ECONOMIC FREEDOM(S) AND ECONOMIC REGULATIONS IN THE MEMBER STATES: WHAT DOES THE EU (REALLY) LIBERALISE?

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Abstract: The present article focuses on national restrictive regulations affecting market structure and functioning. It is argued that EU primary law permits, to a certain extent, a control of legality of such national measures in the light of both competition and free movement rules. The article examines the scope and the boundaries of such control, the legal models elaborated by the Court of Justice of the EU and highlights some implications in view of the enforcement at national level, in particular by the Italian Competition Authority ex Article 21-bis of Law No. 287/90.

1. INTRODUCTION

The European legal order is perceived as a system of law aimed at liberalizing economic activity within the Internal Market. Not surprisingly, however, the Treaties establishing the European Communities did not include a general principle recognizing (and protecting) economic freedom as such: i.e. a norm, similar to Article 41 of the Italian Constitution, that could be used for reviewing the legality of legislative measures restricting entrepreneurial freedom on the marketplace³.

³ This is due to the fact that based on the “principle of conferral”, the Treaties simply institutionalized cooperation among Member States. As an international law instrument, having functional nature, they simply set obligations, in certain fields, for the achievement of specific goals. They were not – and still are not – the founding constitutional charter of a federation or confederation of States and, as a consequence, they did not preconize principles that are part of the typical architecture of the constitution of nation-states. That having been said, it cannot be denied that, even before the modifications of EU primary law introduced since the Single European Act, the EU legal order has been construed and implemented in a way mirroring “constitutional” models. More particularly, for the purposes of the present article, it could be useful to remind that since the 70’s academics started discussing of the emergence of a (sort of) “European economic constitution”, based on both the institutional principles regulating the balance of power between the Community and the Member States (as well as the inter-institutional balance among EC institutions) and the substantive principles and rules governing the Internal Market functioning. For early debate on the economic constitution see inter alia J. Scherer, Die Wirtschaftsverfassung der EIFG (Baden-Baden, Nomos, 1970), and L.-J. Constantinesco, La constitution économique de la CEE, (1977) 13 RTDE 244. More recently, see E. Petersmann, Proposals for a New

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It is true that, since the mid 70’s – in particular since the Hauer case⁴ – the Court of Justice of the EU (“Court”) enounced the principle of “freedom to pursue trade or professional activities” as one of the “fundamental rights in the Community legal order”. However, similarly to all other “general principles” of the Community legal order, it applied to measures adopted by the European institutions: it was – and to a large extent still is – a tool for reviewing the legality of European acts only, and not for scrutinizing restrictive measures adopted by national authorities. As a consequence, such a principle could not be invoked in view of challenging national economic regimes, which determine who and how can operate on certain markets (in particular, markets where services of general economic interest are to be provided).

The situation has not substantially changed after the adoption of the Charter of Fundamental Rights of the European Union and its inclusion (after the Lisbon Treaty) in the body of the EU primary law⁵. Indeed, Article 16 of the Charter, which recognizes the “freedom to conduct a business”, should be regarded as a codification of the pre-existing case-law in this field. Furthermore, although Article 51 of the Charter states that the provisions of the Charter (including Article 16) are addressed to the European Institution as well as the Member States, it also specifies that those provisions apply to Member States only “when they are implementing Union law”. Consequently national legislations, which are not adopted in the frame of the implementation of Union Law, but in the frame of (merely) national prerogatives, are not subject to Article 16 of the Charter, but to national (i.e. constitutional) law only⁶.

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⁵ According to Article 6(1) TEU, “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”.
⁶ Indeed, as clearly stated by the Court in the well-known Åkerberg Fransson ruling “[t]he applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter. Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction”. According to the Court, these conclusions are fully in line with “Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties”; consequently, the Charter “does not extend the field of
However, if one looks at the substantive norms of primary EU law on the Internal Market, the landscape appears to be more complex. The Treaties, in particular the EEC Treaty, included provisions ensuring (i) free movement (of goods, persons, services and capital) in the Internal Market and (ii) free competition (for the purpose of the present article the notion of Internal Market is considered in its wider meaning, i.e. as encompassing both free movement and competition rules). As it appears from their text and ratio, protection of economic freedom(s) was at the very hearth of these provisions; though, only to a certain extent. Thus, the key-question was: to what extent?

Both sets of rules had (and still have) definite purpose and scope.

i) on the one hand, norms on “fundamental freedoms” were aimed at liberalizing intra-Community trade, so contributing to economic integration among the Member States. Consistently with their purpose, ratione personae they only applied to State measures (not to companies’ acts) and, ratione materiae, they only prohibited national measures entailing restrictions on cross-border movement of goods, persons, services and capital;

ii) on the other hand, rules on free competition were aimed at creating “a system ensuring that competition in the internal market is not distorted”. They mainly applied to undertaking’s behaviours (i.e. anti-competitive agreements and abuse of dominant position). State measures were only concerned in the case of State aids and of the (unclear) measures covered by Article 90 of the EEC Treaty (now Article 106 TFEU).

Quite clearly, none of these norms affirmed a right to entrepreneurial freedom as such. Therefore, Member States were not prevented from enacting economic regulations governing firms’ activity, provided that such (legislative or administrative) regulations did not restrict free movement in the Internal Market (nor entailed the granting of aids).

The legal frame partially evolved during the 80’s, in the wake of the accomplishment of the Internal Market. New trends were partially driven by “ideological” reasons. Indeed, the accomplishment of the Internal Market was linked to the liberalization of key economy sectors as well as to the privatization of traditionally State-owned firms. In the aftermath of liberalization and privatization – both linked to liberal policies and stances – previously closed market were opened up to competition and rigid and restrictive economic

application of European Union law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties” (C-617/10, EU:C:2013:105, paragraphs 21-23).


Former Article 3(1)(g) CE. This norm was subsequently “removed” from the Treaty by the Treaty of Lisbon. The latter provides now in its Protocol No. 27 on the internal market and competition that “the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted”.

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(national) regulations were (at least partially) dismantled. Such a process was largely pursued at the legislative level, i.e. through secondary law. Indeed, by its very nature, this process implied complex choices of economic policy, concerning both markets’ structure and functioning. Furthermore, liberalisation often required the adoption of new (European) regulations, taking the place of the national ones. Consequently, the Council and the European Parliament were primarily responsible for striking the right balance between the various interests concerned and to decide if, and to what extent, it was opportune to carry on with liberalisation as well as (re)regulation at the European level.


However, requests for liberalization of economic activities also emerged in a number of sectors not covered (or not covered yet) by European legislation. Not surprisingly, in such circumstances, the justiciables and the national judges – more than the Commission – took the initiative. When facing national regulations having restrictive effects on economic activities, both the parties involved and the competent public authorities looked at possible European legal tools provided by Union primary law. In other words – being aware of the opportunities granted by the principles of “primauté” and “direct effect” – they asked whether, and to what extent, they could directly rely on Treaty provisions for challenging national restrictive regulations.

These questions were mainly raised in the course of the adjudicative process at national level and were brought to the attention of the Court through requests for preliminary rulings under Article 267 TFEU. In this frame, two broad categories of restrictive State measures were considered:

i) measures concerning market structure: i.e. national regimes regulating (and impeding or limiting) market entry;

ii) measure concerning market functioning: i.e. national regimes regulating (and limiting) the way economic activities are exercised in the market, in particular price regimes.

As to the tension between legislation and judicial enforcement see G. M. ROBERTI and A. TIZZANO, Tariffe e prezzi amministrati: profili di diritto comunitario, (1995) IV 310 Foro Italiano.
The Court’s answer has been encouraging, but also a complex (and a prudent) one. Sharing the Zeitgeist and sincerely convinced that fostering liberalisation within the Member States was important, if not necessary, for the accomplishment of the Internal Market, the Court has held (with few – although significant – exceptions) that the national measures at stake could be relevant under EU law and that, consequently, their legality could be reviewed in the light of the Internal Market Treaty rules.\(^{11}\)

It was not an obvious outcome. These measures were typical regulatory regimes, usually applied without distinctions on the basis of the nationality and had only limited, and often merely indirect (de facto) effects on cross-borders flows of goods, services and investments. In other words, they affected competition more than trade flows. Therefore – for the reasons mentioned above – the possibility to assess their legality under the Internal Market Treaty rules was far from being evident. The proof is that, in order to achieve such result, the Court has been obliged to “revisit” its previous case law and to introduce new, or “adapted”, legal models, specifically conceived for dealing with the legal issues at stake.

The Court, however, also showed a certain degree of cautiousness and self-restraint. In the absence of a principle of law protecting entrepreneurial freedom as such, the Court was attentive to verify that its response relied on a robust and coherent legal basis in the existing EU norms, although interpreted in an extensive way. Sure, the Court has admitted the possibility for the justiciables to invoke the EU primary law in order to challenge restrictive regulatory measures of the Member States, affecting market structure or market functioning; at the same time, however, the Court has not pushed its interpretation to the point of creating jure praetorio a general principle of entrepreneurial freedom.\(^{12}\) In a nutshell: the

\(^{11}\)This process certainly reached some of its more significant achievements at the early 90’s. Along with the accomplishment of the Single Market, and on the basis of certain Court’s interventions, it seemed that EU law could have been used broadly for pushing national economic regimes towards much more liberal economic model, with significant “constitutional” implications. As remarked by W. Sauter and H. Schepel, State and Market in the Competition and Free Movement Case Law of the EU Courts, TILEC Discussion Paper No. 2007-024:

“Arguably, the high water mark of this economic constitution was reached by 1992, when, the Court had ‘constitutionalised’ the Treaty’s fundamental freedoms and system of undistorted competition to such an extent that Claus-Dieter Ehlermann, then director general of the Commission’s competition DG (responsible for antitrust, mergers and state aids), could proclaim the EC Treaty ‘the most strongly free market oriented constitution of the world’ [C.-D. Ehlermann, The Contribution of EC Competition Policy to Single Market – emphasis in the text]. This assertion was based on the fact that since the adoption of the 1987 Single Act, state monopolies, state aids, and state action impeding the effective application of the competition rules had all come under fire in unprecedented ways” (p. 5, emphasis added).

\(^{12}\)The need to respect legal certainty and to preserve positive law – particularly in a legal system based on the “principle of conferral” – probably were the main reasons for this approach and were at the hearth of the so-called “November Revolution” (see N. Reich, quoted below). Being aware of the “constitutional” implications of its case law in this field, the Court ultimately decided that Internal Market rules (including, both, free movement and competition rules) could have not been
interested parties can challenge national restrictive measures, but only if, and to the extent that, their claim can be based on one, or more, specific Treaty’s Articles on Internal Market. In addition, even restrictive measures, relevant under Internal Market Treaty rules, are often regarded as justified in the light of certain public policy objectives pursued by the Member States.

Although remaining within the boundaries of orthodoxy, the contribution provided by the case law should not be underestimated. Yet, the solutions preconized by the jurisprudence have entailed serious substantive and institutional implications.

i) In substantive terms, the possibility to apply the Internal Market Treaty rules to national restrictive measures (i.e. national regimes read as the legal basis of an inherent principle of commercial or entrepreneurial freedom. As clarified below, the Court’s rulings in e.g. Keck, Hunermund, Meng, Reiff are the cornerstones of this approach (see in this respect, G. Tesauro, The Community’s Internal Market in the Light of the Recent Case-law of the Court of Justice, (1995) 15 YEL 1; and it is noteworthy that some of Opinions delivered by Advocate General Tesauro had a strong influence on the Court’s attitude). To a certain extent, this jurisprudence also raised (and still raises) criticism; see in this respect the well-known article of N. Reich, The “November Revolution” of the European Court of Justice: Keck, Meng, and Audi Revisited, (1994) 31 CMLR 459; and, for a more recent overview of the academic debate, E. Szyszczak, The Regulation of the State in Competitive Markets in the EU (Oxford, Hart Publishing 2007). However, it can be argued that most of the objections raised in the frame of this debate did not duly consider the main reasons that drove the Court’s approach: the need of preserving the systemic consistency of the EU legal order, as well as of respecting ius positum, without indulging in a too creative case law encroaching upon legitimate prerogatives of the national rule-makers.

affecting market structure or market functioning) has been (and still is) an important tool for liberalizing economic activities. In several occasions the principles stated by the Court have been successfully used for eliminating exclusive or special rights granted by the States to certain undertakings, as well as for abolishing other forms of legal protections limiting competition on the marketplace. In this respect, EU-based solutions have exerted a wide-ranging influence on national legal orders, driving them towards more liberal legal models.

ii) In institutional terms, the enforcement of EU primary law by national judges (or administrative bodies) affected both: (a) the vertical equilibrium between the EU and the Member States, by reducing the margin of regulatory intervention of national (and local) law-makers; and (b) the horizontal institutional balance within the Member States, by allowing judicial (or administrative) bodies to scrutinise and, ultimately, not to apply national (legislative or administrative) measures deemed to be inconsistent with EU Internal Market rules.

The present article focuses on the abovementioned issues. Its purpose is to examine, in a systematic way, the various legal paradigms used for assessing the EU compatibility of national restrictive measures. As exposed below, the overall picture is quite complex, not only because different kinds of measures have to be considered (i.e. measures having different object and effects on market structure/functioning), but also because a single kind of measure can be regarded (and has been regarded) under different legal angles (i.e. in particular, free movement and/or competition rules). In this context, the present article analyses
the status of the EU practice and considers whether—notwithstanding certain (non minor) differences—a homogeneous legal approach can be identified. It is argued that, although relying on various legal basis, the Court and the Commission usually follows a consistent and quite homogeneous approach. In short, and with few exceptions: (a) national restrictive regulatory measures can be scrutinised, and prohibited, under EU free movement and/or competition rules; however (b) these measures can be justified if they aim at achieving public policy goals that are also recognised by the EU legal order and (c) provided that these goals are actually pursued in a consistent and proportionate way.

The present article does not expose an exhaustive and in-depth analysis. It merely outlines the results of a more comprehensive study, which will be released shortly. Here, four main aspects will be considered: first, the (exceptional) situations where EU law does not apply and that, consequently, are only subject to national law (infra sub I); next, the current status of EU case law with regard to State regulatory measures that affect either market structure (infra sub II) or market functioning (infra sub III); finally, some conclusions will be drawn, in particular on the possible implications of such case law in view of the control prerogatives to be exerted by national (judicial and administrative) bodies, namely the Italian Competition Authority (“ICA”) when acting pursuant to Article 21-bis of Law No. 287/90 (infra sub IV).

2. WHEN EU LAW DOES NOT APPLY

2.1 The “domestic” jurisdiction

Is there a “province” where Treaty rules on Internal Market do not apply? Theoretically, the answer is an affirmative one.

i) Firstly, rules on free movement of goods and services and capital, as well as on freedom of establishment, only apply to situations presenting a cross-border element, i.e. a situation having a link with the exercise of the freedoms of movement provided by the FEU Treaty.

ii) Secondly, as clearly specified in the their text, competition rules only apply to acts that (at least potentially) can affect trade between the Member States.

In the light of the above, an area of mere “domestic” jurisdiction, falling outside the sphere of application of the EU (primary) Internal Market law, could be envisaged. In reality, the legal landscape is more nuanced. In the followings observations, the two exceptions under (i) and (ii) will be briefly considered.

13 In the present study, only primary law is examined. As known, secondary law—in particular in case of EU directives aimed at approximation of national legislations—does not distinguish on the basis of the national vs. cross-border character of the situation concerned. With specific regard to the scope of application of the “Bolkestein” Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market), it is discussed whether a cross-border element is required. Advocate General Sapunar has repeatedly affirmed that the Directive should apply also to purely internal situations: a position that will substantially deprive the “purely internal situation” standard of any legal significance (see to that effect Opinion in Hiebler, C-293/14, EU:C:2015:472, paragraph 24).
(i) Merely internal situations

Pursuant to the Court case law, Article 34 TFEU, which prohibits State measures having a restricting effect on free movement of goods within the Union, only concerns imported products and not national ones. This is in line with the ratio of the norm. Aimed at eliminating obstacles to intra-EU trade, Article 34 can be invoked to oppose to all State measures apt to limit cross-border flows\(^\text{14}\), not to liberalize production or commerce of domestic goods. As a consequence, EU law does not oppose to the application of a national regulation to national products and this even if such a regulation is deemed to be inconsistent with Article 34 when applied to imported products\(^\text{15}\).

Similarly, as far as services and establishment (as well as movement of capital) are concerned, it is well known that Articles 56 and 49 (and 63) TFEU do not apply to a “purely internal situation”, i.e. a situation “which is confined in all respects within a single Member State”\(^\text{16}\).

Again, this is linked to the function that these norms are going to accomplish in the Internal Market legal system. They are supposed to liberalize either the provision of services presenting (at least) a cross-border element or the establishment in a Member State of a provider already operating in another Member State. Consistently, as remarked by the Grand Chamber of the Court in its recent *Ullens de Schooten* judgment, these provisions “are intended to protect persons making actual use of the fundamental freedoms” (emphasis added)\(^\text{17}\); therefore, they do not protect nationals from the enforcement of the legislation of their own country, although restrictive such legislation might be.

Two main points should be highlighted in this respect.

i) Firstly, the abovementioned criteria limit the enforceability of the EU norms, not their material scope. In other words, they do not determine whether a national (restrictive) measure is deemed to be inconsistent with EU primary law; they only determine who is entitled to rely on EU primary law to oppose to a given national restrictive measures. Thus, in the light of such jurisprudence, a national measure, that is incompatible with Articles 56 and 49 TFEU, cannot be challenged by national companies, although adversely affected by the measure; and – not being entitled to rely on it – such companies cannot invoke Articles 56 and 49 neither before administrative bodies, nor in courts (with the consequence that a request for preliminary ruling, addressed to the Court in such situation, should be dismissed as inadmissible). However, the national measure remains inconsistent with EU primary law and, as such, it can be challenged either by the Commission, in the frame of an infringement


\(^{16}\) See more recently *Fernand Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 47.

\(^{17}\) Paragraph 57.
procedure under Article 258 TFEU, or by the *ayant droit* (e.g. the service provider of another Member States) before judges and administrative bodies.18ii) Secondly, it is worth noting that the abovementioned criteria were set in a quite old case law. They reflected the original inspiration of the Internal Market legal system, as an instrument aimed at promoting integration among distinct national economies. Along the years, however, the relevance of such jurisprudence has been progressively mitigated, to the point that it is fair to say that, nowadays, such jurisprudence is of little practical significance.19 As said, at EU level, the question whether a given situation presents a cross-border element only arises in the frame of request for preliminary rulings pursuant to Article 267 TFEU. Now, the cases in which the Court recognizes that the situation at stake is to be qualified as a “purely internal” one and, consequently, dismisses the request are sporadic and confined to particularly local (if not infra-local)20 situations.

For the present purposes, four concluding remarks could be made.

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18 The recent *Ullens de Shooten* case is a clear example in this respect. The Court clearly remarked that: “The fact that in its judgment of 12 February 1987, *Commission v Belgium* (221/85, EU:C:1987:81), on the action brought by the Commission for failure to fulfil obligations, the Court assessed the observance by the Kingdom of Belgium of one of the fundamental freedoms laid down by the EEC Treaty cannot in itself allow the conclusion that that freedom may be relied on by an individual in a case such as that in the main proceedings, confined in all respects within a single Member State. While the bringing of an action for failure to fulfil obligations means that the Court ascertains whether the national measure challenged by the Commission is, in general, capable of deterring operators from other Member States from making use of the freedom in question, the Court’s function in proceedings for a preliminary ruling is, by contrast, to help the referring court to resolve the specific dispute pending before that court, which presupposes that that freedom is shown to be applicable to that dispute” (paragraph 49).

19 For a summary, categorisation and analysis of that case law, see Advocate General Wahl’s Opinion in *Venturini*, C-159/12 to C-161/12, EU:C:2013:529, paragraphs 26 to 53 and, more recently, the mentioned ruling of the Grand Chamber in the *Ullens de Shooten* case. In this judgment the Court systematises its former jurisprudence, specifying that a two-step analysis should be performed in view of establishing whether or not free movement rules can be applied to a given situation: (a) first, it has to be assessed if the dispute in the main proceedings is confined in all respect within a single Member State; (b) in the affirmative, it can still be verified if the dispute pending before the national judge, despite its purely domestic character, has a connecting factor with the provisions of EU law on the fundamental freedoms that makes the preliminary ruling on interpretation necessary for the judge to decide on the dispute (see paragraph 55 of the ruling). Furthermore, at paragraphs 50-53, the Court categorises four hypothesis where the condition *sub* (b) can be deemed to be met. Besides the others, the third hypothesis is worth noting. In this regard, the Court recalls its previous jurisprudence where it remarked that, even in cases where all main elements of the situation at stake appears to be confined to a single Member State, its decision could be of indirect relevance for the referring judge by virtue of the (national) principle of non-discrimination: more precisely, the Court assumes that, since the national legal order *could* prohibit disparities of treatment, its interpretation of the EU rule, although not applicable *ex se*, could still be relevant for the national insofar as the (domestic) principle of non discrimination could require the judge to apply to “purely national” situation the same regime that it is to be applied to the cross-border one.

20 See to that effect *Shariga*, C-393/08, EU:C:2010:388 and *Airport Shuttle Express*, C-162/12 and C-163/12, EU:C:2014:74.
i) Firstly, although of limited significance in practical terms, the jurisprudence on “purely internal situations” as not been overruled. On the contrary, it has been reaffirmed quite solemnly in the Grand Chamber judgement in the Ullens de Shooten case mentioned above. Therefore, the “purely internal situation” criterion is still part of the Internal Market primary law.

ii) Secondly, the Court has stressed that, pursuant to Article 94 of the Rules of Procedure of the Court, it is for the referring judge to show, in its order, “the specific factors” that allow to establish a link between “the subject or circumstances of a dispute, confined in all respects within a single Member State, and Article 49, 56 or 63 TFEU”\(^2\); it is understood that, absent such reasoning, the abovementioned Treaty provisions cannot apply\(^2\).

iii) Thirdly, it can be argued that parties intending to rely on those Articles of the FEU Treaty should bear a similar burden of proof. In other words, in case of merely domestic disputes, they should show that the conditions required by the case law are fulfilled. In the same vein, also the national authority – whether judicial or administrative – is under a duty to verify whether the case brought to its attention (a) is a merely domestic one and, in the affirmative, (b) if the conditions for applying Internal Market Treaty rules are met.

iv) Finally, it has to be remarked that – even after the Grand Chamber ruling in the Ullens de Shooten case – the exact meaning and scope of the Court’s approach is far from being evident. In our view further clarifications would be suitable. In addition, the Court could consider widening the scope of the “purely internal situation” criterion, so excluding the application of Internal Market rules in merely domestic situations, where no real cross-border interest is detectable.

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\(^1\) Ullens de Shooten, paragraphs 54-55.

\(^2\) For a recent application of this requirement, see Eurosaneamientos SL and Others, C-532/15 and C-538/15, EU:C:2016:932, where, in declaring the inadmissibility a preliminary ruling request on the interpretation of Article 56 TFEU, the Court observes: “It is in no way clear from the requests for a preliminary ruling that there are factors connected either with the parties to the proceedings before the national courts or with those parties' activities which are not confined within that single Member State. Moreover, the referring courts do not indicate in what way the disputes pending before them, despite their purely domestic character, have a connecting factor with the provisions of EU law on the fundamental freedoms that makes the preliminary ruling on interpretation necessary for them to give judgment in those disputes. In those circumstances, it is clear that the requests for a preliminary ruling do not provide specific factors that allow it to be established that Article 56 TFEU may apply to the

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\(^3\) As stated in the well-known Hujin case (22/78, EU:C:1979:138, paragraph 17): “The interpretation and application of the condition relating to effects on trade between Member States contained in Articles 85 and 86 of the Treaty must be based on the purpose of that condition which is to define, in the context of the law

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(b) Effect on trade

With regard to competition rules, the Treaty itself provide for an explicit clause of “jurisdiction”\(^2\). As it appear from the text of facts of the disputes in the main proceedings” (paragraphs 48-19).
Article 101, 102 and 107 TFEU, these norms only apply to acts that affect, or threaten to affect, trade between Member States. The case law clarifies that, by requiring an effect on trade, the Treaty clearly wanted to draw a dividing line between situations subject to the European law and those that are to be dealt with by national law only\(^{24}\). It follows that, differently from the requirement examined above sub (a), the “effect on trade” condition limits the material scope of the provisions concerned, i.e. it sets “the boundary between the areas respectively covered by Community law and the law of the Member States”.

However, two aspects should be pointed out in this respect:

i) the Court and the Commission opted for a very broad interpretation of such requirement. For detecting an effect on trade, a mere potential, indirect and (quantitatively) limited governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by partitioning the national markets or by affecting the structure of competition within the common market. On the other hand conduct the effects of which are confined to the territory of a single Member State is governed by the national legal order” (emphasis added).

\(^{25}\) For some recent examples in the field of State aids, see: decision 20 July 2016, case SA.44692, Germany Investment for the Port of Wyk auf Föhr, on the public funding for a port infrastructure investment project in the Port of Wyk, on the island Föhr (a port almost exclusively used for supplying the island and transporting the few agricultural products produced there to nearby mainland); decision 7 November 2012, case SA.33243, Jornal de Madeira, on the public funding provided to a purely local newspaper (Jornal da Madeira) published by a local editors (Empresa do Jornal da Madeira).

26 For instance, in the case of an in house water utility, operating at local level (without any possible delivery of water to/from other Member States), the Commission stated that effects on trade could not be excluded considering that: (a) if the operator entrusted with the Integrated Water Supply Service “exited the market, which the restructuring plan aims at avoiding, the [same activity] would be entrusted to another undertaking either via an open public tender (to either select a private company or a private shareholder to create a PPP) or again to in-house provider(s)”; (b) “at present a substantial part of the Italian market is entrusted by concession to private or listed companies, some of which with shareholders active in the provision of water services in several Member States” (Commission decision 31 July 2013, Case SA.35205 (2013/N) – Italy Restructuring aid to Abbanoa S.p.A., paragraphs 37 and 38).

\(^{24}\) See \textit{ex multis}, with reference to Articles 101 and 102 TFEU, Shargis, C-393/08, EU:C:2010:388, paragraphs 29 and 32 and case law cited, and with reference to Article 107 TFEU, Essent v The Parking Adjudicator, C-518/13, ECLI:EU:C:2015:9, paragraphs 65-66, Libert and others, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraphs 76-77.
2.2 The non-economic activities

Competition rules only apply to “undertakings”. Not defined by the FEU Treaty, the notion of “undertaking” is a functional one: it encompasses all entities that – irrespective their (private or public) ownership, their legal form, organisation and way of funding – offer goods or services on a marketplace \(^{27}\). This is more a *ratione materiae* than a *ratione personae* condition. It regards more the nature of the activity carried out by a given entity than its personal features \(^{28}\). More particularly it depends on the way the activity is organised in a Member State. In this respect, the legal and economic system in which the activity is performed is to be taken into account, in view of determining whether or not it is provided in a real market environment. This is a typical case-by-case analysis that should pay attention to the specificities of the Member State and, more particularly, to the political and social choices made by national authorities as to the organisation and performance of the activity concerned.

In practice, only in limited and clearly characterised situations an activity is deemed to be non-economic. Reference can be made to:

i) activities implying the exercise of public powers: that is to say prerogatives that can be regarded as merely *rigaliennes*, such as authorising and controlling telecommunications frequencies or devices \(^{29}\), air and maritime control \(^{30}\), environmental surveillance \(^{31}\), etc;

ii) social security: with respect to social security, the EU practice usually excludes the economic nature of services that are clearly based on solidarity principles and criteria \(^{32}\);

iii) health care: similarly, with respect to hospitals and other health care providers, the EU practice does not recognise the economic nature of activities that are integral part of the national health service and that are operated according to solidarity principles and criteria \(^{33}\);

iv) education and certain research activities: again, economic nature is usually excluded with regard to education provided by the State, and

\(^{27}\) See *Commission v. Italy*, C-118/85, EU:C:1987:283. In *Höfner and Elser* (C-41/90, EU:C:1991:161), the Court specified that “in the context of competition law, […] the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed” (paragraph 21). To that effect see also *Cassa di Risparmio di Firenze*, C-222/04, EU:C:2006:8, where the Court held that an entity operating as a mere *rentier* (like the Italian banking foundations) is not to be regarded as an undertaking in the light of the EU competition rules.

\(^{28}\) See, clearly, in this respect, the presentation made by the Commission in this regard in the recent *Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*, paragraphs 8-16.

\(^{29}\) See *Lagauche*, C-46/90 and C-93/91, EU:C:1993:852, paragraphs 32-33, 46 et seq.

\(^{30}\) See *Notice on the notion of State aid*, paragraph 17, letter (e).

\(^{31}\) See *Notice on the notion of State aid*, paragraph 17, letter (d).


\(^{33}\) See *Notice on the notion of State aid*, paragraphs 24-25.
essentially financed by the latter, in the accomplishment of its typical social, cultural and educational tasks. In the same vein, certain research activities, carried out by universities and other organisations essentially in view of improving the level of knowledge and dissemination of research results, are not to be regarded as economic.

The non-economic nature of a given activity is not only relevant for the application of competition rules.

i) As already pointed out, in Lagauche the Court held that authorisation and control power exerted by a public entity with regard to certain products (telecommunications devices) had to be regarded as a *prerogative régalienne* that, although potentially impacting on imports and commercialisation of goods, fell outside the scope of Treaty rules on free movement of goods;

ii) As to the *provision of services*, it could be reminded that pursuant to Article 56 TFEU, only services “normally provided for remuneration” are to be considered to be “services” within the meaning of the Treaty. Even though the concept of remuneration is not expressly defined in Article 56 et seq. of the FEU Treaty, its legal scope may be deduced from the provisions of the second paragraph of Article 57 TFEU, which states that ‘services’ include in particular activities of an industrial or commercial character and the activities of craftsmen and the professions. Thus, as stated by the Court in Humbel, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service. In the light of the above and with specific regard to education activity provided in the frame of the national education system at stake, the Court held that, by its very nature, such activity could not be regarded as “service” within the meaning of the Treaty, insofar as: (a) the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields; (b) the system in question is, as a general rule, funded from the public purse and not by pupils or their parents. As a consequence, the principle of equality of treatment provided by the Treaty rules on free movement of services did not apply.

iii) As to *services of general interest* (SGI), a distinction is to be made between *economic* (SGEI) and *non-economic* (NSGI) services. Again, the nature of the activity performed is the criterion of distinction. As remarked by K.

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35 See *Notice on the notion of State aid*, paragraph 31.
36 However, the general principle of non-discrimination on grounds of nationality as set forth by Article 18 TFEU, should apply to all activities carried out by the Member State in an area “connected” to those covered by EU law (see to that effect Gavriel, 293/83, EU:C:1985:69, paragraphs 19 and 24-25 as well as *a contrario* Humbel).
37 See in this respect Protocol No 26 on services of general interest.
38 See, in particular, Articles 14 and 106(2) TFEU, as well as Article 36 of the Charter and Article 1 of Protocol No. 26.
39 See Article 2 of Protocol No 26.
Lenaerts, this is an aspect acquiring relevance for the vertical allocation of powers between the EU and the Member States. Whilst in relation to SGEI, the Union shares competences with the Member States, national measures relating to the provision, commission and organisation of NSGI fall outside the scope of application of EU competition law (this does not mean, however, that no other Treaty provisions may apply to NSGI).40

iv) It is also noteworthy that EU Directives on concessions and public procurements (namely Directives 2014/23/EU and 2014/24/EU)41 (a) recognise Member States' freedom to organise the provision of services either as SGEI or as NSGI or as a mixture thereof (see Recital 6 of both Directives); and (b) state that NSGI fall outside the scope of the directives (see Recital 6 of both Directives as well as Article 4(2) of Directive 2014/23/EU). It follows that the awarding of both concession and public contract regarding the provision of NSGI should not abide by the rules and procedures set by the directives.

In conclusion, the non-economic nature of a given activity is a crucial factor for determining whether the latter falls within the sphere of application of EU law, in particular of EU competition rules. In order to ascertain that point, a complex assessment has to be done, taking into account the way the activity is organised and performed, the relevant rules set by the Member State concerned and the underlying policy choices. Finally, it can be argued that the meaning of “economic” is unitary, irrespective of the context in which it is being used; in other words, a single definition should be used for the purposes of the application of different Internal Market rules; however, this does not imply that none of the Treaty provisions could apply to non-economic activity: ultimately, depending on the scope of the provision concerned, some could still apply (e.g. the principle of non-discrimination on the ground of nationality).42

3. STATE MEASURES AFFECTING MARKET STRUCTURE

As said, it is possible that in a Member State a given activity does not present “economic” nature. In such cases, where no market environment exists, Member States can organize and regulate such activity, in

42 In this respect, the reading of V. HATZOPoulos, The concept of “economic activity” in the EU Treaty: from ideological dead-ends to workable judicial concepts, Research Papers in Law 06/2011, College of Europe, appears to be convincing. See also C. WEHLANDER, The “Economic Activity”: Criteria and Relevance in the Fields of EU Internal Market Law, Competition Law and Procurement Law, in C. WEHLANDER, Services of General Economic Interest as a Constitutional Concept of EU Law, Legal Issues of Services of General Interest (T.M.C. Asser Press 2016) 35.
accordance with their own policy priorities and goals, with no (or few) limits stemming from EU primary (Internal Market) law. For example, national authorities are totally free to determine whether to perform such activity themselves or to entrust it to one (or more) ad hoc body(ies); similarly, they are free to decide how to fund it, e.g. through tariffs paid by users, through other forms of contribution, or public subsidies. On the contrary, in case of entrepreneurial activities, EU primary law limits the margin of discretion of the Member States, at least to a certain extent. Where a “market” exists, State measures affecting market structure/functioning have to comply with a minimum set of principles and rules set by the FEU Treaty, as interpreted over the years by the Court and the Commission.

As to measures affecting market structure, different categories can be considered. Firstly, market entry can be limited because of exclusive rights granted by the State to one or more undertakings. Secondly, market entry can also be limited by other kinds of State measures, which – without recognizing an (explicit) exclusive right – determine who, and how, can act on the marketplace. In all these hypothesis there is a common denominator: the State intervenes through regulations that, although aiming at public interest goals, somehow affect market structure, limiting the faculty of third parties to provide a certain activity. However, they have different features and different legal relevance under EU law. Hereinafter, we proceed to an overall consideration of these different categories of measures, briefly outlining the current status of EU primary law in this field.

3.1 Exclusive rights

The granting of exclusive rights to one or more undertakings necessarily prevents potential competitors from entering the market. In the Internal Market perspective, exclusive rights can be examined under two set of rules:

i) under competition rules, insofar they limit competition for the activity at stake;

ii) under free movements rules, insofar as they limit trade flows of goods and services, as well as the exercise of right of establishment, throughout the Union.

3.1.1 The “competition” approach

(a) Notion of exclusive right

In the frame of competition rules, the notion of exclusive right is a functional one: i.e. it encompasses all State measures that, directly or indirectly, reserve to one or more undertakings the faculty (sometimes along with the duty) to carry out an economic activity, so preventing third parties, de jure or de facto, from entering the

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market in order to carry out the same activity\textsuperscript{44}. An exclusive right can be directly recognized to the beneficiary undertaking(s)\textsuperscript{45}; it can also be granted \emph{indirectly}, through e.g.: 

\textsuperscript{44} For a definition of exclusive rights in terms of “reservation” of an economic activity to one or more company, with automatic effects on market entry, see \textit{inter alia}, \textit{Ambulanz Glockner} (case C-475/99, ECLI:EU:C:2001:577) where, with regard to patient transport services, the Court stated that: “the reservation [of such service] is sufficient for that measure to be characterized as a special or exclusive right within the meaning of Article 90(1) of the Treaty, for protection is conferred by a legislative measure on a limited number of undertakings which may substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions” (see paragraph 24, emphasis added).

A definition of “exclusive rights” is also embodied in a number of act of EU secondary law. In particular, according to Article 2(f) of the Transparency Directive (2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings) “exclusive rights” means rights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide a service or undertake an activity within a given geographical area”. A similar notion is now also embodied in Directive 2014/23/UE on the award of concession contracts according to which “exclusive right” means a right granted by a competent authority of a Member State by means of any law, regulation or published administrative provision which is compatible with the Treaties the effect of which is to limit the exercise of an activity to a single economic operator and which substantially affects the ability of other economic operators to carry out such an activity” (Article 5(10); see also Article 4(3) of Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC).

\textsuperscript{45} For a case of collective exclusive rights, see judgment in \textit{Sydbahens Sten & Grus}, C-209/98, EU:C:2000:279.

\textbf{i) a refusal by the competent public authority to grant third parties with legal titles (i.e. authorizations or licenses) required for performing the activity\textsuperscript{46};}

\textbf{ii) an obligation imposed on customers or users to make use of the products/services provided by the beneficiary firm (demand-side regimes are, for example, those imposing an exclusive purchasing obligation on customers\textsuperscript{47} or requiring a compulsory affiliation to the services provided by a certain firm\textsuperscript{48}).}

(b) The legal standard based on Article 106 and 102 TFEU

The FEU Treaty mentions exclusive (and special) rights in Article 106(1). The provision imposes a general prohibition on the Member States, with regard to public undertakings and undertakings to which they grant special or exclusive rights, of enacting or maintaining in force measures contrary to the rules contained in the Treaty, in particular in Articles 18, 101 to 109 TFEU. According to the Court’s case law, the following three points should be highlighted.

\textbf{i) Article 106(1) cannot be applied alone, but only in conjunction with other EU law provisions, in particular provisions on Internal Market set forth by the Treaty. In other words, Article}

\textsuperscript{46} See to that effect \textit{Ambulanz Glockner}, C-475/99, EU:C:2001:577.

\textsuperscript{47} See to that effect \textit{Almelo}, C-393/92, EU:C:1994:171.

\textsuperscript{48} See to that effect \textit{AG2R Prévoyance}, C-437/09, EU:C:2011:112.
106(1), although preconizing a control of legality on certain State measures, does not enounce a *substantive precept* in itself; it simply specifies that Member States are due: (a) to respect EU rules (b) with regard to certain undertakings (i.e. public undertakings and undertakings to which they grant special or exclusive rights, for whose action Member States “must take special responsibility by reason of the influence which they may exert over such action”\(^{49}\)). It follows from this that the “extent” of the control of legality envisaged by Article 106 – a control that the same Commission can exercise through the “supervisory power” conferred on it by Article 106(3) – depends on the “rules, to which Article 90(1) [now Article 106(1)] refers” and, materially, “on the scope of the rules with which compliance is to be ensured”\(^{50}\).

ii) As far as exclusive rights are concerned, it is well known that their legality – rectius the legality of the State measure creating them – can be examined under the legal paradigm based on the *combination* of Article 106(1) and Article 102 TFEU. None of those provisions (or their combination) enounces a *per se* illegality of exclusive rights: neither Article 102 TFEU, that “does not prohibit monopolies as such”\(^{51}\), nor Article 106(1) read in conjunction with Article 102. On the contrary, as clearly stated by the Court since the *Terminals* case, not only exclusive rights are not prohibited as such, but Article 106(1) even “presupposes the existence of undertakings which have certain special or exclusive rights”\(^{52}\). In other words, Article 106(1) “implies that Member States may grant exclusive rights to certain undertakings and thereby grant them a monopoly”\(^{53}\).

iii) However, as pointed out in the *Terminals* case, it does not follow from these statements “that all the special or exclusive rights are necessarily compatible with the Treaty. That depends on different rules, to which Article 90(1) [now Article 106(1)] refers”. In particular, in accordance with the principle of sincere cooperation laid down by Article 4(3) TEU, Member States are required not to deprive EU competition rules, including Article 102 TFEU, of their *effet utile*\(^{54}\).

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\(^{49}\) France and Others v Commission, 188/80, 189/80 and 190/80, EU:C:1982:257, paragraph 12.

\(^{50}\) France v Commission ("Terminals"), C-202/88, EU:C:1991:120, paragraphs 21 and 22.


\(^{52}\) C-202/88, EU:C:1991:120, paragraph 27.

\(^{53}\) Commission v Kingdom of the Netherlands, C-157/94, EU:C:1997:49, paragraph 27; see also in this respect *Sydhavnens Sten & Grus*, where the Court reminds that: "merely creating a dominant position by the grant special or exclusive rights within the meaning of Article 90(1) of the Treaty is not in itself incompatible with Article 86 of the Treaty. A Member State is in breach of the prohibitions contained in those two provisions only if the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position or when such rights are liable to create a situation in which that undertaking is led to commit such abuses (see, for example, Joined Cases C-115/97 to C-117/97 *Brentjens* [1999] ECR I-6025, paragraph 93)" (paragraph 66).

\(^{54}\) INNO v ATAB, C-13/77, EU:C:1977:185, paragraph 31 and 32.
The legal scheme of analysis stemming from these premises is quite complex. First, in order for Articles 106(1) and 102 TFEU to apply, several conditions should be fulfilled: (a) the company(ies) enjoying the exclusive right must hold a dominant position, on a relevant market which embraces a substantial part of the Internal Market; (b) the State measure at stake shall induce a (certain kind of) abusive behaviour (this implies that there must be a link between the State measure and the alleged abuse); (c) the State measure and the related abuse should affect intra-Union trade. Conditions under (a) and (c) are essentially matter of fact and, in any case, can be assessed in the light of the well-established legal standards governing Article 102 TFEU enforcement. Much more complex is the interpretation of condition under (b) (on which, see infra).

In addition, it has to be recalled that (just like many other Internal Market provisions) Article 106 is based upon a prohibition-derogation scheme. While Article 106(1) enounces a prohibition (although by reference to other EU substantive rules), Article 106(2) provides for an exception, specifically concerning undertakings entrusted with services of general economic interest (the “SGEI exception”). According to Article 106(2), undertakings entrusted with the operation of SGEI are subject to the rules on competition (and, thus, to the 106(1)-102 paradigm) so long as it is not shown that: (a) the application of those rules is incompatible with the performance of their particular tasks; and (b) provided that the “development of trade [is not] affected to such an extent as would be contrary to the interests of the Union”.

Accordingly, it is for the national courts – and for the Commission when it exercise its prerogatives under Article 106(3) – to determine:

i) Firstly, whether the exclusive right may infringe Article 106(1), read in conjunction with Article 102;

ii) Secondly, to verify whether such measure may be justified by the needs of the particular task entrusted to the company concerned.

Finally, and quite obviously, the burden of proof of the first step of the analysis relies on the party challenging the exclusive right, while it is up to the concerned State and/or the company(ies) holding the right to demonstrate that the conditions for benefitting of the derogation are fulfilled.

(c) The scope of the prohibition laid down by Articles 106(1) and 102 TFEU

As said, according to a settled case law:

“the mere creation of a dominant position through the grant of exclusive rights within the meaning of Article 106(1) EC is not in itself incompatible with Article 82 EC. A Member State will be in breach of the prohibitions laid down by those two provisions only if the

55 In this respect, the typical Article 102 analysis should be performed (see Sydhavens Sten & Grus, paragraphs 57 et seq).

56 See Sacchi, 155/73, EU:C:1974:40, paragraph 15, and ERT, paragraph 33.
undertaking in question, merely by exercising the exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses (judgments of 23 April 1991 in Höfner and Elser, C-41/90, EU:C:1991:161, paragraph 29, and of 3 March 2011 in AG2R Prévoyance, C-437/09, EU:C:2011:112, paragraph 68; emphasis added).57

The Court has also clarified that: “a Member State will be in breach of those provisions where a measure imputable to a Member State gives rise to a risk of an abuse of a dominant position (see the judgment in MOTOE, EU:C:2008:376, paragraph 50 and the case-law cited).”58

Thus, the mere risk of abuse suffices. Indeed, this is consistent with the principle of sincere cooperation, which is at the very basis of this jurisprudence. Such principle requires the Member States not to adopt or maintain in force any measure which might deprive the EU competition regime of its effectiveness59. Therefore, as recalled in the DEI case, the distortion of competition to be avoided may simply be potential and, coherently, “it is not necessary that any abuse should actually occur”60.

It appears from the EU jurisprudence that such a risk of abuse, induced by the State measure, may exist in three hypothesis:

i) Risk of inefficiency. According to the Court, an abusive practice contrary to Article 106(1) EC may exist “where, in particular, a Member State grants to an undertaking an exclusive right to carry on certain activities and creates a situation in which that undertaking is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind”.61 In the light of this line of jurisprudence, the granting of an exclusive right has to be regarded as illegal if it can lead to patent inefficiencies, i.e. if the company holding the right is not in a position to meet the demand, either because (a) of its limited output or because (b) of its excessive prices.

ii) Risk of extension of market power. This hypothesis dates back to the RTT v. GB-Inno-BM62 and Telecommunication services63 cases and has been reaffirmed in the seminal Corbeau64 case. It stems from these rulings that when a national provision extends an exclusive right from one market to another (neighbouring) market, without any objective justification, it is the extension as such which is prohibited by Article 106(1) and 102 TFEU. Conceptually, this line of jurisprudence is based on the

57 Slovenská pošta a.s. v European Commission, C-293/15 P, EU:C:2016:511, paragraph 34.
58 Slovenská pošta, paragraph 35
59 See to that effect Commission v DEI, C-553/12 P, EU:C:2014:2083, paragraph 45.
60 Commission v DEI, paragraph 41 and case law cited.
61 See Slovenská pošta, paragraph 35 and case law cited.
63 Kingdom of Spain, Kingdom of Belgium and Italian Republic v Commission, C-271/90, C-281/90 and C-289/90, EU:C:1992:440.
64 C-320/91, EU:C:1993:198.
As reported in RTT v. GB-Inno-BM: “an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking (judgment in Case 311/84 CBEM [1985] ECR 3261)”

Now, as far as State measures (and not firms’ behaviours) are concerned, it is Article 106(1) that applies in conjunction with Article 102 TFEU. According to the Court, under those provisions: “Member States must not, by laws, regulations or administrative measures, put public undertakings and undertakings to which they grant special or exclusive rights in a position which the said undertakings could not themselves attain by their own conduct without infringing Article 86.

Accordingly, where the extension of the dominant position of a public undertaking or undertaking to which the State has granted special or exclusive rights results from a State measure, such a measure constitutes an infringement of Article 90 in conjunction with Article 86 of the Treaty”.

The situation of “structural” abuse – i.e. a situation where the effect of the measure may regard the structure of the market, maintaining or strengthening a dominant position – has been also examined in Ambulanz Glockner and Slovenska Posta where the Court reaffirmed the Corbeau approach. More recently, it has been considered in the DEI case. In this important case – which, by the way, did not properly concern a case of extension of dominance – the Court pointed out that an infringement of Articles 106(1) and 102: “may thus be established where the State measures at issue affect the structure of the market by creating unequal conditions of competition between companies, by allowing the public undertaking or the undertaking which was granted special or exclusive rights to maintain (for example by hindering new entrants to the market), strengthen or extend its dominant position over another market, thereby restricting competition, without it being necessary to prove the existence of actual abuse”.

Where these conditions are fulfilled, it is the “situation” in itself, as created by the State

65 Centre belge d’études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB), 311/84, EU:C:1985:394.
66 RTT v. GB-Inno-BM, paragraph 18. In the same judgement, the Court also specifies that: “Therefore the fact that an undertaking holding a monopoly in the market for the establishment and operation of the network, without any objective necessity, reserves to itself a neighbouring but separate market, in this case the market for the importation, marketing, connection, commissioning and maintenance of equipment for connection to the said network, thereby eliminating all competition from other undertakings, constitutes an infringement of Article 86 of the Treaty”.
67 RTT v. GB-Inno-BM, paragraphs 20 and 21.
68 Commission v. DEI, paragraph 46.
measure at stake, which has to be qualified as an “abuse”. No other firm’s behaviours (actual or potential) need to be identified and ascertained. As stated by the Court, in these cases “it is not necessary to identify an abuse other than that which results from the situation brought about by the State measure at issue”69.

iii) Risk of discrimination. Finally, an infringement of Article 106(1) and 102 TFEU can also be detected where the exclusive right is apt to determine actual or potential discrimination among firms on the marketplace. This approach was clearly stated by the Court in one of its older rulings in this field, the Terminals case. The Court observed that: “a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors70.

This risk of abuse occurs in cases where, by effect of the State measure, the concerned undertaking is placed in a situation of structural conflict of interest. This may happen inter alia when:

– the concerned undertaking is led to carry out simultaneously regulatory and entrepreneurial function71. Indeed, such confusion of roles (or bundling of functions) places the undertaking in a position of inherent advantage vis-à-vis its competitors. Through the exercise of its regulatory functions, the undertaking at stake has the possibility (and the incentive) to restrict (at least to a certain extent) third parties access and/or activity on the marketplace;

– the concerned undertaking simultaneously operates on neighbouring markets (usually vertically connected). Again, in such a situation, the undertaking has the possibility (and the incentive) to act in a way that could prejudice its competitors72.

Insofar as these situations are brought about by the State measure at stake, it can be assumed that the Member State concerned is infringing Article 106(1) read in conjunction with Article

69 Commission v. DEI, paragraph 47.

72 The situation of “commercial” conflict of interest, induced by a State measure, was already considered by the Court, in the frame of Treaty provisions on free movement of goods, in the well-known Manghera case (that was examined on the basis of Article 37 CEE, now 37 TFEU; case 59/75, EU:C:1976:14). In the frame of Article 106(1) reference should be made inter alia to the cases examined by the Court in ERT and Raso (C-163/96, EU:C:1998:54). More recently, an echo of this case law can be found in the already mentioned DEI ruling where the Court strongly relied on the need to preserve the equality of opportunity (parité de chances) to support its conclusion on the breach of Article 106(1) and 102 TFEU.
102 TFEU. Indeed, by altering the *parité de chances* among economic operators, not only the Member State *induces* an abuse of dominant position (i.e. placing the company in a position that, allegedly, it could have not autonomously achieved without infringing Article 102), but it also deprives UE competition regime of its *effet utile*, in breach of the principle of sincere cooperation laid down by Article 4(3) TEU.

(d) Justification under Article 106(2) TFEU

As said, State measures infringing Article 106(1), read in conjunction with Article 102, may be justified by virtue of the derogation provided by Article 106(2). For the derogation to be applied, the following conditions have to be fulfilled: (a) the undertaking holding the exclusive right has to be entrusted with the operation of an SGEI; (b) the application of the FEU Treaty provisions (namely, those in the field of competition and free movement) should “obstruct the performance, in law or in fact, of the particular tasks assigned” to the relevant undertaking; (c) in any case, the “development of trade [has] not [to be] affected to such an extent as would be contrary to the interests of the Union”.

As to the definition of SGEI, it is a field where the Member States have resolutely defended their own prerogatives, in particular vis-à-vis possible Commission interventions. A sign of such attitude can be found in the provisions of primary law, progressively introduced in view of (re)affirming the (at least partial) “sovereignity” of the Member States in this field. Reference can be made to Article 14 TFEU (introduced by the Treaty of Amsterdam and amended by the Treaty of Lisbon), as well as to Protocols No. 26 and No. 29 and, last but not the least, to the specific provision included in the Charter of Fundamental Rights of the European Union, namely Article 36. In substance, these provisions confirm that Member States are primarily responsible for establishing, entrusting, organizing and funding SGEIs and that, consequently, their choices – rectius the choices made by the competent national/local (legislative or administrative) bodies – can be subject to the Commission’s scrutiny only to a limited extent. It follows that, although being a derogation to be interpreted narrowly, in practice Article 106(2) grants Member States with a quite wide margin of manoeuvre in regulating SGEIs. This is confirmed by the relevant EU practice. Firstly, as reminded by the Commission in the so-called *Altmark Communication*, in the

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75 Communication from the Commission on the application of the European Union State aid rules to
absence of specific Union rules defining the scope for the existence of an SGEI. Therefore, the Commission’s competence remains limited to the mere check of a manifest error by the Member State, without possibility of putting in question purposes and reasons of the national authorities’ choices.

Secondly, when making such check – and the same is true for national bodies (including the ICA) enforcing Article 106 at national level – the Commission can only verify whether:

i) the Member State has adopted an act of entrustment that clearly defines the “particular task” conferred to the concerned undertaking. Such tasks coincide, in substance, with the public services obligation(s) (PSO), i.e. the activities (e.g. services) or modalities of action (price or non-price conditions), as defined in the act of entrustment, that the concerned undertaking, if it were autonomously considering its own commercial interest, would normally not assume or would not assume to the same extent or under the same conditions;

ii) the activity is “already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the services, consistent with the public interest, as defined by the State, by undertakings operating under market conditions”. In this respect, it has to be remarked that, again, when verifying “whether a service can be provided by the market” (i.e. the market failure test), the Commission scrutiny

compensation granted for the provision of services of general economic interest (OJ C8, 11.01.2012), paragraph 46.

EU secondary law can intervene on SGEIs in two ways:

i) Firstly, by regulating, and so harmonising, conditions and modalities for the entrustment of an SGEI, so limiting the faculties of action of the Member States (see, in this respect, Regulations No 1370/2007 on public passenger transport services by rail and by road and repealing and No 1008/2008 on common rules for the operation of air services in the Community);

ii) Secondly, by setting up an EU regime of the service to be provided, so acting positively in view of the establishment of given services in the interest of all European users (see, in this respect, Directives No 97/67/EC on common rules for the development of the Community postal services and the improvement of quality of service, No 2002/22/EC of on universal service and users’ rights relating to electronic communications networks and services, No 2009/72/EC concerning common rules for the internal market in electricity).

In addition, it must be underlined that Article 14 TFEU, as amended by the Treaty of Lisbon, has introduced a general, and horizontal, legal basis enabling the EU Parliament and the Council to adopt regulation in order to set principles and conditions for the functioning of SIEGs.

76 EU secondary law can intervene on SGEIs in two ways:

77 The PSOs notion was firstly defined by EU secondary law in Regulation No. 1191/69 concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (see Article 2(1), that defines PSOs as “obligations which the transport undertaking in question, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions”). Regulation No. 1191/69 has subsequently been repealed by Regulation No. 1370/2007 that contains the following definition of PSO: “a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward” (Article 2(e)).

78 Altmark Communication, paragraph 48.
remains confined to the mere manifest error of assessment\(^{79}\).

Of course, condition sub (i) concerns only the modalities according to which the service is granted. As such, it regards more the form than the substance of the entrustment and, therefore, it is quite easy to be verified. Much more complex scrutiny is required as to condition sub (ii). In fact, assessing whether the service can be provided by the market is a difficult task; it encroaches on sensitive choices of the national authorities. In the Analir case\(^{80}\) the Court enounced a quite broad version of the market failure test (the fact that the services were regulated by secondary law – Regulation (EEC) No 3577/92\(^{81}\) - had probably an influence on the Court’s assessment)\(^{82}\). More recently, the Court seems to have followed a different approach. Indeed, in Jørgen Andersen, it has been affirmed that “market failure maybe a relevant factor”, but it does not always represent “an essential condition” for assessing if Member States incur in a manifest error when defining SGEIs\(^{83}\). There could be other “various reasons (…) that can justify a Member State’s decision to entrust, for consideration, to undertakings the performance of public service obligations”\(^{84}\).

In any case, EU institutions take a quite prudent attitude. Indeed, they seem to be aware of the difficulty to assess the similarity between the service provided by the SGEI operator and the services offered (or that could be offered) by other competitors: frequently, although performing a similar activity, the competing companies provide services which are not comparable in terms of price, quality or other features, like volumes, continuity, frequency etc. That is why, in the Altmark Communication the Commission clearly specifies that:

– when assessing the characteristics of the service provided by the market, the key criterion is the consistency of these characteristics “with the public interest, as defined by the State”;

– as said, the Commission scrutiny is limited to “manifest error” only.

\(^{79}\) As clearly stated in the mentioned Altmark Communication: “As for the question of whether a service can be provided by the market, the Commission’s assessment is limited to checking whether the Member State has made a manifest error” (paragraph 46).

\(^{80}\) Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v Administración General del Estado, C-205/99, EU:C:2001:107.

\(^{81}\) Regulation of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364).

\(^{82}\) It has also to be reminded that the Analir case did not concern exclusive rights, but a regime of general PSOs in maritime cabotage.


\(^{84}\) Jørgen Andersen v Commission, paragraph 70. In this perspective, The General Court considered that the inclusion of certain connections in a public service contract for the provision of passenger transport services by rail, under Regulation No. 1370/2007, was justified. Such conclusion was based on the fact the features of the PSOs were aimed at “reinforc[ing] the options for access [to a concerned territory and at] improving the service to the same territory” (paragraph 70).
In conclusion, it is true that, as stated by the Court with respect to Article 106(2):

“In allowing derogations to be made from the general rules of the Treaty on certain conditions, that provision seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community’s interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common Market”\(^\text{85}\).

However, in the absence of rules enacted by the EU legislator, it is fair to say that EU (primary) law recognizes the primary role of Member States. Consequently, definition of an SGEI is essentially a matter of policy choices to be made by the competent national/local authorities, with the consequence that supervision and intervention by the Commission – as well as by national bodies enforcing Article 106 in conjunction with Article 102 – remains quite limited.

Thirdly, as to the material scope of the derogation provided by Article 106(2) TFEU, the following observations can be made:

i) with specific regards to exclusive rights, the crucial question is to ascertain whether, and to what extent, exclusivity is necessary for the achievement of the policy goals pursued by the State through the entrustment of the SGEI. In this respect, it has to be borne in mind that exclusivity is essentially a way of funding the SGEI. This is confirmed by the fact that certain acts of secondary law (see, for example, Directive No. 97/67/EC and Regulation No. 1370/2007) recognize that the granting of exclusive rights is an option that Member States can consider for ensuring appropriate funding to SGEI providers. In this perspective, exclusivity represents an alternative to other possibilities, like direct contribution by the State or contribution charged on other operators;

ii) the rationale of this approach is quite clear. As said, companies entrusted with SGEIs are usually subject to PSO, i.e. obligations that the same company would not assume (or would not assume to the same extent) if it were acting autonomously on the market. Fulfilling those obligations normally implies extra-charges that deserve compensation from the entrusting authority. In these circumstances – and as an alternative to State subsidies or other forms of contribution – exclusivity can restore the economic and financial equilibrium of the service provider, so ensuring its viability and, ultimately, the achievement of the public goals. In addition, exclusivity can also prevent free-riding behaviours: i.e. situations where third parties could just focus on profitable segments of the activity carried out by the SGEI operator (so-called “cherry-picking”), so materially reducing its revenues and affecting the sustainability of the SGEI provider;

iii) in legal terms, this approach is now grounded on Article 14 TFEU, which reaffirms the duty of the Union and the Member States to “take care that [SGEIs] operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to

\(^{85}\text{Commission v France ("Terminals"), C-202/88, paragraph 12.}\)
fulfill their missions”

But even before the introduction of Article 14 by the Treaty of Amsterdam, the case law had already recognised the crucial function – and thus the legality – of exclusive rights for ensuring sustainability of SGEIs. In particular, since the seminal Corbeau judgement, the Court verifies whether “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 right to perform its task of general interest and in particular to have the benefit of economically acceptable conditions”

The same approach has been consistently applied in several subsequent cases

86 It should be noted that the reference to “economic and financial conditions” has been introduced by the Treaty of Lisbon, in order to reflect the evolution of the case law.

87 Paragraph 16. As underlined in the Corbeau ruling: “The starting point of such an examination must be the premise that the obligation on the part of the undertaking entrusted with that task to perform its services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings where the economically profitable sectors are concerned.

Indeed, to authorize individual undertakings to compete with the holder of the exclusive rights in the sectors of their choice corresponding to those rights would make it possible for them to concentrate on the economically profitable operations and to offer more advantageous tariffs than those adopted by the holders of the exclusive rights since, unlike the latter, they are not bound for economic reasons to offset losses in the unprofitable sectors against profits in the more profitable sectors” (paragraphs 17 and 18).

88 See inter alia judgements in Commission v. Kingdom of the Netherlands (C-157/94), TNT Traço, Ambulanz Glöckner and AG2R Prévoyance.

iv) as to the enforcement of the derogation provided by Article 106(2), it must be reminded that:

– Article 106(2) has direct effect, with the consequence that “[i]t is for the national court to ascertain whether [its] conditions are fulfilled”

– in addition, Article 106(2) being a derogation, the burden of proof is borne by the party invoking it;

– however, the required standard of proof is not particularly severe. A mere risk of impairment of the of SGEI performance is sufficient, which is something less than proving that company’s viability is at risk: as remarked by the Court in the Electricity cases, “for the Treaty rules not to be applicable to an undertaking entrusted with a service of general economic interest under Article 90(2) [now Article 106(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

89 See Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l’assicurazione contro gli infortuni sul lavoro (INAIL), C-218/00, EU:C:2002:36, where the Court affirmed: “it follows from the case-law of the Court, in particular from the judgments in Case C-320/91 Corbeau [1993] ECR I-2533 and Case C-67/96 Albany [1999] ECR I-5751, that the provisions of Article 90(2) of the Treaty may be relied on by individuals before national courts in order to obtain review of compliance with the conditions which they lay down” (paragraph 19).

90 As stated in the TNT Traço ruling “it is incumbent on the Member State or the undertaking which seeks to rely on Article 90(2) [now Article 106(2)] of the Treaty to show that the conditions for application of that provision are fulfilled (see to that effect, in particular, Case C-159/94 Commission v France [1997] ECR I-5815, paragraph 94)” (paragraph 59).
that undertaking. It is not necessary that the survival of the undertaking itself be threatened” (emphasis added)\(^91\);

v) finally, it stems from the case law that the conditions for the application of Article 106(2) could not be fulfilled in two hypothesis:

– when the national regime at issue brings about clear disproportionate consequences. This could in particular occur when the exclusive right is extended to activities that are objectively severable from the SGEI\(^92\);

\(^91\) It is important to underline that a distinction should be made between the general criteria enounced by the Court in preliminary ruling cases and the scrutiny made by the Commission when it exercise its prerogatives of control on the basis of Article 106(3) TFEU. Decisions adopted under Article 106(3) necessarily imply an in-depth scrutiny of the national measure and of its likely effects (see, in particular, in this regard, the two more recent decisions: 5 March 2008 on the granting or maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation S.A. for extraction of lignite and of 7 October 2008 on the Slovakian postal legislation relating to hybrid mail service).

Obviously, this leads to a complex legal review also before the EU Courts, with regards to both the objections raised by the Commission and/or the grounds of justification invoked by the Member States and the undertaking concerned (see, in particular, Slovenská pošta a.s. v European Commission, T-556/08, EU:T:2015:189, and C-293/15 P, EU:C:2016:511).

\(^92\) For example, in the postal sector, the Court stated in Corbeau that: “However, 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 service, 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 offered, do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right” (paragraph 19).

See also, in this respect, Ordem dos Técnicos Oficiais de Contas-OTOC, C-1/12, EU:C:2013:127, paragraphs 106 and 107.

\(^93\) See to that effect Krister Hanner, C-438/02, EU:C:2005:332, paragraph 48.

\(^94\) See for example ERT, paragraphs 23 and 34.
activities, exclusive rights may breach Articles 34, 37, 56 and 49 TFEU.

(a) Measures of equivalent effect (Article 34 TFEU)

In the well-known Campus Oil case the Court examined an obligation imposed on Irish importers to cover part of their needs (of oil products) from the national refinery (INPC), so creating, in substance, a (partial) exclusive purchasing right in favour of INPC. The Court held that such a measure had to be regarded as a “measure of equivalent effect” under Article 34 TFEU, which met the Dassonville standard since it adversely affected intra-EU trade of oil products.

In addition, the Court recognised that the very purpose of the measure – i.e. ensuring the sustainability of the only refinery in Ireland and, hence, the security of supply – was not merely “economic” and could be relevant under the “public security” derogation provided by Article 36 TFEU. Nevertheless, the Court considered that the measure was disproportionate, since the alleged objective (i.e. security of supply) was already ensured by virtue of EC secondary law. Finally, with specific regards to Article 106(2) TFEU, invoked by the Greek government intervened in the case, the Court did not exclude that this provision could be theoretically relevant. However, it pointed out that, in the circumstances of the case, Article 106(2) could not have been invoked for justifying a disproportionate restriction infringing Article 34 TFEU.

95 It should be underlined that the measures at issue can also be examined under the Bolkestein Directive (Directive 2006/123/EC). The case law regarding the application of this Directive is still developing. However, since the Directive mainly codifies pre-existing jurisprudence based on EU primary law, its enforcement substantially reflects principles and criteria already enounced by the Court in the application of Treaty rules on free movement. Therefore, some relevant rulings are quoted and considered also in the frame of the present article.

96 Campus Oil Limited and others v Minister for Industry and Energy and others, 72/83, EU:C:1984:256.

97 See to that effect the well-known judgement in Dassonville, 8/74, EU:C:1974:82.

98 See paragraph 19 of the Campus Oil judgement, where the Court underlines that “Article 90(2) [now Article 106(2)] does not, however, exempt a Member State which has entrusted such an operation to an undertaking from the prohibition on adopting, in favour of that undertaking and with a view to protecting its activity, measures that restrict imports from other Member States contrary to article 30 [now Article 34] of the treaty”.

99 Indeed, according to a well-established case law derogations to the prohibitions set forth by Treaty rules on free movement have to be construed narrowly and thus do not cover restrictive State measures motivated by mere economic reasons (see, ex multis, CIBA, C-96/08, EU:C:2010:185, paragraph 48 and case law cited).

100 As reported in the facts of the judgement “[t]he Greek Government observed that Article 90 (2) of the EEC Treaty may be applicable. A petroleum refinery constitutes an undertaking of general economic interest inasmuch as its existence makes it possible to guarantee security of supplies of refined petroleum products to the domestic market. As regards whether a purchasing obligation is essential for such an undertaking to fulfil its purpose, it must be borne in mind that a State-owned establishment, like independent refineries, is unable to compete on the same footing with vertically-integrated multinational undertakings and is at a disadvantage as regards the ability to make largescale purchases”.

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In the same vein, mention should be made of national regimes channelling the distribution of certain products through firms belonging to a given group or category of companies (e.g. the sale of medicinal preparations through pharmacies or the sale of lenses through opticians). Insofar as they prevent other companies from selling the same product, such measures are tantamount to a collective exclusive right. To the extent that they could reduce imports, an infringement of Article 34 TFEU could be envisaged (at least, until the revirement in the interpretation of Article 34 decided by the Court in the Keck and Mitbouard judgement). It is worth noting that even after Keck and Mitbouard, the Court has held that national regimes on products commercialisation could still be relevant under Article 34 TFEU when the number of outlets, or their geographical spread, is limited to the point of jeopardising a satisfactory supply of products on the territory concerned.

(b) Monopolies of a commercial character (Article 37 TFEU)

Monopolies of a commercial character under Article 37 TFEU are considered to be illegal “if they are arranged in such a way as to put at disadvantage, in law or in fact, trading goods from other Member States as compared with trade in domestic goods.” Not surprisingly, the approach taken by the Court in the frame of Article 37 is similar to the one followed with regards to exclusive rights under Article 106. Firstly, according to the case law, sales monopolies are not illegal per se, but only if they induce consequences that are deemed to be inconsistent (by the European judge) with the Internal Market.

Secondly, the Court makes recourse to analogous legal terms when defining the ratio of the two norms. With respect to Article 37 the Court points out that:

“the purpose of Article 31(1) EC [now Article 37 TFEU] is to reconcile the possibility for Member States to maintain certain monopolies of a commercial character as instruments for the pursuit of public interest aims with the requirements of the establishment and functioning of the common market. It aims at the elimination of obstacles to the free movement of goods, save, however, for restrictions on trade which are inherent in

of State monopolies of a commercial character, Article 31(1) EC requires them to be adjusted in such a way as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States (see, to that effect, Case 59/75 Manghera and Others [1976] ECR 91, paragraphs 4 and 5; Case 91/78 Hansen [1979] ECR 935, paragraph 8; Case 78/82 Commission v Italy [1983] ECR 1955, paragraph 11; Case C-387/93 Banchero [1995] ECR I-4663, paragraph 27; and Case C-189/95 Franzén [1997] ECR I-5909, paragraph 38)” (Hanner, paragraph 34).

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104 As reminded by the Court, “it is clear from settled case-law that, although it does not require total abolition
the existence of the monopolies in question (Franzén, paragraph 39)."

As seen earlier, a similar balance of interests has been struck by the Court with regard to the interpretation of Article 106 TFEU.

Thirdly, since the Manghera case, the case law has in particular criticised situations of potential “conflict of interest” that could end up in a discrimination of imported goods: as already remarked, this approach has been subsequently transposed to Article 106 TFEU. In conclusion, it can be argued that the Court preconizes a consistent enforcement on the provision on free movement (Article 37) and competition (Article 106): as shown *inter alia* by the Hanner judgement, discriminatory (or disproportionate) State measures, that infringe as such free movement rules, could not be justified under Article 106(2) TFEU even when SGEIs are concerned.

(c) Freedom to provide services (Article 56 TFEU)

Exclusive rights can also be examined under Treaty provisions on free movement of services. Indeed, as clarified by the Court in *Sporting Exchange*, an exclusive right can be relevant under Article 56 TFEU insofar as it confers on a single operator the faculty to provide an activity (i.e. games of chance via the internet), so preventing any other operator, including an operator established in another Member State, from offering the service in the territory of the Member State concerned.

The *ERT* judgment is an interesting example of simultaneous and consistent application of free movement and competition rules. The Court recognized that Article 56 TFEU prevents the establishment of a monopoly *ex lege* (i.e. the broadcasting of television programmes produced by the monopolist, as well as to the re-broadcasting of programmes originating in other Member States), when such a monopoly entails discriminatory effects to the detriment of broadcasters from other Member States. The Court, after having reminded that exclusive rights are not illegal *per se*, examined the possible discriminatory effects stemming from the specific features of the monopoly at stake (in the *ERT* case the Commission and the Court concluded that ERT was in a structural situation of conflict of interest, entailing a material risk of discrimination in prejudice of third operators). Such discrimination was regarded in the light of both Article 56 TFEU and Article 106 TFEU read in conjunction with Article 102 TFEU. Furthermore, a similar reasoning was exposed with respect to both provisions. Hence, free movement and competition rules were applied in a

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106 *Hanner*, paragraph 35.

107 *Pubblico Ministero v Flavia Manghera and others*, 59/75, EU:C:1976:14, paragraphs 22 et seq.

108 See *Hanner*, paragraph 48, where the Court recalls that “a sales regime of the kind at issue in the main proceedings, as described in paragraphs 42 and 43 of this judgment, cannot be justified under Article 86(2) EC [now Article 106(2) TFEU] in the absence of a selection system that excludes any discrimination against medicinal preparations from other Member States”.

homogeneous way, reaching the same outcome (i.e. illegality of the exclusive right) and for the same purpose (i.e. protecting entrepreneurial freedom of competing service providers).

Similarly, in case C-353/89, Commission v Netherlands\textsuperscript{110}, the Court examined an (indirect) exclusive right recognised to a national body through a purchasing obligation imposed upon certain national undertaking. In fact, the national regime required broadcasting organizations to have recourse, for the production of programmes, to a single national entity. Such measure clearly came under Article 56 TFEU and was therefore prohibited, unless justified grounds, relating to the general interest, could have been proven\textsuperscript{111}. Similarly to the approach taken in Campus Oil with regard to free movement of goods, the Court considered that the purchasing obligation infringed Article 56 insofar as it restricted the commercial freedom of service users, preventing them from recurring to service providers established in other Member States. In that case, Article 106 was also invoked by the Netherland government; however, the latter did not go so far as to argue that the service at stake was an SGEI (the defendant government simply made reference to the Court case law pursuant to which exclusive rights are not illegal \textit{per se} under Article 106(1) TFEU). Consequently, the derogation under Article 106(2) was not discussed before the Court and not examined by the latter: the Court simply reiterated that Article 106(1) referring to other Treaty provisions, it could have not justified discriminatory measures breaching Article 56 TFEU\textsuperscript{112}.

The Court’s approach has been refined in the subsequent case law\textsuperscript{113}. More particularly, the Court has defined the following legal criteria, which concern both (i) the creation of exclusive rights, i.e. whether the latter can be legally conferred, as well as (ii) the modality under which a (legal) exclusive right has to be conferred.

i) As to the first aspect, the Court has clarified that, to the extent that an exclusive right affects \textit{competition in the market}, so necessarily limiting the provision of services by operators established in other Member States, such right: (a) implies restrictive effects relevant under Article 56 TFEU; (b) consequently, it has to be deemed illegal unless justified by virtue of the derogations provided by the Treaty or the relevant case law (on grounds of justification see infra).

ii) As to the second aspect, relying on the case law on public concessions, the Court has pointed out that exclusive rights have to be granted in accordance with the \textit{principles of transparency and non-discrimination}, in view of

\textsuperscript{110} EU:C:1991:325

\textsuperscript{111} See Commission v Netherlands, paragraphs 31 et seq.

\textsuperscript{112} See Commission v Netherlands, paragraphs 34 to 36.

ensuring of proper competition for the market. Without necessarily implying an obligation to launch an invitation to tender, that obligation of transparency requires the granting authority to ensure, for the benefit of any potential interested party, a degree of advertising sufficient to enable the service provision to be opened up to competition and the impartiality of the procedure to be reviewed.

114 See to that effect, Placanica and Others. Relying on this ruling, Advocate General Poiares Maduro eloquently pointed out, in the Opinion delivered in Centro Europa 7 Srl (C-380/05, EU:C:2007:505): “As the judgment in Placanica illustrates, it is possible for a licensing system which limits the total number of operators in the national territory to be justified in the light of considerations of public interest. Thus, a national limit on the total number of operators in a particular market sector for services could, in principle, be held permissible under Article 49 EC [now Article 56 TFEU]. However, that would require not only a legitimate reason for limiting the number of operators, but also a selection process which excludes arbitrary discrimination by providing sufficient guarantees that the right to operate is awarded on the basis of objective criteria. Therefore, when a Member State grants such a right, it must do so pursuant to transparent and non-discriminatory procedures. The purpose of this requirement is to ensure that operators throughout the Community have equal opportunities to gain access to any part of the internal market.

The same reasoning underpins the Community rules governing the procedures for the award of public contracts and concessions. (paragraphs 34 and 35).

115 See to that effect, Sporting Exchange, in particular, paragraph 41. See also paragraphs 44 and 47 where the Court affirms that “[t]he single licence constitutes an intervention by the public authorities, the purpose of which is to regulate the pursuit of an economic activity which, in the present case, is the organisation of games of chance” and that “[a]s the Advocate General stated in points 154 and 155 of his Opinion, the obligation of transparency appears to be a mandatory prior condition of the right of a Member State to award to an operator the exclusive right to carry on an economic activity, irrespective of the method of selecting that operator.

Nonetheless, such a requirement could not apply insofar as the undertaking in question is a “public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities”. This could reveal to be an important exception. It could allow Member States to reserve to an undertaking the carrying out of a given activity provided that the same undertaking is subject to the control of the public power; in addition, it is noteworthy that the requirement of control envisaged by the above mentioned case law falls short of the situation of “similar control” required by the jurisprudence on the in-house providing.

It stems from the abovementioned case law that – at least in certain circumstances – the legality of exclusive rights can be assessed under Article 56 TFEU. In this respect, however, an important point has to be highlighted. As reminded above, in principle, provisions on free movement of services are not enforceable in “purely internal situations” (see supra). In other words, they could not be invoked – at national level – when the justiciable, i.e. the complaining party, is a national (natural or legal) person complaining against a measure taken by its own State and when no other link

Such an obligation should apply in the context of a system whereby the authorities of a Member State, by virtue of their public order powers, grant a licence to a single operator, because the effects of such a licence on undertakings established in other Member States and potentially interested in that activity are the same as those of a service concession contract”.

with a cross-border interest can be found. As underlined by the Court in Höfner\(^\text{117}\), and reminded by Advocate General Tesauro in the Courbeau Opinion\(^\text{118}\), Article 56 TFEU does not make it possible to deal with situations in which the exclusive rights “prevent a national operator from providing the service for national users”\(^\text{119}\).

(d) Freedom of establishment (Article 49 TFEU)

Finally, exclusive rights can also be examined under Treaty provisions on the freedom of establishment.

It could be argued that Article 49 TFEU is the more appropriate provision for assessing the compatibility of exclusive rights with free movement rules. Indeed, by their very nature, exclusive rights prevent third party access to the market concerned. Thus, they necessarily impede, \textit{de jure} or \textit{de facto}, the establishment of undertakings which could be interested to carry out the (reserved) activity. As pointed out by the Court in a case concerning a collective exclusivity granted to insemination centres by the French authorities:

“The exclusive rights over a geographical area conferred on authorised insemination centres restricting the overall number of operators permitted to open and manage such centres in French territory and the unlimited duration of those exclusive rights hamper the access of other operators, including those from other Member States, to the insemination market. The fact that the geographical areas covered by those exclusive rights can, as the French Republic claims, be adjusted or divided cannot affect that assessment”\(^\text{120}\).

In legal terms, the possibility to make recourse to Article 49 TFEU depends on the scope recognised to this norm. In a first phase – starting from the \textit{Costa vs Enel} case – Article 49 TFEU was only applied to measures implying a difference of treatment between national and non-national EU persons. With specific regard to exclusive rights, such difference of treatment was ruled out to the extent that \textit{all} third parties – whether national or non-national – where equally impeded from accessing the activity concerned\(^\text{121}\).

\(^{117}\) In the Höfner and Elser judgment (C-41/90, EU:C:1991:161) the Court had stated that Article 56 was not applicable to that case in view of the fact that both the undertaking possessing the exclusive right and the person for whom the service was intended were nationals of one and the same Member State.

\(^{118}\) \textit{Sporting Exchange}, paragraph 59, and the case law cited.

\(^{119}\) Although these principles are still valid, they appear to be mitigated with regard to the \textit{obligation of transparency} that national authorities should abide by for ensuring competition for the market. As pointed out in \textit{Belgacom} (C-221/12, EU:C:2013:736), “once it has been established that there is certain cross-border interest in a given service concession, the obligation of transparency to be complied with by the concession-granting authority benefits \textit{any} potential tenderer (see, to that effect, Case C-91/08 \textit{Wall} [2010] ECR I-2815, paragraph 36), even where it is established in the same Member State as those authorities” (paragraph 32).

\(^{120}\) \textit{Commission v France}, C-389/05, EU:C:2008:411, paragraph 53.

\(^{121}\) In this regard, see also \textit{Van Ameyde}, 90/76, EU:C:1977:101, where the Court pointed out that: “the fact of reserving to insurance companies or to such a national bureau established in the territory where the
In a second phase, the Court progressively modified its approach. Firstly with regard to “services” provisions and subsequently with regard to “establishment” provisions, the Court opted for a broader interpretation of these Treaty rules. Indeed, the Court considered that the latter could be deemed to be infringed by any State measure entailing restrictive effects on the freedoms protected by Internal Market rules.\(^{122}\)

Such approach has also been applied to State measures granting exclusive rights or prerogatives to certain undertakings. For instance, in *Servizi Auxiliari Dottori Commercialisti*\(^{123}\) the Court confirmed that by reserving an activity (i.e., “certain activities of advice and assistance in tax matters”) only to a limited group of entities (i.e., so-called *Centri di Assistenza Fiscale*), with the effect of excluding from the market equally qualified providers, the Member State had put in place a restrictive measure obstructing free establishment in the Internal Market. The Court subsequently examined the compatibility of the measure, i.e., whether it could be justified by “overriding requirements relating to the public interest”.

In the same vein, beside the already quoted *Commission v France* case, one could also mention two quite recent pharmacy cases, *Blanco Pérez*\(^{124}\) and *Venturini*\(^{125}\), concerning two State measures, one establishing a territorial distribution of pharmacies (which in fact entailed a scheme of local exclusivity) and the other reserving the sale of prescription-only medicinal products exclusively to pharmacies.\(^{126}\) In both cases, the Court held that the measures at stake brought about restrictive effects on freedom of establishment of potentially interested third parties.\(^{127}\) Then, the Court considered whether a ground for justification could be invoked, ultimately reaching a positive conclusion (see infra).

Conclusively, it can be argued, with respect to the creation of exclusive rights, that Articles 49 and 56 TFEU should be interpreted and applied in a parallel way, leading to similar, if not fully coincident, legal outcomes.

\(^{122}\) See to that effect the judgement in *Caixa-Bank France*, C-442/02, EU:C:2004:586.

\(^{123}\) C-451/03, EU:C:2006:208.

\(^{124}\) C-570/07 and C-571/07, EU:C:2010:300.

\(^{125}\) C-159/12 to C-161/12, EU:C:2013:791.

\(^{126}\) In an analogous perspective, see also the judgement in *Hiebler*, C-293/14, EU:C:2015:843.

\(^{127}\) In *Blanco Pérez*, pharmacists from other Member States willing to exercise their activities on the Spanish territory through a fixed place of business (i.e., pharmacy); in *Venturini*, pharmacists, nationals of other Member States, willing to operate a para-pharmacy in Italy (see, in particular, paragraphs 33 to 35).
(e) Justification under free movement rules

State measures infringing Articles 34, 37, 56 and 49 TFEU can be justified either on the basis of the derogations provided by the Treaty (i.e. Articles 36 and 52 TFEU) or by other grounds of justification enunciated by the Court (i.e. “mandatory requirements” in case of goods and “overriding requirements relating to the public interest” in case of services and establishment)128. In addition, as said, as far as SIEGs are concerned, restrictive measures could also be justified under Article 106(2) TFEU.

In general terms, according to a settled case law, the derogations can only be applied when: (a) the State measure pursues an objective of public interest that is recognised as deserving legal protection also by the EU legal order; and (b) the measure and its restrictive effects are necessary and proportionate for the attainment of the same objective. In this perspective, with regard to Articles 56 and 49 TFEU, the Court has specified that Member States can introduce restrictive (non-discriminatory) measures – that could affect market structure, obstructing, or even impeding, access to market by interested parties – when such restriction: “(i) does not discriminate on grounds of nationality, (ii) is justified by an overriding reason relating to the public interest and (iii) is suitable for securing the attainment of the objective pursued, does not go beyond what is necessary to attain that objective and may not be replaced by other, less restrictive measures which attain the same result”129.

As far as the granting of exclusive rights is concerned, it stems from the above mentioned case law that restrictive effects deriving from these rights are deemed to be justified when exclusivity appears to be necessary, and proportionate, for attaining public interest goals recognised by the EU legal order130. In this respect, it can be highlighted that the jurisprudence developed by the Court with regard to Treaty rules on free movement is similar to, and consistent with, its interpretation of Article 106 TFEU. In particular, it appears from the rulings delivered in Campus Oil, Blanco Pérez and Venturini that, according to the Court, exclusive rights maybe permitted when:

– the undertakings concerned carry out activities contributing to the fulfilment of a public interest objective (e.g. security of supply; public health; environment protection; public service);

– exclusivity proves to be necessary for ensuring the economic sustainability of the

128 In principle, justifications elaborated by the Court are only applicable to so-called measures indistinctement applicables, i.e. State measures applicable without distinction, that do not discriminate (directly or indirectly) on grounds of nationality. On the contrary, discriminatory measures could only be justified on the basis of the derogation explicitly provided by Articles 36 and 52 TFEU.

129 Hiebler, C-293/14, EU:C:2015:843, paragraph 55.

130 For instance in Sporting Exchange – as well as in other previous rulings concerning the same activity, i.e. gambling – the Court considered the exclusivity regime in place necessary and proportionate in the light of the objective pursued, i.e. combating crime and fraud (see paragraph 36).
undertakings concerned, to the extent that in the absence of exclusivity there will be a serious risk for the undertaking not being able to properly perform its activity, with risk of prejudice for the public interest at stake.\textsuperscript{131}

In conclusion, it can be argued that, without making recourse to the notion of SIEG and to the specific derogation set forth by Article 106(2), the Court takes an approach that is fully homogeneous in terms of rationale and outcome with the one enounced in its case law on Article 106 TFEU.

3.2 Other State measures affecting market structure

3.2.1 Authorisations

As anticipated, access to market can be affected by State measures which, without granting an exclusive right to one or more undertakings, nonetheless determine who, and under which conditions, can exercise a certain economic activity. More specifically, the Court’s case law has increasingly focused on State measures establishing “authorisation schemes”. This notion embraces “any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof”\textsuperscript{132}. Should the number of available authorisations be limited, the authorisation scheme could produce effects similar to collective exclusive rights, insofar as a limited number of undertakings only will be entitled to operate on the market, with exclusion of other potential competitors.

The Bolkestein Directive now sets a detailed regime in this respect. However, beside the Directive, EU primary law, as interpreted by the Court, already provides a comprehensive legal frame\textsuperscript{133}. Indeed, taking into account the

\textsuperscript{131} For instance in \textit{Venturini} the Court recognised that reserving exclusively to pharmacies the sale of medicinal products subject to prescription could be allowed insofar as it was necessary for ensuring the performance of the activity by pharmacies under sound economic conditions: a need particularly important for pharmacies operating in smaller cities and rural areas. See, in particular, paragraphs 51-53 where the Court observes that: “To accept the situation sought by the applicants in the main proceedings, in which the sale of some prescription-only medicinal products would be allowed in para-pharmacies, would amount to being able to sell those medicinal products without being subject to the requirements of territorial planning. Therefore, interested parties could set up business anywhere and of their own choosing”. In this situation, according to the Court, “it is not inconceivable that such an option would lead to a concentration of para-pharmacies in areas deemed to be the most profitable, and therefore the most attractive, at the risk of reducing the number of customers of pharmacies in those areas and, therefore, of depriving them of a large part of their income, all the more so as pharmacies are subject to a number of particular obligations in the way that they manage their business”. Consequently, “[s]uch a loss of revenue would not only be liable to bring about a lower quality of service provided by pharmacies to the public, but, depending on the circumstances, it could also result in the definitive closure of some pharmacies, thus leading to a shortage of pharmacies in some parts of the territory and therefore to a supply of medicinal products which is unreliable and not of good quality”.

\textsuperscript{132} Article 4, n. 6), of Directive 2006/123/EC.

\textsuperscript{133} Indeed, Directive 2006/123/EC is mainly a codification of principles already defined by the Court.
restrictive effects stemming from authorisation schemes, the Court has preconized a set of procedural and substantive requirements that Member States have to comply with if they want to avoid unjustified or disproportionate restriction.

i) Firstly, according to a well-established case law, when awarding concession contracts Member States are required to comply with the principle of non-discrimination and transparency (the latter being regarded as a means for effectively ensuring non-discrimination among potentially interested parties). This approach has been subsequently transposed to authorisation schemes limiting the number of authorised providers. As pointed out by Advocate General Bot in Sporting Exchange:

“The obligation of transparency therefore appears to be a mandatory prior condition of the right of a Member State to award to one or more private operators the exclusive right to carry on an economic activity, irrespective of the method of selecting the operator or operators.

Therefore it should, in my opinion, apply also in the context of a system whereby the authorities of a Member State, by virtue of their public order powers, grant a licence to a single operator because the effects of a such a licence on undertakings established in other Member States and potentially interested in that activity are the same as those of a concession agreement.

In addition, the fact that the monopoly arises from a licence issued in an administrative procedure rather than by virtue of a concession agreement does not remove the risk of partiality which the obligation of transparency also aims to prevent”\textsuperscript{134}.

Consistently, when the authorisation scheme implies only a limited number of undertakings that is entitled to exercise a given activity, such authorisation(s) should be delivered through a procedure ensuring appropriate transparency. As already pointed out:

“Without necessarily implying an obligation to launch an invitation to tender, that obligation of transparency requires the concession-granting authority to ensure, for the benefit of any potential concessionaire, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of the procurement procedures to be reviewed (see, to that effect, Case C-324/07 Coditel Brabant [2008] ECR I-8457, paragraph 25, and Wall, paragraph 36)”\textsuperscript{135}.

ii) Secondly, as to the requirements to be fulfilled in order to obtain the authorisation, the case law has set some general principles. More particularly, in order to guarantee genuine transparency and to limit the margin of discretion of national authorities, the Court has

\textsuperscript{134} Opinion in Sporting Exchange, EU:C:2009:791, paragraphs 154-156.

\textsuperscript{135} Sporting Exchange, paragraph 41.
clarified that these requirements are to be: (a) objective; (b) non-discriminatory; and (c) known in advance.\(^{136}\)

iii) Finally, as already underlined, any limitation of the number of authorisations should be properly justified (see supra).

3.2.2 Concession contracts and public procurements

As said, the criteria enounced with regard to authorisation schemes mirror legal models defined by the Court with respect to concessions and public procurements contracts. This is not surprising. When focusing on the attitude taken by public powers when awarding those contracts, the Court (and the Commission) remarked that Member States could act in a non-transparent and discriminatory way. Such an attitude had the effect (and sometimes the purpose) of reserving the contract to one or more national providers, barring the way to operators of other Member States. When the contract represents an important share of the relevant market, such discriminatory conduct produces effects *de facto* similar to explicit exclusive rights.

A thorough analysis of public concession regime falls outside the scope of the present study. We will simply outline the main criteria pointed out by the Court in this regard. Since the Teleaustria ruling, the Court has established that when concluding public concession contracts “public authorities (…) are (…) bound to comply with the fundamental rules of the EC Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular”\(^{137}\). Accordingly, when awarding concessions, Member States are also required to carry out a procedure that, without presenting the features of an invitation to tender, is apt to realize a certain degree of transparency and competition among interested operators.

This principle has been mitigated to a certain extent. Firstly, the above mentioned case law does not affect the autonomy of Member States as to the way of organizing the performance of public tasks. Pursuant to a well-established case law, that has been now partially codified by Directive 2014/23/EU, Member States are free to directly award concession contracts at least in the following three hypothesis.

i) *In-house providing*. According to the well-known Teckal case law\(^{138}\), direct award of public

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\(^{136}\) See Sporting Exchange, paragraph 50, where the Court reminds that: “[i]t has consistently been held that if a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities’ discretion so that it is not used arbitrarily (Case C-389/05 Commission v France [2008] ECR I-5397, paragraph 94, and Case C-169/07 Hartlauer [2009] ECR I-1721, paragraph 64). Furthermore, any person affected by a restrictive measure based on such a derogation must have a judicial remedy available to them (see, to that effect, Case C-205/99 Analir and Others [2001] ECR I-1271, paragraph 38)”.

\(^{137}\) Teleaustria and Telefonadress, C-324/98, EU:C:2000:669, paragraph 60.

\(^{138}\) Teckal, C-107/98, EU:C:1999:562, paragraph 50. The applicability of the Teckal “exception” to concession
procurements and concessions is allowed in situation where: (a) the contracting authority exercises over a (legally distinct) provider a control similar to that exercised over its own departments; and (b) where the same provider carries out the essential part of its activities with the controlling authority. The subsequent case law has also confirmed that the in house exception is also applicable in situation where the contracting authority exercises its control jointly with other contracting authorities.\(^{139}\)

ii) The Tragsa hypothesis. In the Tragsa case\(^{140}\) the Court confirmed that the relationship between a public consortium (set up by law and participated by the Spanish central government and some local authorities) and the public authorities relying on its services could not be considered as a contractual one. Therefore, such relationship fell outside the scope of EU public procurement rules. The Court came to this conclusion considering the specific national legal regime applicable to the public consortium (Tragsa), according to which the latter had no choice as to the acceptance of an assignment or to the tariff to be applied to its services. In other words, Tragsa was under a binding obligation to meet the requests of the contracting authorities; it was therefore a mere instrument, a technical service, of the same authorities.

iii) Public-public cooperation. In the Hamburg case\(^{141}\), the Court ruled on a public contract governing the continuous delivery of household waste to an incineration plant owned by the municipality of Hamburg by some other neighbouring municipalities. In its judgment, the Court confirmed that no infringement of EU public procurement rules and principles occurs in situations – such as the one examined in the case – where public authorities conclude among themselves cooperation agreements aimed at jointly ensuring the execution of a common “public task”, i.e. a public task that all public authorities taking part to the cooperation have to perform.

Cases under (i) and (ii) have a similar rationale. In both cases, the Court considers that the provider does not enjoy real entrepreneurial autonomy and that, consequently, the relationship between the latter and the contracting authority cannot be regarded as presenting genuine contractual nature. Instead, the provider should be regarded as an internal part of the administrative structure of the Member State. More specifically:

– in the case of in-house providing, the peculiar position of the provider is due to the control exerted by the contracting authority over the same provider, along with the dedicated nature of its activities;

\(^{139}\) See, inter alia, jugement in Coditel Brabant S.A v Commune d’Uccle and Région de Bruxelles-Capitale, C-324/07, EU:C:2008:621.

\(^{140}\) Asemfo, C-295/05, EU:C:2007:227.

\(^{141}\) Commission v Germany, C-480/06, EU:C:2009:357.
– in the case examined in the Tragsa ruling, the peculiar position of the provider is due to the fact that it is subject to an ad hoc and binding legal regime, governing all essential elements (i.e. volume, modalities, price) of the activity to be carried out in favor of the contracting authorities. In other words, in both cases the “instrumental” nature of the provider is the prominent and decisive feature. This excludes in radice the contestability of the activity at issue and, thus, excludes a priori the very existence of a “market” for the same activity.

Case under (iii) has a quite a different rationale. With respect to this hypothesis the Court (and subsequently the EU legislator) has essentially recognized that Member States are free to self-organize the performance of public tasks. In particular, when justified by public interest reasons, they are entitled to set up forms of cooperation that de jure or de facto take away certain activities from the market. Again, in this case the EU legal order respects Member States autonomy to organize public services and considers that such autonomy should prevail over Internal Market rules and principles.

Finally, EU concessions regime does not affect the ability of Member States to create SIEGs and to grant, when necessary, exclusive rights to SIEG providers. This is now explicitly recognized in Directives 2014/23/EU\(^\text{142}\) and 2014/24/EU\(^\text{143}\). The EU legislator has indeed specified that even the existence of an EU regime entailing competition for the market – as the one provided by the mentioned Directives – does not imply any obligation to liberalize (or to privatize) “services of general economic interest, reserved to public or private entities”\(^\text{144}\). In this respect, it should also be reminded that the same principle was already embodied in the Bolkestein Directive where the EU legislator explicitly provided that the same Directive “does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services” and “does not affect the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to”\(^\text{145}\).

142 See, in particular, Recital 6 and Article 4.
143 See, in particular, Recital 6 and Article 1, paragraph 4.
145 Article 1(2) and (3) of Directive 2006/123/EC. See also Recital 8 that coherently points out: that: “the provisions of this Directive concerning the freedom of establishment and the free movement of services should apply only to the extent that the activities in question are open to competition, so that they do not oblige Member States either to liberalise services of general economic interest or to privatise public entities which provide such services or to abolish existing monopolies for other activities or certain distribution services”.
4. State Measures Affecting Market Functioning

State measures regulating market functioning – in particular those concerning price or non-price competition – may entail serious restrictive effects. First, by limiting the way undertakings can operate on the market, they can produce anti-competitive effects, similar (when not identical) to those determined by anti-competitive agreements or concerted practices. Second, by affecting commercial freedom, they can limit movements of goods and services, as well as investments, within the Internal Market. A number of national regimes may be regarded under these angles. For instance, Member States can impose over an entire sector minimum or maximum price; they can establish, or make binding, regimes of production/commercialization quotas; they can take measures that encourage corporate agreements among firms of a given sectors or reinforce the effects of such agreements; they can prohibit and sanction companies’ behaviors that depart from certain authorized commercial standards; they can empower undertakings’ associations to adopt market regimes and/or to exert control and sanction prerogatives over the concerned companies. The list could be much longer.

Needless to say, because of their purpose and effects, such national regimes directly affect entrepreneurial freedom. Should the EU legal system – its “economic constitution” – have included a general principle of law protecting entrepreneurial freedom as such, so allowing an EU-based control of legality over such national regimes, the latter would have been directly scrutinized in the frame of a “constitutional” assessment; and it would have been up to the scrutinizing body – ultimately the Court of justice – to strike the appropriate point of balance between the different (economic and non-economic) interests at stake.

In the absence of such a principle, however, the EU legal order did not remain completely defenseless. In particular since the mid 80’s – consistently with the “liberalization mood” of the period and as an answer to “liberalization requests” stemming from national judges – the Commission and the Court intervened, although in a narrower way, when national regimes conflicted with the rights provided by the Internal Market Treaty rules: i.e. (a) competition provisions; and (b) free movements provisions.

In this section, attention is devoted to price measures taken at national (or infra-national) level by the Member States (however, similar observations can be made with regard to non-price measures also). As shown below – and as already pointed out with respect to State measures affecting market structure – legal enforcement has to take into account the specific features of the abovementioned provisions. As said, they have different purposes and scope (both, ratione personae and ratione materiae). Consequently, when applied, they do not lead to totally coincident outcomes. However, and in spite of these differences and peculiarities, a certain convergence of approach may be identified.

4.1 The “competition” approach

(a) The legal standard based on Article 101 TFEU and 4(3) TEU
A complete analysis of the case law concerning anti-competitive regulatory measures falls outside the scope of the present article. Here, only the main legal aspects will be highlighted.

i) In general, EU competition rules only apply to firms’ conduct, not to measures taken by the Member States.

ii) However, this does not imply that State measures bringing about anti-competitive effects are totally excluded from any form of scrutiny under EU primary law, in particular EU competition provisions. Since the ruling in INNO v ATAB, the Court affirmed that the obligation of sincere cooperation, as set by Article 5 CEE (now Article 4(3) TEU), requires member States not to take measures that could deprive EU competition provisions (Articles 101-102 TFEU) of their effet utile. Sincere cooperation and effet utile were, thus, the two pillars of a possible application of EU competition rules to State conduct. Building on INNO v ATAB, in its dialogue with national judges the Court developed, since the mid 80’s, a line of jurisprudence that introduced a criterion for assessing “the constitutionality of the national anti-competitive measures”.

Various hypotheses were examined and (partially) different approaches were elaborated. In addition, the issue was thoroughly examined by EU law experts, including Court’s judges and prominent Commission officials, that on some crucial aspects expressed quite divergent opinions.

iii) In theoretical terms, as clearly pointed out by Advocate General Tesauro in Meng and Obra, the key question was: “whether a State measure deprives Article 85 [now Article 101 TFEU] of its effectiveness – and is therefore

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150 C-245/91, EU:C:1993:887.
unlawful — merely because it has an effect equivalent to that of an agreement prohibited by that article” (emphasis in the text)\textsuperscript{151}. The question had been examined by the Court before Meng and received a negative answer, although with some sporadic statements that induced to think to possible broader developments\textsuperscript{152}.

iv) Indeed, two possible solutions were envisaged. According to a first, and broader, approach, the effect of the State measure at stake had to be considered as the only decisive point: in other words all State measures entailing effects on firms’ behaviors similar to those of anti-competitive agreements or concerted practices should have been regarded as jeopardizing the effet utile of Article 101, so being incompatible with the duty of cooperation laid down by Article 4(3) TFEU (at that time, Article 5 CEE read in conjunction with Article 3(f) CEE). Such approach — that somehow echoed the model of the “State measure inducing abuse of dominant position”, prohibited under Article 106(1) and 102 TFEU – if upheld by the Court, would have had far-reaching consequences. It would have led to a widespread control of legality of national (legislative or administrative) measures, i.e. measures taken by the Member States, according to their own legal order, in the exercise of their prerogatives of economic policy;

– It would have introduced an extensive EU-based control of legality over national (legislative or administrative) measures, i.e. measures taken by the Member States, according to their own legal order, in the exercise of their prerogatives of economic policy;

– It would have significantly affected the (horizontal) institutional balance within the Member States, enabling national judges (and administrative bodies) to put in question and, ultimately, not to apply legislative and administrative regimes adopted by the competent regulatory powers.

v) According to a second, and narrower, approach, for the national measure being considered as incompatible with Article 101 TFEU and 4(3) TEU, something more than a mere anti-competitive effect was required. Such quid pluris had to be identified in a link between (a) the national regulation and (b) specific anti-competitive conduct attributable to some undertakings. The rationale was clearly explained by Advocate General Tesauro in Meng and Ohra:

“The obligation of Member States not to deprive the competition rules addressed to private undertakings of their practical effect is based on the second paragraph of Article 5 of the Treaty, an article which imposes ‘a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty’ [Deutsche Grammophon, 78/70, paragraph 5] and therefore, in the

\textsuperscript{151} C-2/91, EU:C:1993:308, paragraph 23.

\textsuperscript{152}See R. JOLIET, National Anti-Competitive Legislation and Community Law, cited above, stating that “[i]n the light of the case law, it is not the effects of a particular measure on competition that are decisive in themselves”.

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present case, on Article 85. It is therefore impossible to rely on that provision to declare State measures unlawful, even if they have an effect equivalent to that of an agreement between undertakings prohibited by Article 85(1), in the absence of any — even indirect — link with anticompetitive conduct attributable to undertakings”.

vi) Being aware of the systemic and “constitutional” implications of the question at stake, the Court in the Meng and Ohra cases took a particularly careful attitude. Exceptionally, the Court reopened the oral phase and “consulted” all the Member States and the Commission, addressing written questions on the possible readings of the provisions concerned. Ultimately, the narrower approach was retained.

(b) The scope of the prohibition laid down by Articles 101 TFEU and 4(3) TEU

After Meng and Ohra, the case law has categorized the hypothesis where national regulations can be deemed to be inconsistent with Articles 101 TFEU and 4(3) TEU.

i) The case law is plain in stating that Article 101 TFEU is concerned solely with the conduct of undertakings and not with laws and regulations emanating from Member States. Nonetheless such provision, read in conjunction with Article 4(3) TEU, limits to a certain extent the margin of action of Member States, requiring the latter not to introduce or maintain in force measures, even of legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings.

ii) The case law has identified three hypothesis. The legal paradigm based on the combination of Article 101 TFEU and Article 4(3) TEU is deemed to be infringed where a Member State: (a) requires or encourages the adoption of the agreements, decisions or concerted practices contrary to Article 101 TFEU; or (b) reinforces their effects; or (c) divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere. The three mentioned hypothesis share a common denominator. In all three cases the State is not

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153 Paragraph 24.


155 API, paragraph 28 and case law cited.

156 API, paragraph 29 and case law cited. See also more recently, Euroamiantos SL and Others, case C-532/15 and C-538/15, EU:C:2016:932, paragraph 35. In this ruling, the Court excluded the relevance under cases sub (a), (b) and (c) of a Spanish legislation setting the scale of tariffs for the legal services provided by procuradores, which could only be increased or decreased by 12%, and in respect of which a national court could have only checked its strict application without being in a position, save exceptional circumstances, to derogate from the price limits set by the same law.
genuinely exerting its typical regulatory prerogatives for the achievement of public policy goals: instead, it is acting with the aim (or the effect) of circumventing EU antitrust rules. More specifically, the State is unduly supporting firms’ anti-competitive conduct [cases sub (a) and (b)] or is placing firms in a position to adopt, in their own interest, anti-competitive binding rules [case sub (c)].

iii) In cases sub (a) and (b) there is a clear link between an anti-competitive agreement or concerted practice and the State measure concerned: the latter requiring, encouraging or reinforcing the effects of the former. But an “agreement” may also be identified in case sub (c), although in a sui generis situation: in such a case, thanks to the delegation of regulatory powers in favor of certain undertakings (or of their associations), the agreement (or concerted practice) coincides with the regulation itself.

iv) It stems from the peculiar features of these hypothesis that they can only occur in limited and, indeed, exceptional situations. This is confirmed by the fact that only in few cases – usually originating from requests for preliminary ruling referred to the Court by national judges – a breach of Articles 101 TFEU and 4(3) TEU has been envisaged by the Court. In this respect, it is noteworthy that the Court has preconized a quite complex scheme of analysis.

− First, it has to be ascertained whether one of the mentioned hypothesis can be detected. This has to be done in the light of the relevant circumstances of the case. For instance – with regard to hypothesis sub (a) and (b) – it should be verified whether an agreement or a concerted practice exists and whether the State, when adopting the measures, has acted for public interest reasons (in such a case no breach will be found) or just in the interest of the undertakings/associations concerned. The hypothesis sub (c) reveals to be even a more complex one. In such a case, a thorough assessment should be carried out as to the composition and the decision making process of the entrepreneurial body to which regulatory prerogatives have been “delegated” (in particular, it is relevant to consider if it is only composed representatives of the interested undertakings, or by members empowered to assess third parties interests; in addition, it is also relevant to examine whether the State retained some powers of review or last resort decisions). Indeed, each case can present peculiar features and a categorization reveals to be a quite difficult exercise. Conclusively, however, it can be argued that Article 101 TFEU and 4(3) TEU are violated only if, and to the extent that, the regulatory measure appears to be a mere instrument for creating or strengthening ententes between undertakings.

− Second, in order for EU competition rules to apply to the regulation at stake, it is necessary for that legislation to be capable of restricting competition within the Internal Market. In other words, the agreement or the concerted practice should entail a competition restriction, by object or by effect. Of course, the existence of a restriction will likely occur when the agreement or the concerted practice (or the delegated measure) is intended to fix prices or to set other relevant factors of competition (e.g. output volumes).
– Third, even when the regulation at issue falls within one of the three above mentioned hypothesis, and entails restrictions of competition by object or by effect, a breach of Articles 101 TFEU and 4(3) TEU is not established yet. As recently stated by the Court in API (significantly, a case deriving from an initiative taken by the ICA; see infra):

“Lastly, it should however be noted that the legislation at issue in the main proceedings making mandatory a decision of an association of undertakings which has the object or effect of restricting competition or restricting the freedom of action of the parties or of one of them does not necessarily fall within the prohibition laid down in Article 101(1) TFEU, read in conjunction with Article 4(3) TEU.

For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which a decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (see judgments in Wouters and Others, C-309/99, EU:C:2002:98, paragraph 97, and Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato, C-136/12, EU:C:2013:489, paragraph 53).

In that context, it is important to verify whether the restrictions thus imposed by the rules at issue in the main proceedings are limited to what is necessary to ensure the implementation of legitimate objectives (see, to that effect, judgments in Meca-Medina and Majcen v Commission, C-519/04 P, EU:C:2006:492, paragraph 47, and Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato, EU:C:2013:489, paragraph 54)“157.

In substance, the Court preconizes a ground of justification that is somehow in between the rule of reason for the purpose of the application of Article 101 TFEU (see, in this perspective, the reference to Wouters and Meca-Medina)158 and some sort of justification for public interest reasons, similar to the one usually considered in the frame of the application of free movement Treaty rules. The scheme of analysis followed by the Court is coherent with this approach. It can be argued that the Court’s assessment focuses on three main aspects: (a) firstly, the regulation at issue has to pursue legitimate objectives, i.e. objectives consistent with interests and values recognised by the EU legal order; (b) secondly, its restrictive effects have to be regarded as inherent in the pursuit of those objectives; (c) thirdly, an assessment of appropriateness of the measure has to be carried out: the latter should bring about restrictive effects that go beyond what is necessary for the implementation of the legitimate objective and, furthermore, it should pursue such objective “in a consistent and systematic manner” (it is interesting to remark that, in this respect, the Court explicitly makes reference in API to the criteria for assessing proportionality that the same


Court has developed in free movement cases).  

4.2 “Free movement” approach

(a) Measures of equivalent effect (Article 34 TFEU)

Already in its old case law, the Court held that price regimes – both minimum and maximum price regimes – can be regarded as “measures of equivalent effect” prohibited by Article 34 TFEU if they entail restrictive (discriminatory) effects on imports of goods from other Member States. It is true that, being applicable without distinction to domestic and imported products, price regimes should not, in principle, fall within the scope of Article 34 TFEU. However, they could be qualified as measures of equivalent effect when, considering the circumstances of the case, it could be argued that imported products are placed in a less favorable position vis-à-vis the domestic ones. In case of maximum prices, a restrictive effect can be detected if the price is set at a level “such that the sale of imported products becomes, if not impossible, more difficult than that of domestic products”\(^{160}\) (e.g. when the price cap is actually too low, for example because it does not take into account additional costs typically incurred by the imported products, like transport related costs). In case of minimum prices, a similar restrictive effect on cross-border trade flows can be detected if the price is set at a level that prevents imported products from being properly commercialised or from taking advantage of their lower production costs\(^{161}\).

This line of jurisprudence has been more clearly systematized by the Court after its ruling in *Keck and Mithouard*. Pursuant to the *Keck and Mithouard* doctrine, price regimes should be qualified as so-called “selling arrangements”, excluded as such from the scope of Article 34 TFEU\(^{162}\). However, even the more recent case law confirms that situations may occur where price regimes entail de facto discriminations: of course, should this happen, the national measure will violate Article 34 TFEU and could only be justified on the ground of the derogations provided by Article 36 TFEU\(^{163}\).

(b) Freedom to provide services (Article 59 TFEU) and freedom of establishment (Article 49 TFEU)

A similar approach has been taken in the field of services and establishment. As specified by

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159 See, in particular, paragraph 53 and case law cited.
160 *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)*, 13/77, EU:C:1977:185, paragraph 52. See also *Criminal proceedings against Jan van de Haar and Kaveka de Meern BV*, 177 and 178/82, EU:C:1984:144.
163 Theoretically, the measure being discriminatory, the Member State could not pretend to justify it on the basis of the so-called “mandatory requirements”. See to that effect the recent judgement in *Deutsche Parkinson Vereinigung eV v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*, C-148/15, EU:C:2016:776, paragraphs 28 et seq.
the Court in *Commission v Italy*\(^\text{164}\) (where a maximum tariff regime for services provided lawyers was at stake):

“as regards the existence of restrictions on the freedom of establishment and on the freedom to provide services referred to in Articles 43 EC and 49 EC [now Article 49 TFEU and 56 TFEU] respectively, it is settled case-law that measures which prohibit, impede or render less attractive the exercise of such freedoms constitute such restrictions (see, to that effect, Case C 439/99 *Commission v Italy* [2002] ECR I 305, paragraph 22; Case C-442/02 *CaixaBank France* [2004] ECR I 8961, paragraph 11; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 31; and Case C-330/07 *Jobra* [2008] ECR I 9099, paragraph 19).

In particular, the concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for economic operators from other Member States (see, inter alia, *CaixaBank France*, paragraph 12, and Case C-518/06 *Commission v Italy* [2009] ECR I-3491, paragraph 64)\(^\text{165}\).

Such restrictive effect may in particular arise in case of national regulations setting mandatory minimum tariff or prices. According to the Court, price thresholds can in particular deprive service providers from other Member States, or companies interested to established themselves in another Member State, from “gaining access to the market of the host Member States under conditions of normal and effective competition (see, to that effect, *CaixaBank France*, paragraphs 13 and 14; Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 59; and Case C-384/08 *Attanasio Group* [2010] ECR I-0000, paragraph 45)\(^\text{166}\). The rationale underlying this approach is quite clear. For cross-border service providers and newly established companies price-competitiveness is an important leverage for market entry and for rivalling domestic companies. As a consequence, national regulations, which preclude the possibility to reduce prices under a given threshold, deprive EU operators of an important “factor of competition”\(^\text{167}\) within the market.

However, according to a settled case law, even a restrictive regime “may be justified where it serves overriding requirements relating to the public interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see, inter alia, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 21, and *Servizi Ausiliari Dottori Commercialisti*, paragraph 37)\(^\text{168}\). Consequently, an overall assessment shall be performed in view of ascertaining whether the requirements for applying the derogation are fulfilled. In short, it should be at least verified if the national regulation at stake: (a) pursues a legitimate objective recognized by the EU legal order (e.g. protection of consumers and users or – as in

\(^{164}\) C-565/08, EU:C:2011:188.

\(^{165}\) *Commission v Italy*, paragraphs 45 and 46.

\(^{166}\) *Commission v Italy*, paragraph 51.

\(^{167}\) *Deutsche Parkinson Vereinigung eV*, paragraph 24.

the case of lawyers’ tariff regimes – the proper administration of justice); (b) is necessary and proportionate for the attainment of the same objective.

5. IMPLICATIONS FOR ENFORCEMENT AT NATIONAL LEVEL

In conclusion, although the EU legal order does not enounce a general principle of entrepreneurial freedom, Treaty rules on competition and free movement, as interpreted by the Court, confer rights that can be invoked in order to protect, at least to a certain extent, the freedom of economic initiative of EU undertakings. Obviously, in the absence of a general principle of law, the claim of the justiciables are to shaped in a way to fulfill the conditions of application of the specific Treaty rules. However, and notwithstanding these limits, the system of legal protection, developed by the Court on the basis of EU primary law, for the achievement of the Internal Market, is quite broad and apt to permit a thorough control of legality of Member State regulations affecting both structure and functioning of the markets.

This has important consequences on the activity of enforcement carried out at national level. In this regard, the following aspects could be pointed out.

i) As known, all legal standards considered in the frame of the present article are based on EU norms of primary law having direct effect. Consequentially, national authorities, both judicial and administrative, are due to protect the rights deriving from the EU legal order and not to apply, whenever necessary169, any conflicting national provision170. According to the well-known CIF ruling171, the national competition authorities, as well as other independent authorities, are under the same obligation when exercising their own prerogatives.

ii) Consequently, all administrative bodies, under the control of national judges, are required to check the legality of national regulations affecting market structure or market functioning. In particular, such legality check should be performed in the light of the EU legal standards examined in the present article; more specifically, it should be carried out by national administrations when adopting or enforcing regulations that could infringe the above mentioned EU rules.

iii) As far as the ICA is concerned, the latter can equally rely on the above mentioned provisions and case law when exercising the power provided by Article 21-bis of Law No. 287/90. As known, this provision somehow mirrors the infringement procedure governed by Article 258 TFEU. It grants the ICA with the possibility to issue a “reasoned opinion” vis-à-vis acts of the administrations that are deemed to be inconsistent with the protection of

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169 Of course, disapplication is only due in case of unredeemable conflict, the national authorities being oblige to interpret – whenever possible – national norms in conformity with EU norms.


171 ConSORZIO Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato, C-198/01, EU:C:2003:430.
competition. Ultimately, should the administration concerned not to comply with the reason opinion, the ICA can challenge the act before the competent Regional Administrative Court, asking for its annulment (this was the proceedings followed by the ICA in the API case mentioned above).

iv) Of course, when introducing such an action the ICA can rely on national and/or EU norms. As far as the latter are concerned, the ICA can certainly invoke the legal standards based on Articles 106 and 102 TFEU, as well as on Articles 101 TFEU and 4(3) TEU. In addition, it can also refer to free movement rules – namely, Articles 34, 37, 56 and 49 TFEU – where relevant. In defining its legal initiative the ICA is due to follow the grille d’analyse exposed above. Consequently, it should first verify whether the situation at stake falls within the personal and material scope of the EU provisions (see supra sub I). Second, it should ascertain whether the national regulation infringes one or more of the above mentioned provisions and, in the affirmative, if the requirements for a justification can be met (see supra sub II and III).

v) The possibility to rely on EU provisions reveals to be particularly relevant when the administrative act challenged by the ICA is based upon a specific (national) law provision that requires the administration to adopt the anti-competitive act. In such a situation, actually quite common, the legality of the act can only be contested in court if the (national) law on which it is grounded is declared to be incompatible with the (supra-national) EU norms (or with the norms of the Constitution). This is exactly the scenario that occurred in the mentioned API case: following the ICA’s appeal, the Regional Administrative Court of Rome (Tar Lazio) shared the doubts of legality regarding the national legislation at stake and, consequently, decided to refer the matter to the Court, asking for a preliminary ruling on the compatibility of such legislation with, both, EU competition and free movement rules. Ultimately, as said after a quite thorough analysis, the Court confirmed the incompatibility of the national regulation with the EU legal order.

vi) Needless to say, in the situation considered sub (iv) the enforcement of EU norms leads, in substance, to a decentralised control of “constitutionality” based on EU Internal Market provisions. In the frame of such assessment national administrations and judges are required to perform a really delicate task. Indeed, on the basis of the EU case law, they shall not only examine the possible restrictive effects of the national law on the freedoms of movement and competition protected by the

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172 See Tar Lazio, III ter, order No. 2720/2013, registered in the Court’s case registry with No. C.208/13. Following the Court judgement in API, the Regional Administrative Court of Rome upheld the ICA’s appeal (see Tar Lazio, III ter, judgment No. 2896/2015).

173 It is noteworthy that, confirming the homogeneity of approach in the application of both sets of rules, the Court specified that the answer provided with regard to competition rules (Article 101 TFEU and 4(3) TEU) was also relevant for the interpretation of free movement rules (Articles 49 and 56 TFEU) (see API, paragraph 59).

174 This is somehow confirmed by the fact that, in such cases, similar claims could likely be made on the basis of Constitution norms, in particular Article 41 (entrepreneurial freedom), that, however, cannot be applied directly by the judge.
EU Treaties; they will be also called to consider the (legitimate) objectives of public policy pursued by the legislator and to make a highly-sensitive judgement on the appropriateness and proportionality of the national measure at stake, in the light of the objectives set by the legislature. Sure, when doing so, judges are not alone; they can count on the support of the Court. Nonetheless it has to be reminded that in its preliminary rulings the Court only provides the interpretation of EU norms and that only in rare occasions it takes a clear, and quite definitive, stance on the compatibility of the national law at stake. In the majority of cases the Court refers back to the national judge the task, and the responsibility, to apply the EU norms to the specific case; thus, it would be up to the judge alone to assess delicate issues concerning the very purpose of the contested measures, as well as their appropriateness and proportionality. It is submitted that, considering the sensitiveness of this task and its implications for the (vertical and horizontal) balance of powers, the control of legality made by the judge should not encroach upon the prerogatives of the legislature and should observe a certain degree of “judicial deference”.

The \textit{Hiebler} case (C-293/14, EU:C:2015:843) is a recent, clear example of the situation mentioned in the text. Indeed, in its preliminary ruling the Court offers to the referring judge four alternative solutions, considering as theoretically relevant (a) two different legal basis and (b) for each legal basis two different outcomes. Ultimately, the delicate – and certainly not easy – task of choosing the appropriate solution was left to the referring judge.

Finally – and more specifically – the case law examined above can open interesting possibilities of intervention for the ICA in the case of regulations affecting market functioning (namely, price regimes), which are subject to Article 101 TFEU and 4(3) TEU. A situation may occur where the regulation (embodied in an administrative act based on a law provision) requires firms to operate on the market in an anti-competitive way (e.g. the firms being obliged to apply a fixed level of price or to respect certain output volumes). In such a situation the ICA’s intervention could be twofold:

– on the one hand, the ICA could intervene on the basis of Article 21-\textit{bis} of Law No. 287/90 objecting against the EU legality of the regulation concerned; as said, in this frame the ICA could also contest the compatibility of the national law provisions on which the regulation is based;

– on the other hand, once the regulation has been annulled by the administrative court, possibly after requiring the interpretation of the Court ex Article 267 TFEU, the firms’ behaviour will not be shielded anymore by the same regulation, with the consequence that the companies’ conduct will be challengeable \textit{pro futuro} by the ICA on the basis of Article 101 TFEU.

Other possible implications of the \textit{CIF} ruling are not considered in the present article. Here only national regulations having restrictive effects – as such theoretically challengeable under EU primary law – have been considered; national non-restrictive regulations – as such consistent with EU law – and their relations with the enforcement of Article 101 TFEU and 102 TFEU.
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are obviously outside the scope of the present analysis (on this specific issue see *inter alia* A. Pera and A. Pezza, *Competition Law and Pro-Competitive Regulation: An Unsolved Conundrum?,* in this review (2016) 3(1) 36).


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