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FAILURE TO MEET THE DEMAND AS INFRINGEMENT OF ARTICLES 106(1) AND 102 TFEU: THE NOTION OF FAILURE TO THE MEET THE DEMAND

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Abstract

Purpose – this paper analyses the application of Article 106(1) and Article 102 of the Treaty of the Functioning of the European Union (TFEU) with respect to situations, when statutory monopolies fail to satisfy demand of their customers. This research paper specifically concentrates on the nature of "*failure*", which needs to be determined for the purpose of infringement. On its turn, causality between such failure to meet the demand and actions of the State, which makes the State liable for the actions of holder of monopoly is discussed in detail in Article "*Failure to meet the demand as infringement of Articles 106(1) and 102 TFEU: the problem of causal link*" also published in this journal.

Design/methodology/approach – theoretical analytical and systematic methods had been applied in the research.

Finding – for more than two decades the European Commission and the European Court of Justice (ECJ) have applied different legal tests in determining failure to meet the demand in Articles 106(1) and 102 TFEU cases. In the early case practice ECJ has taken the conservative approach and has been ready to invoke failure to meet the demand in rather extreme cases of failure. At the same time the Commission stood for more stringent legal test. It was ready to invoke infringement whenever factual circumstances suggested that some demand is left unsatisfied by the holder of statutory monopoly. *Slovenska posta* case seems to reconcile these two different approaches admitting that failure to meet the demand requires simple failure to meet specific demand of customers.

Research limitations/implications – as the doctrine is mostly silent on the notion of failure to meet the demand, this research is mostly based on the analysis of case law, which is rather scarce at the present stage of development of the law. Respectively, findings presented in this paper reflect *status quo* of the case law and doctrine, however some developments could be expected in the future.

Practical implications – absence of clear understanding what particular actions could be considered as failure to meet the demand for the purpose of Articles 106(1) and 102 TFEU implicates great legal uncertainty. Analysis provided in this paper enables to understand and interpret decisions adopted by the Commission and ECJ within last two decades. Such analysis also enables to list down parameters, which should be employed considering whether a customer may invoke infringement of Article 106(1) and 102 TFEU in case the holder of a statutory monopoly fails to meet his (the customer's) personal interests.

Originality/Value – it is widely accepted in the legal doctrine that failure to meet the demand could result in infringement of Articles 106(1) and 102 TFEU. Nevertheless, in this regard doctrine mostly refers to *Hofner* test developed by ECJ claiming that infringement shall result from "*manifest failure to meet the demand*". Nevertheless, there is lack of comprehensive analysis in the legal doctrine on the nature of "failure", which may lead to infringement. To some extent this problem was addressed by Monti, Manaridou and Kersting.

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However, their analysis touched upon only certain issues of causal link and nature of failure as such and does not take into account evolvements in the most recent case practice.

Such analysis is provided in this research paper.

Keywords: failure to meet the demand, statutory monopoly, exclusive rights, Article 106(1) TFEU.

Research type: survey.

Introduction

In the European Union law, the status of statutory monopolies has always been subject to controversial debate. For many years after establishment of the European Community statutory monopolies has been perceived by Member States as symbol of their national identity[1]. Nevertheless, having decided to complete creation of Single European Market by 31 December, 1992, the existence of statutory monopolies has been challenged from different legal perspectives. As noted by *Szyszczak* liberalisation has been mostly initiated by internal market provisions, however competition rules were "*viewed as a crowbar, or can opener for greater market liberalization*"[2]. In this regard, special mission has been given to Article 106(1) applied in conjunction with Article 102 TFEU, which prevents Member States from maintenance of measures impairing the effectiveness of abuse of dominant position prohibition. Such legal instrument has been effectively used to protect the process of competition by eliminating market structures, leading to abuse of dominant position (e.g. conflict of interest), or challenging measures, placing undertakings in a situation, which they could not achieve without abusing their dominant position (e.g. extension of dominant position by legal measures).

Such legal instrument has also been used to protect interests of consumers, which are primarily injured by the existence of inefficient monopolies. Such instrument entitles consumers to liberate themselves from constrains of legal monopoly in situations when the holder of monopoly rights fails to meet their needs. For several years, such legal instrument in the EU case practice has been invoked rarely, however following ECJ decision in *Greek lignite*[3] case and on-going litigation in *Slovenska posta*[4] case clearly reminded that Article 106(1) and 102 TFEU are still active and could employed by the consumers *inter alia* to liberate themselves from ineffective monopolies[5].

Evolution of Case Law in Failure to Meet the Demand Cases

The case law in failure to meet the demand cases has been quite controversial for a long time. The conceptual idea that the failure to meet the demand could impair the effectiveness of Article 102 TFEU (and thus lead to State liability under Article 106(1) TFEU) could be traced back to *Dutch Courier Services*[6] decision adopted by the Commission in 1989. In this case the Commission considered, whether extension of

[1] Karayigit, 2009, p. 575.
[2] Szyszczak, 2009, p. 1741.
[3] Greek Lignite, 2014.
[4] Slovenska posta, 2015.
[5] Szyszczak, Services of General Economic Interest and State Measures Affecting Competition., 2015.
[6] Dutch Courier Services, 1989.

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statutory postal monopoly to express delivery services by Dutch government could amount to infringement of Article 106(1) and 102 TFEU. The Commission has declared the presence of infringement *inter alia* for the reason that the State measure has in fact adversely affected customers who were deprived of "*a service of the same quality, as the Netherlands post office and its EMS service are not as yet offering an express delivery service of comparable reliability or speed*". Such infringement has been found by the Commission irrespective of the fact that following intervention of Dutch government customers could still use services provided by private courier companies by accepting to pay higher prices determined by the State.

In *Dutch Courier Services*[1] the Commission did not elaborate on the conceptual grounds for finding such infringement or the criteria, which should be determined in failure to meet the demand cases. Nevertheless, decision adopted by the Commission suggested that failure to meet the demand could be found in rather daily-life situations. Liability of the State does not require establishment that customers were *totally* deprived from some services (e.g. in *Dutch Courier Services* customers could still use post services and and/or purchase express delivery services at higher price). It is rather sufficient to determine that customers are prevented from getting services of some *quality*, which they actually need.

The conceptual grounds for such kind of infringement have been explained by the Commission in *Spanish post*[2] decision adopted a year later. The factual circumstances of the latter case were very similar to the ones considered in *Dutch Courier Services*[3], although in *Spanish post* extension of statutory monopoly had much stronger negative effect on customers. Following extension of monopoly provision of courier services by private companies were fully prohibited. Such extension took part irrespective of the fact that comparable services provided by State-owned postal company at that time did not even cover the whole territory of Spain and entitled customers to reach only the largest destination points. Following the example of *Dutch Courier Services*[4] the Commission has admitted that extension of statutory monopoly has resulted in infringement of Article 106(1) and 102 TFEU *inter alia* for the fact that statutory monopoly failed to meet the demand existing on the market. Nevertheless, at this time the Commission additionally explained the conceptual grounds for such infringement – State measures were considered illegal as they lead to effects similar as the ones prohibited by Article 102(b) (i.e. limitation of supply and technical development by the dominant undertaking)[5].

None of these decisions has been appealed before the ECJ, therefore it remained largely unclear, whether interpretation suggested by the Commission could survive the judicial review. Such legal uncertainty remained until *Hofner* case decided by ECJ in 1991 where ECJ delivered its preliminary ruling concerning failure to meet the demand by the State employment agency, which held statutory monopoly in employment intermediation services. *Hofner* concerned a rather extreme example of failure to meet the demand. Irrespective of the existence of statutory monopoly, governmental employment agency managed to intermediate only in ~28% of

[1] Dutch Courier Services, 1989.
[2] Spanish post, 1990.
[3] Dutch Courier Services, 1989.
[4] (Dutch Courier Services, 1989.
[5] „*Consequently, the State measure in question<...> 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.

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employments of higher tier managers, while such demand has been generally satisfied by 700-800 private intermediation companies[1]. Moreover, the holder of statutory monopoly publicly declared its inability to meet the demand and invited private companies to provide their services falling within the limits of its monopoly.

In the latter case Commission suggested ECJ followed its approach taken in *Dutch Courier Services*[2] and *Spanish post*[3] cases. Such position has been upheld by *AG Jacobs*, who delivered his opinion in the case. In particular, the Commission recalled the Court on *Volvo v. Veng*[4] decision. ECJ accepted that infringement of Article 102 TFEU could take part in case dominant undertaking having exclusive rights to the registered design of spare parts would cease to "*produce spare parts for a particular model even though many cars of that model are still in circulation.*" The Commission considered that failure to meet the demand by the statutory monopoly caused exactly the same effect on consumers, who were not offered with required services by statutory monopoly and simultaneously were prevented by the State of acquiring these services from alternative suppliers. In result, statutory monopoly considered in *Hofner* case placed the "*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.*"[5].

In its preliminary ruling ECJ concurred with the position suggested by the Commission and accepted that failure to meet the demand indeed could amount to infringement of Articles 106(1) and 102 TFEU. ECJ also accepted that failure to meet the demand reduces effectiveness of prohibition contained in Article 102(b) TFEU, i.e. prevention of actions "*limiting the provision of a service, to the prejudice of those seeking to avail themselves of it*"[6]. Nevertheless, ECJ noted that this kind of infringement could be invoked in case a holder of statutory monopoly "*is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind*"[7]. The reasoning used by Commission in *Dutch Courier Services*[8] and *Spanish post*[9] referred to failure *per se* and did not take into account the gravity of such failure. Thus the reference of the Court to "manifest" failure in *Hofner* case resulted in legal confusion.

Hofner case confirmed that *failure to meet the demand* indeed could amount to infringement of Article 106(1) and Article 102 TFEU. However, the approach of ECJ and Commission with regards to legal standard applied for the assessment of such failure diverged. The Commission's decisions in postal cases suggested that *mere* failure to provide services could be sufficient for the purpose of finding the infringement. At the same time ECJ position in *Hofner* case suggested that failure to meet the demand should be sufficiently weighty in order such failure could be described as "*manifest*".

[1] Opinion of AG Jacobs in Hofner, 1991, paragraph 237.
[2] Dutch Courier Services, 1989.
[3] Spanish post, 1990.
[4] Volvo v Veng, 1988.
[5] Opinion of AG Jacobs in Hofner, 1991.
[6] Hofner, 1991, paragraph 30.
[7] Hofner, 1991, paragraph 31.
[8] Dutch Courier Services, 1989.
[9] Spanish post, 1990.

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Interestingly, until 2015, none of the Commission decisions in failure to meet the demand cases were appealed to the ECJ. Hence, it remained unclear what legal standard should be applied considering whether particular failure of statutory monopoly may result in infringement of Articles 106(1) and 102 TFEU. In order to bring more clarity in this respect, this paper analyses evolution of ECJ and Commission's case law aiming to reveal how should *Hofner* test be interpreted in the context of subsequent case law and the most recent decision of General Court in *Slovenska posta* case.

Approach of ECJ: "*Manifest*" Failure is Required

The ECJ's practice in failure to meet the demand cases has been developed through preliminary rulings, whereby the ECJ provided guidance to national courts on interpretation of EU law without facing the necessity to apply such guidance with respect to specific circumstances of the case. Many of decisions in failure to meet the demand cases were provided with regards to legal justification offered by Article 106(2) TFEU. This practice deprived the ECJ from the possibility to explain its position on the criteria, which needs to be assessed in aiming to determine failure to meet the demand leading to State liability under Article 106(1) TFEU. For this reason, *Hofner* and *Job Centre II* still remain the most extensive decisions, which explain application of Articles 106(1) and 102 TFEU in failure to meet the demand cases. In particular, these ECJ decisions explain (i) the intensity of failure, which needs to be determined for the purpose of infringement; and (ii) the context in which such failure should be considered.

As noted above, *Hofner* case suggests that failure to meet the demand could amount to infringement of Article 106(1) and Article 102 TFEU only in case the supplier "*manifestly*" fails to meet the demand. The ECJ did not provide any guidance, that should be employed aiming to determine, whether the failure of statutory monopoly should be considered as "manifest". Although, analysis of ECJ case law suggests that understanding what could be considered as "*manifest*" failure changed over time significantly.

In the early case practice (*Hofner (1991)* and *Job Centre II*[1] *(1997)*) ECJ considered rather extreme examples of failure to meet the demand of public employment offices. Irrespective of the effort placed by the holder of monopoly rights all the circumstances of the case suggested that total demand on the market could not be satisfied for objective reasons: neither then, nor at any time in the future. As declared by ECJ in *Job Centre II* case, "*on such an extensive and differentiated market, which is, moreover, subject to enormous changes as a result of economic and social developments, public placement offices may well be unable to satisfy a significant portion of all requests for services*"[2]. In the perspective of such extraordinary circumstances of the case the Court was able to conclude that failure to meet the demand is "*manifest*" without even conducting any further analysis.

Such case practice induced some commentators to believe that failure to meet the demand could amount to infringement of Article 106(1) and 102 TFEU only in extreme cases. For example *AG Jacobs* in *Albany* noted that infringement in *Hofner* and *Job Centre II* cases was declared "*owing to the specific economic context and the nature of*

[1] Job Centre II, 1997.
[2] Job Centre II, 1997, paragraph 34.

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the services involved, the monopolist could not avoid abusing its dominant position by constantly "limiting production, markets or technical development to the prejudice of consumers" within the meaning of Article 86(b)." In the opinion of *AG Jacobs*, it was the exceptional circumstances the Court felt justified in making a real exception to the principle of not challenging Member States' freedom to grant exclusive rights. Respectively, "*by referring in Höfner to an undertaking manifestly not in a position to satisfy demand the Court made it clear that it exercises only marginal review of the legality of monopolies*"[1].

Interpretation of law suggested by *AG Jacobs* seems rather reasonable. Nevertheless, as the Court itself was silent on meaning provided to the concept of "manifest" failure in *Hofner* case, it could be also claimed that such reference merely reflected factual circumstances of the case. Classification on this point has been provided by the ECJ in *Pavlov case* decided in 2000.

Pavlov case concerned the mandatory obligation to participate in State-owned pension funds. The claimants did not challenge participation in state-owned pension fund *per se*, instead, they intended to change one state-owned fund for another. In delivering its decision, the Court repeated that such situation could be analysed from the perspective of legal test formulated in *Hofner* case (i.e. that *manifest* failure to meet the demand could amount to infringement). Nevertheless, the Court rejected the presence of infringement for the lack of evidences: "*There is no evidence in the case-file <…> that <…> pension services offered by the Fund might not meet the needs of medical specialists*"[2]. Reference to "manifest" inability (not just inability) to meet the demand without any evidence in the file enabling to compare conditions offered by pension funds, clearly suggests that "manifest" failure should be considered as separate legal criteria and not the mere reflection of the factual circumstances of the case.

As noted above, in addition to the intensity of failure, *Hofner* and *Job Centre II* also provided some guidance on the context in which such manifest failure should be considered. This is a very important question as different context of assessment may lead to very different conclusions as to the failure to meet the demand. Importance of the problem could be illustrated by the example of public transportation. Should we consider that failure to meet the demand must be considered from the perspective of an *individual* customer/service, we could invoke infringement in case public transportation services would not be suitable for disabled people (100% of the disabled do not receive service). Nevertheless, should we accept that failure must be assessed from the perspective of *average* customer, failure to meet the needs of disabled would not result in infringement, as public transportation services are suitable for 99% of the population.

As noted above, in the *Hofner* case the ECJ considered the failure to meet the demand of public employment agency, which held monopoly over entire employment intermediation services. Although, factual circumstances of the case suggested that statutory monopoly is not able to meet the demand in all types of intermediation services, ECJ concentrated only on the ability to meet the demand of services falling within the ambit of dispute (employment of higher tier managers) and concluded infringement of Articles 106(1) and 102 TFEU only with respect to such services. Thereby the ECJ suggested that failure should be analyzed from the perspective of

[1] Opinion of AG Jacobs in Albany, 1999, paragraph 408, 409.
[2] Pavlov, 2000, paragraphs 127, 128.

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each type of services, rather than the total scope of statutory monopoly. On its turn, failure to provide some type of service does not invalidate the entire statutory monopoly entrusted on undertaking[1].

Such position has been confirmed by the ECJ in *Job Centre II*, which considered very similar situation to the one considered in *Hofner*. *Job Centre II* concerned refusal to grant licence for private company, which intended to provide various employment intermediation services falling within the ambit of statutory monopoly. In this regard *AG Elmer* noted that employment intermediation market is very diverse, thus assessment of the Court should be made with respect to each separate *market* and *sub-market* covered by monopoly. Although Elmer did not provide it explicitly, the overall reasoning seems to suggest that analysis should be made separately for each *relevant market* falling within the statutory monopoly[2].

By delivering its judgement the Court did not adhere to the proposal submitted by *AG Emler*. Instead, the Court indicated that national courts should make its assessment with respect to each *activity* (which is even narrower than the relevant market) falling within the monopoly: "*A Member State which prohibits <u>any activity</u> as an intermediary between supply and demand on the employment market, whether as an employment agency or as an employment business, unless carried on by those offices, is in breach of Article 90(1) of the Treaty where <…> the public placement offices are manifestly unable to satisfy demand on the market <u>for all types of activity</u>".* As suggested by Olson[3] and Blum[4] by such reasoning ECJ extended the grounds of liability of the State for failure to meet the demand by the statutory monopoly. In their opinion entire legal monopoly could amount to infringement of Article 106(1) and 102 TFEU in case holder of monopoly rights was not able to provide any of the services falling within the ambit of monopoly. Although careful analysis of the reasoning provided by the court does not seem to uphold interpretation suggested by Olson and Blum. Indeed, in *Job Centre II* the court declared that infringement could be committed once statutory monopoly is unable to meet the demand *for all types of activity*, however such statement has been given only with regards to such State measures, which prohibit *"any activity"* of competing undertakings. In other words, the Court merely stated that the *entire* statutory monopoly is invalid once the holder of monopoly rights ceases to meet the demand for the *entire* services, which brings the Court back to the reasoning suggested in *Hofner*. Irrespective of the fact that *Job Centre II* was not as extensive as suggested by Olson and Blum, such decision still remains important for the development of the case law. *Job Centre II* made it clear that the assessment of failure to meet the demand should be made in the context of each service ("*any activity*") rather than relevant market or entire monopoly.

Respectively, following *Hofner, Job Centre II* and *Pavlov* position of the ECJ could be summarized as follows: (i) failure to meet the demand must be "manifest"; (ii) failure is not necessarily related to *absolute* failure to provide the respective service – failure to provide services of appropriate *quality* could be sufficient (in *Hofner* and *Job Centre II* intermediation services were performed, however deficiently); (iii) failure should be assessed in the context of *each service* falling within the scope of monopoly.

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[1] Hofner, 1991, paragraph 86.
[2] See Opinion of AG Elmer Job Centre II, 1997, parapgraphs 55, 56, 60 of AG Elmer. See also Olson, 1998, p. 626.
[3] Olson, 1998.
[4] Blum & Logue, 1998, p. 626.

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The subsequent decisions adopted by the ECJ in failure to meet the demand cases mostly concerned with the possibility to justify failure to meet the demand on the basis of Article 106(2). Hence they provided only with some hints on the legal test, which should be applied considering failure to meet the demand. The most important of such cases is *Ambulanz Glockner* considered by the Court in 2001. This case concerned statutory monopoly of ambulance transportation services. The claimant stated that state-owned company failed to meet the demand available on the market as *inter alia* on certain occasions he failed to arrive to the destination within the statutory time limits. Interestingly, in this case opinion again was delivered by *AG Jacobs*, who explicitly stated in *Albany* that failure to meet the demand could be established only in extreme cases. In *Ambulaz Glockner* AG Jacobs was much more ready for compromise. In the opinion delivered to the Court Advocate General repeated his perception that infringement of Article 106(1) and 102 TFEU requires "manifest" failure to meet the demand. Nevertheless, in this case *AG Jacobs* associated such legal criteria with difficult economic and social assessment criteria, which legitimize some margin of discretion for the Member States, rather than possibility of the ECJ to intervene into exclusive competence of Member States on exceptional / marginal cases as suggested in *Albany*.

Such compromise approach could be found in the specific guidance for the national courts provided by *AG Jacobs*. As suggested by the Advocate General, in making its decision a national court should analyse, whether (i) indeed the holder of statutory monopoly rights fails to provide rapid and high quality services at most marginal cases, i.e. even at peak hours; and (ii) whether authorisations for independent service providers would contribute to shorter arrival times and to generally higher quality services. In the affirmative, a national court could declare presence of infringement of Articles 106(1) and 102 TFEU[1]. It's rather obvious that such approach was no longer associated with extreme cases of failure to meet the demand in very specific circumstances. The legal test suggested by *AG Jacobs* merely required the determination that failure to meet the demand is sufficiently *significant*.

Regrettably, in *Ambulanz Glocker* the ECJ did not disclose its position how to interpret the notion of manifest failure for the purpose of application of Articles 106(1) and 102 TFEU. Nevertheless, in explaining the justification established in Article 106(2) TFEU the Court specifically noted that such justification would cease to apply in case holder of monopoly rights would be "*manifestly unable to satisfy demand for emergency ambulance services and for patient transport at all times*" and in this respect the Court concurs with the position suggested by *AG Jacobs*. In remained generally unclear, whether the Court accepted AG Jacobs position solely with respect to interpretation of the notion of manifest failure to meet the demand for the purposes of justification established in Article 106(2) TFEU. Nevertheless, taking into account that *AG Jacobs* in its opinion given the same legal meaning to such failure for the purpose of finding the infringement on the basis of Article 106(1) and 102 TFEU as well as justification on the basis of 106(2) TFEU, such statement of the Court could be interpreted as a hint that manifest failure to meet the demand should be given the same meaning for the purpose of application of both provisions. On its turn, "manifest" failure requires determination that failure to meet the demand appears to be *sufficiently significant*, rather than extreme.

[1] See opinion AG Jacobs in Ambulanz Glöckner, 2001 paragraphs 147-151.

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Ambulanz Glockner completed the saga of failure to meet the demand cases, which were considered by the ECJ in 1999-2001. Thereafter the Court was invited to comment on such infringement only following a decade in *AG2R* (2011) case. In this case Mr. Beaudout challenged mandatory participation in state health insurance scheme claiming that private suppliers are ready to provide him with better insurance conditions. All factual circumstances of the case resembled *Albany*, *Brentjens*[1], *Drijvende Bokken*[2], *Pavlov*[3]. Hence in AG2R ECJ naturally came to the same conclusion that mandatory participation in social schemes is justified by 106(2) TFEU. Nevertheless, the Court also made some hints on the legal standard, which should be applied in the assessment of „manifest" failure to meet the demand. In particular, the Court rejected presence of failure to meet the demand taking into account that the case file lacked evidences suggesting that Mr. Beaudout indeed has been offered with better insurance conditions from private suppliers in comparison to the conditions offered by State owned health insurance scheme[4]. Such reasoning again suggested that assessment of failure to meet the demand could be limited to the *individual* instances and may entail analysis of demand of *each particular customer*. This in turn also suggests that the State may be held liable for maintaining legal monopoly in case operator of such monopoly at any point of time is unable to match quality of services offered by its potential competitors[5].

Approach of the Commission: Simple Failure is Sufficient

Irrespective of the fact that Commission and the ECJ admitted that failure to meet the demand cases could amount to infringement almost at the same time (i.e. 1989-1991), the first decision of the Commission was appealed to the ECJ only in 2015. Such lack of judicial review resulted in quite strange situation that Commission and ECJ developed their own concepts of failure to meet the demand. As noted above, ECJ explicitly accepted that manifest failure to meet the demand could be invoked in *extreme* cases of failure and very slowly moved towards acceptance of the position that infringement could be also declared in situations concerning *significant* failure. On its turn, the Commission always have been the most pro-market institution of the EU, which deemed market liberalisation as its main priority[6]. Thus it was quite natural that the Commission applied much more stringent test and was ready to declare failure to meet the demand in rather daily life situations. For that purpose Commission merely required to prove that there is certain demand on the market and such demand left unsatisfied by the company holding monopoly position.

In *Dutch Courier Services*[7] and *Spanish post*[8] the Commission declared the failure to meet the demand merely having concluded that customers were deprived from the possibility to use services of private companies, without offering services of analogous *quality* by the holder of monopoly rights. In its reasoning the Commission did not suggest that failure to meet the demand must be "manifest", which was quite

[1] Brentjens v Stichting, 1999.
[2] Drijvende Bokken v. Stichting , 199.
[3] Pavlov, 2000.
[4] AG2R, 2011, paragraph 72.
[5] This was also the interpretation of the court decision in AG2R offered by Kersting (see Kersting, 2011).
[6] Olson , 1998, p. 619.
[7] Dutch Courier Services, 1989.
[8] Spanish post, 1990.

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natural taking into account that *Hofner* test has not been introduced by the Court at that time. Despite that, it was quite obvious that Commission has applied a softer legal test. While the Court in *Hofner* required that statutory monopoly *objectively* would not be able to satisfy demand available on the market (irrespective of the efforts placed), in *Dutch Courier Services*[1] and *Spanish post*[2] Commission was satisfied with the fact that services of appropriate quality were not offered at particular moment of time, irrespective of abilities and/or any plans, which the statutory monopoly could have had in the future. In other words, the legal test applied by the Commission suggests that failure to meet the demand could be associated with *simple* failure to provide the service, rather than *extreme* failure suggested by *AG Jacobs* in *Albany*. Moreover, liability of the State could be invoked in the State, which created the legal monopoly, fails to take appropriate measures ensuring that statutory monopoly would be always ready to meet the demand existing on the market[3].

The next couple of cases have been adopted by the Commission in 1995-1996 in *Italian GSM*[4] and *Spanish GSM*[5] cases. Both of these cases concerned provision of second GSM network license at substantial licensing fees for new market entrants, which effectively shielded incumbent telecommunication operators from their competition. In such case Commission accepted presence of infringement on a mere assumption that placing substantial licensing fee on newcomers *might* run against the interests of consumers: such licensing (i) "*might also encourage Telefónica de España to delay the development of the GSM radiotelephony network"; (ii) Telefónica de España <…> might be encouraged to retain higher tariffs for its GSM services than it would in the absence of the State measure in question.*[6]. Interestingly, both of such decisions have been adopted following *Hofner*, however Commission seems to ignore such ECJ practice intentionally as *Hofner* was mentioned only in *Spanish GSM* case and only in context unrelated to the assessment of failure to meet the demand. Moreover, there are no indications in the decisions adopted by the Commission that infringement of 106(1) and 102 TFEU could be invoked only in cases of "manifest" failure. On the contrary, Commission seemed to be satisfied with substantially realistic possibility that unidentified failure caused by the State shall take part in the future.

In this regards, it should be noted that in all those cases assessment of the Commission has been made in the context of interests each particular customer, rather than relevant market or the scope of monopoly. E.g. in *Dutch Courier Services*[7] and *Spanish post*[8] cases Commission seems to accept that some services provided by statutory monopoly would be suitable for consumers (e.g. the ones living in major cities and intending to deliver postal item to major European cities). It could also be the case that provision of such services could satisfy the major part in total demand for express delivery services. Nevertheless, for the Commission it was sufficient that

[1] Dutch Courier Services, 1989.
[2] Spanish post, 1990.
[3] As suggested by Monti and Manaridou in failure to meet the demand case liability of the State is associated with failure to take appropriate measures to ensure that holder of legal monopoly would meet the demand, rather than inducing holder of such monopoly to disregard its customers. See Monti, 2007, p. 449 and Manaridou, 2015.
[4] Italian GSM, 1995.
[5] Spanish GSM, 1996.
[6] Spanish GSM, 1996, paragraph 21.
[7] Dutch Courier Services, 1989
[8] Spanish post, 1990.

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services provided by statutory monopoly were not suitable for *some* customers having different needs (residing in small cities and intending to send post items to less popular destinations).

Slovenska Posta: Time for Reconciliation

The Slovenska posta[1] case is very important for the evolution of case practice in failure to meet the demand cases. It is the first Commission decision in failure to meet the demand case, which was appealed to the Court within two decades. Differently from preliminary rulings adopted by the ECJ, *Slovenska posta* decisions are full of factual circumstances and entitle us to understand how general explanations provided by the Court should be applied in practical situations. Such decision also entitles to reconcile slightly different approaches used in the assessment of failure to meet the demand by the Commission and EU courts.

Slovenska posta case originated in 2008, when the Commission has adopted the infringement decision challenging the decision of Slovak government to extend statutory monopoly of State postal company to hybrid mailing services *inter alia* on the basis of failure to meet the demand. Hybrid mailing services are rather specific mailing services usually required by the clients having demand to deliver large quantities of letters (usually invoices). In provision of such services clients provide service providers with electronic files, which in turn are printed, enveloped and delivered to address specified by the client. Having conducted the investigation Commission concluded that holder of monopoly provided clients with hybrid mail services (i.e. demand for services as such was satisfied). Although *Slovenska posta* did not offer two features of such services, which were previously offered by private companies, i.e. (i) provision of electronic reports on delivery of postal items; and (ii) delivery of mail items 7 days a week. Failure to provide such services was sufficient for the Commission to adopt the infringement decision.

Interestingly, in its reasoning the Commission specifically mentioned that failure to meet the demand should be assessed in the light of *Hofner* test[2]. Nevertheless, it does not follow from its reasoning that Commission sought to determine "manifest" failure to meet the demand by Slovenska posta. In making its decision Commission was rather satisfied with the fact that private suppliers previously offered such features of hybrid mailing services and such services were no longer provided by Slovenska posta. The same conclusion was made with regards to both features of hybrid mailing services, although the facts of the case does not suggest that delivery of mail items 7 days a week was indeed important for any customer. Such decision suggest that in the opinion of Commission infringement may be related to *simple* failure to provide some services or services with specific quality elements, which could be reasonably needed by some consumers[3].

Such approach has been confirmed by the General Court in 2015. The General Court upheld that failure to offer these *two specific features* of hybrid mail services is sufficient to claim infringement of Article 106(1) and 102 TFEU. In making its decision the General Court noted that demand for such features of hybrid mailing service was very different. The case file clearly suggested that major clients for hybrid

[1] Slovenska posta, 2008, Slovenska posta, 2015.
[2] Slovenska posta, 2008, paragraph 149.
[3] Slovenska posta, 2008, paragraphs 150-155.

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mail services provided *high* importance for electronic reports on delivery of letters, as such reports are necessary to invoicing process. At the same time case file suggested that delivery of letters 7 days week was considered as *rather unimportant* additional feature of hybrid mail services. The General Court hesitated, whether the latter services was needed by some customers at all. Irrespectively of that the court decided that having deprived customers of these *two* specific features of hybrid mail service, Slovak government infringed Article 106(1) and 102 TFEU as Slovenska posta failed to meet the demand available on the market[1].

Conclusions

Analysis of evolution of case practice in failure to meet the demand cases entitle us to make several conclusions on the legal test accepted by modern jurisprudence.

Firstly, as suggested by *Hofner* and *Pavlov*, the "manifest" failure to meet the demand constitutes a separate legal criterion, which needs to be considered in each case. Although interpretation of such legal criterion changed significantly over time, the Commission considered that failure to meet the demand could be associated with *simple*, rather than *extreme* failure to provide some services. Since *Hofner,* the ECJ has been gradually moving towards the same position, while in *Slovenska posta* General Court seems to reconsolidate both positions. By declaring the presence of infringement in *Slovenska Posta* both Commission and the General Court admitted that "manifest" failure is required for the purpose of infringement. Nevertheless, they both confirmed the presence of such manifest failure with respect to *simple* failure to provide service. Respectively, reference to "manifest" failure to meet the demand suggested by *Hofner* in modern jurisprudence seems to be associated with manifest absence of some kind of service, rather than extreme failure to meet the demand.

Secondly, the failure to meet the demand should be analysed from the perspective of each particular service, which may have its own demand. Such approach suggests that failure to meet the demand for the respective services invalidate statutory monopoly only with respect to provision of such services without invalidating the entire monopoly.

Thirdly, the failure to meet the demand does not require establishment that statutory monopoly does not provide some service *at all*. For the purpose infringement it is sufficient that statutory monopoly does not provide service of some quality, which is required by customers.

In this regard, it should be accepted that *Slovenska Posta* is currently under appeal in ECJ, hence more legal certainty shall be provided following final decision of ECJ. Nevertheless, the evolution of case practice suggests that the most intense discussion within ECJ most possibly shall take part on the intensity of demand available on the market, which needs to be determined for the purpose of infringement, without challenging the entire approach taken by the Commission and the General Court.

[1] Slovenska posta, 2015, paragraphs 322-355.

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