Direttore: Prof. Giuseppe Di Gaspare

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Public utilities and municipal: past, present and future

di Giuseppe Sgaramella

Introduction

The first Italian law about local public utilities, the so called Giolitti's Law, by the name of the prime Minister of the period, dates back to 1903.

Since then, a slow, but important evolution of the legislation succeeded until the last decade of the last century. In the 1990 the law n. 142 (regarding the reform of local authorities) took to the definitive cut of the subordination of the local public enterprises ("aziende speciali and consorzi") to the Commons that owned them.

In fact, the local enterprises got the legal entity and were enabled to become autonomous and got the whole responsibility of the managing of the local services that were assigned to them.

Nothing new established the law n. 142 about introducing the rules of open market in the field of local utilities. So it was possible for the Commons to assign directly to its local public enterprise ("azienda speciale" or local public joint stock companies), without doing any public tender, as it was not requested neither by Italian law, nor by the European Union. In fact, there are no general european directives about the services of economic general interest about this subject, while next year a green book will be presented by the European Commission.

Beginning from the next year the open market rules will be applied to the public local transports (competition for the market) and to the sale of natural gas (competition in the market), as a result of specific laws dating back, respectively, to 1997 and to 2000.

More generally, the same rules of competition were more recently established by the article 35 of the financial law for 2002 (law n. 448/2001) for all the other local utilities having industrial nature. Nevertheless they were not fixed by the law, as this is one of the first goals of a regulation which would have been enacted within the last July the 1st.

Before trying to examine the details of the new law, it can be useful to anticipate that the article 35 can be considered, on one side, a complicated plot of dispositions, on the other, a reasonable mix between the needs of the liberalization of the local utilities market and the privatisation of the public enterprises that manage the services.

It is also possible to declare that the true privatisation, which means the sale of the local public enterprises to private investors, was not preferred to the introduction of the rules of competition and that the introduction of the competition was followed by a reasonably long period, between three and five years, of transition from the old to the new rules. However, it is established the principle that local Authorities cannot sell the plants, the grids and the other patrimonial equipments necessary to produce the services. All of them will be placed at the managing enterprises disposal, which will pay a fee for this.

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It is also important to underline that there are some dispositions that encourage the merging of local enterprises to make up stronger ones able to face the competition with the other competitors.

Last, but not least, it is necessary to add now that the article 35 settles the so called formal privatisation, which consists in the obligatory transformation by the local Authorities of all the "aziende speciali" that manage industrial services into joint stock companies. The Commons can do this operation with simplified procedures until June the 30th 2003.

1. A deeper explanation of the most important contents of the article 35 of the law n. 448/2001

Enforcement of the article 35

It is worth specifying that the article 35 of the law n. 448/2001 renews the article 113 of the Italian law about local Authorities and introduces the new article 113-*bis*. It is also interesting to underline that it is possible to apply the renewed article 113 when proper dispositions ruling specific local services miss. In fact, it has been said by professor Giuseppe Di Gaspare that the article 35 is a disposition that only eventually can be applied.

Particularly, the article 35 will be applied when the rules of the liberalized market miss completely. This is the reason why it is possible to say that the new rules can be applied to the services of water supply and of waste management, while they cannot be generally applied to the services of local public transports and of gas distribution (as the gas sale will be completely liberalized since January the 1st 2003).

Industrial and non-industrial services

One of the most important contents of the regulation consists in the definition of the services of industrial nature.

As the local public transports and the water supply are expressly mentioned by the article 35, it is possible to say that these services belong to the kind of industrial services. About the other ones it is only possible to make some supposition, based on the experience in the subject. So it is possible to imagine that also services like waste-management and gas distribution belong to the same category.

The solution that will be given by the regulation is important also for the reason that all the other local public services will be regulated by different dispositions of law.

It is possible to affirm that the Italian common law conception of "industrial activity" is not at all useful to inspire the Government, as the meaning leads to the production of goods or to the

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transformation of original materials in different and new ones. Here it is more likely that the meaning to give to the concept of "industrial services" is related to the use of the plants, the grids and the patrimonial equipments in the production of the services.

About the ownership of plants, grids and patrimonial equipments

The new article 113 states that the local Authorities cannot sell their own plants, grids and other patrimonial equipments that are involved in the production of the public utilities. This means that the privatisation does not touch the investments that local Authority, directly or by their own enterprises, made in the years.

Nevertheless they can found a joint stock company, whom they give to the ownership of the plants, of the grids and of the other patrimonial equipments. The same local Authorities cannot sell the majority of the shares of this company.

If already exist companies which are the owners of all these goods, the local Authorities must divide the companies into two, giving to one of them, in the same way, the ownership of the plants, of the grids and of the other patrimonial equipments. The other company keeps the managing of the services, but, on the contrary, they can be even sold by the local Authorities.

The 31st of December 2002 should be the last day to make all these operations. It is unlikely that the term will be respected, as it is not yet at all clear what are the other patrimonial equipments that must be given to the company which administrates the ownership of them. This should be, in fact, one of the tasks of the Regulation.

The managing of the utilities in the draft of the new law.

It has just been said that the ownership of the instruments for the production of the services must be separated by the managing of them. Now it is necessary to explain that the usual way of managing a local service consists in the sale of it to the clients and in keeping the plants and the grids in normal efficiency, in making the necessary investments to improve and to modernize technically the same plants, grids and other patrimonial equipments.

The public tenders will be done to find the company that will do all that. Later more details about will be given.

Now it is necessary to inform that the law settles that another specific law can distinguish the activity consisting in the sale of the service from the activity of keeping in efficiency all the plants and the grids necessary to produce the same services.

Both the activities can be attributed by a public tender, but the second one can be also directly given to a company whose majority of shares is owned by the local Authority. The same company can even be the owner of the mentioned plants, grids and so on.

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This solution should improve the liberalization of the services sale. The only concrete example is given by the sale of the gas that will be completely liberalized since the beginning of the next year.

The public tenders and the role of the local Authorities

The new rules on local utilities change completely the role of the local Authorities that once had more solutions in the choice of the way of managing the utilities. In fact, they could both to entrust a service to a local enterprise ("azienda speciale" or joint stock company) or to give it in concession, through a public tender (that usually was done only for the first time and after was renewed without any kind of contest).

As it was told before, now local Authorities become above all the regulators and at the same time they can be the owners (even of a part) of the enterprise managing the services.

So while once a typical situation of hierarchy marked the partnership between the local Administrations and their own enterprises, now they can use just the owner powers and the regulator powers, that are based on a "contract of service".

This contract sets now the rules (economic details included) of the partnership between the local Authorities and the enterprises chosen through the public tenders.

It can be useful to underline that the legislator established just the basic principles about the public tenders. It is possible to distinguish two stages: the first consists in the settlement of the standards of quality, of quantity, environmental, of safety and of equal distribution. The law gives this task to the national Authorities, if they exist. If they do not, it becomes a local Authorities task.

The second stage consists in the public tenders. The article 35 sets the criteria that the local Authorities must use to choose the best offer, such as the best level of: the quality, of the safety, of the economic value, of the investments plan, of the plants and grids improvement and of technologic innovation.

The regulation should set more detailed rules about the tenders to assure the most homogeneous application of the competition in the Country.

It is necessary to underline that the law does not admit to the tenders those companies that control or are controlled or are related to other companies managing utilities without having won a public tender. This rule is not applied in the transition period.

The transition period from the old t the new rules

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The article 35 delays for a few years the application of the new rules. It is in fact necessary to prepare the market and the local Administrations to the new situation.

As it was told above, the regulation will set how long the period of transition will last. Anyway the law sets that it cannot be neither shorter than three years, nor longer than five. But it will be possible to extend the period if mergers will be done by the companies or the local Authorities will decide to privatise the for a wide amount (selling at least the 40 or the 51% of the shares).
Even the length of these extensions will be set by the regulation.

Conclusions

It is not possible to forecast what will be the future of the local enterprises. Some of them are now quoted on the stock exchange. Several of them are merging or are buying other companies to reach larger dimensions. It is impossible to say what will happen if they will not win the public tenders in the Commons that own them.It is sure anyway that in a few years the sector of the Italian local public companies will be deeply different from the present.

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The German public supply industry within the European legal framework – with special view to articles 16 and 86 II ECT

di Martin Burgi

I. Thematic framework – municipal undertakings

Tying in with the legal status of municipal undertakings within the German legal framework my lecture focuses the European legal framework. Therefore I will talk about the future of a specific political tool used for political formation of society: the entrepreneurial activity of the public sector. Up to the liberalisation of the energy sector, it were predominantly municipal public undertakings who supplied consumers with energy and who disposed of the distribution grids. Until now the so called "Stadtwerke" are central leading actors in the energy markets – namely as partners as well as competitors of the private energy supply companies. What is their future in Europe? This questions concerns the energy sector and furthermore the supply with water, the disposal of wastage and sewage as well as public transport. All these sectors are denominated with the term "services of general interest" or (in Germany) "Daseinsvorsorge". In the following the activities of municipal undertakings in this field will be covered.

The ECJ states in constant judicature that undertakings in the sense of art. 81 ff. ECT include every entity engaged in an economic activity excluding administrative acts where the exchange of the rendered service and the financial reward are a mere formality. Regarding the terms of the transparency directive undertakings are public if the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. Because of this definition neither the organisational form as such nor the question whether the undertaking serves a public purpose in a direct or indirect manner is relevant.

II. The entrepreneurial layer of Community Law

The ECT constitutes an open market economy with free competition (art. 4 I ECT) and proclaims competition not only indirectly by using the fundamental rights of the competitors but directly as a main principle of configuration. Therefore the treaty created a foundation for

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a brilliant process of stimulating economic activities by overcoming economic and legal barriers for the free movement of goods, persons and services. Single measures targeted not only at existing markets but opened state-dominated markets for private entrepreneurial competitors by the use of liberalisation. But by opening new areas and chances for entrepreneurship through community law, entrepreneurship has become more attractive for the State, too.

A glance into chapter one of title VI of the ECT proves that this is a first hint to the fact that public and private companies are in principle equally treated. Art. 86 I ECT obliges the Member States to equal treatment and art. 86 II ECT equates the companies as such. Therefore the anti-trust law of art. 81, 82 ECT is applicable and it is possible to refer to the fundamental freedoms and in my opinion to European fundamental rights. The equal treatment is consequently implemented and can be found even behind regulations discriminating ostensibly public undertakings like the public procurement law or the commitment to the fundamental freedoms. These regulations serve for eliminating influence of the state and guarantee consequently equal opportunities in the economic competition. Another example is the regulation of state-aids. It may seem that by strictly controlling the financial transfer of Member States to their companies their means of existence are endangered. But these financial transfers are state aids in the sense of art. 87 f. ECT only if in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have *not* subscribed the capital in question. This means in other words that specific circumstances, which are not economic justified, must appear to turn an investment into a potential illegal state aid. In this way the so called market investor test shows concisely the concern of equal treatment in the economic competition.

If the state is looked upon as a mere economic entity the European law opens wide range of possibilities as long as the state complies the rules of the competition-game. But let's see whether this assessment has to be modified because under German appreciation public undertakings should only be used for the realisation of political intentions.

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III. The political layer of Community Law

1. No determination of deployment and organisational design

As a consequence of the equal treatment neither the ownership nor the instrumentation of public companies are determined by community law. It doesn't insist on the pursuit of a public purpose and doesn't contain a subsidiarity-clause. Further on it isn't opposed to translocal or transnational competition of municipal undertakings and doesn't regiment the legal form of such undertakings. Therefore the Commission's description of the legal situation as neutral and free on composition is correct and even the ECJ knows that public undertakings may function as instruments of economic and social policy. The preceding assumption, that community law opens a range of possibilities not provided by national law, seems to be confirmed.

2. Determination of the economic framework

However, even the community law constitutes componential barriers for the pursuit of public purposes on the political layer, in fact through the ties of the competition law which is guarded by the often unpredictable Commission and ECJ. These barriers can nevertheless be overridden because under specific circumstances community competition law may be inapplicable:

This is expressed by art. 86 II ECT, whereupon undertakings entrusted with the operation of services of general economic interest shall be subject to the rules on competition *only* insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. This provision has the effect that every single discrepancy from competition rules, for example state aids or monopolies, has to be legitimated in a rational way, otherwise the concerned structures have to be changed. Because the justification has to be controlled by community institutions, the underlying facts have to be prepared and presented in an adequate manner. The already mentioned transparency directive aims at that concern in a way that henceforth the internal organisation of companies is included and an isolated accounting for different business divisions is required.

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As regards to contents the line of community case law inclines softly towards the services of general economic interest. That can be recognised in an acceptation of a definition scope and especially in a certain exercise of restraint regarding the so-called "obstruction-verification" which can be seen in the *Corbeau*-case. One reason for this can be spotted in art. 16 ECT, which must be understood as a protection rule in favour of services of general economic interest. However it is too far-fetched to proclaim the promotion of the public service as a principle of the ECT drawing the conclusion that the leading principle of economic competition has to be balanced with and interpreted in concordance to this. On the contrary art. 16 ECT may only facilitate the legal argumentation for exceptions of the competition principle but is not able to change the proportion of rule and exception.

3. Position-fixing in the competition of institutions

After having sketched the basic data regarding the community law environment the role of public undertakings as a control media in the European context can be analysed at this point. Till now usually the perspective of a comparison to private undertakings is dominating this consideration. But let's see the picture while changing the perspective and looking at public undertakings in competition to other means of control. In other words: How does community law affect the competition of institutions?

a) Functional inadequacy caused by disregard of the specifics of the control media

At first we have to take a closer look to the determinants provided by community law for the regulation of public undertakings. It can be easily recognised that art. 86 I ECT mentions public undertakings separately but that the justification norm art. 86 II ECT as well as the protection norm art. 16 ECT are formulated neutral in regard to the legal entity. They refer only in an unspecified way to the entrustment with the operation of services of general economic interest. In the following it has to be shown that the exercise of legislation and control exhibited by community institutions makes the appropriate fulfilment of functions assigned to public undertakings considerable difficult. This will become very clear regarding the layer of justification.

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Art. 86 II ECT ties in functionally with a single service, whereas public undertakings combine typically different elements of public and private service in a single organisational way to balance costs and benefits internally. That means that the specific character of German shaped public undertakings lies in the integrated or holistic approach as opposed to the single-service approach of art. 86 II ECT. Because of the latter the Commission and the ECJ interpret namely art. 86 II ECT as a segmentation imperative what stands for the fact that every single state aid and every single preferential position has to be allocated to a single concrete service whose specifics – allegedly certifiably through the transparency directive – have to justify the state-aid. Furthermore it is until now not secure that the instrumentation of public undertakings through private law acts, which can be often found in Germany, can be understood as an entrustment in the sense of art. 86 II ECT at all because it is conceivable that every single service has to be inflicted explicitly through a public law act. To sum up, in the German point of view an offer of a public undertaking in the field of services of general economic interest is an entire package containing elements of cross-subsidisation whereas the EC looks after the net incremental cost of every single service. But even where it is possible to name every single service it is doubtful whether and how services with a political character can be commercialised. For example, how much is it worth that a public sewage company tries politically motivated to convince its costumers from the benefits of sewage avoidance or that a municipal transportation enterprise educates apprentices beyond economic rationality? It seems that the Treaty isn't as aware to these phenomena of pursuance of political aims as to the repeatedly mentioned exercise of official authority. To make matters worse for the local layer municipal self-government isn't guaranteed by community law.

If you look at the conditions of rules binding public undertakings – an examination preliminary to the till now discussed question of justification – another piece of evidence for the thesis of disdain for the specifics of public undertakings and their controlling function can be found easily: Financial assistance given by the state loses its character of a state-aid as it is granted in exchange for a quid pro quo of the receiving company. But we have already seen that the ECJ with regard to the market investor test excludes every social and regional-policy consideration which otherwise could possibly provide for a adequate reward. These excursive considerations prove in my eyes that community law doesn't handle adequately public

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undertakings regarding to their function as an instrument of Member-States' policy at this time.

b) Establishment of competing control media

To complete this position-fixing we have to take a glance at other control media in the competition of institutions as long as they owe their stronger market position to community law. Two examples can be given:

aa) Obligation of universal service at competition in the market

In the course of the liberalisation of important infrastructure areas (especially energy, mail, telecommunication) monopoly positions in favour of public undertakings were reduced and dismantled through which their competitive position and field of application has been reduced. The economic impact is enormous, but it should not be ignored that the function of the public undertaking as a control media is weakened, too, because after the opening of the affected market universal service obligations may possibly evolve flowing out of the state's responsibility to guarantee certain services at a certain level (compare §§ 17 ff. TKG, 11 ff. PostG, 10 EnWG). These obligations are an instrument, created by community law, to ensure continuous accessibility and quality of established services or with other words to realise the public aim of the successful performance of these services. Caused by community law this obligation is laid principally upon every service provider – thus public companies, too – in the relevant market, therefore the performance responsibility of public undertakings seem to become obsolete, particularly because the compensating financial benefits must be extended to every obligated service provider.

This concept established by the EC doesn't prohibit the application of public undertakings as a control media, but it harms their attractiveness. Scepticism is advisable if you recognise that not every relevant public purpose is covered by the universal service obligation. Hence private companies can not be exploited to achieve aims out of the range of the successful supply of the particular service. And even the latter isn't guaranteed automatically because of the fundamental right related implications caused by the compulsory obligation of private companies to help on common welfare.

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bb) Regulative attribution at competition about the market

An even more important example can be found in the community law induced division of responsibility which is characterised by the fact that there is a competition about the supply of a service which is ordered by the state. Known forms of appearance are administration auxiliary models or concession models. In theory many service relationships can be constructed upon the principle of orders of a state principal and accomplishment of a private agent. An example could be found in a tender procedure for the service of a socially acceptable and gilt-edged account management banks could apply for. The Commission announced already in it's report to the Laeken European Council from October 17th 2001 a block exemption for state-aids in the area of services of general economic interest under the condition that the provision of a service of general economic interest is attributed in a fair, transparent, non-discriminatory and competitive tendering procedure. It is characteristic for all these forms of appearance that political aims are achieved by creating a market in which the accordant services are ordered and attributed. Therefore the state doesn't control through the means of a public undertaking but through formulating the conditions for attribution and the then closed contract in the way of a regulating demander.

A new quality of community determination is actually in store for the right of the public local traffic. A Commission's proposition for a regulation should commit the Member States nearly without exemptions to initiate every five years a tender procedure for a determinable supply of transportation service. This means that possibly every five years the supply of service has to be attributed to the then successful tenderer. The common practised decision to perform the transportation service “in-house”, i.e. to attribute to a municipal company, would become unremarkable. The opening of the competition about the particular regional market would be a community law driven commandment, therefore municipal companies can continue their supply of service only if they win the tendering procedure. It is not amazing that these plans cause criticism and reactions of the public transportation companies.

But let's discuss less the economic effects and more the future of public undertakings in the competition of institutions. It can be ascertained that the control media “public undertaking” is going to lose market shares, too, if it has to face the current preconditions in the

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profitability competition due to the already discussed functional inadequacy. The autonomy in the question whether to operate a specific control media, which is respected by community law, will be obsolete rapidly if the municipal transportation company couldn't win the tendering procedure in its hereditary municipal area and isn't able due to national law to apply in other areas. Keeping this at the back of our mind the alternative control media of regulative attribution has still to prove that it is comparably capable to ensure the enforcement of public purposes at the time of attribution as well as during the long years of delivery.

cc) Conclusion

The community law creates freedom for other system-decisions. Therefore the public undertaking is losing ground as a control media, partly because of the discussed functional inadequacy, partly because of a (pretended?) loss of attractiveness.

V. Perspectives of development

In conclusion some perspectives of development shall be shown considering especially the competential framework.

1. Europeanisation?

The European grasp for Services of General Interest was carried out of the perspective of competition between the service providers and in connection with the liberalisation of single concrete markets. Nowadays this position is going to expand in a market spanning manner and develops the perspective of service providers as citizens of the Union and part of the European civil society. Thus art. 36 of the Charter of Fundamental Rights tells that the Union recognises and respects access to services of general economic interest in order to promote the social and territorial cohesion of the Union. Although this doesn't mean that subjective rights are constituted and new competencies for the Union are formally precluded due to art. 51 II of the Charter, it cannot be ruled out that the services of general interest come under the general uniting influence of the fundamental rights idea. It is known especially in Germany based on a long dogmatic fundamental rights experience that constitutional ideals and aims may end up in accordant acts. This is the more likely the more the market community changes into a

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fundamental rights community. Anyway in its Communication on Services of General Interest in Europe the Commission recognises a link between the access to services of general interest and the European citizenship and thinks about a common concept. Concrete considerations were presented in the Commission's report on Services of General Interest from October 17th 2001. All this hints at a new politically-creative and not only competition-controlling access to national and municipal services of general interest.

As a result of this development minimum standards, political aims and access rights may be established by the use of trans-sectoral regulations or directives. The consequential levelling and unification might influence the decision to consign public undertakings to provide services of general interest. However the answer to such striving must be “no” regarding the requirement of competencies. Measures could be based only on art. 86 III ECT such as the liberalisation programs and the transparency directive. A position which is orientated on the citizenship of the Union and which focuses the political aspects of services of general interest is beyond the realm of this article which only covers the Member States' and public undertakings' obligation to the competition rules and fundamental freedoms. The competence to regiment the Member States' behaviour in the economic competition cannot be used to charge services of general interest union-politically what is quite evident if you see that they are drawn to the local living conditions.

2. Creation of functional adequacy and equal opportunities in the competition of institutions

In my eyes the development to strive for is a new weighting of entrepreneurial activities of the state in the competential relationship between the EC and the Member States. Starting point for this is the knowledge that the ECT accepts the system-decision in favour of the use of public undertakings which has to be reached at national level and legitimates the existence of such public undertakings in art. 86 I ECT as an instrument of Member States' politics. A disregarding practise in legislation and interpretation knocks at borders built by primary legislation. Single secondary legislation, Commission's communications and decisions of the ECJ are not allowed to jeopardise from behind what the ECT respects, namely the free choice of the control media “public undertaking” as a form to provide services of general interest.

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Therefore the institutions of the EC are obliged de lege lata to create functional adequacy and equal opportunities in the competition of institutions in combined efforts with the Member States' administration, the national dogmatics and with the support of science. Some generally accepted overlapping guidelines shall be sketched finally; they have to be considered also regarding a concretising solution discussed by the ECJ to be realised in the after-Nizza-process.

Admittedly at first the application of law at community level is asked for at all steps. This starts with the interpretation of the rules referred by art. 86 ECT and there first and foremost with the elements of the state-aid-term. In doing so the performance of secondary obligations with a social or ecological character has to be recognised as a relevant equivalent of the aided public undertaking and not only as a part of the justification examination under the terms of art. 86 II ECT. The concern of functional adequacy is relevant regarding the application of the frequently ambiguous transparency directive as well as regarding the interpretation and implementation of sector-orientated liberalisation-programmes like the already mentioned regulation concerning public local transportation. Furthermore it has to be taken into account for equal opportunities reasons that public undertakings contain a certain regulation-potential which is inherent in the system, whereas in principle the assignation of private companies increases the need for regulation. Moreover it has to be secured that the realisation of as many public aims as possible is possible and that effective enforcement instruments within the bonds of the tendering procedures are available. This involves the formulation of the performance specifications as well as the handling of aims external to the tendering procedure. The Member States' enfeeblement as carriers of undertakings has to be compensated by a strengthening of their function as demanders.

The focus of the dogmatic efforts would be the justification clause art. 86 II ECT. Besides the definitive qualification of the foundation of a company as an entrustment in the sense of art. 86 II ECT it seems most important to recognise that services of general interest provided by public undertakings are a form of service of general interest on their own. Thereby the legitimisation of the use of public undertakings as a basic principle by art. 86 I ECT would be taken into account within the continuing control of rule and exception within the scope of art. 86 II ECT. If it would be possible to structure the necessary consideration accordingly and to

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create space for a more integrated treatment, the development of efficient control media in the European competition of institutions will benefit significantly.

VI. Conclusion

The community law expands the window of entrepreneurial opportunities, but threatens in its actual interpretation and application the opportunities at the layer of political control in different ways. In other words equal opportunities in the competition of institutions are endangered. The competential dimension which is thereby concerned opens an up to now underestimated challenge for administrative law doctrine at another field of Europeanisation of administration and administrative law.

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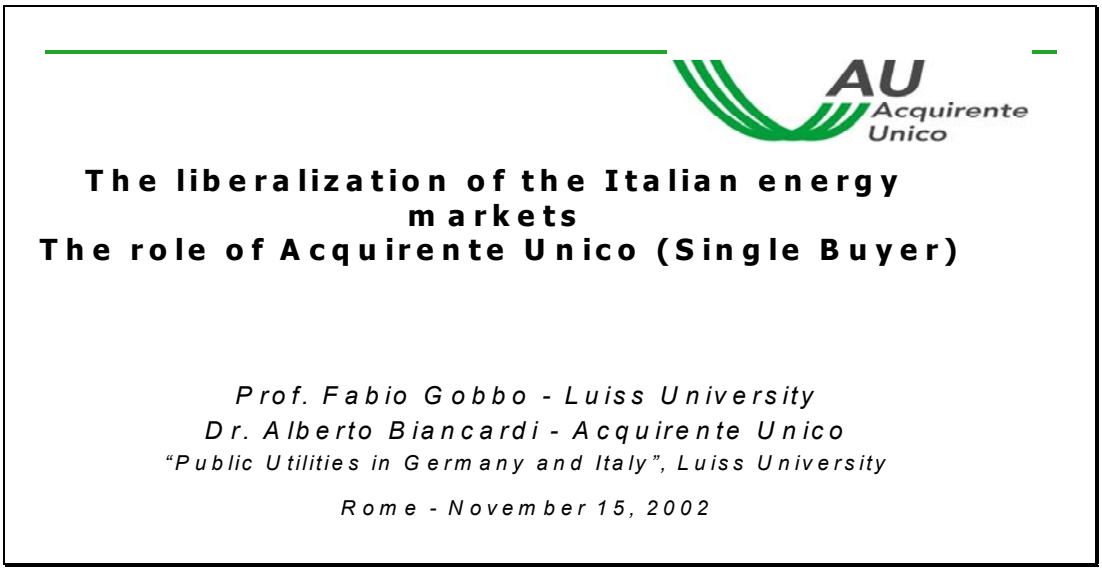
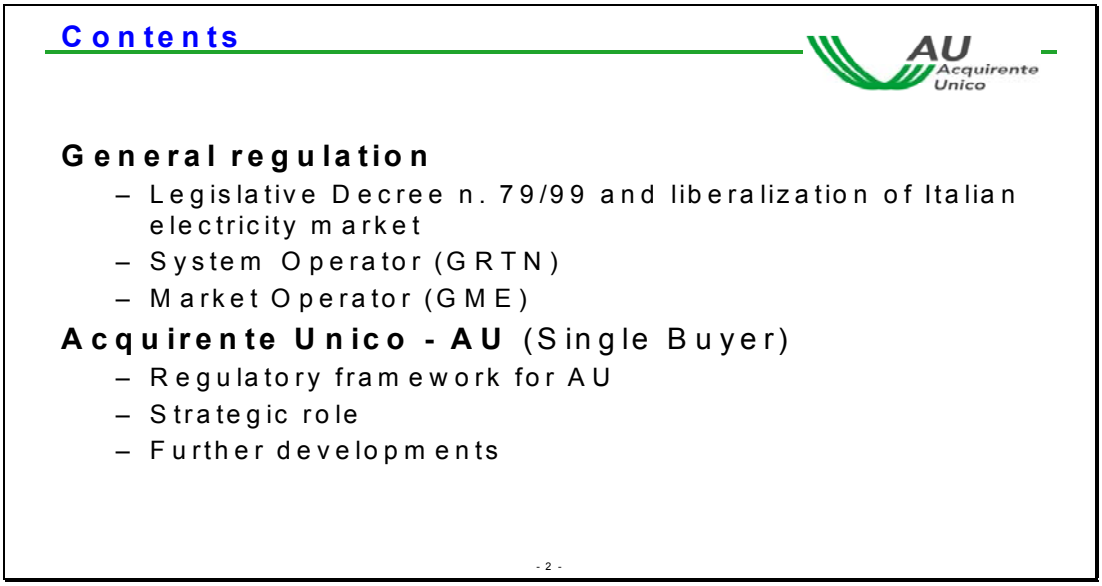
The liberalization of the Italian energy markets
The role of Acquirente Unico

di Fabio Gobbo e Alberto Biancardi





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Legislative Decree n. 79/99

- Legislative Decree no. 79/99 transposes the principles of the European Directive no. 96/92 into the national law and sets forth rules for liberalising and restructuring the electricity market
- The Decree establishes that:
  - the activities of electricity **generation**, **import**, **export**, **purchase and sales shall be liberalised**, subject to the fulfilment of public-service obligations
  - the activities of electricity **transmission and dispatching** shall fall under the responsibility of the State and **be assigned under concession** to GRTN
  - the activity of electricity **distribution** shall be operated **under a concession** granted by the Minister of Industry

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Legislative Decree n. 79/99

- The Decree introduced new public service operators:
  - the **System Operator** (Gestore della Rete di Trasmissione Nazionale, **GRTN**), responsible for transmission and dispatching
  - the **Market Operator** (Gestore del Mercato Elettrico, **GME**), responsible for management and organisation of the trading of electricity (and related services)

  and

  - the **Single Buyer** (Acquirente Unico, **AU**), responsible for electricity supply to the captive market

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System Operator (GRTN)

- **GRTN** is the company with exclusive rights to **carry out transmission and dispatching activities**, as well as the **unified management of the national transmission system**, providing equal access to all eligible operators
- **GRTN negotiates grid operation** and **maintenance contracts with grid owners**, on the basis of a standard contract defined by a decree of the Minister of Industry

Grid Ownership

Terna (Enel) ~ 90%
Other operators 10%

Contracts

Grid Management
(transmission and dispatching)

GRTN

Market Operator (GME)

- **GME** is the public operator in charge of the **management of the electricity market**
- **GME** has the task of organising the electricity market in accordance with criteria of neutrality, transparency, objectivity and competition between producers
- The "market", whose rules were prepared by **GME**, is a regulated market (power exchange)
- The trading of electricity in the organised market is not compulsory: bilateral contracts derogating from the bidding system are allowed, subject to an appropriate authorisation granted by the Regulator

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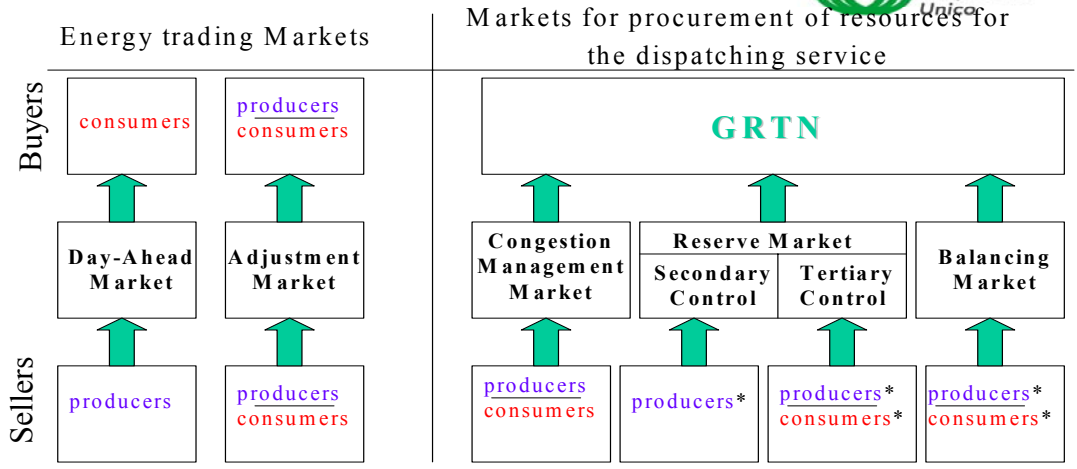
Market Operator (GME)



* subject to technical capability

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Regulatory Framework for AU

The mission

- The mission of Acquirente Unico is established by Legislative Decree n. 79/99:
  - **Guarantee the supply** of electricity to the customers of the captive market
  - **Ensuring economy and efficiency** of electricity supply to captive customers
  - **Enabling the application of a unified national tariff** for all different types of electricity uses in the captive market
- Besides, the Legislative Decree n. 79/99 establishes:
  - The **Minister of productive activities** defines the **guidelines for the purchase** activity of AU to ensure the supply of the captive market
  - The **Regulatory Authority** for electricity and gas establishes the **rules for contracts of sale** with distributors

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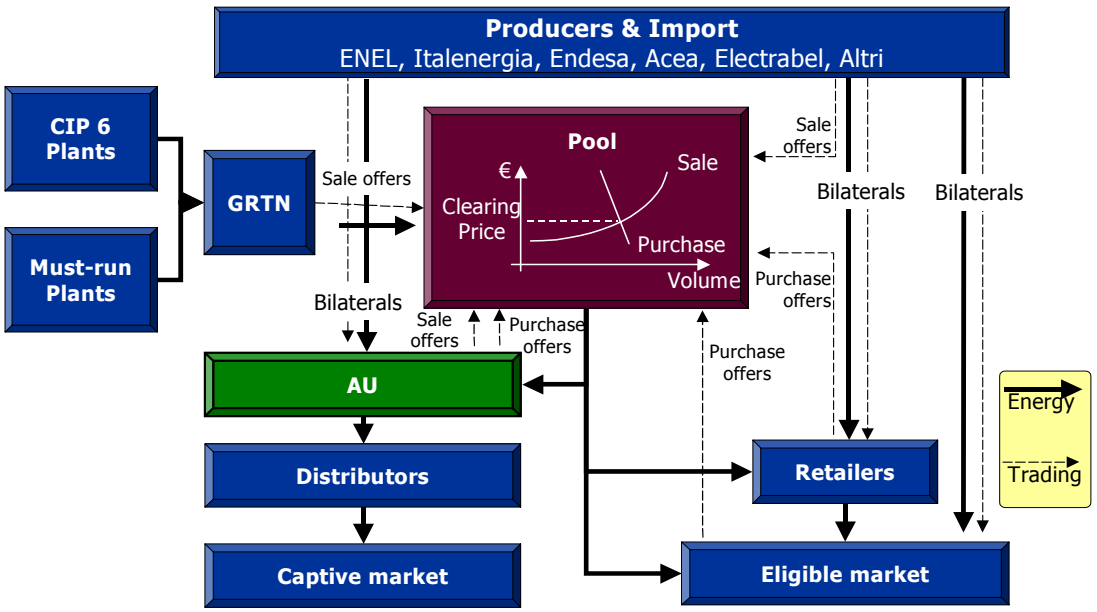
Regulatory Framework for AU

The guidelines

- AU shall procure electricity **mainly** through the **Power exchange**
- AU may also enter into **bilateral contracts**, derogating from the Power Exchange, subject to approval of the Ministry of productive activities and of the Authority
- AU may enter into **financial contracts**
- AU may sign **contracts for the purchase of generating capacity**, subject to approval of the Authority

AU in Italian electricity market



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Strategic role

Captive customers (residential customers, handicraft and commercial firms) are commercially weak.

- Small size
- Inability to control consumption
- Anelasticity of demand in the short term
- Low propensity to switch supplier

Less capability to take advantage from a competitive electricity market

AU purchases electricity for the captive market and resells it to distributors for the supply to the same market. In performing this task AU pursues the target of maximising the protection of captive customers in terms of level and stability of prices, and of ensuring the application of a single national tariff for the captive customers

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Further developments

The role of Standard Offer Service Provider

- Many states of USA has regulated the role of Standard Offer Service Provider for consumers that don't choose to buy electricity from a provider other than local distribution company, as they are unable to find reasonable offers in the free market
- The standard service should ensure an acceptable and easily accessible offer, protecting consumers from large fluctuations of prices and from unfavourable commercial strategies pursued by local distribution companies

Furthermore, even after the full opening of the demand-side market, the role of a Standard Offer Provider for final customers not wishing or unable to enter the eligible market, should be regulated

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Further developments

The role of Provider of Last Resort

- Provider of Last Resort is designed for customers whose retail electric provider fails to provide service to them
- This might happen because the customer has failed to pay the electric provider or because the electric provider went out of business
- Last resort service is provided to guarantee supply continuity against unexpected cut off

In a liberalised market, where suppliers failure is a probable event, the Provider of Last Resort represents a crucial role

Direttore: Prof. Giuseppe Di Gaspare

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Unbundling of energy undertakings and multi-utility strategies in italy

di Loredana De Angelis
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Since the liberalisation process has taken place in Italy, the energy players have been subject to a number of restrictions, both at the legislative and regulatory level. Many of such restrictions are exclusively applicable to major undertakings, some others have a general relevance.

I shall focus this presentation on those restrictions which may have a direct impact on the undertakings' strategies, i.e. the mandatory unbundling of the energy activities and the antitrust ceilings, as provided for under the current Italian legislation.

Furthermore, a recent case law will be analysed, in order to clarify the interpretation of some energy provisions, as made by the antitrust regulator and by the supreme administrative court.

1. Unbundling of energy undertakings

1.1. Corporate and administrative unbundling

There are two possible forms of unbundling: a stricter unbundling, requiring that certain activities are not performed by the same company, and a "light" one, limited to the accounting separation of the various activities carried out by a given company.

The obligation to separately manage certain activities, even only for accounting purposes, is aimed at avoiding any cross-subsidy among such activities. So that each cost is clearly related to the activity it pertains to and it is not hidden by the integration.

With respect to the unbundling issue, the gas and the electricity regimes are quite different in Italy.

While the gas sector is interested by the two forms of unbundling described herein above (i.e. both the corporate and the accounting unbundling), the electricity sector knows only the corporate one. In other terms, no obligation to keep separate accounts applies to the electricity players.

Moreover, while in the former sector (gas) the unbundling is established as a *general obligation*, in the latter (electricity) there is only a corporate unbundling *referred to Enel*, the former monopolist. One could ask whether the obligation to manage the power activities by way of different corporate vehicles, as established for Enel, may apply also to other power undertakings having similar characteristics.

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I would say that such an extensive interpretation is not allowed, since the obligation established under law makes explicit reference to Enel. Moreover, the position of the former monopolist may not be "assimilated" to that of any other power undertaking operating in Italy.

However, to a certain extent the case law we are about to analyse has given a positive answer to this question, at least with respect to the major undertakings. And by use of the instruments made available under the antitrust law.

Before analysing such case law, I shall summarise the unbundling provisions currently applicable.

As anticipated above, the corporate unbundling applies both to the electricity and gas sectors.

Pursuant to Article 13 of Legislative Decree No. 79/99 of March 16 1999, liberalising the electricity sector, Enel had to incorporate a number of companies, for the management of its activities:

- Erga (*Energie Rinnovabili Geotermiche ed Alternative*) S.p.A.: power production;
- ENEL Distribuzione S.p.A: distribution and sale to non-eligible customers (*i.e.* for those who are not allowed to select the electricity supplier);
- ENEL Trade S.p.A.: sale to the eligible customers;
- Terna (*Trasmissione Elettricità Rete Nazionale*) S.p.A.: property rights concerning the transmission grid (including the transport lines) and any connected development and maintenance activity;
- Sogin (*Società Gestione Impianti Nucleari*) S.p.A.: dismantling of nuclear power plants.

As for the gas sector, pursuant to Article 21, paragraphs 1 and 2 of Legislative Decree No. 164/00 of May 23 2000 (liberalising such sector), the following activities are subject to corporate unbundling:

- **starting from January 2002, *transport and dispatching* must be separated from any other gas activity, with the exception of storage;**
- **starting from January 1 2002, *storage* must be separated from any other gas activity, except for transport and dispatching;**
- **starting from January 2002, *distribution* must be separated from any other gas activity.**
- starting from January 2002, *sale* may be performed only by undertakings which do not perform any other gas activity, except for import, export, exploitation and wholesale activities.

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The administrative unbundling is applicable only to the gas sector. In this respect, article 21, paragraphs 1 and 2 of Legislative Decree No. 164/00, establishes that since January 1 2002 gas *transport and dispatching* accounts must be separated from those concerning storage.

1.2. Antitrust ceilings

The antitrust ceilings are a second instrument which has been introduced for liberalisation purposes, i.e. in order to support competition on the supply-side.

Again there are some differences between the two energy sectors.

The electricity field is interested by "stable ceilings", i.e. by antitrust ceilings with an unlimited duration. Namely, starting from January 31 2003, no undertaking may produce or import, directly or indirectly, more than 50% of the whole amount of electricity generated and imported in Italy. Such threshold is calculated as an average, on a three-year basis (Article 8 of Legislative Decree No. 79/99).

In order to meet the above ceilings, Enel had to put on sale 15,000 MW of its generation capacity. To this end, Enel incorporated the so-called Gen.co.s. (Elettrogen, Eurogen, Interpower).

As far as the gas sector is concerned, there are only "temporary ceilings", applicable until 2010. Such ceilings are the following:

- 75% for gas injection into the grid. Since January 1 2002 and up to December 31 2010, no gas undertaking may convey into the national grid domestic or foreign gas, with purposes of sale in Italy, either directly or by means of controlled, controlling companies or by means of companies controlled by the same controlling company, for an amount exceeding 75% of the domestic yearly gas consumption. Such percentage shall be reduced by 2 percentage points for each year subsequent to year 2002, until the achievement of the 61% target (Article 19, paragraph 3 of Legislative Decree No. 164/00), which is due by 2008.
- 50% for the sale to end-users. As of January 1 2003 and up to December 31 2010, no gas undertaking may sell to end-users, directly or by means of controlled or controlling companies, nor by means of companies controlled by the same controlling company, more than 50% of the domestic yearly gas consumption (Article 19, paragraph 2 of Legislative Decree No. 164/00).

2. Multi-utility strategies

The mandatory unbundling, as well as the antitrust thresholds, gave a significant impulse to multi-utility strategies. Such strategies seem to be a possible way to re-establish the economies of scale that energy undertakings were used to, and that had been hindered by the obligations summarised above. For instance, such strategies may allow an undertaking to keep its size although it is forced to reduce its share on the core-business' market.

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In addition to major energy players, also local services' providers have started to implement the same strategies of diversification of their core-business.[1] As a consequence of that, water, electricity and gas distribution services are often carried out by the same company. In broad terms, one could say that this strategy was accelerated by the privatisation of entities supplying public services. But I won't go further on the reasons for the diversification, since this analysis is more based on economic than legal grounds.

Are these strategies fully allowed under the current legislation? And, namely, are these strategies in line with the applicable legislation either when performed by major undertakings or by distributors of merely local relevance?

Being Enel far ahead with this process, we shall hereinafter analyse a case concerning it, trying to come to some general conclusions. The starting point shall be the decision rendered by the Council of State, the supreme administrative court, last October 1.

2.1. The Enel case: Council of State, Decision No. 5156 of October 1, 2002

Enel had requested the EU Commission's clearance on the projected merger between its controlled Wind Telecomunicazioni (which is jointly controlled by Enel SpA and France Telecom) and Infostrada. The merger would have resulted in a new company: New Wind.

The projected merger, of European relevance, obtained the clearance of the EU Commission with respect to the telecommunication services' market. On the other hand, the Commission (decision of January 19 2001) deferred to the Italian Antitrust Authority the analysis of the impact that the deal could have on the Italian market of the power *supply*.

The Antitrust started an investigation (pursuant to Article 16 of the Antitrust Act – adopted with Law No. 287/1990) and authorised the merger (decision of February 28 2001), provided that Enel would have transferred at least 5,500 MW of its productive capacity, in addition to the 15,000 MW to be sold under Legislative Decree No. 79/99. This in order for Enel Trade not to strengthen its dominant position. The sale of additional capacity was re-baptised like the sale of the "Forth Gen.co."

Enel appealed the Antitrust deliberation before the Administrative Court of the Lazio Region (TAR Lazio) which, with decision No. 9534 of November 14 2001, upheld Enel's claim. In particular, the administrative court stated that the pool market would have created a barrier between the *generation* and the *supply* markets and that Enel had not a dominant position in the former one.

In bringing its appeal before the Council of State, the Antitrust claimed that, according to European case law, a 50% market share may imply a dominant position. Due to the position that the Enel Group has in the power market, Enel Trade could pay high energy costs to Enel

[1] Most of local services' providers in Italy may be qualified as a small or medium enterprise.

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Produzione and to Erga (which are active in the power *generation* market), and then it could transfer such costs on the *supply* market. Moreover, the pool market has not yet started in Italy and, in my view, the starting of such market might not have an impact on the matter.[2] The deal would strengthen the dominant position enjoyed by Enel Trade in the *supply* market, since it could play strategies which may attract a high number of clients, by offering a single package including electricity and telecommunication services. Therefore, in order to avoid that Enel, as a consequence of the merger, would strengthen its position in the supply market, the Antitrust deemed it necessary to limit the Enel's position in the generation market: i.e. to sell further 5,500 MW.

Enel reproduced its reasons before the Council of State, insisting that the Antitrust provisions may not apply to a deal involving players of different markets, so-called "conglomerate" deal.

The Council of Stated repealed the TAR's decision, on grounds hereinafter summarised.

The TAR did not make a control on the coherence and logic of the act appealed, but directly verified the existence of a dominant position. Therefore it substituted its assessment to that expressed by the Antitrust. Namely, the court of first instance made an evaluation on the merit of the Antitrust statement, thus performing a strong control which resulted in an "excess of jurisdictional power", where the judge's will substituted that of the administrative body[3]. To assess a dominant position is a complex technical evaluation, which is made on the basis of undetermined juridical concepts and may not be considered as a factual verification. Therefore the TAR is not entitled to perform any merit evaluation concerning a domain which is reserved to the administrative authorities. This principle, already expressed by the Council of State (No. 2199/2002), is coherent with the EU system and with the trend expressed by the EU Court of Justice according to which, where complex economic evaluations are carried out by governmental authorities, the judge may merely verify that: (i) the procedure has been respected, (ii) the facts are exactly represented, (iii) there is not a clear evaluation mistake and (iv) there is no "deviation of the power". The EU Commission had already ascertained the Enel's dominant position, when deferring the merger's proposal to the Antitrust. Therefore, the judge was not allowed to question it.

A second statement made by the Council of State refers to Enel Trade's dominant position in the *supply* market. According to the Supreme Administrative Court, such dominance arises from many elements. I would focus on two of them: Enel Trade enjoys a significant market's share, and Enel Trade belongs to a former monopolist group, which was integrated throughout the power stream and which is still dominant in the supply activity.[4] To make reference to the mere market's share of Enel Trade, as the TAR did, is not enough. Enel Produzione and Erga are dominant in the power generation market, not only because of their huge market's share (53.4%), but also thanks to the composition of the generation capacity they have. In

[2] The authorities are currently discussing how to limit, once the pool market will have started, the Enel's capacity to influence (or even to fix) the electricity price on the wholesale market.
[3] See Supreme Court, No. 7261 of August 5, 1994.
[4] Moreover, the Council of State has underlined that the market's structure is highly concentrated, and that there is a size asymmetry with respect to the other competitors.

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particular, the two companies mentioned above have the ownership of many modulation and peak plants which are able to adapt to the hourly and seasonal modulations of the demand, and therefore may allow Enel to influence the wholesale price of electricity. Moreover, the three Gen.co.s sold must be re-powered and, in the short-term, they shall not be able to produce at full capacity. Finally, such Genco.s include base-load plants, with a limited capacity to affect the market's price. Enel Trade, which is dominant in the supply market, is able to bear high costs for power purchase in the wholesale market, while its competitors (which are similar to Enel Trade with respect to the power supply but not with respect to the power generation) shall sell the electricity at costs lower than those incurred for electricity purchase in the wholesale market.

By means of the merger with Infostrada, at least 25%-45% of the future eligible clients (which are still linked to Enel Distribuzione), may purchase electricity from Enel Trade and telecom services from New Wind (arising from the merger between Wind and Infostrada). And therefore Enel may implement an attractive strategy, including a joint offer of services of public interest.

As for the nature of the deal, the Council of State concluded that "conglomerale" deals may be syndicated by the Antitrust: EU Commission's cases may confirm that such deals are relevant in order to control the mergers. In other words, the merger may be made conditional not only upon the measures relating to the market affected by the deal, but also upon those concerning other markets, connected to it.[5] The Council of State agrees that the supply and the generation markets are closely connected and that to order a measure affecting the up-stream market (generation) is reasonable in order to guarantee competition in the downstream market (supply).

The Council of State upheld in part the Enel's claim concerning the lack of proportionality between the effects of the merger and the measures imposed by the Antitrust. Enel had claimed that there was no proportionality and that the Antitrust measure breached Legislative Decree No. 79/99. According to the Council of State, there is no breach of law, since the decree liberalising the electricity sector has not reserved to the law the power to fix the quantity of MW to be disposed by Enel. Such decree only fixes a minimum quota to be sold (15,000 MW) in order to start the liberalisation process.

On the other hand, the Council of State agreed with Enel that the proportionality principle was not implemented by the Antitrust.

According to the proportionality principle, the less severe measure must be preferred to any possible alternative. This principle requires not only to demonstrate that the measure is *eligible* to reach the purpose, but also that it is *adequate*, i.e. it does not exceed what is strictly required in order to achieve the target. First of all, the implementation of such principle

[5] See the decision rendered by the EU Commission (decision of February 7 2001, case COMP/M 1853, EDF/EnBW), concerning a merger in the power sector. Edf was dominant in the *supply* market, while EnBW was a player in the *supply and transport* markets. By means of the merger EDF would have controlled a possible competitor (EnBW) for the French market, thus strengthening its position in such market.

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requires an exam of the possibility to identify eligible measures in the supply market. Only in case of negative evaluation the authority may implement other measures concerning connected markets, including the generation one. Pursuant to the Council of State, the Antitrust would not have taken in adequate account the above considerations. Lacking an evaluation about the proportionality, the decision is illegimate. The Council of State deems not appropriate the reference, made by the Antitrust in order to justify the measure, to the fact that the amount of generation capacity to be sold is correspondent to the size of a new competitor which would be able to compete with Enel Produzione. In the Antitrust's view, such competitor would have a generation capacity between that of the actual Enel's main competitors (Edison – Sondel) and that of the possible competitors (the two Gen.co.s - Eurogen ed Eleettrogen). According to the Council of State, the above may refer to the eligibility but not to the adequacy (sacrifice corresponding to what is necessary).

The Antitrust was therefore requested to adopt a new decision, duly grounded on the proportionality issue. On October 24 2002, the Antitrust started the investigation aimed at adopting the final decision and on December 5 licensed it[6] (see Paragraph 4. herein below).

3. Possible impact of the Enel case law on multi-utility strategies

The Antitrust position, as well as the Courts decisions on the matter, are of crucial relevance for dominant players, which are likely to re-draft their strategies in order to take into account the principles summarised above.

I would conclude that, in order to prevent any risk of an Antitrust stop, the dominant players are likely to focus on their core-business.

Needless to say that not only the dominant undertaking may be affected by the above, but also the entire group to which it belongs to. In particular the former monopolist's groups. As the Council of State underlined, these players may have a dominant position even irrespectively of the market's share. Moreover, these groups may be prevented from "shopping" outside the domestic borders, to the extent that such shopping is aimed at incorporating possible competitors (the EU Commission already took this position).

In the light of the above, there will be room for small and medium enterprises to carry out multi-utility strategies. As a matter of fact, many undertakings carrying out local services in Italy have a small or a medium size. These operators are more than ever likely to go on with their multi-utility strategies, since the large enterprises are no longer their competitors in such strategies.

As a final comment, I would focus on another provision, which shall be applicable once the pool market will be operating. Pursuant to Article 6, paragraph 1 of Legislative Decree No. 79/99, from that date on, any sale of electricity outside the pool market shall require clearance by the Authority for Electricity and Gas (the Italian Regulator). In doing that, the regulator

[6] The Antitrust issued such decision while this paper was being finalised. A final paragraph has been therefore included, in order to take into account the Antitrust position on the matter.

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shall deny authorisation to those out-of-the-market sale contracts *"which may seriously prejudice competition"*. Although this provision was not mentioned by the case law analysed herein above, it may be used for antitrust purposes and represent a further obstacle to major groups' strategies of diversification.

4. The Antitrust final decision on the merger between Wind-Enel and Infostrada[7]

On December 5, 2002, the Italian Antitrust Authority gave a final green light to the merger analysed, and cleared it without conditions.

It is important to stress that such a decision was taken further to a deeply change in the Enel's industrial strategy. With respect to late 2000-early 2001, where the first evaluation was made, the Antitrust assessed that Enel has planned a new strategy, no longer based on the integration between the sale of electricity services and that of telecom ones.

Therefore, in this changed scenario, no measure was requested to Enel in order to finalise the merger.

I would conclude that the Regulator's final assessment confirmed the above comments about the possible strategies of major undertakings, since only a change in strategy (no more multi-utility) allowed Enel to go on with the merger, without being subject to any mandatory transfer of power in its core-business market.

[7] This paragraph was not included in the presentation made on November 15 2002, during the conference at LUISS.

Direttore: Prof. Giuseppe Di Gaspare

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Public utilities and communal undertakings: The legal scope of the economic activities of municipalities in the energy sector

di Markus Kaltenborn

I. Introduction

The competition between private firms and communal enterprises within the energy market and indeed many other economic sectors is on the increase. Typical business sectors in which municipalities are predominantly economically involved belong to those within public utilities (i.e.) besides the energy sector e.g. water supply, waste removal and sewage disposal, also public transport. The municipalities have always been active in these domains. Due to the process of liberalisation which can be attributed to influences of European law, they are now competing more and more with private companies. Further to this, the local authorities have been opening up numerous new fields of activity over the past few years: For instance, communal enterprises offer their services for the cultivation of private gardens, carry out electrical installations, make repairs for private clients or participate in companies that are engaged in the telecommunication sector, the housing office is active in real estate brokerage and removal services, the municipal canteen organizes a communal party-service and the local adult education programme offers private tuition. There is even a city in which a manicurist has been run by a communal undertaking[8].

The main reason for this imaginativeness in looking for new fields of activity is obvious: the increasingly worsening financial state of the municipalities. There is very little potential to save on expenses as many of the communal tasks, which are particularly costly, are determined by law. Therefore the local authorities endeavour to open up additional sources of revenue. If they do not want to resort to the highly unpopular measure of increasing taxes and selling municipal properties, the only means that remains is to obtain higher receipts by extending their economic activities. Due to these activities they automatically enter into conflict with private companies who even defend themselves against the unwelcome competition of the communal trading in court. Especially private competition law offers the legal basis for corresponding claims of defence. Besides this, the private competitor can also invoke the provisions of communal commercial law, which is part of the respective local government law. This will now be the main topic of the following analysis. Firstly though, it will be necessary to discuss briefly some constitutional aspects of the subject.

II. The constitutional guarantee of local self-government

The starting point of any legal investigation of the possibilities and limits of the economic activity of local authorities is the constitutional guarantee of local self-government. According to art. 28 par. 2 GG, the municipalities have to be guaranteed the right to regulate all the local

[8] For these and further examples cf. *Alexander Schink*, Wirtschaftliche Betätigung kommunaler Unternehmen, NVwZ 2002, 129.

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affairs in their own responsibility. Regarding tasks that refer to local matters, this norm contains a constitutional basis of legitimation for the local authorities to take up such a task. Within the scope of the relevant statutory law, the local authorities can basically decide of their own accord how to fulfil the respective task. Since an economic activity can also serve the fulfilment of public tasks, it is protected by the guarantee of self-government in art. 28 par. 2 GG as well[9]. However the regulation in art. 28 par. 2 GG only delimitates the competences of the local authorities with regard to the state, but it does not contain any statement about their relation to the private business sector[10]. Therefore the constitutional norm neither protects the private enterprises which are competing with the communal trading, nor are the local authorities able to defend themselves against private competitors by referring to the guarantee of self-government[11]. The legal basis for this delimitation can be found in the fundamental rights of the constitution and in the relevant regulations of the local codes.

Most authors of German literature who have written concerning constitutional and local law start with the assumption that art. 28 par. 2 GG does not only assign certain competences to the local authorities but at the same time points out the limits of their fields of action[12]. The conclusion is therefore partly drawn that legal norms, which confer responsibilities on the local authorities that go beyond the tasks protected in art. 28 par. 2 GG, are to be considered as unconstitutional[13]. This view could especially be relevant to the question if the legislator may also allow communal trading beyond the borders of the municipality. However, such an interpretation of art. 28 par. 2 GG cannot be convincing[14]: According to its formulation, the constitutional norm only contains a statement on the question which local tasks are under

[9] Cf. VerfGH Rh.-Pf., NVwZ 2000, 801; *Erichsen*, Kommunalrecht des Landes Nordrhein-Westfalen, 2nd ed. 1997, p. 271; *Markus Moraing*, Kommunales Wirtschaftsrecht vor dem Hintergrund der Liberalisierung der Märkte, WiVerw 1998, 233 (248-249); *Eberhard Schmidt-Aßmann* (ed.), Besonderes Verwaltungsrecht, 1999, chap. 1, no. 120; *Johannes Hellermann*, Örtliche Daseinsvorsorge und gemeindliche Selbstverwaltung, 2000, p. 153; *Florian Becker*, Grenzenlose Kommunalwirtschaft, DÖV 2000, 1032 (1034); *Schink* (supra note 1), NVwZ 2002, 129 (133); *Hans D. Jarass*, Kommunale Wirtschaftsunternehmen und Verfassungsrecht, DÖV 2002, 489 (497).

[10] Cf. e.g. *Tettinger*, in: Hermann von Mangoldt / Friedrich Klein / Christian Starck, Bonner Grundgesetz, vol. 2, 4th ed. 2000, Art. 28, no. 165, 177.

[11] *Schink* (supra note 1), NVwZ 2002, 129 (133); cf. also VerfGH RP, NVwZ 2000, 801; *Peter Badura*, Wirtschaftliche Betätigung der Gemeinde zur Erledigung von Angelegenheiten der örtlichen Gemeinschaft im Rahmen der Gesetze, DÖV 1998, 818 (823); *Matthias Ruffert*, Kommunalwirtschaft und Landes-Wirtschaftsverfassung, NVwZ 2000, 763 (764); of a different opinion *Joachim Wieland / Johannes Hellermann*, Der Schutz des Selbstverwaltungsrechts der Kommunen gegenüber Einschränkungen ihrer wirtschaftlichen Betätigung im nationalen und europäischen Recht, DVBl. 1996, 401 (408).

[12] *Rolf Grawert*, Zuständigkeitsgrenzen der Kommunalwirtschaft, in: Klaus Grupp / Michael Ronellenfitsch (eds.), Planung – Recht – Rechtsschutz, Festschrift für Willi Blümel, 1999, pp. 119-137, at p. 125; *Michael Nierhaus*, in: Michael Sachs (ed.), Grundgesetz, 2nd ed. 1999, Art. 28, no. 32; *Schmidt-Aßmann* (supra note 3), chap. 1, no. 15; *Dirk Ehlers*, Das neue Kommunalwirtschaftsrecht in Nordrhein-Westfalen, NWVBl. 2000, 1 (5-6); *Christina Lux*, Das neue kommunale Wirtschaftsrecht in Nordrhein-Westfalen, NWVBl. 2000, 7 (9); *Tettinger* (supra note 3), Art. 28, no. 173; *Wolfgang Löwer*, in: Ingo von Münch / Philip Kunig (eds.), Grundgesetz-Kommentar, vol. 2, 5th ed. 2001, Art. 28, no. 37-38; *Bodo Pieroth*, in: Hans D. Jarass / Bodo Pieroth, Grundgesetz, 6th ed. 2002, Art. 28, no. 10; *Schink* (supra note 1), NVwZ 2002, 129 (133).

[13] Cf. e.g. *Wolfgang Löwer*, Die Stellung der Kommunen im liberalisierten Strommarkt, NWVBl. 2000, 241 (244).

[14] Cf. *Jarass* (supra note 2), DÖV 2002, 489 (499).

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special, constitutional protection and may not be withdrawn by the legislator. The norm leaves the question open as to whether the legislator can also authorize the local authorities to be active in other fields[15]. Consequently, cross-border activities of communal enterprises should not be regarded to be in contradiction to the constitution, if it is guaranteed that one municipality is not affected by the activities of another one in its rights protected by the constitution[16].

III. The differentiation between the economic and non-economic activities of municipalities

The legal regulations regarding the municipalities economic activities are not formed unitarily in all German federal states but there are many parallels or at least similarities among the states various local codes. As follows, the analysis will be based upon those regulations which are valid for North Rhine-Westphalia, the largest state in regard to population.

According to art. 107 par. 1 GO-NW, the participation of municipalities in the economic intercourse depends on a number of prerequisites of admission. Before going further into detail, it has to be explained how the legislator understands "economic activity". Art. 107 par. 1 clause 3 GO-NW contains a legal definition of this term. It says that economic activity can be regarded as the "running of companies that work in the market as producers, providers or distributors of commodities or services if the result could have also been achieved by a private company with the aim of making profit". In this context we have to consider the regulation of art. 107 par. 2 GO-NW, according to which certain activities have been defined by the legislator as "non-economic" and thus are not subject to the regulation of par. 1. At this point it might be worth mentioning the facilities which the local authorities are legally obliged to operate, or those that are required for the social and cultural care of the citizens (e.g. schools, libraries, hospitals, sports facilities, public gardens, municipal halls etc.). Communal undertakings referring to environmental safety issues, street cleaning, housing allocation or the promotion of trade and tourism[17] are not regarded as economic activities either. Of course, these facilities must also be managed economically (art. 107 par. 2 clause 2 GO-NW) but they are not subject to the strict preconditions of admission in art. 107 par. 1 GO-NW. The same applies to economic activities that are carried out as a mere annex of a non-economic activity. With regard to this, the jurisdiction has however developed strict benchmarks. As an example, a municipal horticulture company has been judicially prohibited to offer their services to private persons although the proportion of this part of the business only amounted to about 2.5% of the total activities of the firm[18].

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[15] See also *Schmidt-Aßmann* (supra note 3), chap. 1, no. 15; cf. moreover *Ehlers* (supra note 5), NWVBl. 2000, 1 (6); *Markus Heintzen*, Zur Tätigkeit kommunaler (Energieversorgungs-)Unternehmen außerhalb der kommunalen Gebietsgrenzen, NVwZ 2000, 743 (744-745); *Klaus Rennert*, Kommunalwirtschaft und Selbstverwaltungsgarantie, DV 35 (2002), 319 (340); *Thomas Mann*, Öffentliche Unternehmen im Spannungsfeld von öffentlichem Auftrag und Wettbewerb, JZ 2002, 819 (825).

[16] *Jarass* (supra note 2), DÖV 2002, 489 (499-500).

[17] For more details on the preferential treatment of the promotion of trade see *Wilfried Erbguth / Sabine Schlacke*, Zur gemeindewirtschaftsrechtlichen Zulässigkeit kommunaler Wirtschaftsförderung in Nordrhein-Westfalen, NWVBl. 2002, 258.

[18] OLG Hamm, DVBl. 1998, 792.

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IV. The participation of municipalities in the economic intercourse and its prerequisites of admission

1. Public purpose

According to art. 107 par. 1 GO-NW, a municipalities' economic activity is only admissible if a public purpose requires this activity. This means that the main purpose of the economic activity has to be the safeguarding of the interests of public welfare. By this restriction it is not excluded that the communal undertaking may also make profit. The profit orientation of the company, though, should not affect the public purpose[19]. On the other hand, in the opinion of the courts and the predominant number of commentators, if the municipalities sole object is to make profit then the activity is forbidden[20]. Certainly, such an activity would also – at least indirectly - support a public purpose, as the funds are usually used for financing other local tasks. The statutory regulation, however, claims an immediate connection between the economic activity and the pursuit of a public interest. All the same, this limitation is not very significant, as the local authorities are given ample scope when determining what is meant by "public purpose"[21].

2. Capability of the municipality

The second prerequisite of admission mentioned in art. 107 par. 1 GO-NW says that there has to be an adequate relation between the quality and extent of the economic activity on the one hand and the capability of the municipality on the other hand. With this regulation, the legislator wants to protect the municipalities against the negative consequences of an oversized economic commitment[22]. An important means for ascertaining the chances and

[19] *Dirk Ehlers*, Rechtsprobleme der Kommunalwirtschaft, DVBl. 1998, 497 (501).
[20] Cf. BVerfGE 61, 82 (107); *Grawert* (supra note 5), pp. 125-126; *Ehlers* (supra note 12), DVBl. 1998, 497 (499); *Johann-Christian Pielow*, Gemeindewirtschaft im Gegenwind ? – Zu den Grenzen kommunaler Wettbewerbsteilnahme am Beispiel der Telekommunikation, NWVBl. 1999, 369 (377); *Joachim Suerbaum*, Die Novellierung des Gemeindewirtschaftsrechts in Nordrhein-Westfalen – Segen oder Fluch?, in: Stadt Bochum (ed.), Festschrift zum 75jährigen Bestehen der Verwaltungs- und Wirtschaftsakademie Industriebezirk Bochum, 2000, pp. 53-69, at p. 58; *Lux* (supra note 5), NWVBl. 2000, 7-8; *Winfried Kluth*, Öffentlich-rechtliche Zulässigkeit gewinnorientierter staatlicher und kommunaler Tätigkeit, in: Rolf Stober / Hanspeter Vogel (eds.), Wirtschaftliche Betätigung der öffentlichen Hand, 2000, pp. 23-40, at pp. 37-38; of a different opinion e.g. *Olaf Otting*, Neues Steuerungsmodell und rechtliche Betätigungsspielräume der Kommunen, 1997, p. 199. For the question in how far a (profit oriented) use of overcapacities is admissible, cf. *Badura* (supra note 4), DÖV 1998, 818 (821); *Ehlers* (supra note 12), DVBl. 1998, 497 (500-501); *Jörg Ennuschat*, Kommunalwirtschaft und Wettbewerbsrecht, WRP 1999, 405 (406-407).
[21] Cf. BVerwGE 39, 329 (334); *Edzard Schmidt-Jortzig*, Kommunalrecht, 1982, no. 688; *Hermann Pünder*, Die kommunale Betätigung auf dem Telekommunikationssektor, DVBl. 1997, 1353 (1358); *Michael Ronellenfitsch*, Staat und Markt: Rechtliche Grenzen einer Privatisierung kommunaler Aufgaben, DÖV 1999, 705 (707); *Schmidt-Aßmann* (supra note 3), chap. 1, no. 120; *Moraing*, in: Günter Püttner (ed.), Zur Reform des Gemeindewirtschaftsrechts, 2002, pp. 41-84, at p. 56.
[22] *Erichsen* (supra note 2), p. 280.

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risks that are connected with economic activities is the market analysis. It is obligatory for the local authorities in North Rhine-Westphalia if they intend to found an undertaking or to participate in a company. The local organisations of trade, industry and commerce as well as the trade unions that are responsible for the respective economic sectors have to be given the opportunity to express their opinions about the local authorities' intentions. However, neither the results of the market analysis nor these views of the affected organizations are obligatory for the decision of the local council whether or not to take up an economic activity[23]. Once again in this case, the local authorities are conceded great latitude concerning the assessment of their capability[24].

3. Subsidiarity clause

According to the so-called subsidiarity clause, which also belongs to the prerequisites of the municipalities' economic activities as enumerated in art. 107 par. 1 GO-NW, a local authority may only carry out economic activities in order to fulfil its tasks, if the public purpose pursued cannot be fulfilled "better and more economically" by other companies. When formulating the subsidiarity clause, the North Rhine-Westphalian legislator did not follow the stricter patterns of other federal states that only permit their municipalities economic activities, if the public purpose cannot be fulfilled by another company "just as efficiently and economically" (e.g. in Bavaria, Thuringia and Rhineland-Palatinate[25]). Therefore it is sufficient when the communal enterprise in North Rhine-Westphalia has the same qualification for the fulfilment of the public purpose as its private competitor.

However, some important economic sectors are explicitly excluded from the application of the subsidiarity clause, amongst these are the energy providers. Some of our local law experts consider this preferential treatment of communal undertakings in these sectors to be unconstitutional[26]. They declare that all state institutions (including the municipalities) are constitutionally obliged to pursue matters of public welfare. The exceptional rule, though, permits state activities, even if private companies are able to fulfil the public interest in a better way. But there is still another argument: If, on the one hand, the regulation of art. 107 par. 1 GO-NW claims that a public purpose "requires" the economic activity of the municipality and if, on the other hand, in certain domains a worse accomplishment of such a public purpose is considered to be insignificant, then – from the point of view of the critical commentators - this has to be regarded as a legal inconsistency and, consequently, as a violation of the rule of law[27]. However, here we can object that an economically sub-optimal fulfilment of tasks, which is supposed to be prevented by the subsidiarity clause, is not always

[23] *Ehlers* (supra note 5), NWVBl. 2000, 1 (2); *Lux* (supra note 5), NWVBl. 2000, 7 (10).
[24] Cf. *Pünder* (supra note 14), DVBl. 1997, 1353 (1359); *Hans-Günter Henneke*, Das Recht der Kommunalwirtschaft in Gegenwart und Zukunft, NdsVBl. 1999, 1 (2).
[25] Cf. Art. 87 para. 1 No. 3 BayGO; § 71 para. 1 No. 3 ThürKO; § 85 para. 1 No. 3 GO Rh.-Pf.
[26] *Ehlers* (supra note 5), NWVBl. 2000, 1 (4); *Suerbaum* (supra note 13), pp. 60-61; cf. also *Pielow* (supra note 13), NWVBl. 1999, 369 (379).
[27] *Ehlers* (supra note 5), NWVBl. 2000, 1 (4).

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contrary to the duty of promoting the public welfare[28]. Local energy suppliers can (and are indeed obliged to) pursue - besides the purely economic maximization of profit - also other aims than those of their private competitors; in particular it is their job to guarantee the population supply of energy in the long run at generally acceptable prices. Now it becomes evident that the first and the third precondition of admission, the accomplishment of a public purpose on the one hand and the subsidiarity-clause on the other hand, have different objects: According to the first prerequisite, it must be considered, whether the local authority can also fulfil the public purpose in a different way than by an economic activity, while the subsidiarity clause asks whether this task can be accomplished "better and more economically" by a private company[29]. If therefore certain sectors of public utilities - like the energy supply - are excluded from the subsidiarity clause, this is not contrary to the remaining requirements of art. 107 par. 1 GO-NW. Another question is whether it is politically desirable to maintain this exceptional rule or whether it would be better to apply the subsidiarity clause also to the economically important field of energy supply[30].

In the literature on communal commercial law, reform proposals that point out an entirely different direction can also be found: Shortly before the German Lawyers' Congress ("Deutscher Juristentag") this Summer dealt with the legal position of public enterprises[31], in a professional journal the idea was brought up to entirely renounce subsidiarity clauses in communal commercial law. In those fields in which there is competition between the different providers due to liberalisation, the author has been of the opinion, that solely the clients should decide which offer is more attractive, and that this decision should not be left to the supervising authorities or the courts[32]. During the congress the majority was in favour of a similar proposal of reforming the communal commercial law[33]. However, it is very doubtful if the legislators of the different federal states will follow this recommendation. The reason for this is that subsidiarity clauses are considered an essential means to effectively protect the medium-sized business against the competition of public enterprises.

V. Communal trading beyond the borders of the municipality

Recently, it has much been discussed whether local enterprises should also be allowed to be active outside of their municipal area[34]. The North Rhine-Westphalian legislator answered

[28] *Löwer* (supra note 6), NWVBl. 2000, 241 (243).
[29] Cf. *Hellermann* (supra note 2), pp. 215-216; *Hans D. Jarass*, Die Vorgaben des Gemeinderechts für rechtlich selbständige Unternehmen der Kommunen, NWVBl. 2002, 335 (339).
[30] *Ehlers* (supra note 5), NWVBl. 2000, 1 (5).
[31] Cf. *Dirk Ehlers*, Gutachten D für den 64. DJT, 2002; *Mann* (supra note 8), JZ 2002, 819.
[32] *Günter Püttner*, Neue Regeln für öffentliche Unternehmen DÖV 2002, 731 (735).
[33] Decisions of the 64th. DJT, D Nr. 45 a); cf. also Nr. 40 a).
[34] Cf. OLG Düsseldorf, NVwZ 2000, 714; *Grawert* (supra note 5), pp. 127-129; *Becker* (supra note 2), DÖV 2000, 1032; *Ehlers* (supra note 5), NWVBl. 2000, 1 (5-6); *Heintzen* (supra note 8), NVwZ 2000, 743; *Löwer* (supra note 6), NWVBl. 2000, 241 (243-244); *Janbernd Oebbecke*, Die örtliche Begrenzung kommunaler Wirtschaftstätigkeit, ZHR 164 (2000), 375; for an examination of the economical aspects of the subject see *Helmut Siekmann*, Wirtschaftliche Betätigung der öffentlichen Hand und ökonomische Analyse des Rechts, in: Rolf Stober / Hanspeter Vogel (eds.), Wirtschaftliche Betätigung der öffentlichen Hand, 2000, pp. 103-144 (at

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this question with a definite "yes". According to art. 107 par. 3 GO-NW an economic activity outside the local area is permissible, "if the prerequisites of paragraph 1 are fulfilled and the rightful interests of the municipalities concerned are guaranteed." The local authorities are even allowed to be economically active in foreign markets but the permission of the supervising authority has to be asked for in advance (art. 107 par. 4 GO-NW). Particularly in the energy sector this opening of the local field of activity is undoubtedly necessary to avoid insurmountable disadvantages for municipal undertakings in the competition with the private companies. Under constitutional law, there are no objections against the regulation of art. 107 par. 3 GO-NW, if we consider - as already mentioned above - the constitutional guarantee of local self-government not to be a limitation of competences, but just a protection norm which local authorities can invoke in order to defend themselves against the influence of other public institutions (e.g. by the legislator or by the activities of other local authorities). The legislator has taken notice of the need for protection of those municipalities that might be affected in their right of self-government by the economic activities of another municipality, by deciding that cross-border activities have to be compatible with the "rightful interests" of the respective municipalities concerned. However, we will have to consider the additional clause in sentence 2 of art. 107 par. 3 GO-NW to be legally problematic. According to this clause, only those interests are regarded as "rightful" which allow a restriction of competition according to the law of the power economy business. The municipalities affected by the expansion of a communal energy supply company can only appeal to such rights which are also conceded to private companies in their competition with other energy suppliers. Such a far reaching limitation of the right of the local authorities' self-government cannot be justified and is therefore unconstitutional[35].

VI. Competition law and communal commercial law

Over the last years a controversy has been developing in Germany concerning the question as to which branch of jurisdiction has the competence for the judgement of the economic activities of municipalities. At first, some private firms tried to defend themselves against the activities of municipal undertakings in the administrative courts. However, in these cases it was stated that such a claim cannot be deduced from the relevant provisions - neither from the regulations of the communal commercial law nor from the fundamental rights of the constitution[36]. An affection of the fundamental rights is only accepted by the administrative

pp. 120-124); *Gabriele Britz*, Funktion und Funktionsweise öffentlicher Unternehmen im Wandel: Zu den jüngsten Entwicklungen im Recht der kommunalen Wirtschaftsunternehmen, NVwZ 2001, 380 (385-386); *Mann*, (supra note 8), JZ 2002, 819 (825); *Rennert* (supra note 8), DV 35 (2002), 319 (338-341); *Johannes Hellermann / Joachim Wieland*, Die wirtschaftliche Betätigung der Kommunen außerhalb ihres Gebiets, in: Günter Püttner (ed.), Zur Reform des Gemeindewirtschaftsrechts, 2002, pp. 117-141; *Schink* (supra note 1), NVwZ 2002, 129 (135-137); *Gern*, NJW 2002, 2593.

[35] *Ehlers* (supra note 5), NWVBl. 2000, 1 (6); *Becker* (supra note 2), DÖV 2000, 1032 (1037-1039); *Markus Kaltenborn*, Gemeinden im Wettbewerb mit Privaten - Zu den Änderungen des kommunalen Wirtschaftsrechts in Nordrhein-Westfalen, WuW 2000, 488 (491); *Schink* (supra note 1), NVwZ 2002, 129 (136-137); cf. also *Löwer* (supra note 6, NWVBl. 2000, 241 [244]).

[36] Cf. BVerwGE 39, 329 (336-337); BVerwG, DVBl. 1996, 152 (153); VGH B.-W., VBlBW 1983, 78-79; NJW 1995, 274; BayVGH, BayVBl. 1976, 628 (629-630).

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tribunals, if the freedom of competition is restricted "to an intolerable extent" or if the competitors "are affected in an unacceptable way"[37]. For instance this is the case if a public enterprise holds a legal or factual monopoly or pursues a pure competition of supersession.

This restrictive point of view has, of course, not been met with undivided approval in academic circles: First of all, the critics of this jurisdiction rightly point out that the subsidiarity clauses of the communal commercial law have not only been enacted in the interest of the municipalities, but shall also protect the private competitors[38]. Besides, it has to be asked, whether the fundamental right of occupational freedom (art. 12 par. 1 GG) is not at least indirectly affected, if a communal undertaking is violating the relevant regulations of the public law and thus causes disadvantages for private competitors[39]. Here we might argue that the municipalities are privileged especially in financial matters (e.g. with regard to the credit supply) and therefore their undertakings often have a better starting point than private competitors[40]. This advantage de facto warps the competition. For that reason it cannot be correct to say that the participation of municipalities in the economic intercourse has no relevance to the fundamental rights of the private competitors[41]. But, as already mentioned, these arguments did not impress the administrative tribunals. As a rule, they declare an action against the economic activity of a municipality already as inadmissible.

Private companies have been more successful in the civil courts. This branch of jurisdiction is responsible for those cases which are judged on the basis of (private) competition law. Communal undertakings like any other participants in the market have to observe the rules of the law against unfair competition[42]. Several civil courts had judged that activities of a municipal undertaking, which are in conflict with the relevant regulations of the communal

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[37] BVerwG, DÖV 1978, 851; BVerwG, NJW 1995, 2938-2939; cf. also *Manssen*, in: Hermann v. Mangoldt / Friedrich Klein / Christian Starck (eds.), Das Bonner Grundgesetz, vol. 1, 4th ed. 1999, Art. 12 Abs. 1, no. 80; *Bodo Pieroth / Bernd J. Hartmann*, Grundrechtsschutz gegen wirtschaftliche Betätigung der öffentlichen Hand, DVBl. 2002, 421 (422).

[38] *Erichsen* (supra note 2), p. 292; *Badura* (supra note 4), DÖV 1998, 818 (822); *Grawert* (supra note 5), pp. 135-136; *Pielow* (supra note 13), NWVBl. 1999, 369 (379); *Hans-Joachim David*, Wettbewerbsrechtliche Ansprüche gegen Betätigung von Kommunen und deren Gesellschaften, NVwZ 2000, 738 (740-741); *Kaltenborn* (supra note 28), WuW 2000, 488 (495); *Ruffert* (supra note 4), NVwZ 2000, 763 (764); *Mann* (supra note 8), JZ 2002, 819 (824); *Jochem Gröning*, Kommunalrechtliche Grenzen der wirtschaftlichen Betätigung der Gemeinden und Drittschutz auf dem ordentlichen Rechtsweg, WRP 2002, 17 (20); *Schink* (supra note 1), NVwZ 2002, 129 (138); of a different opinion e.g. *Joachim Wieland*, Konkurrentenschutz in der neueren Rechtsprechung zum Wirtschaftsverwaltungsrecht, DV 32 (1999), 235 (239).

[39] Cf. *Peter J. Tettinger*, Rechtsschutz gegen kommunale Wettbewerbsteilnahme, NJW 1998, 3473 (3474); *Pielow* (supra note 13), NWVBl. 1999, 369 (375-376); *Pieroth / Hartmann* (supra note 30), DVBl. 2002, 421.

[40] *Rüdiger Breuer*, in: Josef Isensee / Paul Kirchhof (eds.), Handbuch des Staatsrechts, vol. VI, 1989, § 148, no. 57.

[41] Cf. *Dirk Ehlers*, Verwaltung in Privatrechtsform, 1984, pp. 100-104; *Winfried Kluth*, Grenzen kommunalere Wettbewerbsteilnahme, 1988, pp. 51-86; *Reiner Schmidt*, Öffentliches Wirtschaftsrecht, Allg. Teil, 1990, p. 523; *Utz Schliesky*, Über Notwendigkeit und Gestalt eines Öffentlichen Wettbewerbsrechts, DVBl. 1999, 78 (82); *Ulrich Hösch*, Öffentlicher Zweck und wirtschaftliche Betätigung von Kommunen, DÖV 2000, 393 (396-399); *Rolf Stober*, Allgemeines Wirtschaftsverwaltungsrecht, 12. Aufl. 2000, pp. 240-241; *Wolfgang Löwer*, Der Staat als Wirtschaftssubjekt und Auftraggeber, VVDStRL 60 (2001), 416 (445); *Stefan Storr*, Der Staat als Unternehmer, 2001, pp. 152-186.

[42] BGHZ 66 , 229 (237); 67, 81 (86-90); 82, 375 (395-396).

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commercial law, have to be considered unfair and thus a prohibited competitive behaviour[43]. As a result the action of the private competitors had been sustained. However just a few months ago, the Federal Court of Audit withdrew the basis of this interpretation of competition law[44]. The court has been of the opinion that it is not the purpose of competition law to keep competitors away from the market, not even if another legal regulation prohibits the participation in the competition. In principle, the market access of public enterprises is even desired, because it leads to a stimulation of competition. Just as the other civil courts, the Federal Court of Audit assumes that the regulations of communal commercial law also aim at protecting the private industry. But if these rules are violated by a municipality, this has not to be regarded automatically as a violation also of the law against unfair competition. According to the opinion of the Federal Court of Audit, an action against the economic activities of a communal undertaking might only be successful in the civil courts, if the public enterprise has also acted in violation of other rules which guarantee a fair competition in the markets.

This judgement has important consequences for the legal protection against the municipalities' participation in the economic intercourse. In future, the civil courts will no longer be able to consider any violation of communal commercial law at the same time as a breach of competition law. As a consequence, private companies who intend to defend themselves against activities of communal undertakings, will be more than likely successful in invoking the aid of the civil courts only in exceptional cases. It will be interesting to see whether the administrative tribunals now will change their jurisdiction, too. If, however, they maintain their restrictive course an improvement of the position of the private industry will probably only be reached by changing the legal basis[45]. In all, compared with the private competitors, the legal position of communal undertakings has been strengthened notably by the judgement of the Federal Court of Audit. Therefore, both the local authorities and the supervising authorities bear – we can say: now more than ever - a special responsibility for the observance of the rules of communal commercial law[46].

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[43] OLG Düsseldorf, NWVBl. 1997, 353; NVwZ 2000, 111; OLG Hamm, DVBl. 1998, 792; LG Wuppertal, NWVBl. 1999, 275; see also the critical remarks of *Ennuschat* (supra note 13), WRP 1999, 405; *Norbert Kämper / Matthias Heßhaus*, Die Organisationshoheit der Städte ist zu beachten, in: der städtetag 2000, 36 (38); *Stephan Tomerius*, Wirtschaftliche Betätigung der Kommunen zwischen Gemeindewirtschafts- und Wettbewerbsrecht, LKV 2000, 41 (45-46); *Storr* (supra note 34), pp. 511-513; *Schink* (supra note 1), NVwZ 2002, 129 (139); cf. also *Helmut Köhler*, Wettbewerbsverstoß durch rechtswidrigen Marktzutritt ?, in: Günter Püttner (ed.), Zur Reform des Gemeindewirtschaftsrechts, 2002, pp. 99-115.

[44] BGH, DVBl. 2002, 1282.

[45] *Kluth* (supra note 13), p. 39.

[46] Cf. *Hubert Meyer*, Wettbewerbsrecht und wirtschaftliche Betätigung der Kommunen, NVwZ 2002, 1075 (1078); for the tasks of the supervising authorities with regard to economic activities of municipalities see *Matthias Ruffert*, Grundlagen und Maßstäbe einer wirkungsvollen Aufsicht über die kommunale wirtschaftliche Betätigung, VerwArch 92 (2001), 27.