The Role of the European Court of Justice in the Design of Regulatory Space

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1 Introduction

This paper analyses the role of the European Court of Justice (hereafter referred to as the Court) when it assesses the legality of state intervention in the universal services sectors. The Court, it is argued, plays a crucial role in defining the role of the law in the regulatory regime, shaping regulatory structures and allocating regulatory authority.

The regulation of universal services, such as the utilities services, is dominated by the idea that the influence of market forces ought to be attenuated: member states introduce measures such as public monopolies and the granting of special and exclusive rights to privileged undertakings; these forms of state intervention hinder the free movement of goods and distort competition.

When assessing the legality of anti-competition state intervention under European law, the Court focuses on the application of the so-called *public mission* exception: the derogation clause of competition law enshrined in Article 86(2) EC: the provision of a service of general economic interest — the public mission — justifies the disapplication of competition law.[1]

The analysis as to how the Court applies the *public mission* exception in competition matters aims at evaluating how the Court determines crucial aspects of the European regulatory regime, namely:

- The role of the law in the regulatory regime. How far does the market regulate universal services sectors?
- The allocation of regulatory authority. How far do member states intervene and regulate these sectors? What level of discretion of Member states is compatible with European law?
- The regulatory structure, i.e. the institutional arrangement elaborated by member states to guarantee the provision of universal services. Does the Court's case law affect the state institutional settlement in the utilities sectors?

2 Proportionality in Competition Law

Universal services, following the definition provided by the Court, are those services which benefit all users, throughout the territory, at uniform tariffs and with similar quality conditions.[2] States have protected these sectors from the operation of market forces. They have developed and introduced measures such as public monopolies and the granting of exclusive import and export rights which aim at distorting competition and restricting free trade as the legitimate way to guarantee the universality of certain public services. Moreover, the attenuation of market influence in these sectors has also facilitated throughout the member states the evolution of different institutional arrangements to provide universal services, and therefore it clearly hinders the European harmonisation of these regimes.

The liberalization process essential services, which European institutions and in particular by the European Commission have launched, poses a conflict between undistorted competition, on the one hand, and the universal access to services of general economic interest, on the other hand. National courts and the European Court of Justice ought to solve

this conflict whenever the legality of state intervention under European law is put into question. It ought to weigh to how far the market should penetrate in universal services sectors and how far member states can intervene and distort competition to provide essential services.

The *public mission* exception catches this tension between market values — undistorted competition — and non-market values — providing universal services. It also provides a valuable legal tool to solve it: the test of proportionality. According to it, restrictions on competition are *prima facie* contrary to the Treaty, unless they are *necessary* for the provision of services of general economic interest.[3]

Essentially, the proportionality test determines the level of scrutiny that the Community exercise in the political, economic and social choices made by Member states. In the case of national measures which interfere with the laws of free movement and undistorted competition, the crucial function of the principle of proportionality is in promoting market integration *via* free access to the market (Tridimas 1999, 124). Indeed, any obstacle to free access becomes an unlawful impediment unless objectively justified. The judicial scrutiny extends to the reasons of policy which member states provide to justify the unlawful measure.

An alternative path to promote market integration, which narrows the borders of judicial scrutiny, is provided by the principle of non-discrimination — in relation to the marketing of national and imported products: "If it is accepted that free movement is exhausted in the obligation of Member states to treat imported products or services on a equal footing with domestic ones, discrimination is the touchstone of integration" (Tridimas 1999, 127).

There is a tension between proportionality and non-discrimination, for they demonstrate different patterns of legal reasoning. On the one hand, proportionality is a *more-or-less* criterion allowing weighing in terms of accommodating colliding interests, rather than withholding one and upholding the other. It is a non-definitive rule, which prompts a balanceable form of legal reasoning; that is, legal reasoning becomes a matter of appraising the relative weight of colliding interest. On the other hand, non-discrimination is an *all-or-nothing* criterion, for either a measure has discriminatory effects — and then the measure is illegal — or it does not. Legal reasoning, according to this criterion, becomes a matter of finding out the discriminatory effects of the measure upon domestic and imported products.[4]

Proportionality and non-discrimination evidence alternative patterns of integration: the greater the importance of proportionality, the smaller the influence of non-discrimination in determining the legality of national measures.[5] The case law in universal services provides a good example of how the principle of proportionality has gradually gained importance and displaced the principle of non-discrimination; that is, the case law evidences the gaining importance of the public mission exception (Article 86(2) EC) to assess the legality of state intervention in the provision of universal services.

3 *Höfner, ERT* and *Merci*

The Court has established that Article 86(2) EC provides the legal framework within which the legality of national anti-competition measures, such as the granting of special and exclusive rights, have to be evaluated in reference to the provision of services of general economic interest, and in reference to the rules of competition. Hence, Article 86(2) EC is the legal framework within which a balance has to be struck between colliding values: market value — namely competition — and non-market value — namely provision of services of general economic interest.

There are three landmark cases discussed by the Court in 1991 which share the same outcome: the triumph of market values in regulated sectors. These are the *Höfner*,[6] *ERT*,[7] and *Merci*[8] cases. The Court dealt with two questions. First, when a privileged undertaking does abuse its dominant position? And second, how to apply the derogation

clause of Article 86(2) EC? The Court interpreted the abuse conduct strictly: a Member State is in breach of Community competition law when the privileged undertaking, *merely by exercising the exclusive right, cannot avoid* abusing its dominant position (Höfner, at para. 29). In the *ERT* case, the Court referred to the fact that exclusive rights create a situation in which the undertaking *is led* to abuse its dominant position (*ERT*, at para. 37) or even *induced* to do so (*Merci* at para. 19). Although it is legal to create a dominant position by conferring special and exclusive rights to those undertakings entrusted with the provision of a public service, the way the Court has interpreted such cases of abuse of dominant position makes it very likely that the activities of privileged undertakings can be declared illegal, and Member states be found to be in breach of Community law.

Neither was the Court less stringent when interpreting the application of the public mission derogation clause. In all three cases, the Court repeated that privileged undertakings entrusted with the provision of public services are exempted from the obligations imposed by competition rules, if the application of these rules is *incompatible* with the provision of the public service (*Höfner* at para. 24) or it *obstructs* its provision (*ERT* at para. 38; and *Merci* at para. 26). The Court did not elaborated these terms, probably because more attention was paid to *how to bring anti-competition state intervention under judicial scrutiny*, than *how to evaluate anti-competition state measures*. Despite the loose definition of 'incompatibility' and 'obstruction' elaborated in the framework of the public mission task, both terms led to an all-or-nothing approach to the conflict between competition law and public services, in which market considerations have priority over non-market interests.

4 New Path: *Corbeau* and *Almelo*

The *Corbeau* and the *Almelo* cases are meant to be the turning point in the application of the public mission exception.[9] This is true. Many authors have found a more pro-non-market attitude of the Court, which affected the way in which this derogation clause was applied. The major innovation was the way in which the Court constructed the derogation clause and interpreted it: as a balancing exercise. The Court adopted a sort of 'rule of reason' which leaves the door open to non-market values, namely the provision of public services; these ought to be balanced against market values, namely undistorted competition. This balanceable approach is reached by embracing the *criterion of proportionality* in order to evaluate the legality of national measures (Advocate General Tesauro's Opinion in the *Corbeau* case, at para. 14). According to it, the focus is not on whether the application of competition rules is incompatible or whether it obstructs the task entrusted to the privileged undertaking; instead, what is going to be assessed is whether restrictions on competition are *necessary* for the realisation of the requirements of public interest. Members States can confer exclusive rights which may hinder the application of European competition rules in so far as:

> [R]estrictions on competition, or even the exclusion of all competition by other economic operators are necessary to ensure the performance of the particular task assigned to the undertakings possessed of the exclusive rights (para. 14).

The change is very subtle but powerful. Before the *Corbeau* judgment, the conflict between competition policy and public services was considered a conflict between opposed aims, that is, it was conceived as a sort of either-or conflict. However, the innovation in *Corbeau* was that instead of focusing on the conflict, the Court focused on the aims/end relationship existing between competition policy and the provision of public services. Indeed, restrictions on competition are thought of as necessary means to provide services of general economic interest.

Then, the question turns to be whether restrictions are necessary to provide such services. Although the answer to this question is up to the national courts — the *Corbeau* case arrived to the Court via the preliminary question procedure — the Court provided some criteria, and in particular it referred to the *conditions of economic equilibrium* (para. 17) or the

economically acceptable conditions (para. 16) under which the entrusted undertaking should perform its public mission task.

Despite the economic expertise which the mentioned criteria may require, the Court had in mind a lay notion of what amounts to conditions of economic equilibrium; indeed, the Court did not hold that competition rules apply as long as the economic stability of the undertaking is assured; it upheld that restrictions on competition are justified in order to guarantee the economic stability of a firm entrusted with the provision of a public service. Advocate General Darmon interprets the ruling of the *Corbeau* case in reference to this:

> The competition rules may be disapplied not only where they make it impossible for the undertaking in question to perform its public service task but also where they jeopardize its financial stability (Advocate General Darmon's Opinion in *Almelo,* para. 146).

This results in looser judicial control on state intervention. This is further confirmed by the *Almelo* case where the application of the public mission exception was at stake in the field of electricity supply. The Court repeated the doctrine of *Corbeau*: restrictions on competition are allowed if they are necessary for the performance of a task of general interest. It argued that:

> 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 (para. 49).[10]

If in the *Corbeau* case the Court showed a deferential attitude towards Member states' discretionary powers, this attitude is definitively strengthened in *Almelo,* for the Court explicitly referred to the national regulation of the discussed public service. This means that the economic, social, and policy choices that Member states made when regulating services of general economic interest ought to be taken into account to decided whether or not competition rules apply. It also means that national regulatory space is left unchallenged by European law, and in particular by competition rules.

Although adopting the proportionality test is a choice to be welcome in the field of competition law, its application is not free from criticism. As it has been elaborated by the Court, proportionality entails two subtests, namely suitability and necessity. Both are ill-applied by the Court in the *Corbeau* case, and these mistakes are going to be repeated in further cases.

The suitability test concerns the appropriateness of the means (restrictions on competition) to the ends (provision of public services). It also entails a debate concerning the desirability of the ends. Neither of these tasks has been undertaken by the Court. The Court presupposes that preventing new entrants from accessing profitable sectors of a public service market — electricity supply in urban areas — is the appropriate measure to guarantee the provision of services of general economic interest. Why? Because, by so doing, the entrusted firm can compensate for loss-making activities, which a privileged firm ought to provide, with profits obtained from profitable sectors which are free from competition.

The Court also presupposes that providing services of general economic interest is desirable. Such a presupposition prevents the Court from analysing the foundations for the performance of tasks of general interest. This is not a theoretical activity which lacks practical relevance: depending on what a service of general economic interest stands for, and which values and aims the provision a public service attains, Member states can justify a higher degree of restriction on competition, or the Commission can seek a stricter control on national anti-competition measures. Article 16 EC Treaty remedies the scant attention which the justification of services of economic general interest has attracted from the Court: it establishes that public services, the provision of which is a competence of both the Community and the Member states, promote social and territorial cohesion. It is still too early

to evaluate whether these values will become the new threshold according to which state intervention ought to be scrutinize.

Avoiding the question of desirability also prevents the Court from judging whether the service is provided in an *efficient* manner, for this will influence the quality and price of the service. It could be argued that the Court would pay merely lip service if Member states could draw back on the derogation clause of Article 86(2), independent on whether the public service is efficiently provided by the privileged undertaking. On the one hand, if no requirement for efficiency is attached to the provision of services of general interest, Member states may transform the public mission exception into a general derogation rule, without deriving any obligation as far as the quality of the service is concerned. On the other hand, if the question of desirability is put in terms of the efficient provision of public services, either the Court or the national judge should evaluate not only whether the monopoly is objectively justified by requirements of public interest, but also whether it is more or less effectively managed. This approach would enhance the judicial control of regulatory measures adopted by Member states beyond the granting of exclusive or special rights. The Court seems implicitly to reject this path; Advocate General Tesauro is more explicit, as he has been declared to be contrary to such appraisal:

> Articles 86 and 82 cannot constitute a means of evaluating the economic efficiency of this or that national monopoly. If a monopoly is objectively justified, as in the case of the basic postal monopoly, it is of little importance whether it is more or less effectively managed (Opinion Advocate General Tesauro in *Corbeau* para. 16).

This means that the test of proportionality, and in particular the test of suitability is inappropriate to assess how a public service market has been regulated by the state. It also means that the judicial scrutiny, when applying the public mission exception, is not going to be stretched to include the control of a baste regulatory space: namely the management of the public service.

The necessity test, unlike the suitability test, received great attention from the Court. Actually, it seems as if the entire test of proportionality was reduced to assessing the necessity of a national measure. However, the way in which the Court conducted the necessity test is not free from criticism.

First of all, as it has been elaborated in the free movement rules case-law, the necessity test entails a debate concerning the level of intrusion or restriction into a Community right or policy which is acceptable under European law. That is, the necessity test is a matter of *degree*. However, in the *Corbeau* case, as in further judgments of the Court on competition matters, the necessity test focuses on the *justification* of the restrictive measure. The question, "what is the level of restriction on competition necessary to guarantee the provision of public services?" is substituted by the more general question, "are the restrictive measures necessary to guarantee the provision of public goods?" That is, a question of balancing turns out to be a question of the justification of the restriction on competition.

Second, the most striking feature of the test of necessity as applied in *Corbeau* is that no alternatives are considered. Proportionality involves the evaluation of the merits of a measure to assess its legality, and, in this sense, it involves evaluating alternatives (Emiliou 1996). To examine the proportionality of economic measures, two conditions are to be met: technical knowledge is needed to assess and compare the advantage and disadvantages of a measure; evidence is to be presented to the Court that the chosen measure is the most efficient means to achieve the desirable aims. Despite the importance of evaluating alternatives in the field of free market, in competition law cases the Court does not examine any alternative arrangement to the granting of exclusive or special rights: it presupposes that cross-subsidisation is the only way to guarantee the provision of universal services, and it also presupposes that restricting market access to new entrants is the only effective arrangement to guarantee the provision of universal services under economically acceptable conditions.[11] This lack of interest in evaluating alternative solutions is due to another

absence: the Court does not assess whether the public mission task entrusted to a privileged undertaking could be more efficiently provided by other firms. By so doing, "the Court examined the issue from the point of view of the incumbents rather than the consumers" (Nicolaides 1998, 27). That is to say that the Court took the point of view of the Member states.

5 Following the Path and Enlarging It: *Gas and Electricity Monopolies*

In 1997 the Court delivered three judicial decisions concerning exclusive rights to import and export gas and electricity. The Netherlands granted exclusive rights to import and export electricity to the privileged undertaking SEP, whereas France granted exclusive rights to import and export both, gas and electricity to EDF and GDF, and Italy did so to ENEL. The so-called *Gas and Electricity Monopolies* cases[12] are landmark cases for a number of reasons. In the *Gas and Electricity Monopolies* cases the Court solved the conflict between free trade rules and competition rules. It established that restrictions on free trade which, moreover, are discriminatory, such as the granting of exclusive import rights, could be justified by the public mission exception, Article 86(2) EC. By so doing, the Court applied the competition rules' derogation clause, which entails a less strict judicial scrutiny than would otherwise have been the case had the free movement rules and the free movement derogation clause been applied.

The *Gas and Electricity Monopolies* cases are also landmark cases, for here the Court made the definitive movement towards backing up Member states' discretionary powers concerning the provision of services of general economic interest. It did it by applying two means: the test of necessity and the burden of proof.

5.1.1 The Necessity Test

As a derogation clause, the Court said that Article 86(2) has to be interpreted strictly (para. 37). However, it continued, exemptions to competition rules are permitted, provided that they are necessary for the performance of a public service task (para. 38). What does the Court take into account to determine such *necessity*? In addressing this it, first of all, referred to the discretion of Member states to use certain undertakings, in particular in the public sector, as an instrument for economic of fiscal policy (para 39 following *France v Commission*). Second, it established that, when defining the services of general economic interest, Member states cannot be precluded from taking into account objectives pertaining to their national policy or from endeavouring to attain them (para 40).[13] And third, it emphasised the importance of the uninterrupted supply of electricity throughout the territory, in sufficient quantities to meet demand at any given time, at uniform tariff rates, and on terms which may not vary is a task of general economic interest. So, what test of necessity ought to be applied after taking into account the former issues?

> It is sufficient that the application of those rules obstruct the performance, in law or in fact, of the special obligations incumbent upon that undertaking. *It is not necessary that the survival of the undertaking itself be threatened* (para 43).[14]
>
> It is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, *defined by reference to the obligations and constraints to which it is subject* (para 52).[15]
>
> Moreover, it follows from the *Corbeau* judgment that the conditions for the application of Article 90(2) are fulfilled in particular if maintenance of those rights is necessary to enable the holder of them to perform the tasks of general economic interest assigned to it under economically acceptable conditions (para 53).

That is, the economic survival of the undertaking is not the threshold to which the public mission exception is to be applied; the threshold is rather the economically acceptable conditions under which the entrusted undertaking performs its activity (*Corbeau*); and the performance is determined by the obligations and constraints imposed by the Member states. This is the definitive recognition of the value of public services, independent of their economic viability (Ross 2000, 25). It is also the definitive recognition of Member states' broad discretion in the provision of universal services.

To strike a balance between undistorted competition and public services, the clear-cut economic criterion — the finance balance or the economic viability of the undertaking — is finally withdrawn: the Court said that if the exclusive import rights granted to the Dutch electricity undertaking were to be removed, prices would be lower (para. 54); however, the Court continued,

> [i]t is also clear that such opening up of the market would involve substantial changes in the way the national supply system is run, particularly with regard to SEP's obligation to contribute, through the planning for which it is responsible, to the proper functioning of that system on the basis of costs that are as low as possible and in socially responsible manner (para 55).[16]

Restrictive measures should not be proportionate to the survival of the enterprise; rather, they have to be proportionate to the provision of services of general economic interest, as defined by Member states and under economically acceptable conditions.

5.1.2 Burden of Proof

The second tool which the Court used to back up Member states' regulatory powers in the area of public services is the burden of proof. First of all, those who invoke the public mission exemption should demonstrate that all conditions are met. Member states have to prove by eliminating the restrictive measures (exclusive import rights) that performing the public interest under economically acceptable conditions will jeopardize it. This burden, the Court added, cannot be extended so that is necessary that member states have to prove that no other conceivable measure could enable the public mission task to be performed under the same conditions (para. 58). As such, the former definition of the burden of proof leaves a wide margin of discretion for the member states (Slot 1998, 1200) which can concentrate on the justification of the restrictive measure rather than on evaluating other (possibly more efficient) alternatives.

The large leeway granted to Member states contrasts with the tougher attitude of the Court towards the Commission. The Court ruled that the Commission failed to fulfil its obligation as a judicial applicant, namely it ruled that Treaty obligations have not been fulfilled by The Netherlands, France, and Italy. The Court blamed the Commission for concentrating too much on the legal reasons which backed its claim, and too little on the facts.[17] The Court devoted many words (paras. 59-63 and 71) to the lack a reasonable and coherent statement from the Commission, to its failure to provide evidence, and finally, to the failure to bring clearer initiatives to bear.

5.1.3 No Balance, but Justification of the Universal Services

In the *Gas and Electricity Monopolies* cases the Court enlarged the path initiated in *Corbeau* and *Almelo*: the not challenging member states' regulatory powers in the field of universal services. Member states' discretionary powers are not enhanced by the rulings of the Court, but they are not eroded either.

A final criticism to the way the Court conducted the proportionality test is that it focuses more on the justification of universal services than on the balance which should be struck between non-distorted competition and the provision of services of general economic interest, and this is going to be maintained by the Court in further judgments.

6 No Return: the *Albany* Judgment

In the *Albany*,[18] *Brentjens*, and *Drijvende Bokken* judgments, the Court dealt with the question as to what extent European competition law applies to entities which administer social protection regimes for employed workers. In particular, Albany, Brentjens, and Drijvende Bokken challenged the legality, under European competition law, of a system of compulsory affiliation to supplementary pension funds.[19] Albany — the *Albany* judgment is going to be referred to, since the other cases contains similar arguments — argued that the benefits available from the compulsory sectoral fund did not match the needs of the undertaking: they were too low, and obliged employers to make other pensions arrangements. The Court maintained that compulsory affiliation would undoubtedly restrict competition (para. 97); the question, however, is whether such restriction can be justified by the performance of a particular *social* task of general interest which the fund has been charged with (para. 98).

The Court referred to its prior judgments, in particular to *Corbeau* and the *Gas and Electricity Monopolies* cases, and argued in favour of member states' powers to use certain companies as an instrument of economic or fiscal policy; their discretion, when determining what services of general economic interest should be entrusted to certain undertakings, to take account of objectives pertaining to their national policy; and, finally, their discretion to impose obligations and constraints on certain undertakings in order to attain objectives of national policy. The discussed compulsory affiliation with a sectoral pension scheme is the outcome of such discretionary powers; the *social function* attributed to the supplementary pension scheme is the value which justified restrictions on competition.

Hence, is the measure of restricting competition proportionate to its aim, namely of providing the supplementary pension scheme? To answer the question regarding proportionality, the Court identified in its previous judgments, two alternative necessity tests (para. 107): Would it be possible for the undertaking to perform its tasks *as defined by reference to the obligations and constraints imposed*? (*Gas and Electricity Monopolies* case) Or, can the privileged undertaking perform tasks of general interest *under economically acceptable conditions*? (*Corbeau* and *Gas and Electricity Monopolies* cases)

Advocate-General Jacobs considered that the Court was not in the position to answer these questions: many points concerning the factual background were not entirely clear, and therefore, it was up to the national courts to examine all the economic, financial and social matters involved in the case (para. 335). The Court, however, thought it was in the position to evaluate the matter. The way it undertook the proportionality test could be not less technical. First, it said that:

> If exclusive rights of the fund to manage supplementary pensions 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. 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).
>
> Such 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*... (para. 109).[20]

The value of solidarity attached to the social task of general interest performed by the sectoral pension fund justifies the exclusive right of the fund and therefore, it justifies the restriction on competition.

> It follows that the removal of the exclusive right conferred on the Fund might make it impossible for it to perform the tasks of general economic interest entrusted to it under economically acceptable conditions and threaten its financial equilibrium (para. 111).

This conclusion is mostly astonishing. To start with, the Court mixed up the question of whether exclusive rights are justified, and the question on whether they are proportional. Of course, there are related questions. However, the former is concerned with the aims of a measure, and the latter with the relationship between means and aims. Second, unlike Advocate-General Jacobs, the Court did not conclude that is was up to the national court to ascertain whether or not the discussed measures are proportionate. Instead of returning the final decision to the national judge, after having established guiding criteria, in order to harmonize the application of European competition law, the Court struck the balance which national courts have to apply. Finally, it is also striking that despite the complexity of the economic, financial, and social issues which the Court was dealing with, it concluded that the removal of exclusive rights would make it impossible to perform the task of general interest without undertaking an economic analysis.[21] The judgment's centre of gravity was on values rather than on evidences. This approach excluded the consideration of alternative measures which, instead of eliminating competition altogether, maintain a certain level of competition — such as introducing minimum requirements. It is the burial of the requirement to find out the least restrictive and equally efficient measure; it is also the burial of the view that proportionality requires finding a compromise between colliding interests.

The outcome of the Court's ruling is a most deferential attitude towards member states' discretionary powers, since the Court embraced a relaxed notion of the proportionality test (Gyselen 2000, 447). To Gyselen, now it is up to the market or the national government to decide the direction of supplementary sectoral funds: "It is not EC competition law that will steer such a decision" (Gyselen 2000, 448).

6.1 Wrapping up

From the Court's case law, which has been analysed here, it flows that proportionality rather than non-discrimination is the chosen path to assess the legality of anti-competition state measures. However, whereas the principle of non-discrimination provides a clear-cut scrutinizing criterion, the use of proportionality offers no conclusive answer. A further key question concerning the principle of proportionality has to be asked, namely *how to apply* it.

This question has to be posed because the principle of proportionality is sufficiently flexible (Jacobs 1999, 20-21) to permit a variety of applications. This is possible to appreciate when comparing the judicial scrutiny of Community measures and national measures (Jacobs 1999, Tridimas 1999 among others), for the tolerant standard of judicial review applied to Community measures contrasts to the more demanding one applied to national measures.[22] The flexible nature of the proportionality test can also be appreciated when comparing the judicial scrutiny of two sorts of national measures, namely those restricting the free movement of goods, and those restricting competition between undertakings. The strict control applied in free movement of goods cases, which epitome is the less restrictive measure test, differs from the Court's deferential attitude which flows from the case law in competition matters.[23]

Some signs of the loose application of the proportionality test in competition matters are the following. First, the Court does not assess whether the universal service, which justifies restrictions on competition, is efficiently provided by the privileged undertaking. Indeed, if the Court wants to do so, it has to adopt an intrusive attitude on member states' discretionary powers, for it is going to assess not only whether granting exclusive and special rights is the most appropriate means to achieve a certain desirable aim, namely guaranteeing the provision of universal services; it also is going to analyse whether the privileged undertaking efficiently provides the universal service.[24] Second, the lack of technical knowledge and the scarcity of evidence produced by the applicants prevent the Court from evaluating alternatives to the discussed measure. This leads to assessing the

validity of a measure under proportionality *in abstracto,* which clearly favours the choices made by member states, because the Court does not determine which level of intrusion is justifiable, but rather whether the intrusion is justifiable because of the provision of public services.

7 The Court's Active Self-Restraint

In the case law in anti-competition state measures the application of the proportionality test leads to a rather loose judicial scrutiny. The crucial question to be asked now is *why*. Two complementing sort of reasons should be provided: those concerning the inherent limitations in judicial control and those concerning the nature of the judicial function (Edward and Hoskins 1995).

As to the reasons concerning the inherent limitations in judicial control, Edward says that "a realistic appraisal of the forensic resources available to the Court also pleads in favour of marginal control" (Edward and Hoskins 1995, 172). He argues that most cases concerning the legality of public monopolies and privileged undertakings "arise in the context of preliminary references which is ill-suited to detailed factual or economic analysis" (Edward and Hoskins 1995, 172). Moreover, as Tridimas observes (Tridimas 1999) in those cases which require complex economic analysis the Court applies a tolerant level of judicial scrutiny, because it lacks the expertise and resources to undertake such an analysis.

As to the reasons concerning the role of the judiciary, one has to bear in mind that when applying the test of proportionality, the level of scrutiny does not depend on the structure of the principle itself as much as on the *nature* of the judicial function. Asking why proportionality is applied in such a way that preserves member states' discretionary powers, means asking how the Court itself understands its judiciary function. It might be said that the role of the courts is to adjudicate on the scope of powers conferred and the manner of their exercise. This, it is claimed, involves assessing whether the exercise of powers is the most appropriate to achieving a particular policy goal. By contrast, it might be said that the judicial function, although it concerns the scope and manner of exercise of power, cannot be of legislative nature, and therefore, any social and economic consideration is reserved to the executive and the legislative. In either case, the application of the proportionality test leads to different standards of judicial scrutiny, the difference being the extent to which the social and economic considerations which justify a restrictive or anti-competition measure, are balanced against the need to ensure free market and undistorted competition.

Also belonging to the reasons concerning the role of the judiciary, it is important to keep in mind that the intensity of judicial scrutiny depends, among other things, on whether the national measure impairs the effectiveness of Community measures. This has been and still is the case in the free-trade field where national measures restricting fundamental freedoms have been subject to strict judicial control. But what would happen if a national measure both infringed on and promoted Community values? This is the case in providing services of general economic interest, because, since Article 16 has been incorporated to the Treaty, not only member states, but also the Community shall see to it that universal services operate on the basis of social and territorial cohesion. Hence, a restrictive national measure which aims at guaranteeing the provision of universal services, impairs the effectiveness of European competition law; so, a higher degree of judicial scrutiny is expected. However, it also improves the realisation of another Community value, namely the provision of universal services in order to promote social and territorial cohesion. Since the dichotomy between national interest *and* Community interest debilitates in the area of public services, for state intervention promotes Community values, a lower degree of judicial scrutiny should be expected when judging national anti-competition measures.

Generally, it is claimed that when the judiciary holds an intrusive attitude towards member states discretionary powers, it exercises judicial activism, whereas if member states' choices remain unchallenged the judiciary exercises judicial self-restraint. Despite the large use of these categories when studying the Court's activity, judicial activism and self-restraint

are inappropriate tools to analyse the nature of the judiciary function. Public monopolies case-law, for example, shows the exercise of a greater restraint by the Court: it is more sensitive to the member states' choices on public policies and it is less willing to substitute the Community institutions' view by its own approach. However, when analysing the decisions' content, typical "judicial activism" signals can be appreciated: the balancing criterion of proportionality is widely confirmed to assess policy choices; non-market values are balanced against purely economic ones; and the shifting of policy-making from the political to the judicial arena is reinforced by requiring national courts to assess according to proportionality the legality of domestic policy choices.

Hence, in applying activism/restraint categories to judicial decisions a paradox takes place: the Court simultaneously exercises greater restraint and greater activism. The exercise of judicial activism and judicial self-restraint mirrors the exercise of *great discretion* by the judiciary: the restrictive use of discretion is as activist judicial exercise as the activist use of discretion. Moreover, those who analyse the activity of the judiciary according to the activism/restraint categories presuppose the existence of a line separating law from politics: if the judiciary crosses the line it exercises judicial activism, whereas if it keeps behind the dividing line it exercises judicial self-restraint. This "dividing line" approach disregards that the limits between law and politics are so fuzzy that rather than lines one should talk about an area where law and politics converge, and where judicial adjudication influence politics as much as politics influence judicial activity.

The scope of the following pages is to analyse this area of convergence, for it is there where most confronted opinions arise regarding the content of the judicial function. It is argued that the Court's rulings influence politics. This neither means that the judiciary function is a quasi-legislative one, nor that judicial adjudication should expel social, economic and policy considerations. To this aim, the analysis of the so-called "judicial activism" signals in the competition case law may lead to a better understanding of the function of the judiciary and how it relates to politics. These signals are (i) introducing the proportionality test in competition cases; (ii) taking account of non-market values; (iii) and national courts gaining an active role in assessing the proportionality of anti-competition state measures.

7.1 Introducing the Proportionality Test in Competition Matters

One of the greatest contributions of the Court's case law in competition issues is the introduction of the principle of proportionality to assess the legality of public monopolies and privileged undertakings. This means, first, that restrictions on competition have to be weighed against the realization of a legitimate national goal, namely guaranteeing the provision of services of general economic interest; and second, it also means that weighing is a matter of degree, rather than undistorted competition outweighing universal services.

The choice for proportionality in competition law has the following institutional consequences. First of all, the Court acquires *a priori* control over national regulation; and second, by assessing the necessity of state intervention, the Court decides whether either the market or the national regulation determine the allocation of resources: the market if the measure is considered not to be necessary, and the national regulation if the anti-competition measure is deemed to be necessary.

The choice for proportionality in competition matters also has an immediate consequence in the political arena, and in particular in the process of integration: it promotes the so-called negative integration, that is, the elimination of national restrains on trade and distortions of competition (Scharpf 1996, 15). *Free access to the market* becomes the axis of negative integration; and the Commission through its intervention against infringements of Treaty obligations and the Court through its decisions and preliminary rulings become the crucial actors of this form of integration.

However, the rulings of the Court can also boost European legislation, and in this sense, negative integration becomes a catalyst for positive integration (Dehousse 1998, 90ff). This has been the case after the *Cassis de Dijon* judgment. Before *Cassis,* in the

absence of European harmonization legislation member states felt they had liberty to regulate to protect their own interests. After *Cassis* this is no longer the case: national legislation and the legitimacy of national choices is subject to judicial scrutiny by the Court in the absence of harmonization legislation. The strong position of member states is weakened, and the reaction is the acceleration of the harmonization process, which is also favoured by institutional changes such as the adoption of majority voting when passing legislative measures concerning the completion of internal market. A similar reaction can be appreciated in competition law, and in particular in those cases where a privileged undertaking to which a Member State has entrusted with the provision of a service of general economic interest, e.g., electricity supply, has been granted exclusive and special rights. If the Court, when appraising the legality of the national measure, concludes that it is contrary to Articles 81 and 82 (undistorted competition and prohibition of abusing a dominant position) the result is that it cannot be applied. This will create a legislative void since the Court cannot substitute alternative regulations to govern the economic activities (Edward and Hoskins 1995, 172); the market, rather than national regulation, will determine the allocation of resources which will put the provision of the universal service will be in jeopardy. The break down of universal services "militates in favour of Community legislation to clarify the acceptable limits of legal monopolies and state regulation" (Edward and Hoskins 1995, 173), that is, it militates in favour of positive integration.

It is also important to bear in mind that the granting of exclusive and special rights is justified by public services obligations (PSOs) which member states impose on certain undertakings. According to the proportionality test as applied in *Corbeau* and *Almelo*, restrictive measures should not be proportionate to the survival of the enterprise; rather, they have to be proportionate to the provision of services of general economic interest as defined by member states and under economically acceptable conditions. This determines the degree of distortion of competition which is necessary to guaranteeing the provision of a universal service. It also favours state regulation and Community legislation — national governments in the Council of Ministers — to clarify the content of public services obligations. By so doing, member states settle the limits of intrusion into their economic, social, and policy choices against the Commission and the Court, and therefore, legal certainty is increased.

7.2 Non-Market Values are Taken into Account

When proportionality is applied in free trade and in competition matters, the judiciary decides on the extent of regulatory powers left to member states under European law. This is done by striking a balance between colliding interests, namely market-values such as free movement of goods or undistorted competition, on the one hand, legitimate national non-market-values such as health consumer or environmental protection, public service obligations etc., on the other hand.

Taking account of the provision of universal services as a non-market value, which collides against undistorted competition, holds no novelty in comparison to the free trade case law. And yet, there is something in the way the Court has applied the proportionality test, especially after *Corbeau* and *Almelo* which differs from the free trade case law, namely the recognition of the value of public service independent of its economic viability (Ross 2000), that is, the non-economic value attached to essential public services.

The pre-*Corbeau* case law is characterised by two features (Ross 2000, 24): first, the Court has constructed the derogation clause of Article 86(2) EC Treaty as narrowly as possible; and second, rather than promoting the provision of universal values, the threshold applied was the notion of "obstructing performance". This led to an analysis as to how the economic viability of an entrusted undertaking would be affected by fully comply with the Treaty obligations. It led to a balancing exercise dominated by an economic analysis rooted in the ideology of market building, and in the priority of market values over non-market values.

The strict economic test of "obstructing the performance" or "making impossible the performance" of a public mission task, along with direct effect and the *effect utile* doctrines as applied in competition matters, was part of a long-running strategy of constructing Europe by market integration, and in particular by the so-called negative integration (Scharpf 1996). The market becomes the major harmonizing and integrating force in a process which is clearly de-politized and oriented to eliminating all national restraints on trade and distortions of competition.

The well-known U-turn of the case law took place with the *Corbeau* judgment and it was further confirmed by the *Almelo* case. Here, the Court substituted the notion of "obstructing performance" by the "conditions of economic equilibrium" or the "economically acceptable conditions" under which the entrusted undertaking should perform its public mission task. To Roos, the new formulation indicates 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 normal market rules can be disapplied" (Ross 2000, 25).

The Court definitively abandoned the economic viability test in the *Gas and Electricity Monopolies* cases, where it held that:

> For the Treaty rules not to be applied to an undertaking entrusted with a service of general economic interest under Article 90(2) of the Treaty, it is sufficient that the application of those rules obstruct the performance, in law or in fact, of the special obligations incumbent upon that undertaking. It is not necessary that the survival of the undertaking itself be threatened (para. 43).

This means that priority has been placed to the provision of a universal service, and that judicial scrutiny should focus on the justification for protecting the service — imposition of public services obligations — rather than on the assessment of the anti-competition effects of the measure. "Put another way, the crucial methodological switch is from economic measurement to value judgment in the application of the derogation" (Ross 2000, 25). This is reinforced by Article 16 EC which recognises the place occupied by services of general economic interest among the shared values of the Union. Hence, whereas initially the non-market value of "universal service" was translated into economic terms, the novelty after the *Corbeau* case is that the Court renounces to carrying out such translation: non-market concerns are taken by its own and they have priority over market values.

This preference clearly benefits member states' regulation, for the economic and social choices they make in relation to the provision of essential public services are not going to be systematically scrutinised by the Court, and their regulatory powers are upheld in front of the Commission. The consequence of this option are twofold: it re-politizises a particular economic field, namely competition law; and it restores national boundary control.

The consideration of universal services as non-market values and the recognition of priority over undistorted competition contradicts the claim made by Scharpf (Scharpf 1996) that the Court is bound by a bias in favour of a market-building and negative integration policy as opposed to a market-correcting or positive integration policy. By recognising the legality of anti-competition measures which aim at guaranteeing the provision of a universal service, the Court has sparked off a process of re-politization of competition law, which is favoured by institutional changes, namely the post-Amsterdam Article 16 EC. It commands the Community and the member states to take care that the services of general economic interest operate on the basis of principles and conditions which enable them to fulfil their mission, namely promoting social and territorial cohesion. The political process *horizontally* involves both member states and the European Commission (mainly although not exclusively).

However, this horizontal political process, which is founded on the European problem-solving capacity, might be hindered by the institutional arrangements governing the provision of universal services, because *institutions matter* (Scharpf 1996, 31). As Scharpf

argues, sectors close to the state, such as the utility sectors, have been protected against the market forces by the territorial state, which has developed a variety of forms of intervention leading to a variety of institutional arrangements. A European-wide harmonisation of these sectors seems not to be a feasible option due to the great disparity of the institutional arrangements. Since European-wide harmonization will erode the States' institutional structures to provide universal services, the most likely outcome would be the competency gap (Scharpf 1996, 15), that is, the lack of intergovernmental agreement.

If the European problem-solving capacity seems to fail, there is an alternative solution to the competency gap in competition law: the legislative powers which the Treaty confers to the Commission (Article 86(3) EC). A certain degree of legislation, i.e., harmonization is necessary in the liberalisation of universal services, and the powers of the Commission might turn out to be of particular significant when the European-wide law-making process is blocked in the Council of Ministers. However, it would be fallacious to hold that the Commission' legislative powers in promoting competition are unlimited. In the *France v Commission* judgment[25] the Court ruled that the Commission could adopt directives only in relation to state intervention. This is a more limited legislative power than that conferred to the Council to adopt harmonization measures under Article 95 (the functioning of the internal market) or Article 83 (competition law). It also emphasized that anti-competitive conduct of legal monopolies ought to be controlled by the Commission on a case-by-case basis and by means of infringement procedures, rather than on the whole and by legislative measures. And finally, the Court established that the Commission could issue a detailed Community regulatory regime, because it would "complicate the pre-existing national regime without improving it" (Edward and Hoskins 1995, 185). This means that the Commission should limit itself to adopting framework legislation, and leaving member states wide discretion to adopt detailed rules according to the social, economic, and political choices made by the state, and according to its own institutional arrangement.

Hence, the alternative solution to overcome the competency gap is not offered by the Commission's legislative powers on competition law, but rather by restoring the national boundary control (Scharpf 1996, 34). This means protecting national preferences and institutional arrangements against negative integration. Scharpf's proposal is a radical one: to abolish the constitutional status of European competition law by taking it out of the Treaty. This, he argues, will end the *de facto* priority of negative integration over national policy preferences and institutional arrangements through judicial control.

However, to restore the national boundary control it is not necessary to adopt such a radical option, as it shows the Court's case law in the liberalisation of universal services. Not only does the Court weigh the degree of distortion of competition against the realization of a legitimate national goals (as in *Cassis de Dijon*); it also recognises the non-market value of the provision of universal services and weighs this against the market value of undistorted competition. The outcome, as in the *Corbeau* judgment, is that national policy options and institutional arrangements in the universal service sectors remain unchallenged by the Court's scrutiny. This refutes the *de facto* priority of negative integration, and the bias for negative integration which many think the Court is bound to.

7.3 National Courts Gain an Active Role in Assessing the Proportionality of Measures

The final signal of judicial activism sent by the Court through its competition case law is the reinforcement of national courts active role in furthering economic integration. The Court has consistently held that it is up to national court to assess the proportionality of state intervention aiming at guaranteeing the provision of services of economic general interest. Such assessment should be carried out according to the general criteria elaborated by the Court in its case law.

Most cases concerning the legality of the granting of exclusive rights to privileged undertakings have made their way to the Court through the preliminary reference procedure

(Article 234 EC). In this framework, to refer back to the national court the evaluation of the state measure seems to be the appropriate solution to adopt for two reasons. First, when the Court establishes general criteria the application of which is a competence of national courts, it strengthens the co-operation model that organizes the relationship between the Court and its national counterparts. Through this co-operation model, a Community character is imprinted on national courts. To explain this result, it is necessary to remember the requirements established by Article 86(2) EC. This derogation clause applies (i) to undertakings providing services of general economic interest; (ii) if the application of competition rules obstructs the performance of their task, in law or in fact; and (iii) if trade is not affected in a manner contrary to the interest of the Community. The later requirement means that the Community interest threshold does not delimit the jurisdiction of national courts; it rather stamps them with a further community role: national courts not only apply Community law — supremacy, direct effect, and the effective implementation of Community rights being the main tools that the Court elaborates for this purpose;[26] they also have to take into account and to evaluate the Community interest; by so doing, national courts come close to assuming the role of a Community institution.

Second, the preliminary reference process, as it has been noted before, is ill-suited to provide and analyse detailed information which is necessary to apply the proportionality test. National courts have better access to this information which can be analysed with the support of the Commission. Indeed, due to the complexity of competition cases, and the uneven familiarity of national judges with competition law, national courts may address the Commission as an expert in competition law. The Court has indicated this possibility,[27] and the Commission has elaborated the Notice concerning co-operation with national courts.[28] Moreover, in the Commission's White Paper on Competition law, it has declared the need to reform the existing procedure for co-operation in order to adapt it to the decentralized application of European competition rules.

The active role which national courts play when assessing the legality of public monopolies and privileged undertakings under European competition law has been characterized as a signal of judicial activism. Why? Because the Court extends to national courts its role in negative integration, and in particular it extends the power of deciding whether either the market or state regulation are the appropriate tools to allocate economic resources. The advantage of so doing is wisely put by Dehouse:

> Whereas on the international plane implementation often looks like a zero-sum game (if the state complies with rulings of international courts, it reduces its margin of manoeuvre), things are different when domestic courts have to implement EC law. There, implementation may often look like a positive-sum game, in which compliance will actually increase the powers of domestic jurisdictions with respect to other domestic actors, mostly the legislature (Dehousse 1998, 141).

However, whereas the penetration of European law increases the readiness to subject domestic legislation to a greater judicial scrutiny, and therefore, it reinforces the powers of national courts, it is unlikely that they will erode neither the institutional settlement to provide universal services, nor the power of the executive and legislature to make legitimately social, economic, and political choices. The necessity of weighing economic considerations, such as undistorted competition, against social considerations, such as supplying potable water in order to assess the legality of anti-competition state measures makes judges being confronted with the content of the judiciary function. On the one hand, they have to exercise a legislative function since social, economic and policy considerations have to be balanced against each other. On the other hand, they cannot substitute the choices made by the legislative, which are the outcome of democratically finding compromises between competing interests.

8 Concluding Remarks

The analysis of the Court's case law has highlighted two related issues. First, the Court assesses the legality of state intervention in the universal services sectors under the competition rules. This means that the restrictive trade effects and the anti-competitive effects which flow from state intervention can be justified by applying the public mission exception (Article 86(2) EC) which facilitates a rather a less strict control than that should be pertinent if the free trade derogation clause (Article 30 EC) were to be applied. Second, the crucial criterion to assess the legality of state intervention is the proportionality of the measure rather than its discriminatory effects. This means that the Court gains an *a priori* control over state intervention. However, the degree of scrutiny will depend on how the test of proportionality is applied. The content of the necessity test as elaborated in *Corbeau* and following judgements, the absence of an evaluation of alternatives to the state measure, and the definition of the burden of proof in favour of member states speak volumes of the Court's deferential attitude towards the choices made by member states.

These factors support the following conclusions:

- According to the proportionality test as applied in *Corbeau* and *Almelo*, restrictive measures have to be proportionate to the provision of services of general economic interest as defined by member states and under economically acceptable conditions. This means that member states settle the limits of intrusion into their economic, social, and policy choices against the Commission and the Court. The Court, as the member states, seems to protect the regulation of universal services sectors from the influence of market forces. Regulation, rather than deregulation, that is, the law rather than the market rules the provision of universal services.

- National policy options and institutional arrangements in the universal service sectors remain unchallenged by the Court's scrutiny. This refutes the *de facto* priority of negative integration, and the bias for negative integration which many think the Court is bound to.

- The gaining importance of national courts' role when assessing the legality of state intervention under European competition law will reinforce the powers of national courts, but it is unlikely that they will erode neither the institutional settlement to provide universal services, nor the power of the executive and legislature to make legitimately social, economic, and political choices.

Notes

[1] Article 86(2) EC words: "Undertakings entrusted with the operation of services of general economic interest or 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, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them."

[2] Case C-393/92 *Municipality of Almelo and others v. NV Energiebedrijf Ijsselmij* [1994] ECR I-1477, para. 48.

[3] The Court has elaborated this sort of *rule of reason* to adjudicate in the free movement of goods. In the *Cassis de Dijon* case, the Court established that obstacles to the free movement of goods within the Community are *prima facie* contrary to the Treaty (Article 28 EC); however, restrictions must be accepted in so far as they are *necessary* to satisfy legitimate national objectives (mandatory requirements). The *Cassis de Dijon* approach excludes the consideration of all-or-nothing criteria according to which, either member states have exclusive competence in relation to public monopolies and privileged undertakings — the so-called Absolute Sovereignty approach — or public monopolies and privileged undertakings are *per se* a violation of European competition rules — the so-called Absolute Sovereignty approach. Instead, the Court embraces a more-or-less criterion — a so-called balancing criterion — according to which the Court tries to combine — integrate — colliding interests.

[4] If a national measure is deemed to have discriminatory effects, the test of proportionality would be excluded, and in this sense, it also is excluded a balancing exercise: that of appraising whether or not discrimination in intra-Community market can be justified by the realisation of a national legitimate interest.

[5] Indeed, this relationship can be exemplified by three landmark cases in the field of restrictions on free movement of goods: *Dassonville* (Case 8/74 *Procureur du Roi v Benoit and Gustave Dassonville* [1974] ECR 1299), *Cassis de Dijon*, and the joined cases *Keck and Mithouard* (Cases C-267/91 and 268/91 *Criminal proceedings against Mr. Keck and Mr. Mithouard* [1993] ECR I-6097). These cases exemplify the change in the criterion for scrutinizing the legality of national regulation: from proportionality towards non-discrimination.

[6] Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979.

[7] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-2925..

[8] Case C-170/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889.

[9] The *Corbeau* case (Case C-320/91 *Criminal proceedings against Paul Corbeau* [1993] ECR I-2533) arose when Mr. Corbeau established a courier business consisted of the home collection and distribution of mail before noon the next day in or around Liège. The courier business competed against *Régie de Postes*, a public monopoly to which, according to the Law on Postal Service of 1956, was granted exclusive rights over mailing activities in Belgium. The national court, which was dealing with the judicial action brought by Mr. Corbeau, addressed a preliminary question to the Court concerning the compatibility of the exclusive right with the command of unrestricted competition (Article 81).

[10] Emphasis added.

[11] From the least restrictive measure criterion, the Court has moved towards the most restrictive measure one.

[12] Case C-157/94 Commission v Kingdom of the Netherlands [1997] ECR I-5699; Case C-159/94 *Commission v* French *Republic* [1997] ECR I-5815; Case C-158/94 *Commission v Italian Republic* [1997] ECR I-5789.

[13] It is striking that the Court did not at the time refer to the Directive 96/92 of 19 December 1996, which had just been issued, concerning common rules for the internal market for electricity, which leaves a broad leeway to member states in defining public service obligations. Article 3(2) establishes that "Having full regard to the relevant provisions of the Treaty, in particular Article 90, member states may... impose public service obligations... such obligations must be clearly defined, transparent, non-discriminatory and verifiable... they shall be published and notified to the Commission".

[14] Emphasis added.

[15] Emphasis added.

[16] Whereas in *Corbeau* case the state relied on the 'cream-skimming' argument to justify the granting of exclusive rights, in the *Gas and Electricity Monopolies* cases the security of supply gas and electricity was the main argument put forward to justify the restrictive measure. Unfortunately, the Court did not provide any definition or standards regarding the security of supply of energy.

[17] The failure of the Commission could be appreciated during the proceedings before the Court, as well as during the prelitigation procedure.

[18] Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

[19] Sectoral pension funds are collective forms of pensions which supplement the basic statutory pension. They are bound to the active population of a particular sector; they can be created by the public authorities or by the social partners; participation can be compulsory or optional; they can be financed according to the 'pay-as-you-go' principle, or under the capitalization principle (Gyselen 2000).

[20] Emphasis added. This high level of solidarity can be achieved by the sectoral pension fund, since contributions do not reflect the risk, there is an obligation to accept the fund without prior medical examination, pension rights accrue despite exemption from the payment of contributions in the event of incapacity of work, arrears of contributions due from an employer in the event of insolvency can be discharged by the fund, and the amount of pensions can be indexed in order to maintain their value (para. 109).

[21] The Court of First Instance has stressed the importance of undertaking economic analysis when deciding upon the application of Article 86(2). In the *Eurovision* case (Joined Cases T-528, 542 and 546/93, *Eurovision* [1996] ECR II-689) the CFI blamed the Commission for not having carried out any analysis of the relevant economic factors involving the performance of broadcasting services; in the *Air Inter* case (Case T-260/94 *Air Inter* [1997] ECR II-997) the Court considered that the flight company Air Inter, although it upheld the burden of proof, limited itself to asserting that the loss of the exclusive right would make it impossible to fulfil its task, without quantifying either the cost of the task or the additional incomes from the operation of the exclusive right. For more details of these cases see Buendía Sierra 1999.

[22] This disparity may be justified by good reasons (Jacobs 1999): national measures are likely to weaken the effectiveness of Community measures and European law.

[23] This difference is due, Maduro says, to the fact that the Court is concerned about state intervention rather than public intervention in the market (Maduro 1998).

[24] On the other hand, eluding such analysis may erode the effectiveness of Community law, for member states will appeal to the provision of services of general economic interest to privilege certain undertakings regardless of whether the granting of exclusive and special rights and the chosen firm assure the most efficient service.

[25] Case C-202/88 *France v Commission* [1991] ECR I-1223.

[26] For a further analysis of the role of national courts as Community courts in the interpretation and application of Community law, see Maher 1994.

[27] Case C-234/89 *Stergios Delimitis v Henniger Brau* [1992] ECR I-935.

[28] OJ 1993 C39/6. The co-operation between the Commission and the national courts, if taken seriously, will lead to the introduction in national law of procedures allowing such consultations.

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