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Catherine Olson

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## Job Centre: The Ongoing Demise of Public Monopolies in Europe

### Keywords

Economics, Trade Regulation, Politics, European Union

# JOB CENTRE: THE ONGOING DEMISE OF PUBLIC MONOPOLIES IN EUROPE

CATHERINE OLSON\*

## I. INTRODUCTION

*It is ultimately the competitive activities of undertakings driven by self-interest to trade across frontiers, which makes the single market a reality.*<sup>1</sup>

— Adam Smith

In the 1990s, the European Union has become highly focused on competitiveness.<sup>2</sup> The dynamics of economic integration and the need for job growth in the midst of a more globally competitive and technologically-oriented environment have created this impetus.<sup>3</sup> Community institutions, primarily the European Commission (Commission), have focused on promoting economic efficiency via policy harmonization among national economies and liberalization and privatization within national economies.<sup>4</sup>

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\* J.D. Candidate, May 2000.

1. CHRISTOFER BELLAMY & GRAHAM CHILD COMMON MARKET LAW OF COMPETITION, 16 & n.2 (3d ed. 1987).

2. The title "European Union" was used after the implementation of the Maastricht Treaty in November 1993 to reflect the increased economic, political, and social integration of the organization. Prior to that, the organization was referred to as the European Community. Barbara Crutchfield George et al., *The Dilemma of the European Union: Balancing the Power of the Supranational EU Entity against the Sovereignty of its Independent Member Nations*, 9 PACE INT'L L. REV. 111, 111 n.1 (1997). The term Community will be used throughout this article to refer to the European Union.

3. See *Growth, Competitiveness, and Employment: The Challenges and Ways Forward into the 21<sup>st</sup> Century: White Paper from the Commission to the European Council*, COM(93)700 Final [hereinafter *Commission White Paper*] (discussing the link between competition and employment and the necessary conditions to enhance both). In particular, the White Paper states, "[T]he [Member State] regulatory environment is still too rigid, and administrative and managerial traditions too centralized and compartmentalized . . . [G]overnment policies are often still too defensive and do not take sufficient account of the new constraints imposed by global competition." *Commission White Paper*, art. II, ch. 2(A).

4. See Dana L. Romaniuk, Note, *Regulating Public Monopolies in Furtherance of the EEC Free Competition Goal: Article 90 and the Two-Step Approach*, 69 CHICAGO-KENT L. REV. 1025, 1068-69 (1994); Mario Siragusa, *Privatization and EC Competition Law*, 19

The European Court of Justice (Court) has supported the Commission's pro-market efforts.<sup>5</sup> In *Job Centre Coop arl*, the Court affirmed its legal approaches to support the Commission objective of limiting Member State support for public monopolies.<sup>6</sup> The Court held that Italian legislation prohibiting private entities within Italy from engaging as intermediaries in the State's demand and supply of labor, i.e., private employment/recruitment agencies, violated Community Law and thus, was invalid.<sup>7</sup>

In light of legal precedent, as well as political and economic forces within the Community, this Case comment discusses how the Court uses the Treaty of the European Union's (EU Treaty) legal mechanisms or "tools" to promote the Commission's objectives. This comment argues that *Job Centre* confirms the Court's legal approach in order to support the Commission's objective of liberalizing public monopolies. The Court's approach has been to rely increasingly upon Article 90 of the competition articles and to interpret its terms favorably toward the Commission's perspective, finding Member States liable more frequently for public monopoly behavior. Nevertheless, *Job Centre* is also a political reminder to the Court that Community law is reaching into realms traditionally managed by Member States. Considering that the Court's ability to influence stems from Member State courts, the Court needs to balance its support for the Commission with Member State concerns.

## II. BACKGROUND

### A. Community "Tools"

The European Union was initially created as the European Economic Community (EEC) in 1958.<sup>8</sup> The treaty that created the EEC, commonly known as the Treaty of Rome, ambitiously sought to establish a common market.<sup>9</sup> While the EEC has amended the Treaty of Rome several times to widen and deepen economic and political integra-

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FORDHAM INT'L L.J. 999, 999-1001 (1996). The primary EU institutions are: the Commission, the "executive branch" of the Community, responsible for initiating, implementing and enforcing EU policy and law; the Council, the primary legislative role, debates and approves policy; and the European Parliament, originally an advisory body, now plays a more substantive role in the legislative process following the Maastricht Treaty. George et al., *supra* note 2, at 119-201

5. BELLAMY & CHILD, *supra* note 1, at 32-33; Siragusa, *supra* note 4, at 1068.

6. Case C-55/96, *Job Centre Coop. arl*, [1998] 4 C.M.L.R. 708 (1997).

7. *Id.*

8. Rudiger Dohms, *Energy Panel: The Development of a Competitive Internal Energy Market in the European Community*, 9 CONN. J. INT'L L. 805, 805 (1994).

9. *Id.*

tion, the fundamental economic tools have remained the same.<sup>10</sup> In particular, the Treaty of Rome has aimed to promote free movement of goods, services, labor, and capital (the four freedoms),<sup>11</sup> and to ensure that competition among the States do not become distorted as a result.<sup>12</sup> The Community framers, however, also envisioned some autonomy for Member States in maintaining their own economic and social policies.<sup>13</sup> Thus, while economic integration of Member State policies was the primary goal of the EU Treaty, it also provided Member States with some ability to manage and control their own individual policies.

For the purpose of this discussion, the EU Treaty articles pertaining to competition will be analyzed. The "competition articles" promote economic integration by ensuring that Member State markets act efficiently but fairly.<sup>14</sup> Article 86 of the EU Treaty is a mechanism for controlling the abusive nature of monopolistic entities or "undertakings." It prohibits undertakings from: 1) holding a dominant position within a substantial part of the common market; 2) and abusing the dominant position which could potentially affect trade between Member States.<sup>15</sup> Article 86 has been a powerful tool for the Community to ensure that European markets remain competitive as integration continues.

Article 90 of the EU Treaty is similar to Article 86, but it focuses on "public undertakings" otherwise known as state monopolies; those undertakings "provided exclusive rights by the State" - otherwise known as state-supported monopolies.<sup>16</sup> In particular, Article 90(1) obligates Member States to refrain from maintaining measures that support a public or exclusively-granted undertaking, which are contrary to the EU Treaty, especially the competition articles.<sup>17</sup> However, the Article

10. See George et al., *supra* note 2, at 111 n.3. See also TREATY ESTABLISHING THE EUROPEAN UNION, Feb. 7, 1992, O.J. C-224/1, 1 C.M.L.R. 573 (1992) [hereinafter EU TREATY].

11. The freedom articles are primarily aimed at eliminating trade barriers among the Member States and include: Articles 30 to 36, freedom of goods; Articles 59 to 66 freedom of services; and Articles 48 to 59 free movement for people and entities. EU TREATY, *supra* note 10.

12. See generally Thomas H. Hefti, *European Union Competition Law*, 18 SETON HALL LEGIS. J. 613, 614 (1994). See also EU TREATY, *supra* note 10, arts. 85-94 (referring to competition) and art. 3(f) (explicitly obligating the Community to establish a system ensuring that competition in the Common Market is not distorted).

13. See generally Siragusa, *supra* note 4, at 1069. For example, Article 222 provides that the Community will not prejudice national rules governing property ownership, and Article 37 requires Member States to adjust only those state monopolies of a commercial character. *Id.*

14. See HANS MICKLETZ & STEPHEN WEATHERILL, EUROPEAN ECONOMIC LAW, 136 (1997); EU TREATY, *supra* note 10, arts. 85-94. Only Article 86 and Article 90 will be discussed in this paper.

15. EU TREATY, *supra* note 10, art. 86; BELLAMY & CHILD, *supra* note 1, at 388-90.

16. EU TREATY, *supra* note 10, art. 90; BELLAMY & CHILD, *supra* note 1, at 568-78.

17. EU TREATY, *supra* note 10, art. 90(1). Although the Court has never defined an "exclusive right" clearly, it generally means that one undertaking dominates the whole

does not preclude granting exclusive rights to entities so long as they do not violate other EC law.<sup>18</sup> Therefore, the framers' balancing between Member State rights and Community objectives creates an inherent tension between the States and the Community.

Article 90(2) of the EU Treaty focuses on the public undertaking itself and emphasizes that even public undertakings that serve a general economic interest or have a revenue-producing character can be subject to the EU Treaty.<sup>19</sup> However, a public undertaking may be exempt if the application of EU Treaty rules would obstruct the undertaking's performance.<sup>20</sup> The purpose and nature of the undertaking can thus, justify its exemption. But, if trade is affected "to such an extent" that it would be contrary to the interests of the Community, then the public monopoly might not be exempt.<sup>21</sup> The Community-Member State tension again emerges since public monopolies serving public interests may be exempt from the EU Treaty, but not in certain circumstances.

Article 90(3) also plays a unique role in the Community-Member State dynamic. It empowers the Commission "to ensure the application of the provisions of this Article" and to "address appropriate directives or decisions to Member States."<sup>22</sup> This section differs from the rest of the EU Treaty, which only authorizes the Council of Ministers, in conjunction with the European Parliament, to enact legislation.<sup>23</sup> Relying on Article 90(3), the Commission can issue binding directives and regulations to Member States on its own.<sup>24</sup> Moreover, Article 90(3) does not provide Member States with any ability to justify their position in additional proceedings, as opposed to procedures provided when they violate the freedom articles.<sup>25</sup> With the Court establishing the legitimacy of Article 90(3), the Commission has used it frequently to enact legislation that aims to liberalize traditional state monopolies.<sup>26</sup>

The EU Treaty also provides a specifically important tool for the Court for imposing Community law on Member States. Article 177 grants the Court authority to provide preliminary rulings interpreting the EU Treaty, as well as Community institutional behavior and legislation.<sup>27</sup> The Court's purpose is to guarantee that Community law will

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economic activity in that Member State. Romaniuk, *supra* note 4, at 1028 n.17 (citing Marc Van der Woude, *Article 90: "Competing for Competence" Competition Law Checklist Competition Law Checklist*, EUR. L. REV., 60, 61 (1991)).

18. See Siragusa, *supra* note 4, at 1070.

19. EU TREATY, *supra* note 10, art. 90(2).

20. *Id.*

21. *Id.*

22. EU TREATY, *supra* note 10, art. 90(3).

23. See BELLAMY & CHILD, *supra* note 1, at 578.

24. See *Id.*

25. See Romaniuk, *supra* note 4, at 1044-47.

26. Siragusa, *supra* note 4, at 1079-81.

27. Carl Otto Lenz, *The Role and Mechanism of the Preliminary Ruling Procedure*, 18

remain uniform among all Member States via their national courts.<sup>28</sup> Although the Court is only supposed to "interpret" Community law, it frequently makes clear to national courts how they should apply the law.<sup>29</sup> Thus, under Article 177, the Court has considerable influence in the application of Community law among Member States.<sup>30</sup>

### *B. Increased Focus on Competition and Member State Reservations*

Community competition policy has monitored the economic integration process via the use of the EU Treaty's freedom and competition articles.<sup>31</sup> However, the drive for completing the common market, and thus, for increased the use of competition policy became a prime focus following the adoption of the Single European Act (SEA) in 1987, which aimed to complete an internal market by 1992.<sup>32</sup> The Commission has been the most pro-market institution in the Community, and coupled with support from the Court, the Commission increasingly has been involved with initiating legislation and overseeing Member State action in order to complete the internal market.<sup>33</sup> The Commission, however, has found that competitiveness continues to be hampered, *inter alia*, by a still-rigid and centralized regulatory environment within the Member States.<sup>34</sup> It specifically has made liberalization of public and state-supported monopolies a main priority.<sup>35</sup> For instance, the Commission, supported by Court decisions, has been able to introduce competition into previously state-run services such as telecommunications, broadcasting, electricity, gas, postal delivery, and now employment.<sup>36</sup>

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FORDHAM INT'L L.J. 388, 389 (1994).

28. *Id.* at 391. Any national court can request the Court to review issues pertaining to a national judgment that may conflict with Community law. The national court stays the proceedings until the Court makes a decision, which is then binding upon the national court. However, the Court does not follow a system of *stare decisis*, and a national court may submit the same issues in a different case without being held to previously decided rulings. *Id.*

29. See Jeffrey C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, 44 AM. J. COMP. L. 421, 428-434 (1996).

30. Andrew Adonis and Robert Rice, *In the Hot Seat of Judgment: The European Court is Coming Under Fire, Accused of Pushing a Political Agenda*, FIN. TIMES, April 3, 1995, at 17.

31. MICKLETZ & WEATHERILL, *supra* note 14, at 4.

32. Dohms, *supra* note 8, at 805.

33. Romaniuk, *supra* note 4, at 1027-28.

34. *Commission White Paper*, *supra* note 3, art. III, ch. 2(A); Siragusa, *supra* note 4, at 1067 (citing Commission of the European Communities, XXth Report on Competition Policy 1990, at 125-26, 169 (1991), Commission of the European Communities, XXIst Report on Competition Policy 1991, at 25-38, 15-41 (1992), and Commission of the European Communities, XXIIIrd Report on Competition Policy 1993, at 30-36 (1994)).

35. *Id.*

36. MICKLETZ & WEATHERILL, *supra* note 14, at 185; See Case 320/91, *Re Corbeau*, 1993 E.C.R. I-2533, [1993] 4 C.M.L.R. 621 (1993) (regarding privatization of postal serv-

Although the Community's push toward improved competitiveness through liberalization of state monopolies has been generally supported by Member States, Member States have been concerned about the Community's encroachment into their authority to provide public services.<sup>37</sup> Several States have suggested amending the EU Treaty to consolidate a special place for public services.<sup>38</sup> For instance, France revealed the perspective that public services are not purely economic entities that should merely respond to market efficiency because they serve an important purpose in providing "economic and social cohesion in Europe."<sup>39</sup> In particular, streamlining public employment services may increase Member State concerns, considering that these services traditionally fell within the realm of Member States' labor and employment policies.<sup>40</sup> Thus, while liberalization of public monopolies promotes the necessary Community goals of increased competitiveness and employment, Member States have expressed their reservations about whole-heartedly subjecting all public entities to market forces.

### III. JOB CENTRE: FACTS AND PROCEDURAL HISTORY

Job Centre is a company that was in the process of becoming established in Italy.<sup>41</sup> The enterprise intended, *inter alia*, to conduct an employee placement service, providing both permanent and temporary employment within Italy.<sup>42</sup> Moreover, Job Centre aimed to solicit business from workers or undertakings beyond the Member State.<sup>43</sup> A mandatory placement system in Italy, however, administered by public placement offices prevented the establishment of intermediaries in the labor market.<sup>44</sup> In particular, Civil Code Law No. 264, established in 1949, prohibits pursuit "of any activity, even if unremunerated, as an intermediary between supply and demand for paid employment," and Civil Code Law No. 1369, established in 1960, prohibits any entity from hiring out temporary workers.<sup>45</sup>

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ices).

37. *Commission White Paper*, *supra* note 3, art. III, ch. 2, 2.1; *Public Services*, Intergovernmental Conference Briefing No. 12 § III. (Second Update: 23<sup>rd</sup> March 1996) [hereafter *Public Services Briefing*] <<http://.dg7/fiches/en/fiche12.htm>>. For general information about Member State concerns regarding Community authority, see generally PAUL DAVIES, *EUROPEAN COMMUNITY LABOUR LAW*, 49-62 (1996).

38. *See Public Services Briefing*, *supra* note 37.

39. *Id.* at pt. III. In fact, France advocated amending Article 90(2) to make it more difficult for public services to be subject to EU Treaty rules. *Id.*

40. DAVIES, *supra* note 37, at 45-55.

41. *Job Centre*, [1998] 4 C.M.L.R. 708, ¶ 9.

42. *Id.*

43. *Id.*

44. *Id.* ¶ 6.

45. *Id.* ¶ 6-7.



On January 28, 1994, Job Centre's chairman applied for confirmation of an instrument, which would legally establish the entity in Italy.<sup>46</sup> Italian courts have the authority to administer these confirmations. On March 31, 1994, the Tribunale Civile e Penale in Milan stayed Job Centre's confirmation procedure.<sup>47</sup> Under Article 177, Job Centre submitted two questions to the European Court of Justice for a preliminary ruling regarding EU Treaty articles.<sup>48</sup> On October 19, 1995, the Court held that it had no jurisdiction to rule on the questions raised by the Milan Tribunal because the Italian court was performing a non-judicial function.<sup>49</sup> On December 18, 1995, the Milan Tribunal then dismissed Job Centre's application for confirmation because its business objectives were incompatible with Italy's employment law.<sup>50</sup>

Job Centre then appealed to the Corte d'Appello in Milan, which the Court suggested in its preliminary ruling as a sufficient exercise of the Italian court's judicial function.<sup>51</sup> The European Court of Justice allowed the national court to resubmit the issues under Article 177.<sup>52</sup> The Corte d'Appello, then stayed the proceedings and referred the case to the Court for a preliminary ruling on EU Treaty articles pertaining to freedom of services, freedom of worker movement, and competition.<sup>53</sup>

In particular, Italy raised two significant issues: 1) whether maintenance of Italy's employment laws Article 11(1) of Law No. 264 and Article 1 of Law No. 1369 could be justified as an exercise of official authority, which, under EU Treaty Articles 66 and 55, precludes a Member State from applying Community laws; and 2) whether the Italian laws conflicted with EU Treaty Articles 48 and 49 (freedom of workers), Articles 59, 60, 62 and 66 (freedom of services), Article 86 (abuse of a dominant position within the market) and Article 90 (abuse by a public undertaking within the market).<sup>54</sup>

#### IV. JOB CENTRE DECISION

In relation to Articles 86 and 90, the Court held that Italy violated Article 90(1) because it created a situation where public employment

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46. *Id.* ¶ 13.

47. *Id.* at "Decision".

48. *Id.*

49. *Id.* ¶ 2. Under Article 177, a national court cannot submit a question to the Court unless the national court provides a judgment. See Case C-111/94, *Job Centre Coop. arl*, 1995 E.C.R. I-3361(1995) (giving more details about the decision). See EU TREATY, *supra* note 10, art. 177.

50. *Job Centre*, [1998] 4 C.M.L.R. 708, ¶ 11.

51. *Id.* ¶ 3 & "Decision."

52. *Id.*

53. *Id.* ¶¶ 13-14.

54. *Id.*

agencies could not avoid infringing Article 86.<sup>55</sup> The Court determined that an undertaking's inability to avoid abuse of a dominant position emerges when all the following conditions are met: 1) public placement offices are "manifestly unable to satisfy demand" on the market for all types of activity; 2) employee placement by private groups is deemed "impossible" due to the enforcement of statutory provisions under which such activities are prohibited; and 3) the placement activities under review could possibly extend to nationals or to the territory of other Member States.<sup>56</sup> According to the Court, Laws No. 264 and No. 1369 should be set aside.

The Court first focused on whether Job Centre was a public undertaking subject to the EU Treaty under Article 90. The Court has broadly interpreted public undertaking to include "every entity engaged in an economic activity regardless of its status and the way in which it is financed. . . ."<sup>57</sup> The Court found the state's employment service was an undertaking, rejecting Italy's argument that entities supporting national solidarity principles should be considered "non-economic," and thus, not an undertaking. In terms of the possible exception within Article 90(2), the Court briefly mentioned whether application of the EU Treaty rules would obstruct the undertaking's performance.<sup>58</sup> It held that if the undertaking was unable to satisfy demand, then the EU Treaty articles, particularly Article 86, would apply regardless.<sup>59</sup>

The Court then turned to whether Italy was liable under Article 90(1) for causing the monopoly's abuse by maintaining employment laws No. 264 and No. 1369.<sup>60</sup> Although it reiterated that a Member State will not be liable under Article 86 for the "mere creation" of a public monopoly, it also stated that the EU Treaty requires Member States to refrain from maintaining measures, which could destroy the effectiveness of the competition rules.<sup>61</sup> The Court then held that when

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55. *Id.* at "Decision." Article 90(1) states: "[I]n the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 6 [discrimination] and Articles 85 to 94 [competition articles]." EU TREATY, *supra* note 10, art. 90(1). *See supra* notes 8 to 30, and accompanying text (pertaining to Article 90).

56. *Job Centre*, [1998] 4 C.M.L.R. 708, at "Decision."

57. *Id.* *See also* Commission Directive 80/723/EEC of 25 June 1980, on the Transparency of Financial Relations Between Member States and Public Undertakings, art. 2, 1980 O.J. (L 195) (1980) (showing how the Commission has also taken a broad view of public undertakings).

58. *Job Centre*, [1998] 4 C.M.L.R. 708, at "Decision." The Court did not really analyze whether the entity was a public undertaking but referred to Case C-41/90, *Hofner & Elser v. Macrotron GmbH*, (1991) E.C.R. I-1979, [1993] 4 C.M.L.R. 306 (1993), which first determined whether public employment services constituted an undertaking.

59. *Job Centre*, [1998] 4 C.M.L.R. 708, at "Decision."

60. *Id.*

61. *Id.* (referring to holding in Case 131/77, *NV GB-INNO-BM (INNO) v. Vereniging*

an undertaking cannot avoid abusing its dominant position under Article 86, due to Member State laws supporting its behavior, then the Member State violates its duty under Article 90(1).<sup>62</sup>

The Court then analyzed whether, under Article 86, the undertaking abused its position.<sup>63</sup> First, the Court reiterated that a dominant position exists when an undertaking is vested with a legal monopoly.<sup>64</sup> Second, the Court affirmed that abuse under Article 86(b) amounted to behavior limiting the service and prejudicing consumers<sup>65</sup> and that the inability to satisfy market demand met this definition.<sup>66</sup> It found that an inability to serve “such an extensive and differentiated [employment] market . . . subject to enormous changes as a result of economic and social developments” constituted an inability to satisfy demand.<sup>67</sup> Since Italy’s measures completely prohibited private entities from competing as intermediaries, it directly resulted in the public undertaking’s inability to satisfy demand. Third, under Article 86, the abusive conduct must affect trade, and the Court found that employee placement could potentially affect individuals from other Member States.<sup>68</sup> Italy, therefore, was liable for violating Article 86 in conjunction with its duty in Article 90(1).<sup>69</sup>

The Court also held that because the laws violated Articles 86 and 90(1), it was not necessary to determine whether they also violated Article 59, free movement of services, or Article 52, right to establishment (which the Advocate General considered relevant).<sup>70</sup> The Court also dismissed the use of Articles 48 and 49 (free movement of labor) because if Job Centre had been established, it would be one legal business entity and thus would not be considered a “worker.”<sup>71</sup>

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van de Kleinhanddelaars in Tabak (ATAB), 1977 E.C.R. 2115, [1978] 1 C.M.L.R. 283 (1977).

62. *Id.*

63. *Id.* Article 86 states: “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.” EU TREATY, *supra* note 10, art. 86.

64. *Job Centre*, [1998] 4 C.M.L.R. 708 (referring to holding in Case 311/84, CBEM v. CLT & IPB, 1985 E.C.R. 3261, 2 C.M.L.R. 558 (1986)).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* ¶¶ 25-32 & “Decision.”

71. *Id.* at “Decision”.

## V. JOB CENTRE CONFIRMS COURT'S APPROACH FOR ACCOMMODATING COMMISSION ATTACK ON PUBLIC MONOPOLIES

The Commission's perspective, as discussed previously, has become increasingly hostile toward publicly supported and owned monopolies. Likewise, the Court has aligned with the Commission's deregulatory approach. In doing so, the Court has shifted its analytical approach to increase reliance on Article 90, which was rarely invoked prior to the 1987 Single European Act.<sup>72</sup> In the 1990's, Article 90 in conjunction with Article 86 has become a primary force for dismantling state monopolies, and thus, Community liberalization of areas traditionally managed by Member States, such as telecommunications, broadcasting, insurance, electricity, transport, gas, postal, and employment services.<sup>73</sup> As a result, State autonomy to enact or maintain domestic legislation has been restrained.

### A. "Public Undertaking" Definition Remains Broad

*Job Centre* confirms legal precedent defining an undertaking. When addressing this issue, the Court generally will focus on whether the entity fits within the definition of undertaking under Article 86 and Article 90, and in light of increased emphasis on competition and integration, this definition has been defined broadly.

In *Hofner & Elser v. Macrotron GmbH*, undertaking was clearly defined as encompassing every entity engaged in an economic activity, regardless of the legal status of the entity and the way it has been financed.<sup>74</sup> The Court in *Hofner* found executive recruitment services to be an economic activity, and thus, an undertaking.<sup>75</sup> However, in *Poucet & Pistre v. Assurances Generales de France & Others*, the Court found that two social security agencies were not considered undertakings.<sup>76</sup> In particular, the Court pointed to the agency's non-profit-making nature and to the fact that compulsory contribution payments

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72. See Romaniuk, *supra* note 4, at 1029-31.

73. See Siragusa, *supra* note 4, at 1068-69; MICKLETZ & WEATHERILL, *supra* note 14, at 185; C-320/91, Corbeau, (1993) ECR I-2533, [1991] 4 C.M.L.R. 621 (regarding deregulation of postal services). See also *Hofner*, [1993] 4 C.M.L.R. 306 and *Job Centre*, [1998] 4 C.M.L.R. 708 (regarding deregulation of public employment services). Article 90(1) makes Member States directly liable for legislation supporting monopolies and Article 90(3) gives the Commission unique authority to legislate and enforce directly against Member States when they violate the article. See *supra*, notes 8-30, and accompanying text.

74. *Hofner*, [1993] 4 C.M.L.R. 306, at "Judgment," ¶¶ 21-24.

75. *Id.* ¶ 23.

76. Case C-70/95, *Sodamere SA & Others v. Regione Lombardia*, [1991] 3 C.M.L.R. 591, ¶¶ 24-26 (1997). See also Case C159-160/91, *Poucet & Pistre v. Assurances Generales de France and Others* (1993) ECR I-637.

were indispensable to the principle of solidarity.<sup>77</sup> Solidarity, which involves the redistribution of income, the seems to be the more vital requirement. The Court has found non-profit-making bodies with little solidarity supporting them to be engaging in economic activity and thus, public undertakings.<sup>78</sup>

In *Job Centre*, the Court determined public service agencies to be undertakings as in *Hofner*.<sup>79</sup> Italy, however, argued that because employment agencies were established for social objectives, similar to the social security agencies in *Poucet*, they were not economic activities and thus, not public undertakings.<sup>80</sup> The Court in *Job Centre*, however, distinguished *Poucet*. It implied that employment agencies were not based on solidarity, and were not completely non-profit-making.<sup>81</sup> The Court justified its decision, stating that in *Hofner*, employment procurement was a business activity.<sup>82</sup> *Job Centre* affirmed that competition rules can impact Member State entities, which serve social purposes but fail to provide redistribution of income.

#### *B. Article 86: Abuse Continues to Be Interpreted Broadly*

*Job Centre* reflected the Court's broad interpretation of abuse under Article 86. Like other terms in Articles 86 and 90, "abuse" also has undergone broadening. In particular, Article 86(b) requires "limiting production, markets, or technical development to the prejudice of consumers."<sup>83</sup> Traditionally, only active behavior by an undertaking constituted abuse of a dominant position.<sup>84</sup> However, in *Hofner*, the State's executive recruitment agency's inability to satisfy market demand - passive behavior - constituted abuse as well.<sup>85</sup>

In *Job Centre*, the Court affirmed the inability-to-satisfy-demand approach under Article 86(b) and provided further clarification.<sup>86</sup> Advocate General Elmer, who wrote the Advocate General's opinion, agreed with the Court that the diversity of the employment service market in terms of consumers and users made it impossible for Italy's employment service to satisfy demand.<sup>87</sup> However, Elmer suggested that abuse should not be determined for the composite group, but for each

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77. *Id.*, ¶¶ 24-26.

78. *Id.*

79. *Job Centre*, [1998] 4 C.M.L.R. 708, at "Decision."

80. *Id.* ¶ 34.

81. *Id.* at "Decision."

82. *Id.*

83. EU TREATY, *supra* note 10, art. 86(b).

84. See MICKLETZ & WEATHERILL, *supra* note 14, at 136-38

85. *Hofner*, [1993] 4 C.M.L.R. 306, at "Judgment," ¶ 34; *Siragusa*, *supra* note 4, at 1076-77.

86. *Job Centre*, [1998] 4 C.M.L.R. 708, at "Decision."

87. *Id.* ¶ 52-56.

sector within that market because of the huge diversity involved.<sup>88</sup> He supported his reasoning with previous case law involving goods.<sup>89</sup> For instance, in *Michelin v. E.C. Commission*, the tire market was separated into used and new tires, and the Court then determined whether the entity could satisfy either.<sup>90</sup> However, in *Job Centre*, the Court ignored this segmented approach, and stated that because one entity could not satisfy *all* of the types of employment services in the market, it had abused its position.<sup>91</sup> As a result, a public monopoly could be eliminated when in fact, it might be able to satisfy demand in certain portions of the employment services market. The Court's broadening of "abuse" by failing to segment the markets reveals its pro-Commission approach.

### C. Member State Liability Increased under Article 90(1)

Most importantly, the Court in *Job Centre* affirmed its use of Articles 86 and 90(1), making Member States more liable for a state monopoly's abuse of its position.<sup>92</sup> Previously, the Court held in *Sacchi* that a Member State under Article 90(1) could not itself violate Article 86, and so Italian legislation granting public entity, RAI (a radio and television monopoly), exclusive rights, did not violate the EU Treaty.<sup>93</sup> In *Sacchi*, the Commission's perspective was quite different than its deregulatory approach of the 1990's.<sup>94</sup> It stated that the "grant of exclusive rights [by a Member State] does not constitute in itself an infringement of Article 90, [and] [s]ince Article 86 does not prohibit a dominant position [only abuse of that position] . . . Article 90 cannot give rise to liabilities greater than those arising under Article 86."<sup>95</sup> Not surprisingly, the Court also supported this position, holding that a mere grant or extension of a right to a public undertaking under Article 90(1) "is not as such incompatible with" Article 86.<sup>96</sup> Thus, if the undertaking did engage in abusive conduct, then Article 86 alone applied, and if no abusive conduct existed, then Article 90(1) could not apply in conjunction with Article 86.<sup>97</sup> A Member State's duty under Article 90(1) was deemed mutually exclusive from its duty under Article 86.

However, in 1991, the Court broadened the meaning of Article 90(1)

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88. *Id.* ¶ 50.

89. *Id.*

90. *Id.* See also Case 322/81, *Michelin v. E.C. Commission*, [1983] ECR 3461, [1985] 1 C.M.L.R. 282 (1985).

91. *Id.* at "Decision".

92. See Romaniuk, *supra* note 4, at 1035.

93. Case 155/73, *Sacchi*, 1974 E.C.R. 408, 428-30, [1974] 2 C.M.L.R. 177 (1974).

94. *Sacchi*, 1974 E.C.R. at 414.

95. *Id.*

96. *Id.* at 429.

97. Siragusa, *supra* note 4, at 1071-72.

to make Member States liable under Article 86 for merely granting exclusive rights to an undertaking.<sup>98</sup> In *Hofner*, the Commission argued that under Article 90(1) and Article 86, a Member State should be liable for maintaining measures that support a monopoly where the "grantee of the monopoly is not willing or able to carry out that task fully."<sup>99</sup> Reiterating *Scacchi*, the Court held that Germany was liable under Article 90(1) because even though a Member State cannot be responsible for "creating a dominant position by granting an exclusive right within the meaning of Article 86 of the Treaty" if that results in a situation where the public undertaking "cannot avoid abusing its dominant position" under Article 86, then the Member State shall be liable.<sup>100</sup> Therefore, Member States could be directly liable for supporting monopolies that exercised abuse.

The Court has affirmed this new approach in subsequent case law, but not consistently, making it unclear what behavior triggers Member State liability. For instance, in *Merci Convenzionali Porto Di Genova SpA v. Siderurgica Gabrielli SpA (Merci)* and in *Elliniki Radiophonia Tileorassi AE & Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia, et al. (ERT)*, the Court held that a Member State can be liable under Article 86 and Article 90(1) if the undertaking, in merely exercising exclusive rights, "cannot avoid abusing the dominant position."<sup>101</sup> However, the Court added that liability can also emerge when the granting of such rights "leads to" or "induces" an undertaking to infringe Article 86.<sup>102</sup> This alternative interpretation of *Hofner* makes it easier to find Member States liable. Instead of requiring only "unavoidable abuse," which suggests that State legislation directly causes abuse, this alternative language suggests that Member State legislation can be one of several reasons for an undertaking's abuse, yet still making Member States liable.

With both *Merci* and *ERT* concerning discrimination against other Member States,<sup>103</sup> the Court might have applied a softer *Hofner* test in order to find Member States liable. In fact, in non-discrimination cases,

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98. *Id.* at 1069-71; Romaniuk, *supra* note 4, at 1035-36.

99. *Hofner*, [1993] 4 C.M.L.R. 306, at "Judgment," ¶ 18.

100. *Id.* at "Judgment," ¶ 29.

101. Case C-179/90, *Merci Convenzionali Porto Di Genova SpA v. Siderurgica Gabrielli SpA*, [1994] C.M.L.R. 422, Decision (1991) [hereinafter *Merci*]; Case C-260/89, *Elliniki Radiophonia Tileorassi AE & Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia, et al.*, 1991 E.C.J. CELEX LEXIS 2506 (1991) [hereinafter *ERT*].

102. *Merci*, [1994] C.M.L.R. 422, at "Decision"; *ERT*, 1991 E.C.J. CELIX LEXIS 2506, ¶ 37.

103. Legislation in *Merci* excluded non-Italian dock workers and dock companies, and *ERT* excluded non-Greek entities, compared with *Hofner* which did not specifically exclude other Member States in favor of its own nationals. See *Merci*, [1994] C.M.L.R. 422; *ERT*, 1991 E.C.J. CELEX LEXIS 2506; and *Hofner*, [1993] 4 C.M.L.R. 306 (referring to possible discrimination).

the Court has applied the strict *Hofner* test, requiring the causal relationship between Member State legislation and the undertaking's abuse to be more direct. For instance, in *Societe Civile Agricole du Centre d'Insemination de la Crespelle v. Cooperative d'Elevage et d'Insemination Artificielle du Departement de la Mayenne*, the Court found that although the Member State granted an exclusive right resulting in a dominant position, the alleged abuse was not the "direct consequence of the national law."<sup>104</sup> Also, in *Chemische Afvalstoffen Dusseldorp BV & Others v. Minister Van Volkshuisvesting*, the Court stated that liability exists if the entity "caused the breach of Article 86", and considering the entity's pricing policy was not an "inevitable result" of any exclusive rights granted, the Netherlands did not violate Article 90(1).<sup>105</sup> Discrimination might be a factor, but the Court does not clearly say so.

Another problem with the *Hofner* approach is the Court's inconsistency in analyzing whether an exclusive right has even been granted.<sup>106</sup> In *Hofner*, the Court ignored analyzing whether Germany had conferred an exclusive right to public service agencies.<sup>107</sup> However, in the *Giorgio Banchemo Decision*, the Court failed to find any violation because it determined that the State had not granted an exclusive right to the entity.<sup>108</sup> The Italian legislation, which reserved retail sale of manufactured tobacco products to distributors authorized by the state, did not "cause" the channeling of sales or prejudice to consumers leading to unsatisfied demand.<sup>109</sup> The Court concluded that the legislation "merely governs [the retailers] access" and does not grant "exclusive distribution rights" to retailers.<sup>110</sup> The different treatment may turn on the nature of the exclusive right,<sup>111</sup> but the Court does not delineate clear factors to help determine the different applications.<sup>112</sup>

In *Job Centre*, the Court affirmed the *Hofner* approach broadening *Sacchi*.<sup>113</sup> The Court held that the Italian measures supporting public placement agencies directly resulted in the public entity's inability "to

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104. Case C-323/93, *Societe Civile Agricole du Centre d'Insemination de la Crespelle v. Cooperative d'Elevage et d'Insemination Artificielle du Departement de la Mayenne*, 1994 E.C.J. CELEX LEXIS 2581, ¶ 18-20 (1994).

105. Case C-203/96, *Chemische Afvalstoffen Dusseldorp BV & Others v. Minister Van Volkshuisvesting*, [1998] 3 C.M.L.R. 873, ¶ 101 (1998) [hereinafter *Chemische*].

106. See generally Romaniuk, *supra* note 4 (discussing the inconsistent analysis of an exclusive right).

107. See Romaniuk, *supra* note 4, at 1047-48.

108. Case 387/93, *Giorgio Banchemo Decision*, 1995 E.C.R. I-4663, [1996] 1 C.M.L.R. 829 (1995).

109. *Id.*

110. *Id.*

111. See Romaniuk, *supra* note 4 (discussing the conditions when the Court analyzes the granting of an exclusive right).

112. See Case C-163/96, *Silvano Raso & Others*, 4 C.M.L.R. 737, "Opinion," ¶¶ 61-62.

113. *Job Centre*, [1998] 4 C.M.L.R. 708, at "Decision."



avoid abuse.”<sup>114</sup> Italy, therefore, was liable for supporting the public employment agencies.<sup>115</sup> The Court’s application of *Hofner* seems generally consistent with recent case law. Considering that *Job Centre* did not involve discrimination,<sup>116</sup> the holding supports the notion that the strict *Hofner* test is being used in non-discrimination cases, as well as in discrimination cases. And, considering *Job Centre*’s facts were very similar to *Hofner*, the Court’s neglect to analyze whether an exclusive right even existed is not surprising.<sup>117</sup> Nevertheless, Italy’s argument that the legislation failed to grant employment agencies any exclusive rights did not go unnoticed.<sup>118</sup> In Advocate General Elmer’s opinion in *Job Centre*, he analyzed whether the State conferred an exclusive right upon the undertaking.<sup>119</sup> He determined that Law No. 264, which clearly prohibited any intermediaries, was an exclusive grant to the Italian employment agency.<sup>120</sup> But, he noted that Law No. 1369, prohibiting the hiring of temporary staff, was a general prohibition not granting an exclusive right to any group.<sup>121</sup> While, *Job Centre* seems legally consistent with other cases, Elmer’s difference of opinion reflects the ongoing problem in how to apply *Hofner*.

One negative consequence of this approach is that it is not clear when a Member State will be liable for violating the EU Treaty. In not clearly delineating the boundary line between when a Member State can allow for the mere establishment of a dominant position and when it violates the EU Treaty by directly causing an undertaking’s abuse, Member States are less able to predict what is acceptable legislation under the EU Treaty.

By altering the analysis to increase Member State liability under Article 90(1) and Article 86, yet failing to clarify how that approach is applied, the Court has made Member States more vulnerable to de-regulation of their public services, and thus, supports the Commission’s objective.

#### *D. Member State Justification Under Article 90(2) Remains Narrow*

*Job Centre* revealed the increased difficulty Member States have in justifying public monopoly behavior for public interest reasons. Under Article 90(2), a Member State can argue that the public entity is entrusted with the operation of a general economic interest, and that the

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114. *Id.*

115. *Id.*

116. *Id.* ¶ 32.

117. *Id.*

118. *See Id.* ¶ 3.

119. *Id.* ¶¶ 36-39.

120. *Id.*

121. *Id.*

EU Treaty rules obstruct the performance of the entity's tasks.<sup>122</sup> However, the Court has increasingly narrowed the application of this exception to make it very difficult for public monopolies to remain exempt from the EU Treaty.<sup>123</sup>

The Court has narrowly defined an undertaking "entrusted with a general economic interest." "Entrusted" requires that certain obligations are imposed on the public entity by the State to satisfy public interest.<sup>124</sup> The Court has required entities serving a general economic interest to "exhibit special characteristics" compared with other activities.<sup>125</sup> For instance, dock work services do not reveal special characteristics, but universal mooring, postal, and waste management services do constitute general economic interests.<sup>126</sup>

Whether the EU Treaty "obstructs performance" of a public undertaking, serving a general economic interest also has been narrowed, but rather inconsistently. For instance, in *Sacchi*, obstruction of performance referred to whether the EU Treaty was "incompatible" with the performance of the television monopoly's task.<sup>127</sup> In *Hofner*, the Court referred to *Sacchi*, but further narrowed Article 90(2) by holding that "application of Article 86 of the EU Treaty cannot obstruct the performance of the particular task" when the entity "is not in a position to satisfy demand in that area."<sup>128</sup>

However, another test has emerged. The Court in *Corbeau* suggested that obstruction was determined by whether restricting or excluding competition was "necessary" to perform its task - in particular, to provide economically acceptable conditions.<sup>129</sup> If the undertaking has "economic equilibrium" then it will be able to offset non-profitable sectors with its profitable ones, and thus, can justify restricting competition in its profitable sectors.<sup>130</sup> The Court's narrow definition led to finding that certain aspects of the postal service would not suffer from disequilibrium if subjected to competition.<sup>131</sup> *Chemische* also supports this "strict scrutiny" approach, since the Court endorsed the Commis-

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122. EU TREATY, *supra* note 10, at art 90(2).

123. See Siragusa, *supra* note 4, at 1074-78.

124. *Chemische*, [1998] 3 C.M.L.R. 873, ¶ 103.

125. See generally Case C-266/96, *Corsica Ferries France SA v. Gruppo Antichi Ormeggiatori Del Porto Di Genova Coop, ARL & Others*, [1998] 5 C.M.L.R. 402, "Opinion," ¶ 61 (1998) (regarding fees charged for mooring services).

126. See *id.* *Corbeau*, [1993] 4 C.M.L.R. 621 (regarding postal service), *Merici*, [1994] 4 C.M.L.R. 422 (regarding dock workers), and *Chemische*, 3 C.M.L.R. 873 (regarding waste service).

127. *Sacchi*, 1974 E.C.R., at 429, ¶ 15. The Court in *Sacchi* did not apply the facts to Article 90(2) because it did not find Italy liable under Article 90(1). *Id.* at 428-29, ¶ 14.

128. *Hofner*, [1993] 4 C.M.L.R. 306, at "Judgment," ¶¶ 25-26.

129. *Corbeau*, [1993] 4 C.M.L.R. 621, at "Decision".

130. *Id.* ¶¶ 17-19.

131. See Siragusa, *supra* note 4, at 1075-76.

sion's suggestion that obstruction exists when the objective cannot be carried out "equally well by any other means."<sup>132</sup> Again, the Court does not make clear when these different tests apply.

In *Job Centre*, the Court used the "incompatible" language of *Sacchi* and followed the same reasoning as in *Hofner*.<sup>133</sup> Advocate General Elmer gave little discussion to Article 90(2), merely reiterating that *Hofner* deemed it inapplicable.<sup>134</sup> *Job Centre* failed to provide any clarity on why this approach was taken, but it is, nevertheless, clear that Article 90(2) will continue to be construed narrowly.

## VI. IMPLICATIONS

The Court's position on public service monopolies in *Job Centre* and in other recent cases seems to reflect the Commission's economic perspective and interest in dismantling Member State laws that support monopolies. The decision in *Job Centre* has confirmed the broad interpretation of undertaking and abuse, the Member State's increased liability under Article 90(1), and the State's reduced capacity to justify support for a public service undertaking under Article 90(2). In light of ongoing challenges to job creation, competition, and integration, the Court will likely continue to be an ally of the Commission and a strong promoter of the Community's agenda.

Nevertheless, the Court is also aware of the tension between Member State and Community authority. The debate on the Community's explicit authority into new realms such as employment policy will likely continue, as will discussion about the erosion of socially-underpinned objectives for public services. The Court will, therefore, have to balance its Community-oriented objectives with national court sentiment and thus, to a certain extent Member State sentiment, since its primary vehicle for shaping Member State behavior is through the cooperation of the national courts via Article 177.

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132. *Chemische*, [1998] 3 C.M.L.R. 873, at "Opinion," ¶ 108.

133. *Job Centre*, [1998] 4 C.M.L.R. 708 at "Decision."

134. *Id.* at opinion.

