

Who owns the public interest?

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Key elements in Article 90(1) and (2)

Clause	90(1)	90(2)
scope	public undertakings and undertakings granted ...	undertaking entrusted with ...
elements	special rights exclusive rights	operation of services of general economic interest having the character of a revenue producing monopoly
Member states shall... →	...neither enact nor maintain in force any measure contrary to ... Articles 6, 85 to 94	
Undertakings shall... →		...be subject to the [competition rules]...as long as [they do not] obstruct the performance, in law or in fact, of the particular tasks assigned to them.

Relevant cases: 1

Case	Decision
<i>BRT v SABAM</i> Case 127/73	Article 90(2) must be interpreted specifically as a Treaty derogation
<i>Sacchi</i> Case C 155/73 [1974] ECR 409	states can decide non-economic public interest
<i>CBEM v CLT and IBP</i> Case C 311/84 [1985] ECR 3261	statutory monopolies have a dominant position
<i>Bobson v Pompes Fun^①bres des r^②gions lib^③res</i> Case 30/87 [1988] ECR 2479	states may not use a dominant economic position to fix prices and restrict market entry of competitors
<i>RTT v GB-INNO</i> Case C 18/88	public undertakings operating public infrastructures abuse their dominant position by excluding third-party service and content competitors

Relevant cases: 2

<i>Ahmed Saeed Flugreisen v Zentrale zur Bekämpfung unlauteren Wettbewerbs</i> Case 66/86 [1989]	natural monopolies are not subject to Article 90(2) protection unless specifically tasked by the state
<i>Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielle</i> Case C 179/90	dominant positions are not in illegal, but undertakings may not be created which cannot help but abuse that dominant position in what they are tasked to do by the state
<i>France v Commission</i> Case C 202/88 [1991] ECR I-1223	the Commission has the power to issue Article 90(3) directives
<i>Procureur du Roi v P. Corbeau</i> C 320/91	definition of public interest within Article 90(2)
<i>ERT v Dimotiki</i> Case C 260/89 [1991] ECR I-2925	internal market and competition objectives cannot be infringed by the operation of public undertakings
<i>Commune d'Almelo v NV Energiebedrijf Ijsselmij</i> Case C 393-92	definition of public service obligations
<i>Höfner and Elser v Macrotron GmbH</i> Case C 41/90 [1993] 4 CMLR 306	states may not create economic entities with dominant positions that are unable to meet the demand for services, or distort the competitive structure of economic markets

Allocative efficiency

public interest action	market problem	Court or Commission response
restrict market access; control or license third parties	vertical restraint, vertical integration, selective or exclusive distribution	<i>RTT v GB INNO</i>
own the infrastructure	inter-state inequity	Trans-European Networks
set fee <i>nomenclature</i> (price = cost)	lack of transparency in cost and price structure	<i>Merci, Bobson</i>
ensure access or service not price equity		
cross-subsidies unrelated to economic activities	cherry-picking	<i>Corbeau</i>

Enlightened self-interest

public interest action	market problem	Court or Commission response
own infrastructure or control market logic	vice versus virtue	<i>Sacchi, Harner</i>
license third parties, ownership, regulate	profit motive at the expense of public service	<i>Harner, Corbeau</i>

Gaming

public interest feature	market problem	Court or Commission response
regulate or own	interstate “forum-shopping”	European regulatory power for Commission
	the “competitive advantage of nations”	“The Single Market”
license	free-rider problem and subsidies (“pork-barrel funding) for loss-making activities	<i>Ahmed Saeed</i>

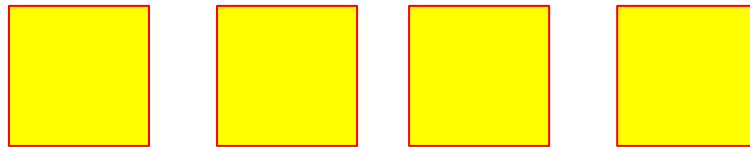
Market entry

public interest action	market problem	Court or Commission response
create public undertaking	lack of scale, or interest	<i>CBEM, Bobson, Merci</i>
provide subsidies		Articles 92-94

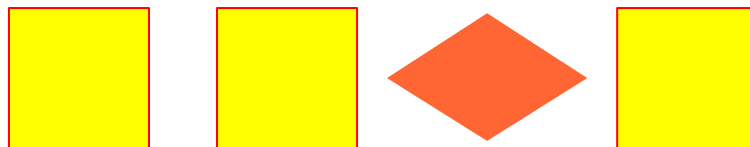
Regulatory effort

public interest feature	market problem	Court or Commission response
define public interest	no public service ethos	<i>Sacchi, ERT, Corbeau</i>
bundle services and infrastructure and use vertical integration to produce efficiencies	vertical integration, selective or exclusive distribution	<i>Almelo, Corbeau, Bobson, Merci, H^uffner</i>
seek macro-economic objectives	fragmented, high cost operation, micro-economic inefficiency	<i>Bobson, Almelo, H^uffner</i>

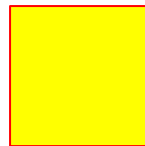
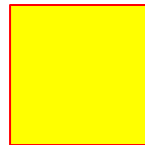
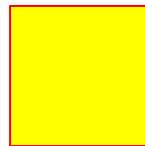
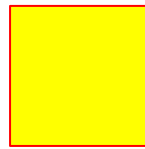
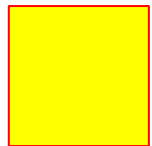
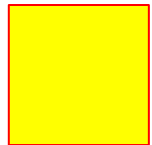
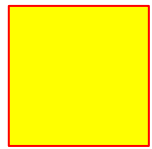
Horizontal unbundling



- outsourcing
- contracting out
- facilities management



Vertical unbundling



- outsourcing
- contracting out
- facilities management

- carve outs
- disease management

