When the State grants market power

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> "*On the whole, although the state on some points curbs monopoly, it is in many respects monopoly's great friend*"
> CE LINDBLOM, *The Market system. What It Is, How It Works, and What To Make of It,* 2001, 158.
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> "*The state is potentially the best friend of the would-be monopolist. The state can erect and enforce entry barriers. The state can enact legislation that hampers the ability of competitors to vie for crucial inputs or the business of big customers. The antitrust cases have many examples or private parties who enlisted or attempted to enlist the aid of the state in supporting an anticompetitive scheme*"
> KN HYLTON, *Antitrust Law. Economic Theory and Common Law Evolution*, 2003, 353.

Aside from the technicalities in the design and enforcement of the substantive legal rules to combat abuse of market power in different jurisdictions, this paper is devoted to the connected issue of the most frequent and extended cause of firm's market dominance: different forms of State intervention granting exclusive rights to firms.
Experience tells that many cases dealing with single-firm conduct worldwide (either abuse of dominance or monopolization) are rooted in situations in which the undertaking achieved its position (many times a monopoly) by decision of the State.
The ultimate reasons for the State granting to a firm (rights that imply market power) have varied, from time to time, in each specific national context. Conventionally it was considered a major way of achieving various goals of general interest. In most cases, granting exclusive or special rights to firm was understood as the basis of the operation of public services. In other situations, monopolies were part of a revenue-producing scheme for the State.
Although many of these cases of market power positions granted by the State are subject to regulation in several aspects, there is still a role to play for the unilateral conduct prohibition set in Competition Law. Politics aside, there is room for legal thinking on the principles and limits that should govern State decisions of this kind and how competition law enforcement should proceed on these cases.
Starting from the vast EU experience on this area (based on internal market, services of general economic interest and state aid rules), this paper sketches the major issues to be considered in assessing possible abuses by firms with market power granted by the State and also the limits imposed to States in attributing market power. The decisions by the European Commission and the judgments delivered by the EU Courts on several cases may provide lessons to other jurisdictions in adequately confronting how to deal with State attributions of market power and business abuses of those positions.

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1. Introduction

Unearthing the roots of dominance we may frequently find a State decision or action ultimately creating the ground for a strong power in the market of an undertaking.[1] This paper aims at examining how the State being the source of a dominant position or a monopoly affects the enforcement of the prohibition against single-firm abusive conducts and other tools available to tackle State attribution of monopoly or market dominance to a firm.

Different legal systems follow different models or paths in dealing with that situation. At the end, everything depends on the role the State may play in markets according to the constitutional rules in each country (*infra* §2). Although this may vary from country to country, State Owned Dominant Enterprises (SODEs) are the most prevalent type of State sponsored or promoted dominant firms in some markets (*infra* §3). In other cases, private undertakings are granted exclusive and special rights in exchange for their contribution to some general interest achieving a monopoly or a dominant position (*infra* §4).

[1] See EM FOX & D HEALY 'When the State Harms Competition?' (2014) *Antitrust Law Journal* 79: 769.

The enforcement of the competition rules in any of those two scenarios may be nuanced, ranging from an absolute exclusion to a conditioned enforcement depending of the specific circumstances (*infra* §5). Together with domestic competition rules, which may generally be 'soft' in their treatment of State granted dominant position in the market, some supranational legal systems furnish more robust ways to dealing effectively with them. The EU rules to preserve and protect market integration and the specific norms on competition enforcement against SOEs and other firms granted exclusive or special rights by the State, are aimed at achieving an equilibrated trade-off between the interests of free market competition and other general interest that may be worth protecting (infra §6).

2. Constitutional rules concerning market activities by the State

Although States may vary in their explicit constitutional endorsement of the market as the main system used for the production and allocation of goods and resources, some level of economic freedom by acknowledging the right to property and freedom of contract are basic ingredients for markets to function adequately.[2] Aside from other relevant political institutions,[3] economic growth requires a proper functioning rule of law that protects property rights and enforces contracts, as a key institutional design allowing and fostering private economic initiatives.[4] Embodied in constitutional rules, the rule of law limits and defines the boundaries of State actions in the market, not only concerning the very limited grounds for confiscating private property but also the potential scope of State economic activities.[5]

Generally the State assumes a crucial role in guaranteeing free competition in the markets, monitoring business behavior and deterring anti-competitive action by market players; in some areas in which the market is prone to fail regulation is introduced as a way of preventing and correcting market failures. Regulation is adopted aimed at achieving general interest goals and market competition

[2] See LINDBLOM, *The Market system*, 42, 52, 58 and 175.

[3] See, for example, on federalism as a market-preserving political system, B WEINGAST, 'Constitutions as Governance Structures: The Political Foundations of Secure Markets' (1993) *Journal of Institutional and Theoretical Economics* 149: 286-311.

[4] For discussion, with further references, see J DE HANN & CLJ SIERMANN, 'Further evidence on the relationship between economic freedom and economic growth' (1998) *Public Choice* 95: 363-380.

[5] By initiating business activities itself, the State may be somehow pinching private actors, which occasionally are prevented from doing so themselves. See AF ABBOT 'Constitutional constraints and federal antitrust law' *Heritage Foundation Legal Memorandum* 143, 11 Dec. 2014, 9 ('*Constitutional limitations on the scope of antitrust law are and will continue to be significant. Under certain limited circumstances, the "economic liberty" provisions of the constitution may provide alternative means by which to vindicate the free market–oriented ends of the antitrust enterprise*').

may exist to a limited extent[6]. The performance of these actions as a competition or regulatory watchdog is done by the State through a framework of rules, enforced in the exercise of its sovereign powers.

Aside from those public functions as 'market umpire', different public bodies may operate and act as 'regular' market players, either buying or supplying goods in the market. Indeed, it's not rare that in some markets the State is the largest buyer or supplier of goods of services.[7] Also, occasionally State initiative *was* needed for the installment and development of basic infrastructures for many network services (water, energy, communications and transportation) and modern welfare States require public provision of some social services (education, health care). Although there should be be some constitutional grounds for public powers developing economic activities, even in those countries adhering a rule of strict subsidiarity in economic matters (according to which State economic action should be restrained to permit private business initiatives) public bodies are deemed to be able to run business activities in the markets.[8]

However, the constitutional issues that State involvement and participation as a direct or indirect market player raises may be the least important ones, as it also may pose very relevant political, economic and even philosophical puzzles, especially in relation with business private initiatives. Indeed, direct economic activities run by the State may contradict a liberal (or neo-liberal) conception of the role the State should play in business and in markets,[9] but –theoretically at least- those activities will generally be aimed at serving some legitimate general

[6] See H HOVENKAMP 'Antitrust and the Regulatory Enterprise' (2004) *Columbia Business Law Review* 336.

[7] See LINDBLOM, *The Market system (supra n1) 102*

[8] For example, see Chile (art. 19.21 of 1980 Constitution "*El Estado y sus organismos podrán desarrollar actividades empresariales o participar en ellas sólo si una ley de quórum calificado los autoriza*"), Italy [explicitly since 2001, article 118 in fine" *Regiones, Ciudades metropolitanas, Provincias y Municipios favorecen la autónoma iniciativa de los ciudadanos, individualmente o aso- ciados, para el desarrollo de actividades de interés general, sobre la base del principio de subsidiariedad* ", see M LOO GUTIÉRREZ, 'La disciplina constitucional del principio de subsidiariedad en Italia y Chile' (trans. The principle of subsidiarity: its constitutional discipline in Italy and Chile') 2009 *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso 33:* 391 – 426] and Peru [Article 60 of 1993 Peruvian Constitution, "*Sólo autorizado por ley expresa, el Estado puede realizar subsidiariamente actividad empresarial, directa o indirecta, por razón de alto interés público o de manifiesta conveniencia nacional*"), see V RODRIGUEZ CAIRO, 'Principio de Subsidiariedad Económica del Estado en la Constitución Política del Perú' *(trans. Principle of Economic subsidiarity of the State in the Constitution in Peru) 2013 QUIPUKAMAYOC Revista de la Facultad de Ciencias Contables* 21(40) 113-122].

[9] See I LIANOS, 'Towards a bureaucracy theory of the interaction between competition law and state action', in TK CHENG; I LIANOS & DD SOKOL (eds), *Competition and the State,* 2014: 32-45.

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interest and, for that reason, many Constitutions provide grounds (and even require) those State economic activities to take place.[10]

In this paper we shall be concerned only with those cases in which the State intervention or participation is essential (either directly or indirectly) in granting a monopoly or a dominant position in the market. In the US monopoly power is defined as '*the power to control prices or exclude competition*'[11], whilst in the EU dominance refers to '*a position of economic strength enjoyed by an undertaking, which enables it to prevent competition being maintained on a relevant market, by affording it the power to behave in an appreciable extent independently of its competitors, its customers and ultimately of consumers*'.[12]

Apart from dominant undertakings owned by the State (SODEs), which occasionally may be reminiscences of the State central planning in the past in some industries (*infra §*3), the organization of some services may have led the State to grant privileges to some business firms in order to guarantee that the service is provided or *merely* as a source of revenue thereby awarding them a dominant position (*infra §*4).

3. When the State *owns* the dominant player: State Owned Dominant Enterprises (SODEs)

Many SODEs were initially justified in the inability of private firms to tackle investments needed to be able to produce some goods or render some services. Indeed some SODEs exist for the production of goods or operation of services deemed to be of strategic importance, linked somehow to the exercise of sovereignty by the State (f.e. defense). In a lot of countries, SODEs have also been somehow (and frequently for a limited period of time) the responsible for the creation and development of utility firms in network industries (in telecommunications, energy, transportation, water and postal services).

However, independently of the reasons leading State ownership of a specific undertaking, the conditions under which they were created or operated led to them having a dominant position in the market. Eventually, that situation can be

[10] See H HOVENKAMP *Federal Antitrust Policy. The Law of Competition and its practice*, 3rd ed. 2005, 693 ('*The antitrust laws are concerned mainly with preserving competition and economic efficiency in the production and distribution process. By contrast, economic efficiency is almost never the exclusive goal of the government process.*')

[11] See *Eastman Kodak Co v. Image Technical Servs, Inc*, 504 U.S. 451, 481 [quoting *US v E.I. du Pont de Nemours & Co*, 351 U.S. 377, 391 (1956)]; *US v. Grinnell Corp*, 384 U.S. 563, 571 (1976) and HOVENKAMP *Federal Antitrust Policy* (*supra* n10) 271-274.

[12] ¶65 of Case 27/76, *United Brands CO & United Brands Continental BV v Commission* [1978] ECR 207 and ¶38 of case 85/76, *Hoffman-La Roche AG v Commission* [1979] ECR 461. See R WISH & D BAILEY, *Competition Law*, 7th Ed. 2009, 179-180 and G MONTI, *EC Competition Law*, 2007, 127-130.

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the outcome of a liberalization process: services which before were previously directly rendered by the State itself and which later were delivered instead by a firm owned by the State. The conditions under which liberalization took place and eventual privatization of former state owned enterprises are crucial in determining how much competition would exist in the market.[13] Liberalization refers to opening to competition markets in which only the State operated in the past due to alleged market failures. Liberalization measures include regulation aimed at protecting the conditions in which the industry operates and the services are delivered. In many countries, liberalization has occurred in network industries (energy, telecommunications, transport, post and water) fostering also the entrance to the markets private business initiatives.[14]

Despite they are considered to be more inefficient that their private counterparts, state owned enterprises are still very common in many countries.[15] Allegedly, their actions in the market may be considered in breach of the prohibition of abuse of dominance or monopolization (see *infra §* 5).

It is out of the scope of competition law to contest State ownership *per se*. Competition rules are prohibitions targeting market distortions caused by undertakings, independently of the legal form or of who is the owner. Aside from those situations in which State ownership is coupled with the grant of exclusive rights or privileges to SODEs (*infra §*4), the ownership condition should not influence the enforcement of competition rules against them.[16]

4. When the State *empowers* the dominant player: exclusive or special rights or privileges granted to private enterprises

Apart from SODEs, there are other forms of State intervention in markets that may lead to private monopolies or dominant positions in some industries. Eventually, the State may grant exclusive or special rights or privileges that make the beneficial undertaking a dominant or monopolist in the market (either

[13] S ROBERTS & J TAPIA 'Abuses of dominance in developing countries: a view from the south, with an eye on telecoms', in M BAKHOUM & M GAL (eds) *Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law*, 2015, in press.

[14] In general, see M ARMSTRONG & DE SAPPINGTON, 'Regulation, Competition, and Liberalization' (2006) *Journal of Economic Literature* 44: 325–366. Although apparently not always benefiting consumers, see KJ CSERES, 'What Has Competition Done for Consumers in Liberalised Markets?'(2008) *Competition Law Review* 4(2): 77-92 (referring to the EU).

[15] For example in Singapore, Government linked corporations (GLC) 37% of listed companies capitalization in Singapore stock markets.

[16] See WISH & BAILEY, *Competition Law (supra n12)* 178 ('*the fact that an undertaking has a monopoly conferred upon by statute does not remove it from the ambit of Article 82*') and 181 ('*The ECJ has rejected the argument that, because a monopoly is conferred by statute, this immunizes the undertaking from article 82*')

de iure or de facto). There is a vast variety of ways through which the former can occur, and it will generally be related to the regulated nature of some business activities. As mentioned before, this occurs in many network industries in which the competition conditions are regulated by the State, and public powers limit the number of players operating in the market, transforming them in dominant players.[17] Nevertheless, in parallel to the liberalization process, de-regulation has substantially changed the competitive landscape in many network industries by opening the gates to additional competition. [18] Technological, political and economic reasons have lead to a change of policy concerning State market intervention in many industries (in public transportation, for example, route concessions awarded to private undertakings had introduced *ex ante* competition *for* the market in the bidding process, whilst there is little competition *in* the market afterwards).[19]

Anyhow, a tension is likely to exist between regulation and competition in those markets. However, competition law cannot question the merits of the regulatory option as long it is legitimate, justified, proportionated and has valid grounds in the Constitution (*supra §*2).[20]

4.1. Dominant undertakings rendering services of general interest

The liberalization of markets has lead to the introduction of regulation inspired in guaranteeing the conditions in which some services are rendered and the functioning of an industry. In order to secure of supply or guarantee universal service, regulation may restrict the competition, limiting entrance to the market and the number of players in the market. Services of general interest or public services exist in every country and the conditions in which they are rendered may be generally biased towards granting the firms that operate them a monopoly or dominant position.

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[17] See HOVENKAMP 'Antitrust and the Regulatory Enterprise' (supra n6) 338-339 ('*In many of these markets the political, or regulatory, solution we have adopted is to permit a single firm to have a monopoly over a certain portion of the market, but to regulate that firm's prices*').

[18] See RA POSNER 'The effects of deregulation on competition: The experience of the United States' (2000) *Fordham Journal of International Law* 23: S14 ('*The deregulated world is the competitive world*').

[19] The potential for challenge and contestability of incumbent firms by newcomers may provide incentives similar to competition *in* the market if the duration of concessions is not very large, see HOVENKAMP 'The Antitrust Enterprise' (supra n6) 243.

[20] See H HOVENKAMP *The Antitrust Enterprise. Principle and Execution*, 2005, 231 ('*On the question of which markets should be regulated, and by what means, legislatures have the final say, subject only to the limits imposed by the Constitution*').

4.2. Fiscal monopolies

Some undertakings, either fully or partly state owned are granted a legal monopoly in the production or distribution of some goods or services to raise public revenues through excise taxes (tobacco, alcoholic beverages, fuels, lottery). Entry of private business in these industries is not allowed, and prices are controlled by the State. Depending on the technical (legal) details of how these activities are organized, it may well be that the activities are not considered to be economic and that they are deemed to be part of State activities.

5. Competition Law enforcement against SODEs or State empowered dominant firms or monopolies

Competition rules are aimed at tackling business anti-competitive behavior. The same goes in particular for the prohibition of single firm abuses. As it has been said in the previous two sections, occasionally the ultimate roots of anti-competitive actions lie in State interventions in the market that grant or preserve the monopoly of the market to some firm. Regulation will govern some actions of the dominant or monopolist firm, in that case competition law does not apply to *regulated* conduct.[21]

Aside from regulated conducts, lacking explicit legal exceptions, the prohibitions of anti-competitive conducts (multilateral and unilateral) should be applicable like if they were any other regular undertakings. Although the law or the state can grant monopoly power, it cannot grant rights to abuse of such power.[22]

Regulation may alter the competition conditions in the market, by controlling and limiting the actions and decisions that the monopolist can adopt, but aside from the *regulated conduct*, standard competition prohibitions are in force.[23]

[21] See HOVENKAMP *The Antitrust Enterprise* (supra n10) ('*One consequence of regulation is a reduced role for the antitrust laws. If the government makes rules about price or output, market forces no longer govern those decisions, and antitrust is shoved aside'*) and HOVENKAMP 'Antitrust and the Regulatory Enterprise' (supra n6) 341.

[22] Formally, one could argue that the State could through specific legal mandates exempt abuses of dominance from the prohibition of single firm abuses, but this would surely run against the constitutional foundations of the market system in many countries. See ABBOT 'Constitutional constraints and federal antitrust law' (supra n5) 3 (a statute '*may not authorize private actors to engage in clear federal antitrust violations, acting on their own, without state regulatory involvement*.')

[23] See HOVENKAMP *Federal Antitrust Policy* (supra n90) 693 ('*regulatory regimes leave "gaps" where there is room for private firms to exercise their discretion and perhaps behave anti-competitively'*), 713 ('*Interventions under the antitrust laws is generally appropriate with respect to market decisions that (a) are actually or potentially anticompetitive; and (b) are made according to the discretion of private firms without effective agency supervision'*), 716 ('*The less room there is for competition and private discretion, the less role for antitrust*') and 717-720. See also HOVENKAMP 'Antitrust and the Regulatory Enterprise' (supra n6) 342 ('*Antitrust law takes a market's regulatory structure as given, warts and all, and tries to prevent injuries to competition that the regulatory process leaves untended. Competing with a regulatory*

Indeed, although the greater role of State firms in economic activity in the EU is assumed to be at the root of the different wording of article 102 of the Treaty on the Functioning of the European Union (TFUE)[24] in comparison with section 2 of the Sherman Act[25], apparently that did not have much influence in its enforcement.[26]

Of course, the fact that the State itself has some stake in granting a monopoly or dominant position, which deemed necessary for the achievement of some general interest goal, may condition the way the competition authorities enforce the prohibition of single-firm abuses.

6. Supranational rules on SODEs and private firms empowered by the State

Like other state restraints to competition in the market, the difficulties found in adequately enforcing the prohibition of single-firm abuses committed by SODEs or private undertakings empowered with a dominant position by the State explain why the best way to tackle this sort of anti-competitive actions will probably be found out of competition law itself.[27]

Constitutional constraints against State sponsored restraints to competition may not provide an effective ground for challenging them in practice. Nevertheless, international obligations assumed by the State not to distort or interfere

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regime or substituting its judgment for that of government officials is not antitrust's purpose. This is why we say that antitrust role is "residual". It picks up only where regulation leaves off').

[24] Consolidated version of the TFEU (EU Official Journal C 326 of 26 October 2012, 1-390).

[25] 15 U.S. Code §2 (2015).

See HOVENKAMP "The Monopolization Offense' (2000) *Ohio State Law Journal* 61: 1035 "*the legislative history of the Sherman Act shows virtually no concern at all for monopolies created by government grant. Rather, Congress was concerned with large firms who acquired their dominant positions without the explicit aid of government intervention*" but previously he acknowledged that "[*t*]*he history of the term "monopoly" prior to 1890, when the Sherman Act was passed, indicates that most people understood "monopoly" to mean a grant of exclusive privileges from the government, such as the exclusive right to process meat in the famous Slaughter-House Cases, or the exclusive state grants of routes to steamboat companies that were responsible for some of our most important commerce clause decisions*" (footnotes omitted).

[26] See BE HAWK 'Article 82 and Section 2: Abuse and Monopolizing Conduct ' (2008) *Issues in Competition Law and Policy* 2008 (ABA Section of Antitrust) vol. 2: 884 (many of the leading cases on abuse of dominance were not against SOEs).

[27] See H HOVENKAMP *Federal Antitrust Policy (supra n10)* 692 ('*Antitrust intervention is not appropriate when the wrong being challenged is the policy choice of a sovereign government. Rather, antitrust applies when private parties are able to evade or manipulate the democratic process in such a way as to give themselves effective, unsupervised control over a market') and* HOVENKAMP 'Antitrust and the Regulatory Enterprise' (supra n6) 377 (*While judges might blanch at the atrocities that governments have committed in the name of regulation, antitrust is not the appropriate vehicle to provide a cure*').

competition in the markets in supranational trade organizations may be a better tool to prevent or correct SODEs or private monopolist empowered by the State from committing abuses.[28] Of course, as the scope of the obligations assumed by the State may be restricted to the transnational effects of its rules or actions, purely domestic situations may be left unaffected.

Currently, the UE provides the most developed system worldwide to deal with those types of actions. Free market competition is one of the constitutional principles of the EU internal market. This principle, formerly embodied in article 3(1)g of the Treaty of the European Communities (in establishing a "*system ensuring that competition in the internal market is not distorted*"), has powerful implications in combating Member States rules and actions that run afoul that principle**.** Currently, articles 3.3 and 4.3 of the Treaty of the European Union (TEU), together with Protocol 27 (on internal market and competition)[29] imply that Member States should refrain from introducing restraints to competition.[30]

EU Treaties also give the Commission legislative powers to harmonize regulation and introduce competition in some markets through liberalization. The EU rules adopted in traditionally State ran or operated industries have had disparate impact in introducing competition in telecommunications, energy and railway transportation services.

Aside from EU regulatory measures addressed to specific industries, there are other powerful tools targeting the Member States that are aimed at tackling State actions that introduce, promote or sponsor anti-competitive business behaviors of undertakings in the market. Internal market rules (*infra* §6.1), and competition rules specifically tailored and directed to the State have also a say in this regard (*infra* §§6.2 and 6.3). [31]

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[28] In a sense, there may be certain parallelism with the situation in the US, where the doctrinal formulations for dealing with regulatory policy y antitrust depend "*on the level of sovereign imposing the regulation*", see HOVENKAMP 'Antitrust and the Regulatory Enterprise' (supra n6) 343. Id. HOVENKAMP *The Antitrust Enterprise* (supra n20) 231.

[29] Consolidated version of the TEU (EU Official Journal C 326 of 26 October 2012, 1-390).

[30] See B VAN ROMPUY 'The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Law of the EU Courts' (2011) *CPI Antitrust Chronicle,* December and D. GERARD 'EU Competition Policy after Lisbon: Time to Review the State Action Doctrine?' (2010) *J. of European Competition Law & Practice* 1/3:202-210.

[31] See A HEIMLER 'Regulatory Reform and Competition: How to Push the Agenda Forward. A European Perspective' (2009) *Comparative Economic Studies* 51: 544 ['*No other international organization (or for that matter no other country) had a similar portfolio of instruments aimed at achieving an integrated and unified market*'] and 545 ['*This is why the European Treaty goes much further than merely imposing a free trade regime. It guarantees within the Union the respect of the four fundamental freedoms, the free movement of goods, services, labor and capital, and makes sure that regulatory restrictions of competition are strictly justified*']

6.1. Internal market rules

To provide the conditions for undistorted market competition in the EU internal market to exist, Member States cannot adopt rules or decisions that restraint trade or competition between Member States. Internal market rules and competition rules of the TFEU share objectives and may be considered complements.

State actions regarding SODEs or private undertaking with a dominant position in the market that provoke that effect may trigger a suit by the European Commission ex article 258 TFEU. Although the anti-competitive outcome was caused by the State that does not mean it cannot be challenged, internal market rules provide a venue for the Commission to combat it. [32] There may be however, public interest grounds that may occasionally justify the state intervention,[33] but the public interest exception should never introduce arbitrary discrimination or a disguised restriction on trade between Member States.

In particular, dealing precisely public or private monopolies granted by the State, the TFEU mandates Member States to ensure that monopolies do not abuse their position by partitioning or separating markets or unjustifiably restraining or distorting trade in the internal market (article 37 TFEU).

6.2. Rules on Services of General Economic Interest (SGEI)

Welfare State obligations in many EU Member States require public bodies' actions aimed at guaranteeing some general interest services. The scope of those services varies in each Member State for historical, cultural and socio-economic reasons. Those services may be rendered by SOEs or by private undertakings contracted or licensed by the State. In that situation, they may occasionally found to be monopolies or dominant firms.

Services of General Economic Interest (SGEI) are services of general interest of 'economic character' subject to the competition prohibitions, comprehending utility and regulated industries. They should be distinguished from Non-Economic Services of General interest (NESGI), which refers to State services tied to public order (police, justice) or minimum social protection according to the Constitution (health, education and social security) to which competition law

[32] See BRISIMI *The Interface Between Competition and the Internal Market*, 54 *('if something is excluded from the scope of competition rules it does not necessarily fall outside of the scope of the freedoms*') and 56 ('*the mutually exclusive classification of the actor as an undertaking or an actor with regulatory powers as regards goods, services or workers determines the line between the free movement positions and the competition law provisions*').

[33] '*Public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property*' (article 36 of TFEU).

is not applicable. The later are also named Social Services of General Interest (SSGI) and competition law may be applicable to them depending on whether they are contributory and therefore they become SGEIs (f.e, health care).[34] Occasionally there may be firms that, at the same time, render services which are subject to competition law and other which are not (f.e. airports).[35]

Although the initial presumption is that the EU competition rules apply to SGEIs,[36] according to article 106.2 of the TFEU that would be not the case if the application of such rules obstructs their performance of the particular tasks assigned to them.[37]

6.3. State aid rules

The conditions under which SODEs and private undertakings with a dominant position in the market operate should also respect the rules on State aid, that impedes unjustified State subsidies. This has been found to be relevant if those subsidies are awarded any kind of compensation for the services they render in the market (universal service). The conditions under which the undertaking has been selected and the amount of the compensation given will be crucial in assessing them,[38] and the European Commission is in charge of monitoring them.[39]

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[34] See T PROSSER *The Limits of Competition Law. Markets and Public Services,* 2005, 17-38 and 'EU competition law and public services', in MOSSIALOS et al., *Health Systems Governance in Europe: The Role of EU Law and Policy*, 2010, 323 (*If a Member State chooses to operate a health service predominantly on the basis of social solidarity, decisions of the bodies comprising it will not be covered by competition law. If, however, a Member State decides to introduce competition into the system - for example, by contracting services out to competing suppliers of health care provision or by creating a competitive internal market - then competition law will apply, as the various bodies involved will be acting as undertakings).*

[35] See ¶¶74-82 of EU Court of Justice Judgment of 24 October 2002, C-82/01P *Aéroports de Paris*.

[36] Indeed, stressing that Same idea article 106.1 of the TFEU reads '*in 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 the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109*'.

[37] See JL BUENDÍA SIERRA 'Writing Straight with Crooked Lines: Competition Policy and Services of General Interest in the Treaty of Lisbon' in A BIONDI, P EECKOUT & A RIPLEY (eds) *EU Law After Lisbon,* 2012, 347-366; 'Exclusive or special rights under article 106 TFEU: An overview of EU and national case law' (2012) *e-Competitions* 44436; 'Exclusive Rights and other Anti-Competitive Measures', in J FAULL& A NIKPAY, *The EC Law of Competition,* 2th ed. 2006, 593-655 and, in general, *Exclusive Rights and State Monopolies under EC Law. Article 86 (former article 90) of the EC Treaty,* 1999.

[38] See ¶¶69-93 of EU Court of Justice of 24 July 2003, C-280/00, *Altmark*.

[39] See Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (EU Official Journal L7 of 11 January 2012, 3-10).

7. Conclusions

This paper has looked at those cases in which State intervention is at the root of the abuse of dominance or monopolization in the market. They constitute a relevant share of all the single-firm anti-competitive abuses that occur in most countries. In many occasions, State Owned Dominant Enterprises or private undertakings that had been granted a dominant position in the market by the State pose a difficult case for competition law enforcement.

The paper submits that adequate treatment of these cases can be better found out of competition law, either in the constitutional rules concerning the role the State should play in the markets or in sector specific regulation. However, the best way to effectively combat unjustified distortions provoked by those firms may be found in supranational rules adopted within regional supranational organizations (like those in force in the EU) that constraint State interventions that may distort competition in the market.

References

- ✓ AF ABBOT 'Constitutional constraints and federal antitrust law' *Heritage Foundation Legal Memorandum* 143, 11 Dec. 2014.
- ✓ V BRISIMI *The Interface Between Competition and the Internal Market. Market separation under Article 102 TFEU*, 2014.
- ✓ JL BUENDÍA SIERRA 'Writing Straight with Crooked Lines: Competition Policy and Services of General Interest in the Treaty of Lisbon' in A BIONDI; P EECKOUT & A RIPLEY (eds) *EU Law After Lisbon,* 2012, 347-366,
- ✓ JL BUENDÍA SIERRA 'Exclusive or special rights under article 106 TFEU: An overview of EU and national case law' (2012) *e-Competitions* 44436
- ✓ JL BUENDÍA SIERRA 'Exclusive Rights and other Anti-Competitive Measures', in J FAULL& A NIKPAY, *The EC Law of Competition,* 2th ed. 2006, 593-655
- ✓ JL BUENDÍA SIERRA '*Exclusive Rights and State Monopolies under EC Law. Article 86 (former article 90) of the EC Treaty,* 1999.
- ✓ KJ CSERES 'What Has Competition Done for Consumers in Liberalised Markets?'(2008) *Competition Law Review* 4(2): 77-121
- ✓ J DE HANN & CLJ SIERMANN 'Further evidence on the relationship between economic freedom and economic growth' (1998) *Public Choice* 95: 363-380.
- ✓ EM FOX & D HEALY 'When the State Harms Competition?' (2014) *Antitrust Law Journal* 79: 769-820.
- ✓ D. GERARD 'EU Competition Policy after Lisbon: Time to Review the State Action Doctrine?' (2010) *J. of European Competition Law & Practice* 1/3:202-210.
- ✓ BE HAWK 'Article 82 and Section 2: Abuse and Monopolizing Conduct ' (2008) *Issues in Competition Law and Policy* 2008 (ABA Section of Antitrust) vol. 2: 871-893.
- ✓ A HEIMLER 'Regulatory Reform and Competition: How to Push the Agenda Forward. A European Perspective' (2009) *Comparative Economic Studies* 51: 540–557.
- ✓ H HOVENKAMP *The Antitrust Enterprise. Principle and Execution*, 2005.
- ✓ H HOVENKAMP *Federal Antitrust Policy. The Law of Competition and its practice*, 3rd ed. 2005.

- ✓ H HOVENKAMP 'Antitrust and the Regulatory Enterprise' (2004) *Columbia Business Law Review* 335-377.
- ✓ H HOVENKAMP 'The Monopolization Offense' (2000) *Ohio State Law Journal* **61**: 1035-1049
- ✓ I LIANOS 'Towards a bureaucracy theory of the interaction between competition law and state action', in TK CHENG, I LIANOS & DD SOKOL (eds), *Competition and the State,* 2014, 32-58.
- ✓ CE LINDBLOM *The Market system. What It Is, How It Works, and What To Make of It*, 2001.
- ✓ M LOO GUTIÉRREZ 'La disciplina constitucional del principio de subsidiariedad en Italia y Chile' (trans. The principle of subsidiarity: its constitutional discipline in Italy and Chile') 2009 *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso 33:* 391 – 426.
- ✓ G MONTI*, EC Competition Law*, 2007.
- ✓ RA POSNER 'The effects of deregulation on competition: The experience of the United States' (2000) *Fordham Journal of International Law* 23: S7-S19
- ✓ S ROBERTS & J TAPIA 'Abuses of dominance in developing countries: a view from the south, with an eye on telecoms', in M BAKHOUM & M GAL (eds) *Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law*, 2015, in press.
- ✓ V RODRIGUEZ CAIRO 'Principio de Subsidiariedad Económica del Estado En la Constitución Política del Perú' *(trans. Principle of Economic subsidiarity of the State in the Constitution in Peru) 2013 QUIPUKAMAYOC Revista de la Facultad de Ciencias Contables* vol. 21(40) 113-122.
- ✓ B VAN ROMPUY 'The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Law of the EU Courts' (2011) *CPI Antitrust Chronicle,* December.
- ✓ B WEINGAST, 'Constitutions as Governance Structures: The Political Foundations of Secure Markets' (1993) *Journal of Institutional and Theoretical Economics* 149: 286-311.
- ✓ R WISH, *Competition Law*, 6th Ed. 2009.