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The Concept of State Aid in Liberalised Sectors

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Abstract

The author highlights the balancing act both on the regulatory as well as on the institutional level between state aid control and the liberalization of public services. He focuses on partially liberalized markets and tackling cross-subsidisation where Member States infringe the competitive neutrality of the privatisation process by various funding schemes. These are all subject to three criteria linked to the private investor test. Once partially liberalized, sectors traditionally shaped by public service obligations are prone to state intervention owing to the special needs they fulfil. Starting from the premise that the concept of universal services is designed to combine public policy objectives with a fully competitive market, the author allocates the role of state aid control as both a specific mandate avoiding selective distortions through the granting of state resources imputable to the State and as a regulatory mandate to maintain a level playing field for all undertakings in the Internal Market. The jurisprudence of Community Courts – e.g. *UFEX*, *Chronopost* and *Laboratoires Boiron* - is faced with the demarcation of the European Commission's powers and the determination of the nature and extent of judicial review. Its analysis focuses on cost calculation and allocation in search of cross-subsidisation of liberalised market segments by using state resources originally designed to compensate for public service obligations. He closes with the assumption that, because of the narrow confines of aleatory references made to the Courts, preference should be given to a best practice approach to cost allocation standards

Keywords

Regulatory politics – sectoral governance – European law – judicial review – state aids – liberalization – European Court of Justice – universal services – cross-subsidisation

The Concept of State Aid in Liberalised Sectors

Thomas von Danwitz*

I. Introduction

The following reflections on the concept of state aid in liberalised sectors have, of course, been inspired by the particular intellectual appeal of this subject resulting from the indistinguishable combination of legal and economic elements which, like all crossbreeds, led to particularly original features and the need for a high degree of commitment to fully understand the nature of those developments. Less of intellectual but more of practical concern are the far reaching economic, financial and even political consequences with which we are faced when dealing with the subject of state aid in liberalised sectors. Already a first glance at the relevant jurisprudence tells us that it might not be easy to establish a clear cut concept, since the Community Courts have only delivered a rather limited number of judgements in recent times of state aid features in liberalised sectors.

Beyond this interest in our subject lies a second dimension, which is of no lesser importance. After long years of discussion over the role of public services within the creation of the single market, the framework for public services has become more and more precisely defined after the elaboration of Article 16 in the treaty of Amsterdam, and particularly after its amendment by the treaty of Lisbon. The new paragraph added to Article 16, now re-numbered as Article 14, empowers the Community legislator to establish principles and conditions in order to enable the Member States and the Community to provide, commission and to fund such services. This specific rulemaking provision on the functioning of public services inserted in the treaty, to which a specific protocol on services of general interest¹ has been added and which is accompanied by a Communication of the Commission², constitutes a major change in the existing legal framework and, so far, the culmination point in the fight for a specific legal status of public services. It goes without saying that this rulemaking provision is designed to bear legislation specifically designed to meet the particular mission of public services and thereby, at least to a certain extent, replacing the predominant focus of the existing

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¹ See treaty of Lisbon, protocol no. 26.

² COM (2007) 725 final.

legal framework on competition rules and their implementation. Such an evolution could of course lead to a significant change of the existing framework, going far beyond the well balanced solution adopted in the Constitutional treaty³. But it will hopefully not limit the completion of the internal market in this field.

It is self evident that these changes in the legal framework will become the predominant source of inspiration for legal scholars and will, once secondary legislation has been enacted, become more and more relevant for the status of public services and the legal appreciation of the conditions under which they operate. Given this perspective, it remains to be seen, to what extend the relevant jurisprudence of the Court, in particular in *Preußen Elektra*⁴, *Stardust Marine*⁵, *Chronopost*⁶ and *Altmark Trans*⁷, will continue to play a crucial role in this field. As you are certainly expecting a view from the Court on these matters and given the wide range of legal aspects having an impact on the mission and the functioning of public services, I will focus on the role of state aid control and its major challenges in this field. On the basis of some general remarks on the specific nature and difficulties of state aid control over public services, the major part of my presentation will be dedicated to the main elements of the established jurisprudence in respect to the problems arising from partially liberalised markets and in particular to the crucial question of cross-subsidisation.

II. The role of state aid control in the process of liberalisation and privatisation

Undoubtedly, the purpose of privatisation is to deprive state aid control of its principal object, a public undertaking. But, in order to achieve this goal, privatisation has to be accomplished under conditions ensuring the competitive neutrality of the conducted privatisation procedure. Typically, state aid control in the field of privatisation gives rise to three different issues, all closely linked to the famous private investor test:

- *firstly*, the well-known phenomenon of "dressing the bride" in order to make an undertaking more attractive to private investors;
- *secondly*, the famous dilemma of stranded costs: contributions or preferential treatments in order to compensate for investments or other engagements of formerly public undertakings which have become void under liberalised market conditions.
- *thirdly*, the old problem of how to assess whether the sale of a public undertaking is at market value or entails state aid.

Each of these problems would undoubtedly justify me concentrating my remarks on them individually. Instead, let me confine my remarks to the general statement that the

³ See von Danwitz, Die Rolle der Unternehmen der Daseinsvorsorge im Verfassungsentwurf, in: Schwarze (Hrsg.), Der Verfassungsentwurf des Europäischen Konvents, Baden-Baden 2004, S. 251 f.

⁴ Case C-379/98 PreussenElektra [2001] ECR I-2099.

⁵ Case C-482/99 French Republic v Commission – Stardust Marine [2002] ECR I-4397.

⁶ Joined Cases C-83/01 P, C-93/01 P, 94/01 P Chronopost [2003] ECR I-6993.

⁷ Case C-280/00 Altmark Trans [2003] ECR I-7747.

settled case-law on contributions aimed at making an undertaking more attractive to private investors⁸ gives full guidance for the application of the private investor test in that respect. Nevertheless, the central question of whether a comparable private investor pursuing a structural policy which is guided by prospects of long term viability leaves considerable scope for the assessment of each particular case. In contrast to that, there is only rather limited jurisprudence on the problem of stranded costs⁹ and on the question of whether the sale of a public undertaking entails state aid¹⁰.

Finally, it should be noted that the general experience of state aid law to witness an incredible inventiveness of Member States when it comes to original funding schemes and methods, is quite impressively confirmed in the field of privatisation and liberalisation. In the *AEM* case¹¹ the Court has already been asked to judge whether an increased charge for access to the national transmission grid only levied on certain undertakings in order to offset a particular advantage which they presumably might have gained from liberalisation constitutes state aid. Unfortunately, the preliminary reference did not contain sufficient factual information to conclude that the existence of state aid was established. I am convinced that Member States will also in the future ensure that the task of the Court will not end up in routine, but will continue to be faced with innovative systems of preferential treatment which have to be monitored strictly under state aid rules.

III. The competitive environment

Despite the focus of my following remarks on state aid law, let me bring to your attention that state aid is by far not the only tool for Member States to favour a particular undertaking or a certain type of public services. In the preliminary ruling C-357/07 *TNT Post UK*, the Court is faced with the question of VAT exoneration in favour of services carried out by public postal service operators under the circumstances of liberalisation. The notion figuring in Article 13 A. paragraph 1 under a) of the Sixth VAT Directive received a self evident interpretation in the good old days of the delivery monopole for state owned postal undertakings. Accordingly, the Court has held in 1985¹² under those circumstances that the public service operator was exempted from VAT including all offered services. Based on the assumption that the existence of a reserved market would constitute a prerequisite for such a VAT exemption, advocate general *Geelhoed* proposed in 2003 under conditions of a partially liberalised market that the VAT exemption should only cover reserved market shares and not go beyond.

⁸ For ex: Case T-157/01 *Dansk Busvognmænd* [2004] ECR II-917; joined Cases T-129/95, T-2/96, T-97/96 *Maxhütte* [1999] ECR II-17; joined Cases C-278/92, C-279/92 and C-280/92 *Spain/COM – Hytasa* [1994] ECR I-4103.

⁹ Joined Cases C-128/03 and C-129/03 *AEM* [2005] ECR I-2861; C-206/06 *Essent Netwerk Noord* – pending.

¹⁰ Case C-334/99 *Germany/COM – Gröditzer Stahlwerke* [2003] ECR I-1139; C-280/92 *Spain/COM – Hytasa* [1994] ECR I-4103.

¹¹ Joined Cases C-128/03 and C-129/03 *AEM* [2005] ECR I-2861.

¹² See Case 107/84 [1985] ECR 02655 (2666, point 11).

Unfortunately a withdrawal of the preliminary request made it impossible for the Court to render its judgement.

Under conditions of entirely liberalised markets the question is today asked from a different angle. On the one hand it is quite evident that public postal services do merit a VAT exemption, even if those services are accomplished in a market environment by one or more operators. On the other hand, it is equally evident that such a VAT exemption of relevant services is of sufficient importance for the evolution of a competitive environment in postal markets to possibly produce distortions of competition. Therefore the decision of the Court will, in any event, have to take the importance of public postal services and the maintenance of a high level of universal services into consideration as possible justification. Given these diverging goals, it will be revealing to see how the Court might strike the balance.

IV. State aid control in partially liberalised markets and cross-subsidisation

Once a sector has been liberalised, it seems to be, at a first glance at least, rather peculiar to look for a major role of state aid control under circumstances of liberalisation. But in fact, state aid control is faced with quite a significant set of questions which go far beyond the traditional patterns of regional and sectorial state aid schemes or infrastructural support measures¹³. Particularly in sectors which have traditionally been shaped by public service obligations, it is not uncommon to see a member state devoting continuous efforts to the development of this market according to priorities inspired by the general interest. The process of liberalisation, which we have experienced in the European Communities in sectors such as telecommunications, postal services, energy supply and public transportation since the 90s, has shown quite strikingly that Member States are in general not willing to pursue a strict “hands off” policy once public undertakings have been privatised and market conditions in these sectors have been liberalised¹⁴. The basic reason is simply to be found in the mere fact that those sectors continue to be perceived under a different angle than most other industrial or commercial markets, both by consumers and by public authorities. Those sectors are and will, for the foreseeable future, remain to be marked by the particular interest of consumers in services of general economic interest in terms of continuity, periodicity and affordability¹⁵.

In consequence, public authorities continue to seek ways and means of ensuring that those consumer needs are met and, depending on traditional policy orientations, consider state subsidies and the maintenance of exclusive rights quite a legitimate way of ensuring that public policy priorities in delivering services of general economic interest are achieved. In that respect it seems that Member States have not yet fully

¹³ For the latter see *Koenig/Kiefer*, Public Funding of Infrastructure Projects under EC-State Aid Law, EStAL 3/2005, p. 415 seq.

¹⁴ See *v. Danwitz*, Der europäische Elektrizitätsbinnenmarkt zwischen Wettbewerbsorientierung und Wettbewerbsbeschränkung, 2007, under A, in: *Recht und Ordnung der Wirtschaft*, Festschrift für Peter J. Tettinger (Jörg Ennuschat, Jörg Gerling, Thomas Mann and Johann Christian Pielow, eds.).

¹⁵ Services of General Economic Interest – Opinion Prepared by the State Aid Group of EAGCP, June 29, 2006.

embraced the deeper logic of the concept of universal services which is designed to combine the continuous pursuit of public policy objectives with the conditions of a fully competitive market environment. This might explain why the liberalisation process has in general been enacted on a step by step basis with a persistent tendency of maintaining certain exclusive rights of limited scope in postal services¹⁶, energy supply¹⁷ and public transport¹⁸. Beyond direct state subsidies designed to fulfil public service objectives, in particular the phenomenon of partially liberalised markets, be it a constant or a transitional one, most naturally gives rise to possible distortions of competition through cross-subsidisation. The different manifestations, in which cross-subsidisation might occur are as numerous and possibly as diverse as the granting of state aid itself. The Court's practise already shows a quite significant range of different schemes, be it direct payments to compensate for public service obligations¹⁹ or the levy of increased charges to finance public service missions²⁰, logistical and commercial support to a subsidiary operating in a competitive market²¹ and the calculation of charges for the access and use of a transmission or a transport system²² to a subsidiary.

1. The role of state aid control in partially liberalised markets

The undoubtedly highly technical nature of these examples, in particular when it comes to the allocation of costs, should not lead to the false conclusion that this subject-matter is too detailed to be deserving of particular attention. A closer look into the relevant jurisprudence and the academic research quite strikingly shows the considerable importance of these questions and the far-reaching consequences in economic and even in political terms²³. The principal challenge facing Community Courts in the environment of liberalised and partially liberalised markets is to ask whether there is a specific role for state aid control, to define the scope of the powers of the European Commission in the assessment of state aid measures and to determine the nature and the extent of judicial review in this field. Fundamental questions altogether.

a) A "specific" role for state aid control in liberalised sectors?

The starting-point of our reflections on the scope of state aid control in liberalised sectors is the basic question of whether state aid control has a specific role to play in liberalised areas. To put it in quite simple terms: My suggestion is that state aid control has no different role to play in liberalised sectors than in any other field. State aid

¹⁶ Article 7 paragraph 1 of Directive 97/67/EC as amended by Directive 2002/39/EC.

¹⁷ Article 3 paragraph 8 of Directive 2003/54/EC.

¹⁸ Art. 10 of Directive 91/440/EEC.

¹⁹ Case C-280/00 *Altmark Trans* [2003] ECR I-7747.

²⁰ Case C-340/90 *TNT Traco* [2001] ECR I-4109; Case C-526/04 *Laboratoires Boiron* [2006] ECR I-7529.

²¹ Joined Cases C-83/01 P, C-93/01 P, 94/01 P *Chronopost* [2003] ECR I-6993; Case T-613/97 *UFEX* [2006] ECR II-1531.

²² Joined Cases C-128/03 and C-129/03 *AEM* [2005] ECR I-2861; Case T-266/02 *Deutsche Post v Commission* - pending.

²³ The ongoing discussion on Community and national level instigated by the Court's decisions in Cases like *Stardust Marine* and *Altmark Trans* and the resulting legislative initiatives may serve as examples.

control has to effectively ensure that Member States cannot create distortions of competition by aids which, firstly, are granted directly or indirectly through state resources and, secondly, are imputable to the State²⁴. In view of the wide spectrum of ways in which aid can be granted, state aid control has to cover the entire range of possible configurations. In that respect, let me recall the settled case-law according to which Community law cannot permit the rules on state aid to be circumvented by the creation of autonomous institutions or procedures charged with allocating state aid²⁵.

But the purpose of state aid control of avoiding distortions of competition is not a self-sufficient objective which is on its own capable of justifying any given measure designed to improve conditions of competition in general. In that respect, it has to be stressed that a clear distinction must be drawn between the specific mandate of state aid control of avoiding selective distortions of competition by specific state intervention in granting state resources and a general, far-reaching regulatory mandate to maintain a level playing field for all undertakings active on the Internal Market. In particular, the improvement of competitive conditions as such between former public undertakings with enduring strong market positions in their home market and new competitors, be it new private undertakings or former public undertakings from other Member States, lies, as urgent as it might be for the realisation of the Internal Market, beyond the Commission's mandate in matters of state aid control²⁶. Cross-subsidisation in general is subject to Article 82 EC²⁷ and specific regulatory rules for each sector come within the ambit of state aid rules only if state resources have been granted in a way which is imputable to the state.

Although the distinction between the general regulatory need for the realisation of a level playing field in liberalised markets and the rather "limited" function of state aid control is certainly less evident in practice, an important conclusion should be drawn from this differentiation. The regulatory standards contained in regulations and directives on the liberalisation of a particular sector can go well beyond or stay behind the requirements of state aid control. Therefore, those standards as such cannot, it seems to me, be taken as valid criteria for decisions in state aid law without particular justification, which might of course be possible under given circumstances. This is why the Commission has rightly elaborated specific compensation standards in Article 5 paragraph 2 of the decision taken on the application of Article 86 paragraph 2 EC²⁸ concerning the compensation granted to undertakings entrusted with the operation of services of general economic interest.

²⁴ Case C-482/99 French Republic v Commission – Stardust Marine [2002] ECR I-4397 (4436, para 24).

²⁵ See Case C-482/99 French Republic v Commission – Stardust Marine [2002] ECR I-4397 (4435, para 23).

²⁶ *Vesterdorf*, A Further Comment on the New State Aid Concept as this Concept Continues to be Reshaped, *EstAQ* 2005 p. 393, 398.

²⁷ See *v. Danwitz*, *Europarechtliche Grundlagen*, in: *Beck'scher PostG-Kommentar*, 2. ed. 2002, para. 113 seq.

²⁸ Decision on the application of Article 86 (2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, O.J. L 312, p. 67.

b) Use and abuse of state resources – in search of imputability

State aid control in liberalised sectors requires the granting of state resources in a manner which is imputable to the State. Quite evidently, both conditions must be met. All advantages financed by state resources constitute aid, irrespective of whether they are granted directly by the State or indirectly by a public or private body designated or established by the State²⁹. By contrast, a selective measure that does not involve any direct or indirect transfer of State resources to undertakings may not be qualified an aid, even if it confers an undeniable advantage on certain undertakings³⁰.

In quite a number of cases, the use of state resources has not been in question³¹, but the focus was rather on the question of whether the decision to grant those state resources can be attributed to the State and the measure therefore constitutes state aid. The conditions for such an imputability have been developed in the *Stardust Marine* judgement³² on the basis of a realistic assumption. The Court states clearly that relations between the State and public undertakings are in general close and that it will therefore be very difficult for a third party to demonstrate in a particular case that aid measures taken by such an undertaking were in fact adopted on instructions of public authorities³³. The reference made in *Stardust Marine* to the circumstances of the case and the context in which the measure was taken, has been criticised for being a rather vague notion³⁴. But in fact it seems hard to imagine how one could set up criteria once and for all relevant cases that could be significantly more precise.

In that respect it seems to be more important to note that the Court has deployed great efforts on identifying indicators which might be relevant to establish that an aid measure adopted by a public undertaking is imputable to the State. Seen from this angle, it does not seem unreasonable to conclude that a merely formalistic approach fixing on the fact that an undertaking is legally placed under public control, would not be sufficient for drawing conclusions as regards the imputability of its decisions to the State. In making reference to the intensity of the supervision exercised by public authorities³⁵ and to the real possibilities of exercising a dominant influence³⁶, *Stardust Marine* aims to achieve a realistic assessment of the particular legal and factual situation *in concreto* in which a public undertaking adopts a certain aid measure³⁷. In the end it is for the Commission and the Member States to demonstrate to the Court for what legal and factual reasons an

²⁹ Case C-379/98 *PreussenElektra* [2001] ECR I-2099 (2181, para. 58) with reference to the settled case-law of the Court.

³⁰ Case C-379/98 *PreussenElektra* [2001] ECR I-2099 (2181, para. 61).

³¹ Case C-39/94 *SFEI* [1996] ECR I-3549 (3595, point 56); Case C-482/99 *French Republic v Commission – Stardust Marine* [2002] ECR I-4397 (4438, para. 32).

³² Case C-482/99 *French Republic v Commission – Stardust Marine* [2002] ECR I-4397 (4444, para. 52 seq.).

³³ *Ibid.* para 53 seq. – *Stardust Marine*.

³⁴ See *Gahlleithner*, Die Zurechenbarkeit von Handlungen öffentlicher Unternehmen an den Staat, 2002, *European Law Reporter* 271, 276; *Lübbig/von Merveldt*, *Stardust Marine: Introducing Imputability into State Aid Rules - Plain Sailing into Calm Seas or Rowing Back into Shallow Waters?*, (2003) *EC.L.R.* 629, 632.

³⁵ Case C-482/99 *French Republic v Commission – Stardust Marine* [2002] ECR I-4397 (4445, para. 56).

³⁶ *Ibid.* Para. 57.

³⁷ See the reasoning of the *CFI*, Case T-613/97 *UFEX* [2006] ECR II-1531 (para. 166).

aid measure should be considered imputable to the State or not. The jurisprudence will evolve in the light of this experience.

2. Cost allocation - in search of the “right” standard

Ever since the ground-breaking study of *Faulhaber* on the phenomenon of cross-subsidisation in public enterprises,³⁸ the pricing behaviour of public undertakings and their internal allocation of costs have become central features in proceedings on the abuse of a dominant market position. It should however be noted that *Faulhaber's* studies concerned wholly regulated industries.³⁹ Therefore it might be worthwhile to do some research on the question to what extent his approach is transposable to state aid control over undertakings offering services both on reserved and on competitive markets.

In the early *Corbeau*-judgement the Court concluded that cross-subsidisation can be considered a generally justified behaviour in accordance with Article 86 paragraph 2 EC, but added quite strongly that the exclusion of competition is not justified as regards specific services which are dissociable from services of general interest and meet special needs of economic operators for which the traditional postal services make no adequate offer⁴⁰. The perception of cross-subsidisation as a subject to state aid rules is a more recent evolution, rather closely linked to the process of step by step liberalisation giving rise to partially liberalised markets in which the cross-subsidisation of liberalised market segments by using state resources originally designed to compensate for public service obligations has become a real danger for the creation of a competitive environment⁴¹.

a) Scope and intensity of judicial review

Ever since the fundamental judgement in *Corbeau*, the Court has had quite a number of opportunities of developing its jurisprudence with regards to Article 86 paragraph 2 EC. The general message of the judgements in *TNT Traco*⁴², *Chronopost*⁴³ and *Ambulanz Glöckner*⁴⁴ seems to be quite clear. In particular the Court pointed out clearly in *Chronopost* that the public network made available to Chronopost was clearly not a market network and would never have been created by a private undertaking. Accordingly, cost calculation and allocation in search of possible cross-subsidisation have to be based on objective and verifiable elements⁴⁵ on the factual basis of the

³⁸ *Faulhaber*, Cross-Subsidization: Pricing in Public Enterprises, *American Economy Review* 1975, p. 966; idem. Cross-Subsidization: Analysis with more than two Services, *Journal of Competition Law and Economics*, 2005, p. 441-448.

³⁹ *Faulhaber*, (Footnote 35), p. 966 (967).

⁴⁰ Case C-320/91 *Corbeau* [1993] ECR I- 2533 (2569, para.16-19).

⁴¹ See *Hancher/Buendia Sierra*, Cross-Subsidization and EC Law, *CMLRev.* 35 (1998), 901 ff.; *Dimitris Triantafyllou*, L'encadrement communautaire du service public, *RTDEur* 1999 p. 21.

⁴² Case C-340/90 *TNT Traco* [2001] ECR I-4109.

⁴³ Joined Cases C-83/01 P, C-93/01 P, 94/01 P *Chronopost* [2003] ECR I-6993.

⁴⁴ Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089.

⁴⁵ Joined Cases C-83/01 P, C-93/01 P, 94/01 P *Chronopost* [2003] ECR I-6993 (7042, para. 38).

existing network⁴⁶. The factual and legal difficulties for the Commission of meeting this standard may not be neglected, as the follow-on *UFEX*-judgment of the CFI shows, in which the Tribunal annulled the contested decision of the Commission for defective reasoning. For the future, the rather detailed accounting standards of the transparency directive 2006/111/EC⁴⁷ and the cost calculation standards of the Commission decision on the application of Article 86 paragraph 2 EC to state aid in the form of public service compensation⁴⁸ should improve the factual conditions quite considerably to identify objective and verifiable elements for the required assessments relating to cross-subsidisation.

In the *UFEX*-judgement, the Tribunal addressed a rather fundamental question in stating that the Commission's calculation of the cost incurred in providing logistical and commercial assistance to a subsidiary involves, in the absence of analytical accounts, a complex economic appraisal for which the Commission enjoys a wide discretion. In consequence, the judicial review of that measure, even though comprehensive in principle as the CFI adds, is limited to manifest errors of assessment as well as the respect of procedural rules and the statement of reasons⁴⁹. In the light of the complexities of cost calculation, this reasoning is fully understandable from any lawyer's and not only from a judge's point of view. In addition to that, we all know since the Court's reasoning in *TU München*⁵⁰ that a rather strict monitoring of the obligation to state reasons may in practice lead to a judicial review which is as strict as a comprehensive review in substantive terms.

But still, the question remains whether it would be compatible with Article 87 paragraph 1 EC to assume that the Commission could lawfully, by a certainly non-arbitrary and most likely reasonable choice between different methods of calculation, come in one particular case to opposite conclusions as regards the existence of state aid? One could, of course, consider in line with the *UFEX*-judgement that this would constitute a manifest error of assessment⁵¹, if that could be demonstrated to the Court. But again, would the same logic apply if not the existence of an aid, but only the amount were to differ considerably according to the choice of the calculation method? Where could one draw the line? In any event, we will follow with particular interest how the Commission will eventually justify for what reasons a particular cost-allocation standard has been chosen in one case while using a different cost-allocation standard in another case.

⁴⁶ See CFI, Case T-613/97 *UFEX* [2006] ECR II-1531 para. 131 and with respect to Article 82 EC see Case 27/76 *United Brands* [1978] ECR 207 (305; para. 248/257); Case C-323/93 *Centre d'insémination de la Crespelle* [1994] I-5077 (5106, para. 26 f.).

⁴⁷ Commission 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, O.J. 2006, L 318, p. 17.

⁴⁸ Commission decision of 28 November 2005 on the application of Article 86 (2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, O.J. 2005, L 312, p. 67.

⁴⁹ See CFI, Case T-613/97 *UFEX* [2006] ECR II-1531 (para. 128).

⁵⁰ Case C-269/90 *Technische Universität München* [1991] ECR I-5469 (5501, para. 26).

⁵¹ See CFI, Case T-613/97 *UFEX* [2006] ECR II-1531 (1581, para. 138).

b) The cost-standard for cross-subsidisation

When it comes to the central question of the “right” cost-standard for monitoring and detecting cross-subsidisation, the interrelation of cost-accounting rules and the legal requirements of Community law deserve our full attention. Even if it might be in practice a quite self-evident starting point, it appears important to note that the allocation of costs has to be made on the basis of generally accepted cost accounting principles, as the Commission decision of November 28, 2005⁵² states in Article 5 paragraph 2. This ensures that state aid control of cross-subsidisation relies in the very first place on a “best practice” approach, which is in particular completed by the requirements of the transparency directive.

On that basis, the opposing aims of the prohibition of any state aid in Article 87 paragraph 1 EC and the necessity of ensuring workable conditions for public services according to Article 86 paragraph 2 and Article 16 EC have to guide our reflections. The basic idea is to keep the prohibition of state aid effective, even if aid is granted by way of cross-subsidisation. This purpose may, of course, not endanger the good functioning of public service operations, which enjoy a particular recognition in Community law. To me it seems quite inappropriate to strive for a hierarchical understanding of both values in terms of Community law. The challenge is rather to achieve practical solutions designed for an equivalent realisation of both objectives. To my mind, the rationale of the jurisprudence in *Chronopost* seems to be rightly based on this balancing approach.

The formula for cost-allocation used in *Chronopost* reflects quite clearly the commitment to a strict application of state aid rules without interfering with the conditions necessary for the operation of services of general economic interest, although this standard might indeed not have been written with the precision of a text book in business administration. Nonetheless, it becomes quite clear that the focus of the judgement is on the additional cost-concept. Therefore, as the judgement states, prices charged to a subsidiary need to cover all the additional variable costs incurred in providing the assistance for a service in liberalized markets, an appropriate contribution to the fixed costs arising from the use of the existing postal network and an adequate return on capital investment used for competitive activities⁵³. In my understanding only those fixed costs can be taken into account which result from the actual use of the postal network for a particular competitive activity. Otherwise, this competitive activity would have to bear costs of services of general economic interest.

Admittedly, the Commission’s decision on compensation of public services is not crystal clear in that crucial respect, when it states in Article 5 paragraph 2 under c) that costs allocated to a service of general economic interest may cover the variable costs and “a proportionate contribution to fixed costs common to both services of general economic interest and other activities”. But quite evidently, this provision can and has to be read in conformity with the requirements established in *Chronopost*, since they constitute an interpretation of primary law in Article 87 paragraph 1 EC.

⁵² Commission decision of 28 November 2005 on the application of Article 86 (2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, O.J. 2005, L 312, p. 67 (Footnote 45).

⁵³ Joined Cases C-83/01 P, C-93/01 P, 94/01 P *Chronopost* [2003] ECR I-6993 (7042, para. 40).

c) Remaining uncertainties

Nevertheless it is quite evident, that the problem of cost allocation between services of general economic interest and competitive services has not fully been resolved by the existing jurisprudence. Details of considerable economic importance have so far not been brought to the attention of the Court and, therefore, have remained undecided yet. Questions relating to an eventual difference in calculating additional costs or incremental costs, to the degree of admissible standardisation, to the timeframe for calculation which is important for shifting the demarcation line between variable and fixed costs and, finally, to the consequences of a top-down as opposed to a bottom-up approach do not find an answer in the rules on state aid law. Consequently, they have not been reflected in the jurisprudence of the Court. It should however be noted that the Commission has made an effort to cope with these problems in a discussion paper on Article 82 EC⁵⁴. Here again, it remains to be seen whether those standards are fully transposable to state aid law.

When it comes to the mission of Community Courts in that respect, it seems to be quite clear that enacting cost-allocation standards cannot be considered a genuine task of the judiciary and, beyond that, defining common rules for cost-accounting and cost-allocation in essence does not require a specifically legal reasoning. This only comes into play when the suitability and proportionality of such standards or the requirements of a homogeneous application respecting an equal treatment of all undertakings concerned give rise to legal doubts. But, in my perception, the elaboration of such standards in itself ought to be regarded as a non-judicial question which should be answered in accordance with generally recognized cost-accounting and cost-allocation standards. In that perspective, preference should be given to a best practice approach.

3. Procedural consequences

What remains is the question of procedural consequences and in particular, how a party can eventually prove features of overcompensation. Since Member States enjoy, in general, procedural autonomy, the requirements of Community law are limited to the principles of equivalence and effectiveness. On this basis, in *Laboratoires Boiron* the Court has dealt with the delicate question of the burden of proof⁵⁵. According to the findings of the Court, in a situation in which it is likely to be impossible or excessively difficult for the required evidence to be produced by a party, a national Court is required to use all procedures available under national law for this purpose, including the production of a particular document⁵⁶. By this finding, the Court evidently responds to the need arising from a particular situation to make sure that a national court can verify a potential overcompensation.

There is indeed an undeniable need for such a procedural possibility in order to assess whether an alleged overcompensation in fact took place. But still, this judgement should not be taken as a general rule without limitations giving rise to all sorts of investigatory actions. It should rather be noted that the Court refers to the factual and legal

⁵⁴ DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, para. 64 seq.

⁵⁵ Case C-526/04 *Laboratoires Boiron* [2006] ECR I-7529 (7565, para. 51 seq.)

⁵⁶ *Ibid.*, para. 55.

circumstances in this specific case, where a national court had the power to order a party to produce a certain document. In particular, this judgement has not dealt with the protection of business secrets and the possibility of rejecting claims for the production of documents on such grounds⁵⁷.

V. Conclusion

This overview over the jurisprudence of Community Courts on the concept of aid in liberalised sectors has been an occasion to identify the main challenges for state aid control in this field and to reflect the state of Community law jurisprudence. In essence, it seems to me that the jurisprudence is well established on a balanced approach which takes the necessities of a stringent state aid control seriously without neglecting the importance of maintaining the good functioning of services of general economic interest. In particular, let me draw three conclusions from the foregoing:

Firstly, we have to acknowledge that state aid control is not a generally usable, unconditioned instrument of regulatory policy for realising a level playing field in liberalised markets. State aid control is rather focused on the use and abuse of state resources in a competitive environment. In that respect, the role of state aid control in liberalised markets does not differ from the traditional mandate to render the prohibition of state aids in Article 87 paragraph 1 EC effective.

Secondly, the discussion of the issue of imputability has shown that Community Courts will have to live up to the basic standards established in *PreußenElektra* and in *Stardust Marine*. Quite evidently, these judgments have not provided us with a standard of review which is so easy to handle that most proceedings before the Commission and the Community Courts have or will become superfluous. But, as you well know, these judgements were not adopted to fulfil such unrealistic expectations and no future judgment will do so. The standards of review in state aid control need to be designed in a way which takes two aspects into account. A certain degree of flexibility is necessary to ensure a reasonable application in the Commission's practice and in particular in order to cover future evolutions. But a solid concept with a visible profile is indispensable to give Member States and public undertakings the orientation which they clearly need.

Thirdly, the jurisprudence of the Court has developed a realistic approach to cross-subsidisation, which might still need some refinement and future evolution. In particular, judicial review will have to ensure a homogenous application of the criteria for cost allocation as they have been established in *Chronopost*. On that basis, procedural consequences, as they have been discussed in *Laboratoires Boiron* for the very first time, will certainly require more attention in the future.

⁵⁷ See *BVerfGE* 115, 205; v. Danwitz, Der Schutz von Geschäfts- und Betriebsgeheimnissen im Recht der Regulierungsverwaltung, DVBl. 2005, p. 597.