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EUROPEAN UNION LAW RULES ON STATE MEASURES RESTRICTING COMPETITION

BY

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State measures restricting competition are referred to only once in the EC Treaty, in Article 86. Article 86 provides, in effect, that "[even] in the case of State enterprises and enterprises to which the State has given monopoly or special rights, States may not adopt or maintain measures contrary to the Treaty". Because it does not say "even", it suggests, wrongly, that it imposes an especially strict rule on State measures dealing with State-owned or privileged enterprises. In fact, essentially the same substantive rule applies in connection with all other enterprises, as a result of Article 10 (ex-5) EC, a provision the importance of which has been very much under-estimated.

However, Article 86(2) allowed Member States to exempt enterprises responsible for services of general economic interest from Treaty rules. For this reason, and because Article 86 was potentially applicable to a diverse range of politically sensitive situations in different Member States, the Commission made very little use of Article 86 until the late 1980s, and the questions which arose were referred to the Court of Justice from national courts. These questions were answered without the Court or the Commission finding it necessary to formulate general principles. The result was to develop several legal rules on a case-by-case basis, which have not been explicitly related to one another, which overlap, and which have not clearly answered several foreseeable questions which, due to accidents of litigation or to the prudence or tactics of plaintiffs, have not so far been raised.

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The nearest that the Commission has come to stating any comprehensive view was in the 1990s when, under French pressure, it produced several rather cautious Notices on "services of general economic interest" under Article 86(2), which did little to clarify the overall legal position.

The legal principles which have emerged have therefore never been authoritatively stated as a single set of rules in a clear conceptual framework. That does not prevent them from being sufficient to deal with most cases which are likely to arise. The competition law cases which have come before the Court of Justice have concerned markets on which there were non-State companies. If and insofar as these markets are privatised, the rules on State measures restricting competition will become increasingly important, and the rules of competition applicable to enterprises will become more widely applicable. In any case, the principles summarised here will be important in the ten new Member States.

Member States may choose public or private ownership in any industry

The EU Treaty does not limit the freedom of Member States to choose public or private ownership. Article 295 (ex-222) reads:

> "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."

However, when a Member State owns or controls wholly or in part any "enterprise" (essentially, any body or company providing goods or services as an economic or commercial activity), the body in question is subject to the EU rules on competition which apply to enterprises, as well as to the special EU rules applicable to State measures concerning State-owned enterprises. If a publicly owned or controlled entity has both economic activities and official regulatory powers, it is subject to the rules on competition insofar as its economic activities are concerned, and to the rules on States and State authorities insofar as its regulatory powers are concerned.

Member States may not use State owned companies for protectionist purposes, or give them more favourable treatment than would be permitted for private companies under State aid rules. The only exceptions to the EU Treaty rules are for services of general economic interest under Article 86(2), and these apply whether the company which is required to provide them is State owned or not. It follows that, as far as EU law is concerned, State ownership offers no advantages over private ownership.

Principles and rules limiting State measures restricting competition[2]

The case law of the Community Courts shows that the legal constraints on the powers of Member States to take national legislative, executive or administrative measures restricting competition are based on two principles:

1. The general duty of national authorities not to adopt or maintain any measure which would deprive Community competition law of its effectiveness.[3]

[2] See generally Edward and Hoskins, Article 90: Deregulation and EC laws: Reflections arising from the XVI FIDE conference, (1995) Common Market Law Review 157; Siragusa, Privatization and EU competition law, in Hawk (ed.), 1995 Fordham Corporate Law Institute (1996) 375-464; Blum and Logue, State monopolies under EC law (Wiley, 1998); Buendia Sierra, Exclusive rights and State monopolies under EC law (1999, Oxford U.P.); Geradin (ed.), The liberalization of State monopolies in the European Union and beyond (Kluwer, 2000); von Quitzow, State measures distorting free competition in the EC (Kluwer, 2002); Temple Lang, Community antitrust law and government measures relating to public and privileged enterprises: Article 90 EEC Treaty, in Hawk (ed.) 1984 Fordham Corporate Law Institute (1985) 543-581; Case C-471/99, *Martinez Domingo, Urbano v. Bundesanstalt für Arbeit*, Sept. 24 2002; Case C-113/96 *Gomez Rodríguez*, [1998] ECR I. For the USA, see Federal Trade Commission, Report of the State Action Task Force (2003).

[3] Case 13/77 *INNO v. ATAB* [1977] ECR 2115, para. 31; [1978] 1 C.M.L.R. 283; Case 229/83, *Leclerc*, [1985] ECR I; Case C-260/89, ERT [1991] ECR I 2925, para. 35; Case 267/86 *Van Eycke v. ASPA* [1988] ECR 4769 para 16; [1990] 4 C.M.L.R. 330; the cases reviewed by Advocate General Van Gerven in joined cases C-48/90 and C-66/90 *PTT Netherlands v. Commission* [1992] ECR I-565 at pp. 615 ff.; [1993] 5 C.M.L.R. 316; Case C-320/91 *Corbeau* [1993] ECR I-2533; Case C-41/90 *Höfner and Elsner* [1991] ECR I-1979; [1993] 4 C.M.L.R. 306; Case C-60/91 *Batista Morais* [1992] ECR I-2085; [1992] 2 C.M.L.R. 533; Case C-2/91 *Meng* [1993] ECR I-5751 para 14; Case C-185/91 *Reiff* [1993] ECR I-5801 para 14; [1995] 5 C.M.L.R. 145; Case C-245/91 *Ohra* [1993] ECR I-5851 para 10; Case C- 153/93 *Delta* [1994] ECR I-2517 para 12; [1996] 4 C.M.L.R. 21; Case C-55/93 *van Schaik* [1994] ECR I-4837 para 25; Case C-379/92 *Peralta* [1994] ECR I-3453 para 21; Joined cases C-401/92 and C-402/92 *Heukske and Boermans* [1994] ECR I- 2199 at para. 16; Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883 para 20; [1996] 4 C.M.L.R. 613; Case C-134/94 *Esso Española* [1995] ECR I-4223; [1996] 5 C.M.L.R. 154; Joined cases C-140/94 *DIP v. Comune di Bassano* [1995] ECR I-3257 para. 14; [1996] 4 C.M.L.R. 157; See also Case C-250/95 *Futura Participations* [1997] ECR I-2471. In almost all these cases the Court said Member States may not "*take measures which may render ineffective the competition rules applicable to undertakings*"; Case C-38/97 *Librandi v. Cuttica* {1998] ECR I-5955. See also Case C-67/96 *Albany International*, joined cases C-115/97 and others, *Brentjens*', and Case C-219/97 *Drijvende Bokken*, 1999 ECR I 5751, 6025 and 6121; joined cases 46/87 and 227/88 *Hoechst* [1989] ECR 2859, para. 33 ("Member States are required to ensure that the Commission's action is effective"); Case T-228/97, *Irish Sugar*, 1999 ECR II 2629, para. 130; Case C-38/97, *Librandi* [1998] ECR I 5955; Case C-35/96, *Commission v. Italy* [1998] ECR I 3831 and Case T-513/93, *CNSD v. Commission*, [2000] ECR II 1807; Case C-35/99 *Arduino* [2002] ECR I 1529, Advocate General Léger, Opinion paras. 83-91; Cases C-180-184/98, *Pavlov*, [2000] ECR I 6451, Advocate General Jacobs, Opinion paras. 163-165.

2. The duty of Member States not to adopt or maintain any measure restricting freedoms granted or guaranteed by the EC Treaty except for a legitimate (*i.e.*, non-protectionist) purpose in the public interest and using means which are no more restrictive than is necessary to achieve that purpose.[4]

In Case C-387/93 *Banchero* [1995] ECR I-4663; [1996] 1 C.M.L.R. 829 the Court said (at p. 4697) "*the obligations which Member States must perform in good faith under Article 5 include the obligation, set out in Article 90(1), whereby they must not let public undertakings and undertakings to which they grant special or exclusive rights enact or maintain in force any measure contrary to the rules contained in the Treaty...*".

Joined cases C-147/97 and C-148/97 *Deutsche Post v. GZS and Citicorp*, 2000 ECR I 825 para. 39; cp. joined cases C-153/94 and 204/94, *R. v. Commissioners of Customs and Excise, ex. p. Faroe Seafood* [1996] ECR I-2465; [1996] 2 C.M.L.R. 821; (national measures for collecting Community revenues must not make it excessively difficult to implement Community legislation). See also Case C-271/91 *Marshall v. Southampton Area Health Authority ("Marshall II")* [1993] ECR I-4367. See Temple Lang, Community antitrust law and national regulatory procedures, in Hawk (ed.), 1997 Fordham Corporate Law Institute (1998) 297-334; Temple Lang, State measures restricting competition, 2 Europarättlig Tidskrift (2001) 206-223.

In Case C-137, *R. v. Competition Commission*, *ex parte Milk Marque*, judgment dated Sept. 9, 2003 it was held that a national competition authority should reconcile national competition policy with the EU common agricultural policy, just as the Commission should reconcile EU competition policy with it.

[4] In relation to the freedom of establishment, the freedom of services and the freedom to compete, see the following judgments: Case 33/74, *van Binsbergen*, 1974 ECR 1299; Case 352/85, *Bond von Adverteerders*, 1988 ECR 2055; Case C-353/89, *Commission v. Netherlands*, 1991 ECR I 4069; Case C-288/89, *Antenne de Gouda*, 1991 ECR I 4007; Case C-76/90, *Säger v. Dennemeyer*, 1991 ECR I 4221; Case C-320/91, *Corbeau*, 1993 ECR I 2533; Case C-275/92, *Schindler*, 1994 ECR I 1039; Case C-323/93, *Crespelle*, 1994 ECR I 5077; Case C-384/93, *Alpine Investments*, 1995 ECR I 1141; Case C-189/95, *Franzén*, 1997 ECR I 1509, at 5976-5977; Case C-264/96, *I.C.I. v. Colmer*, [1998] ECR I 4695, paras. 28-29; Case C-222/95, *Parodi v. Banque Bary*, 1997 ECR I 3899; Case C-167/97, *Seymour Smith*, [1999] ECR I 623; Case C-212/97, *Centros*, [1999] ECR I 1459; Case T-266/97, *Vlaamse Televisie*, [1999] ECR II 2329; Opinion of Advocate General La Pergola, in Case C-124/97, *Läärä*, [1999] ECR I 6067; Case C-67/98 *Zenatti* 1999 ECR I 7289; Case C-58/99, *Commission v. Italy*, 2000 ECR I 3811; Case C-205/99, *Empresas Navieras*, [2001] ECR I 1271; Case C-108/96, *MacQuen*, [2001] ECR I 837; Case C-390/99, *Canal Satellite*, January 22, 2002; Case C-439/99, *Commission v. Italy*, Jan. 15 2002; joined cases C-430/99 and C-431/99, *Sea-land Service*, June 13 2002; Case C-243/01, *Gambelli*, November 6, 2003.

All such measures must pass three tests: the objective must be important enough to justify restricting the freedom guaranteed by the Treaty (the balancing test); the measure must be appropriate to the objective (the appropriateness test); there must be no less restrictive way of achieving the objective (the necessity test); see Emiliou, The principle of proportionality – a comparative study (1996); Case T-266/97, *VTM*, [1999] ECR II 2329.

The two principles are the basis for several rules:[5]

- Member States may not adopt measures which lead enterprises to do anything which, if done directly by the State itself, would be contrary to the EC law rules binding on States. For example, a national measure may not require enterprises to give preference to goods or services produced in the Member State concerned, or to indulge in any other form of protectionism.

- The rule that States may not make competition law ineffective means that Member States may not adopt measures which lead to enterprises acting contrary to EC law rules on enterprises, even if the enterprises in question are State enterprises or enterprises which have been granted special or exclusive rights.

- The rule against restrictions on freedom of establishment and services means that there are limits on how far Member States may adopt measures which create or strengthen a dominant position.

To these rules there is one exception, in Article 86(2) (ex-90(2)) EC Treaty, which is discussed below.

It will be seen that some of the rules set out here overlap with one another, and that it should be possible to synthesise them more concisely than has been done here. This explains some repetition in this paper. Such a synthesis would not represent the current case law, although it would rationalise it, not in the sense of altering it, but by tidying it up. In fact, all of the rules summarised here could, in theory, be derived from the two principles first stated, although the Court of Justice has never pointed this out.

<u>The general principle that national measures must not make Community competition law ineffective</u>

This is a general duty based on Article 3 and Article 10 combined: Member States must not defeat the purpose of Community rules. This means that national measures must not lead to infringements of Articles 81 and 82 by enterprises. There would be little point in prohibiting companies from restricting competition if national authorities were free to adopt measures which restrict it (or to order companies to restrict it) with similar effects. Article 86, which is among the Treaty rules on competition although it refers to all the Treaty rules

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[5] There is also the rule that Member States must not interfere with the operation of a Community institution (the Community Courts or the Commission) in the competition law sphere. They must not interfere with the ability of the Commission to obtain evidence, or adopt decisions likely to conflict with decisions of the Commission or judgments of the Community Courts. Case 14/68 *Walt Wilhelm*, [1969] ECR I; Case 234/89, *Delimitis*, [1991] ECR I 935; Case C 9/99, *Echirolles Distribution*, 2000 ECR I 8207; C-344/98, *Masterfoods*, [2000] ECR I-11,369; Temple Lang, General report, the duties of cooperation of national authorities and courts and the Community institutions under Article 10 EC, in XIX FIDE Congress (Helsinki, 2000) Vol. I, 373-426 and Vol. IV 65-72; Temple Lang, The duties of cooperation of national authorities and courts under Article 10 EC: two more reflections, 2001 European Law Review 84-93.

and not only to competition rules, makes it clear that the Articles on State aids are not the only Treaty competition rules binding on national authorities, as distinct from enterprises.

The Court of Justice has frequently repeated this principle in general terms.[6] There are many ways in which national authorities could use their legislative, executive and administrative powers so as to create situations in which the Community competition rules would be made ineffective to achieve the economic results which they are designed to achieve. A general principle is therefore essential.

This rule is relevant to national measures specifically restricting competition *e.g.*, by controlling prices, and to measures giving selected enterprises privileged positions protected from competition, whether or not infringements of Articles 81-82 by the enterprises are likely to result directly.

The general principle that freedoms given by the Treaty may be restricted only for legitimate purposes and by proportional measures

Any measure which restricts competition significantly is also likely to restrict freedom to supply services or freedom of establishment, or both. Since Article 86 is a specific example of the general duties of Member States under Article 10,[7] and since Article 86 refers specifically to the rules on competition, the principle that freedoms may be restricted only for legitimate reasons applies to national measures regulating or restricting freedom to compete. This is so even though competition is not usually thought of as one of the "freedoms" guaranteed by the Treaty, and even though competition law is also subject to the effectiveness principle already mentioned.

A non-discriminatory measure which restricts the freedom in question (whether freedom to provide services, freedom of establishment, or freedom to compete) of all companies equally, is usually adopted for a good reason, and so is relatively easy to justify under Article 10. A discriminatory measure which gives a protected or privileged position to one or some limited number of enterprises is very much more difficult to justify on public interest grounds under Article 86. Both the legitimate purpose test and the proportional means test are harder to fulfil in the case of a measure giving a special position to a monopoly or to a strictly limited number of companies.

The rule that Member States must not adopt measures which lead to breaches of Articles 81 or 82 by enterprises

This rule has a series of consequences, according to the case law:

- National authorities may not order a company to infringe Article 81 or 82.

- National authorities may not encourage, reinforce, or contribute to a violation of Article 81 or 82. This rule prohibits measures allowing companies to agree

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6 See the cases listed in f.n. 3 above. In Case C-198/01, *Fiammiferi*, Sept. 9, 2003 para. 51, the Court confirmed that Member States' obligations are distinct from the obligations of enterprises under Articles 81 and 82.

7 Case C-18/88 *GB-Inno* 1991 ECR I 5941.

minimum prices for automatic "rubber-stamp" approval by public authorities. It prohibits measures requiring companies to join a restrictive agreement, or making the terms of such an agreement binding on non-parties. There is also a duty not to approve any practice which is contrary to Community competition law, and therefore not to extend the effects of any practice contrary to Community competition law, or making violations of Community law inevitable.[8]

- A regulatory or price control authority (or any other national authority) may not approve or authorise, even for non-competition objectives and under national law, any price fixing arrangements between companies or any price fixed by an agreement between competitors which is contrary to Article 81,[9] or any price which is contrary to Article 82. National authorities must not promote or encourage price fixing between competitors, and must not authorise competitors to fix prices, even by way of settlement of disputes. Any committees of competitors set up to advise State authorities must be purely advisory.

- A duty not to adopt any measure which leads to a breach of Article 82 by the enterprise in question. Any company in a dominant position acts unlawfully if it abuses its dominant position (unless Article 86(2) applies), whether or not it is a State enterprise or an enterprise having special or exclusive rights, and whether or not the abuse was prompted by a State measure. A Member State cannot authorise an abuse of a dominant position, except in the special situations to which Article 86(2) applies. If the abusive conduct is <u>required</u> by national legislation, or if the legislation creates a situation in which there is no possibility of competition, Articles 81 and 82 apparently do not apply,[10] but the measure is a violation of the duties of the State. If a State measure obliges the companies to which it applies to do something which infringes Article 81 or 82, the measure is illegal, but since the companies have no choice, they are acting legally,[11] until the measure is declared unlawful by a national authority or by the Commission.[12]

If a State measure is sufficiently likely to lead to a violation of Article 82, even without requiring it, both the measure and the behaviour are unlawful. Describing when a State measure is so likely to lead to an abuse that the measure itself is contrary to Community law, the Court has made a number of rulings, saying almost the same thing in different words.

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8 Case C-163/96, *Silvano Raso*, [1998] ECR I 533, at p. 579; Case C-258/98, *Carra*, [2000] ECR I 4217.

9 Case 66/86, *Ahmed Saeed*, April 11, 1989, [1989] ECR 803; Case 209/84, *Asjes*, April 30, 1986, [1986] ECR 1425; Case C-18/93, *Corsica Ferries* [1994] ECR I 1783.

10 Case T-228/97 *Irish Sugar*, [1999], ECR II 2969 para. 130.

11 Case C-379/97, *Ladbroke Racing* 1997 ECR I 6265 paras. 20, 33; Case T-513/93, *Consilio Nazionale* [2000] ECR II 1807 para. 58.

12 Case C-198/01, *Fiammiferi*, September 9, 2003.

A Member State must not give exclusive rights which are "liable to create a situation in which that undertaking is led to infringe" Article 82.[13] A State must not adopt or maintain a measure which creates a situation in which a dominant enterprise "cannot avoid infringing" Article 82[14] or a situation in which the enterprise is "induced to commit" an infringement of Article 86.[15] A State may not create "a situation in which the provision of a service is limited", contrary to Article 82, if the statutory monopolist is obviously unable to satisfy the demand for these services.[16] A State may not require an enterprise to infringe Community competition law as a condition of obtaining an official licence or concession.[17] A State which "facilitates" an abuse will normally be acting contrary to the Articles on free movement of goods[18] or to the Articles on freedom to supply services, or both. Most recently, and strikingly, the Court said that EU competition rules would be "less effective" if a national competition authority could not declare a national measure to be contrary to Article 10.[19]

A dominant company may not be authorised to regulate its competitors.[20] That would involve a conflict of interest. This means, among other things, that a dominant company may

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[13] Case C-260/89 *ERT* [1991] ECR I-2925, para. 38; Case C-462/99, *Connect Austria v. Telekom-Control-Kommission*, May 22 2003, para. 80.

[14] Case C-41/90 *Höfner* [1991] ECR 1979, at para. 27; case C-55/96 *Job Centre* [1997] ECR I-7119, at paras. 29, 31, 35, 38; Case C-179/90 *Port of Genoa* [1991] ECR I-5889, para. 17; Case C-323/93 *Crespelle* [1994] ECR I-5077, at p. 5104. In Case C-387/93 *Banchero* [1995] ECR I-4663, at p. 4699, the Court also referred to violation by the State if "in merely exercising the exclusive right granted to it, the undertaking in question cannot avoid abusing its dominant position". In Case C-163/96 *Raso* [1998] ECR I-533, at p. 579-80, the Court pointed out that if one company had an exclusive right to provide temporary workers to its competitors, it has a conflict of interest, because merely exercising its monopoly will enable it to distort conditions of competition in its favour. It is therefore "led to abuse" its monopoly. The exclusive right is therefore unlawful even if no specific case of abuse is found. See however Case C-203/*96 Dusseldorp* [1998] ECR I-4075, paras. 61, 63 ("enables an undertaking on which it has conferred exclusive rights to abuse its dominant position") and Advocate General Jacobs at p. 4106, and Case C-340/99, *TNT Traco v. Poste Italiane*, May 17 2001, paras. 44-48 and 54-58.

[15] Case C-170/90 *Port of Genoa* [1991] ECR I-5889, at p. 5928, citing Case C-260/89 *ERT* [1991] 2925, para. 37, both use the concept of "inducing" an abuse: see also Advocate General La Pergola in cases C-147/97 and C-148/97 *Deutsche Post v. GZA* and *Citibank Kartenservice*, [2000] ECR I 825, at para. 18.

[16] Case C-55/96 *Job Centre* [1997] ECR I-7119, at para. 31-36 (this refers to Article 82(b) which prohibits actions limiting production of the competitors of the dominant enterprise).

[17] Case 30/87 *Bodson v. Pompes Funèbres* [1988] ECR 2479, paras. 34, 35.

[18] Case 13/77 *GB-Inno v. Atab* [1977] ECR 2115, para. 35; Case C-170/90 *Port of Genoa* [1991] ECR I-5889, at p. 5929.

[19] Case C-198/01, *Fiammiferi*, Sept. 9, 2003, para. 50; Case 103/88 *Fratelli Costanzo*, [1989] ECR 1839 para. 31.

[20] Case 267/86, *van Eycke v. Aspa*, 1988 ECR at 4769; Case C-202/88 *France v. Commission (telecommunications equipment)* [1991], ECR I-1223, at para. 51; Case C-18/88, *RTT v. GB-*

never be the ultimate judge of the lawfulness of its own or its competitors' behaviour. An official regulator may not delegate its powers to companies which have a conflict of interest. Advocate General Fennelly in *Silvano Raso*[21] distinguished between the situation in which a State measure compels or encourages the dominant enterprise to commit an abuse and the situation in which the measure merely enables the enterprise to commit an abuse, but does not directly compel or encourage it. The Court in *Silvano Raso*[22] confirmed his view that it is unlawful encouragement of an abuse, if the dominant company has a conflict of interest as a result of the State measure. Merely exercising its powers in the *Raso* case would have enabled the dominant company to distort conditions of competition in its own favour, by charging its competitors too much or supplying them with a less satisfactory service than it gave itself. So if the State measure creates a situation in which the enterprise has both a power and an incentive to do something which would be contrary to Article 82, the measure is contrary to EU law: it is the probable consequence of the measure that a violation of Article 82 will be committed. Enterprises can be expected to act in their own interests. There is no need to prove that any particular example of abuse has occurred.

When a measure which strengthens or extends an already existing dominant position is unlawful,[23] there is no need to show that it is likely to lead to an abuse. The test of likelihood of abuse is needed only where the measure does not extend dominance, and therefore the only objection to the State measure is that it is likely to lead to behaviour contrary to Article 82. Some of the State measures in the case law of the Court, because they granted special or exclusive rights, could have been challenged on the grounds that they created a dominant position or constituted an unjustified restriction on freedom of establishment or freedom to provide services. The latter argument accepted by the Court in *VTM*, the Flemish advertising case.[24] If a measure is unlawful because an exclusive or special right unjustifiably creates a dominant position or restricts freedoms protected by Community law, this might be the real objection to it, rather than the criticism, even if it was justified, that it led to infringements of Article 82.

Logically, the first question therefore is whether a State measure creating exclusive or special rights is legitimate. The second question is whether it is unjustifiably extending or strengthening existing dominance. It has been realised only slowly that measures granting exclusive rights, and measures extending or strengthening dominance, can be challenged. Companies often have more interest in attacking behaviour than in attacking a measure conferring dominance. But national courts are required to raise questions of Community law,

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Inno 1991 ECR I 5941; Case C-48/90 *Netherlands v. Commission* [1992] ECR I-565, at p. 616, Advocate General Van Gerven; Case C-163/96 *Silvano Raso* [1998] ECR I-533.

21 Case C-163/96, *Silvano Raso* [1998] ECR I 533.

22 At p. 579. See also Advocate General La Pergola, in joined cases C-147/97 and C-148/97 *GZS Gesellschaft* and *Citicorp Kartenservice* at para. 21: the Court came to a different result, but on the grounds that there had been no unlawful conduct [2000] ECR I 825.

23 See Case C-18/88 *GB-Inno-BM* 1991 ECR I 5941, discussed below.

24 Case T-266/97 *Vlaamse Televisie* [1999] ECR II 2329.

if they arise on the facts before them, on their own initiative.[25] Article 82(b) prohibits a dominant enterprise from limiting the production of its competitors, as well as its own production,[26] so that Article 82(b) prohibits all forms of foreclosure by the dominant company, and therefore also indirectly prohibits State measures foreclosing competition unless they are specifically justified under Article 86.

So a State measure can be contrary to EU law:

- Where the measure unjustifiably extends an existing dominant position.
- Where the measure directly orders or encourages the unlawful conduct.
- Where the measure creates a dominant position for the supply of a specified service, and the dominant enterprise is unable to meet the demand, so that the monopoly cannot be justified. This is the *Höfn er* rule.
- Where the measure creates a situation of conflict of interest (the *Silvano Raso* rule). This arises if the dominant enterprise has both regulatory and economic activities, or where it has two commercial activities, and it is likely to discriminate in one of its activities in favour of its operations in the other. But the rule that the enterprise should not be allowed to have regulatory powers over its competitors does not prevent the enterprise being consulted, if the regulatory powers are exercised by another body. The rule also means that the enterprise should not be given a monopoly in the supply of an input needed by its own and its competitors' downstream operations.

The rule that a Member State must not create or strengthen a dominant position without sufficient justification

Apparently there are two principles:

- A Member State may not adopt a measure which unjustifiably extends an existing dominant position without sufficient justification. A measure which extends an existing dominant position is likely to be discriminatory, and can probably be justified only under Article 86(2).
- A Member State may not adopt a measure which restricts freedom of establishment or freedom to provide services and thereby creates a dominant

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[25] Case C-312/93 *Peterbroeck* [1995] ECR I-4599; joined cases C-340/93 and C-431/93 *von Schijndel* [1995] ECR I-4705; Case C-72/95 *Kraaijveld* [1996] ECR I-5403, paras. 54-62.

[26] Joined cases 40-48/73 and others *Suiker Unie* [1975] ECR 1663, paras. 399, 482-83, and in particular 523-527; Case 41/83 *Italy v. Commission (British Telecommunications)* [1985] ECR 873; Case 311/84 *Télémarketing CBEM* [1985] ECR 3261, para 26; Case 53/87 *CICR and Maxicar v. Renault* [1988] ECR 6039; Case 238/87 *Volvo v. Veng*, [1988] ECR 6211; Joined Cases C-241/91P *RTE and ITP ("Magill")* [1995] ECR-I-743 at para. 54; C-41/90 *Höfner and Elsner* [1991] ECR I-1979 at pp. 2017-2018, in particular para. 30; C-55/96 *Job Centre* [1997] ECR I-7119 at pp. 7149-7150, paras. 31-36; Case C-258/98 *Carra*, [2000] ECR I 4217.

position without a sufficient justification. A measure which creates a dominant position is inherently discriminatory (because it gives one enterprise a privileged position), and can probably be justified only under Article 86(2).

There is no reason why these two principles should be regarded as separate. Nor is it clear whether the first of these two principles is based on Article 82 combined with Article 86 (on the basis that if the dominant enterprise itself extended its dominant position, it would infringe Article 82), or on Article 86 combined with the rules on freedom of establishment and services. In most cases these distinctions have no practical significance, but in theory they might affect the analysis and the justification. There is no economic reason for distinguishing between an extension of a dominant position in another market and creating a new separate dominant position.

The first principle was stated by the Court of Justice in *GB-Inno*, in which the court said that a Member State:

> "must not by laws, regulations or administrative measures put public undertakings and undertakings to which they grant special or exclusive rights in a position which the said undertakings could not themselves attain by their own conduct without infringing Article 86. Accordingly where the extension of the dominant position of a public undertaking or undertaking to which a State has granted special or exclusive rights results from a State measure, such a measure constitutes an infringement of Article 90 in conjunction with Article 86". [27]

The second principle was stated by the Court of First Instance in *Vlaamse Televisie*, the Flemish advertising case. [28]

The Court in *GB-Inno* specifically rejected the argument that the State measure was unlawful only if the dominant enterprise had committed or would be led by the measure to commit an abuse.

> "It is sufficient to point out in this regard that it is the extension of the monopoly in the establishment and operation of the telephone network to the market in telephone equipment, without any objective justification, which is prohibited as such by Article 86, or by Article 90(1) in conjunction with Article 86 where that extension results from a measure adopted by a State. As competition may not be eliminated in that manner, it may not be distorted either". [29]

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27 Case C-18/88 *GB-Inno BM* [1991] ECR I, at p. 5980, 5981; see also joined cases C-48/90 *Netherlands v. Commission* [1992] ECR I-565, at pp. 619-622, Advocate General Van Gerven; joined cases C-271/90, *Spain v. Commission (telecommunications services)*, 1992 ECR I 5833, para.36; Case C-320/91 *Corbeau* 1993 ECR I 2533; Case T-266/97, *Vlaamse Televisie*, 1999 ECR II 2329.

28 Case T-266/97, *Vlaamse Televisie*, [1999] ECR II 2329.

29 At para. 24.

This judgment shows that a State measure strengthening or extending a dominant position is prohibited even if it does not cause the dominant enterprise itself to do anything which would constitute an abuse. All that is needed for the measure to be illegal (unless Article 86(2) applies) is that it extends or strengthens a dominant position.

The Court has also made statements[30] to the effect that a State measure creating a dominant position is contrary to EC law only if it is likely to lead to a violation of Article 82 by the company concerned. However, these statements have all been made in cases in which the issue was whether the State measure was contrary to EU rules only because it was likely to lead to an abuse of the dominant position. In such cases of course the relevant principle is that the measure is illegal if, but only if, the measure is sufficiently likely to lead to the abuse. The cases in which this is the essential issue are distinct from the (so far) relatively few cases in which the issue was whether the creation or extension of the dominant position was unjustified.

In *Crespelle*,[31] for example, the Court considered whether a State measure was likely to lead to an abuse of a dominant position without considering the question whether there was a justification for the measure creating the dominant position. Implicitly the Court assumed that there was sufficient justification, but it seems odd that the Court did not say why, as the second question should logically precede the first. The answer presumably is simply that in Article 234 cases the Court answers only the questions which have been asked by the national court. One also suspects that the judges have not always agreed that there is no need to prove that an abuse is probable.

In effect, the Court said in *GB-Inno* that a Member State must not, without justification, extend a monopoly. If the dominant enterprise did it, it would be contrary to Article 82; if the State does it, the State measure is contrary to Article 86 because it eliminates or distorts competition, not because it leads to behaviour by the dominant enterprise which is contrary to Article 82 (although of course it may do so). Several comments are appropriate:

- The judgment in *GB-Inno* could be deduced from either or both of the two general principles stated at the beginning of this article. Any exclusive right involves a restriction on freedom of establishment and freedom to supply goods and services.

- The rule is a strict one, because even a dominant enterprise can extend a dominant position and obtain a *de facto* monopoly if it does so only by legitimate competition – essentially by offering better bargains. What the Court is saying is that a dominant position may not be extended by the State except when the State has "objective justification".

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30 In *e.g.* Case C-209/98, *Sydhavnens Sten & Grus* [2000] ECR I 3743, para. 66; Case C-67/96, *Albany* [1999] ECR I 5751 at para. 93; joined cases C-115/97 and others, *Brentjens*, [1999] ECR I 6025 at para. 93.

31 C-323/93, 1994 ECR I 5077.

- If a Member State needs a justification to extend a dominant position into a new, second market, it needs a justification to create a dominant position. There is no rational basis for stricter rules on extending dominant positions than for creating them.[32]

- The *GB-Inno* case shows that the rule prohibits distortions of competition, resulting from giving a dominant company power to regulate its competitors, as well as prohibiting measures eliminating competition.

- The judgment makes sense. It would be odd and irrational if the Member States, without special justification, could bring about by a State measure a situation which the dominant enterprise itself would not be allowed to create.

- *GB-Inno* is consistent with the principle that national measures hindering the exercise of fundamental freedoms guaranteed by the Treaty must be justified by important requirements in the general interest, and must be proportionate, and non-discriminatory,[33] and suggests that it is a principle which applies to freedom of competition as well as to free movement of goods, persons, services and freedom of establishment.[34]

- The judgment means that the Member States are obliged to respect the underlying aim of the Treaty provisions, to maintain a competitive market. They are, in other words, obliged to avoid interfering with the Community objective of competition stated in Article 3.[35] This obligation, in so far as State enterprises are concerned, now results from Article 86 (2). This can also be deduced from the duty not to deprive the Community competition rules of their effectiveness.[36]

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32 "Provisions extending the scope of an exclusive right are not by their nature different from provisions establishing an exclusive right. They both eliminate, in a given sector, the possibility of the free exercise of economic activity and hence of competition. They may therefore be examined in the light of Articles 90 and 86. And in both cases what is essential to check is whether or not the provisions in question are objectively justified" (emphasis in original): Advocate General Tesauro, Case C-320/91 *Corbeau* 1993 ECR I 2533 at p. 2555: see also p. 2556, and Advocate General Jacobs, Case C-271/90 *Spain v Commission (Telecommunications Terminals)*, 1992 ECR I 5833 at p.5855.

33 See the cases cited in footnote 4, above.

34 Case C-323/93, *Crespelle* 1994 ECR I 5077; Case C-320/91, *Corbeau* 1993 ECR I 2533; Case T-266/97, *Vlaamse Televisie* 1999 ECR II 2329.

35 In Case C-202/88 *France v Commission (Telecommunications terminals)* 1991 ECR I 1223 (a judgment given nine months before *RTT v GB -Inno-BM*), the Court said "… Articles 2 and 3 of the Treaty set out to establish a market characterized by the free movement of goods where the terms of competition are not distorted… Article 30 *et seq*. must therefore be interpreted in the light of that principle, which means that the competition aspect of Article 3 (f) of the Treaty has to be taken into account" (para. 41).

36 See footnote 3, above.

The competition rules are intended to protect competition, so Member States should not, without sufficient reason, restrict competition in a way which a dominant enterprise would not be allowed to bring about, whatever the legal nature of the means by which they restrict it.

- In respect of enterprises which are not State-owned or privileged, Member States have the same obligation, but it results from Article 10 (ex 5). Article 86 (1) is merely a specific example of the general principle set out in Article 10.[37] If there is a duty not to extend or create a new dominant position in a market in which one does not already exist, there is no reason why that duty should be confined to situations in which there is a State owned company. The principles referred to in Article 86 (1) apply equally to enterprises without State ownership or special privileges.

- The Court has confirmed the *GB-Inno* judgment, without elaborating or explaining it, in *Dusseldorp*,[38] *Glöckner*,[39] and *Connect Austria*,[40] and it is consistent with *Telecommunication Terminals*.[41]

The Advocate General in *Sydhavnens Sten & Grus*[42] called attention to the two approaches which can be seen in the case law of the Court: the view that "*the mere finding that exclusive rights were conferred automatically made it possible to establish the existence of abuse*" within the meaning of Article 82, and the view that EU law is infringed only if the enterprise "*merely by exercising the exclusive rights granted to it, is led to abuse its dominant position*". These two approaches both refer to "abuse", and they have not yet been fully and clearly reconciled, but clearly an exclusive right which is said to be in the public interest cannot be justified if it leads to a breach of Article 82 or if the privileged enterprise is unable to satisfy the demand which it was intended to meet.[43]

On the duties of Member States to make Community law work effectively in the way it was intended to work: see Temple Lang, The duties of cooperation of national authorities and courts and the Community Institutions under Article 10 EC Treaty, in Sundström (ed.), FIDE Congress (Helsinki, 2000).

[37] Case 13/77, *INNO v. ATAB*, 1977 ECR 2115 at paras. 30-31; Case C-323/93 *Centre d'insémination de la Crespelle*, 1994 ECR I 5077 para. 15.

[38] Case C-203/96, *Dusseldorp* [1998] ECR I-4075 para. 61.

[39] Case C-475/99, *Ambulanz Glöckner*, [2001] ECR I 8089.

[40] Case C-462/99, *Connect Austria v. Telekom-Control-Kommission*, judgment dated May 22 2003, paras. 81-82.

[41] Case C-202/88 *France v. Commission*, [1991] ECR I 1223; see also Case C-209/98, *Sydhavnens Sten & Grus*, [2000] ECR I 3743.

[42] Case C-209/98, [2000] ECR I 3743 at pp. 3763-3766.

[43] Case C-258/98, *Carra* [2000] ECR I 4217.

Granting of an exclusive licence, or of one of a very limited number of licences, is only one of the ways in which a Member State may create or strengthen a dominant position. The Treaty would apply similarly to any other measure with the same economic effects *e.g.*, a government instruction that civil servants should travel only on the State owned airline[44] or that public property should be insured only with the State owned insurance company.[45]

In *Vlaamse Televisie*[46] the Court of First Instance said that a State measure was illegal because it established a monopoly contrary to the rules on freedom of establishment and services, although it was not alleged to lead to an abuse of a dominant position, or to involve extension of an existing dominant position. This case is therefore clearly an example of the principle about restriction of freedoms, and not an example of the rule on Article 82. However, the *Vlaamse Televise* principle would also prohibit a State measure extending a dominant position without justification. This would be a more natural approach than the rather artificial argument in *GB-Inno*, that the State measure extending the dominant position was illegal because the dominant company could not have extended its position in the same way.

In *Connect Austria*[47] the Court held that a State measure is illegal if it causes a new entrant into a market to pay the State for a licence when a dominant State-owned enterprise gets the same rights without payment, as this reinforces the dominant position. The Court said that the discriminatory State measure was contrary to Article 82, together with Article 86, because it did not guarantee "equality of chances".

To summarise, there are several categories of State measures:

- Measures which restrict freedom of establishment or services on a non-discriminatory basis, without creating any privileged position, on the basis of "imperative requirements in the general interest", which are relatively easy to justify.
- Measures which are likely to lead to a dominant enterprise committing an abuse contrary to Article 82.
- Measures which restrict freedom of establishment or services on a discriminatory basis, creating a monopoly or a privileged position, without a justification under Article 86(2). In addition, measures which without justification extend an

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44 See Temple Lang, Community anti-trust law and government measures relating to public and privileged enterprises: Article 90 EEC Treaty, in Hawk (ed.), 1984 Fordham Corporate Law Institute (1985) 543 – 581, at 556 – 560.

45 See Commission decision on Greek Insurance law, OJ N° L. 152/25, 1985.

46 Cast T-266/97, *Vlaamse Televisie v. Commission*, [1999] ECR II 2329.

47 Case C-462/99, *Connect Austria v. Telekom-Control-Kommission*, judgment dated May 22 2003, paras. 80-87.

existing dominant position are clearly illegal, but the principle involved may not be separate from that concerning creation of dominant positions.

Article 86(2): the kinds of tasks which may be exempted from the Treaty rules

Article 86(2) is a remarkable provision. It says that enterprises entrusted with the operation of services of general economic interest may be relieved from the rules contained in the Treaty, in particular the rules on competition, insofar as the application of these rules would obstruct the performance, in law and in fact, of the particular tasks given to them.

This is such a potentially far-reaching provision that it is natural that it has been interpreted very strictly. An enterprise which has public service obligations imposed on it may be relieved of some of the consequences of Treaty rules, *e.g.*, on State aids, insofar as that is necessary to enable it to finance its public service obligations and to break even.[48] The Article applies only if the tasks have been entrusted by an act of a public authority, and the tasks must be clearly identified and defined in order to justify any exemption from Treaty rules.

Article 86(2) allows undertakings required to provide services of general economic interest to be relieved from the duties imposed by Community competition law only in so far as the application of competition rules would "obstruct the performance, in law or in fact, of the particular tasks assigned to them". As already mentioned, Article 86 would be clearer if it had been written: "Even in the case of public undertakings ... (and *a fortiori* in the case of all other enterprises), Member States shall not enact or maintain ..." Article 86 creates the exception in Article 86(2), but it does not create any other special substantive rule. That is why the Court has said that it is only an example of the general principle stated in Article 10.[49] A legitimate purpose must be in the general interest, that is, it must not be for the benefit of any private persons or a limited group of persons. Any restriction on competition must be necessary to enable the enterprise to do the job it has been given, or to enable it to do its job on a financially acceptable basis, that is, not incurring substantial losses as a result of being required to carry on some unprofitable activities.

In *Commission v. Spain*[50] (a "golden shares" case) the Court of Justice said that if Article 86(2) is said to apply "the Member State must set out in detail the reasons for which, in the event of the elimination of the contested measures, the performance under economically acceptable conditions of the tasks of general economic interest which it has entrusted to an undertaking would in its view be jeopardised."

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[48] Case C-280/00 *Altmark Trans*, judgment dated July 24, 2003.

[49] Case 13/77, *Inno v. Atab,* 1977 ECR 2115 at paras. 30-31. Article 86(3), of course, creates a special procedural rule applicable to public and privileged enterprises.

[50] Case C-463/00, May 13 2003, para. 82; see Case C-157/94, *Commission v. Netherlands*, [1997] ECR I 5699 para. 39.

The tasks recognised as falling under Article 86(2) have included controlling navigation on an important waterway,[51] a universal and continuous mooring service at ports,[52] operating the public telephone network,[53] broadcasting television,[54] operating the national public electricity supply,[55] the basic postal service,[56] supplementary pension schemes,[57] operating an unprofitable air route for reasons of the general interest,[58] and management of environmentally undesirable waste.[59] However, private interests are not providing services of general economic interest for the purposes of Article 86(2) unless some specific tasks have been assigned to them by the State.[60]

The specific purposes and factual situations on which such exclusive rights are justified are considered below.

The justification for monopolies and special rights for services of general economic interest under Article 86(2)

Exclusive rights (*i.e.*, monopolies) and special rights (*i.e.*, rights granted to a strictly limited number of companies) have often been accepted, in most cases without serious

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[51] Case 10/71 *Müller*, [1971] ECR 725.

[52] Case C-266/96 *Corsica Ferries*, [1998] ECR I 3949.

[53] See Case 41/83, (*British Telecommunications)* [1985] ECR 873; Case C-18/88, *GB-Inno-BM*, [1991] ECR I 5941.

[54] Case 155/73, *Sacchi*, [1974] ECR 409, paras. 15-17; *ERT* [1991] ECR I 2925; Case T-69/89 *Radio Telefis Eirann v. Commission* [1991] ECR II-485, [1991] 4 CMLR 586, para. 82. But see *Television advertising in Flanders*, OJ 1997 L-244/18, Case T-266/97 *Vlaamse Televisie Maatschappij v. Commission* [1999] ECR II-2329. The BBC fell within what is now Art. 86(2) *BBC/Valley Printing*, Sixth Report on Competition Policy (1976), point 163.

[55] Case C-393/92, *Almelo*, [1994] ECR I 1477; Case C-157/94 *Commission v. Netherlands* [1997] ECR I 5699; Case C-158/94 *Commission v. Italy*, and Case C-159/94 *Commission v. France* [1997] ECR I 5815. Similarly for water authorities, see Case 96/82, *IAZ* [1983] ECR 3369 and the Commission's decision in *NAVEWA-ANSEAU*, OJ No. L-167/39, 1982.

[56] Case C-320/91 *Corbeau*, [1993] ECR I 2533; Case T-106/95, *FFSA*, [1997] ECR II 229; Cases C-147&148/97 *Deutsche Post* [2000] ECR I-825.

[57] The *Dutch Pension Funds* cases: Case C-67/96 *Albany* [1999] ECR I 5751; Case C-115 to 117/97, *Brentjens*, [1999] ECR I 6025; Case C-219/97, *Drijvende Bokken*, [1999] ECR I 6121.

[58] Case 66/86 *Ahmed Saeed* [1989] ECR 803; Case T-260/94 *Air Inter v. Commission* [1997] ECR II-997.

[59] Case C-209/98, *Sydhavnens Sten & Grus*, [2000] ECR I 3743 para. 75-76; Case C-203/96, *Dusseldorp*, [1998] ECR I 4075, paras. 53-68.

[60] Case 127/73, *BRT v. SABAM* [1974] ECR 313; Case 7/82, *GVL* [1983] ECR 483; Case C-179/90, *Porto di Genova*, [1991] ECR I 5889; Case C-242/95, *GT-Link*, [1997] ECR I 4449; cp. C-266/96, *Corsica Ferries* [1998] ECR I 3949.

analysis, in EU law cases. In most of these cases the justification for the exclusive or special rights was clear and uncontested. However, in a number of other cases the monopoly was challenged, and in some of these it was not justified.

Of these cases, the leading judgment is *Corbeau*,[61] which dealt with a postal monopoly. The justification claimed for the monopoly was that some postal services are inevitably unprofitable, and that therefore a post office with a universal service obligation and postal rates which are the same for everyone must be able to cross-subsidise if it is to break even overall. It therefore needs to be protected against competitors which would "cherry pick" the profitable services and leave it with the unprofitable ones, which would force it to raise postal rates unacceptably. The Court accepted this, but held that the justification did not apply to an express postal service, recently introduced, which was not essential for financial balance. The judgment therefore confirms that any statutory monopoly needs a justification, and that the justification must be looked at carefully to see how far it validly extends. The judgment has little relevance in cases where different kinds of justification are suggested.

The judgment is important because it shows that there must be a precise reason for saying that the restriction on competition is needed to enable the monopoly to carry out its task, or to do so on a break-even basis. It would not be enough to say that a monopoly would enable the enterprise to make more money, and that it would then be better able to invest and improve its services. The monopoly must be a necessary element in its financial stability.

The *Corbeau* judgment is important in any case in which a monopoly is said to be justified to allow an enterprise to break even, in spite of being obliged to provide some services on an unprofitable basis (in other words, where the justification for the monopoly is economic or financial). In this context, it does not seem to make a difference who pays for each service, if the officially authorised payment is a standard one which sometimes does not cover the cost of providing the service.

In *Dusseldorp*[62] the Court said that rules giving an undertaking an exclusive right to process dangerous waste are illegal "if, without any objective justification and without being necessary for the performance of a task in the general interest, those rules have the effect of favouring the national undertaking and increasing its dominant position."

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[61] Case C-320/91, *Corbeau* [1993] ECR I 2533. There are other cases in which a monopoly is needed for simple practical or physical reasons (one cannot have more than one authority controlling traffic, it may not make sense to have more than one national electricity grid). See also Case C-340/99, *TNT Traco v. Poste Italiane*, May 17 2001, paras. 54-58 (contributions paid by competitors to the cost of providing a universal service); Soriano, How proportionate should anti-competitive State measures be? 28 European Law Review (2003) 112-123.

[62] Case C-203/96, [1998] ECR I 4075 para. 68; cp. Case C-159/94 *Commission v. France* [1997] ECR I 5815 para. 49 (exclusive right to import and export electricity, may be justified under Article 86(2).

A more recent case is *Glöckner*,[63] in which the issue was the lawfulness of a measure extending a monopoly for the provision of non-emergency ambulance services over a defined geographical area. The Court confirmed that a medical aid organisation which provides services for payment by users is an enterprise, and that as only a limited number of organisations had been licensed, they held "special" rights under Article 86. The Court, rather surprisingly, said that the national court was asking "essentially" whether the measure created a situation in which medical aid organisations are led to infringe Article 82. Having thus altered the question, the Court repeated that "the mere creation of a dominant position through the grant of special or exclusive rights is not in itself illegal", and went on: "A Member State will be in breach of [Articles 82 and 86] only if the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position, or where such rights are liable to create a situation in which that undertaking is led to commit such abuses". However, the Court then went on to rule that the grant of an exclusive right to provide non-emergency services to companies which already had exclusive rights to provide emergency services (*i.e.*, the extension of a dominant position) limited markets, and is contrary to Article 82(b). The Court decided that this was justified under Article 86(2), because the revenue from non-emergency transport helps to cover the cost of emergency services. Unlike *Corbeau*, in this case emergency and non-emergency services were closely linked, and the non-emergency revenue enabled the services to break even. However, if they had been unable to meet the demand, the monopoly would be unjustifiable (the *Höfner* principle).

It will be seen that:

- The Court was not asked by the national court to consider whether the original monopoly for emergency services was justified.
- The extension of the monopoly by the official measure was contrary to Articles 82 and 86: *GB-Inno-BM* was cited specifically for this statement, as was *Dusseldorp*.
- The statement that an official measure is illegal only if it leads to abuse committed by the dominant enterprise appears inconsistent with the following statement that the extension, though an official measure and not through any act of the dominant company, and without evidence of any abuse being likely, is incompatible with Articles 82 and 86. In both *Glöckner* and *Dusseldorp*, the Court considered that the measure limited production, contrary to these Articles, even without any act of the enterprise. There are two possible explanations. First, the limitation of production could be attributed to the enterprise (on the assumption that it will assert exclusive rights, if it has any, or on the basis that the extension of dominance is not something which the enterprise could lawfully do). Second, more convincingly, the statement that a measure is illegal only if it leads to an abuse by the dominant enterprise is applicable when the only objection to the grant of a monopoly is that it is likely to lead to an abuse, but irrelevant if the

[63] Case C-475/99, *Ambulanz Glöckner* [2001] ECR I 8089.

extension of dominance through a State measure is illegal in itself unless there is justification.

In other words, in *Glöckner* the Court has confirmed the ruling in *GB-Inno-BM* and *Dusseldorp* that an official measure extending a dominant position can be illegal, but without explicitly reconciling that view with the statement about abuse (and without expressly considering how far it is unlawful to create a dominant position, as distinct from extending one).[64]

The Court has not had to consider the situation in which changing circumstances in the sector in question would make it no longer necessary to protect an enterprise with public service obligations, or subject to price control, from competition. However, exclusive or special rights, if they are legal, must be justifiable at all times. Also, it might become justifiable to confer exclusive rights, *e.g.* if the area of an ambulance service was enlarged and due to universal service obligations it was not allowed to charge more for services carried out over longer distances.

In *Sydhavnens Sten & Grus*[65] the Court accepted the argument that an exclusive right was necessary to make a high-capacity waste management plant profitable – in effect, to ensure the maximum obtainable economies of scale. The exclusive right was "limited in time to the period over which the investments could foreseeably be written off and in space to the land within the boundaries" of Copenhagen. In other words, an exclusive right which is not needed for physical or practical purposes is justified to avoid net losses (otherwise the service would not be provided), but is not justified merely to increase profits.

Services of general economic interest

Some steps have been taken to define the range of services which Member States may declare to be of general economic interest, and so capable of being exempted from Treaty rules.[66] Whether to designate any particular service is a matter for each Member State.

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64 When a judgment contains two apparently inconsistent statements without reconciling them explicitly, it is sometimes a sign of an unresolved disagreement within the Court: see the opinion of the Advocate General in Case C-209/98 *Sydhavnens Sten & Grus*, [2000] ECR I 3743 at pp. 3763-66.

65 Case C-209/98, *Sydhavnens Sten & Grus*, [2000] ECR I 3743 at paras. 77-81; cp. joined cases C-147/97 and C-148/97 *Deutsche Post* [2000] ECR I 825 at paras. 49-54 (the right of a statutory postal monopoly to charge for delivering incoming international mail, in order to operate under "economically acceptable conditions"); joined cases C-115/97 and others, *Brentjens*, [1999] ECR I 6025, para. 107; Case C-157/99, *Geraets-Smits and Peerbooms*, 12 July 2001.

66 The Commission has adopted two Communications on services of general economic interest: OJ No. C-281/3, Sept. 26 1996 and OJ No. C-17/4, January 19, 2001; see also the Report to the Laeken European Council, Services of General Interest, COM (2001) 598 final, Oct. 17 2001; Green Paper on services of general economic interest, COM (2003) 270 final.

Article 16 EC says that "services of general economic interest" should operate on the basis of principles and conditions which enable them to fulfil their missions. This seems to add nothing to Article 86(2). EU law governs the procedures for selecting enterprises to be made responsible for these services, as well as the privileges which may be conferred on them to ensure that they break even or can make a limited profit.

Consultative bodies

The case law distinguishes between companies being represented on consultative bodies, which is legal as long as official powers are exercised by an official authority, and situations in which a dominant enterprise or a group of companies are themselves allowed to take the operative decisions or to exercise official regulatory powers, which is illegal.[67] It is lawful for prices to be proposed by committees including representatives of enterprises, provided that the legislation granting the power to propose prices requires the public interest to be taken into account (so that judicial review would be possible on this ground) and provided that the public authority has power to alter or override the committee's proposal.[68]

The right to join together to lobby for regulatory measures

EU law recognises, implicitly and rather imprecisely, the right of enterprises to join together to request legislative or other governmental policy changes.[69] This right exists even

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[67] See *e.g.*, Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I 2883; Case C-140/94 *DIP v. Comune di Bassano* [1995] ECR I 3257; Case C-70/95 *Sodemare v. Regione Lombardia* [1997] ECR I 3395 (social welfare health care services: a Member State may decide to allow only non-profit-making operators to provide social welfare, under contracts refunding their expenses to them); Case C-38/97, *Librandi* [1998] ECR I 5955; Case C-266/96, *Corsica Ferries* [1998] ECR I 3949; Case C-35/96, *Commission v. Italy* [1998] ECR I 3851 (legislation allowing a price set by a national committee of customs agents, to be charged by all customs agents, is illegal: the national legislation "wholly relinquished to private economic operators the powers of the public authorities as regards the setting of tariffs"; Case T-513/93, *CNSD v. Commission*, [2000] ECR II 1807.

[68] Cp Case C-38/97, *Librandi* [1998] ECR I 5955 para. 29 and Case C-35/96, *Commission v. Italy*, [1998] ECR I 3851.

[69] Temple Lang, EEC competition action in Member States' courts – claims for damages, declarations and injunctions for breach of Community antitrust law, in Hawk (ed.), 1983 Fordham Corporate Law Institute (1984) 219-304, at pp. 260-262; Temple Lang, Trade associations and self-regulation under EEC antitrust law, in Hawk (ed.), 1984 Fordham Corporate Law Institute (1985) 605-671 at pp. 649-650; Temple Lang, Reconciling European Community antitrust and antidumping, transport and trade safeguard policies – practical problems, in Hawk (ed.), 1988 Fordham Corporate Law Institute (1989) ch. 7; Vossestein, Corporate efforts to influence public authorities, and the EC rules on competition, 37 Common Market Law Review 1383-1402 (2000); Cases C-395/96P and others, *Compagnie Maritime Belge* [2000] ECR I 1365 at paras. 82-83.

In joined Cases C-180/98 to C-184/98, *Pavlov*, [2000] ECR I 6451 at paras. 98-99, the Court said that it was not contrary to Article 81 for an organisation representing members of a profession to request public authorities to make membership of an occupational pension

if the changes desired would restrict competition in a way which it would be illegal for the enterprises themselves to attempt. Legally, this principle allows companies to ask for legislation to restrict competition, but does not allow them to behave as if the legislation had already been enacted. It is this principle which allows, among other things, trade associations to make antidumping complaints, the aim and effect of which is to raise prices. A broadly similar principle in US antitrust law, Noerr-Pennington immunity, has been the subject of substantial case law, and much criticism. Nevertheless, some such principle is necessary in a democracy.

In EU law, the principle is in substance that it is lawful for competitors to join together solely for the purpose of urging or influencing official action. However, the principle would probably not apply if the State action requested would itself infringe EU law. In any case, a campaign to propose a measure could not legitimise anticompetitive behaviour by the lobbyists, and if there is no anticompetitive behaviour, no defence is needed. Certainly it would not apply if the campaign was merely a disguise for a concerted exchange of price information or other conduct influencing competitors' behaviour directly.[70] Probably it would not make lawful any discussion of a specific price level to be recommended for official adoption, and it would certainly be illegal to exchange price information which was not strictly necessary to reach agreement on the submission to the authorities. On the other hand, the principle should <u>not</u> be limited to situations in which the governmental authorities have set up consultation mechanisms or have taken the initiative in some other way. There are special rules applicable to the development of officially recognised standards.[71] The principle applies to both lobbying for Member State action and lobbying for action by the EU institutions.

The right to associate in order to lobby for official action is protected by Article 10 of the European Convention on Human Rights (freedom of expression) and Article 11 (freedom of association), but these Articles do not significantly clarify the scope of the exemption from EU competition law.

It is important to note that under EU law a national competition or regulatory authority is bound by the same rules of EU law as any other national authority, and so a regulatory authority has no power to approve or authorise a breach of EU competition law, except to the

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scheme which it had set up compulsory, because similar regimes are designed to promote the creation of secondary pensions, and include safeguards. Clearly this is not a blank cheque. See also Case C-67/96, *Albany International* [1999] ECR I 5751, paras. 52-70 (agreement not contrary to Article 81, so it cannot be unlawful to ask for it to be made compulsory), and Advocate General Jacobs at paras. 291-293.

[70] Case 82/77, *Van Tiggele* [1978] ECR 25, Advocate General Capotorti at p. 48.

[71] Temple Lang, European Community antitrust law: innovation markets and high technology industries, Hawk (ed.), 1996 Fordham Corporate Law Institute (1997) 519-599, at pp. 567-570; Dolmans, Standards for Standards, 26 Fordham International Law Journal (2003) 163-208.

extent permitted by Article 86(2).[72] This means that a national authority cannot legitimise a breach of Article 81 by inviting enterprises e.g. to agree on a price to be charged for a given service. Companies and individuals need to be careful when offering advice to public authorities even when they have been asked to do so.

After liberalisation, regulation may still be needed

Until the market is fully competitive, regulation may still be needed to correct or avoid the effects of market imperfections, and of course it may be needed on a permanent basis. Regulation may be needed to determine how much may be charged for services, or to specify what services will be paid for out of public funds. Regulation may be needed to prevent *e.g.* cross-subsidies within a newly privatised entity, to prevent it from competing unfairly against privately owned competitors.

Regulation may also be useful to make clear obligations which would in any case arise under competition law. For example, an enterprise operating partly in a competitive market and partly in a market in which it was dominant may be tempted to "tie" its services, by providing the services for which it is dominant only on condition that the buyer also takes the services for which it is exposed to competition. That can, depending on the circumstances, be contrary to Article 82, but it might also be useful to prohibit it explicitly by regulatory measures, or to say in what circumstances it might be permissible.

Regulation may limit the freedom of the regulated enterprises to compete. Competition authorities may rely on regulatory authorities to enforce obligations, such as duties not to discriminate, which might otherwise have to be imposed and enforced under competition law. Price control, if it is necessary, should be done under regulatory powers rather than competition law.

A company has a right under EU law to insist that its competitors comply with at least some kinds of regulatory requirements.[73]

Regulatory measures of these kinds must comply with Article 86 or (if no enterprise subject to Article 86 is involved) with Article 10.

Implications for purchasers of shares

Many of these rules have implications for potential purchasers of shares. It may be essential to know whether any protection against competition which a company has been given is valid or is open to challenge under EU law. Lawyers doing "due diligence"

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[72] Case 66/86, *Ahmed Saeed* [1989] ECR 803; Case C-35/96, *Commission v. Italy* [1998] ECR I 3851; Case T-513/93, *CNSD v. Commission* [2000] ECR II 1807; Case C-198/01, *Fiammiferi*, September 9, 2003.

[73] Case C-253/00, *Muñoz and Superior Fruiticola* Sept. 17, 2002; cp Case C-453/99, *Crehan v. Courage* [2001] ECR I.

investigations of companies being acquired need to understand clearly the possible consequences of all the rules discussed here.[74] Since there are no formal procedures for getting Commission approval for many kinds of national measures restricting competition (except for technical barriers[75] and State aids), lawyers advising investors need to be able to take the responsibility of assessing the risks. Since the Commission is not the ultimate judge of whether a national measure is permitted under EU law or not, the Commission cannot give a conclusive guarantee that a national measure is lawful: that can be done only by the Court of Justice.[76] At most, the Commission can tie its own hands under the principle of legitimate expectations (similar to estoppel).[77]

Conclusion

The basic EU law principles discussed here may seem complex, but this is because they apply, or may apply, to a wide variety of situations, and because they have never been authoritatively synthesised. They give Member States a good deal of freedom, whether the State chooses a public-sector or a private-sector approach. What the rules mean, in brief, is that whichever approach is chosen, the State must respect the EU law rules applicable to that approach, unless the State has an objective in the general interest which genuinely can be achieved only by exemption from EU rules. If this exception applies, it does not matter whether the company providing the service of general interest is privately or publicly owned. The Court has applied these principles prudently, and it is understandable that neither the Commission nor any Advocate General has so far tried to summarise and synthesise all of the consequences of these principles, since they could hardly all arise in any one case.

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[74] Temple Lang, Precautions programmes, compliance programmes and strategies, 24 European Law Review (1999) 305-316.

[75] Directives 83/189 EEC, 88/182/EEC.

[76] Case C-415/93, *Football Association v. Bosman* [1995] ECR I 4921; Case C-393/98 *Valente* [2001] ECR I 1327.

[77] Temple Lang, Legal certainty and legitimate expectations as general principles of law, in Bernitz & Nergelius, General principles of European Community law (2000) 163-184.