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Tussen protectie en concurrentie; marktwerking of regulering voor bedrijven met een taak van algemeen belang.

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Summary

This study of how to interpret the various concepts contained in Article 90(1) of the EC Treaty shows that the Court of Justice has clarified the distinction to be made between providers of services of public interest and undertakings. The decisive criterion applied by the Court is that for a body to be regarded as an undertaking it is necessary for it to perform economic activities. However, it has also become clear that it is not always easy to establish whether services of public interest involve such activities. Although the Court has indicated that activities based on the solidarity principle cannot be considered to be economic activities, case law on this point is not yet firmly established. Which factors play a role in the consideration of whether the solidarity principle is present to an extent which precludes the body in question from being deemed to be an undertaking, and the weight attached to each factor is not yet clear. What must be concluded, on the basis of current case law, is that in order to answer, for example, the question of whether organisations involved in implementing social security legislation, hospitals or universities must be deemed to be undertakings within the meaning of Article 90, in conjunction with Articles 85 and 86, the way in which the implementation of the relevant activities is regulated is of decisive importance.

With regard to the interpretation of the term 'special or exclusive rights', the Commission, prompted by the case law of the Court, has provided a definition in Directive 94/46, the substance of which is that special rights exist if the number of undertakings within a specific geographic area is limited to two or more on grounds other than objective, proportionate and non-discriminatory criteria. A holder of a special right will therefore always be faced with at least *one* competitor.

In studying the interpretation of Article 90(2), I looked at the question of to whom and when the exception referred to in that paragraph can be applicable. At first sight, the text of paragraph 2 would seem to indicate that the exception from the prohibition contained in the Treaty rules, in particular the rules on competition, applies only to the actions of undertakings with a public service task. However, it can now be concluded on the basis of the case law, that the Court does not only consider the exception to be applicable to the actions of such undertakings themselves, but also to the measures taken by the Member States, in obliging the undertakings to per-

form certain activities. Furthermore, it has become clear that the Court considers the exception applicable not only to breaches of Articles 85 and 86, and of Article 90(1), in conjunction with Articles 85 and 86, but also to breaches of other articles of the Treaty.

The scope of the exception has long been restricted by both the Commission and the Court. It was only considered applicable where the financial balance or economic viability of a public body would have been threatened by the application of the rules in question and therefore the performance of its task not only made difficult but actually obstructed. However, from recent judgments of the Court in the energy cases C-157 to 160/94, it is clear that it has now adopted a change of course. It is not only the financial balance or viability of the body in question which is decisive. It is sufficient for the undertaking to be unable to perform its special task, as defined by the obligations and the specific restrictions laid upon it. Nevertheless, the Court has not yet handed down a ruling on the question of whether the measures at issue were indeed necessary and proportionate to the performance of that task.

From the judgments handed down by the Court relating to the interpretation of Article 90(3), it can first be concluded that on the basis of this provision the Commission is indeed competent to lay down general rules which define or clarify the obligations laid upon the Member States by the Treaty with regard to the undertakings referred to in Article 90, paragraphs 1 and 2. It has also become clear that although the Commission's competence to do so must be based on the obligations on Member States which already exist by virtue of the provisions of the Treaty, this competence also has constitutional aspects in that the Commission can issue rules on the way in which the Member States must comply with these obligations.

In addition, the Commission may address itself to an individual Member State by means of a decision. This competence embraces the power to establish that a specific government measure is incompatible with the treaty rules and the power to indicate which measures the Member State concerned has to take in order to comply with its obligations under Community law. The Court has compared these powers of the Commission under Article 90(3) with those which it enjoys under Article 93 of the Treaty. In both cases, the Commission may act against a Member State which restricts competition.

In response to the question of whether if requested to issue a decision on the basis of this article, the Commission may refuse to do so, the Court held that the Commission has a broad discretion with regard both to the necessity to take action and to the way in which it chooses to do so. However, exceptional circumstances in which a private individual or an association serving the collective interests of a group of individuals may take legal ac-

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is restricted by both the Commission's competence which is applicable where the financial burden would have been threatened and therefore the performance is materially obstructed. However, in cases C-157 to 160/94, it is not only the financial burden which is decisive. It is sufficient for the Commission to perform its special task, as defined by the provisions laid upon it. Nevertheless, the Commission's decision on the question of whether the burden is proportionate to the per-

the Court relating to the interpretation of Article 90(2) that on the basis of this provision to lay down general rules for the Member States by the Commission in Article 90, paragraphs 1 and 2, is the Commission's competence. In the case of Member States which already have a monopoly, this competence also includes the power to issue rules on the conditions of the monopoly with these obligations.

It is not sufficient for an individual Member State to claim that its measure embraces the power to issue rules which is incompatible with the treaty provisions. It is the Member State's obligation to justify its obligations under Community law. The Commission under Article 93 of the Treaty. In both cases, the Member State which restricts

requested to issue a decision. If the Commission refuse to do so, the Court will rule with regard both to the Commission's decision and to the Member State's decision to do so. However, the Commission's individual or an association of Member States may take legal ac-

tion against a refusal by the Commission to issue a decision pursuant to Article 90(3), may not be ruled out in advance.

The examination of the question of whether it is still permissible to create a legal monopoly, which is the subject of Chapter 5, revealed that the Court no longer uses the distinction between the existence and the operation of legal monopolies as the criterion for their compatibility with Treaty rules. The existence of such monopolies, as well as their creation or maintenance, must be assessed in the light of the rules of the Treaty, notably of Articles 30, 34, 37, 52 and 59.

It can also be concluded from the case law that the creation or maintenance of a monopoly, whether or not this is incompatible with other Treaty rules, may also conflict with Article 90 in conjunction with Article 86. The main question here is whether as a result of the government measure, a situation has arisen on the market which is the same as that which would arise if a dominant undertaking was to abuse its position. If that is the case, or if a situation has been created in which the undertaking with the monopoly is in fact obliged to abuse its position, then incompatibility exists with Article 86 in conjunction with Article 90. Although the Court's ruling in the *Corbeau* case gave a different impression, later case law made it clear that the Court does not consider the mere creation of a monopoly as incompatible with Articles 90 and 86.

At the same time, Article 90(2) plays an increasingly important role in this context too. It has become clear, on the one hand, that the exception provided for by Article 90(2) may be deemed to apply both to the actions of undertakings and to government measures, and moreover also to measures prohibited under articles of the Treaty other than 85 and 86. On the other hand, it appears from the Court's rulings in the energy cases (see above), that the scope of the exception must be interpreted more broadly than was assumed previously. Not only the economic future of an undertaking with a public service task, but also the way in which that task can be carried out, may constitute justification for granting or maintaining special or exclusive rights.

It has also become clear that the rules of conduct which must be imposed on undertakings with special or exclusive rights in the various sectors investigated in Chapter 6 have broadly similar aims. These rules can be divided into five categories according to their objectives: the prevention of discrimination, the prevention of linkage between regulatory and commercial functions, the imposition of quality requirements, the prevention of too high, too low or discriminatory prices and the prevention of cross subsidies. The same rules often have to be maintained for a period following the abolition of the special or exclusive rights.

In effect, the aim of these rules is to prevent abuse of a dominant position and thus any conflict with Article 86 of the Treaty. Nevertheless, we

cannot conclude that they are in fact superfluous, although Article 86 imposes in my opinion an obligation to the same effect. Unlike Article 86, which contains a prohibition, the rules contain, on the whole, positive and more specific prescriptions, in the way that the obligation to perform certain actions is imposed in order to ensure that activities of the undertaking conform to the norm of Article 86. This creates a greater degree of legal certainty. The parameters of a prohibition, for instance those of a prohibition on abuse of a dominant position, are broader than the positive rules of conduct resulting from a directive, which are often fairly detailed. Furthermore, positive rules lighten the burden of proof and can shift it more in the direction of the undertaking being sued. In addition, the directives also contain provisions which facilitate the monitoring of compliance (the provisions on cost attribution systems and on making public certain conditions governing access, for instance). If it is not clear precisely how costs are calculated, it is very difficult to ascertain whether there is any cross subsidy. The same applies to the transparency of conditions governing access. If there is no such transparency, an undertaking which is suffering from discrimination will be unable to establish or prove that it is being discriminated against and will be unable to take any action.

It can therefore be concluded that the rules of conduct contained in the directives in fact strengthen the effect of the prohibition contained in Article 86 and furthermore improve the monitoring of compliance. One might wonder, indeed, whether similar rules should not be imposed on undertakings which have a 'normal dominant' position in the market. The effectiveness of Article 86 would seem generally limited in the absence of rules on the transparency of supply or access, and the same is true of provisions on the keeping of proper, separate financial records.

In addition to the rules of conduct contained in these directives, the rules which derive from Article 85 and 86, and the regulation on the control of concentrations ('Merger Regulation') itself, apart from the exception laid down in Article 90(2), also apply of course to these undertakings. With the Guidelines and Draft Notice for the telecommunications sector and the Notice for the postal sector, the Commission attempted to create greater clarity for the undertakings concerned as to exactly which rules of conduct they should adhere to on the basis of these provisions. Policy with regard to these undertakings, which is based on Articles 85 and 86 and the Merger Regulation, demonstrates that in applying these rules, the Commission can – and indeed does – take account of the special problems to which these undertakings may give rise.

The Commission looks favourably on cooperation agreements as such, even where undertakings with special or exclusive rights are involved. It does however impose the condition that such an agreement does not exclude competition. To this end, conditions are imposed on the undertakings.

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The decisions in the Atlas and Phoenix cases in particular show how much attention the Commission pays to this issue. If we take a closer look at the conditions imposed by the Commission in these decisions, we see that they are the same as two of the five rules of conduct contained in the ONP directives and the liberalisation directives: they aim to prevent discrimination and cross subsidisation. If the Member States have fulfilled the obligations arising from the ONP or liberalisation directives, therefore, undertakings with special or exclusive rights in those sectors on their territory are obliged by national legislation to comply with the rules of conduct referred to above. The decision in the BT-MCI case shows that in those situations the Commission no longer considers it necessary to impose these rules again in the form of conditions for the granting of an exemption.

The form of abuse which has occupied the Commission the most so far in relation to these undertakings is the refusal to supply an essential facility. In cases where the undertaking having the essential facility is also active in a downstream market, the undertaking being refused the facility is of course also being discriminated against in relation to the branch or subsidiary of the owner of the essential facility. In this connection, the Commission has made it clear that it bears in mind the question of whether there is sufficient capacity available. It assumes that the operator of an essential facility which is also active on the downstream market must in fact behave as if the latter were not the case. It may make absolutely no distinction between its own subsidiary and the latter's competitors.

In practice, the Commission has not issued any decisions on the basis of Article 86 with regard to cross subsidisation by undertakings with special or exclusive rights. As the Commission remarked in the Guidelines on the application of competition rules in the telecommunications sector, cross subsidisation does not qualify as an abuse in all cases. It is thus justified for an undertaking with exclusive rights to offset the higher costs which it incurs in offering a service in thinly populated areas against the profits it makes in densely populated parts.

Exactly as with other forms of abuse, cross subsidisation only constitutes abuse if it entails substantial negative effects on the structure of the market and if there is no objective justification for the behaviour in question. Such negative effects will be present if activities taking place on other markets than the market in which the undertaking has a dominant position are subsidised. In such a situation there will be artificially low prices being charged on the second market and the competition structure will be distorted. In this connection it may be noted that it will be difficult to show that prices whereby the costs associated with production or services on the downstream market are not fully passed on are not too low.

Decisions regarding the control of concentrations show that approval for a concentrative joint venture being set up by undertakings with special

or exclusive rights will depend on there being a genuine chance that other undertakings will be able to enter the market where the joint venture is active. In my view, the Commission can be expected to accept rules of conduct aimed at the parent companies in order to prevent joint ventures obtaining a dominant position.

With regard to the short description in Chapter 8 of a number of developments in this area in the Netherlands, it can first be stated that Section 41, subsection 3 of the Dutch Competition Act (*Mededingingswet*) considers the possibility of taking account of the special position of undertakings with a public service task in monitoring concentration. While the choice at European level has been for a sectoral approach to the problem, the Cohen working group has studied the scope for a generic approach. The Government believes that the proposals the working group has made require further elaboration, and suggests that experience should first be gained with specific areas.

It should also be noted that at European level, unlike in the Netherlands, no effort has been made to prohibit undertakings with exclusive rights from developing subsidiary activities, although every effort is made to prevent distortion of competition. In practice, it appears that the greatest impact is expected from the introduction of competition on the privileged market and therefore from the abolition of exclusive rights. The Commission has brought this about in the telecommunications sector. Whether the same thing will happen in other sectors and whether the abolition of exclusive rights there too will be considered justified cannot at present be predicted. Much will depend on the extent to which the Member States will be prepared to go along with the Commission in this.

Finally, it may be concluded that the search at both European and national level for the best way of carrying out public service tasks and of achieving balance between protection and competition is not yet over in most sectors. The performance of public service tasks may in some cases justify the granting of monopoly rights for a time, but in others it will not. In granting or retaining such rights the Member States will in any event have to take account of the justification requirement, and of the fact that the requirement of proportionality will have to be satisfied. In those cases in which special or exclusive rights may be retained, it may be that undertakings holding such rights will have to be subject to additional rules of conduct which prescribe in a more detailed way than the generally valid competition rules the behaviour of those undertakings on the market, in order to counter as far as possible the negative impact which may be the result of monopoly rights.

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