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THE INFLUENCE OF FAIR COMPETITION ON THE MANAGEMENT OF PUBLIC UNDERTAKINGS

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Abstract

Since the 1990s, European judicial and normative institutions have paid particular attention to the competitive practices of public undertakings. Consequently, their regime is governed by a significant number of rules pursuing objectives appearing, a priori, contradictory. In fact, public undertakings may experience difficulties in their management.
In this context, an approach of public competition law through the prism of fair competition can be very useful. Regarding the uniformity of its judgment, fair competition appears as an objective capable of coordinating rules and overcoming their contradictions. It thereby offers a global and coherent reading plan of all the legal translations of the European competitive order being of some practical importance. In illuminating the common features of the different legal aspects of competition, we can easily switch from one to the other. It therefore makes the European approach to competition more accessible and understandable. Furthermore, and most importantly, it leads to identifying legal opportunities and threats in a cross-disciplinary way. So, from a "Law & Management" perspective, it appears to be a precious tool for the management of public undertakings.
Key words: *European competition law, public undertakings, fair competition, "Management & law".*

Introduction

Subject to an increase of specific rules, the European regulations of competition catalyze part of the criticisms regarding the main symptoms of the "*decline of law"* (Ripert, 1949): the lack of coherence and intelligibility. Also subjected to a growing number of innumerable rules, the legal status of public enterprises cannot avoid inheriting some of these criticisms. The different standards that are applicable arouse perplexity. The phenomenon of "*marketization"* (Boy, 2003, p. 25) has led to such an expansion of competition law applicable to the public sector that the latter appears today as a "*fragmented law"* (Farjat, 2006, p. 3).

The competition regime to which the public sector is subjected is based on three major components, namely liberalization, harmonization and the application of the rules of the treaty.

The acts pertaining to liberalization and harmonization aim at organizing the opening of competition to public services in a network. They are based on paragraph 3 of article 106 TFEU (Treaty on the Functioning of the European Union), which constitutes *"the special, original legal basis"* (Bracq, 2011, p. 518) of the regulation of services of general economic interest. The latter grants the Commission the power to generally specify, through directives, the obligations resulting from paragraph 1 of the article which states that concerning the "*public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109*".

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The measures pertaining to harmonization are based, for their part, on article 114 TFEU. They are deemed more legitimate since article 114 TFEU allows for the association of European Parliament with all of the Member States through the Council thanks to the procedure of co-decision.

Finally, the subjection of public operators to the rules of the treaty results from articles 106 and 107 TFEU. These articles do not represent, at least mainly, the rules of competition applicable to public enterprises. Their purpose is to regulate States' actions in their dealings with public undertakings and the businesses to which special rights are granted. Therefore, they allow for "*the establishment of an inspection of State actions"* (Goldman & Lyon-Caen & Vogel, 1994, p. 756).

Article 106 § 1 TFEU presents the particularity of being a cross-reference. It is destined to be applied in combination with the principles of free movement and free competition. As an example, in the judgment of March 19th, 1991, *French Republic v Commission of the European Communities*, the Court used exclusive importation and commercialization rights in the telecommunications sector in conjunction with article 34 TFEU in order to prohibit local duties[1]. However, the drafting of article 106 § 1 TFEU, which refers explicitly to rules established in articles 101 to 109 TFEU, has had a major impact which, beyond the stipulations aimed directly at the States, provides rules applicable to businesses which are made binding for public institutions in their dealings with their operators. Article 106 § 2 TFEU permits, however, derogations from all treaty rules, in particular the rules of competition, insofar as is necessary for the accomplishment of missions of general economic interest.

The latter states that "*undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union*".

Article 107 TFEU has a similar structure: prohibition accompanied by exemptions. Paragraph 1 states that "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*". For their part and under certain conditions, § 2 and 3 include an exclusion of the prohibition cited in paragraph 1.

Problem of Research and Research Focus

Each of the previously mentioned rules goes back to the problems that public enterprises pose for European authorities. The latter vacillate, where relevant, between a policy of "*assimilation*" (Debène, 1992, p. 243) and of acknowledging the utility of public enterprises for satisfying general interest (Eckert & Kovar, 2011, § 30s.). This two-sided policy makes difficult the management of the public undertakings. In a legislative environment so overwrought with sometimes conflicting objectives, it can be difficult to establish a course of action. In this regard, a reflection based on the objective of fairness can prove to be particularly opportune. The latter, as a standard of the European Union (Carbonnaux, 2013, p. 373), can, in effect, prove to be of great utility for transversally determining both the threats and the legal opportunities of the European approach to competition.

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Methodology of Research

General Background of Research

The establishment of the ability of the concept of fair competition to act as a tool of management in public enterprises is based on a study of jurisprudence and the European Union's official documentation.

The reading of these documents reveals that by means of the rules applicable to public enterprises, European authorities aim at insuring fair competition –an objective which they intend to preserve through the principle of equality. This consistent treatment of fair competition shows an interest in revealing that the objective constitutes a standard of the European Union which can, as such, be used as a frame of reference for the management of public enterprises.

1. Fair competition : an objective of the European competition law

In Member States' law, fair competition generally refers to considerations relating to good faith and to the protection of competitors' subjective interests. In European Union law, it has a wider scope. It also refers to a public economic perspective (Carbonnaux, 2013, p. 30s.). This concept of fairness can be found in all of the rules of competition applicable to public enterprises. Evidence of this is first found in the preparations for the Treaty of Rome in which it appears that the commission of the common market chose, to insure its operation consisting in regulating fair competition, to regulate both practices relating to dumping and cartels as well as the "*the measures and practices liable to distort competition in the common market"*, namely the "*measures of public authorities such as subsidies, direct or indirect aid for example; the practices in the area of private commercial relations, such as the restrictions of competition by the abuse of economic power or by agreements between undertakings"*[2]. In the same vein, a more recent document from the Commission specifies that the "*fight against anti-competitive commercial practices; (the) opening up of sectors previously controlled by public monopolies to competition; and the control of financial support granted to undertakings by the governments of Member States of the EU"*[3] constitute actions aimed at guaranteeing fair competition in the European Union. This objective found in the different rules applicable to public enterprises can also be found in various other individual documents (Carbonnaux, 2013, p. 104s.).

It thereby becomes evident that in their management policy, public enterprises must comply with the objective of fair competition. It remains to be seen what content the European Union intends to give it. Regarding this point, European documentation shows great coherence. Fair competition is transversally understood as an objective based on the equality of opportunity between economic operators.

2. The unit of treatment of fair competition

In the different rules which are part of "the law of public competition", fair competition is based on the common requirement of equality between economic operators.

The Commission has generally asserted that "*competition policy must ensure fair competition so that enterprises operating within the common market can, in general, benefit from the same conditions of competition*"[4]. In particular, the equality endorsed by the European Commission includes various aspects. It is first intended as the equality of constraints.

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a) The equality of constraints

It appears from the study of the law of public competition that the objective of fair competition, which it intends to preserve, implies that all public operators operating under normal market conditions are equally subjected to both constraints tied to the application of the rule of law and those related to competition.

- Equality facing the law

The requirement of equality facing the law is found in particular in the directives based on article 114 TFEU and article 106 § 2 TFEU.

Through harmonization, directives 114 TFEU focus on guaranteeing fair competition by ensuring "*a level playing field for all stakeholders*" and making "*sure they operate in the same legal environment*"[5].

Following a similar logic, article 106 § 2 TFEU, which has it that "*undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties",* guarantees fair competition, insuring that all of the treaty rules are applied in the same way to all private as well as public undertakings in all of the Member States[6].

- Equality facing the constraints of competition

The requirement of equality facing competition is based on a "*model of material justice"* (Hernu, 2003, p. 135) which implies that in European Union law "*equality according to merits presides over competition"* (*Ivi,* p. 136).

As far as public competition is concerned, the concept of competition on merits takes on a particular dimension.

Fair competition stands in the way of unwarranted "*competitive advantages"* (Lemaire, 2004, p. 404) which can stem from the privileged relationship between public enterprises and the State. As Advocate General Reischl noted, fair competition means that "*public undertakings in the individual Member States may not be given preferential treatment"*[7].

With this objective in mind, the Europe's founding fathers forbid Member States, as far as public undertakings and undertakings to which they give special and exclusive rights are concerned, from enacting or maintaining provisions conflicting with the treaty rules (art. 106 § 1 TFEU). Additionally, from the same perspective, in order to insure that "*the rules are the same for everyone"*[8] the founding fathers decided to forbid Member States from granting State aid[9].

These rules prevent public authority from determining the result of a relationship between competitors *a priori.* Fair competition has it that competitive relationships are assessed in meritocratic confrontation. In this way, "*as soon as an institution of public law is deployed in a market, jurisprudence forces it to practice equal competition with private economic actors"* (Clamour & Destours, 2008, § 125). In order to do this, European authorities are attempting to restore balance to the relationships that public and private operators have with competition (Jappont, 2006, p. 151) by aligning public competition with private competition.

With this objective in mind, European authorities adopted the so-called theory of "automatic abuse" (Charbit, 2002, p. 271). This procedure does not consist in sanctioning a real abuse but the risk of abuse stemming from the State's granting of special and exclusive rights to particular undertakings. This method insures that the public operator operates under the same conditions of competition as private operators, taking away any real or potential source of advantages. The Court prefers, as it were, "to anticipate rather than cure" at the risk of enacting an

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"*asymmetric regulation"* (Brault, 2004, p. 38) for public enterprises. At one time abandoned, the Court recently resorted to this procedure in its decision *MOTOE* from July 1st, 2008[10].

The requirement of equality through merits also explains European authorities' recourse to the "the private investor test" as part of the judgment of article 107 TFEU. The latter was formalized for the first time in 1984, in a letter addressed to the Member States. The guardian of the treaties explains that there is no State aid "*involved where fresh capital is contributed in circumstances which would be acceptable to a private investor operating under normal market economy"*[11]. In short, it must be verified if, under similar circumstances, a private investor of a size comparable to that of the public investor could make the same investment (Kovar, 2009, p. 272). Today this test is applied to all kinds of public financing, including loans and guarantees, for example[12], and reveals itself in three forms: the private investor, the private creditor and the rational operator in a market economy (Berrod, 2008, § 11s.).

The pertinence of the principle of the investor in a market economy would result from the fact that it constitutes an instrument "*appropriate (...) for ensuring neutrality of treatment between public and private undertakings"*[13] and therefore « *fair competition between operators in a given market* » (Berrod, 2008, § 114). The approach is definitely comparable to that which prevails over anti-competitive practices. In this area, equality is insured through the concept of enterprise, which leads to subjecting identical activities to articles 101 and 102 TFEU (Eckert, 2002, p. 216). Likewise, theoretically, as far as State aid is concerned, equality is insured by the "private investor test", which similarly leads to subjecting identical investors to the constraints of the market and thereby the undertakings receiving said aid.

Finally, fair competition, and the equality through merits which influences it, finds itself at the origin of a great number of measures aiming at insuring the useful effect of the principle of transparency. For example, in order to insure "*fair competition between public undertakings and between public and private undertakings"*[14] article 1 § 1 in the "transparency"[15] directive subjects States to the obligation of emphasizing the provisions of public resources distributed directly by public authorities in favor of the public enterprises concerned; as well as the provisions of public resources distributed by public authorities through an intermediary of public enterprises or financial institutions, while specifying the effective use of public resources. Having the same goal, the transparency directive and the numerous directives organizing the liberalization of sectors under a public monopoly, force the operator who manages both the essential infrastructure and other activities of providing goods and services, to keep separate accounts for each of its activities. The latter must reflect the different activities practiced by the same undertaking, emphasizing the products and contributions associated with these different activities as well as the method of their allocation or distribution. This obligation allows for the avoidance of the so-called « cross-subsidies » technique which consists in financing the losses of one or more integrated loss-making activities with the profits of one of more integrated activities (Laget-Annamayer, 2002, p. 198s.).

The requirement of fair competition even leads institutions to require an organizational separation of activities, and even their institutional separation (Laget-Annamayer, 2002, p. 207s.). The reason for this organizational separation is found in the well-known idea that the equality of opportunity between public and private operators would be compromised if the former were both competitors and arbitrators for the same activity.

Finally, remaining within the problem of fair trade (Carbonnaux, 2013, p.328s.), regulatory laws impose various other obligations of transparency, the goal being to render the conditions of access to networks transparent, published in the appropriate forms and proposed on a non-discriminatory basis (Waelbroeck, 1998, p. 457). This can therefore be the transparency of the conditions of the opening of the market involved and establishing the methods of the services themselves or requiring transparency in establishing the price of the service (Laget-Annamayer, 2002, p. 213s.).

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However, in public competition law, fair competition does not just involve respecting the equality of constraints. It also entails respecting a second aspect of the principle of equality: equality through differentiation.

b) Equality through differentiation

For part of the doctrine, fair competition, which involves the prohibition of preferential treatment for public operators, focuses on a formal equality obscuring the fact that the latter "*can be used to social or economic ends in the framework of economic, industrial or regional policy"* (Debène, 1992, p. 245). There would therefore be « *permanent discrimination* » (Tuot, 1994, p. 399) against them. It would therefore be a « *widely fanciful idea of equality* » (Debène, *op. cit.,* p. 64) which would seem to promote fair competition. Such criticism would not however be maintained. The equality sought through the objective of fair trade is not limited to the parity of constraints but also requires, when the particularity of the situation demands it, "*equality through differentiation"* (Rivero, 1965, p. 351).

Fair trade has it that "*enterprises operating within the common market can, in general, benefit from the same conditions of competition"*[16]. This is real equality and not formal equality "*which takes into account the differences of the situation and does not treat those who find themselves in a completely similar situation identically"* (Le Mestre, 1995, p. 34). In accordance with its ordoliberal filiation, fair competition also promotes differentiation based on general interest. As soon as, if the preservation of fair trade demands it, « the rules of the game are the same for all competitors » when they evolve under normal competitive conditions, it also requires, when the preservation of general interest demands it, for this demand to be set aside, limiting the application of the rules of competition. In a way, coming back to the expression used in the limited context of public action, where the operator intervenes to promote general interest, the technique of "*compensatory inequality"* was used (Asso, 1987, p. 30). Here, it takes the shape of a setting aside of prohibitions enacted by legal aspects of competition when the specifics of the nature or operation of the operator demand it.

In this way, for example, conscious of the fact that the service of general economic interest can generally only function correctly beginning with aid or subsidies that are granted by public authorities, the Court put a mechanism of justification parallel to that which is cited in the texts in place for when the pursuit of an obligation of public service demands it. In the *Altmark* judgment[17], the Court decided that any State measure, regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, evades the application of article 107 § 1 TFEU.

Similarly, article 106 § 2 TFEU insures fair competition by providing an adjustment of the principles put forth in articles 101 and 102 TFEU in favor of services of general economic interest. This particular treatment aims at supporting operators subjected to particular constraints which rival businesses evade while operating under normal market conditions. While the granting of this exemption has been problematic for some time, during these last few years the Court has softened somewhat. In a « *quest for balance* » between the market and public service (Desselas & Rodrigues, 1998, p. 9; Grard, 1999, p. 209) the Court nevertheless undertook a rereading of article 106 TFEU in the *Corbeau*[18] and *Municipality of Almelo*[19] judgment. From this point forward it adopts a more flexible reading of article 106 § 2 TFEU, which "*permits the Member States to confer on undertakings to which they entrust the operation of services of general economic interest, exclusive rights which may hinder the application of the rules of the Treaty on competition in so far as restrictions on competition, or even the exclusion of all competition, by other economic operators are necessary to ensure the performance of the particular tasks assigned to the undertakings possessed of the exclusive rights"*[20]. Additionally, the Court considers that these undertakings must be able to benefit from "*economically acceptable*

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conditions"[21] or "*conditions of economic equilibrium"*[22]. This means that the rules of competition can be set aside, not only when they make the performance of its operation of public service difficult for the undertaking, but also when they endanger its financial equilibrium. As Mr. Darmon noted, this is a certain softening of the interpretation of article 106 § 2 TFEU, a real "*turning point"*[23].

Additionally, concerning the identification of the operation of general interest, the judge adopted the subjective method in the *Corbeau* judgment, which was more favorable to promoting requirements tied to the performance of an operation of general interest. This method identifies operations of general interest based on the legal status that the rules of national law require from the undertaking which is managing it (Le Berre, 2008, p. 52). It therefore consists in accepting the applicability of article 106 § 2 TFEU for a number of important activities which are partially or entirely reputed as non-excludable, that is to say, activities whose financing must be insured in part or entirely by collective management (*Ibidem*). In doing so, the *Corbeau* judgment shows "*the merit of attracting attention to the constraints of public service which the recent evolution of Community law had perhaps neglected a bit too much"* (Hamon, 1993, p. 869). It reestablishes certain equality between economic operators by offsetting the constraints of general interest through a more flexible admission of justifications.

Consequently, this search for equality would translate into the introduction of extra-competitive considerations in the implementation of article 106 § 2 TFEU. The Court had of course already opened the path to "*another possibility of exemption based on the awareness of considerations of non-economic public interest"* (Bazex, 1995, p. 302) in the *Sacchi* judgment[24]. Here, the Court had ruled that "*nothing in the Treaty prevents Member States, for considerations of public interest, of a non-economic nature, from removing radio and television transmissions, including cable transmissions, from the field of competition by conferring on one or more establishments an exclusive right to conduct them"*[25]. This possibility would, however, not be used for the first time until twenty years later, in the *Municipality of Almelo* judgment. In this instance, the Court explains that "*it is necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation, particularly concerning the environment"*[26]. It characterizes the planning of the territory as environmental protection of economic interest justifying, in compliance with article 106 § 2, restrictions on competition (Sabirau-Perez, 1998, p. 291). In this way, the Court agrees with Advocate General Darmon, who had suggested four criteria including the "*effective protection of the environment"*[27]*,* in order to decide on the applicability of article 106 § 2 TFEU. Following a similar logic, in the *FFAD c/ Københavns Kommune* judgment, the Court of Justice would concede that a temporary exclusivity limited in time and space may be granted to undertakings that recycle waste which are entrusted with an operation of general economic interest, on the grounds that "*a measure having a less restrictive effect on competition, such as rules which merely required undertakings to have their waste recycled, would not necessarily have ensured that most of the waste produced in the municipality would be recycled, precisely because there was not sufficient capacity to process that waste"*[28].

Additionally, aside from the specifics tied to the performance of an operation of public service, the Court also takes into account the specifics tied to the pursuit of an operation of social interest[29]. In this way, it appears evident that the Court considers the constraints which endeavor to pursue an operation of general extra-competitive interest (Van Raepenbusch, 2006, p. 15) and which it strives to offset by setting aside the rules of competition.

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Hypothesis and Perspectives

The unvarying approach of fair competition which the aforementioned documents confirm, gives the objective the status of a European Union standard. As such, fair competition can be used as part of the management of public undertakings. The quality of the article's standard can in fact allow public operators to transversally discover the legal opportunities and threats of the different rules within public competition law (Bouthinon–Dumas, H. & Masson, A. 2011, p. 238).

In some ways, equality through merits, for example, which implies fair competition, can represent a legal threat for public operators. The wave of alignment of public competition over private competition, which guides its application, requires great care when resorting to exclusive and special rights which can be granted or still, using public capital with great caution.

Equality through differentiation, on the contrary, shows a source of legal opportunities. It offers arguments for services of economic interest to criticize the current European approach to general interest. The condition of efficiency, which finds itself subjected to operators acting on behalf of general interest, is particularly targeted. European Union law commands operators benefitting from exclusive and special rights to see through the operation of general economic interest that has been entrusted to them. This condition was introduced for the first time by the Court in its *Höfner* judgment[30] on April 23rd, 1991 in order to evaluate article 102 TFEU. Consequently, the judges extended the use of the theory of the under-performing monopoly[31] to the evaluation of the exemption cited in article 106 § 2 TFEU. At this point, the Court uses the theory of the under-performing monopoly to determine the legitimacy of public action.

In its *Job Centre Coop* (1997)[32], *Giovanni Carra* (2000)[33] and *Firma Ambulanz Glöckner* (2001)[34] judgments, the Court ruled that the exception of article 106 § 2 TFEU could only be invoked if the public service was well-managed or well-insured. In particular, the *Firma Ambulanz Glöckner* judgment represents the most symptomatic decision of this policy. In this instance, the Land de Rheinpfalz had granted ambulance transportation companies a legal monopoly over the market of emergency transport. The companies in question did not have a legal monopoly over the neighbouring market of non-urgent transportation. Nevertheless, the arrival of a new competitor was subject to their preliminary consultation. Excluded from the ambulance services market, Glöckner had contested before the judge the abuse of the dominant position resulting from the exclusive right granted by the Land. After having observed the monopoly's conflict with article 106 § 1 TFEU, the Court noted that a restriction of competition resulting from the granting of exclusive rights can be seen as necessary if it allows the beneficiary an exclusive right to perform its operation of general interest under economically acceptable conditions[35]. In this instance, the Court considered that the granting of exclusive rights was necessary in order to allow its beneficiaries to insure the permanence of emergency transport which it considers general interest.

The Court specified, however, that the application of the exemption from article 106 § 2 TFEU should be ruled out if, according to the principles affirmed in the *Höfner*[36] and *Job Centre*[37] judgment, it had been established that health organizations responsible for managing an emergency medical service were clearly incapable of permanently satisfying the demand for emergency medical transportation and ambulance service[38]. The Court then assigned the task of assessing whether "*the medical aid organizations which occupy a dominant position on the markets in question are in fact able to satisfy demand and to fulfil not only their statutory obligation to provide the public emergency ambulance services in all situations and 24 hours a day but also to offer efficient patient transport services"*[39] to the national judges.

In doing so, the Court establishes the principle that free competition allows for the obtainment of better social productivity when the exclusive supplies of these services are unsatisfactory (Le berre, 2008, p. 56).

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This condition of efficiency of public action reappears in competition law at the stage of State Aid qualification. In its *Altmark* judgment, the Court ruled that in order for public service compensation to evade State Aid qualification its level must, in particular, be determined "*on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations"*[40]. With these criteria, European authorities wish to spare certain costs for which service providers receive compensation from Member States from having low efficiency levels. Nevertheless, they do not appear to be very compatible with the requirement of equality through differentiation. By introducing the label of private operator where the State acts as a public power, the *Altmark* judgment as well as the Commission notice tend to assimilate when differentiation should be used. In fact, it seems "*hard to imagine a private operator embarking on his own initiative on such financing activity"*[41]. As Advocate General Philippe Léger states in his conclusions regarding the *Altmark* judgment, "*the criterion of the private operator is not material where the intervention by the State has no economic character"*[42]. In fact, "*in situations of this kind, the intervention by the state cannot be adopted by a private operator acting with a view to profit but falls within the exercise of public powers of the state (...). The private operator criterion is therefore not material, since, by definition, there cannot be any breach of equal treatment between the public and private sectors"*[43].

Moreover, the Court expressly confirmed this principle. In the *Ryanair/Commission* decision[44], it explains that "*while it is clearly necessary, when the State acts as an undertaking operating as a private investor, to analyze its conduct by reference to the private investor principle, application of that principle must be excluded in the event that the State acts as a public authority. In the latter event, the conduct of the State can never be compared to that of an operator or private investor in a market economy"*[45]. In this sense, when the State intervenes in order to support a service of general economic interest, the management logic to which is answers is not purely economic (Driguez, 2006, p. 750). Other requirements come into play and in particular, in the hospital sector, that of maintaining unprofitable hospital structures but insuring good coverage for the territory (*Ibid.*). On the contrary, efficient economic management consists in only injecting capital into structures located in densely populated areas and capable of filling beds (*Ibid.*). In this way, in certain situations, private management cannot act as a criterion of assessment for public management in the sense that the latter does not answer to simple requirements of financial productivity. Introducing such a comparison between methods of public and private management can create the risk that "*economic normality is substituted (...) for legal validity as a principle of judgment"* and "*leads to viewing the objectives transcending the market that are assigned to public undertakings as irrelevant"* (Supiot, 1994, p. 380). Now, it is the consideration of these same objectives that involves the principle of equality through differentiation. The problem is therefore that "*the cult of efficiency"* (Mintzberg, 1989, p. 479) must not become the "*cult of the quantifiable"* (*Ibid.*). Efficiency must also be understood in qualitative terms *(Ibid.)*.

Of course, in its memorandum regarding compensation granted to services of general economic interest [46], the Commission pairs the search for economic efficiency with the search for qualitative efficiency. Nevertheless, until then, the Commission had had the tendency to favor the former to the detriment of the latter. Conversely, the Committee of the Regions considers that the measure of economic efficiency can only be one component of a more general framework for evaluation and for the quality of public services which must incorporate purely qualitative indicators (accessibility, continuity of service, response time, and user satisfaction)[47]. The respect for the principle of equality through differentiation implies that these wishes are understood.

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Conclusions

The previous developments show that public undertakings can find a real management tool in fair competition. The objective, in view of its unit of meaning and treatment, constitutes a true standard of the European Union which can be used in the framework of determining its course of action. Indeed, the recurrent reference to the principle of equality offers a frame of reference which allows public undertakings to characterize the threats and opportunities of public competition law and to adapt their competitive strategy accordingly.

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Notes (Endnotes)

1 Judgment of the Court of 19 March 1991. *French Republic v Commission of the European Communities*. Case C-202/88. European Court Reports 1991, p. 1223.

2 Commission du marché commun, des investissements et des problèmes sociaux**,** *Document de travail relatif aux facteurs susceptibles d'influencer le jeu de la concurrence*, Bruxelles, 2 août 1955, document n° 97, MAE 139 f/55 oc, p. 3.

3 Commission européenne, *La politique de concurrence de l'UE et le consommateur*, Luxembourg: Office des publications officielles des Communautés européennes, 2005, Avant-propos.

4 European commission, *First Report on Competition Policy*, 1971, p. 13.

5 Opinion of the European Economic and Social Committee on The social and environmental dimension of the internal market, *OJ n°C 182, 4.8.2009, p. 1–7, §1.4*

6 Opinion of Mr Advocate General Reischl delivered on 4 May 1982. *French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities*. Joined cases 188 to 190/80. European Court Reports 1982, p. 2545, spec. p. 2588.

7 *ibid.*

8 European commission, *First Report on Competition Policy*, 1971, p. 13.

9 European Commission, *State aid : Commission opens in depth-investigation into financial advantages to BT from UK Crown pension guarantee*, Brussells, 29th november 2007, IP/07/1802.

10 Judgment of the Court (Grand Chamber) of 1 July 2008. *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*. Case C-49/07. European Court reports 2008, p. 4863.

11 Communication to the Member States concerning public authorities holdings in company capital, in Bulletin EC, n° 9-1984, p. 93, § 3.2.

12 Judgment of the Court of 14 November 1984. *SA Intermills v Commission of the European Communities*. Case 323/82.European Court Reports 1984, p. 3809, § 31.

13 Commission communication to the Member States - *Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector*. *OJ n° C 307*, 13.11.1993, p. 3–14, spec. § 23.

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