# Competition and State intervention: The Derogation of Competition Rules test in the public provision of service of general economic interest within the scope of Article 86 EC Treaty

*Relazione alla Summer School in European Public Law, Centro Studi Italo-Tedesco Villa Vigoni, 19 settembre 2005*

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## 1. Introduction.

The legal regime of the public services in the EU law – *rectius*: of the "*service of general interest*" (and specifically of "*general economic interest*") according to the Treaty definition – is a very sensitive matter of research in the field of the interrelationship of competition law and public/national interest-based regulatory provisions as well as the Internal Market rules, on the other, in the broader context of the State and Market relation[1]. In fact, the public intervention in the market is a wide area of economic activity, involving both public and private resources. Historically and traditionally, the role of the European Member State in their own national economy and markets (especially but not only in Continental Europe by means of special or exclusive rights or public monopolies granted in favour of public enterprises) has turned out to be "*pervasive*"[2] and – at least up to the 1970s – increasing. This role of State intervention in the market could be recognized as the truest and most distinctive feature of the European economic identity. Such a public power and dominance has been increasingly questioned and challenged by EU Institutions in the implementation of the Internal Market and competition policies.[3] The conclusions of the European Council Presidency of Lisbon – during the extraordinary session of the 23rd and 24th of March 2002 –

[1] E. Szyszczak, "State Intervention and the Internal Market", in D. O'Keefe and T. Tridimas (EDS), *EU Law for the 21st Century*, Hart, Oxford, 2004, p. 1 and 3-4, passim.
[2] E. Szyszczak, "Public Services in the New Economy", in C. Graham and F. Smith (EDS, *Competition and the New Economy*, Hart, Oxford, 2004, p. 4.

have thus stressed the point with the declaration of the "*quantum shift resulting from globalisation and the challenge of a new knowledge-driven economy*", accompanied by frequent referring to the need "*step up the process of structural reform of competitiveness and innovation and by completing the Internal Market" and to "the full benefits of market liberalisation*"[4]. Specifically and from a legal point of view – since the early 1990s – the challenge has been based on the enforcement of Article 86 and the State Aid rules. These issues obviously lead to the demand for a balance between "*sovereignty, subsidiarity and competence in the EU*"[5]. This paper intends to offer a concise review: a) of the path taken by the EU in affirming the central role of the market and the competition process in the European political economic agenda and specifically in the Community Institutions policy on public services; b) of the case law of the ECJ in building the balance between the enforcement of the competition law and the protection of the fulfilment of the general (or public) interest tasks in the provision of public services; c) of the need for a substantial legal framework to guarantee certainty and clarity in the demand for a balance between economic efficiency. This must be achieved by enforcing the EU competition law (firstly through Article 86 EC Treaty) and the protection of public/national interest – by means of the regulatory choices adopted by the Community and State Members – in the context of the principles, the values and last but not least the right of citizenship established by the Treaty itself, the Charter of Fundamental Rights and the draft Constitution of the Convention for the Future of Europe.

## 2. The EC Treaty provisions on the derogation of competition and Internal Market rules in the public services sector: from derogation (Articles 86(2)) to obligation (Art. 16) but in a recognized competitive environment.

The legal regime of service of general economic interest – and specifically of the regime of derogation of competition and Internal Market rules in order to provide protection for the provision of public services – is settled by Articles 86(2) and 295 of the EC Treaty.

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[3] E. Szyszczak, "State Intervention and the Internal Market", in D. O'Keefe and T. Tridimas (EDS), *EU Law for the 21st Century*, Hart, Oxford, 2004, p. 3.
[4] Already known as the "*Lisbon process*".
[5] E. Szyszczak, "State Intervention and the Internal Market", in D. O'Keefe and T. Tridimas (EDS), *EU Law for the 21st Century*, Hart, Oxford, 2004, p. 2.

If Article 295 states the principle of neutrality of the EU law in respect of private or public ownership – "*The Treaty shall in no way prejudice the rules governing the system of property ownership*" – Article 86(2) provides that the "*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly shall be subjected to the rules contained in the 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 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 interest of the Community*".

In this legal context – developed on the traditional pillars of the Community Institutions (Internal Market and competition rules) – the debate about the social and territorial cohesion issue involved in the matter of the services of general interest came to an initial conclusion with the introduction (provided by the Treaty of Amsterdam) of a new principle established in Article 16 of the EC Treaty, according to which: "*Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their mission*". In the details, the same Article has been accompanied by a Declaration, stating that "*The provisions of Article 16 of the Treaty establishing the European Community on public services shall be implemented with full respect for the jurisprudence of the Court of Justice, inter alia as regards the principles of equality treatment, quality and continuity of such services*".

Anyway – considered the above mentioned normative complex – the general issue concerning the provision of public services should be addressed in the light of the above mentioned "*Lisbon Process*" (oriented toward the construction of a European global competitive and dynamic knowledge based society), where the Community and State Members economic policies must be designed "*in accordance with the principles of an open market economy with free competition*" (Article 4 EC Treaty). The ECJ, on its own part, has in fact declared (**Echirolles Distribution SA du Dauphine and others**, C-9/99) that Article 4 (and Article 98) establish a "*general principle whose application calls for complex economic assessments which are a matter for the legislature or the national administration*". Even more enlightening about the current trend of Community law is the remark that Art. 28 has been

transformed into an "*economic due process clause*"[6], based "*upon the free market, open competition and a particular view of the kind of the regulations that are acceptable*", which reveals "*an increased willingness on the part of the Commission and the Court to subject State activity to competitive market principles*" and "*to take a more aggressive approach to free trade using the fundamental values of the Internal Market project as well as the competition rules to regulate state intervention in the market*"[7].

Following this trend, it is therefore no longer possible to sustain the neutrality of EC Treaty provisions about the room granted to public and private operators in the national economies, according to the local regulation.

Given this current attitude of the Community Institutions, it remains to be considered the real (and true) extension of the principle stated by Article 16 in order to protect the "*shared*" Community values about the role of the services of general economic interest in the broader context of the social and territorial cohesion policies. Ross remarks that – despite the fact that the text of Article 16 appears to be "*a triumph for ambiguous drafting and diplomacy insofar as it appears to support any interpretation along a spectrum running from defensive protection by Member States of their existing national public sector influence to the creation of a new communitaire concept of public service capable of horizontal application throughout Community law and policy*"[8] – the same Article seems to develop a community obligation to support services of general economic interest beyond the purely competition law context. The more cautious approach of the Commission observes that "*The new Treaty, while retaining the provisions of Article 86, thus reinforces the principle whereby a balance must be struck between the competition rules and the fulfilment of the public services' missions*" (XXVIIth Report on Competition Policy of the Commission, 1997, pts 97 and 100).

At the same time it could not be denied – since the lack of an appropriate legal base for the adoption of Community substantive law in the sector – that the current provisions of the Treaty do not enable the Community Institutions to provide a specific legal framework in

[6] E. Szyszczak, "Free trade As a Fundamental Value in the European Union", in K. Economides et al. (EDS), *Fundamental Value*, Hart, Oxford, 2000, p. 176.

[7] E. Szyszczak, "Free trade As a Fundamental Value in the European Union", in K. Economides et al. (EDS), *Fundamental Value*, Hart, Oxford, 2000, p. 176.

[8] M. Ross, "Article 16 an Service of General Interest: From derogation to Obligation", (2000) 25, *European Law Review*, p. 22.

order to guarantee the invoked balance between the competition rules and the fulfilment of the public service mission.

The Convention on the Future of Europe showed awareness of this question. In the draft Constitution – under the heading "*Clauses of general application*" – the provision of Article III-6 (following the previous text of Article 16 EC Treaty and Article 36 Charter of Fundamental Rights, according to which: "*The Union recognises and respects access to services of general economic interest as provided for by national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union*") reads:

"*Without prejudice to Articles III-55, III-56 and III-136, and given the place occupied by services of general economic interest as services to which all in the Union attribute value as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Constitution, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their mission. European laws shall define these principles and conditions*".

Awaiting the last and approved version of the Constitution, the case law provided by the ECJ turns out to be the real source of legal discipline in the area of the public services and the protection of their provision.

## 3. The derogation of the free and competitive market EC Treaty provisions in the case law of the ECJ: proportionality and economic analysis in the application of Article 86(2) and State Aid rules.

Since **Van Gend en Loss** (C-26/62) the role of non-State actors has been essential in the enforcement of Community law. In the development of the Internal Market, the promotion of self-interests has became a key tool against Member States for failing to comply with Community law. This capability of non-State actors – *rectius*: individual economic actors – to challenge national laws and regulations has been increased by the Court, once the "*direct effect*" was taken for granted, as is well known. Again the same remark must be confirmed regarding the enforcement of Community law provisions in the area of service of general economic interest. In fact, Article 86(2) EC Treaty allows the existence of public monopolies

("*legal monopolies*" and "*special or exclusive rights*") but subjects the monopolies to the competition and internal market rules unless the Member States could demonstrate and offer evidence that the application of the market law would "*hinder*"[9] the provision of service of general interest.

### 3.1. The grant of special or exclusive rights in favour of undertakings between "*general interest*" justification and the abuse of dominant position: the proportionality requirement.

Article 86(2) provides a limited derogation of the free movement and competition rules in order to discipline the activities of undertakings entrusted by the States with tasks of general interest. In this sense the role of Article 86(2) is essential in relation of Article 82: The derogation allowed by Article 86(2) – in order to ensure the performance of general interest tasks – is the only legal tool granted by the Treaty to avoid a systematic and indiscriminate application of Article 82 against the State intervention in the public services sector by means of special or exclusive rights. The whole issue must be obviously placed in the broader context "*of the duty of Community loyalty contained in Article 10*". From **INNO v. ATAB** (C-13/77) onwards, the Court declared that – since "*the Treaty provides that Member States shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty*" (par. 30) – Member States "*shall neither enact nor maintain in force any measure contrary inter alia to the rules provided for in Article 81 to 89*" and therefore "*the national measure which has the effect of facilitating the abuse of dominant position capable of affecting trade between Member State will generally be incompatible which Articles 28 and 29, which prohibits quantitative restrictions on imports and exports and all measures having equivalent effect*" (par 35). Regarding the judicial enforcement of Article 82 in this area, the ECJ ruled that Article 86 (2) is directly effective and the national Court is competent to determine whether or not the undertakings examined are entrusted with purposes of general economic interest in their own activities (**BRT v. SABAM**, C-127/3). More complex is the

[9] E. Szyszczak, "Public Services in the New Economy", in C. Graham and F. Smith (EDS, *Competition and the New Economy*, Hart, Oxford, 2004, p. 4.

Community case law about the role of national Court in verifying whether or not the application of the competition rules obstructs the tasks of general interest performed by the undertakings. Initially the ECJ did not recognise this competence in favour of national Courts (**Ministere Public of Luxembourg v. Muller**, C-10/71; **Sacchi**, C-155/73; **Syndicat National des Fabricants Raffineurs d'Huile de Graissage v. Inter Huiles**, C-172/82) but the same European Court then reached the opposite conclusion, leaving to national Courts that issue of judicial review (**ERT**, C-260/89; **Corbeau**, C-320/91; **Almelo**, C-393/94).

**3.1.1.** The ECJ stated that even though Article 86(1) presupposes the existence of undertakings which have certain special or exclusive rights, it does not follow that all special or exclusive rights are necessarily compatible with the Treaty because that depends on different rules, to which Article 86 (2) refers (see **Telecommunications Terminal Equipment**, C-202/88, where France claimed that Article 86(1) presupposed the existence of special or exclusive rights and therefore the Commission had not competence to adopt directive capable to interfere with the grant of similar rights)[10]. At the same time the Court (**Hoefner v. Macrotron**, C-41/90, par. 29) held that "*the simple fact of creating a dominant position of that kind by granting an exclusive right within the meaning of Article 86 (1) is not as such incompatible with Article 82 of the Treaty*" (see also, in the same sense, **Telecommunication Services**, C-271, 281 and 289/90, where the ECJ annulled the provisions of Directive 90/388 concerning the requirement to withdraw all special rights granted in the market for telecommunication services, since the directive was unable to define "*the type of special rights with which the directive*" was "*concerned or in what respect the existence of those rights*" was "*contrary to the various provisions of the Treaty*", par. 34). And again **Hoefner v. Macrotron** (C-41/90, par. 29) stated that "*a Member State is in breach of the prohibition contained in those two provisions only if the undertaking in question, merely by exercising the exclusive right granted to it, cannot avoid the abuse of dominant position*". In the specific case – involving the position of the German public employment agency to which the Government had conferred the exclusive right to carry on the employment procurement activity – the Court found in fact that the exclusive right conferred

[10] See also **CBEM** (C-311/84): "*an undertaking vested with a legal monopoly may be regarded as occupying a dominant position within the meaning of Article 82 of the Treaty*" and **Michelin** (c-322/81): "*the territory of a Member State, to which the monopoly extends, may constitutes a substantial part of the Common Market*".

created a situation in which the agency cannot avoid infringing Art. 82 of the Treaty, since the Agency itself was manifestly incapable of satisfying demand prevailing on the market for such activities. In a different way, **ERT** (C-260/89) – a case concerning the exclusive rights granted to a Greek radio and television undertaking in the broadcasting and retransmitting of programmes in Greece – ruled that such rights are "*liable to create a situation in which that undertaking is led to infringe Article 82 by virtue of a discriminatory broadcasting policy which favours its own programmes*" (par. 37), affirming, therefore, the principle that the manner in which the monopoly is organised may infringe the rules of the treaty. In the same line of decisions must be placed **Merci Convenzionali Porto di Genova** (C-179/90), where an Italian firm had the exclusive right to provide all the handling services of goods, and **RTT v. INNO** (C-18/88), where the review concerned the Belgian Law according to which only equipment supplied by the monopolist undertaking, RTT, or approved by the monopolist itself, could be connected to its network).

**3.1.2.** In **Corbeau** (C-320/91) – a case regarding the monopoly granted to the Belgian Post Office ("Regie des Postes") in the collection, transporting and delivery of correspondence in Belgium – the ECJ said that the point is "*the extent to which a restriction on competition or even the exclusion of all competition from other economic operators is necessary in order to allow the holder of the exclusive rights to perform its task of general interest and in particular to have the benefit of economically acceptable conditions*". In the case – according **Corbeau** – "*the exclusion of competition is not justified as regards specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal services, such as collection from the senders' address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit, in so far as such specific services, by their nature and the conditions in which they are provided, do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right*" (see also **Deutsche Poste** (C-147 and 148/97), where the Court said that the granted right ex Article 25 Universal Postal Convention of the state monopolist to treat the international mail as internal mail, by demanding the full internal rate fee, was necessary and proportionate to perform its public interest mission "*under economically acceptable conditions*", par. 44). The Court confirmed, in this way, that Article 86(2) implies a

proportionality judgement. The rationale of the decision must be found in the need to justify the cross-subsidisation of the less profitable parts of the service in order to avoid the cream-skimming of the most profitable ones of the same service by the market forces[11]. This judicial approach "*starts from the presumption that the restrictions of competition inherent in legal monopolies is illegal*" and "*the onus is placed squarely on the Member States to prove that the existence of a particular is limited to what is necessary to achieve the relevant objective*"[12]. In other terms, the respect of the principle of proportionality – i.e. "*the restriction of competition must not exceed what is necessary in order to attain the objective*"[13] – must be demonstrated by the Member State, which is called to monitor the market conditions and the economic equilibrium assumed as justification for the exclusive or special right granted by the same State. In this light, **Corbeau** – compared with the earlier case **Hoefner v. Macrotron** (C-41/90) and the following **Centre d'Insemination de la Crespelle** (C-323/93) where the Court found that the exclusive right to provide bovine insemination did not lead the undertaking to charge disproportionate cost and thereby abuse dominant position – remains a landmark case in the judicial attitude toward the derogation of competition rules for public services providers throughout a flexible application of Article 86(2).

**3.1.3.** The ECJ itself denied the need for derogation – and found the failure in the burden of the related proof – of the free market rules in **Hoefner v. Macrotron** (C-41/90), **Merci Convenzionali** (C-179/90), **British Telecom** (C-41/83), **RTT** (C-18/88) and **Air Inter** (T-260/94). On the other side, the European Court in Luxembourg ruled – directly and without leaving the decision to the national Courts – in favour of the legitimacy of the derogation granted of the competition law, in **Corsica Ferries France** (C-266/96), **Albany** (C-67/96) and **Deutsche Post** (C-147 and 148/97 above mentioned), declaring that the requirements established in Article 86(2) were fulfilled. In **Corsica Ferries**, the Court – examining the alleged (by the "*Corsica Ferries France SA*") dominant position granted by the Italian Law according to which ships from other Member States were required to use the services of local

[11] A. Jones and B. Sufrin, EC Competition Law. Text, Cases and Material, Oxford, OUP, 2001, p. 463.
[12] D. Edward and M. Hoskins, "Art. 90: Deregulation and EC Law. Reflections Arising from the XVI FIDE Conference", (1995), *Common Market Law Review*, 157, 164 and 167, where the "*limited competition approach*" in Corbeau is compared with the "*limited sovereignty approach*" in Hoefner v. Macrotron and La Crespelle.
[13] D. Edward and M. Hoskins, "Art. 90: Deregulation and EC Law. Reflections Arising from the XVI FIDE Conference", (1995), *Common Market Law Review*, 157, 164 and 167.

mooring companies ("*Gruppo Antichi Ormeggiatori del Porto di Genova*") enabled by exclusive concessions in each port – ruled:

(a) firstly that, "*although merely creating a dominant position by granting exclusive rights within the meaning of Article 86(1) of the Treaty is not in itself incompatible with Article 82, a Member State in breach of the prohibitions contained in those two provisions in the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position or if such rights are liable to create a situation in which that undertaking is led to commit such abuses*" (para. 40), recalling its own line of decisions on the same point (**Hoefner v. Macrotron**, C-41/90; ERT, C-260/89; **Merci Convenzionali**, C-179/90, **Centre d'Insemination de la Crespelle**, C-323/93)

(b) and found secondly, that "*It is evident from the file on the case in the main proceedings that mooring operations are of general economic interest, such interest having special characteristics, in relation to those of other economic activities, which is capable of bringing them within the scope of Article 86(2) of the Treaty. Mooring groups are obliged to provide at any time and to any user a universal mooring service, for reasons of safety in port waters. In all events, Italy could have properly considered that it was necessary, on grounds of public security, to confer with local groups of operators the exclusive right to provide a universal mooring service*" (para. 45)

(c) and concluded, therefore and thirdly, that "*In those circumstances it is not incompatible with the Articles (82) and 86(1) of the Treaty to include in the price of the service a component designed to cover the cost of maintaining the universal mooring service, inasmuch as it corresponds to the supplementary cost occasioned by the special characteristics of that service, and to lay down for that service different tariffs on the basis of the particular characteristics of each port*" (para. 46).

**3.1.4.** In **Albany** – a case concerned the regime of compulsory affiliation to sectoral pension schemes in Netherlands – the ECJ conducted the proportionality judgment in favour of the legitimacy of the compulsory regime (granted by the Dutch law) according the principle of solidarity. The Court – moving from the premises that "*it is not necessary, in order for the conditions for the application of Article 86(2) of the Treaty to be fulfilled, that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened*" (para. 107 but see *contra*

**Deutsche Post**, C-147 and 148/97, par. 50-52) – found that "*If the exclusive right of the fund to manage the supplementary pension scheme for all workers in a given sector were removed, undertakings with young employees in good health engaged in non-dangerous activities would seek more advantageous insurance terms from private insurers*" and "*the progressive departure of 'good' risks would leave the sectoral pension fund with responsibility for an increasing share of 'bad' risks, thereby increasing the cost of pensions for workers, particularly those in small and medium-sized undertakings with older employees engaged in dangerous activities, to which the fund could no longer offer pensions at an acceptable cost*" (para. 108). The ECJ added that "*Such a situation would arise particularly in a case where, as in the main proceedings, the supplementary pension scheme managed exclusively by the Fund displays a high level of solidarity resulting*" (para. 109). The Court then recognized that "*Such constraints, which render the service provided by the Fund less competitive than a comparable service provided by insurance companies, go towards justifying the exclusive right of the Fund to manage the supplementary pension scheme*" (para. 110). In another previous case (**Poucet and Pistre**, C-159-160/91) – again involving national social insurance schemes in France – the Court remarked that these schemes "*are based on a system of compulsory contribution, which is indispensable for the application of the principle of solidarity and the financial equilibrium*" of the system itself (para. 13) "*based on the principle of national solidarity*" and "*entirely non-profit-making*" (para. 18), therefore "*not an economic activity*" (para. 19 but see also **Pavlov**, C-180-184/98, where the ECJ found that the compulsory nature of the supplementary medical pension scheme for medical practitioner under the Dutch Law must be considered subject to competition rules even though the effect on the market is minimal, allowing the application of *de minimis* rule). A different example of public interest justification is the ruling in **Wouters** (C-309/99) where the judges in Luxembourg – called to decide a reference about the prohibition established by the Bar of the Netherlands on multidisciplinary partnership between lawyers and accountants – stated that such prohibition provided by the Bar, acting as a regulatory body, was justified as being a necessary condition for the practice of legal profession. The justification becomes so public interest-based in relation to free movement provisions and competition rules[14].

[14] E. Szyszczak, "Public Services in the New Economy", in C. Graham and F. Smith (EDS, *Competition and the New Economy*, Hart, Oxford, 2004, p. 9-10.

**3.2 The derogation of competition rules by means of "*cross-subsidisation*": the state intervention in costs allocation in order to protect the task of "*general interest*" in the provision of public services.**

The same issues – as above seen in **Corbeau**[15] – are raised by cross-subsidisation cases where the use of profitable activities to subsidize less profitable activities is debated. The Commission has defined cross-subsidization as consisting of the circumstance "*that an undertaking allocates all or part of the costs of its activities in one product or geographic market to its activity in another product or geographic market*" (Guidelines of the Commission on the Application of EEC Competition Rules in the Telecommunications Sectoring, COM 233/3). In this sense, cross-subsidization leads to a risk of distorting the competitive process, enabling the undertakings to offer services (or goods) at a price lower than their real market price "*or even lower than the production cost*"[16].

**3.2.1.** In **Almelo** (C-393/94), the ECJ – dealing with a preliminary reference from a Dutch Court in a case of litigation between electricity distributors concerning an exclusive purchasing clause – stated that "*restrictions on competition from other economic operators must be allowed so far as they are necessary in order to enable the undertaking entrusted with such a task of general interest to perform it. In that regard, it is necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation, particularly concerning the environment, to which it is subject. It is for the national Court to consider whether an exclusive purchasing clause prohibiting local distributors from importing electricity is necessary in order to enable the regional distributor to perform its task of general interest*" (para. 49-50). Ross notes that **Almelo** – following **Corbeau** – "*clearly indicated that the availability of the derogation was to be measured by a balancing exercise based upon competing priorities rather than inhibiting that choice by insisting upon narrow economic tests to be satisfied before the*

[15] See on the point: L. Hancher, Casenote on Corbeau, (1994), 31, *Common Market Law Review*, 105, p. 119-120.
[16] See D. Edward and M. Hoskins, "Art. 90: Deregulation and EC Law. Reflections Arising from the XVI FIDE Conference", (1995), *Common Market Law Review*, 157, 179-181.

*normal market rules can cease to apply*"[17]. But in the opposite sense, must be mentioned **Air-Inter** (C-260/94), where the Court – in a case regarding the legitimacy (denied by the Commission) of the exclusive rights on two internal air routes in France granted in favour of a French undertaking (Air-Inter) – ruled that the private applicant was not able to meet the proportionality requirement, since "*it does not put a figure on the probable loss of revenue if other air carriers are allowed to compete with it on the two routes in question. Nor has it shown that loss of income will be so great that it will be forced to abandon certain routes forming part of its network*" (para. 139). In this line of decision, a landmark case appears to be another **Deutsche Poste** case (Commission Decision, 2001 / 354 /EC), where the Commission recognized the German state monopolist – once victorious in claiming the legitimacy of its own special right granted (see above **Deutsche Poste**, C-147 and 148/97) – in breach of the EU competition law because of the use of cross-subsidisation to finance a strategy of below selling cost in business parcel service already liberalised and opened to competition[18] (see also **Hays v. La Poste**, Commission Decision 2002/180/EC).

**3.2.2.** Cross-subsidisation is a problematic issue, particularly in respect of network monopolies involving the role of essential facilities in the provision of public services[19]. In **Bronner** (C-7/97) – a case concerning the legitimacy of the denied access to the German national home delivery service by a publisher of a daily newspaper (Bronner) against another publisher (Mediaprint) in a dominant position with a market share of 95% – the Court refused the role of regulatory body, affirming that the judicial grant of access implies the adoption of detailed regulation (in fixing the prices and settling the supply conditions) "*unworkable, anti-competitive and scarcely compatible with a free market economy*"[20]. The Court took a different approach in **Telefonica de Espana SA v. Administracion General del Estado** (C-79/00), where was challenged the Spanish regulator, which required a telecommunications operator in dominant position on the public telecommunications network to provide access

[17] M. Ross, "Article 16 an Service of General Interest: From derogation to Obligation", (2000) 25, *European Law Review*, 22, p. 24.

[18] E. Szyszczak, "Public Services in the New Economy", in C. Graham and F. Smith (EDS, *Competition and the New Economy*, Hart, Oxford, 2004, p. 14.

[19] A. Jones and B. Sufrin, EC Competition Law. Text, Cases and Material, Oxford, OUP, 2001, p. 462.

[20] E. Szyszczak, "Public Services in the New Economy", in C. Graham and F. Smith (EDS, *Competition and the New Economy*, Hart, Oxford, 2004, p. 17.

and interconnection in favour of other competitors. The ECJ found that – even though the Directive 97/33 (implemented by the Spanish regulatory body) did rely primarily on commercial negotiations between operators providing telecommunication services – the same Directive granted broad discretion to regulate the freedom of the operators by requiring to allow access and interconnection to other competitor[21].

Significant uncertainty remains on two crucial points: a) the role of national Courts in the enforcement on the economic analysis tests about the real existence of the need of "*equilibrium*" between the cross-subsidised activities[22]; b) the contents and purposes of those extensive and complicated economic analysis tests in order to guarantee shared legal standards in the justification scrutiny.

### 3.3. The State Aid as legitimate compensation for public services obligations: transparency and economic costs analysis in the justification scrutiny.

In the same sense, the ECJ stated the justification of the financing of the provision of public services, under the State Aid rules (**FFSA**, T-106/95 and **CELF II**, C-322/98 but see also **SFEI and Others**, C-39/94, para. 59-62) and recognized the legitimacy of the aid given "*to offset the additional cost incurred by providing public services*" since this aid should be considered as "*compensation for providing the service and not an economic advantage*" in the context of the Article 87(1), according the ruling in **Ferring SA** (C-53/00).

**3.3.1.** In **FFSA** (T-106/95, para. 164-178) and **SIC** (T-46/97, para 76-84), the Court of First Instance ruled that the fact that a financial advantage is granted to an undertaking by the public authorities in order to offset the cost of public service obligations which that undertaking is claimed to have assumed has no bearing the classification of that measure as aid within the meaning of Article 87(1) of the Treaty, although that aspect may be taken into account when considering whether the aid in question is compatible with the common market

[21] E. Szyszczak, "Public Services in the New Economy", in C. Graham and F. Smith (EDS, *Competition and the New Economy*, Hart, Oxford, 2004, pp. 17-18.
[22] A. Jones and B. Sufrin, EC Competition Law. Text, Cases and Material, Oxford, OUP, 2001, p. 462.

under Article 86(2) of the Treaty[23]. In **Ferring SA** (C-53/00) – a case concerning the wholesale distribution of medicinal products in France – the Court of Justice stated that, where tax exemption granted to an undertaking entrusted with the operation of a public service simply offsets the additional costs of the public services, the recipients do not enjoy an advantage within the meaning of Article 87(1) and the measure in question does not therefore constitute state aid[24], as above mentioned.

**3.3.2.** A four-test scrutiny – in order to revisit the **Ferring SA** doctrine – has thus been established by the ECJ Court in **Altmark** (C-280/00):

a) "*The recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined*" (para. 95);

b) *"The basis on which the compensation is calculated must be established in advance in an objective and transparent manner*" (para. 95);

c) "*The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit*" (para. 95);

d) "*Where the undertaking is not chosen in a public procurement procedure, the level must be determined by a comparison with an analysis of the costs, which a typical undertaking in this sector would incur, taking into account the amounts received and a reasonable profit from discharging the obligations*" (para. 95).

The role of **Altmark** as a leading case is confirmed by the EC Commission itself, who has structured the recent draft decision on public service compensation (15th july 2005) according the Altamrk judgement (see also the State Aid Action Plan 2005).

Again the Court – in **GEMO SA** (C-126/01) which concerned a public service for the collection and disposal of animal carcasses and slaughterhouse waste – ruled that intervention by the public authorities intended to relieve farmers and slaughterhouses of that financial burden constitutes an economic advantage liable to distort competition, since the fact that, in France, the costs of carcass disposal are borne neither by farmers nor by slaughterhouses

[23] See "*Report from the Commission on the status of work on the Guidelines for State Aid and Services of General Economic Interest*", Brussells, 05.06.2002, COM, (2002), para. 4-5.
[24] See "*Report from the Commission on the status of work on the Guidelines for State Aid and Services of General Economic Interest*", Brussells, 05.06.2002, COM, (2002), para. 7.

necessarily, has positive impact on meat prices and makes that product more competitive on the markets of the Member States where such costs are normally paid out of the budgets of competing traders. In this ruling, the ECJ remarked – as to the argument of the French Government that the measure in question is part of a health and safety policy which supersedes individual interests – that the Article 92 (1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects (see also **France v. Commission**, C-241/94 and **Netherlands v. Commission**, C-382/99). Even regarding this two decisions, it must be underlined that uncertainty remains, since the notion (and the amount) of the relevant costs to be considered is not clear. The criteria of the economic analysis required is still not clearly settled.

**4. Conclusions.**

Public services are now provided – or they are supposed to be provided (despite the resistance of national Legislative and Administrative powers especially in Continental Europe[25]) – in a competitive environment, where the privatisation and liberalisation process (still in progress as well as the integration of the Internal Market by means of the Community law on public procurement and call for tender in the utilities sector) has affected the function, form and delivery of the services themselves[26]. In such a context, the goal of a balanced protection of the general interest – in terms of universality, quality, fair access and continuity of the provision of public services (as stated in the Green Paper enacted by the Commission[27]) – demands the setting of a legal framework able to offer certainty, clarity, transparency and consistency in the interaction of competition law and regulation in the public services sector. Still today, the Community law – as output of the *ad hoc* litigation approach – lacks the above mentioned requirements, revealing instead inconsistency and uncertainty, in a disappointing way for economic operators (public and private parties both committed in public private partnership or separately active in the market) as well as consumers and citizens. Even the concept of proportionality – when applied as a general clause in supporting the public interest

[25] See the CEEP position on the Commission Green Paper on Service of General Interest.
[26] E. Szyszczak, "Public Services in the New Economy", in C. Graham and F. Smith (EDS, *Competition and the New Economy*, Hart, Oxford, 2004, p. 18.
[27] See Bruxelles, 21.05.2003, COM (2003), The Green Peper, and before Bruxelles, 26.09.1996, COM (1996), First Communication, Bruxelles, 19.01.2001, COM (2001), Second Communication.

justification for the claim of immunity from the competition and Internal Market rules – seems unable to guarantee uniformity in setting the standards and boundaries between the enforcement of the competition law and the implementation of regulatory tools[28] against market failures and their negative spill-over for consumers and environmental aspects. It appears therefore that only a substantive legal framework could allow the economic operators and the regulatory bodies to rely on clear provisions – constructed by the Community legal sources – on derogation of the competition rules in order to provide services according to the principle of universality, quality, fair access and continuity established by the EU Commission soft law and the notion of general interest provided by Article 36 CFR and Article III-6 and its implication in terms of social and territorial cohesion. It seems urgent, under this point of view, the adoption – at the end in the EU Constitution – of a new and appropriate legal base for Community regulation of public services, in the light of the above mentioned principles of social and territorial cohesion and far beyond the purely competition legal context.

[28] E. Szyszczak, "Public Services in the New Economy", in C. Graham and F. Smith (EDS, *Competition and the New Economy*, Hart, Oxford, 2004, p. 18.