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**ROUNDTABLE ON THE APPLICATION OF ANTITRUST LAW TO STATE-OWNED ENTERPRISES**

**-- European Commission --**

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## 1. Introduction<sup>1</sup>

1. The topic of this roundtable raises the important question of principle regarding the reach of competition law in relation to state-owned companies. To what extent should competition law be applied not only to private but also to state-owned undertakings? More precisely, are there certain aspects of the business of state-owned enterprises that should be exempt from the control of antitrust law? Or should they on the contrary be scrutinised more carefully than private companies?<sup>2</sup>

2. As regards EC competition law, the answer to this question is clear: EC competition law applies just as well to state-owned companies as to private companies.

3. However, not only does EC competition law apply to the behaviour of state-owned companies but it also creates obligations for the Member States themselves. This is linked to the specific legal system of the European Union.

4. The EC Treaty has a different legal status than other international treaties. By creating the European Community, and later on the European Union, the Member States have transferred part of their sovereignty to the Community. In those parts where the Member States have transferred their rule making power, they can no longer unilaterally decide how to regulate a certain issue. In fact, Community law has primacy over national law (this is often referred to as the supremacy of Community law).<sup>3</sup> It gives rights directly to the citizens of the Member States and may, on certain conditions, be directly enforced in front of national courts. In case national legislations conflict with Community law, the national court is under a clear duty to set aside the national law.

5. One of the most important goals of the EC Treaty is the creation of a single European market (i.e. a market without barriers *de facto* working as one integrated market). A key pillar for achieving a fully integrated market is an efficient competition policy. With the goal of market integration in mind, Community law prohibits devices such as tariffs, quotas and the like which can impede the attainment of this goal. This type of prohibitions is directly addressed to Member States and their legislative measures.

6. The competition articles of the Treaty are, in contrast to the prohibitions just mentioned, addressed to companies. The duty of the Member States to respect the rules of the EC Treaty together with the concept of supremacy of Community law, however also leads to an obligation for the Member States not to enact any legislative measure which could risk endangering the effectiveness of the Treaty.

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<sup>1</sup> This paper owes to the contribution of Anna Emanuelsen, Directorate-General for Competition of the European Commission.

<sup>2</sup> See for example Sappington and Sidak, "Competition law for state-owned enterprises", 71 Antitrust Law Journal, No. 2(2003). Their conclusions however would seem to be of more relevance to purely state-owned companies than to undertakings which are controlled by the state but also traded on the stock exchange (or partly owned by other private investors), i.e. partly privatized.

<sup>3</sup> See e.g. Case 26/62, NV. Algemene Transporten Expeditie Onderneming van Gend en Looos v. Nederlandse Administratie der Belastingen [1963], ECR I, at para. 164: "The objective of the EEC Treaty, which is to establish a Common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states... It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights... The conclusions to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."

According to the case-law of the European Court of Justice, a Member State may not adopt or maintain in force any measure which would deprive the competition rules, i.e. Articles 81 (prohibition of anti-competitive agreements) and 82 (prohibition of abuse of a dominant position), of its effectiveness or prejudice its full and uniform application. A state can be in breach of this obligation either when it requires or encourages companies to conclude cartels which are in violation of Article 81, or when it divests its national provisions of their public nature by, in effect, delegating to the firms the responsibility for taking decisions about the boundaries of competition.<sup>4</sup>

7. When it comes to state-owned companies (public undertakings in the words of the Treaty) or companies to which the state has given exclusive or special rights, the obligation for states not to adopt legislative measures which deprives the competition rules of their effectiveness is even specifically provided for in the Treaty.<sup>5</sup> Article 86 of the EC Treaty reminds the Member States that the competition rules apply also to state-owned companies (and companies given special or exclusive rights) and that national laws depriving the competition rules of their effectiveness would be in violation of the Treaty.

8. The application of competition law to the traditionally state-owned undertakings (in sectors such as post, telecoms, electricity etc) however also lead to a certain tension due to the specific public interest of the services which are performed by such companies. The interest of providing a certain public service, for example affordable and nation-wide postal services, could sometimes conflict with a full application of competition law. This is why EC competition law provides for a narrow exception to the application of competition law, when competition law enforcement would make it impossible to provide the public service (in the context of EC law referred to as a "service of general economic interest"). This exception is applicable both to state-owned companies and companies to which a Member States give exclusive or special rights.

9. The remainder of this paper briefly analyses the application of EC competition law to state-owned enterprises (and so called privileged undertakings, i.e. undertakings having been given special rights by the state to provide a certain service). Even if the topic of the roundtable is defined as the application of competition law to state-owned enterprises, the application of EC competition law to pure state measures will also be touched upon since in practice cases concerning the behaviour of state-owned companies often deal with the issue of whether it is the state or the company, or both, that are responsible for a certain potential infringement. The paper is however limited to the (*ex post*) application of competition law and excludes (*ex ante*) regulation of this type of companies, even though in practice this is also an important competition tool for remedying competition failures in these type of markets.<sup>6</sup>

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<sup>4</sup> The state may be liable for an infringement of the Treaty by way of Articles 3(g), 10 and 82. According to the case-law of the Court of Justice those state measures that impose or induce anti-competitive behaviour by undertakings, reinforce the effects of anti-competitive behaviour or delegate regulatory powers to private operators can be considered as violating these provisions, see cases C-2/91 (Meng) [1993] ECR I-05751, C-245/91 (Ohra) [1993], ECR I-05851, and C-185/91 (Reiff) [1993] ECR I-05801. In essence this jurisprudence is the means whereby the ECJ has extended the type of obligation imposed on a state by Article 86 to situations where the undertakings are neither public nor enjoy any specially privileged situation.

<sup>5</sup> Where the state intervenes not to support an existing agreement which is in itself illegal under Article 81 but through an independent measure which undertakings must follow, Article 28, i.e. the free movement of goods, would be the most appropriate provision to employ in the case of goods and Article 49 in the case of services.

<sup>6</sup> During the last 30 years many state-owned monopolies in Europe have been wholly or partly privatized. The traditional utilities sectors have been liberalised (i.e. opened up for new entry). Just privatizing a former monopoly however might lead to a private monopoly replacing the former public monopoly. This is

10. The important topic of state-aid in relation to public undertakings is dealt with in a separate paper submitted by the Commission in preparation of this roundtable.

## **2. Is the state or the company responsible?**

11. Both companies and the Member States can be responsible for violations of EC competition law according to the circumstances of the case.

12. When the potentially anticompetitive practice is an autonomous decision of the undertaking the competition rules of the Treaty (articles 81 and 82) apply. If, on the contrary, an undertaking would be forced by legislation (or other types of binding state measures) to behave in a certain way, the undertaking can no longer act autonomously and may invoke the so called "state action defence", to escape responsibility under competition law.<sup>7</sup>

13. Only the state is responsible for state-imposed abuses or anti-competitive agreements. Article 86(1) (see below) in combination with Article 81/82 obliges the Member States to refrain from imposing anti-competitive behaviour on their public or privileged undertakings. The lack of liability of the company in such cases is thus compensated for by the liability of the state.

14. If however the anti-competitive behaviour is only state-induced (as opposed to state imposed), both the state and the undertaking are liable. Article 86(1) in combination with Articles 81/82 not only prohibits the Member States from obliging the public undertaking to behave anti-competitively, it also prohibits them from inducing their state-owned or privileged companies to e.g. abuse their dominant position. Obviously, the mere state inducement does not remove the autonomous character of the actions of the public undertaking and thus the potential liability under EC competition law.<sup>8</sup>

## **3. Rules applicable to companies**

15. As described above the application of EC competition law is, in principle, neutral to the ownership of the company. Whether the company in question is privately or publicly owned (or controlled) is as such irrelevant.

16. In order to fall under the competition rules the company must however qualify as an undertaking under EC competition law. This implies that the entity performs an economic activity but is not dependent on whether the entity is considered a company under company law or whether it is privately or publicly financed.<sup>9</sup> An "economic activity" is defined as "any activity consisting in offering goods and services on a given market".<sup>10</sup> It is not necessary that the activity is intended to earn revenues. For example, part of the activity of a public authority can be an economic activity qualifying the entity as an undertaking under

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why liberalisation in most cases has to be accompanied either by *ex ante* regulation or by *ex post* competition law intervention to open up the market.

<sup>7</sup> See for example Case T-65/99 *Strintzis Lines* [2003] ECR II-5433, paras. 119-122.

<sup>8</sup> It could however be seen as a mitigating factor when it comes to setting the level of the fines, c.f. case T-65/99 *Strintzis Lines* [2003] ECR II-5433, para. 171.

<sup>9</sup> The European Court of Justice defines the concept of an undertaking as "any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed", see f.ex. case C-41-90 *Kraus Höfner and Fritz Elser v. Macrotron GmbH* [1991] ECR I-1979, para 21.

<sup>10</sup> See f.ex. case C-118/85 *Commission v. Italy* [1987] ECR 2599, para 7.

Article 81/82 while other parts of its activity might be the classical tasks performed by an authority (i.e. the exercise of public powers) falling outside the scope of the competition rules.<sup>11</sup>

17. The Commission has on several occasions intervened against state-owned companies abusing their dominant position on the internal market. This section sets out a few examples illustrating the direct application of Article 82 to such companies.<sup>12</sup>

18. As described above state-owned companies are often found in the traditional utilities sectors. It is therefore illustrative that the examples below concern respectively postal services, telecommunications and gas.

19. The *Deutsche Post* case from 2001<sup>13</sup> is widely cited in the background literature as a landmark case for applying anti-trust law to public monopolies. This case is the first time that the Commission applied the test for predatory pricing to a traditional public service such as postal service (and also the first time it applied the test to a network industry which gives rise to particular concerns when calculating the pricing floor for the purpose of predatory pricing).<sup>14</sup>

20. In 1994 UPS lodged a complaint with the Commission alleging that Deutsche Post was using revenues from its profitable letter-mail monopoly to finance a strategy of below-cost selling in business parcel services (a service open to competition). The complainant alleged that it was only with the "cross-subsidies" from the monopoly that Deutsche Post could finance the below-costs prices on parcel services. In its decision the Commission laid down the test for measuring "cross-subsidies" between the monopoly area and competitive activities that result in predatory prices (in the competitive area): any service provided by the beneficiary of a monopoly in open competition has to cover at least the additional or incremental cost incurred in branching out into the competitive sector.<sup>15</sup> In applying this test, the Commission found that Deutsche Post did not cover the costs incremental to providing the mail-order delivery service during five years.<sup>16</sup>

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<sup>11</sup> See f.ex. case C-113/07 P, *SELEX Sistemi Integrati SpA v. Commission*, not yet reported, paras. 69-70 ff.

<sup>12</sup> In practice most cases relating to public undertakings have concerned Article 82, which, which is why this section, and the paper in general, focuses on interventions against abusive behaviour.

<sup>13</sup> Commission Decision 2001/354/EC of 20 March 2001 relating to a proceeding under Article 82 (Case COMP/35.141 – *Deutsche Post AG*), OJ 2001 L 125, p. 27.

<sup>14</sup> The decision also finds that Deutsche Post had abused its dominant position by its fidelity rebates scheme.

<sup>15</sup> The decision distinguished between costs for network capacity and network usage. The costs incurred for providing network capacity to give everyone an option to ship parcels at a uniform rate as part of Deutsche Post's universal service obligation. This forces Deutsche Post to hold capacity in reserve in order to meet demand at peak load. These costs are treated as common fixed costs. The costs for actual usage of the network for offering product X are, on the other hand, long-term variable or "incremental" costs. In this context incremental costs are thus equal to network usage.

<sup>16</sup> Exceptionally Deutsche Post was however not imposed a fine since the economic cost concepts used to identify predation were not considered sufficiently developed at the time the abuse occurred. It was therefore, before this case, difficult for a company to concretely calculate the price floor for predatory pricing. See Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C45, 24.2.2009, footnote 39 which makes a reference to the type of situation dealt with in the *Deutsche Post* case.

21. Two years later, the Commission intervened against *Deutsche Telekom's*<sup>17</sup> pricing behaviour in relation to its customers and potential competitors. The Commission found that Deutsche Telekom, which at the time was a publicly owned company, had abused its dominant position by way of a so called margin squeeze. Deutsche Telekom was charging new entrants higher fees for wholesale access to the local loop than what Deutsche Telekom's own subscribers paid for fixed line subscriptions thereby discouraging new entry.

22. Deutsche Telekom was, at the time of the abuse, legally obliged to provide competitors access to its local loops but in spite of this, there was still only very limited competition (Deutsche Telekom retaining 95 per cent of the relevant retail markets in 2003).<sup>18</sup>

23. The Commission's decision was recently upheld by the Court of First Instance<sup>19</sup>. The Court confirmed that Deutsche Telekom had a sufficient scope to end the margin squeeze, while still complying with the price ceiling imposed by the German regulator. This is an interesting aspect of this case in relation to the topic of this roundtable. Public undertakings, and privatised previously public undertakings in the utilities sectors, are often subject to sectoral regulation. However, in accordance with the principles of state action defence set out below, the company's behaviour will still fall under competition law on condition that it has a sufficient margin of manoeuvre for rectifying an anti-competitive behaviour. The fact that Deutsche Telekom's charges had to be approved by the German regulator did not therefore absolve it from its responsibility under competition law.<sup>20</sup>

24. Both cases above could serve as examples of typical behaviour of a public monopoly trying to prevent entry in order to continue enjoying its privileged position on the market. However, it is also interesting to note that these two types of abuses have just as well been investigated in cases concerning privately owned enterprises. Whether there are more important incentives for a public undertaking to, for example prevent entry by predation or to try to raise rivals costs by margin squeeze than for any private company with the sole goal of profit-maximisation, is an interesting debate. Though, practical experience at Commission level at least shows that such type of behaviour are in the interest of a company with monopoly power (for example those which have taken over the old "natural monopolies") be it a private or public undertaking.

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<sup>17</sup> Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 (Case COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom AG), OJ 2003 L 263, p. 9.

<sup>18</sup> In the Telefónica case (Commission Decision of 04.07.2007 relating to a proceeding under Article 82 (Case COMP/38.784 – Wanadoo España vs. Telefónica)) from July 2007 the Commission recently also found that a telecom incumbent (but this time privatized) tried to pre-empt new entry by a margin squeeze: The Commission forced Telefónica to end its practice of imposing unfair prices in the Spanish broadband market, a very serious abuse of its dominant position, and fined Telefónica over €151 million. In particular, for more than five years, Telefónica imposed unfair prices in the form of a margin squeeze between the wholesale prices it charged to competitors and the retail prices it charged to its own customers. Competitors who bought access to the network at Telefónica's inflated wholesale prices were forced to make losses if they wanted to match Telefónica's retail prices. Telefónica's actions weakened its competitors, making their continued presence and growth difficult.

<sup>19</sup> Judgment of the Court of First Instance of 10 April 2008 not yet reported in case T-271/03, Deutsche Telekom AG v. Commission.

<sup>20</sup> There are many technically interesting aspects of this case that will not be discussed here. It could just be mentioned that the Court found that it was enough to show an insufficient margin between wholesale and retail prices and not to show predatory retail prices. The Court also found that the Commission's was correct in calculating the margin squeeze on a comparison of wholesale access with a weighted average of retail prices for all Deutsche Telekom's access services (analogue, ISDN and ADSL).

25. The Commission is still today very attentive to potential abusive behaviour by public undertakings. For example, the behaviour of the state-owned company *EdF* (the largest supplier of electricity in France) is presently subject to investigation by the Commission. The Commission has preliminarily concluded that contracts concluded by EdF with industrial customers in France may prevent customers from switching (especially when considering the exclusive nature and duration of the contracts as well as the share of the market they relate to) to other providers thereby reducing competition. If confirmed by the on-going investigation such practices could have prevented entry on the French market and constitute a violation of Article 82 of the EC Treaty.<sup>21</sup>

#### 4. Rules applicable to state measures

26. Article 86 of the EC Treaty, clarifies that the competition rules apply also to state-owned undertakings and other "privileged" undertakings. However, Article 86 also clarifies that the state in itself can infringe the rules of the Treaty by enacting state measures depriving the competition rules of their effectiveness.

27. Article 86(1), which is addressed to the Member States, lays down the following broad principle:

*"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 12 and Articles 81 to 90".*

28. Before briefly setting out the conditions for application of Article 86, it should be mentioned that this Article is can only be applied in conjunction with another Article of the Treaty (for example in conjunction with an infringement of the competition rules). Secondly, it is also worth underlining that the Article is not limited to infringements of competition law but that it can also be applied on measures that infringe for example the rules on free movements of goods.

##### 4.1 The conditions for application of Article 86(1)

29. If the conditions set out in Article 86(1) are satisfied, a state measure as such may be held contrary to the EC Treaty.

30. Article 86(1) refers to "*public undertakings*" but do not further define these. This term is a concept of community law and is defined in the Transparency Directive<sup>22</sup> by the Commission as: "*any undertaking over which the public authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it*". Conceptually this is equivalent to the question of control raised in merger proceedings.

31. Article 86 applies both to public undertakings as defined above, but also to private undertakings with *special or exclusive rights*. Examples in the case-law of companies having been granted exclusive

<sup>21</sup> A statement of objections was sent to EdF in December 2008, see press MEMO/08/809 on <http://europa.eu/rapid/pressreleases>. See also MEMO/09/191 about opening of formal proceedings with respect to the behaviour of the public undertaking Svenska Kraftnät, the Swedish electricity Transmission System Operator, for possible abuse of a dominant market position. The Commission believes at this stage that Svenska Kraftnät may be abusing its monopoly position as the Swedish monopoly electricity transmission service provider by limiting export transmission capacity on Swedish interconnectors to neighbouring countries and thereby hindering the proper functioning of the Single Market in electricity.

<sup>22</sup> OJ [1980] L 195/35, as amended most recently by Directive 2006/111/EC OJ [2006] L 318/7.

rights is an entity granted a monopoly over the provision of recruitment services or a dock-work undertaking entrusted with the exclusive right to organise dock work for third parties. Special rights, on the other hand, could be defined as rights that are granted by a Member State to a limited number of undertakings which limits the number of undertakings authorised to provide a certain service (having been designed otherwise than according to objective and non-discriminatory criteria)<sup>23</sup>. The logic with extending the scope also to undertakings having been granted special or exclusive rights is that the same rules should apply regardless of whether a Member State chooses to remain the owner of the undertaking performing the public service or whether it delegates this to a private company.

32. Moreover, the scope of Article 86 is limited to *state measures*. This expression has been given a wide meaning and covers even measures which are not legally binding such as recommendations, provided that it is capable of exerting an influence and of frustrating the aims of the Community.<sup>24</sup>

#### 4.2 *Examples of when a state measure infringes Articles 86(1)*

33. The case-law of the European Courts on state measures infringing Article 86 in conjunction with the competition rules is complex and the list of cases is long. Therefore this section only exemplifies situations in which state measures have been considered contrary to Article 86(1) and Articles 81/82.

- *Discrimination*: state measures leading to discrimination between different economic operators can be contrary to Article 86. For example in *Merci* the European Court of Justice found that the discriminatory treatment of customers can be an abuse for which a Member State could be held responsible under Article 86(1).<sup>25</sup>
- *Conflict of interest/discrimination in favour of own down-stream arm*: In the *ERT* case<sup>26</sup> the European Court of Justice held that there would be an infringement of Article 86(1) where Greece had created a situation in which the broadcaster ERT would be led to infringe Article 82 by virtue of a discriminatory policy in favour of its own broadcasting arm.
- *Reservation of ancillary activity/extension of monopoly*: The extension of a previous monopoly to an ancillary activity on a neighbouring market can also be contrary to Article 86(1) in combination with Article 82. In *RTT v. GB-Inno-BM*<sup>27</sup> the European Court of Justice found that the extension of RTT (the Belgian telecom incumbent) to an ancillary activity on a neighbouring but separate market infringed Article 86(1).

34. These examples illustrates well the type of cases in which EC competition law can intervene against state measure which leads to an abuse under Article 82. However, it should be kept in mind that this list is not exhaustive. In each specific case, the question has to be answered whether a Member State has adopted a measure that infringes or might infringe Article 81/82 for which it bears responsibility under Article 86(1).

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<sup>23</sup> See the Commission's decision in "Second operator of GSM Radiotelephony Services in Italy" OJ [1995] L 280/49, para 6.

<sup>24</sup> Case 249/81 Commission v. Ireland, [1982] ECR 4005 (the "Buy Irish" case), para 28.

<sup>25</sup> Case C-179/90 [1991] ECR I-5880, [1994] 4 CMLR 422.

<sup>26</sup> Case C-260/89 [1991] ECR I-2925, [1994] 4 CMLR 540.

<sup>27</sup> Case C-18/88 [1991] ECR I-5941.

## 5. The exception to the application of competition law

35. Article 86(2) provides for a narrow exception to the rule that competition law is applied to all types of undertakings.

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

36. Article 86(2), which is (contrary to Article 86(1)) addressed to the undertakings themselves, thus specifies the conditions under which the competition rules can be set aside for public or privileged undertakings. Three cumulative conditions have to be satisfied before the exemption becomes applicable:

1. the undertakings in question must have been entrusted with the "operation of a service of general economic interest"<sup>28</sup>;
2. the application of the Treaty would obstruct the performance (in law or in fact) of the tasks assigned to this undertaking and
3. the exemption is anyway not available if the development of trade is affected to an extent contrary to the interests of the Community.

37. The practical effect of Article 86(2) is that undertakings entrusted with the task of performing a public service, or rather a service of general economic interest, can escape the application of Articles 81 and 82 to their behaviour if the application of competition law would prevent them from carrying out the tasks assigned to them by the Member State. Article 86(2) can be invoked, and is indeed often invoked, by companies as a defence in Article 82 proceedings (they are more rarely invoked in Article 81 proceedings even if technically possible).<sup>29</sup> However, the exception can equally be invoked by the Member States in proceedings where it is alleged that state measures are in violation of Articles 86(1) in combination with Articles 81 or 82.

38. A typical case of an activity that could come within the ambit of Article 86 is the provision of postal services. The Member State would normally require the Postal operator to provide a minimum service (for example classical postal services over the whole territory). The Postal operator would then provide this service for the same price all over the country and finance this by making the inhabitants of the densely populated areas subsidise the cost of providing the service in regions which are scarcely populated. Should this be seen as a discrimination amounting to an abuse under Article 82 or should it be seen as a necessary and proportionate measure to justify the dis-application of Article 82 under Article 86(2)?

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<sup>28</sup> Or having the character of a revenue producing monopoly. Since this last case is of little practical importance it will not be further dealt with in this paper. There seems to be a consensus that exclusive rights where the only objective is the generation of revenues would not be justified under Article 86(2), see the articles cited in footnote 215 and 216 of Faull and Nikpay, "The EC law of competition", Second edition, Oxford.

<sup>29</sup> See for example Case C-393/92 Almelo [1994] ECR I-1517, paras 33-50.

39. It follows from condition 1 above that an undertaking can only claim the applicability of the exception if it has been entrusted with the performance of a *service of general economic interest*. This raises the issue of what to include in services of general economic interest. The term "services of general economic interest" is not defined in the Treaty. It covers obviously the conventional utilities such as provision of postal services, telecommunication services, gas, electricity etc. However, the concept has also been applied to provision of services in the transport sector which are not viable on its own<sup>30</sup> or to the treatment of waste material<sup>31</sup>. In practice, the Member States has a wide discretion to define the scope of what they consider to be services of general economic interest.<sup>32</sup>

40. Moreover, the exception will only apply if the restriction is *proportionate*, i.e. necessary for the fulfilment of the service of general economic interest. For example in *British Telecommunications* British Telecom's defence based on Article 86(2) was rejected. On appeal the European Court of Justice held that it had not been shown that British Telecom's refusal to allow private message-forwarding agencies from using its network to forward messages from other Member States endangered the performance of its tasks.<sup>33</sup> In *Corbeau* the European Court of Justice dealt at length with to what extent the postal monopoly in Belgium was justified under Article 86(2).<sup>34</sup> It was found that the Post was indeed entrusted with a service of general economic interest and that it might be necessary for it to benefit from a restriction of competition in order to be able to offset less profitable activities against profitable ones. It could therefore in certain cases be legitimate to prevent a new entrant from "cherry picking" the most profitable services if that could prevent the Postal operator from fulfilling its universal service obligation.

41. An example of a case where the restriction was considered necessary is *Deutsche Post AG v. Gesellschaft für Zahlungssysteme mbH and Citicorp Kartenservice GmbH*.<sup>35</sup> The European Court of Justice considered that Article 86(2) justified the grant by a Member State to its postal operators of a statutory right to charge internal postage on items of so-called remail. The exclusive rights of a pension fund to manage supplementary pensions in a particular sector has also been justified under Article 86(2) with the motivation that otherwise "young people in good health engaged in non-dangerous activities" would leave the scheme (raising the costs for the remaining people).<sup>36</sup>

42. Finally, in order to qualify for an exemption the behaviour may *not negatively affect trade* to such an extent as being contrary to the interest of the Community.

## 6. Case studies of recent cases involving 86 in conjunction with 82

43. The Commission has recently adopted two decisions finding an infringement of a Member State by violation of 86 in conjunction with Article 82 regarding state-owned companies. In both these cases the exemption provided for in 86(2) was not applicable. This section briefly analyses these two cases to exemplify the type of cases that have recently arisen in this field.

<sup>30</sup> Case 66/88 Ahmed Saeed [1989] ECR 803 [1990] 4 CMLR 102, para 55.

<sup>31</sup> Case C-209/98 Entreprenørforeningens Affalds/Miljøsektion v. Københavns Kommune [2000] ECR I-3743, para 75.

<sup>32</sup> See for example case T-106/95 FFSA v. Commission [1997] ECR II-229, para 99.

<sup>33</sup> OJ [1982] L 360/36, [1983] 1 CMLR 457 and case 41/83 Italy v Commission [1985] ECR 873, [1985]2 CMLR 368.

<sup>34</sup> Case C-320/91 [1993] ECR I-2533, [1995] 4 CMLR 621.

<sup>35</sup> Cases C-147/97 et al [2000] ECR I-825; [2000 ] 4 CMLR 838.

<sup>36</sup> Cases C-67/96 etc Alabany International B V v SBT [1999] ECR I-5751, [2000] 4 CMLR 446.

44. In 2008 the European Commission adopted a decision finding that Greece had infringed Article 86 of the EC Treaty in combination with Article 82 by maintaining rights giving the state-owned electricity incumbent "Public Power Corporation" (PPC) quasi-exclusive access to lignite (i.e. brown coal).<sup>37</sup> The state measures created inequality of opportunity between economic operators as regards access to lignite. As a result, despite liberalisation of the electricity wholesale market which started in 2001, PPC continues to enjoy today a virtual monopoly over access to lignite and Greece has protected PPC's dominant position in the electricity market (85 per cent).

45. Lignite is the cheapest and therefore also primary fuel for production of electricity in Greece. The state-measures in question, giving PPC preferential access to lignite, enabled PPC to maintain or reinforce its dominant position on the Greek wholesale electricity market because it had a low-cost advantage on the market. PPC was given a special advantage in access to a cheap fuel input, enabling PPC to compete more effectively in the electricity market distorting competition on that market. Due to the advantages given to PPC it is more difficult for new entrants to enter and compete on the electricity market in Greece. By granting and maintaining the quasi-monopolistic rights of PPC for lignite exploitation (i.e. privileged access to the cheapest source of fuel in Greece), the Greek state had reinforced the dominance of PPC in the wholesale electricity market. Greece did not rely on 86(2) to justify granting the privileged access to lignite to PPC. In this case, the decision was not addressed to PPC but only to the Greek state since the behaviour of PPC in only accepting these privileged rights was not equivalent to an abusive behaviour under Article 82 of the EC Treaty.

46. In August 2009, the Commission accepted commitments by Greece to ensure fair access to Greek lignite deposits.<sup>38</sup>

47. A few months after the adoption of the Greek lignite decision, the Commission decided that certain amendments introduced to Slovakia's postal legislation infringed Article 82 in conjunction with Article 86. The amendment in question extended the monopoly of the incumbent postal operator, Slovenská Pošta, to the delivery of hybrid mail services, which had so far been open to competition. This extension endangered directly the viability of Slovak postal operators which had already entered this market.

48. Hybrid mail is a specific type of mail, in which the content is electronically transferred from the sender to the postal service operator, who prints, envelopes, sorts and delivers the postal items. Hybrid mail is a product that is important to companies who regularly send large amounts of mail, such as invoices (for example insurance companies or banks).

49. In the Slovak Republic, the delivery of hybrid mail was open to competition and several private companies were active in that sector. In February 2008, the Slovak Republic amended its postal laws, reserving the delivery of hybrid mail to Slovenská Pošta. Private operators were thus prevented from sending hybrid mail, and therefore suffered financial losses.

50. This latter case is an example of the rule that the extension of a statutory monopoly into neighboring but competitive markets is incompatible with Articles 82 and 86. It is obvious in this case that a monopoly on the neighbouring market was not necessary for the fulfilment of the universal service

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<sup>37</sup> IP/08/36, March 5, 2008. The Commission's Decision is on the DG COMP webpage with a one pages summary at [2008] OJ C93/3.

<sup>38</sup> See IP/09/1226, 6 August 2009. In particular Greece committed to grant exploitation rights to four lignite deposits through public tenders excluding PPC, to ensure that competitors of PPC in the Greek electricity market get access to lignite. On the basis of these commitments, competitors of PPC will potentially access about 40 % of all exploitable Greek lignite deposits.

obligation, since the market for hybrid mail was previously a competitive market. It was not demonstrated that, without the extension, the achievement of the universal service would be precluded or that it could at least not be carried out under economically accepted conditions. The Commission therefore concluded that neither the Slovak Republic nor Slovenská Pošta had been able to demonstrate that the reservation of hybrid mail services was necessary to finance the universal postal service (c.f. the Corbeau case referred to above). In addition, the Commission found that Articles 86(1) and 82 were also infringed on the ground that the reservation of hybrid mail services to the incumbent limited the services available although there were demand for certain value added services such as track-and-trace services of the mail items (which were offered by Slovenská Pošta's competitors)<sup>39</sup>.

## 7. Conclusion

51. According to Article 295 of the EC Treaty, the Treaty shall in no way prejudice the rules in the Member States governing the system of property ownership. This means that the mere fact that certain activities are operated in the public or in the private sphere could not in itself be contrary to the Treaty. It is therefore the decision of each and every Member State to what extent it remains the owner of the traditionally state-owned industries (such as post, telecommunications, electricity, gas).

52. However, if it was allowed to treat state-owned undertakings more favourably than other enterprises, removing the level playing field that should be the characteristic of free competition, the competitive process and the long-term goal of one European integrated market could be considerably damaged.

53. Therefore, as outlined above, not only is EC competition law applicable to any company performing an economic activity irrespectively of whether the company is state-owned or private, it can also be directly applicable to legislative acts of the Member States. Indeed, the Commission has vigorously applied competition law to state-owned companies as well as to state measures with anti-competitive effects. The examples given above show the importance and priority that the Commission gives to such cases of abusive behaviour.

54. When it comes to the provision of services of general economic interest the right balance between pure competition law concerns and the interest of the Member State ensuring the provision of a specific public service in pursuit of economic and social goals has to be found. This is done by the balancing act of assessing which types of restrictions are necessary and proportionate in order to allow for the company to provide the service.

55. In essence, Articles 86(1) and (2) attempt to find this balance between the sometimes conflicting interests of national policy and EC competition law. As the European Court of Justice expressed it:

*"[P]aragraph 2 of Article 86, read with paragraph (1), seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or social policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common market".<sup>40</sup>*

56. Experience shows that sometimes this right balance can only be found in the careful assessment of the facts of the specific case at hand.

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<sup>39</sup> Referring to case C-41/90 *Höfner and Elser* [1991] ECR p. 1979.

<sup>40</sup> Case C-463/00 *Spain v. Commission* [2003] ECR I-4581, [2003] 2 CMLR 557, para 82.