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**The State and the Common Market:  
A study over Article 90 of the Treaty and  
legal monopolies in the field of services.**

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# 1. Summary

This thesis deals with legal monopolies in the field of services. The discussion concentrates on state actions hindering the freedom to provide services in the Common Market and to what extent Member States are allowed to keep in force protectionistic measures through public undertakings.

I have described the four freedoms and the concept of the European Single Market, and explained the concept of services through Articles 59-60 of the European Economic Community Treaty<sup>1</sup> to finally discuss Article 90 and its connection to the competition rules and to the rules on free movement of goods.

I have tried to define where the Court of Justice stands on the matter and where it is going by examining case law.

The objective of the thesis is then to explain monopolies' existence and a possible justification to that and especially how far they can go without interfering with the achievement of the objectives of the EEC Treaty.

I have reached the conclusion that the economies of the Member States are now exposed to a more effective competition, as generally protected sectors are now involved and regarded as potential obstacles to the achievement of the objectives of the Community.

The Court's practice shows that legal monopolies are inimical to the rules of competition. From the cases discussed in this work, it is evident that the Court does not to automatically justify the state intervention on the market.

The function of Article 90 is to submit public undertakings to the same rules as private ones, although there are certain limitations, to hinder Member States from using their influence and power of nationalising industries and thereby avoiding the application of the competition rules.

In my opinion the use of Article 90 has increased and the tendency is clearly not in favour of legal monopolies. The Community has realised that they have a considerable size and an economic importance on the market and therefore are to be subject to the Treaty rules of competition and the free movement, in order to achieve the goals of the Community in Article 2 of the Treaty.

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<sup>1</sup> I will call it either EEC Treaty or simply the Treaty from now on.

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## **4. Introduction**

It is evident from the Preamble of the Treaty of Rome that the participating Member States decided to create a European Economic Community to, among other things, ensure the economic and social progress of their countries and to eliminate the barriers which divide Europe. Recognising that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition and desiring to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade.

In the past the Community has concentrated on the free movement of goods and the private sector. However, in the late seventies the Community started to pay more attention to public sector activities, which notably are of considerable size and economic importance, to develop a more systematic approach to the application of the competition rules to the public sector and to use Article 90 of the Treaty. Legal monopolies are at least to be considered as potential obstacles to the achievement of the objectives of the Community.

The question is whether the state might infringe the obligations laid down in the Treaty through its actions, in order to provide its nationals with certain services and protect its national economy, or whether it is to be seen as inimical by definition to the rules on competition.

## **5. Background**

### **5. 1. The establishment of the Single Market**

The establishment of a common market is mentioned in Article 2 of the Treaty, as a mean to achieve the realisation of the objectives set out in the same Article. Later, the Treaty of Maastricht that came into force in November 1993 has created the European Union by adding a common foreign policy, a co-operation in environmental and social issues, and the idea of a monetary union between the Member States.

The idea of free trade is the classic issue of international economic policy.<sup>2</sup> The idea of a customs union, where goods and services shall be produced in the most suited areas and then transported across national borders to be sold where the request is big, is the basis of the Treaty. For its achievement the free movement of goods, services, workers and capital is indispensable and the Treaty provides for it. However, without the competition rules in the Treaty, this would not be sufficient. This is among other causes, the start of a unified continental market in Europe, after World War II.

One of the major obstacles to achieve the Treaty's objectives has, and still is, the Member States' fear of removing protection of their domestic industries against international competition.

To avoid a frontal impact with that fear and the risk of jeopardising the whole European project, the Treaty's founders saw to it, that the removal of tariffs and quotas<sup>3</sup> should be done over a transitional period of 12-15 years. In this way, each Member State was given the necessary time to adjust its domestic tariffs and legislation.

As time went by, even the sceptical Member States saw the positive economic results of a customs union.

During the sixties trade between Member States grew twice as fast as trade in the rest of the international economy and gross domestic product expanded in the Community at 5% a year<sup>4</sup>.

Although Member States did not know at what extent this was due to the customs union, they realised that it had provided a framework in which they could operate. This explains why the Community, notwithstanding a period of stagnation in the seventies and early eighties, expanded from six to twelve Member States and move further towards the Single Market.

Still, the major problem of the Community was the existence of non-tariff barriers, which impeded the internal market. The Commission stepped in and published its White Paper, *Completing the Internal Market*, where it set out a timetable for enacting about three hundred measures to remove the barriers by the end of 1992. The 1992 programme received its juridical form in the Single European Act.

The Commission divided the barriers into three categories: physical, fiscal and technical. The physical barriers were the ones people and goods met at the frontiers, i.e. immigration controls and customs. The fiscal barriers consisted of indirect taxes as value-added taxes, levied on most sales of goods and services, and excise duties on alcoholic drinks, tobacco and petrol.<sup>5</sup> The technical barriers are the most important as they are wide-ranging. They exist through all technical regulations and standards imposed on goods and services that every Member State has developed. Public purchasing, state

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<sup>2</sup> Pinder J., 60.

<sup>3</sup> Even called quantitative restrictions.

<sup>4</sup> Pinder J., 63.

<sup>5</sup> Pinder J., 69.



enterprises and government subsidies to industries are also a form of technical barriers as they favour the domestic production and impede an open market.

These barriers influenced the Community in a negative way. Such a fragmented market implied a loss of time, money, and competitiveness on an international market and as well an obstacle to new technologies and employment. Eventually it became even a political worry, as the Commission had absolutely to remove these obstacles through the co-operation of the Member States, while at the same time it did not want to fall out with them.

The Commission tried to remove the obstacles through a completely new approach to the harmonising of Member States' regulations. It suggested a much simpler method of "general reference to standards"<sup>6</sup> instead of long, detailed and bulky regulations, by assigning to the authorised standard institutions of Member States the task of drawing up the detailed harmonised documents. Furthermore the Commission also put forward deregulation rather than regulation with a view to ease the burden of legislating for the 1992 programme.

The EEC Treaty contained the principle of prohibition against measures, such as technical regulations or standards, restricting trade among the Member States, but there was neither a timetable that could contribute to put the principle in practice nor a provision requiring majority voting for the law harmonising process.

The Single European Act, inducing the Member States to complete the internal market by the end of 1992<sup>7</sup> as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty" and the Commissions' White paper setting a timetable, are two factors that contributed to the search for unanimity without jeopardising the achievement of the objective.

The SEA's introduction of majority voting<sup>8</sup> in the Council was the needed political impulse to launch the Single Market Programme successfully. The SEA as a whole contributed to develop the Community, but the Commission felt anyway the need to demonstrate the general economic benefits that could be reached in order to overcome protectionist interests and bureaucratic inertia, and ordered the Cecchini report<sup>9</sup>.

The report was a study throughout the Community to estimate the dynamic effects of establishing a Single Market. The result of the report increased the trust in the programme, so that the Council approved almost all of the

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<sup>6</sup> Pinder J., 72.

<sup>7</sup> SEA Article 13.

<sup>8</sup> With the exception of the tax harmonisation.

<sup>9</sup> The report is named after the former Commission official that directed it.

Commission's proposals<sup>1011</sup> by the end of 1991. This influenced other policies for developing the Community.

The negative integration, by removing barriers to free trade, and the positive integration through common policies existed already in the sixties. However, through political and juridical adjustments to better accomplish with the needs, over the years several progresses have been made towards a European Union. The Maastricht Treaty with the EMU, new competences and reforms to the Community institutions, and the two new pillars<sup>12</sup> has contributed to the Community's development towards a federal Union in a qualitative way and has started a new era.

## **5. 2. The importance of the Single Market<sup>13</sup>**

The Single Market is a continuous process of expansion. It has been since the start the core of the Community and the achievement of the programme is one of the Community's most important successes.

To bring about one single market out of fifteen different domestic markets and to grant full competence signifies to have created the biggest and most complete free trade area of the world, with 370 millions inhabitants and a yield of 6441 milliards ECU.

A report ordered by the Commission shows that the Single Market Programme has had positive effects as, among others, an augmentation of the production within the Union of 1%, a low inflation and an increased trade within the Community. There are as well negative effects like the long time it took to carry through the programme and therefore the fact that competitiveness of European companies has not broken through yet, especially since the programme has mostly favoured larger concerns than smaller or medium sized companies.

Still the European Union handled the economic recession of the end of the eighties and beginning of the nineties better than both the USA and Japan. The Single Market Programme has definitively helped the change of the structure within several sectors that previously had been protected by trade barriers. Other sectors, such as telecommunications and information services have been favoured by the liberalisation.

In spite of all the negative prognoses and worries the internal market has improved the situation of the poorer Member States and their industries, and

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<sup>10</sup> Pinder J., 74.

<sup>11</sup> 282 directives were totally proposed.

<sup>12</sup> These are: a common foreign and security policy and a co-operation on justice and home affairs.

<sup>13</sup> This section is based on Monti, chapter 1.

at the same time it has not put a check on the richer Member States in their high-tech evolution.

The living standard and the consumers' possibility of choice have also substantially increased. This depends mostly on the disappearance of frontier controls and the liberalisation of the transport system, which implies high losses in time and money.

The internal market programme has to a great extent integrated the market of industrial products within the Union, but, on the other hand, it has not succeeded in the same way when it comes to services. As there are a lot of different domestic rules and legislation that concern the sector of services, it is due to take longer time to achieve an integrated service market.

### **5. 3. The four freedoms**

Part Three of the Treaty<sup>14</sup> contains many of the principles that are of importance in the establishment of a customs union and a common market. It sets out the four freedoms, i.e. Free Movement of goods, persons, services and capital.

Before discussing the four freedoms it is necessary to explain what free movement means. According to Kapteyn,<sup>15</sup> it is possible to interpret it in three different ways. The first may mean that Member States may not promulgate any regulations that concern inter-state trade. The second may imply that Member States are prohibited in promulgating any freedom restricting rules at all. The third one may imply that all kind of discrimination on grounds of nationality is forbidden.

In my opinion the concept of free movement includes all three interpretations, as Community law in general is to be understood in a wider sense instead of in a narrow one. In other words, free movement means that Member States are not allowed in any way to build up or, when already existing, maintain any form of internal barriers and to discriminate on grounds of nationality.

Title I of Part Three is concerned with the free movement of goods. It is designed to ensure the removal of duties,<sup>16</sup> quotas and other quantitative restrictions.<sup>17</sup> Title III of Part Three contains the rules for the free movement of workers, services and capital.

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<sup>14</sup> Part Three of the Treaty, called Community Policies.

<sup>15</sup> Kapteyn P. J. G., 193.

<sup>16</sup> Articles 12-17 of the Treaty.

<sup>17</sup> Articles 30-37 of the Treaty.

There is a relationship between the latter provisions and the ones on the free movement of goods as they do convey the economic objectives.

The provisions on the free movement of goods are intended to establish the basic principles of a customs union.<sup>18</sup> This means that goods which originate in a Member State and those which come from outside shall freely move within the Member States, in order to satisfy the consumers' demand. Consequently the consumers' choice will be larger and the producers of the most desirable goods will be most successful on a Community-wide basis, which will press down prices and increase the Community's welfare as a whole.

The provisions concerned with the free movement of workers, establishment, services and capital reflect the same idea, and have both social and economic objectives.<sup>19</sup> Labour and capital are two of the economic factors of production. The principle is to allocate the resources in the most favourable way within the Community, i.e. by enabling the factors of production to move to the area where they are most valued.

## 6. Free movement of services

Very often the concept of trade is associated with goods. But, it is not to be forgotten that even services do play an important role in the economics, especially in the actual society. What is happening today, is that the society is moving more and more towards a high-technological one, and the traditional form of work is replaced by a newer one that is based on services. Therefore the free movement of services has become an important issue not only in the national economic contest, but as well in the international trade.

Article 59 of the Treaty provides:

“Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provision of this Chapter to nationals of a third

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<sup>18</sup> A customs union means that members do remove tariffs and quotas on trade between them, but they do even agree to apply a common level of tariff on goods entering the union from outside.

<sup>19</sup> Craig & Búrca, 549.

country who provide services and who are established within the Community.”

The primary condition for providing services is that a natural or a legal person must already have a place of establishment in the Community.<sup>20</sup> However, Community law requires that a Community national or a company that are established outside the Community, have an economic foothold within the Community, if they wish to avail themselves of the right to provide services within the Community.<sup>21</sup> The General Programme<sup>22</sup> specifically asks for a real and continuous link with the economy of a Member State, other than a link of nationality.

Article 60 provides:

“Services shall be considered to be ‘services’ within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons.

‘Services’ shall in particular include

- a) activities of an industrial character,
- b) activities of a commercial character,
- c) activities of craftsmen,
- d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is to be provided, under the same conditions as are imposed by that State on its own nationals.”

Article 60 clearly sets out a few conditions that have to be fulfilled for services to be considered as services under this part of the Treaty. Firstly, they are to be paid for. Secondly, the freedom to provide services is subject to the principle of non-discrimination on grounds of nationality. Thirdly, the Article refers only to the freedom to provide services in another Member State other than the Member State where the provider is established, and does therefore not cover the situation of the recipient of the service, who travels to another Member State to receive the service.

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<sup>20</sup> In the 1961 General Programme on freedom to provide services it is stressed that the right to provide services is available only to nationals who are established in the Community, or to companies that are formed under the laws of a Member State and that have their seat, centre of administration, or main establishment within the Community.

<sup>21</sup> Craig & Búrca, 751.

<sup>22</sup> See the General Programme for the Abolition of Restrictions on the Freedom of Establishment of 18 Dec. 1961 ([1962] OJ 36/62), OJ Spec. Edn., Second Ser., IX, already mentioned in n. 20 above.

Article 59 as well, refers only to the freedom of providing services and not to the recipient's rights. However, Article 1 of Directive 64/221<sup>23</sup> protects the position of a recipient of services who resides in or travels to another Member State for that purpose. Above that, the Court confirmed in *Luisi and Carbone*<sup>24</sup> and several later judgements, that the Articles on the freedom to provide services include also the freedom for the recipient of services to go to another Member State in order to receive a service there, without any restrictions. Furthermore the Article sets out that the provision only applies if a restriction does not fall under the provisions on the free movement of goods, persons, or capital.

Articles 61-66 deal with the realisation of the free movement of services. Article 61 excludes transport services from the chapter of services, as transport is dealt with elsewhere in the Treaty.<sup>25</sup> Article 62 is a standstill provision, which hinders Member States from introducing new restrictions on the freedom to provide services. Article 63 provides for the drawing up of a General Programme for the abolition of restrictions to provide services and for the issue of directives by the Council so as to liberalise specific services.

The provisions of the General Programme set out the kind of restrictions that are to be abolished, i.e. the ones imposing restrictions and conditions on the actual provisions of services, and the ones limiting the powers normally enjoyed by a self-employed person engaged in such activity.<sup>26</sup> The emphasis in the programme on the provision of services is on the abolition of discrimination.

Article 66 refers to Articles 55-58 of the Treaty. Article 55 is the provision of Official Authority Exception: it justifies restrictions when these are concerned with the exercise of official authority. Article 56 allows Member States to discriminate foreign citizens on grounds of public security, safety or health. Article 57 is concerned with the mutual recognition of qualifications. Eventually Article 58 places companies on an equal level with natural persons.

When it comes to services Articles 59 and 60 are the most important, as they are the starting-point.

Article 59 has, like Article 52<sup>27</sup> in the chapter of establishment, direct effect. The Court established this in the *Van Binsbergen* case<sup>28</sup>, although some Member States had intervened to argue that the area of provisions of services was subject to even greater problems of control and discipline than that of establishment.

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<sup>23</sup> Dir 64/221/EEC on movement and residence of foreign nationals (OJ 164 56/850).

<sup>24</sup> *Luisi and Carbone v. Ministero del Tesoro*, Case 286/82 and 26/83 [1984] ECR 377.

<sup>25</sup> See Articles 74-84 of the Treaty.

<sup>26</sup> See note 22 above.

<sup>27</sup> *Reyners v. Belgium*, Case 2/74 [1974] ECR 631.

<sup>28</sup> *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, Case 33/74 [1974] ECR 1299.

Article 59 requires an inter-state element, by referring to a provider who is established ‘in a State of the Community other than that of the person for whom the services are intended’. The Court has held in several cases<sup>29</sup> that, like in the context of workers and establishment, the provisions of the Treaty on freedom to provide services will not be relevant where the situation is confined within a single Member State.

The objective of Article 59 is substantially to abolish restrictions on the freedom to provide services. And Articles 66 gives the Member States three different grounds, i.e. public policy, security, or health,<sup>30</sup> to try to justify existing restrictions. However, the Court has alongside these exceptions, developed a justificatory test, which is similar to the ‘rule of reason’ in the free movement of goods, that was set out in the *Cassis de Dijon* case.<sup>31</sup> Once a non-discriminatory restriction on the free movement of services has been found, it will be in conflict with Article 59 unless it is not proved to be objectively justified in pursuance of a public interest.<sup>32</sup>

Several conditions were set out in the *Van Binsbergen* case<sup>33</sup> that must be satisfied to make a restriction on the freedom to provide services compatible with Article 59. In the first place, the restriction must pursue a justified aim that it is not incompatible with Community aims. In the second place, it must be equally applicable to nationals, and persons providing the services, which are established outside the state and which could evade the restriction. In the third place, the Court also made clear that the restriction imposed on the provider of services has to be ‘objectively justified’. This implies a proportionality test to see whether there is an actual need for the rule in question, whether it is appropriate in achieving its aim and whether the interest pursued by the rule cannot be satisfied by other less restrictive rules.

In *Webb*<sup>34</sup> the Court discussed further the requirement of ‘objective justification’ of restrictive rules. Where the provider of services is subject to regulations or restrictions in the Member State where he is established, there will be no objective justification to impose similar restrictions in another Member State, as the requirement would then duplicate a condition which has already been satisfied. The case set clearly out the three conditions of the justificatory test mentioned in *Van Binsbergen*. The restriction must pursue a justified aim, it must be equally applicable to nationals, non-nationals, and those established within and outside the Member State alike, and it must not be more restrictive or burdensome than it is necessary. A restriction might

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<sup>29</sup> *Procureur du Roi*, Case 52/79 [1980] ECR 833, 872, *Société Générale de Banque SA v. Koestler* [1978] ECR 1971.

<sup>30</sup> The same grounds set out in Article 56.

<sup>31</sup> *Rewe-Zentral AG v. Bundemonopolverwaltung für Branntwein*, Case 120/78 [1979] ECR 649.

<sup>32</sup> *Craig & De Búrca*, 765.

<sup>33</sup> *Ibid*, note 27 above.

<sup>34</sup> *Criminal proceeding against Webb*, Case 279/80 [1981] ECR 3305.

then be objectively justified, with regard to the character of the service otherwise it will be contrary to Article 59 and therefore forbidden.

To sum up, there are two types of justification of restrictions on the freedom to provide services: justifications based on Article 56 and justifications based on the general public interest or the 'public good'.

Article 56 justifications including the application of discriminatory measures may be permitted on grounds of public health, public security or public policy.<sup>35</sup> The Court has narrowly interpreted these justifications.

The Court has, on the other hand, permitted a restriction on the freedom to provide services in several cases,<sup>36</sup> on the base of the public interest justification. Through its practice, it has settled four conditions the restriction must satisfy for the justification to apply: it must be based on the need to protect the public interest or the 'public good', it must be non-discriminatory, it must not duplicate a requirement already imposed in the Member State of establishment and it must be proportionate to the aim to be achieved.

## 6. 1. Article 59 and monopolies

State monopolies in the field of services are liable to be affected by Article 59 if they fall within the definition of services in Article 60. The Court has examined telecommunication services,<sup>37</sup> television broadcasting,<sup>38</sup> postal services,<sup>39</sup> etc.

There are several cases on services, involving public undertakings, where the Court has decided pursuant to Article 86 rather than 59. *Höfner* was not based on Article 59, as it lacked a cross-frontier element. *Corbeau* was decided mainly pursuant to Article 90 and subsidiarily to Article 86. Article 59 was not mentioned, probably because the competition rules were sufficient to deal with the case and the case related to one Member State as in *Höfner*. However, such services as the placement of employees, port services and postal services are all liable to be examined under Articles 59 and 90 when they are provided by a state-related undertaking.<sup>40</sup>

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<sup>35</sup> Blum F., 133.

<sup>36</sup> *Commission v. Germany*, Case 205/84 [1986] ECR 3755; *Commission v. France*, Case 220/83 [1986] ECR 3663; *Commission v. Denmark*, Case 252/83 [1986] ECR 3713; *Commission v. Ireland*, Case 206/84 [1986] ECR 3817.

<sup>37</sup> *The Telecom Services* case, joined cases C-271/90, C-281/90 and C-289/90, [1992] ECR I-5833.

<sup>38</sup> *ERT* [1991] ECR I-2925.

<sup>39</sup> *The Netherlands v. Commission*, joined cases C-48/90 and C-66/90 [1992] ECR I-565.

<sup>40</sup> Blum F., 137.



Even other services carried out by state-related undertakings could be examined under Articles 59 and 90, for example certain services relating to the provision of energy and gas. However, this may be possible if the essential part of the activity concerned constitutes a service rather than the sale of a product. This comes from the fact that electricity and gas have been held to constitute goods and that the import, export and distribution of gas and electricity have been held to relate to the supply of goods falling within Article 30.

## **6. 2. Restrictions caught by Article 59**

Article 59 prohibits restrictions on the provision of services on grounds of nationality. In regard to state-related monopolies a distinction between two different forms of discrimination can be made.<sup>41</sup> First, discrimination on grounds of nationality resulting from the behaviour of the monopoly towards third parties and second, discrimination arising from the existence of the monopoly itself.

### **6. 2. 1. Discrimination resulting from the behaviour of the monopoly**

State monopolies' actions in favour of national service providers may infringe Articles 59 and 90 if they are not covered by one of the permitted justifications.

In *Van Ameyde*<sup>42</sup> the Court held that the law was not discriminatory if the exclusion of other undertakings was not based on grounds of nationality. The Italian law required foreign insurers to use only the Italian bureau or insurers established locally to appoint a loss adjuster to evaluate claims involving foreign cars, in stead of appoint one of their choice. The Court found that the Italian law was not discriminating, even though it imposed an obligation to use the services of insurers established in Italy, as the obligation was imposed to protect the victims of car accidents. It is possible that today, after the *Mediawet* and the *Telecom Services* judgements, the Court should have found the obligation to use the services of a local undertaking to be a discrimination against companies situated abroad; and therefore incompatible with the Treaty rules, if it was not covered by one of the permitted justifications.

In *Corsica Ferries*,<sup>43</sup> the Court found that the measure taken by the Italian public authorities following a decision by a state-related undertaking, dis-

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<sup>41</sup> Blum F., 138.

<sup>42</sup> *Van Ameyde*, C-90/76 [1977] ECR 1091.

<sup>43</sup> *Corsica Ferries*, Case C-18/93 [1994] ECR I-1783.

criminated on grounds of nationality and was not justified by Article 56 or on public interest grounds.

In *ERT*, the Court held that the monopoly could lead to a discriminatory behaviour, by giving preference to national programmes over foreign ones, contrary to Article 59. This was a case of possible discrimination, arising from the combination of ERT's right of broadcasting its own programmes and of receiving and retransmitting programmes from other Member States. The Court reached the conclusion that whether discrimination actually took place or not was a matter that only the national court could determine. It seems from the ruling of the Court, as it is the combination of functions that gives the monopoly the possibility of discrimination, contrary to Article 59, and not the monopoly per se. The case is not entirely clear about Article 59.

The question is, whether a finding by a national court that discrimination actually took place, should result in the abolition of the monopoly or part of the monopoly, or whether it should only result in an obligation on the Member State to eliminate the discriminatory behaviour by setting up appropriate safeguards, but without requiring the abolition of the monopoly or part of it. It is quite probable that if discrimination was proven, the law giving ERT a double monopoly would be contrary to Article 59 and therefore would have to be changed in so far as it ended at least one of the two exclusive rights, which ERT is entrusted with.

### **6. 2. 2. Discrimination arising from the existence of the monopoly itself**

In the cases discussed above the Court examined discriminatory behaviour to the detriment of non-nationals.

In *Mediawet* and *Telecom Services*, the Court examined the validity of the obligation on consumers to use only the services of the national monopoly undertaking, i.e. not just the difficulty but the impossibility for foreign operators to provide their services in the country of the monopoly.

*Mediawet*, a Dutch law, reserved to a broadcasting undertaking all or most orders for the preparation of programmes for Dutch national broadcasting bodies and restricted the retransmission in the Netherlands of programmes from other Member States containing advertising specifically for the Dutch public. The law contained two types of restrictions:

- an obligation on radio and TV broadcasting companies in the Netherlands to make all or part of their programmes through NOPB, a specific Dutch Company and
- an obligation to observe certain rules relating to advertising.

The first obligation was held to fall within the prohibition in Article 59 and not to be covered by the permitted justifications.

The second obligation relating to advertising required both foreign broadcasters to entrust advertising to a legal person independent of the suppliers of the programme; to use all the advertising revenue for the production of the programme; and not to permit third parties to make a profit. Regarding national broadcasters, they were not allowed to make profits from commercial advertising as this was reserved to the STER, i.e. the television advertising foundation. Moreover, it imposed conditions on the form of the advertising on both national and foreign broadcasting.

The Court considered that all these rules had the effect of limiting competition in the Netherlands from foreign service providers, and of safeguarding the unique status and privileges given to NOPB and the STER. Thus, the Court found the obligations imposed by the Dutch law to fall within Article 59 and not covered by one of the possible justifications.

*Mediawet* made it clear for the first time that the creation of a monopoly and the legal obligation imposed on customers to use solely or mostly the services of the monopoly constituted a form of discrimination to the detriment of foreign service providers, contrary to Article 59. Previously, the opinion was that an obligation on all potential service providers, both national and foreign, to use the services of a national undertaking was no discrimination on grounds of nationality. In this case, the Court made it clear that it is sufficient that the preferential system set up should benefit a national provider of services. This means that a Member State cannot protect a national undertaking from other Member States unless there are overwhelming reasons compatible with Community interests and as well that it cannot impose its rules on other Member States if this is to protect the revenue of its undertakings.

In *Telecom Services*, the Commission and the Court went a step further. The Commission required in its Directive on Telecom Services,<sup>44</sup> Member States to accept competition from other Member States through the application of the rules on freedom to provide services, and to abolish the monopoly of their national telecommunications undertakings over defined value-added services. The Commission's justification was that there was no reason why the Member States should maintain a monopoly contrary to both Articles 59 and 86, by restricting competition from other member States and from national undertakings as well.

The Court upheld the Commission's approach, and in particular its consideration that monopolies over value-added services limited the variety of services offered to consumers, as they hindered foreign service providers to provide their services throughout the Community, which is contrary to Article 59. Thus, to secure full competition and enable customers in a Member State to have access to services provided outside the territory, it was neces-

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<sup>44</sup> *Commission Directive of 28 June 1990 on competition in the markets for telecommunication services, OJ 1990 L 192/10.*

sary to abolish the exclusive right of a national undertaking and enable foreign service providers to provide their services either from abroad or from inside the territory of the monopoly.

## **7. The State and the Market**

The General Programme was the first step towards the accomplishment of the free movement in the European Community and especially in the attempt at eliminating barriers in the free movement of services.

Services are a relatively newer economic factor than goods, and at the same time they are more complicated, because of the different relationship between providers and consumers. Besides, there has been a true need of liberalising services, as they are the portion of the European economy that is growing the most.

Services play an important role in the Member States' national economies, which is why the Member States have woven a net of rules and directions round services. This has obviously created several barriers to free trade over the borders and implies discrimination on grounds of nationality.

Thus, a discussion about how rules of national law infringe the Treaty provisions relating to services cannot only be concerned with the behaviour of private undertakings but must take consideration of the way in which the actions of the state itself might infringe the obligations laid down in the Treaty.

In fact a real and concrete break to competition and to the free movement is the state itself. A state has a particular interest in protecting its own domestic production and therefore reluctance to make its own internal home market accessible. But, a state has an advantage over private undertakings in distorting competition and hindering the free movement, as it has the means and the power to create protectionistic rules on grounds of law.

It is not unusual that the state plays some direct or indirect role in the market place in mixed economic systems of the type that exist in Europe. The reasons why the state thinks that certain activities should be within public ownership or undertaken by firms which are given a privileged position are several. In the past, utilities have been either nationalised or put under some privileged monopoly or quasi-monopoly status. Through the years the situation of and the opinion about state participation in the industry and in the market have changed by diminishing the role of the state. However, there are still ranges of undertakings that either remain within public ownership

or possess a certain privileged status in the market place. Besides, the issue becomes complex because the intention and the legal status of the privileged monopoly then might be quite in contrast with those needed today.

Article 222 of the Treaty declares that ‘this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership’. This means that the mere fact that certain activities are undertaken in the public or the private sphere is not in itself contrary to the Treaty. Article 222 takes in fact up, a position of neutrality as to the nationalisation or privatisation of undertakings, leaving the Member States the political choice.<sup>45</sup> However, the state remains subject to the rules forbidding discrimination on grounds of nationality. A state favouring its own nationals, either in the public or in the private sector, will be found to be breaking Community law. Article 222 is like any other Articles of the Treaty subject to judicial interpretation and is therefore irrelevant<sup>46</sup> in the question of legal monopolies.

In the modern economy the state is supposed to be involved in the regulation of the market in different ways, as in wealth creation and wealth distribution. The state needs the possibility and the legal power to operate in certain sectors. It may seek for price stability or protection of poorer members of society. It may stimulate private firms through financial inducement. State subsidies are thus a necessary and used instrument.

State ownership and participation in the market are according to the Treaty lawful, but barriers to interstate trade must be controlled. Community law seeks therefore to exercise control over state economic power where it leads to distortion of the structure of the market.

For this purpose the Treaty contains several provisions concerning competition policy and state actions including Articles 5, 30, 85, 86, 90, and 92 to 94.<sup>47</sup>

Control of the state under Community law has always been a sensitive issue, because of historical and political reasons. The state has a duty to take care of its citizens and therefore it has to involve itself in certain crucial sectors of the economy, such as transport, energy supply and communications.

Community goals have not always coincided with those of the Member States, and the Community has tried not to offend any Member State in the achievement of the Treaty’s objectives. However, this caution of the past has recently been abandoned. The state ownership is not considered unlawful, for that would conflict with the agnosticism in Article 222. It is, instead, based on the fact that state ownership is capable of leading to distortion of free and fair competition.<sup>48</sup> This can be seen in the introduction of Article

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<sup>45</sup> Craig & De Búrca, 1067, Weatherhill & Beaumont, 859 and Fordham Corporate Law Institute, Marengo, 199.

<sup>46</sup> Marengo, 199.

<sup>47</sup> Craig & De Búrca, 1065.

<sup>48</sup> Weatherhill & Beaumont, 860.

130, which provides that the Community and the Member States shall ensure that the conditions necessary for the competitiveness of the Community's industry exist. The Article clearly pleads for structural changes in the industry, for open and competitive markets and an encouragement of a favourable environment for undertakings, especially small and medium-sized. In other words although Article 222 does not answer exhaustively about where the Community stands in the issue of state monopolies, the thrust of much else within the Treaty is against the kind of dominance that often accompanies public ownership. The Treaty is also against the according of any special, beneficial position to firms that may imply a distortion of the common market as a whole.<sup>49</sup>

## 7. 1. Public undertakings and Article 90

Article 90 has been from the beginning a rather difficult article. For more than 20 years the provision was not the object of any significant measure of application, but more of an academic matter of discussion. Article 90 did therefore not play any important role in the process of Community integration.<sup>50</sup> This has probably to do with the fact that the enforcing of Articles 85 and 86 occupied the Commission totally, both through the enactment of numerous regulations and the development of significant administrative practice. The Commission has on the few occasions that it referred to Article 90, either excluded its applicability or provided only general indications as to how it should be interpreted.<sup>51</sup>

Article 90 constitutes a unique Treaty provision, differing in several aspects from the other provisions of the chapter on rules of competition.

Article 90 declares:

“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 measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly

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<sup>49</sup> Craig & De Búrca, 1067.

<sup>50</sup> [1991] 1 ECLR 29, Pappalardo A., “State measures and Public Undertakings: Article 90 of the EEC Treaty revisited”.

<sup>51</sup> See the recommendations of 6 and 11 April 1962 concerning the adjustment of the French monopolies in tobacco and matches, OJ 1962, 1500 onward, as well the 1969 recommendations concerning several Italian and French monopolies, OJ (special edition) September 1974, 3 onward. And also the answers of the Commission to Question 48 (1963), by Mr Burgbacher, on the ‘application of the competition rules to State enterprises’, (OJ 1963, 2235 onward); and Question 149/68, by Mr Deringer, on ‘Article 90 of the EEC Treaty’ (OJ 1968, C 109/5).

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 task 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 provision of this Article and shall, where necessary, address appropriate directives or decisions to Member States.”

First of all, it should be noted that Article 90(1) imposes an obligation on Member States, rather than on undertakings. Secondly it covers two types of undertaking: public undertakings and undertakings to which Member States have granted special or exclusive rights. Thirdly, although the Article especially mentions certain provisions of the Treaty, the prohibition extends to measures that are contrary of any provisions anywhere in the Treaty. The Article can therefore be seen as a detailed application of the second sentence of Article 5, which in general terms obliges Member States to abstain from any measures that can jeopardise the attainment of the objectives of the Treaty.

### **7. 1. 1. Article 90(1)**

Article 90 covers two types of undertaking: public undertakings and undertakings enjoying special or exclusive rights.

The concept of undertaking is broad, and refers to all entities performing economic activities regardless of their legal form, as is the case under Articles 85 and 86.

Within the Member States’ legal systems there are different definitions of both private and public undertakings and as to the Community, it has not yet provided a definition of public undertaking under Community law. However, in the *Transparency Directive Case*<sup>52</sup> the Commission defined ‘public undertaking’ as any undertaking over which the public authorities may directly or indirectly exercise a dominant influence.<sup>53</sup> Admittedly the definition was not set out to define ‘public undertakings’ for the purpose of Article 90, but nevertheless it provides a useful indication of the Commission’s view. The fact that the ECJ approved of the definition, that its reasoning explicitly looks to the purpose of Article 90 and that the Commission’s broad definition is in line with the Court’s own emphasis upon economic reality rather than legal form, all point strongly to the conclusion that it is

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<sup>52</sup> Cases 188-190/80, *France, Italy, and the United Kingdom v. Commission* [1982] ECR 2545.

<sup>53</sup> Article 2 of Commission Directive 80/273 on the transparency of financial relations between member states and public undertakings, OJ 1980 L195/35.

the existence of a state influence over an undertaking that is of importance in determining, whether it is to be considered ‘public’ or not.<sup>54</sup>

Undertakings enjoying special or exclusive rights are caught under Article 90 probably because of the influence that the state may have on their behaviour. Special or exclusive rights can be given to either a private or a public undertaking. But an undertaking enjoying special or exclusive rights ends up having a stronger market position than it would have otherwise, as the state has deliberately intervened to relieve the undertaking wholly or partially from the discipline of competition.

The Treaty does not have a definition of ‘special or exclusive rights’. However the Commission defines them in the telecommunications directive<sup>55</sup> 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’.

When a Member State grants to a single undertaking the right to provide a service or operate a network, the undertaking enjoys an exclusive right in the sense of Article 90. But, when it comes to a special right the definition is not as clear as it is for exclusive right. One possibility is to consider special rights those rights that are granted to more than one undertaking, but to a limited number of undertakings anyway, and chosen in a discriminatory and subjective manner by the state concerned.<sup>56</sup>

In *NV GB Inno-BM v ATAB*,<sup>57</sup> the Court found that a Member State had given certain undertakings the possibility of fixing compulsory selling prices among themselves to customers, and that this was open to all those which fulfilled certain criteria. The Court found it therefore questionable whether this amounted to a special right.

A special right, in the meaning of Article 90, must be granted by the state to a limited number of undertakings and not to an indefinite group of undertakings.<sup>58</sup>

Article 90(1) says that Member States shall neither enact nor maintain in force any measure contrary to the Treaty rules. It constitutes a standstill obligation, by imposing on Member States a duty not to enact or maintain in force any measure contrary to the Treaty and by requiring a positive obligation to remove any such measure that currently exists. This clearly indicates

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<sup>54</sup> Note 41, p. 25-26.

<sup>55</sup> Commission Directive 90/388 on competition in the markets for telecommunications services, OJ 1990 L192/10, art 1.

<sup>56</sup> See opinion of Advocate General Jacobs in *Spain & Ors v EC Commission*, Cases C-271/90 and C-281/90 and C-289/90.

<sup>57</sup> *NV GB-Inno-BM v ATAB* [1977] ECR 2115.

<sup>58</sup> Van Bael I. & Bellis JF., 1318.



that the state may be held responsible even if it fails to correct an infringement of the Treaty.<sup>59</sup>

It is also to be noticed that a breach of Article 90 (1) presupposes that some other Article of the Treaty also has been broken. Even if the Article refers to particular provisions, it does not mean that it does not cover the other Treaty provisions.

Article 90(1) plays an important role in the control of anticompetitive conduct. Once an entity falls under the definition of ‘undertaking’ then the Article is applicable to the Member State. The Article covers besides public undertakings, also, through its wording, undertakings to which ‘special or exclusive rights’ have been granted. The Article recognises, in principle, that it is compatible with the Treaty to confer such rights on undertakings. However, the exercise of such rights is subject to the rules of the Treaty.

In *Sacchi*,<sup>60</sup> the Court held that Article 90(1) ensured that the grant to RAI under Italian law of exclusive rights in respect of television broadcast was not of itself incompatible with Community law. However, an abuse of its position or a discriminative conduct on grounds of nationality would be unlawful by virtue of the application of Articles 86 and 6.<sup>61</sup>

In *Bodson v. Pompes Funèbres*<sup>62</sup> the French practice permitted local authorities to exercise exclusive powers to conduct funeral services. The authorities then granted concessions to private undertakings and Pompes Funèbres held many of these concessions. Bodson offered external service at a price significantly lower than the one set by Pompes Funèbres. The Court held that where market dominance is established, artificially high prices might be incompatible with Community law. Where a public authority fixes the price, it violates Article 90(1) read with Article 86. Where a private firm fixes the prices, then Article 86 is applicable. A breach of Community law might be found where the state has created the conditions of exclusivity that enables a firm to act abusively.

In *Höfner v Macrotron*,<sup>63</sup> the Court held that the state-licensed agency, with exclusive powers in the field of bringing prospective employees in contact with employers and administering unemployment benefits, was an undertaking for the purposes of the competition rules. Any state measure that creates a situation where it cannot avoid infringing Article 86 is unlawful by virtue of Article 90(1). The Court found that the restrictive German rules created a situation where a public agency infringed Treaty provisions as it was unable to meet demand and it prevented private alternatives to pursue the activity at all.

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<sup>59</sup> Craig & De Búrca, 1069.

<sup>60</sup> *Sacchi*, Case 155/73, [1974] ECR 409.

<sup>61</sup> Formerly Article 7 of the Treaty.

<sup>62</sup> *Bodson v. Pompes Funèbres Des Régions Libérées SA*, Case 30/87, [1988] ECR 2479.

<sup>63</sup> *Höfner and Elser v. Macrotron GmbH*, Case C-41/90, [1991] ECR I-1979.

These cases confirm that in the application of the competition rules, state participation is treated in the same way as private activity. Therefore, Article 90(1) does not prevent the existence of a dominant position through state acts, but rather a control of the consequences of such a position of economic strength.

### 7. 1. 2. Article 90(2)

Article 90(2) concerns two types of undertakings: undertakings entrusted with the operation of services of general economic interest and undertakings having the character of a revenue-producing monopoly.

Above that, it reaffirms that the Treaty rules apply to these undertakings, however it contains an exception to those rules, where they obstruct the undertakings' task. Eventually the Article puts the exception under the interests of the Community, i.e. the development of trade.

Two requirements have to be fulfilled in order to apply the exception. First, the performance of the task must be obstructed by the application of the competition rules and second, trade must not be affected to a degree contrary to the interests of the Community.

The first thing to do is to determine whether an undertaking is of the kind mentioned in the Article. It is therefore not a surprise that the ECJ has given emphasis to the importance of defining entrusted undertakings, as the Article implies derogation from the rules of the Treaty.<sup>64</sup> Whether the undertaking is public or private is not relevant, instead it is of relevance that the service entrusted to the undertaking has been assigned by an act of a public authority.<sup>65</sup>

Secondly, in the application of Article 90(2), it is to determine whether the exception applies. The exception is frequently used as a defence in proceedings involving Member States and different monopolies. Undertakings seek to bring themselves within the Article 90(2) exception, in order to argue that the Treaty rules must be modified in the aim of not obstructing the tasks assigned to them. However, the ECJ has not easily accepted such arguments.<sup>66</sup> The ECJ has made it clear that the exception only come into play if the relevant prohibitions are incompatible with the performance of their assigned tasks.<sup>67</sup>

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<sup>64</sup> *BRT v. SABAM*, Case 127/73, [1974] ECR 483.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung Unlauteren Wettbewerbs e V*, Case 66/86, [1989] ECR 803; *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA*, Case C-179/90 [1191] ECR I-5889; *British Telecommunications: Italy v. Commission*, Case 41/83 [1985] ECR 873.

<sup>67</sup> *Sacchi*.

### **7. 1. 2. 1. Entrusted undertakings**

Entrusted undertakings under Article 90(2) are undertakings that have been entrusted by an act of public authority with a task of general economic interest. The state must have intervened with legal measures in order to secure the provision of the service by the undertaking in question. This means that an undertaking created by a private initiative, although performing a service of general economic interest, may not be considered to be an ‘entrusted’ undertaking.<sup>68</sup>

### **7. 1. 2. 2. Services of general economic interest**

The services are to be performed on a regular basis and to be considered of general economic interest when they involve an economic activity and are operated in the interest of the general public. The concept of general economic interest is very wide.<sup>69</sup> The ECJ has found undertakings such as monopoly over the broadcasting of television advertising,<sup>70</sup> the operation of not commercially viable routes,<sup>71</sup> and postal services,<sup>72</sup> to operate services of a general economic interest within the meaning of Article 90(2). On the other hand, the Court did not find undertakings carrying out dock work to be entrusted with a service of general economic interest.<sup>73</sup>

### **7. 1. 2. 3. Revenue-producing monopolies**

A revenue-producing monopoly is an undertaking to which the state has given an exclusive right only for the purpose of creating revenue for the state. This type of monopoly loses more and more its importance in the Community. Besides, it also has to operate within the limits created by Article 37 of the Treaty.<sup>74</sup>

### **7. 1. 2. 4. Obstruction of assigned task**

It is rather difficult to satisfy the conditions for derogation under Article 90(2). An exemption can be given to an undertaking only when the application of the Treaty rules obstructs the performance of its task. This means

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<sup>68</sup> Van Bael & Bellis, 901.

<sup>69</sup> Van Bael & Bellis, 901.

<sup>70</sup> *Sacchi*.

<sup>71</sup> *Ahmed Saeed Flugreisen* [1989] ECR 803.

<sup>72</sup> *Procureur du Roi v. Corbeau*, Case C-320/91 [1993] ECR I-2533.

<sup>73</sup> *Merci Convenzionali* [1991] ECR I-5889.

<sup>74</sup> Van Bael & Bellis, 902.

that the exemption is not possible if the application of Treaty rules only makes the undertaking's performance of its task more difficult.<sup>75</sup>

While it is difficult to successfully invoke the exception of Article 90(2), the Commission is on the other hand, more willing to admit the exception when the monopoly is under the obligation to provide a universal service,<sup>76</sup> which could be jeopardised if competition is allowed.

One case where the Court has developed this line is the *Corbeau*<sup>77</sup> case, concerning postal services. Corbeau competed with the Belgian postal monopoly by offering specific postal services. The Court was faced with the question whether a monopoly over postal services was necessary to enable the Belgian PTT to perform its task. The Court found that PTT's obligation to provide universal services in condition of economic equilibrium presupposes that less profitable sectors are counterbalanced by the profitable sectors and a restriction of competition from individual undertakings in the profitable activities is accordingly justified. Otherwise, undertakings concentrating on the profitable activities would be in a better position, as they do not have to bear costs of providing a universal service.

The Court reached, however, the conclusion that this reason did not justify a monopoly with respect to specific services distinguishable from services of general economic interest, as they were designed to meet individual needs of companies that requested additional services, which the traditional postal service did not offer, such as home collection of mail, more rapid or reliable delivery.

The Court added that where such additional services, by their nature or the conditions under which they were offered, such as geographic coverage, would not jeopardise the financial stability of the basic service.

### **7. 1. 2. 5. Direct effect**

In order to give a provision of the Treaty direct effect there are three conditions, which have to be fulfilled. The provision must be clear and precise, unconditional and not subject to the adoption by the Community or the Member States of subsequent rules.

According to these criteria Article 90 does not fit as the most suitable example of article for direct effect. Article 90 is a classic example of a 'framework' provision, which is in general and unclear terms,<sup>78</sup> where terms like 'special or exclusive rights', 'services of general economic interest' and

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<sup>75</sup> Van Bael & Bellis, 903.

<sup>76</sup> The Commission has defined 'universal service' as a service "having general geographical coverage, and being provided to any service provider or user upon request within a reasonable period of time." Commission Directive 90/388 on competition in the markets for telecommunications services, OJ 1990 L192/10, preamble, recital 18.

<sup>77</sup> *Corbeau* [1993] ECR I-2533.

<sup>78</sup> Burrows F., 110.

‘the interest of the Community’ need to be explained and developed in various individual situations.

According to Craig and De Burga<sup>79</sup> and to Pappalardo,<sup>80</sup> Article 90 is a ‘reference’ provision. This means that in order to infringe Article 90(1), another provision of the Treaty also must have been infringed, by the action or inaction of a Member State. According to Craig and De Burga it would therefore be logic for individuals to be able to invoke Article 90 when another directly effective Treaty rule has been infringed.<sup>81</sup> Others also suggest this point of view<sup>82</sup>.

However, the question of direct effect is even more complicated as regards Article 90(2). The wording of Article 90(2) suggests that the interests of the Community come first and the development of trade must not be affected. This should point at the Commission as the competent body to apply the derogation. And indeed the Court has supported this view, for example, in *Muller*,<sup>83</sup> and in the *British Telecom* case.<sup>84</sup>

However, the ECJ has in other cases shown that it does not preclude national courts to answer the question whether an undertaking, invoking Article 90(2) with the purpose of claiming derogation from one of the Treaty rules, has in fact been entrusted by a Member State with a service of general economic interest.<sup>85</sup> Subsequent cases<sup>86</sup> have clarified whether the national court is competent to decide whether the application of the Treaty rules would obstruct the performance of the particular task assigned to the undertaking.

These cases indicate that the national court may refuse to apply the exception, if it establishes that the rights entrusted to the undertaking are disproportionate to accomplish the task and then it may apply the competition rules. And, if the national court finds that the undertaking could not perform the assigned task, if it were subject to the competition rules, the national court would have three options: request a preliminary ruling from the Court under Article 177 of the Treaty, stay the proceedings and ask the Commission for its opinion, or grant the derogation.<sup>87</sup>

The decision in the *ERT* case suggests that the national court is competent to decide whether the exception under Article 90(2) applies. However, this

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<sup>79</sup> Craig & De Búrca, 1080-f.

<sup>80</sup> Pappalardo, see note 39.

<sup>81</sup> Craig & De Búrca, 1081.

<sup>82</sup> See e.g. Advocate General Jacobs in *Höfner and Elser*.

<sup>83</sup> *Ministère Public Luxembourg v. Muller* [1971] ECR 723.

<sup>84</sup> *Italy v Commission* [1985] ECR 873.

<sup>85</sup> *SABAM* Case 127/73.

<sup>86</sup> *Ahmed Saeed and ERT*, Case C-260/89[1992] ECR I-2925.

<sup>87</sup> Van Bael & Bellis, 905-f.

does not seem to be the position of the Commission.<sup>88</sup> Several others support the Commission in its point of view that national courts do not have the competence to apply the proviso of Article 90(2), insofar as they will neither have the information on which to take an overview of the Community's interest, nor the political legitimacy to determine where the balance should be drawn.<sup>89</sup>

### 7. 1. 3. Article 90(3)

Article 90(3) requires the Commission to ensure the application of the provisions of Article 90 by the Member States and to address suitable directives or decisions to the Member States. It is one of the relatively rare provisions which confers direct legislative competence on the Commission. This does not mean that it is the only way to enforce the Article. Recourse may be made through actions under Article 169 and the interpretation of Article 90 can be clarified through Article 177 reference.

The Commission has used Article 90(3) quite rarely for passing directives. Besides, when it has used the Article, Member States have challenged the competence of the Commission to proceed in this manner. In the *Transparency Directive* case,<sup>90</sup> the Member States argued that the Commission could not adopt the Directive under Article 90(3), because the Article was limited to deal with a specific situation in one or more Member States, and did not give any more legislative power to the Commission. The Court rejected this argument and the Member States' argumentation about the need of the adoption of the directive in question by the Council, pursuant to Article 94. There was no need of construing the term 'directive' in Article 90(3) any differently from Article 189. And the fact that the rules might be laid down by the Council under its general power in Article 94 did not preclude the Commission's exercise of power under Article 90(3).

In the *Telecommunication Terminal Equipment* case<sup>91</sup> the Court had a more recent occasion to clarify the scope of the Commission's powers under Article 90(3). France contested the legality of the directive on telecommunication terminal equipment adopted by the Commission pursuant to Article 90(3). The Court stated that the Commission has the power to adopt general directives setting out Member States' obligations in concrete terms resulting from Article 90(1) and (2). However, the Commission cannot use a directive to make a finding that a Member State has failed to fulfil a particular obligation under the Treaty.

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<sup>88</sup> In its guidelines on the application of EEC competition rules in the telecommunications sector, OJ 1991 C233/2, para. 23, the Commission claims that it has exclusive competence to decide that the derogation of Article 90(2) applies.

<sup>89</sup> Craig & De Búrca, 1081-f, Wyatt & Dashwood, 566.

<sup>90</sup> *France, Italy and United Kingdom v. Commission*, Cases 188-190/80 [1982] ECR 2545.

<sup>91</sup> *France v. Commission*, Case C-202/88 [1991] ECR I-1223.

There is a difference between a directive and a decision that the Commission can adopt under Article 90(3). This was outlined in the *Koninklijke PTT* case,<sup>92</sup> where the Court held that the Commission can, when a particular Member State is found in breach of Article 90, use the power under Article 90(3) to make a decision in order to specify the measures which must be taken to comply with Community law. It is apparent that the ECJ does not want to curtail the Commission's power under Article 90(3) in making directives or decisions.

## 8. Legal monopolies

State controlled undertakings or undertakings enjoying special or exclusive rights play an important role in the economic life of the European Community.

During the last few years there has been a trend towards 'privatisation' of the public sector, which coincide also with the increasing importance of Article 90 and the discussion about the justification of legal monopolies.

By setting up a monopoly by virtue of law, a Member State excludes competition. Article 90(1) is addressed to Member States, but it is not a provision that is against legal monopolies, as it rather seems to imply their positive legality.

The Court itself has confirmed that in principle the existence of a legal monopoly is not in conflict with the Treaty.

### 8. 1. Analysis of case law

#### 8. 1. 1. Sacchi

In *Sacchi*,<sup>93</sup> the Court said, with reference to the Italian public monopoly of television broadcast, that nothing in the Treaty prevents Member States, for consideration of public interest, of a non economic nature, from removing radio and television transmission from the field of competition, by conferring on an undertaking an exclusive right.

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<sup>92</sup> *Netherlands, Koninklijke PTT Nederland NV and PTT Post BV. Commission*, Cases C-48 and 66/90 [1992] ECR I-565.

<sup>93</sup> *Sacchi* [1974] ECR 409.

Article 90(1) permits Member States to grant special or exclusive rights to undertakings. However, undertakings remain, for the performance of their tasks, subject to the prohibitions against discrimination and fall under the provisions referred to in Article 90. The Court reached the conclusion that Articles 86 and 90 taken together do not imply that an undertaking, which has been granted exclusive rights and which has a monopoly is not as such incompatible with Article 86. It is however important that it does not discriminate nationals of Member States by reason of their nationality.

### **8. 1. 2. Höfner**

The case concerned the legality of German rules on certain categories of persons who were seeking work. Under these rules a state-licensed agency, which had been given exclusive powers to undertake employment procurement, assisted undertakings regarding personnel policy. The effect of the monopoly was to suppress the activities of private, independent employment consultants.

The Court found that the agency was an undertaking for the purpose of Article 86 and subject to the prohibition contained in the Article, inasmuch as the application did not obstruct the performance of the particular task assigned to it.

The Court found that the application of Article 86 did not obstruct the performance of the agency, as the agency was manifestly not in the position to satisfy the market demand and in fact allowed its exclusive rights to be encroached by private recruitment consultancy companies. Furthermore, the fact remains that Article 90(1) provides that the Member States are not to take or maintain in force measures contrary to the rules contained in the Treaty. Consequently, the Court said that the Member State violated Article 90(1) by maintaining in force a statutory provision that created a situation in which the agency could not avoid infringing Article 86.

The Court held that the grant of exclusive rights was not *per se* incompatible with Article 86, but only by exercising its exclusive right the agency could not avoid being abusive of its dominant position. The Court held that the Member State had created such a situation because the agency, to which it had granted exclusive rights, was not able to satisfy market demand, besides it rendered impossible the activities of private undertakings, by maintaining in force a legal prohibition that made their contracts void.

Moreover the Court found that the responsibility imposed on Member States through Articles 86 and 90(1) is involved if the abusive conduct of the agency is potentially capable of affecting trade between Member States. This was the case, where recruitment by private companies might extend to the nationals or to the territory of other Member States.



### **8. 1. 3. ERT**

The case concerned the legality of a statutory radio and television monopoly held by ERT given to it by the Greek State. The Court stated once again that the existence of a statutory monopoly was not *per se* abusive for the purposes of Article 86. But Articles 86 and 90 could be infringed where the granting of an exclusive right to a single undertaking would lead the undertaking to infringe Article 86 by virtue of a discriminatory policy, since the grantee would be likely to favour its own programmes, rather than those from other companies.

The case stresses further the fine line that may exist between a lawful grant of exclusive right and illegality under Articles 90 and 86.

### **8. 1. 4. Corbeau**

The case concerned the legality of the statutory official Belgian postal monopoly. Corbeau provided the City of Liege and the surrounding areas with his own postal services, consisting in collecting mail from the address of the sender and distributing it by noon on the following day, or if the addressee was located outside his district to send it via the normal postal services. He was prosecuted for contravening the Belgian legislation on the postal monopoly. The question was whether this constituted a breach of Article 90.

The Court reconfirmed that the mere creation of a dominant position by the state through the grant of exclusive rights is not in itself incompatible with Article 90. However, it held that Article 90 implies that the state must not enact or maintain in force measures that might eliminate the effectiveness of provisions of competition such as Article 86. Then, the Court went on to consider the application of Article 90(2).

The Court accepted that the Belgian postal service was an entrusted undertaking and also that some restriction on competition might be necessary. This depends on the fact that the entrusted undertaking has in performing its duties, also to perform loss-making activities as well, whilst private alternatives can simply cream off the profitable areas and ignore the non-profitable ones. However, this did not exclude all competition.

The Court said that services, which could be dissociated from the general public services, could be offered by other undertakings without compromising the economic stability needed by the holder of the exclusive rights.

## 8. 2. Comments

The Court's practice indicates that the line of thinking concerning monopolies has changed. *Sacchi* was the first approach to state monopolies and was in line with the political mood that provided a State with the right to exclude certain sectors of the economy from competition and control itself within these sectors. This is why the Court held the grant of exclusive rights by the State and the existence of monopolies granted for reasons of general public interest to be compatible with the Treaty and not contrary to the competition rules.

By and by the Court changed its view and started to question the inherent compatibility of monopolies with the Treaty. Monopolies could therefore be potentially illegal *per se*. It would thus, be possible to challenge the validity of monopolies as such.

With *Höfner* the Court went further and explained that a Member State may not withdraw an activity from the field of competition even if its motive is to fulfil a socio-political aim. Such motives are allowed, but they do not imply that the objective cannot be met by other means and be in accordance with the aim of the Common Market.

*ERT* showed that Member States must not adopt or maintain in force any measures that could deprive the Treaty rules of their effectiveness. The monopoly in question was through its exclusive rights in a dominant position that might infringe Article 86. *Corbeau* provided that in order for a monopoly to be compatible with Treaty rules, it must be necessary in order to enable the performance of a task of general public interest.

The change has thus, progressively gone from an obvious legitimate existence of the monopoly to a need to prove that it is necessary to achieve its task of general public interest.

## 9. State monopolies under Article 37

Article 37 requires Member States to adjust any state monopolies of a commercial character that affect imports and exports to ensure that no discrimination exists between nationals of Member States with regard to the conditions under which goods are procured and marketed.

The question is what does Article 37 add to Articles 30 to 36 and how does it tie with Article 90(1) and (2)?

Article 37(1) provides as follow:

‘Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provision of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.’

Monopolies may be defined as situations where an individual or a group of individuals entirely controls the offer of certain products.<sup>94</sup> Article 37 is only concerned with monopolies set up by the State in conformity with national law.

State monopolies are set up with a view to fulfil political wishes, to control the supply within certain areas, e.g. energy supply, or to secure the market for certain products such as the ones arising from the colonies, or to secure market potential for non-competitive but important national producers and eventually to safeguard fiscal and other political considerations<sup>95</sup>.

The concept of monopoly in Article 37 is different from the concept of monopoly in Article 86, as the latter is based on economic criteria, whilst Article 37 requires a form of state intervention.

## 9. 1. Commercial monopolies

Commercial monopolies refer to undertakings involved in trade in goods.<sup>96</sup> They cover imports, exports and the marketing of products and do not cover services, which fall within Article 59.

In *Costa*<sup>97</sup> the Court held that Article 37 applies to monopolies which, on the one hand have as their object “transactions [on] a commercial product liable to be subject to competition and trade between Member States” and which, on the other hand, play “an effective role in trade between Member States”.

The product in question does not necessarily have to be traded between Member States but it is sufficient that it can be traded.

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<sup>94</sup> Blum F., 120.

<sup>95</sup> EU-Karnov, chapter 7.

<sup>96</sup> See *Sacchi* [1974] ECR 409.

<sup>97</sup> *Costa v. Enel* C-6/64 [1964] ECR 614.

Examples of commercial monopolies are<sup>98</sup>, among others, tobacco and tobacco product such as lighters, matches, alcohol, powder and explosives, petroleum products, salt and natural gas for export.

Article 37(1) paragraph 2 provides that the obligation to adjust monopolies of a commercial character applies to any body through which the State exercises an influence over imports or exports between Member States. A ministry, a division of a ministry, a government body, or an autonomous public undertaking, may exercise state monopolies.

Article 37 covers situations, where the monopoly is exercised by an undertaking, a group of undertakings, or territorial units of the State such as local authorities.<sup>99</sup> However, Article 37 does not apply to situations where the State entrusts local authorities with the provision of a service including the sale of products and the local authorities, in turn, entrust one or several independent private undertakings with the task. This depends on the fact that any effect on trade that may follow does not stem from the behaviour of the State or the local authorities but from the private undertakings themselves.<sup>100</sup>

## **9. 2. Purpose and scope of Article 37**

### **9. 2. 1. Purpose of Article 37**

As the Treaty rules on the free movement of goods aim at establishing an internal market without any quantitative restrictions or measures having equivalent effect, it is obvious that state monopolies may be such an obstacle that Article 30 and 34 aim at removing. State monopolies could through their existence or the shape of their policy isolate, completely or partially, the national market from the common market, and evade Article 30 to 36.

Article 37 was introduced and placed after the rules on non-tariff barriers to complete Article 30-36, where imports and exports of goods are not hindered by quantitative restrictions or measures having equivalent effect, but by state monopolies.<sup>101</sup>

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<sup>98</sup> Some of them have now been abolished. Blum F., 120. EU-Karnov, kap. 7, abolished monopolies in Italy: bananas, sulphur, quinine, flint, cigarette paper, salt, saccharin; in France: matches, alcohol; in Germany: matches; in Belgium natural gas for export, and in Spain: oil and other products of energy. Several state monopolies have been adjusted, i.e. tobacco and tobacco paper, alcohol, oil and other forms of energy, potassic fertilisers, etc.

<sup>99</sup> *Bodson*, C-30/87, [1988] ECR 2479.

<sup>100</sup> *Bodson*, C-30/87, [1988] ECR 2479.

<sup>101</sup> EU-Karnov, chapter 7.

Article 37 was thus introduced to prevent Member States discriminating in favour of domestic products through their national import and export agencies. Article 37 does not forbid state monopolies but it does require their adjustment, in order to secure that no discrimination exists between nationals of Member States with regard to the conditions under which goods are procured and marketed. Because of the political interests at stake resulting from the economic importance of commercial monopolies to certain Member States, in particular France and Italy, Article 37 has provided for the gradual adjustment of these monopolies.

Moreover Article 37(2) is a form of standstill clause that requires Member States to refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the Articles 30-36. This means that the Article does not forbid the establishment of new state monopolies, if this does not lead to the mentioned effects.<sup>102</sup>

Article 37(1) and (2) have direct effect and can therefore be pleaded and enforced before their national courts by citizens of the Member States.<sup>103</sup>

Article 37(6) has given the Commission the power to issue recommendations to encourage the Member States to carry out the necessary adjustments.

### 9. 2. 2. Scope of Article 37

Article 37 includes an obligation on Member States to adjust their state monopolies of a commercial character in order to avoid all discrimination. This obligation does not go as far as to abolish state monopolies, on the contrary it allows the maintenance of monopolies, provided that they do not result in discrimination in the trading of products between Member States. This has been repeatedly confirmed by the case law of the Court.<sup>104</sup>

Article 37 requires Member States to adjust their monopolies so as to bring to an end all discrimination. Relevant discrimination is that which results in a restriction on imports or marketing of foreign goods<sup>105</sup> and it can have various forms:

- straightforward limitations of imports resulting from the existence of a state monopoly holding a discretionary power over imports. Limitations are likely to be significant where the state monopoly covers not just import but also production. The national undertaking benefiting from such

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<sup>102</sup> EU-karnov, chapter. 7.

<sup>103</sup> *Manghera*, [1976] ECR 91; *Hansen*, [1979] ECR 935; *Costa/ENEL*, [1964] ECR 585.

<sup>104</sup> *Hansen* [1979] ECR 935, *Manghera* [1976] ECR 91, *Commission v. Italy* [1983] ECR 1955.

<sup>105</sup> Blum F., 122.

monopoly is likely to limit imports to the strict minimum so that they do not compete with its own products (*Manghera*);

- obligation to purchase minimum quantities from the national undertaking (*Greek Oil*<sup>106</sup>);
- application of higher charges on imports than on domestic goods (*Miritz*<sup>107</sup>)
- application of different rules on marketing, pricing, etc., for imported products.

### 9.3. Article 37 in relation to other Articles of the Treaty

#### 9.3.1. Articles 30-34

Article 30 relates to normative measures issued by the State, whilst Article 37 relates to the activity of state agencies benefiting from an exclusive right to trade in products.

Earlier it was assumed that Articles 30-34 and Article 37 could be infringed at the same time.<sup>108</sup> This is still the case, especially after the cases concerning *Exclusive rights to Import and Export Electricity and Gas* in various Member States.<sup>109</sup> Advocate General Cosmas examined the relationship between Article 37 and Article 30 in his opinion in the above mentioned cases.<sup>110</sup> He considers that certain state measures may fall under both Articles 37 and 30. His recommendation is to examine whether a state monopoly falls within Article 37.

If the answer is negative, then the compatibility of the monopoly with EC rules should be examined only under Articles 30-34; if the answer is positive, the analysis should consist in examining first, whether the monopoly is discriminatory and therefore contrary to Article 37 and second, whether the monopoly amounts to a measure equivalent to a quantitative restriction on imports or exports, contrary to Articles 30-34.

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<sup>106</sup> *Greek Oil*, case 347/88, [1990] ECR 4747.

<sup>107</sup> *Miritz*, case 91/75, [1976] ECR 217.

<sup>108</sup> See *Peureux*, Case 119/78 [1979], ECR 975, where the Court found that a French prohibition against distillery of certain imported products was a measure having equivalent effect to a quantitative restriction (Article 30) and discrimination regarding to conditions under which goods are procured and marketed.

<sup>109</sup> Cases C-157/94, C-158/94, C-159/74 and C-160/94 [1997] ECR 5815, which will be examined more accurately in a later chapter.

<sup>110</sup> AG Cosmas Opinion, p. 24

### **9. 3. 2. Article 36 and Article 37**

Whether Article 36 can be used in relation to Article 37 remains uncertain and this is because the text of Article 36 only refers to Articles 30-34 and therefore seems to provide an exemption only to situations covered by these Articles.

One possible view is that the Article 36 derogation cannot apply on state monopolies as Article 37 requires state monopolies to be adjusted so as to ensure that there is no discrimination between Member States.<sup>111</sup> However,<sup>112</sup> where the monopoly does not have a pure commercial character but also ‘non-economic reasons’, the derogation in Article 36 might apply in certain cases, i.e. a pure commercial monopoly whose principal task is to generate revenue for the state could not benefit from the Article 36 derogation; whilst a monopoly that meets other interests of a more general nature and that satisfies vital needs of the population might in certain cases benefit from the derogation in Article 36.<sup>113</sup>

### **9. 3. 3. Link between Article 37 and Article 90**

It is clear that state monopolies are public undertakings or undertakings benefiting from exclusive rights that fall within the scope of Article 90(1). However, it is not entirely clear, whether Article 90(2) can and if so, how, apply to state monopolies.

Article 90(2) expressly mentions revenue-producing monopolies, i.e. monopolies whose purpose is maximisation of the revenue of the state, and they include monopolies over tobacco or alcohol, which clearly fall within the definition of commercial monopolies.

According to Article 90(2), the rules of the Treaty, which must also include Article 37, apply to commercial monopolies in so far as they do not obstruct the performance of their particular task. Thus, the Article 90(2) derogation will apply to commercial monopolies to exempt them from the adjustment obligation in Article 37, when Article 37 makes it impossible for the commercial monopoly to perform the task that it is entrusted with. It is clear that the requirement in Article 90(2) is that the task is made impossible by the obligation arising from Article 37 and not just made more difficult.

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<sup>111</sup> Blum F., 125 f.; EU-Publica 7:28.

<sup>112</sup> Blum F., 126.

<sup>113</sup> In the cases concerning Exclusive Rights to Import and Export Electricity and Gas, Advocate General Cosmas examined whether Article 36 applied and found on the facts that the conditions for the application of the derogation were not met.

The case law suggests that in certain circumstances it has to be possible to apply the derogation in Article 90(2) to state monopolies caught under Article 37.<sup>114</sup> It may apply to revenue-producing monopolies, whether or not they are also entrusted with a task of general economic interest, as long as they meet the necessity test provided in the Article. But, the test is more likely to be met where the monopoly has a task of general economic interest.<sup>115</sup>

#### 9. 3. 4. Almelo<sup>116</sup>

The *Almelo* case has brought some light into the applicability of the competition rules of the Treaty in the energy area. Before then, there was no case law dealing directly with the compatibility of energy monopolies with EC law.

The case concerned the Dutch electricity distribution system and is based on a complaint by local electricity distributors, among them Almelo, against an exclusive purchase obligation imposed on them by their regional distributor, Ijsselcentrale. The case also raised the question of the compatibility with EC law of an equalisation charge imposed on the local distributors.

The Court confirmed that electricity is a product and not a service, and therefore covered by Article 37 on monopolies of a commercial character. However, it found that Article 37 did not apply in this case because the exclusive purchasing obligation and the ban on import were not imposed by law but resulted from an agreement between enterprises. Therefore the Court went on and discussed whether the conditions imposed on local distributors was compatible with Article 85, 86 and 90.

The Court found the conditions imposed on local distributors to be contrary to Article 85, as they had a restrictive effect in partitioning the market.

On Article 86, the Court held that Ijsselmij alone could not be said to hold a dominant position in a substantial part of the Common Market. However, it could be in a collective dominant position with other regional distributors. And, that it was for the national judge to determine whether this was the case. If so, then the restriction on imports would constitute an abuse contrary to Article 86.

The question was then, whether the infringement of Articles 85 and 86 could be exempted by Article 90(2).

In this aspect, the Court referred to *Corbeau*<sup>117</sup> by reaffirming that such derogation from the application of the competition rules in so far as restric-

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<sup>114</sup> *Commission v. Italy*, Case 78/82 [1983] ECR 155.

<sup>115</sup> Blum F., 127.

<sup>116</sup> *Commune d'Almelo v. NV Energierbedrijf Ijsselmij*, case C-393/92 [1994] ECR 1477.



tion or even elimination of competition is possible when necessary to enable the entrusted undertakings to carry out their task. In determining this, account should be taken of the economic situation under which the enterprise operates, including the cost it must bear and the regulations, especially in the field of environment, it must observe.

If a state-related undertaking is subject to the strict observance of environmental rules, it may be able to rely on Article 90(2) to resist the competition of foreign undertakings, which are not subject to such rules.

However, the environmental reason cannot be relied on in the abstract, but it must, like other overriding public interest reasons, be closely connected to the facts of the case and may not be relied on to justify any type of exclusive right.

The Court did not refer to the paragraph in Article 90(2), which provides that the development of trade must not be affected to such an extent as would be contrary to the interest of the Community.

The Court leaves to Member States or to undertakings granted exclusive rights, to prove that these exclusive rights are necessary to enable them to perform their specific task with which they have been entrusted in the general public interest. The Court leaves it to the national judge to have the final say.

Products may be linked to services. This is often the case where an undertaking is granted a monopoly over certain goods and services related to the goods.

The concepts of goods and services have moved closer under Articles 30 and 59. This affects state monopolies, as if the measure constitutes a direct or indirect restriction on imports or exports, or on the fundamental freedom to provide services, Member States must be able to justify the restrictions either through the Articles permitting restrictions or through the 'public good'.

### **9. 3. 5. The Gas and Electricity cases**

The recent judgements in *the gas and electricity cases*<sup>118</sup> have provided a significant contribution to the case law of the Court on state monopolies.

The Commission had started proceedings against four Member States in relation to their monopoly over the import and export of electricity and, in one case, of gas as well.

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<sup>117</sup> *Corbeau*, C-320/91 [1993] I-2533.

<sup>118</sup> *Commission v. Netherlands*, C-157/94, *Commission v. Italy*, C-158/94; *Commission v. France*, C-159/94 and *Commission v. Spain*, C-160/94.

The Commission considered these monopolies to be contrary to Articles 30, 34 and 37 and therefore to be abolished. The Member States involved denied any infringement and put forward a number of arguments to justify the maintenance of exclusive import and export rights under both Articles 36 and 90(2). The Commission stated that the derogation contained in Article 90(2) did not apply to them and that in any event, the Member States had not proven that the monopoly was necessary to enable the entrusted undertakings to remain economically viable.

The Court agreed with the Commission that the import and export monopolies constituted discrimination contrary to Article 37, and therefore that it was not necessary to examine whether the monopolies were contrary to Article 30-36. An implication is that Article 36 does not apply to justify a monopoly contrary to Article 37.

However, the Court held, contrary to the Commission that the derogation contained in Article 90(2) might apply and thus that it was necessary to examine whether the criteria contained in Article 90(2) were met.

The Court confirmed that the validity of the monopolies in question depended on whether they were necessary to enable the gas and electricity enterprises to carry out their task of general economic interest. And it rejected the Commission's narrow interpretation of its case law in the *Corbeau* case, that the monopolies would only be valid if they were absolutely necessary to enable the undertakings concerned to remain commercially viable. If the undertakings could continue to operate and remain financially sound under conditions of competition, this would show that their monopoly is not necessary and therefore contrary to the Treaty.

The Court disagreed and held that there could be circumstances when the monopolies could be valid. It should be examined whether the monopolies are necessary to enable the undertakings to carry out all the specific obligations imposed upon them by the State as part of their task of general economic interest.

The Court explained that the obligations must be specific and directly linked to the task of general economic interest and that they may vary between Member States.<sup>119</sup> The Court explained that the monopolies could be compatible with the Treaty if they were absolutely necessary to meet such specific obligations.

The Court clarified also the question of who bears the burden of proof. It held that it is true that it is incumbent upon a Member State invoking Arti-

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<sup>119</sup> The obligation to provide electricity at the lowest possible price was a specific obligation in the Netherlands, while in France the obligation was to supply with electricity all citizens, on a continuous and equal basis.

cle 90(2), as derogation from the fundamental rules of the Treaty, to show that the conditions for application of that provision are fulfilled.

However, once a Member State has explained in detail, why the monopoly is necessary to enable the entrusted undertaking to perform its task of general economic interest, under economically acceptable conditions, it does not have to go further and prove, positively, that there are no other conceivable measures to carry out its obligations. Thus, it is for the Commission when it attacks the monopoly to prove that the monopoly is not necessary and that there might be other ways to carry out the specific task that the monopoly is entrusted with. It is then, for the Commission to prove its case using all relevant economic, social and financial data.

The Court stated that the Commission had failed in the present cases and that it therefore was impossible for the Court to rule on whether the monopolies in question went further than it was necessary in carrying out their task of general economic interest under economically acceptable conditions.

It is submitted that these cases follow the previous line of Court cases and that they further clarify the application of Article 90(2) and the application of the burden of proof.

### **9. 3. 6. Franzén**

In *Franzén*,<sup>120</sup> the Court made a distinction between the national rules governing the existence and operation of the monopoly and which should be examined under Article 37, and those rules which could be separated from the existence and operation of the monopoly itself and which should be examined under Article 30 and 36. The Court held that Article 37 does not necessarily imply that monopolies have to be abolished, but only adjusted to see that they do not lead to discrimination against foreign goods. Furthermore, the Court held that Article 37 aims at eliminating restrictions on the free movement of goods, except restrictions on trade which are inherent in the existence of the monopoly itself.

The Court's lesson from the case is that the validity of the existence and operation of a commercial monopoly may be examined under Article 37 alone. If the Court finds that the existence and operation are valid under Article 37, it will not examine them also under Article 30. In *Franzén* the Court found that the Swedish monopoly over the retail sale of alcohol was compatible with Article 37, as it did not discriminate against foreign good more than against domestic goods. Thus, the Court did not examine whether the monopoly might be contrary to Article 30.

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<sup>120</sup> *Franzén*, C-189/95 [1997] ECR 5909.

Moreover, the Court did not examine whether the monopoly was absolutely necessary to carry out the task of public interest entrusted to the undertaking by the State, under Article 90.

Contrary to the *Gas and Electricity* cases the Court did not regard the Swedish alcohol monopoly as an exception to the Treaty that has to be justified in accordance with the criteria of Article 90(2). Indeed, it regarded the monopoly as being one of those monopolies, which according to the Treaty should be allowed, irrespective of its restrictions on trade.

It is surprising that the Court did not examine the monopoly under Articles 30-36 and 90(2). As the Court appears to accept the validity *per se* of certain commercial monopolies falling under Article 37, it seems that this case goes against the general trend of cases developed since the *Corbeau* judgement.<sup>121</sup>

This case does not invalidate the Court's approach in other state monopoly cases. Instead, it does raise the question whether this case should be limited to monopolies falling under Article 37 and then, only to certain monopolies, or whether it is a new approach from the Court which might extend to Article 30 and 59 monopolies. Possibly this case might, however, open new possibilities to defend certain state monopolies.

## 10. Conclusions

The principles of the free market and of the four fundamental freedoms are the base of the Community. Under these principles, consumers and undertakings would profit from competition and the state would ensure the undistorted and unhindered functioning of the free competition mechanism. This is based on the idea that competition is the instrument that guarantees the highest freedom in economic decisions and the highest possible degree of efficiency on the market.

Several provisions of the Treaty, especially those requiring the removal of trade barriers, prove that competition is the motor of the Community. The elimination of custom duties and quantitative restrictions incite the free movement of goods between Member States and free competition. In the same way, the rules of the free movement of persons, services and capital, which are based on rules of competition as the prohibition of any discrimination based on nationality, also contributes to free competition.

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<sup>121</sup> Blum F., xxiv.

The White Paper and the SEA have re-emphasised the need of the abolition of all legislative and administrative barriers in order to allow the complete integration of the markets into one single internal market. The economies of the Member States are now exposed to a more effective competition. Sectors generally protected are now involved and regarded as potential obstacles to the achievement of the objectives of the EEC. The activities of the state are a great risk on the distortion and the restriction of competition. In fact the state pursues general economic objectives that are not always compatible with the ones of a free market and it has the possibility to affect, directly or indirectly, the most important sectors of the economy and the market. Besides, the state has at its disposal the legal tools to achieve its goals.

However, it can be noticed that things are changing. The Court has through its practice shown that legal monopolies are inimical to the rules of competition. In the cases discussed above, we can see the tendency of the Court not to automatically justify the state intervention on the market.

In *Sacchi*, the Court said that nothing prevents Member States, for consideration of public interest, of a non-economic nature from removing radio and television transmission from the field of competition by conferring an undertaking exclusive rights to conduct them. The undertaking that enjoys exclusive rights, granted by a Member State, within the meaning of Article 90(1) that ends up in a monopoly position is not as such incompatible with Community law. However, abuse of the position created by law or conduct that discriminates according to nationality is unlawful by virtue of the application of Article 86 and 6, i.e. only the behaviour of the monopoly towards third parties may be contrary to Treaty rules. This was a first approach to legal monopolies and their legitimate existence.

*Sacchi* was in line with the views of the founders of the Treaty, providing for the right of the state to reserve to itself certain sectors of the economy and exclude them from competition.

In *Höfner*, the Court reaffirmed that there is nothing in The Treaty that forbids legal monopolies, but a public agency engaged in its activities is subject to the prohibition of Article 86, if this does not obstruct the performance of the particular task assigned to it. The Court stated that the Member State was in breach of Article 90(1), as it created a situation, where the agency granted exclusive rights could not avoid infringing Article 86. This was the case as the agency was not capable of satisfying the market demand and made impossible the activities of private consultants by the maintenance in force of a statutory provision forbidding such activities.

The attempt of the German government to reserve the activity of employment procurement services to the state to ensure that the public interest was best served in this manner and by excluding it from the field of competition was not accepted by the Court. The Court was not convinced by the socio-

political arguments of the German government, as there was a clear demand for competing services that other service providers could meet, without preventing the German government to carry out its service task. Furthermore the activities in question could extend to the nationals or to the territory of other Member States.

In *ERT*, the Court did once again confirm that Community law does not prevent Member States from granting a single undertaking exclusive rights. However, where those rights are liable to create a situation in which the undertaking could abuse of its dominant position by virtue of a discriminatory policy that favours its own productions, Article 90(1) is applicable and prohibits the granting of the exclusive rights. Moreover, the Court reached then the conclusion that the dominant position, enjoyed by the undertaking through the granting of exclusive rights, may in itself imply a breach of the competition rules, as the undertaking cannot avoid abusing of its dominant position and therefore distort competition.

In *Corbeau*, the Court once again confirmed that legal monopolies are not contrary to the rules of the Treaty. Indeed, the Court even explained and justified the Belgian postal monopoly. A monopoly competes on the market on different premises, as it has to take account of serving less profitable sectors in its activities and cannot just concentrate on the profitable ones. And if private alternatives were allowed to simply cream off the profitable areas of business then, the monopoly would not be able to fulfil the duties it is required to perform. However, the Court said that this did not exclude all competition, as there could be services that could be dissociated from the general public service, which could be offered by other undertakings without threatening the economic stability needed by the holder of the exclusive right.

The Court's practice shows that there is nothing in the Treaty that prohibits Member States to grant exclusive rights to undertakings and thus to intervene on the market. But both the exercise and even just the granting of exclusive rights may infringe certain provisions of the Treaty, especially those concerned with the free movement of goods and services and the rules on competition. These rules will be infringed, unless a suitable justification is available:<sup>122</sup>

- 'where the monopoly is closely linked with a rule restricting imports or exports,
- where a national preference is inherent in the exclusive right itself, such as where buyers of a given good or service are required to purchase all or part of their requirements from a specified national undertaking,
- where the monopolistic undertaking actually discriminates in favour of domestic products or services,
- by an exclusive right to import, where it leads, inevitably or in all likelihood, to a discrimination in favour of national products or services, e.g.

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<sup>122</sup> Marengo G., 1991 Fordham Corp. L Inst. 000(B. Hawke ed. 1992), 220.

when the undertaking holding the exclusive right to import at the same time markets its own products, or when the market is technologically so complex as to make it impossible in practice to ensure equal treatment of all available products.’

By applying to exclusive rights the prohibition resulting from the combination of Articles 90 and 86 the control of monopolies is now entering a new phase. The coupling of Article 90 with Article 86 allows the very granting of the exclusive right to be questioned when it leads, inevitably or in all likelihood, to abusive behaviour.

We have seen that the Court’s attitude has changed. The Court has said in *Sacchi* that nothing in the Treaty prevents Member States for considerations of public interest, of a non-economic nature, from removing an economic activity from the field of competition by conferring on one or more undertakings an exclusive right to conduct it.

It did also reaffirm it in *ERT*. And there are reasons that explain why monopolies exist and what their function is. They are supposed to provide universal services and cannot therefore compete with private alternatives at the same conditions, as they cannot invest on profitable sectors only, whilst offering universal services. However, this does not justify *per se* monopolies, using their exclusive rights to consequently shut out private alternatives and hindering competition.

The *Höfner* judgement shows that a monopoly is not justified when it is unable to satisfy demand. The abuse was considered more a question of sheer inefficiency rather than of a deliberate conduct.

*Corbeau* is also a proof of the application of the competition rules to the public sector. The case shows that just because an undertaking with exclusive rights provides a universal service, a private alternative offering other services, different from the ones of the public undertaking, is not automatically excluded from the market, where the monopolistic undertaking acts.

The recent *Gas and Electricity cases* has implied that Article 36 does not apply to justify monopolies contrary to Article 37<sup>123</sup> and that the derogation in Article 90(2) might apply and therefore that it is necessary to examine if the criteria in the Article are met.

The Court confirmed that the validity of the monopoly entrusted with a task of general economic interest depends on whether they are necessary to carry out their specific obligations imposed upon them by the state. It explained that the monopolies could be compatible with the treaty if they are absolutely necessary to meet such specific obligations. Then, it is for the Member States to prove that they meet all the conditions in Article 90(2). How-

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<sup>123</sup> Also confirmed in *Hansen*.

ever, this does not mean that the Member States has to go so far as to prove there could be other restrictive ways to carry out the specific task entrusted to the monopoly, once they have explained in detail why they consider the monopoly necessary.

One case contrary to *the Gas and Electricity cases* and other cases involving state monopolies is *Franzén*, where the Court did not regard the monopoly in question as an exception to the Treaty which must be justified in accordance with the criteria of Article 90(2). The Court's absence of examination under Articles 30-36 and Article 90(2) is surprising and it appears as the Court accepts the validity *per se* of certain monopolies. The case is not in line with other cases concerning state monopolies and it does not answer to the question whether this is a new approach from the Court. However, it seems to open new possibilities for Member States to defend certain state monopolies.

The free movement of services is as the other freedoms relevant to the EC. Competition is one of the bearing thoughts of the Treaty and it applies indeed to the public sector as well. Article 90 specifies the conditions under which Articles 85 and 86 are applicable to public undertakings, undertakings granted special or exclusive rights and to undertakings entrusted with the operation of services in the general economic interest.<sup>124</sup>

Article 90 submits public undertakings to the same rules as private ones, although there are certain limitations. The reason is to hinder Member States from using their influence and power of nationalising industries and thereby avoid the application of the competition rules. Where Member States induce public undertakings to infringe the competition rules without there being any action on the part of the undertaking itself, the Member States are to be held responsible under Article 90.

I do not presuppose to offer a concluded view, as the issues are complex. But in my opinion the use of Article 90 has increased and public sector activities, such as the production and distribution of gas and electricity, telecommunications, postal services, transportation and certain financial services, have received much more attention from the Community in the last years. Notably, several of these activities are not operating as public monopolies any more, as the market has loosened up. The tendency is clearly not in favour of legal monopolies.

Furthermore, we can through the Court's practice see that the concepts of goods and services move closer together and that this affects state monopolies, when it comes to why and how they are to be allowed.

The Community has realised that they have a considerable size and an economic importance and therefore are to be subject to the Treaty rules of

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<sup>124</sup> *Bodson v Pompes Funèbres* [1988] ECR 2479.



competition and the free movement, in order to achieve the goals of the Community in Article 2 of the Treaty. And this is also why Member States have to follow the request of Article 5 to take appropriate measures to ensure fulfilment of the obligations arising out of the Treaty and to facilitate the achievement of the Community's task.

The Member States have an obligation, derived from Article 5, to abstain from any measures that could jeopardise the attainment of the objectives of the Treaty.

The contribute of Article 90 is to submit public undertakings to the same rules as private ones and to hinder Member States from making the competition rules ineffective.

The competition rules apply not only to the way in which the monopoly is exercised, but also to the existence of the monopoly itself. The existence of monopolies granted by the state may be contrary to the Treaty. Monopolies are only compatible with the Treaty if they are necessary to perform a task of general policy interest.