

## FAILURE TO MEET THE DEMAND AS INFRINGEMENT OF ARTICLES 106(1) AND 102 TFEU: THE PROBLEM OF CAUSAL LINK

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### Abstract

**Purpose** – this paper aims to analyse application of Article 106(1) in conjunction with Article 102 of Treaty of the Functioning of the European Union (TFEU) with respect to situations, when undertakings having statutory monopoly rights fail to satisfy demand/needs of their customers. In particular, this research paper aims to determine what kind of causal link needs to be established between State actions and failure to meet the demand by the holder of statutory monopoly.

**Design/methodology/approach** – theoretical methods (analytic and systematic) as well as case law analysis has been applied in the research.

**Finding** – there are two legal tests supported by case practice. Commission takes the position that the State and holder of monopoly rights are jointly liable for failure to meet the demand. Hence infringement may be found in all cases, when there is clear demand on the market which remains unsatisfied. On its turn, European Court of Justice (ECJ) considers that infringement can be found only in such cases, when failure to meet the demand results from the State actions only. This paper suggests that joint liability test is more adequate for finding the infringement, and the most recent practice of EU courts seems to support this view.

**Research limitations/implications** – findings presented in this paper are based on the analysis of case law of European Court of Justice and European Commission, which is admittedly rather scarce. Respectively, findings presented in this paper reflect *status quo* of the case law and doctrine, however some developments can be expected in the nearest future.

**Practical implications** – selection of causal link theory, which should be applied in failure to meet the demand cases, has direct impact on the burden of proof falling on the claimant. Having determined to apply direct causal link test, practical possibilities to prove the infringement would be limited to very extreme cases of failure to meet the demand. On the contrary, application of joint liability test entitles to prove infringement rather easily – such infringement can be found in all cases when the customer has demand for some services and such demand is left unsatisfied by the holder of monopoly rights.

**Originality/Value** – legal doctrine analyse the causal link in Article 106(1) and 102 TFEU cases, however the doctrine lack analysis of causal link problem specifically in failure to meet the demand cases, which are quite specific. The latter problem was addressed to some extent by Monti, Manaridou and Kersting. However their analysis touched upon only certain issues of causal link and does not take into account evolvments in the most recent case practice.

**Keywords:** failure to meet the demand, statutory monopoly, exclusive rights, causal link.

**Research type:** research paper.

## Introduction

It is generally accepted that allocative and productive inefficiency appears to be an inherent feature of each monopoly. In such markets, companies don't experience any pressure from their customers and competitors to innovate and increase production efficiency. In turn, absence of such competitive pressure always ends-up in a situation, when customers are faced with the necessity to purchase monopoly goods, rather than goods actually they need most. They are also required to pay monopoly price for such goods, which by definition appears well above the competitive level. Needless to say that such competitive outcome is detrimental to consumers, thus States are usually opposing creation and operation of monopolies. Nevertheless, there is a number of examples suggesting that States do not follow the same rationale with respect to monopolies of State-owned undertakings or other undertakings in which the State has specific interest. When the question concerns business operations of such undertakings State authorities tend to find many seemingly legitimate reasons to monopolise goods supplied thereby. As a general rule, the necessity of monopolisation is explained as falling under the interest of national security, insufficient quality of services provided by private undertakings, the urgency to cross-subsidy provision of services to socially vulnerable people, etc. Nevertheless, in many cases the creation of monopolies merely aims to shield inefficient undertakings from competition as failure of State-owned companies is normally outside political agenda.

Since 1992 Article 46 of the Constitution of the Republic of Lithuania specifically prohibits monopolisation of goods and services, which leads to natural expectation that monopolies should no longer be created or exist in the Republic of Lithuania. Nevertheless, as suggested by the most recent examples such conclusion would be far from reality. For example, since 2014 Lithuania managed to establish legal monopoly of state-owned company for provision of television transmission services to national broadcaster (LRT)<sup>1</sup>, attempted to re-establish legal monopoly of company providing *secure* IT and data transmission services to public sector companies and establish a new legal monopoly for provision of IT clouding services. There is also a number of examples of monopolies created at municipal level, e.g. in 2015 Lithuanian competition council (LCC) considered monopoly rights granted by Kaunas municipality to undertaking engaged in treatment of human remains and administration of cemeteries<sup>2</sup>, public transportation monopolies operating in Klaipėda<sup>3</sup> and Švenčionys<sup>4</sup>, heat energy monopoly in Šiauliai<sup>5</sup> and waste treatment monopoly in Joniškis<sup>6</sup>.

Legality of all such monopolies could be analysed from the perspective of various legal instruments. These could be national instruments, such as Article 46 of Constitution and Article 4 of Law on Competition. The problem also could be analysed from the perspective of instruments offered by EU law, i.e. infringement of fundamental EU freedoms, such as free movement of goods/services and/or freedom of establishment. All these instruments are designed to challenge monopoly rights *as*

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<sup>1</sup> Law No XII-1032 on amendment of Article 2 of the Law No XI-1574, which amended Article 5 of the Law on National Radio and Television, 2014

<sup>2</sup> Treatment of human remains and administration of cemeteries in Kaunas municipality, 2015

<sup>3</sup> Public transportation in Klaipėda municipality, 2015

<sup>4</sup> Public transportation in Švenčioniai municipality, 2015

<sup>5</sup> Central heating in Šiauliai municipality, 2015

<sup>6</sup> Waste treatment in Joniškis municipality, 2015

*such* and offer a possibility to analyse the situation from the perspective of the competitor. Nevertheless, EU law also contains a very interesting legal instrument offering possibility to consider legality of monopolies from the perspective of consumers whose interests are primarily impaired by creation of monopolies, – Article 106(1) TFEU applied in conjunction with Article 102 TFEU. This legal instrument shall be analysed in detail in this paper suggesting that existence of legal monopolies could be reasonably challenged in case holders of monopoly rights do not offer goods and/or services, which are needed by each individual customer, i.e. holder of monopoly rights does not meet the demand.

### **The Prohibition Established in Article 106(1)**

Article 106(1) TFEU appears to be the reference rule, which is applicable only in conjunction with other provisions of TFEU. As noted by Lang, irrespective of rather complicated language of this provision, in effect it provides that “[*even*] in the case of *State enterprises and enterprises to which the State has given monopoly or special rights, States may not adopt or maintain measures contrary to the Treaty*”<sup>1</sup>. Such prohibition is addressed to Member States and prevents them from adoption of any measures, which would impair effectiveness of any other provision contained in the Treaty.

Article 106(1) could also be applied in conjunction with provisions of competition law, such as prohibition of abuse of dominant position established in Article 102 TFEU. In such cases Article 106(1) requires that Member States refrain from any measures, which would impair the possibility to invoke abuse of dominant position committed by State-owned undertakings and/or undertakings holding special or exclusive rights, or more general impairment of effectiveness of such prohibition. There are many forms of State measures, which could lead to reduction of effectiveness of Article 102 and it could also be the case when the holder of legal monopoly is unable to meet the demand available on the market.

### **Failure to Meet the Demand is Considered Infringement of Article 106(1) and 102 TFEU**

The idea that failure to meet the demand available on the market could amount to infringement of Article 106(1) applied in conjunction with Article 102 can be traced back to European Commission decision in *Dutch Courier Services*<sup>2</sup> adopted in 1989. In this case the Commission considered the extension of dominant position of Dutch postal company PTT into a neighbouring market of express delivery services by the laws adopted by the Dutch Government. The Commission the declared presence of infringement of Article 106(1) and 102 *inter alia* taking into account that prior to monopolisation customers used to purchase express delivery services from private undertakings and such customers did not consider that quality of services provided by the state-owned company was comparable to the one previously provided by private companies. In this respect Commission concluded that “*the Law requires them to use the PTT Post BV express services on the terms laid down by the latter, whether or not*

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<sup>1</sup> Temple Lang, 2003, p. 1

<sup>2</sup> Dutch Courier Services, 1989

*they correspond to their needs*<sup>1</sup>. Commission did not elaborate as to the conceptual grounds for finding such infringement (i.e. how the efficiency of Article 102 has been reduced by State measures). Nevertheless, the analysis made by the Commission suggests that Commission has concentrated on the failure to meet the demand as such (i.e. situation) without finding it necessary to investigate in detail, whether such failure has been caused by the State actions or inefficiency of state-owned company.

The conceptual grounds for finding such infringement have been slightly more explained by the Commission in *Spanish post*<sup>2</sup> decision adopted a year later in a very similar situation. In the latter case Commission considered the extension of postal monopoly into express delivery services market realised by the laws of Spanish government. The Commission has found the infringement of Article 106(1) applied in conjunction with Article 102 on the same basis as in *Dutch Courier Services* case, i.e. *inter alia* taking into account that customers are deprived from the possibility to purchase goods and services they actually need. Nevertheless, the Commission has additionally explained that such State actions are prohibited as they have led to effects similar as the ones prohibited by Article 102(b) (i.e. limitation of supply and technical development) and such infringement has resulted from joint actions of the State and the holder of monopoly rights<sup>3</sup>.

None of the abovementioned decisions of the Commission have been appealed before ECJ, hence it remained unclear whether ECJ was ready to accept such interpretation of Article 106(1) applied in conjunction with Article 102, which was strongly suggested by the Commission. Nevertheless, in 1991 the ECJ received a request for a preliminary ruling from German national court, which specifically asked to explain, whether failure to meet the demand could amount to infringement of Articles 106(1) and 102. The case concerned exclusive rights provided to the State employment agency AFG in Germany. The facts of the case suggested that AGF was manifestly not in the position to meet the demand for services related to employment of higher tier managers, openly declared its limited possibilities in provision of such services and even invited private market operators to provide their services. As a result, irrespectively of existence of legal monopoly for employment agency services, AFG managed to intermediate only in approximately 28 per cent of cases of employment of higher tier managers and there were 700-800 of private employment agencies, which actually was meeting the demand available on the market<sup>4</sup>.

In this case the Commission considered that ECJ should find the infringement taking into account the combined effect of (i) German legislation prohibiting private recruitment services and (ii) AFG's conduct in failing to satisfy the demand that clearly exists in the market, which has ultimately resulted in limitation of production, markets or technical development within the meaning of Article 102(b). In the view of the Commission possibility of such kind of infringement has been accepted by ECJ in *Volvo v. Veng*<sup>5</sup>, where the Court found that the holder of the exclusive right to registered design for case parts may be found abusing its dominant position in case

<sup>1</sup> Dutch Courier Services, 1989, 12 paragraph.

<sup>2</sup> Spanish post, 1990

<sup>3</sup> „Consequently, the State measure in question, together with the behaviour of the Spanish Post Office, has the effect of limiting supply and technical development within the meaning of Article 86, thus constituting an infringement of Article 90 in conjunction with Article 86 (b) of the Treaty., Spanish post, 1990, paragraph 11.

<sup>4</sup> Opinion of AG Jacobs in Hofner, 1991, paragraph 237.

<sup>5</sup> Volvo v Veng, 1988.

one would cease production of spare parts for a model with still many examples in circulation.

*AG Jacobs*, who delivered his opinion in the case, wasn't as enthusiastic of the position suggested by the Commission. Nevertheless, he admitted that joint actions of German government and AFG placed “*employer or executive <...> in the same situation as the Volvo owner who cannot obtain a new body panel for his car because the proprietor of the registered design for such parts does not manufacture them and refuses to allow anyone else to do so.*”. Respectively, AG Jacobs accepted the principle that “*where national law confers an exclusive right on someone—whether in the form of a patent, a registered design or a monopoly in the provision of certain services—and he fails to produce the goods or services covered by the exclusive right, that failure may amount to abuse of a dominant position <...> The effect of that prohibition is that the exclusive right can no longer be enforced.*”.

In its preliminary ruling delivered in *Hofner* case ECJ accepted the position suggested by the Commission and AG Jacobs by concluding that failure to meet the demand could amount to infringement of Articles 106(1) and 102. As provided by the Court, in the view of Article 102(b) abuse may “*consist in limiting the provision of a service, to the prejudice of those seeking to avail themselves of it*”<sup>1</sup>. Respectively, the infringement could be found in case the State creates a situation in which provision of services is limited due to grant of exclusive right by the State to undertaking, which “*is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind*”<sup>2</sup>. On its turn, liability of the State could be invoked provided that the State “*creates a situation in which a public employment agency cannot avoid infringing Article [102]*”<sup>3</sup>.

### **The Problem of Causal Link between State Actions and Failure to Meet the Demand**

As noted above, Article 106(1) could be invoked in cases, when measures adopted by the State reduce efficiency of Article 102, i.e. there is a *causal link* between State actions and the reduction of efficiency of Article 102. When it concerns the *failure to meet the demand* there are always two parties, which could be liable for such failure to, i.e. the (i) State, which established the legal monopoly; and (ii) the holder of monopoly rights, which actually provides services to customers and fails to deliver goods/services needed by the customer. Respectively, application of Articles 106(1) and 102 TFEU requires considering what should be the role of the State in failure to meet the demand cases in order to call into question its liability under Article 106(1). In other words, what should the causal link between State actions and “*limiting the provision of a service, to the prejudice of those seeking to avail themselves of it*” prohibited by Article 102(b) be?

The problem of causal link always has been subject to extensive debates. The early ECJ case practice suggested that infringement of Article 106(1) and 102 TFEU may be invoked only in such situations, when undertaking is placed by the State in such situation, when undertaking *cannot avoid abusing* its dominant position. In such kind of situations undertaking is effectively deprived from the autonomy of its actions,

<sup>1</sup> Hofner, 1991, paragraph 30.

<sup>2</sup> Hofner, 1991, paragraph 31.

<sup>3</sup> Hofner, 1991, paragraph 26.

hence its liability cannot be invoked under Article 102 TFEU<sup>1</sup>. Nevertheless, in such kind of situations it's quite rational to invoke liability of the State under Article 106(1) as undertaking managed to escape liability for infringement of Article 102 TFEU merely due to intervention of the State<sup>2</sup>.

It the context of failure to meet the demand case, such theory suggests that liability of the State could be invoked only in cases, when the establishment of legal monopoly was the primary reason for failure to meet the demand, i.e. there is *direct causal link* between State actions and the said failure. On the basis of this theory it's possible to invoke the liability of the State only in cases, when the possibility to meet the demand is objectively impossible irrespective of the efforts placed by holder of monopoly rights. This situation could be perfectly illustrated by the example of *Hofner* case discussed above. It was the case of extreme failure to meet the demand and the Court had found that infringement could be established only in case the holder of monopoly rights “*is manifestly not in a position to satisfy the demand prevailing on the market*”<sup>3</sup>. Moreover, the ECJ declared that liability of the State could be invoked in case it “*creates a situation in which a public employment agency cannot avoid infringing Article [102]*”<sup>4</sup>. In other words, liability of the State under Article 106(1) could be invoked only in cases when the holder of monopoly rights objectively “*cannot*” meet the demand available on the market irrespective of the efforts made thereby. Analogous legal test has been employed by the ECJ in *Job Centre II*<sup>5</sup> and *Carra*<sup>6</sup> cases, which also concerned State monopolies for employment agency services, and *manifest* failure of State agencies to meet the demand available on the market.

Following *Hofner* the case practice gradually expanded the scope of State liability under Article 106(1) and 102 TFEU. In the modern case practice liability of the State could be also be invoked in case the State “*is led to abuse its dominant position*”<sup>7</sup>, without necessity even to show that any abuse actually occurred<sup>8</sup>. In this regard, the State may be liable for inducement to commit abusive actions. In such kind of situations, autonomy of undertaking is not restricted to such extent which would prevent invoking its liability for abusive actions under Article 102 TFEU. Nevertheless, the State still may be found liable under Article 106(1) for creation of such situation taking into account that State measures impair preventive effectiveness of Article 102 TFEU.

In the context of failure to meet the demand cases such theory suggests that the State and the holder of monopoly rights could be *jointly liable* for failure to meet the demand. Respectively, infringement of Articles 106(1) and 102 should be assessed from the perspective *consequences*, i.e. in case there is demand available on the market and such demand is not satisfied by the holder of monopoly rights it's immaterial whether such failure was caused by actions of the State or inefficiency of the holder of monopoly rights. In other words, application of this theory suggests that liability of the State under Article 106(1) could be invoked in case the holder of monopoly rights “*is not willing or able to carry out that task fully, according to the*

<sup>1</sup> Ladbroke, 1995, Atlantic Container, 2003, paragraph 1130; Deutsche Telekom, 2010, paragraph 80;

<sup>2</sup> Buendia Sierra, 1999, p.152-153.

<sup>3</sup> Hofner, 1991, paragraph 31.

<sup>4</sup> Hofner, 1991, paragraph 26.

<sup>5</sup> Job Centre II, 1997

<sup>6</sup> Carra, 2000

<sup>7</sup> Greek Lignite, 2014, paragraph 41; MOTOE, 2008, paragraph 49.

<sup>8</sup> Greek Lignite, 2014, paragraph 42; MOTOE, 2008, paragraph 50.

*demand existing on the market*<sup>1</sup>. This causal link theory has been suggested by the Commission to ECJ in *Hofner* case and employed in all infringement cases considered by the Commission (*Dutch Courier Services*<sup>2</sup>, *Spanish post*<sup>3</sup>, *Italian GSM*<sup>4</sup>, *Spanish GSM*<sup>5</sup>, *Slovenska posta*<sup>6</sup> cases).

Interestingly, since 1989 when the Commission has adopted its decision in *Dutch Courier Services* case none of its decisions in failure to meet the demand cases has been appealed to ECJ. The lack of such appeal led to quite an odd situation. The Commission kept its original position and considered that failure to meet the demand cases should be analysed from the perspective of consequences and it's immaterial to consider, whether failure to meet the demand has been caused by the State or the holder of monopoly rights. On its turn, ECJ in *Job Centre II*<sup>7</sup> and *Carra*<sup>8</sup> cases applied direct causal link theory and was ready to accept infringement only in case the State alone was liable for failure to meet the demand. In subsequent *Albany*<sup>9</sup>, *Pavlov*<sup>10</sup>, *Ambulanz Glocker*<sup>11</sup> and *AG2R*<sup>12</sup> cases ECJ has shown some signs that joint liability test supported by the Commission could be accepted. Potential acceptance of joint liability test was also suggested by the general evolution of Article 106(1) and 102 TFEU case law. Nevertheless final position of the Court remained unclear. Respectively, to major extent the outcome of the case depended on the institution considering the claim, which is obviously not an acceptable form from the perspective of legal certainty. Nevertheless, the situation is about to change in the nearest future taking into account that decision adopted by the Commission in 2008 in *Slovenska Posta* case<sup>13</sup> has been appealed to the General Court, which delivered its judgement in 2015<sup>14</sup> and the appeal before the ECJ in this case is currently pending.

### Which Theory to Apply: Pros and Cons

Prior to discussing details of *Slovenska Posta* case it is worth considering pros and cons of direct causal link test suggested by the ECJ and joint liability test suggested by the Commission.

Without any doubt, the strongest point of direct causal link theory is legal certainty provided to the State in making its decision on the establishment of a monopoly for certain goods and services. At the outset of such decision the State can make *ex ante* assessment whether the decision to monopolise certain business areas would be in compliance with Article 106(1) and 102 TFEU. In case the State has reasonable grounds to believe that a sufficiently effective holder of monopoly rights would be able to satisfy the demand available on the market, such monopolisation

<sup>1</sup> Such test has been suggested by European Commission in *Hofner* case (see Hofner, 1991), paragraph 18

<sup>2</sup> Dutch Courier Services, 1989.

<sup>3</sup> Spanish post, 1990

<sup>4</sup> Italian GSM, 1995

<sup>5</sup> Spanish GSM, 1996

<sup>6</sup> Slovenska posta, 2008

<sup>7</sup> Job Centre II, 1997

<sup>8</sup> Carra, 2000

<sup>9</sup> Albany, 1999

<sup>10</sup> Pavlov, 2000

<sup>11</sup> Ambulanz Glöckner, 2001

<sup>12</sup> AG2R, 2011

<sup>13</sup> Slovenska posta, 2008

<sup>14</sup> Slovenska posta, 2015

would be shielded from the objections raised on the basis of Article 106(1) applied in conjunction with Article 102 TFEU. Obviously, such legal certainty is not offered having accepted joint liability test suggested by the Commission. In fact, once joint liability test is applied the State cannot be entirely sure, whether monopolisation decision shall be in compliance with Articles 106 and 102. Compliance of the legal monopoly would depend on the effectiveness of the holder of legal monopoly (i.e. whether it's capable to meet the demand available in the market). Moreover, the legality of legal monopoly would become dynamic phenomena as monopoly could be found illegal from the perspective of Articles 106 and 102 TFEU, when services requested by customers would not be provided. Nevertheless, the same monopoly could turn to be perfectly legal once services demanded by the customers would be accordingly offered.

The lack of legal certainty in joint liability theory was strongly criticized by *AG Jacobs* in *Albany*<sup>1</sup>. As provided by *AG Jacobs*, Articles 106(1) and 102 TFEU „cannot be the appropriate legal basis for holding Member States responsible for independent anticompetitive behaviour on the part of undertakings merely because it takes place within their jurisdiction. Article [106(1)] can therefore be infringed only where there is a causal link between a Member State's legislative or administrative intervention on the one hand and anticompetitive behaviour of undertakings on the other hand. The Court has held that in the context of Article [106(1)] alleged abuses must be the “direct consequence” of the national legal framework “<sup>2</sup>. Joint liability test has also been criticised by *AG Tesouro* in *Corbeau* case. As provided by *Tesouro*, Articles 106(1) and 102 should not constitute means of evaluating the economic efficiency of a national monopoly. If monopoly is legally justifiable „it is of little importance whether it is more or less effectively managed; in any event it will have to be regarded as consistent with the Treaty, whilst it will be for the national authorities to apply themselves to improving the quality of the services provided. Any other solution, moreover, would have the consequence that a national system conferring exclusive rights would be permissible in one case and prohibited in another, depending on how efficiently or, to put it another way, how ably and correctly the entity possessed of the exclusive right was managed.”<sup>3</sup>. In other words, *AG Tesouro* considered that compliance of the legal monopoly with Articles 106(1) and 102 could not be dependent on the effectiveness of the holder of monopoly rights, which again leads to conclusion that inability to meet the demand should be considered as the *direct consequence* of State actions in establishing such monopoly.

It should be accepted that criticism expressed by *AG Tesouro* and *AG Jacobs* seems to be perfectly rational as joint liability theory does not bring any legal certainty for the State, which considers establishment of a monopoly. Nevertheless, direct causal link supported thereby has one material deficiency – it does not solve the problem faced by “*Volvo owner without spare parts*”, which historically led ECJ to admit that inability to meet the demand could amount to infringement of Articles 106(1) and 102 TFEU. Indeed, the application of direct causal link theory does not offer any legal protection to the customer having very specific needs, i.e. goods and services needed by specific customer are not offered by the holder of monopoly rights

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<sup>1</sup> Opinion of *AG Jacobs* in *Albany*, 1999.

<sup>2</sup> See paragraph 388 of *AG Jacobs* opinion in *Albany*, 1999.

<sup>3</sup> See paragraph 16 of *AG Tesouro* opinion in *Corbeau*, 1993.

and simultaneously the customer is, by the State, prevented from approaching any alternative suppliers who would be ready to adopt to his needs.

It could also be doubted whether AG *Jacobs* was correct to assume that application of joint liability theory makes the State liable “merely because [infringement] takes place within their jurisdiction”<sup>1</sup>. Looking from the broader perspective AG *Jacobs*’ statement does not seem to be entirely correct. Indeed, it would be rather inaccurate to say that having established the legal monopoly the State completes its mission and does not have any relation to actions performed by the operator of such monopoly. The establishment of the legal monopoly involves a long-standing commitment of the State towards protection and supervision of such formation. The State devotes its enforcement mechanisms for protection of the monopoly, e.g. police and court system, which ensure judicial intervention into the business area covered by the monopoly<sup>2</sup> and refuses the protection of legal interests of those providing services in contradiction to the legal monopoly<sup>3</sup>. All such State enforcement mechanisms ensure on constant basis that customers purchase goods/services from the holder of monopoly rights, meaning that State liability in *failure to meet the demand cases* does not arise “merely because [infringement] takes place within their jurisdiction”. On the contrary, State liability arises due to *active* participation of the State in protection of legal monopoly, which enables the holder of monopoly rights to present customers with goods/services, which not necessarily meet their needs.

Quite similar approach was offered by Monti<sup>4</sup> and Manaridou, which considered that State liability in such situation, could arise for failure to take the appropriate actions to eliminate such anticompetitive consequences (i.e. passive actions). As suggested by Manaridou, in case the failure to meet the demand is caused by inefficiency of undertakings, the State can be held liable “*for maintaining an exclusive right in force if it does not intervene to make good the inefficiency or if other companies are better equipped to provide the same service.*”<sup>5</sup> In other words, the State has obligation to monitor effectiveness of monopolies and may be held liable under Article 106(1) TFEU in case the State fails to take appropriate measures to eliminate anticompetitive actions resulting from such monopolization, i.e. failure to meet the demand<sup>6</sup>.

Even in case the above grounds for State liability would be rejected, there would be nothing odd to consider that State liability could arise from the actions of holder of monopoly rights without any fault of the State. Indeed, many European legal systems accept liability without fault in special cases. E.g. in Lithuania the State is liable for the all damage done by wild animals<sup>7</sup>. In this regard, it should be recalled that State monopolies are created by the State in clear understanding that customers shall be deprived from the possibility to choose alternative suppliers to satisfy their specific needs. Moreover, operation of such monopolies is usually entrusted to State-owned operators controlled by State authorities and supervised by national regulatory authorities. Therefore, it seems rather rational to accept that in such cases liability of

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<sup>1</sup> See paragraph 388 of AG *Jacobs* opinion in Albany, 1999.

<sup>2</sup> E.g. Carra, 2000.

<sup>3</sup> E.g. Hofner, 1991.

<sup>4</sup> Monti, 2007, 449.

<sup>5</sup> Manaridou, 2015, p. 430.

<sup>6</sup> See also Kersting, 2011, p.475.

<sup>7</sup> AB „If draudimas“ v. Republic of Lithuania, 2009.

the State could arise without (objective) fault. It was the State which created the monopoly with clear understanding that monopoly markets cease to innovate and does not achieve productive efficiency, and it was the State which had a possibility but failed to establish an adequate control mechanism to protect interests of consumers. Respectively, there are all reasonable grounds to believe that the State could be held liable for failure to meet the demand even in case we accept that all fault for not meeting the demand falls on the inefficient holder of monopoly rights. This seems particularly true considering that the State has much more possibilities to control monopolies created thereby than any actions done by wild animals.

Quite similar critics could be directed to the position held by AG *Tesauro* in *Corbeau*<sup>1</sup>. As noted above, AG *Tesauro* considered that infringement of Articles 106(1) and 102 could not depend on the *effectiveness* of holder of monopoly rights, as such legal test would result in the dynamic legality of legal monopoly. In particular, legal monopoly could turn illegal and *vice versa* depending on the ability of the holder of monopoly rights to offer goods/services requested by its customers, although legislation establishing such monopoly would remain the same. Moreover, the same legal monopoly in one Member State could be considered compliant with Articles 106(1) and 102 TFEU and incompliant in another again subject to effectiveness of the holder of monopoly rights. In other words, joint liability test would not provide Member States with sufficient legal certainty in creating monopolies.

In this regard, it should be admitted that necessity for legal certainty corresponds to absolutely rational interests of Member States. Nevertheless, there is nothing in the law to suggest that Member States should be provided with such comfort. It should be noted that Article 102 requires dominant undertakings to run constant review of their business practices aiming to avoid abuse of dominant position. For example, in case the company in a dominant position does not increase its prices to cover production costs, such company could be found engaging in predatory pricing irrespectively that prices of such company remained the same for number of years. Having admitted that Article 106(1) operates as a reference rule and merely mirrors the content of Article 102, it does not seem odd to accept that compliance of legal monopoly with Articles 106(1) and 102 could change during passage of time in the same manner as could change compliance of business practices of dominant undertakings with Article 102. This was also accepted in the doctrine, e.g. Monti, Kersting and Manaridou.

Having responded to the criticism expressed by AG Jacobs and AG *Tesauro*, its worth adding that acceptance of joint liability theory appears to be material prerequisite to ensure effective enforcement of law in failure to meet the demand cases. In this regard it should be noted that direct causal link theory requires proving that holder of monopoly rights objectively *cannot* provide certain goods/services irrespectively of its efficiency, i.e. the State alone is liable for the failure to meet the demand. In most cases customers are perfectly aware that they don't receive goods/services they need; however they don't have detailed information on the obstacles, which leads to failure to meet their demand. Even in case they could name the obstacles, it would be rather impossible for them to explain in detail, whether such obstacles could not be remedied by the efficient operator of monopoly rights. Moreover, any claim resulting from the customers could be easily rejected by the court by having admitted that company holding monopoly rights in principle is capable to provide the

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<sup>1</sup> Corbeau, 1993.

requested goods/services, however such supply shall be offered at some point of time in the future (e.g. when they will have more resources). It's rather doubtful whether this kind of claim could be proven to the requested legal standard even by the Commission. Respectively, having accepted that direct causal link theory should prevail, it should also be accepted that infringement of Article 106(1) and 102 could be invoked only in an extreme failure to meet the demand cases, which were considered in *Hofner*, *Carra* and *Job Centre II*. In this regard it should be admitted that effective protection of consumers could only be ensured by having admitted that the State and holder of monopoly rights are jointly liable for failure to meet the demand. In other words, it would be merely required from the customer or competition authority to prove that holder of monopoly rights “*is not willing or cannot provide*” certain goods and services, i.e. there is real demand for such goods/services and such demand is not satisfied.

### **Slovenska Posta: Time for Reconciliation**

As noted above, *Slovenska posta* case is the most recent and very important case as this was the first case, where Commission decision in failure to meet the demand case has been appealed to EU courts. The case concerned extension of Slovak postal monopoly into hybrid-mail services. Having extended such monopoly major, customers have been forced to purchase hybrid-mail services from State-owned postal company (i.e. hybrid mail services *as such* have been provided). Nevertheless they were no longer offered with specific features of such services as delivery of postal items 7 days a week and submission of electronic reports on delivery of postal items, which was previously offered by private operators. All the circumstances of the case suggested that State-owned postal company *could* offer such additional features of hybrid mail services by making some investment, thus failure to meet such demand primarily depended on inefficiency of postal company, rather than the State which extended legal monopoly. Nevertheless, it did not withhold the Commission from finding infringement of Article 106(1) and 102 for failure to meet the demand assuming joint liability of the State and holder of monopoly rights<sup>1</sup>.

Slovak government appealed such decision to General Court, however the court decided to uphold conclusions made by the Commission. Although the court started its analysis by mentioning *Hofner* case, which requires determination of direct causal link, it seems that the court indicated such case merely as example that failure to meet the demand may lead to infringement of Article 106(1) and 102<sup>2</sup>. This becomes clear in subsequent sections, where the court concluded that infringement may be committed once holder of monopoly rights “*is led*” to infringement of Article 102, which correspond to the modern legal test accepted by the ECJ in *Greek lignite*. Such legal test presupposes existence of joint liability, which contrasts with “*cannot avoid infringement*” test employed in *Hofner*, which presuppose sole liability of the State.

And finally determination of the court to accept joint liability test could be derived from confirmation of conclusions made by Commission with respect to infringement committed by Slovak government. The court admitted that failure to offer such minor additional features of hybrid mail services as 7 days a week delivery and delivery of electronic reports could amount to infringement. Taking into account that such services previously were provided by private operators and obviously could

<sup>1</sup> Slovenska posta, 2008, paragraphs 149-155.

<sup>2</sup> Slovenska posta, 2015, paragraph 315.

be provided by holder of monopoly rights, acceptance of the existence of infringement leads us to a very clear conclusion that General Court presupposes joint liability of the State and holder of monopoly rights for failure to meet the demand. In this regards the General Court

### Conclusions

Absence of appeal on the Commission decisions in failure to meet the demand cases led to quite a peculiar situation that the ECJ and the Commission have developed their own legal tests, which are supposed to be applied in such cases. This divergence of views is mostly evident with respect to causal link, which needs to be determined between State actions and failure to meet the demand by the holder of monopoly rights. The ECJ considered that there should be *direct causal link* between the State measures and failure to meet the demand, which presupposes that the State measures should be the *sole* reason of such failure. On its turn, the Commission was ready to consider that the State and the holder of monopoly rights are jointly liable for the said failure, hence infringement may be found merely having determined that there is clear demand available on the market, which is not satisfied by the holder of monopoly rights.

Joint liability test suggested by the Commission has been criticised by AG Jacobs and AG Tesouro due to lack of legal certainty provided for the States, which is considering an establishment of a legal monopoly, and dynamics of infringement. Nevertheless, this research paper suggests that there is nothing in the law, that would support the application of *direct causal link*. Moreover, application of joint liability test is rational taking into account that the State actively contributes to the limitation of supply in failure to meet the demand cases by the entire State enforcement mechanism or fails to employ such mechanism to eliminate anticompetitive consequences caused by monopolisation.

Alternatively, it would be quite rational to keep the State liable even without fault in the same manner as the State is liable for damage done by wild animals. Economic doctrine suggests that monopolies don't have sufficient incentives to innovate. In case the State decides to disrespect this principle and does not establish a sufficient supervision mechanism, the State should be ready to accept all consequences stemming from the operation of the monopoly, including failure to meet the demand. This research paper also suggests that it's rather impossible to prove the infringement on the basis of direct causal link test, hence effective deterrence and enforcement could be achieved only having accepted joint liability of the State and the holder of monopoly rights.

Finally, this research paper takes a note that most recent *Slovenska Posta* case tends to reconcile different positions of the Commission and European Courts. General Court already accepted that joint liability test should prevail in failure to meet the demand cases concurring with the most recent ECJ case practice adopted in *Greek lignite*. Nevertheless, the appeal against such decision has been submitted, hence it shall be clear whether application of the joint liability test shall finally be confirmed by the ECJ quite soon.

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