴

The Court first confirmed that the Belgian postal authority was an undertaking which enjoyed exclusive rights within the meaning of Article 90(1) now Article 86(1) and that it held a dominant position within the common market according to Article 86 (now Article 82). The Court referred to its earlier ruling in *ERT* to restate that the mere fact that a Member State create a dominant position by the grant of exclusive rights is not in itself incompatible with Article 86 (now Article 82). Nevertheless, the Treaty requires the Member States not to take nor maintain in force measures capable of eliminating the effectiveness (*effet utile*) of this provision.¹²⁵

The Court did not regard it as necessary to examine whether any abusive behaviour had taken place. Without reaching any conclusions as to what the obligations of Member States are under Article 90(1) (now Article 86(1)), the Court went on to examine the scope of the exception contained in Article 90(2) (now Article 86(2)), meaning that in principle all grants of exclusive rights are contrary to Article 90(1) (now Article 86(1)). Corbeau seems to be the final consequence of the effects doctrine. If the purpose with Article 82 is to prevent distortion, restriction or elimination of competition caused by the abusive behaviour of undertakings, a State measure which totally eliminates competition will have the same effects, as such behaviour. Since the behaviour of undertakings would have been contrary to Article 82, such State measures are contrary to Article 86(1) in conjunction with Article 82. The approval by the Court of the effects doctrine, enlarged the scope of prohibition under Article 86(1) in combination with Article 82, to a point of including all exclusive rights which could not be objectively justified.¹²⁶

Corbeau is the judgment in which the Court states in an outspoken way that the granting of exclusive rights is as such subject to the competition rules, without prejudice to Article 90(2) (now Article 86(2)).¹²⁷

¹²⁴ Corbeau, AG Opinion, paras. 22-23.

¹²⁵ Corbeau, paras. 8-11.

¹²⁶ Buendia Sierra, p. 175.

¹²⁷ Gyselen, L, Anti-competitive State Measures under the EC Treaty: Towards a substantive legality standard, *ELRev.* 1993, Supp (Competition law checklist), 55-89.

By reading the case, someone can distinguish a dividing up in two parts of the Court's judgment. On the one hand, the first part of the ruling (paras. 1-12) suggests that in order to ensure the effectiveness of Articles 90(1) and 86 (now Articles 86(1) and 82), the Court appears to condemn the very existence of national rules conferring a dominant position on an undertaking unless the exclusive rights at issue can be justified in accordance with Article 90(2) (now Article 86(2)). Nowhere is the exact nature of the abuse made clear, or whether it has occurred. On the other hand, the second part of the judgment (paras. 12 et seq.) concerning the scope of Article 90(2) (now Article 86(2)) is a liberal one; monopoly rights may be retained and competition excluded if it is necessary to ensure economic conditions for the performance of public services. An interesting observation was made by Leigh Hancher who stressed that, before jumping to the conclusion that all state measures conferring exclusive rights must be considered as illegal, we should bear in mind certain aspects of the market for postal services. As the Advocate General stated in his Opinion, this market has had recent developments by the demand for "added-value" services. At the time the State granted the exclusivity on the postal services, the demand for this sort of service did not exist. The question is whether the initial grant of monopoly rights could be interpreted as also covering these new added value services. The Court was being asked to rule upon the compatibility with the Community competition rules of a measure which had granted exclusive right on an undertaking forty years ago. The market situation had since then, changed fundamentally, thus the abuse, if any, lays in the failure on the part of the Member State to respond to such changes and redefine the granting of exclusivity. Leigh Hancher continues by stating that if this interpretation is correct, then the first part of the judgment represents a significant extension on the *effet utile* of the Treaty's competition rules to situations where the development of competition is restricted because the market has changed, and not as a result of an action by the Member State or the statutory monopoly.¹²⁸

The effect of *Corbeau* was to change the burden of proof, according to Buendia Sierra. Until *Corbeau*, the main rule was that exclusive rights were *prima facie* legal. They would only be contrary to former Articles 90(1) and 86 if it was shown that they led undertakings to engage in abusive behaviour (*Höfner*, *ERT* and *Port of Genoa*) or if they constituted an extension of a dominant position (*RTT*, *Telecommunications Services*). By the *Corbeau* case, exclusive rights are presumed to be illegal, unless they can be objectively justified or guarantee the carrying out of a project of general economic interest. According to Buendia Sierra, the effect of *Corbeau* was simply to bring the approach in relation to Articles 90(1) and 86 (now Articles 86(1) and 82) into line with the free movement of goods, which is that restrictions on trade and free competition are in principle prohibited

¹²⁸ Hancher, L, Case C-320/91 P, Procureur du Roi v. Paul Corbeau, Judgment of the Court, 19 May 1993 CMLRev, 31, 1994, 105-122.

unless they exist because of mandatory requirements of general interest and they are proportionate.¹²⁹

4.6 *La Crespelle* case

After the *Corbeau* case, the Court chose in October 1994 a more cautious approach in *La Crespelle*¹³⁰ case which concerned exclusive rights to artificially inseminate cattle. The French legislation required an administrative authorization for the operation of centres for the production of semen and centres which carried out insemination. As regards the insemination centres, the law provided that each of the centres authorized would serve a given area in which only that centre could operate. Thus, each centre enjoyed an exclusive right for the activities of artificial insemination of cattle in a specific area and the farmers within each area had to use their local centre. Generally, the artificial insemination centres supplied themselves from the authorized production centres. They were free to select the centres they preferred. Yet, farmers had the right to request a centre to use semen from a particular production centre, either national or foreign, although the additional cost would have to be met by the farmer making the request. The applicable rates were freely fixed by each insemination centre and were not approved by the public authorities. Despite these rules, since 1961 the *La Crespelle* insemination centre had carried out artificial insemination activities in the Mayenne Department. The officially authorized centre in that department, the Mayenne Co-operative, brought proceedings against the *La Crespelle* centre for breach of its exclusive right.

According to Advocate General Gulmann's Opinion, there were not any features of the exclusive rights enjoyed by the centres which implied an infringement of Article 90(1) (now Article 86) in conjunction with Article 86 (now Article 82). He continued by stating that the dominant position puts the insemination centres in a position to commit abuses in connection with price-fixing and possibly also with regard to restricting the opportunities for others. There are possibilities of abuse also in other respects, but the monopoly system itself does not induce the undertakings to commit such abuses. The centres' right to require the breeders to pay for additional expenses in connection with the delivery of semen from other than the centres' regular suppliers is not in itself of such a nature as to induce the centres to commit abuses contrary to Article 86 (now Article 82). It is clear, as the Commission described, that the right would be abused if the centres demanded payment for additional expenses which they had not really incurred. But, according to the Advocate General, that risk of abuse is not such that the right to demand payment for additional expenses is in itself contrary to Article 90(1) (now Article 86(1) in conjunction with Article 86

¹²⁹ Buendia Sierra, p. 176.

¹³⁰ Case C-323/93, *Société Civile Agricole du Centre d'Insemination de la Crespelle v. Coopérative d'Élevage et d'Insemination Artificielle du Département de la Mayenne* [1994] ECR I-5077.

(now Article 82). There is nothing in the French rules to induce the centres to act in that way.¹³¹ Accordingly, it cannot be assumed that the aspects of the system in the case, lead to an abuse of the centres' dominant position.

The Court began by indicating that the French legislation established 'a contiguous series of monopolies territorially limited but together covering the entire territory of the Member State'. This created a dominant position in a substantial part of the Common Market, within the meaning of Article 86 (now Article 82). The Court continued by repeating that the mere fact of creating a dominant position through the grant of exclusive rights was not in itself illegal. A Member State would only infringe Article 90(1) (now Article 86(1)) in conjunction with Article 86 (now Article 82) if, in merely exercising the exclusive right granted to it, the undertaking in question cannot avoid abusing its dominant position. The alleged abuse in this case consisted in the charging of exorbitant prices by the insemination centres. The question to be examined by the Court was therefore whether the alleged abuse was the direct consequence of the national law. The Court stated that while the legislation in question authorized the insemination centres to establish freely their charges, it did not incite them to demand exorbitant prices. Therefore it could not be concluded that such legislation led undertakings to abuse their dominant position.¹³²

Compared to the earlier case law, the interpretation of the expression '*led to abuse*' had now changed. Until this judgment, the Court suggested by its case law that if a monopoly facilitated the possibility of abuse, that was sufficient to constitute '*leading*' the undertaking to abuse. Since all monopolies by definition, facilitated the charging of abusive prices, the logical conclusion according to Buendia Sierra, was that all monopolies were prima facie contrary to Articles 86(1) and 82 (formerly Articles 90(1) and 86). The mentioned position was the one taken in *Corbeau*.¹³³

However, faced with a similar situation in *La Crespelle* the Court reacted in a different way and held that the presence of possible abuses derived from the exercise of the exclusive right could not automatically be imputed to the mere existence of the exclusive right. The fact that the monopolist had abused its dominant position by demanding excessive prices could justify the application of Article 82 to such behaviour, but could not on its own lead to an action against the Member State under Articles 86(1) and 82. Such action would only be justified if a causal relation between the State measure and the abuse were demonstrated.¹³⁴

By comparing the *Port of Genoa* and *La Crespelle* we can distinguish a different approach taken by the Court. In *Port of Genoa*, the Court was faced with a series of abusive practices on the one hand and a monopoly in dock work activities of the other hand. In that case, it simply concluded that

¹³¹ *La Crespelle*, AG Opinion, paras. 36, 43.

¹³² *La Crespelle*, para. 17-22.

¹³³ Buendia Sierra, p. 177-178.

¹³⁴ Faull, Nikpay, p. 298.

the abusive practices were caused by the existence of the monopoly without any explanation. However, in *La Crespelle*, the Court reacted in a different way and stated that the presence of possible abuses originating from the exercise of the exclusive right, could not automatically be imputed to the mere existence of the exclusive right. The application of former Article 86 could be justified, but could not on its own lead to an action against the Member State under Articles 90(1) and 86 (now Articles 86(1) and 82). The conclusion that can be drawn from this case is that the Court rejected the doctrine of automatic abuse established in *Corbeau*. Following *La Crespelle* it cannot be argued that all exclusive rights automatically lead an undertaking to abuse its dominant position, nor that all exclusive rights are per se contrary to Articles 86(1) and 82.¹³⁵

Blum and Logue support the above mentioned opinion and state that *La Crespelle* appears to constitute a drawing back from the position adopted by the Court in *Port of Genoa*, since it refused to establish a direct link between excessive charges and exclusive rights. The Court considered that the excessive price was *not* the direct consequence of the law on which the exclusive right was based on, therefore the insemination centre had the choice not to apply unfair prices.¹³⁶

Also the judgment in *Banchero*¹³⁷ confirmed the Court's change of approach to the application of Articles 86(1) and 82 to exclusive rights. While it is clear that the case law has changed its approach with the judgment in *La Crespelle* and *Banchero*, the question is how far backwards the Court has gone and what remains from the pre-*La Crespelle* time.

¹³⁵ Buendia Sierra, p. 178.

¹³⁶ Blum, Logue, p. 70.

¹³⁷ Case C-387/93 *Banchero* [1995] ECR I-4697.

5 Conclusions

5.1 Is the granting of exclusive rights prohibited *per se*?

Many attempts have been made to make sense of the cases, by identifying specific categories, but different commentators have devised different categories or have assigned the cases differently. According to Richard Whish this is not surprising since the cases can be explained in different and overlapping ways and the jurisprudence is still on a developing stage.¹³⁸

Despite the fact that the case law is neither clear nor consistent, some commentators have expressed their opinion which is mentioned below.

Until recently, Articles 82 and 86 have only been applied when undertakings exercised their special or exclusive rights in an abusive manner. The recent extension in the application of these articles to attack the existence of such rights is of considerable importance to the structure of the European Economy. In the several cases that have been discussed above, the emphasis appears to be shifting from proving abusive behaviour to identifying the existence of exclusive or special rights conferring on an undertaking a dominant position whose structure is likely to result in an abuse.

According to Anthony Gardner, who has commented on the case law until *Corbeau*, the Court has practically erased the distinction under Article 86 (now Article 82) jurisprudence between the concept of the existence of a dominant position on the relevant market and the exercise of that dominance in an abusive manner. The recent case law has suggested that the mere existence of a dominant position of a public or privileged undertaking on the relevant market may in certain circumstances be abusive *per se* and that the mere grant by a Member State of special or exclusive rights to such an undertaking might constitute a measure contrary to Article 90(1) (now Article 86(1)). Secondly, the Court has recently sought to define the minimum sphere of exclusive rights compatible with the financial viability of privileged undertakings, rather than seeking to define, as it did in the past, the maximum sphere of exclusive rights which these undertakings may enjoy without infringing the competition rules.

Finally, by establishing for itself powers under Article 90(3) (now Article 86(3)), to issue legislation concerning public monopolies and privileged undertakings without the need for approval by the Council of Ministers or the European Parliament, the Commission has encouraged the Member States to take actions within the Council of Ministers to liberalize the remaining regulated sectors under the traditional harmonisation powers.¹³⁹

¹³⁸ Whish, p. 226-227.

¹³⁹ Gardner, p. 79.

According to Gardner's opinion, the combined application of Articles 90 and 86 (now Articles 86 and 82) amounts to a revolution in which Europe's regulated sectors are exposed one after another, 'to the free forces of free competition' in a manner compatible with their universal service obligations. This case law is revolutionary because it has reversed the decades old presumption that public monopolies and privileged undertakings are compatible with the EC Treaty and that Member States are free to determine their preferred system of property ownership. Whereas the jurisprudence of the Court had previously suggested that public monopolies were permitted unless prohibited in specific circumstances, it now appears to suggest that they are prohibited unless permitted in specific circumstances. Moreover, the Court continues to limit the scope of Article 90(2) (now Article 86(2)) exception and even when this exception applies, the Court has instructed Member State courts to define the sphere of the monopoly rights in the narrowest way. Finally, Anthony Gardner mentions also the success of the Commission's use of its powers under Article 90(3) (now Article 86(3)) and the growing consensus in the Community that market liberalization and privatisation are the best guarantees of consumer welfare and economic growth. He concludes by stating that based on the last mentioned, it may be expected that Europe's remaining monopolies and regulated sectors will be opened to free competition. He foresees that the trend towards liberalization will become the rule rather than the exception.¹⁴⁰

I would like to comment the above article by a simple question: Was the *La Crespelle* judgment delivered by the time Anthony Gardner published his article? If the case was not delivered by that time, I believe that Gardner should add some comments to the original article and consequently include the specific judgment. If the case was delivered before the publication of the article, then Gardner, deliberately avoided to mention it in order to guide his readers to his choice of direction. My personal opinion when reading the article is that it becomes very clear which view the writer supports. The *La Crespelle* would call in question Antony Gardner's view, which he tries to present as a matter of course. I do not say that the cases that are mentioned in his article are misinterpreted, however by not mentioning a case deliberately with the intention to influence your readers is according to my opinion, not correct.

We should however, also take into consideration the *La Crespelle* case when examining the question in matter.

Buendia Sierra as well as Faull and Nikpay are convinced that the Court has decided to retreat from the presumption that the mere granting of exclusive rights is incompatible with Articles 86(1) and 82. However, that does not mean that there has been a return to the doctrine established in *Sacchi*. The question that has to be answered is, in what circumstances we can use each approach. Buendia Sierra observes that in the *La Crespelle* and *Banchero* judgments, *Corbeau* is not cited, but *Höfner* and *Port of Genoa* are. The

¹⁴⁰ Gardner A.

conclusion that can be drawn from the reference to the two last mentioned cases, is that the Court holds to the behaviour doctrine, which prohibits those State measures which lead undertakings to carry out abusive behaviour. By this, the question of how to interpret the word 'lead' appears. Despite the fact that the Court continues to cite *Port of Genoa*, Buendia Sierra is of the opinion that the Court is now less willing to consider that a given structure 'lead' an undertaking to commit abuse, than it was in 1991. Furthermore, the demand limitation doctrine in *Höfner* appears to remain in force, since it was applied in *Banchero*. Concerning the conflict of interest situation such as the one in *ERT*, the Court would continue to consider that monopolies are led to abuse and therefore infringe Articles 86(1) and 82. Regarding the doctrine of the extension of the dominant position, Buendia Sierra sees no reason why the Court should go back on the doctrine established in *RTT*. It seems from the above mentioned that the Court has gone back on the doctrine it established in *Corbeau* and no longer considers all exclusive rights which are not objectively justified must necessarily be contrary to Articles 86(1) and 82. The rest of the doctrines established remain in force, however what does appear to have changed is the general attitude of the Court. The Court will probably adopt a more reserved attitude when considering whether a measure lead an undertaking to engage in abusive behaviour together with a more extensive approach to applying the exception in Article 86(2) to justify exclusive rights. In the end, Buendia Sierra considers that the status in the case law relating to Articles 86(2) and 82 has returned to the *pre-Corbeau* stage. In addition, the changes in the Court's reasoning in the *La Crespelle* and *Banchero* case are important, but not conclusive, since the Commission has also the power to legislate in this field due to the power granted to it by Article 86(3).¹⁴¹

Paul Craig and Grainne De Búrca, conclude that these developments have led to the fact that it is now more difficult for a state to organize its economic activities by giving special or exclusive rights to particular firms. The Court seems to prefer the operation of free market in which the actors enjoy no specially privileged position.¹⁴²

According to Leigh Hancher, the case law has developed in a haphazard direction. The Community policy towards liberalization of certain sectors becomes clearer and henceforth the Court will be more inclined to condemn certain forms of privileges as contrary to the rules on competition and free movement.¹⁴³

I have to admit that it was challenging to find the above comments about the granting of exclusive rights by Member States to undertakings. Many authors do mention the case law about exclusivity, give some comments about each case separately, however, they avoid to discuss and examine what the case law means in general terms, they avoid to analyze the cases in

¹⁴¹ Buendia Sierra, p. 179-180, Faull, Nikpay, p. 299.

¹⁴² Craig, De Burca, p. 1131.

¹⁴³ Hancher, Community, State and Market, in Craig and De Burca's, The Evolution of EU Law, p. 733.

depth to be able to summarize them and draw conclusions about whether the granting of exclusive rights are prohibited per se.

In my opinion, it seems that the Court begins in every case by stressing out, that the main rule is that exclusive rights are not prohibited per se and then goes on by using different ways of expressions to make the specific case to seem as an exception from the main rule. By that, the main rule remains, however the conclusion of the judgment is the opposite and the exception seems to expand. I think that the Court uses a liberalization process between the lines by adopting a different doctrine in each case which contravenes with the main rule, that exclusive rights are not prohibited per se. By this way, it manages to deliver judgments, without having to be confronted by the different Member States who have a different opinion.

It seems to me that the Court is more inclined to liberalize certain sectors more than others, therefore I do not know if the *La Crespelle* case was a step backwards compared to the earlier cases. I would like to see how the Court would have reasoned if there was a case similar to *Corbeau* today, and by this I mean a case related to the postal sector. This leads us to the next question which is also considered as a problem in the doctrine.

The problem is how to categorize the different cases. Should we divide them by the doctrines, *inability to meet demand*, *conflict of interest*, *extension of a dominant position*, or should we divide them according to the sector they belong to, e.g. postal sector, telecommunications sector, energy sector etc?

As stated in 2.4.1-2.4.2, apart from the case law by the Court of Justice, the Commission has been active and adopted various Directives and Decisions within the different sectors. I have however, only mentioned measures that have been taken by the Commission in the postal and telecommunications sector. For the remaining sectors I can refer to the Commission's website.

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A question of relevance is whether the Commission and the Court of Justice support the same approach or not.

5.2 Analysis of the Commission's approach

I believe it is important to examine whether the Commission and the Court of Justice are complementing each other or whether each of them has chosen a certain direction.

As mentioned above, according to Buendia Sierra, the changes in the Court's attitude in the *La Crespelle* and *Banchemer* are important, but not conclusive since at the same time as the Court of Justice took a step backwards by these cases, the Commission was relying on a directive based

¹⁴⁴ <http://www.europa.eu.int/comm/competition/liberalization/overview/>

on Article 86(3) in order to try to carry out its programme of liberalization of the telecommunications sector.

In the recitals of the directives in the telecommunications sector, the Commission frequently relied on reasoning which was based on Articles 86(1) and 82. Apart from the doctrine in *Corbeau*, which was never used by the Commission, all the other doctrines adopted by the Court of Justice have been used by the Commission in the telecommunications directives. Some of them will be mentioned briefly below.

The demand limitation doctrine established in the *Höfner* case, is referred in all of the mentioned telecommunications directives, while the conflict of interests doctrine employed by the Court in *ERT* was used both in the Full Competition Directive and the Cable Television Networks Directive. Finally, also extension of the dominant position doctrine, established in the RTT case has been used by the Commission in its directives.¹⁴⁵ I think it is clear that the Commission wanted to liberalize the telecommunications sector and in order to do that it was influenced by the Court of Justice.

Concerning the postal sector, it is stated in the preamble of the Directive 97/67 that 'cross-border postal links do not always meet the expectations of users and European citizens, and performance, in terms of quality of service with regard to Community cross-border postal services, is at the moment unsatisfactory',¹⁴⁶ and this is according to my opinion, similar to the reasoning the Court had in the *Höfner* case.

5.3 Reasons for the development of the case law

Various reasons have been expressed in order to explain the Court's delivered judgments towards liberalization. A summary of them is presented below.

Anthony Gardner thinks that this development in the case law depend on the *growing public realisation* that growth and prosperity are more likely to be achieved through free competition than state intervention. Another reason is that the policy of the Commission, has influenced the Court of Justice, to eliminate the barriers placed in the way of the single market by the existence of monopolies and public and privileged undertakings.¹⁴⁷

Another view is that, it is not for ideological reasons that exclusive rights granted, are called into question on the next day. This process is due to changes in objective circumstances. The first reason is related to the *internal*

¹⁴⁵ Buendia Sierra, p. 182-184.

¹⁴⁶ Directive 97/67/EEC, para. 6.

¹⁴⁷ Gardner A.

market since monopolistic situations can be tolerated only if they are indispensable both from the point of view of the Member States and from that of the Community.¹⁴⁸ It seems that the common answer for the reason of the liberalization, is the internal market. Certain sectors, which have traditionally been subject to monopoly such as telecommunications, energy, postal services and transport, should be liberalized. There can never be a true internal market if these sectors are organized on a national and monopolistic basis.¹⁴⁹ Christian Hocepiéd considers that in the context of the internal market the continued existence of exclusive rights is an anomaly. As long as national monopolies exist, there can be no freedom to provide cross-border services, no freedom of establishment and no undistorted competition. The restrictive effects of exclusive rights have as practical consequences, additional costly constraint on business in the Community, at the expense of its competitive position when compared with companies in the US and Japan. By maintaining these restrictions they can lead to restrictions on growth opportunities and job creation.¹⁵⁰ Szyszczak supports the view that the liberalization of the public sector is an unavoidable consequence of the establishment of the internal market. She also believes that private undertakings are more efficient than public undertakings and that the free market is more responsive to consumers as well.¹⁵¹ The competitive pressure ensures that efficiency improvements and cost reductions are passed on to customers and not retained as higher profits for the producers.¹⁵²

Another factor is the *technological development*. This development is most apparent in the field of telecommunications. The new technologies are gradually breaking down the natural monopolies which underlie most of the exclusive rights granted by states. The public monopolies of radio and television can be mentioned as examples. Technological breakthroughs, like cable and satellite, have modified the situation by removing the technical justification for the monopolies, thereby opening the door to other operators and to competition.

Finally, the third reason why exclusive rights are being called into question is the *great need for funds* which characterises the sectors concerned. This need cannot be satisfied by the state in its capacity as owner of public enterprises owing to the pressure on public finances, the high level of existing taxation and international competition which encourages governments to reduce taxes rather than increase them. For that reason,

¹⁴⁸ Ehlermann C-D, *Managing Monopolies: The Role of the State in Controlling Market*, ECLR 1993, 14(2), 61-69.

¹⁴⁹ Otterwanger, Steenbergen, *Competition Law of the European Union*, the Netherlands and Belgium, p. 69.

¹⁵⁰ Hocepiéd C, *Does the EEC Treaty prohibit Exclusive Rights?* In Stuyck J.H.V. and Vossestein A.J. *State Entrepreneurship, National Monopolies and European Community Law*, p. 113.

¹⁵¹ Szyszczak E. *Public Service Provision in Competitive Markets*, 2001, 20, *Yearbook of European Law* 35, 36.

¹⁵² McGowan F, *State Monopoly Liberalization and the Consumer*, in Geradin D, *The liberalization of State Monopolies in the European Union and Beyond*, p. 207.

there is a need to resort to private capital and to operate on the financial markets with the same flexibility and the same attractiveness as private enterprises. These three reasons explain in part, according to Ehlermann, the general move towards liberalization.¹⁵³

It seems that the main reason for the liberalization process by the Court of Justice is the internal market, which is one of the main aims of the European Community. Effective competition is crucial to an open market economy. It cuts prices, raises quality and expands customer choice. These factors strengthens the competitive position of the EU towards the rest of the world.

¹⁵³ Ehlermann C-D.

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