

New York University School of Law



*The Jean Monnet Center for
International and Regional
Economic Law & Justice*

THE NYU INSTITUTES ON THE PARK

Jean Monnet Working Paper Series



JMWP 09/13

Thomas Perroud

**Administrative Law and Competition:
How Administrative Law Protects the Market?
Leviathan as an Ordinary Market Player in Europe?**

Cover: *Upper East Side Family*, Diana Chelaru, USA



*The Jean Monnet Center for
International and Regional
Economic Law & Justice*

THE NYU INSTITUTES ON THE PARK

THE JEAN MONNET PROGRAM

J.H.H. Weiler, Director

in cooperation with the



TOWARDS A MULTIPOLAR ADMINISTRATIVE LAW: A THEORETICAL PERSPECTIVE

Jean Monnet Working Paper 09/13

Thomas Perroud

**Administrative Law and Competition:
How Administrative Law Protects the Market?
Leviathan as an Ordinary Market Player in Europe?**

All rights reserved.
No part of this paper may be reproduced in any form
without permission of the author.

ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim
© Thomas Perroud 2013
New York University School of Law
New York, NY 10011
USA

<p>Publications in the Series should be cited as: AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]</p>

Prologue:
**Towards a Multipolar Administrative Law:
A Theoretical Perspective**

The idea that administrative law concepts can remain stable over time has been abandoned. Today, administrative agencies are no longer conceived of as simply executive “machines” and command-and-control bodies. There is a growing tension within countries between the executive branches and social expectations for rights-based institutions, and administrative bodies accordingly develop in an increasingly interstitial and incremental manner. This also happens because the separation of society and administration is less clear, and the public-private dividing line has blurred: dual relationships are becoming an exception; networking and multipolar linkages between norms, actors and procedures are the rule. Legal systems have become more interdependent, due to the import-export of administrative models: this has several implications, such as the fact that some basic principles of administrative law beyond the State have been developing. Furthermore, economic and political analyses of public administrations are increasing; this requires the adoption of multi-disciplinary approaches in examining the field.

All these phenomena – to name but a few – constitute the main features of an emerging “multipolar administrative law”, where the traditional dual relationship between administrative agencies and the citizen is replaced by multilateral relations between a plurality of autonomous public bodies and of conflicting public, collective and private interests. For a long time, administrative law was conceived as a monolithic body of law, which depended on its master, the modern State: as such, administrative law was intended to be the domain of stability and continuity. Continuity in the paradigms for study paralleled the idea of continuity in administrative institutions. However, from the last quarter of the 20th century, both assumptions became obsolete. Administrative institutions have undergone significant changes, due to several factors such as globalization, privatization, citizens’ participation, and new global fiscal responsibilities. Thus, it is necessary to review the major transformations that took place in the field over the last 30 or 40 years, and to address the consequent transformations in the methods used to study this branch of law.

To analyze this emerging multipolar administrative law, the first objective should be to decouple the study of administrative law from its traditional national bases. According to this tradition, administrative law is national in character, and the lawyer’s “ultimate frontier” is comparison, meant as a purely scholarly exercise. On the contrary, administrative law throughout the world is now grounded on certain basic and common principles, such as proportionality, the duty to hear and provide reasons, due process, and reasonableness. These principles have different uses in different contexts, but they share common roots.

A second objective would be to consider each national law’s tendency toward macro-regional law (such as EU law) and global law. While the leading scholars of the past labored (to a great extent in Germany and Italy, less so in France and the UK) to establish the primacy of national constitutional law (“*Verwaltungsrecht als konkretisiertes Verfassungsrecht*”), today the more pressing task is to ensure that the

increasingly important role of supranational legal orders is widely acknowledged. Whereas administrative law was once state-centered, it should now be conceived as a complex network of public bodies (infranational, national, and supranational).

A third objective should be the reconstruction of an integrated view of public law. Within legal scholarship, constitutional law, administrative law, and the other branches of public law have progressively lost their unity: for instance, constitutional law is increasingly dominated by the institution and practice of judicial review; most administrative lawyers have been overwhelmed by the fragmentation of legal orders, which led them to abandon all efforts at applying a theoretically comprehensive approach. The time has come to re-establish a unitary and systematic perspective on public law in general. Such an approach, however, should not be purely legal. In the global legal space, the rules and institutions of public law must face competition from private actors and must also be evaluated from an economic and a political point of view.

To better analyze and understand such a complex framework, to elaborate and discuss new theories and conceptual tools and to favor a collective reflection by both the leading and the most promising public administrative law scholars from around the world, the Jean Monnet Center of the New York University (NYU) School of Law and the Institute for Research on Public Administration (IRPA) of Rome launched a call for papers and hosted a seminar (<http://www.irpa.eu/gal-section/a-multipolar-administrative-law/>). The seminar, entitled “Toward a Multipolar Administrative Law – A Theoretical Perspective”, took place on 9-10 September 2012, at the NYU School of Law.

This symposium contains a selection of the papers presented at the Seminar. Our hope is that these articles can contribute to the growth of public law scholarship and strengthen its efforts in dealing with the numerous legal issues stemming from these times of change: discontinuity in the realm of administrative institutions requires discontinuity in the approaches adopted for studying administrative law.

Sabino Cassese, *Italian Constitutional Court*
Giulio Napolitano, *University of “Roma Tre”*
Lorenzo Casini, *University of Rome “Sapienza”*

**ADMINISTRATIVE LAW AND COMPETITION:
HOW ADMINISTRATIVE LAW PROTECTS THE MARKET?
LEVIATHAN AS AN ORDINARY MARKET PLAYER IN EUROPE?**

By Thomas Perroud*

Abstract

In most Western countries liberalism meant that administrative law provided a remedy against public action that would breach the principle of the freedom of trade. But in doing so freedom of trade was a freedom among others, it had no specificity in administrative law. It was enforced against the State exactly as any freedom would be enforced. It would prevent any intervention of a public body either by regulation or provision of a public service that would not be authorized by Parliament. Parliament is the sole guardian of freedoms, and the freedom of trade was no exception.

Current legal developments would autotomize the protection of the market in extending the scope of competition law to State actions. In contrast to the United State where the Supreme Court held that State actions were immune from antitrust litigation, the ECJ extended the reach of competition law to State actions. In France, the Conseil d'Etat even created a new ground for review, entailing thus an extended control of administrative decisions and public services.

What singles out Europe is the reach of competition law and to what extent it undermines the very essence of state intervention in the market. As David Gerber has showed, this evolution can be explained by the ordoliberal origins of competition law in Europe.¹

* Assistant Professor, Paris-Est Créteil University; Research Associate, Sciences Po, Governance and Public Law Centre; Deputy Director Program on Comparative Administrative Law and Visiting Fellow, Yale Law School.

¹ D. Gerber, *Law and competition in twentieth century Europe: protecting Prometheus*, Oxford University Press, 1998.

The purpose of this paper is thus to analyse the rise and fall of the freedom of trade in comparative administrative law and to show how distinct is Europe in this respect. The ECJ has gone further than the United States Supreme Court in holding back the State on the market. This evolution can be explained by studying ordoliberal thinking.

The structure of the analysis is as follows:

- I. The Rise and Fall of the Freedom of Trade in Comparative Perspective
- II. The Rising Star of Competition Rules in Administrative Law: the State as an Ordinary Market Player
- III. Conclusion: The Ordoliberal Economic Constitution and European Administrative Law

1. The rise and fall of the freedom of trade in comparative perspective

Although the protection of competition has been a traditional concern of administrative laws in civil and common law countries, the way in which judges in Europe review public bodies' actions when they are operating on the market has changed dramatically in the 1980s and 1990s. The ECJ has gone as far as forcing European States to incorporate rules and methods of competition law to review administrative action.

The history of the relationships between administrative law and the protection of the freedom of trade will be analysed on a comparative basis using the United States and several European jurisdiction as well as EU and ECHR laws as points of comparison.

This history can be traced back very easily studying the French case. The commitment of the French Conseil d'État to liberal ideas has been well documented and is of an old and respected lineage.² Finally realizing the ideas of the physiocrats, the French Revolution passed a law that remains nowadays the legal basis of the jurisprudence of the Conseil d'État on the freedom of trade. The "Décret d'Allarde" of 2-17 March 1791 provides that people are free to engage in whichever trade they choose without the State interfering in their choice. This law was directed against the corporatist regulations of the Ancien Régime. The Conseil d'État uses it constantly as the basis of its liberal jurisprudence.³

Since the end of the 19th century, and more precisely with the advent of the first liberal regime of the Third Republic⁴ in 1875, the administrative judge developed a line case law aimed at ensuring that administrative actions do not breach peoples' freedoms.

² See S. Cassese, *Culture et politique du droit administratif*, Dalloz, 2008; S. Braconnier, "Les libertés économiques jusqu'à la crise de 1929", *Revue du droit public et de la science politique en France et à l'étranger* (2012) p. 731; P.-H. Prélôt, "Les doctrines ont-elles théorisé les libertés publiques avant l'âge d'or des lois des années 1880", *Revue du droit public et de la science politique en France et à l'étranger* (2012) p. 473.

³ Afterwards the law labeled "Le Chapelier" was passed to prevent strikes and unions. However social laws from the Third Republic will repeal it. It is therefore the Décret d'Allarde that is the basis for the review of administrative action in the private sphere.

⁴ See F. Saint-Bonnet, "Le droit des libertés publiques, antonymes du droit administratif au XIXe siècle", *Revue du droit public et de la science politique en France et à l'étranger* (2012) p. 457. F. Saint-Bonnet traces back the conditions of the advent of a new *droit administratif* since the 1860s. Before, scholars and judges were not interested in public liberties because there was no commitment to liberty as the basis of the political régime. Because also it was difficult for lawyers to think that laws could enslave. The tradition inherited from the French revolution was that laws were freeing people. That an individual would need to go to a judge to be protected against a law was not thinkable in the 19th century.

Applied to commercial activities it meant that the judge protected private dealings and commerce using general principles of the law. France is obviously not the only country that committed itself to free market ideologies. The Spanish constitution of Cadiz of 1812 also introduced the protection of the freedom of trade.⁵ Also, common law courts in the United Kingdom use the principle of the freedom of trade to protect private dealings from government interference: « By common law, any person may carry on any trade in any place, unless there be a custom to the contrary, and if there be such a custom, then a by-law in restraint of trade warranted by such custom will be good ».⁶ Also, In 1711, Lord Macclesfield referred in the case of *Mitchel v. Reynolds* to section 29 of Magna Charta on the protection of freedom as applying also to freedom of trade: “These words have been always taken to extend to freedom of trade.”⁷ In the United States, numerous cases in States Supreme Courts vindicate this right.⁸ At federal level, the Supreme Court established after *Munn v Illinois* that “the power of Congress to regulate commerce must be subject to judicial review, and should be limited to reasonable regulations”.⁹ In Germany, freedom of trade and professions benefits from a specific provision of the Basic Law: “All Germans shall have the right freely to choose their trade, occupation, or profession, their place of work and their place of training. The practice of trades, occupations, and professions may be regulated by or pursuant to a law.”¹⁰

These elements are interesting as they show that in the liberal world, freedom of trade is considered an emanation of freedom itself. Neither Magna Charta nor the 1789 Declaration of the Rights of Man mention trade but there is no doubt that the freedom of commerce is just an emanation of other rights and liberties, such as the right of property. It shows that freedom of trade is not treated specifically in the first ages of

⁵ See Ricardo Rivero Ortega, *La Libertad de Comercio* at: http://www.uclm.es/centro/ceuropeos/aepda/pdf/congresos/VCongreso_Ponencia_2.pdf

⁶ Clark, Esq., *Chamberlain of the City of London v Le Cren*, 24 January 1829, (1829) 9 Barnewall and Cresswell 52, 109 E.R. 20, p. 58.

⁷ 1 P. Williams, 181.

⁸ See W. D. Guthrie, “Constitutionality of the Sherman Anti-Trust Act of 1890, As Interpreted by the United States Supreme Court in the Case of the Trans-Missouri Traffic Association”, 11 *Harvard Law Review* (1897) pp. 80-94, at p. 85 sq.

⁹ *Ibidem*, at p. 90.

¹⁰ See article 12.1.

liberalism. In law, it means that judges will review actions under this freedom as they would for any other right or liberty, with a suspicion against State's intervention.

This explains why the first line of jurisprudence protecting individuals against public intervention rests on traditional principle (freedom and equality). The jurisprudence can be analysed by distinguishing two ways in which the administration can upset the market: by regulating (A) or by creating public services that compete with private companies (B).

1.1. Regulation Versus Free Competition: the Liberal Jurisprudence Protecting Against Restraints of Trade and Capture

The influence of liberal ideas on the Conseil d'Etat is obvious but never clearly stated, in the cases and in the conclusions of the "*commissaire du gouvernement*" (now "*rapporteur public*"¹¹).

Despite this fact the liberal inspirations of the Conseil d'Etat is clear. These assertions can seem paradoxical at first sight given the fact that the institution was created under an authoritarian régime, during the first Empire. The commitment of the Conseil d'Etat to liberal ideas can be traced back to the advent of the 3rd Republic in the 1870s. After the collapse of the Second Empire at Sedan the Conseil d'Etat was "cleansed" and a new generation of judges arrived, committed to the new ideas of the Republic.

From this date on, the Conseil d'Etat will develop its liberal jurisprudence, trying to limit the development of public intervention.

Administrative regulation of private activities is reviewed by administrative judges using two main grounds.

Firstly, the principle of equality is used to ensure that public authorities treat everyone equally, that they do not award any favours to any particular player. This principle is of course of general application: the administration should treat everyone equally provided

¹¹ The *commissaire* or *rapporteur* gives an independent opinion before the administrative courts on the legality of the impugned decision. The office of the advocate general before the ECJ was modeled after it.

they are in the same legal situation. In this respect, economic activities do not enjoy a special treatment (1).

Second, the freedom of trade principle can help preventing public actions that would restraint trade without being first authorized by Parliament (2).

1.1.1. Equality against Capture and Favouring Evidence-Based Policy-Making

This ground of review is very common in Western countries as well as before the ECJ and the ECt HR. The EUCJ has declared that the principle of equality “is one of the fundamental principles of community law”. This principle “requires that similar situations shall not be treated differently unless differentiation is objectively justified”.¹² The test applied by European courts is explained thus: “For the Commission to be accused of discrimination, it must be shown to have treated like cases differently, thereby subjecting some traders to disadvantages as opposed to others, without such differentiation being justified by the existence of substantial objective differences.”¹³

In the Arcelor case, the EUCJ recalls both the rule (the necessary respect of the principle of equality) and the broad margin of appreciation enjoyed by the EU legislator to discriminate: “A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment. (...) In the exercise of the powers conferred on it, the Community legislature has a broad discretion where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations.”

For the ECtHR, equality is also a fundamental principle that underlies the Convention.¹⁴ The evaluation of discriminations is made by the Court taking into account comparable situations. Situations must indeed be “analogous” to attract the protections of the Convention. But discriminations are not necessarily illegal: “It is important, then, to

¹² Cases 810/79, 117/76, 16/77, T-323/02.

¹³ Case T-106/96.

¹⁴ Case of Străin and Others v. Romania, Application no. 57001/00.

look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14 (art. 14). On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles that normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.”¹⁵

Common law countries do not use the principle of equality in the same manner. In the UK, the principle is not incorporated into the grounds of judicial review. If we go back to the English case concerning black cabs the common law does not provide a remedy here because breach of the principle of equality is not a ground for review. Equality can be treated in UK public law “under the umbrella of Wednesbury reasonableness”.¹⁶

A decision of a public body that would create a difference of treatment is not amenable to JR on this ground alone. It may sound strange given the emphasis put by Dicey on the argument that a fundamental feature of the common law is the equal treatment of all before the law.¹⁷ However, this requirement has not developed into a specific remedy aimed at treating discriminations. At most the problem can be remedied using rationality review.¹⁸

¹⁵ Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium, Application no 1474/62.

¹⁶ See D. Oliver, “The Singularity of the English Public-Private Divide”, at chap 23, in M. T. Andenæs, D. Fairgrieve, *Judicial Review in International Perspective*, Vol. 2, Kluwer Law International, 2000. There are however signs of a change: C. McCrudden, “Equality and Non-Discrimination”, chap 11, *English Public Law*, OUP, 2010, at p. 520 “Equality and Rationality”.

¹⁷ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (9th ed., 1952), at p. 202.

¹⁸ J. Jowell, ‘Is Equality a Constitutional Principle?’, 7 *Current Legal Problems* (1994) p. 1.

In the United States the situation is different from that of the United Kingdom. The US Supreme Court has indeed developed a very elaborated jurisprudence on discriminations using the equal protections clause.¹⁹ The position of the Supreme Court is not very different from that of the ECJ or the ECHR, or the French Conseil d'Etat. The equal protection clause can help remedy situations of nepotism or capture in certain instances. For example, in *Yick Wo v. Hopkins*, the Supreme Court had to judge the legality of a San Francisco ordinance that banned “the conduct a laundry business in other than brick buildings without having first obtained the permission of a board of supervisors. All Chinese laundries were conducted in wooden buildings. The supervisors permitted the operation of all laundries in wooden buildings except those owned by Chinese. The Supreme Court held in this case that equal protection of the laws had been denied.”²⁰ In this case the racist nature of the ordinance may have influenced the outcome, for the jurisprudence on the equal protection clause is mainly concerned with this type of challenge.

As Mr. Justice Jackson put it “I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation”.²¹ The Court will therefore review legislative or administrative classifications in order to check the legality of the discriminations. In addition the Court will check that the “the differentiation must have an appropriate relation to the object of the legislation or ordinance”.²² In *Smith v. Cahoon* a motor vehicle regulation was struck down because “such a classification is not based on anything having relation to the purpose for which it is made.”²³

¹⁹ Kenji Yoshino, “The New Equal Protection”, 124 *Harvard Law Review* (2011) p. 747.

²⁰ “Equal Protection Clause and Nepotism”, 23 *Indiana Law Journal* (1948) p. 204.

²¹ *Railway Express Agency Inc. v. New York* 336 U.S. 106 (1949).

²² Ibidem. See also *Kotch v. Bd. of River Port Pilot Commissioners* 330 U.S. 552 (1947). Justice Black observed: “We cannot say that the method adopted in Louisiana for the selection of pilots is unrelated to this objective. We do not need to consider hypothetical questions concerning any similar system of selection which might conceivably be practiced in other professions or businesses regulated or operated by state governments”.

²³ 283 U.S. 553, 51 S.Ct. 582, 75 L.Ed. 1264.

In *Federal Communications Commission v Beach* the Supreme Court affirmed that a large margin of appreciation would be left to agencies when they decide to treat private operators differently according to objective criteria: “equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification”.²⁴

The Conseil d’État as well as of the Constitutional Council review regulations and legislation on the ground of a breach of equality. The basis is article 1 of the 1789 Declaration. The principle of equality is even one of the founding principles of the legal régime of public services in France: a public service being an entity that cannot discriminate between users, as opposed to a private company. Contrary to EU and ECHR law, the principle of equality in French administrative law does not require to treat differently people in a different situation. The administration in France can treat similarly people if different situations.²⁵

The principle requires that all the people placed in the same legal situation be treated similarly by public services.²⁶ The principle applies to many areas of public law: in tax law²⁷, or in civil service law (requiring equal access to the public service notwithstanding gender for example²⁸). Differences of treatment are allowed in two circumstances: when people are in different situations and provided the difference of treatment is relevant to the difference of legal situations; or when the difference of treatment pursues of general interest goal. The Conseil d’Etat will check that the difference of treatment is relevant to the different of situation and that the difference of treatment is proportionate to the

²⁴ *F.C.C. v. Beach Communications* (92-603), 508 U.S. 307 (1993).

²⁵ In ECHR law: Cour EDH, grande chambre, *Thlimmenos c/ Grèce*, 6 avr. 2000. In EU law: P. Craig, *EU Administrative Law*, OUP, 2nd ed., p. 496.

²⁶ Conseil d’Etat, Sect., 9 mars 1951, *Société des concerts du Conservatoire*, Rec. 151; Conseil d’Etat, Ass., 1er avr. 1938, *Société L’Alcool dénaturé*, Rec. 337.

²⁷ Conseil d’Etat, Sect. 4 févr. 1944, *Guieysse*, Rec. 45 ; Conseil d’Etat, Ass. 22 févr. 1974, *Association des maires de France*, Rec. 136.

²⁸ Conseil d’Etat, Ass. 3 juill. 1936, *Delle Bobard*, Rec. 721.

different situations.²⁹ Many cases show to what extent the judge controls classifications in order to ensure that the administration establish discriminations on an objective basis, in order to fulfil a real public interest goal.³⁰

In the economic sphere however the evaluation of classifications is difficult. The judge is made to evaluate economic realities that may be hard to grasp.³¹ Economic intervention in itself favours some players and discourages others. But the interest of JR on the basis of equality is to ensure and to force Parliament to establish discriminations on a rational basis. Two examples can be given at French and European levels, concerning schemes aimed at diminishing carbon emissions.

The Constitutional Council in France was made to judge the constitutionality of a carbon tax established by Parliament. The goal was to curb carbon emissions and applied on the prices of goods bought by consumers. However a whole part of the law was concerned with exemptions, to the extent that important parts of the economy were exempt from the levy. The Council found that consequently, 93% of carbon dioxide emissions of industrial origin, fuels excepted, would be fully exempted from the carbon levy, and activities subject to the carbon levy would represent less than half the aggregate greenhouse gas emissions. The Council censured the mechanism on the ground that by their magnitude the systems of total exemption instituted by the impugned statute (inter alia) caused a clear breach of equality.

The reasoning of the ECJ is much more elaborated. In the Arcelor case of 16 December 2008, the ECJ had to judge the legality of Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading.³² The question of the reference for a preliminary ruling was about whether, by excluding the plastics and aluminium sectors from the scope of the Directive, the Community legislature breached the principle of equality with respect to the steel sector.

²⁹ Conseil d'Etat, sect., 18 déc. 2002, *Mme Duvignères*, Rec. 463.

³⁰ See the instances in B. Genevois, "Principes généraux du droit", in *Répertoire Dalloz de contentieux administratif*, n° 176-178.

³¹ See P. Delvolvé, *Droit public de l'économie* (Dalloz, 1998), pp. 186 sq.

³² Case C-127/07.

The reasoning of the ECJ uses the following steps.

The first question is about establishing that discrimination has been created, in other words that a different treatment is applied to similar situations. What elements can characterise different situations? The ECJ determines and assesses the situations in the light of the subject matter and purpose of the Community act that makes the distinction in question. Given the objective of the scheme and the principles on which the policy on environment is based the sectors treated differently are indeed in the same situation: “the different sources of greenhouse gas emissions relating to economic activities are in principle in a comparable situation, since all emissions of greenhouse gases are liable to contribute to dangerous interference with the climate system and all sectors of the economy which emit such gases can contribute to the functioning of the allowance trading scheme”.

The second step consists in showing that the discrimination puts some undertakings at a disadvantage compared to others.³³ One cannot help but making a link between EU state aid law and this criteria. The first element of a state aid is that it gives an advantage to a player relative to others. In this regard, discrimination could also amount to a “regulatory state aid”, when some players are exempted from certain burdens. For the Court here, it makes no doubt that the steel sector is at a disadvantage compared to others that were exempted.

Even though there is a discrimination that puts an undertaking at a disadvantage, the principle of equality will not be breached if the discrimination is justified. A difference of treatment is justified if “it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment”.³⁴

The burden of proof for demonstrative that the difference of treatment is justified rests on the Community legislature. The Court is indeed very demanding on the degree of motivation that is necessary to justify a difference of treatment. Trade-offs and choices

³³ Cases 17/61, 250/83.

³⁴ Case C-127/07, § 47.

must be clearly explained. The jurisprudence on the principle of equality show, at this stage of the reasoning of the Court, to what extent case law require evidence-based policy-making. Better regulation at EU level is not just a catch phrase. The Court requires EU institutions to show clear evidence on which it has based its evaluations.

The Court begins by acknowledging that although EC institutions enjoy a wide discretion in making the necessary trade-offs to set up the policies they have to base their arguments on objective criteria. The difference of treatment must therefore be consistent with the objective of protecting the environment and diminishing emissions. Also EC legislation must take into account all the interests at stake and also make the trade-offs according to clear evaluations.

At this stage, the link between impact assessments methods and judicial review seems obvious. Alberto Alemanno has tried to show to what extent the two can be connected.³⁵ When the Court contends: “In examining the burdens associated with various possible measures, it must be considered that, even if the importance of the objectives pursued is such as to justify even substantial negative economic consequences for certain operators (...), the Community legislature’s exercise of its discretion must not produce results that are manifestly less appropriate than those that would be produced by other measures that were also suitable for those objectives.” How could the EC legislature ensure such a requirement if no IA of the different alternative has been performed? As Alberto Alemanno explains, “IA requires the Commission services to identify the advantages and disadvantages of possible policy options by assessing their potential impacts and issue the final proposed regulation only if ‘necessary’”.³⁶

The expertise mandated by IA is mandated by the review on the ground of equality. The Court quotes the advocate general who argued before the court that “the Community legislature’s discretion (...) could not, in the light of the principle of equal treatment, dispense it from having recourse, for determining the sectors it thought suitable for inclusion in the scope of Directive 2003/87 from the outset, to objective criteria based

³⁵ Alberto Alemanno, “A Meeting of Minds on Impact Assessment - When Ex Ante Evaluation Meets Ex Post Judicial Control”, 17 *European Public Law*, (2011) p. 547.

³⁶ Ibidem.

on the technical and scientific information available at the time of adoption of the directive”.³⁷ The basis of public policy tools of expertise are thus at the core of equality review.

The outcome will be in favour of the Directive. The ECJ did not strike down the scheme but one important argument in favour of it was the step-by-step approach taken by the legislature. Sectors were exempted from the scheme only on a temporary basis in order to be included afterwards. The argument and the fact that choices were made based on sound evidence were sufficient to meet the requirement of “justification” for the purpose of the difference of treatment.

The principle of equality is central in ensuring a fair functioning of the market. It helps preventing the State from favouring some players. However, the principle does not have the same bite everywhere. At EU level, and perhaps because the principle of equality is central in EU law (the single market has for a long time been defended by the ECJ using this principle in order to strike down Member States legislation favouring their national companies) the principle of equality mandates a high level of justification on the part of the legislature.

The market is also protected by another principle of liberal origin: freedom of trade.

1.1.2. The rise and Fall of the Freedom of Trade in the Liberal World

Most importantly for the protection of the competitive process the principle of the freedom of trade exists in most jurisdictions: “libertà di commercio e di industria” in Italy, “libertad de comercio” or “libertad de empresa” in Spain, “liberté du commerce et de l’industrie” in France.

In France, the principle has been used by the Conseil d’État to quash administrative decisions that amount to a restraint of trade: as the Commissaire du gouvernement Gazier said where no law has been taken the principle remains that commerce and trade

³⁷ Case C-127/07, §63.

should be free from any interference from the State.³⁸ This is clear statement showing the liberal idea inspiring its decisions.

In the Daudignac case a Mayor tried to forbid a trade on the ground that it caused disruptions to public order (photographers that took by surprise pictures of people in the street). This kind of decision is clearly illegal: a mayor cannot ban a lawful trade if Parliament has not authorized it. Even before the war, the judge was careful to review closely local regulations of trade. Some local regulations restricting trade more stringently than required by actual local circumstances were stricken down.³⁹

The limit of this principle being that if the breach of the liberty had been authorized by Parliament the judge would have had nothing to say. In another case the Conseil d'Etat held that when the exercise of police power is likely to affect activities of production, distribution or service, the fact that these measures aim at protecting public order does not dispense public authorities from taking into account also the freedom of trade and competition rules.⁴⁰

The French Constitutional Council gave this principle constitutional rank and checks that Parliament does not breach this principle in a way that would be disproportionate.⁴¹ One could find similar contentions in the United Kingdom under the doctrine of restraint of trade. This doctrine being well integrated in the common law judges have quashed municipal by-laws that amounted to restricting a trade.⁴² One can also find in the US similar concerns by judges in what was called “laissez faire constitutionalism” in the post *Lochner* era.⁴³ In the 1897 case *Allgeyer v. Louisiana*, a unanimous court considered that the due process clause enshrined in the 14th amendment comprised

³⁸ Conseil d'Etat, 22 June 1951, *Daudignac*, Rec. 362.

³⁹ Conseil d'Etat, 30 Nov. 1928, *Penicaud*, Rec. 1227.

⁴⁰ Conseil d'Etat, Sect., avis, 22 Nov. 2000, *Société L. et P. Publicité*, Rec. 526.

⁴¹ Conseil constitutionnel, 1982, *Loi de nationalisations*, Rec. 18.

⁴² See Clark, Esq., *Chamberlain of the City of London v Le Cren*, 24 January 1829, (1829) 9 Barnewall and Cresswell 52, 109 E.R. 20, p. 58: “By common law, any person may carry on any trade in any place, unless there be a custom to the contrary, and if there be such a custom, then a by-law in restraint of trade warranted by such custom will be good”. See Local Government, Halsbury's Laws of England, vol. 69, 2009, 5th ed., at n° 565. See also *Case of Monopolies*, 77 Eng. Rep. 1260 (1378-1865) and more recently *R. v Coventry Airport Ex p. Phoenix Aviation* [1995] 3 All E.R. 37.

⁴³ 198 U.S. 45 (1905).

economic liberty: “The “liberty” mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to...live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.”

What is striking when one compares the French and American jurisprudence is to what extent judges have attracted the protections afforded by the principles of freedom to include economic freedom without any clear written statement in favour of it. The only “economic right” present in the 1789 Declaration of the Rights of Man is the right of property and at that time this right is not at all understood as being economic. In the liberal tradition, from Hobbes to Locke, the right of property is at the basis of the political system, as Macpherson shows.⁴⁴

EU law also protects freedom of trade. The ECJ protects the freedom to choose with whom to do business that is implied by the free pursuit of economic activities,⁴⁵ freedom to conduct a business, which coincides with freedom to pursue an occupation.⁴⁶

Even though freedom of trade seems vindicated by courts in many legal systems, it is generally acknowledged that the protection this freedom affords is rather weak. In the United States, the *Lochner* era seems to be an exception. In France, although the Conseil d’Etat keeps referring to this liberty, the actual bite of the principle is rather weak once Parliament has authorized the breach. We will see further that claimants have put much hope in France in the recognition by the Conseil d’Etat of competition law as a new ground for review. Competition law could appear to be the new remedy for the protection of economic rights.

⁴⁴ C. B. Macpherson, *The political theory of possessive individualism: Hobbes to Locke*, (Oxford, Clarendon Press) 1964.

⁴⁵ C-307/91.

⁴⁶ C-184/02.

The competitive process is thus protected by the principles of equality and the principle of the freedom of trade and ensure, as much as possible, the neutral exercise of the State's regulatory power.

Public bodies can disrupt competition not only by regulating unfairly but also when they create public services.

1.2. Public Service Versus Fair Competition: Municipal Socialism Versus Liberalism

At the beginning of the 20th century judges will face growing demands for local and State intervention. From that time on judges in France and the United States will face increasing demands for allowing public intervention to respond to social pressures. They reluctantly accepted (1). At the very end of this evolution, the Conseil d'Etat in France modified the way it reviews public intervention (2).

1.2.1 The Slow Demise Of Laissez-Faire

In France the Conseil d'Etat has been pretty slow in accepting, with reserves and reluctance, local intervention in the economy in the form of public services. It is only in the 1930s that the judge will give municipalities some liberty to respond to local necessities.

At the beginning of the 20th century the administrative judge was very stringent: only "exceptional circumstances" could justify the creation of public services by a municipality.⁴⁷ The city of Olmeto in Corsica decided to create a job of doctor, paid on public money, to treat poor people for free. A taxpayer challenged the decision successfully. The judge considers that no such exceptional circumstances exist as there

⁴⁷ CE, 29 mars 1901, *Casanova*, Rec. 333 (S. 1901.3.73, note Hauriou): "The judge held that even though "local councils may, in exceptional circumstances, act to ensure the provision of medical care for inhabitants in need thereof, it is clear from the proceedings that no such circumstance existed in Olmeto, where two doctors were in practice; that it follows therefrom that the local council exceeded its powers when the challenged resolution allocated a yearly stipend of 2,000 francs to a local authority doctor employed to treat free of charge all inhabitants, rich and poor indiscriminately, and that the Prefect was wrong in approving that resolution" (The translation from Professor Bernard Rudden is available at: http://www.utexas.edu/law/academics/centers/transnational/work_new/french/case.php?id=1035).

are already two doctors working in the city. Commentators at that time remarked that the judge had also in mind the necessity to force local governments in managing carefully their funds. Hauriou argued that the Conseil d'Etat would foster good administration by doing this.

The decision means that for the Conseil d'Etat social needs have to be provided by private enterprise. Hauriou writes enigmatically: “public life and activity are the exception, the rule is private life: administrative organisations purport to be merely remedies to failures or insufficiencies of private initiatives”.⁴⁸ The jurisprudence marks the attachment of the judge to a conception of public intervention limited to market failures. Hauriou further praises the solution as being in conformity with the “individualistic conception” of French public law.

Individualism was indeed a product of the French Revolution. By cancelling the feudal organization of the Ancien Régime (orders and corporations) the Revolution left individuals alone vis-à-vis the State. The social question that emerged in the 19th century in Europe and in the United States produced an incredible amount of reflexion and, in France, the idea produced to remedy the issue was the idea of solidarity, which would later form the basis of the notion public service and a founding notion of the 3rd Republic as well. When the Conseil d'Etat refuses the creation of a public service in this case, it refuses actually that public power should intervene to manifest public solidarity for the have-nots.

In 1921, the Conseil d'Etat continues to resist public demand. A government commissioner argued that the jurisprudence of the Court lays down the principle that a local government cannot “change the general conditions of the economic régime by competing with private initiatives, using its administrative capacity”.⁴⁹

⁴⁸ M. Hauriou, *La jurisprudence administrative de 1892 à 1929*, Sirey, tome 2, p. 237.

⁴⁹ Conseil d'Etat, 20 Janvier 1921, *Syndicat des agents généraux des compagnies d'assurances du territoire de Belfort*, Rec. p. 82.

Similar cases would be hard to find in the United Kingdom. In the United Kingdom, municipalities being only corporate body could only create such services, as the private act of Parliament would allow them to create. Until 2011 local governments did not enjoy general competence clauses allowing them to create public services that would serve the general interest of the local population.⁵⁰

In the United States the situation is mixed, in two respects. The solution would be different whether the question arose at municipal or at State level, and also whether the creation of the public service involves taxation or not.

Local government enjoy no inherent power and therefore can create public services only if state legislature has authorized it. This rule – called Dillon’s rule - is a strong guarantee against municipal socialism.⁵¹ According to Dillon, any doubt as to whether a local government had a power to act were to be “resolved by the courts against the municipal corporation”.⁵² Scholars, some courts and states have rejected the strict construction of the Dillon rule.⁵³

But where courts retained power to decide the merit of local action lied in the requirement that “any power conferred on a locality, whether by way of specific enumeration or by broad grant of general welfare or police powers, must serve a public purpose as distinguished from a private purpose”.⁵⁴

As for the creation of public services that compete with private enterprise the federal nature of the United States explains that solutions may differ. Martinez admits that problems may arise in this case.⁵⁵ Courts seem to be more sympathetic to municipalities creating public services in the United States than in France. As Martinez argues: “The

⁵⁰ See Localism Act 2011.

⁵¹ *Hunter v. City of Pittsburgh*, 207 U.S. 161, 177–180, 28 S. Ct. 40, 52 L. Ed. 151 (1907).

⁵² *City of Clinton v. Cedar Rapids and Missouri River Rail Road Company* 110 U.S. 27 (1884).

⁵³ Michael E. Libonati, John Martinez, *Local government law* (St. Paul, Minn.: Thomson West) § 13:9.

⁵⁴ *Ibidem*, § 13:10.

⁵⁵ *Ibidem*, § 18:7.

‘public purpose’ limitation on local activities is generally construed to permit a wide range of trading and entrepreneurial pursuits by localities”.⁵⁶

In the Slaughter-House Cases, the Supreme Court sustained the creation of a monopoly by a municipality. Justice Miller distinguished this case from the famous Case of Monopolies decided by Coke where the monopoly was created by the Monarch and not by Parliament.⁵⁷ The determination of the power of the locality to create a public service will be assessed only by statutory interpretation and it appears that judges were quite sympathetic to monopolies.⁵⁸

American judges were on the contrary more demanding when it came to judging the legality of aids to private entities, because the constitution forbids taxation for private purposes.⁵⁹ The case law is mainly concerned with aids granted to private businesses and it appears that the courts are very reluctant to accept a public purpose in these instances: “But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labour. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favour of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.”⁶⁰

In 1930s France, the Conseil d’Etat evolved, accepting that local government could under special local circumstances and provided a public interest was at stake, create a

⁵⁶ *Ibidem*, § 18 :7.

⁵⁷ *Slaughter-House Cases*, 83 U.S. 36, 21 L. Ed. 394, 1872 WL 15386 (1872).

⁵⁸ Michael E. Libonati, John Martinez, *Local government law*, op. cit., § 18:7.

⁵⁹ Franck Parsons, *Legal Aspects of Monopolies*, in *Municipal monopolies*, E. W. Bemis (ed.) (New York, Boston, T. Y. Crowell & company, 1899) p. 425.

⁶⁰ *Citizens' Savings & Loan Ass'n v. City of Topeka*, 87 U.S. 655, 22 L. Ed. 455, 1874 WL 17323 (1874).

public service.⁶¹ Under this new line of authority the Conseil d'Etat reaffirmed that “commercial enterprises should be left, as a general rule, to private initiative”. But it concedes right away that “local authorities cannot set up an economic activity as a public service unless, because of special conditions of place and time, their intervention is justified by a public interest”.⁶² The negative turn of the phrase shows the reluctance of the judge to admit that a public body could engage in a private business. The city of Nevers had established and contracted out a service of food supply to its population in order to stop rising prices. The final but not complete acceptance of the judge is results from the initiative of the government that had passed a decree authorizing local governments to create such services. The minister at the time issued a report criticizing the case law for not being in line with new necessities.⁶³ The government commissioner on the case minimized the importance of the decree saying, “Whatever the desires of the writers of the decree were, the laws do not allow us to reach the conclusion that a profound modification of your principles happened (...). So, municipal intervention will be legal only if a public interest makes it legitimate ... That public interest may be interpreted more broadly than before, yes, but we are made to conclude that the 1926 decrees do not derogate from the principles”.

The speech is a good example of how the Conseil d'Etat is reluctant to acknowledge any change in the law and tries to accommodate its previous case law with changing policy. The case is a milestone in a progressive retreat from its previous standpoint.

With time the administrative judge has adopted a large view of these two conditions for public intervention: the existence of a public interest and of special conditions of time and space: “the public interest that can justify economic intervention by local authorities is based on the needs of the local population. Such needs can arise as a result of either the absence or the inadequacy of private enterprise. The inadequacy can be quantitative or qualitative. Case-law has, for example, allowed local authorities to engage in

⁶¹ Conseil d'Etat, 30 mai 1930, *Chambre syndicale du commerce en détail de Nevers*.

⁶² Council of Europe, *Conference on the European Charter of Local Self-Government* (Barcelona, 23-25 January 1992), “What Have You Done with the European Charter of Local Self-Government?” Report on France by J.-M. Woehrling, 1993, at p. 144.

⁶³ P. Delvolvé, M. Long, P. Weil, G. Braibant, B. Genevois, *Les grands arrêts de la jurisprudence administrative* (Dalloz, 18^e ed.) p. 267.

cinematographic activities (Conseil d'Etat, 12 June, Syndicat des exploitants du cinématographe de l'Oranie), to organize free legal aid (23 December, Prefect of the Val d'Oise), to run a municipal butcher's shop at which prices are lower than in private butchers' shops (Ass., 2 November 1933, Zenard) and to operate a municipal dental surgery providing a cheaper service than the private surgeries (Sect., 20 November, Municipality of Nanterre)".⁶⁴

The door was open. At first the activities concerned were only medical activities in places where there were no doctors or food stores (like butchers) or during the war undertakings to ensure the supply of the population. Of course with time the need of the population changed and the question arose for example about theatres. Was it to be considered a public service and could municipalities engage in such undertakings? It may seem odd to consider that a country that is now defending its "cultural exceptions" in all international free-trade forums could have been so reluctant to admit public intervention in this sphere. The Conseil d'Etat considered it was not the place of the State to get engaged in these activities.

The French administrative law professor Hauriou gave the first expression of the rejection in a famous sentence. He denied that the theatre could be an activity of general interest saying that theatre "bears the major inconvenience of exalting imagination, it gets minds used to false and fictitious life and excites the passions of love, which are as dangerous as gaming and intemperance".⁶⁵ This opinion dates back from 1916 and reflects what the Conseil d'Etat thought. By the 1927, the Conseil d'Etat had authorized municipalities to engage in theatres and cinemas⁶⁶, and later on to all sorts of trade that could satisfy the new needs of the population, provided no private enterprise would satisfy such a need.

⁶⁴ Note 66.

⁶⁵ Hauriou, note sous CE 7 avril 1916, Astruc : S. 1916, 3, p. 49. Translation of: le théâtre présente "l'inconvénient majeur d'exalter l'imagination, d'habituer les esprits à la vie factice et fictive et d'exciter les passions de l'amour, lesquelles sont aussi dangereuses que celles du jeu et de l'intempérance".

⁶⁶ Conseil d'Etat, 27 Juillet 1923, *Gheusi*, Rec. p. 638.

With the rise of the Welfare State, the impact of the principles of equality and of the freedom of trade would be of less consequence. Parliament authorizing and nationalizing more and more activities gave the Conseil d'État less power to constrain public bodies and prevent them from entering into private activities.

But, with the advent of the 5th Republic and constitutional review the battle took place before the Conseil constitutionnel. The last battle involving liberalism and socialism took place when the newly elected socialist government nationalized many areas of the economy, in 1982.⁶⁷ The decision of the Council to strike down the law involves a reflection on whether the French legal system is a liberal or socialist one. The constitutional sources and traditions are indeed contradictory. On the one hand the 1789 Declaration proclaims an attachment to private property. The Court takes an additional argument in the fact that in 1946 the French people rejected a referendum on a project of Constitution containing a new version of the Declaration of the Rights of Man. The new Declaration was more socialist in inspiration. The Court takes argument from the rejection of this proposal to adopt a traditional conception of the right of property.

The Court will therefore review the operation following the criteria laid down in 1789: the taking of property should be deemed necessary and should be compensated. The Court accepts the argument of Parliament that the nationalisation could be justified by the economic crisis at that time. The Court further argues that it will defer to Parliament's appreciation on the necessity of the nationalizations.

At the end of the day, the vindication of private property seems very platonic. It is not on this ground that the law will be quashed but on the ground that insufficient compensation was provided for. However the Court took the opportunity to establish firmly the liberal principles at the basis of the legal system.

⁶⁷ Decision n° 81-132 DC, 16 Janvier 1982.

1.2.2. From Freedom to Competition

In 2006, the Conseil d'Etat affirmed its position as regards the way it would control public intervention in the economy.⁶⁸

The obiter reads: “Public bodies are in charge of carrying out activities necessary for the fulfilment of public services and, to this end, are given public power prerogatives. If they want to take in charge, in addition to these missions, economic activities, they can legally do so only having regard to the freedom of trade and competition law. In order to operate on a market, not only do they have to keep within the limits of their power, but also show a public interest that can stem from the lack of private sector initiative. Once admitted in its principle, such an intervention, because of the special situation of public bodies compared to other players on the market, must not be carried out in such a manner that it would distort free competition”.

The judge therefore distinguishes the principle of the intervention (whether the intervention is in itself legal) from its modalities (whether the intervention breaches competition law).

On the one hand, the “Ordre des avocats au barreau de Paris” case appears to give more freedom to public authorities to create public services. Whereas before two conditions had to be met so that a public body could create a public service (a public interest and special conditions of time and place) this case holds that the public interest can result from the special conditions alone, which means that a local government wanting to set up a public service would only need to prove a public interest purpose. The change can appear cosmetic. It is an acknowledgement that the judge has been unable to control properly public intervention, to the extent that one can wonder if the principle of the freedom of trade is still useful.

The meaning of the case lies in the second part of the obiter dictum. On the one hand the Conseil d'Etat says that public authority need a public purpose to intervene in the

⁶⁸ See Conseil d'Etat, 30 mai 2006, *Ordre des avocats au barreau de Paris*, Rec. p.272.

economy. But on the other hand the Conseil d'Etat adds that the modalities of the intervention would be reviewed in light of competition rules.

Competition law has indeed changed the focus of the Conseil d'Etat. We will see next that this change occurred in the 1990s. The rise of competition law litigation in the public sphere changes the focus of economic public law: whereas liberalism was constructed on the idea that State intervention was in itself a bad thing, the new ideology is indifferent to whether the player is public or private as long as it abides by the rules of the game. With competition law the State becomes one actor among others in the market. This view can be challenged.

2. The Rising Star of Competition in Administrative Law: The State as an Ordinary Market Player?

The movement towards using competition law as a way to control state intervention in the economy is new but global: “While it was once the case that antitrust (or competition) laws were reserved for private restraints, a more modern view of the state and the market recognizes the integral relationship between them”.⁶⁹ The OECD⁷⁰, Australia⁷¹, Europe have studied the issue.

We would like first to assess the relevance of competition law to control public activity in the United States (A) in order to show what the developments have been in Europe and especially in France (B). In conclusion, we will then venture some explanations as to why competition law has gained such an importance in Europe to control public action.

2.1. Competition Law and Public Action in the United States

In the United State competition law is of ancient lineage but its scope is restricted and does not encompass public actions. Two reasons can be advanced to explain this result. First, the federal nature of the United States render the application of federal antitrust laws complex in case of state and local anticompetitive practices. In addition, the “state action” doctrine immunizes state and local actions from federal antitrust laws. In this respect it appears that the US Supreme Court is more respectful of states’ sovereignty than EU law or, Eleanor M. Fox puts it: “The United States ... has given preference to state sovereignty over national governance, even though the converse route would increase national welfare”.⁷²

⁶⁹ Eleanor M. Fox, Deborah Healey, *When the State Harms Competition – The Role for Competition Law*, April 10, 2013, NYU Law and Economics Research Paper No. 13-11.

⁷⁰ See the OECD Competition Assessment Toolkit at: <http://www.oecd.org/competition/assessment-toolkit.htm> (last visited 20 August 2013).

⁷¹ Report by the Independent Committee of Inquiry into National Competition Policy, August 1993, available at: <http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf>.

⁷² Eleanor Fox, “What if Parker v. Brown were Italian?”, Chap. 19 in 2003 Fordham Corp. L. Inst., *International Antitrust Law & Policy* (B. Hawk ed. 2004) at p. 463.

Second, as Areeda and Hovenkamp very clearly state: “antitrust’s main job is to pursue anticompetitive private conduct that is not effectively controlled or constrained by government officials”.⁷³

In *Parker v Brown*⁷⁴ the Supreme Court held that the Sherman Act “was not intended to apply to state action”.⁷⁵ The case was decided in 1943. Subsequently, John Wiley showed “that eroding confidence in regulation has paralleled a shift in state action doctrine: the Court’s earlier broad deference to state sovereignty has been narrowed by restrictive definitions of state action that often permit federal antitrust review of important state regulatory policies”.⁷⁶ The immunity applies today only where clear intent is showed in the statute and where adequate supervision of any private discretionary conduct is provided. Only if these two conditions are met will federal antitrust laws not be applied.⁷⁷ John Wiley has showed the influence of capture theory on the evolution of the Supreme Court.⁷⁸

What seems striking when compared with the scope of EU antitrust law, is that US law is concerned with the intent of state legislatures whereas EU law is concerned with the nature of the activity. A EU member state could not intend to displace antitrust rules even if it wanted. As Eleanor Fox has written: “In *Parker v. Brown*, the state won; under

⁷³ Phillip E. Areeda, Herbert Hovenkamp, *Antitrust Law, An Analysis of Antitrust Principles and Their Application* (Aspen, 2nd ed.) Vol. I, p. 140.

⁷⁴ 317 U.S. 341 (1943).

⁷⁵ Areeda, Hovenkamp note 74, p. 357.

⁷⁶ John Shepard Wiley, *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713 (1985-1986). See also Thomas W. Merrill, *Capture Theory and the Courts 1967-1983*, 72 Chi. Kent L. Rev. 1039.

⁷⁷ *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

⁷⁸ Wiley, Note 77, p. 715: “This shift in doctrine paralleled and, I argue, reflected a changed intellectual attitude about the social utility of regulation. The confidence the Parker Court exhibited in its state action formulation suggests that it embraced the dominant view of the time that regulation was both economically necessary to combat market failures and politically legitimated by the mandate of broad political majorities. The Court thus saw no significant conflict between desirable economic policy and respect for state and local sovereignty. Subsequently, however, regulation came to be regarded as economically inefficient and as the product not of broad political consensus but of the capture of lawmaking bodies by producer groups seeking benefit at the expense of others. This changed attitude toward regulation has created a tension in antitrust federalism that was wholly absent in *Parker* - a tension that has led courts to use the very state action doctrine that arose from a desire to defer to state sovereignty as a means to intrude increasingly on that sovereignty”.

EU law, the state would have lost”.⁷⁹ The ECJ jurisprudence indeed implies “an answer different from the one the US Supreme Court gave in the celebrated case of *Parker v. Brown* when the Court refused to enjoin the operation of a California statute organizing a state/private raisin cartel”.⁸⁰

For state-owned enterprises antitrust applies for undertakings owned by states but does not apply for federally owned enterprises. The US Supreme Court held that ““The Postal Service, in both form and function, is not a separate antitrust person from the United States. It is part of the Government of the United States and so is not controlled by the antitrust laws.”⁸¹

Here also US and EU antitrust laws operate differently. EU antitrust law is indifferent to the fact that an activity is done by a government, what matters is the nature of the activity.⁸²

2.2. Competition Law and Public Action in Europe and France

2.2.1 EU Law on Competition and Public Bodies: Scope of Application and Consequences (State aid)

The scope of application of EU antitrust law is the existence of an economic activity. EU law is indifferent to the nature of the body or the intent of the legislature, it gives absolutely no deference to the will of a Member State (a). This indifference is also very apparent in state aid law (b).

a. EU Competition Law and public regulations and actions on the market: States as ordinary actors and public services under the law of the market

The delimitation of the scope of application of EU competition law is very different from that of US antitrust law.

⁷⁹ Eleanor Fox, “What if *Parker v. Brown* were Italian?”, Chap. 19 in 2003 Fordham Corp. L. Inst., *International Antitrust Law & Policy* (B. Hawk ed. 2004).

⁸⁰ Eleanor M. Fox, Deborah Healey, note 70, p. 38.

⁸¹ *Postal Service v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004).

⁸² See below on article 81 and 82 of the Treaty.

The ECJ held that competition law applies to undertakings, a concept that is defined as an entity performing an economic activity, “regardless of its legal status and the way in which it is financed”.⁸³ Interestingly when we compare this dictum with the jurisprudence of the US Supreme Court, no question of federalism is raised by the ECJ. The European court uses only a material criterion, the nature of the activity.

The only limits of the reach of competition law are the exercise of public power and social security activities.⁸⁴ For example concerning the first limit the ECJ held in *Diego Cali* that:

As regards the possible application of the competition rules of the Treaty, a distinction must be drawn between a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market (...)

The anti-pollution surveillance for which SEPG was responsible in the oil port of Genoa is a task in the public interest that forms part of the essential functions of the State as regards protection of the environment in maritime areas.

Such surveillance is connected by its nature, its aim and the rules to which it is subject with the exercise of powers relating to the protection of the environment that are typically those of a public authority. It is not of an economic nature justifying the application of the Treaty rules on competition⁸⁵

When public services are concerned the Treaty (article 106 TFEU) make it clear that competition rules apply in principle to these activities “in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them”. The provision means that the disruption of competition made by public services will be reviewed on the basis of proportionality review. The disruption must be deemed necessary for the operation of the public services. At any rate the burden of proof for the necessity of the mechanism lie with the Member States. In *Corbeau* the issue at stake was the monopoly (exclusive right) granted to the postal

⁸³ Case C-41/90.

⁸⁴ C-159/91 and C-160/91: “The concept of an undertaking, within the meaning of Articles 85 and 86 of the Treaty, encompasses all entities engaged in an economic activity. It does not include, therefore, organizations involved in the management of the public social security system, which fulfil an exclusively social function and perform an activity based on the principle of national solidarity which is entirely non-profit-making”.

⁸⁵ ECJ, 18 March 1997, *Diego Calì & Figli Srl contre Servizi ecologici porto di Genova SpA* (SEPG), no C-343/95.

operator on the distribution of mail, monopoly that extended to profitable services. The exclusive right was meant as a way to finance the public services obligations of the entity, to offset the losses of the non-profitable parts of the service. The ECJ holds that “Although the obligation for the holder of the exclusive right to perform a task of general interest by performing its services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings where the economically profitable sectors are concerned, such a restriction of competition is, however, not justified in all cases. In particular it is not permissible as regards specific services which may be dissociated from the service of general interest, which meet special needs of economic operators and which call for certain additional services such as, where the carriage of mail is concerned, collection from the sender’s address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit, which the traditional postal service does not offer, in so far as such specific services, by their nature and the conditions in which they are offered, such as the geographical area in which they are provided, do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right”.⁸⁶

The power of Member States to organize public services is seriously undermined by competition law, which means that the scope of public services shall be restricted to the strict minimum to be immunized against competition rules. Actions of the State on the market are therefore seriously restricted.

Another element that limits State power on the market is the jurisprudence on competition law and regulatory power. The ECJ does not hesitate to judge the legality of laws and regulation on competition law grounds. This element explains why competition law has enabled the ECJ to force Member State to create independent agencies to separate regulatory from operational activities on the market. In the *Commission v Italy* case, the ECJ holds that “the management, by an undertaking having the status of a

⁸⁶ C-320/91. See also C-393/92.

nationalized industry, of public telecommunication equipment and its placing of such equipment at the disposal of users on payment of a fee amounts to a business activity which as such is subject to the obligations imposed by article 86 of the treaty. Comprised within that activity, and therefore subject to review in the light of article 86 of the treaty, is the autonomous exercise of rule-making powers strictly limited to the fixing of tariffs and the conditions under which services are provided for users”.⁸⁷

When regulation is comprised in an economic activity it has to abide by the rules of the market and that’s how competition law enters the domain of judicial review through the duty of cooperation established by the Treaty. The position of the ECJ is very well explained in the Italian matches case.⁸⁸ The Court explains that although articles 101 TFEU (anticompetitive agreements) and 102 TFEU (abuse of dominance) “are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article [4 Treaty on European Union], which lays down a duty to cooperate, none the less require the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings”.

Thus, States must disapply all legislation or regulation that amount to an anticompetitive practice in order to foster an open market economy with free competition established by the Maastricht Treaty.

How does it work? How does the ECJ judge the legality of an act as regards its effects on competition? For this purpose the ECJ has developed the theory of the automatic abuse. Legislation or a regulation will be illegal if it places an undertaking in a situation where it cannot avoid abusing its position. The Court explains the reasoning in Höfner: “Consequently, any measure adopted by a Member State which maintains in force a statutory provision that creates a situation in which a public employment agency cannot avoid infringing Article 86 is incompatible with the rules of the Treaty. (...)A Member

⁸⁷ Case 41/83.

⁸⁸ Case C-198/01.

State is in breach of the prohibition contained in those two provisions only if the undertaking in question, merely by exercising the exclusive right granted to it, cannot avoid abusing its dominant position”.⁸⁹The public decision must be the necessary cause of the abusive conduct.

States acting on the market are therefore tightly constrained by competition law.

b. The standards of State aids law: Shareholder State as private actors

State aid law is another good example of how competition law reduce dramatically State prerogatives when acting the market. This body of law has established standards of conduct that undermine the legitimacy of State intervention.

When examining aids that take the form of investment in capital States must conform to the standard of the private investor in the market economy. The ECJ held in this respect that “In order to determine whether investment by public authorities in the capital of an undertaking, in whatever form, is in the nature of State aid (...), it is necessary to consider whether in similar circumstances a private investor of a size comparable to that of the bodies administering the public sector might have provided capital of such an amount”.⁹⁰

This standard is a perfect example of how EU competition law voids all justification for State intervention. If the State has to act as a private investor there is absolutely no justification for acting in the first place.

2.3. France: Competition Law as a New Ground for Review

In France, developments of European law lead to the introduction of competition law as a ground for review. Competition law was thus integrated in administrative legality to further control public interventions. This evolution further strengthens the European rule of law. The administrative judge will thus void regulation that is contrary to

⁸⁹ Case C-41/90, at § 27 and 29.

⁹⁰ Case C-42/93.

competition law. But it responds also to national calls, as the *commissaire du gouvernement* Stahl argued.

Strong arguments pleaded against such an application of competition law to administrative decisions. Competition law is thought to be about controlling private activities and not policy decisions by public bodies.

The Conseil d'Etat was thus under no pressure to accept competition as a new ground of review. Yet, it did, in the *Millions et Marais* case.⁹¹ In this case the company challenged the exclusive right granted to the *Société des Pompes funèbres générales* to exercise the activity of undertaker, arguing that granting this exclusive right amounted to an abuse of a dominant position. The Conseil d'État, after a decade of uncertainty, finally held that such a ground was valid but the challenge in question failed, because no abuse was found.

Why did it accept such a new ground of review? It can indeed seem strange to consider that an administrative decision amounts to an abuse of a dominant position. In Ireland, the *Panda Waste* case is about the same issue. As the judge summarizes it: “These judicial review proceedings arise out of a Variation to the Waste Management Plan for the Dublin Region 2005 – 2010 made by the respondents on 3rd March 2008. The Variation would have the effect of excluding private operators from the domestic waste collection market (...) and would vest all rights to collect waste in a single operator who, at their choice, shall be either a Dublin Local Authority, or following a public tender process their nominee. The applicants are contesting the Variation on the grounds that: i) the Variation amounts to an abuse of a dominant position”.⁹²

The question before the Conseil d'État in 1997 was therefore whether the competition law provisions had an effect on the legality of administrative decision (whether regulations, unilateral adjudications, or public contracts). In the *Millions et Marais* case it was a public contract (a public service concession) that was in question. The

⁹¹ Conseil d'Etat, 3 Novembre 1997, *Société Million et Marais*, Rec. 393.

⁹² *Neurendale Ltd t/a Panda Waste Services -v- Dublin City Council & Ors* [2009] IEHC 588.

Government commissioner gave several reasons in favour of an application of competition law to administrative decisions:⁹³ First, he tried to convince the Conseil d'État that administrative decisions had an effect on the market and on free competition. He convincingly said that awarding a public contract (a service concession) amounted to granting an exclusive right to engage in a specific trade, which involves competition law issues: the administrative decision has consequences on the situation of other companies operating on the same market as the service concession holder. Thus the Conseil d'Etat should be wary to control that these decisions do not put the administration's partner in a position where he would automatically breach the Competition Act of 1986.

Secondly, and more basically the Government Commissioner said that competition law rules belonged to the block of legality and were among the norms that public bodies had to abide by. This statement is a traditional consideration for the Conseil d'État: it held for example that breach of consumer law or criminal law were valid grounds of review because they were of general application. It is therefore a technical argument of law that convinced the judge.

Thirdly, jurisprudential policy was invoked: the Government Commissioner argued that the impossibility to review administrative decision on the ground that they would breach competition law was felt as a lacuna in the powers of the judge, because it is very likely that some anticompetitive practices may originate from administrative decisions. Finally, and more importantly for the Government Commissioner, accepting this new ground of review would be a way for the Conseil d'État to reshape the relationships between public services and the competitive environment. Public service law was, for him, too much centred on users, and not enough on the competitive environment. It would be an improvement of the Conseil d'État's powers to be able to review this and include the competition law aspect so that the judge can have a say in what was going on at the time. In 1997, the EU was indeed engaged in a massive reform of public services

⁹³ See J.-H. Stahl, RFDA 1997, p. 1228.

in Europe, trying to introduce competition in what was everywhere a national monopoly.

This new case changes the way the administrative judge review public activities that have an impact on the market, importing into judicial review all the economic methods of competition law.

The Conseil d'État thus quashed a decision of the Minister for the Economy that set the price for the selling of the national statistics authority data. Because the price set in this decision was too high it made the downstream business of the companies using these data unprofitable. The Conseil held that the decision put the authority in a situation where it would automatically abuse its dominant position.⁹⁴

Similarly, an administrative decision that had the effect of creating or ratifying a prohibited agreement between private entities would be illegal: for example, a decision that would approve an agreement between professionals (in a collective agreement or bargaining⁹⁵).

Another case should be mentioned that shows to what extent competition law has changed the way the judge envisages public intervention on the market.

The Jean-Louis Bernard Consultant was a challenged aimed at preventing public bodies from participating in competitive tendering. The question was whether a public body could participate in the award of public procurement contracts. The Conseil d'Etat held very clearly that no law or general principle prevents a public body, because of its nature, from engaging in a competitive tendering.⁹⁶ The Conseil d'Etat added that administrative judges should check that the price proposed by the public body should reflect the costs.

⁹⁴ Conseil d'Etat, 29 July 2002, *Société Cégédim*, Rec. 280.

⁹⁵ CE, 30 April 2003, *Syndicat professionnel des exploitants indépendants des réseaux d'eau et d'assainissement*, Rec. 189.

⁹⁶ Conseil d'Etat, avis, 8 November 2000, *Société Jean-Louis Bernard Consultants*, n° 222208.

This case shows very well to what extent the ideology has changed. Formerly, in the liberal ideology, the jurisprudence was aimed at preventing the state from interfering in private affairs. Now, the role of the judge is to review the way in which the state operates.

Finally competition law has modified the way in which the Conseil d'Etat reviews monopolies.

Everywhere in the western world, in the field of network industries, monopoly was the common way of providing utilities and therefore many public utilities enjoyed a position of monopoly that was at the beginning uncontested. Competition in the field of utilities either did not work (and the concept of natural monopoly tended to give a justification for this) or was felt to be undesirable.

For this reason and following the general distrust of competition, the Conseil d'État accepted in the 1930s that local authorities might establish a monopoly for their public services. The seminal case was in the field of buses.⁹⁷ As is very well known, the economic justification for establishing monopolies in the field of utilities was highly contested in the United States. The theory of contestable market undermined severely the justification for monopoly in the field of public service.⁹⁸ Also, the building of the single market in the EU used network industries as a privileged field for market integration. The “public turn” of the EU history in competition law as David Gerber called it used utilities as a way to foster greater economic unification of the European Union.⁹⁹

Again, the jurisprudence of the Conseil d'État echoed this change. Now the Conseil d'État holds that local government may only establish monopolies or grant more

⁹⁷ Conseil d'Etat, 29 January 1932, *Société des autobus antibois*, Rec. 117.

⁹⁸ W. J. Baumol, J. C. Panzar, R. D. Willig, *Contestable markets and the theory of industry structure* (New York, London, Harcourt Brace Jovanovich, 1982). See especially the contributions of E. E. Bailey, D. Fischer, H. C. Quirmbach.

⁹⁹ See D. Gerber, *Law and Competition in Twentieth Century Europe* (Oxford University Press, 1998).

favourable conditions to public services in exceptional circumstances. And the Conseil d'Etat checks that the justifications are indeed present.¹⁰⁰

The situation is therefore very different in the United States and in Europe. Why is that?

¹⁰⁰ Conseil d'Etat, 30 juin 2004, *Département de la Vendée*, n° 250124.

3. Conclusion: The Ordoliberal Economic Constitution and European Administrative Law

How to account for the distinctiveness of European Administrative Law?

David Gerber has studied the European antitrust paradox: whereas everything pleaded for the adoption of an American model of antitrust (experience in the field, influence of the country after WWII, and the fact that Jean Monnet asked a prominent scholar from Harvard, Robert Bowie, to draft the provisions) Europe adopted what he calls the “administrative control model of competition law”.¹⁰¹ This model places the administration at the centre of competition law enforcement. This is true at European and Member States levels. Administrative law and competition law are therefore linked at the very beginning this way: administrative bodies will be in charge to enforce competition law throughout Europe. The two bodies of law are also linked in another way. In this respect the influence of ordoliberalism is critical.

Ordoliberals, also called the Freiburg School, were economists (Walter Eucken) and lawyers (Franz Böhm and Hans Grossmann-Doerth) who gathered, in 1933, around similar ideas concerning the failing of the Weimar Republic. It is not the place here to explain all their ideas. We would like first to emphasize their thinking about how to constrain State’s intervention in the economy and how it influenced policy in Europe.¹⁰² The role of law in Ordoliberal thinking is critical and they were very influential in recasting the role of the State in the economy in Germany and Europe. The notion of economic constitution was developed by them to give a new legitimacy and a new limited scope of state intervention in the economy but also to constrain tightly this intervention: “The ordoliberals emphasized that *Ordnungspolitik* did not permit discretionary governmental intervention in the economy, but required the opposite-legal principles that directed but also *constrained* government conduct! The constitutional dimension of their thought allowed them to call for law to create and

¹⁰¹ David J. Gerber, *Law and competition in twentieth century Europe: protecting Prometheus* (Oxford University Press, 2001) p. 176.

¹⁰² The following paragraphs follow David Gerber’s explanations (note 102) as well as Michel Foucault’s (*The birth of biopolitics: lectures at the Collège de France, 1978-79*, New York, Palgrave Macmillan, 2008).

maintain the basic structures of the economic system *without* authorizing governmental ‘intervention’ in the economy (...) If it is legitimate to ask whether particular governmental conduct conforms to the political constitution, it ought to be similarly legitimate to ask whether such conduct conforms to the economic constitution. Decisions about the legal environment of the market would thus be bound by the economic constitution.”.¹⁰³ And David Gerber notes that the body of law concerned in Europe with constraining States is precisely administrative law.

This development explains why the ECJ had no problem to hold back States from the 1980 on when these States were operating on the market. The philosophical foundations for this jurisprudence were already laid down and much influenced European ideas.

Michel Foucault explains the link between the ordoliberal idea of the economic constitution¹⁰⁴ and administrative law in linking judicial review as being central to the rule of law and State’s intervention in the economy. In *The birth of Biopolitics*, he explains the ordoliberal project was to extend the concept of the rule of law to the economy, in order to constrain the State in its relations to the market. He explains then how in 19th century Germany there were discussions about whether “the Rule of law means a state in which citizens can and must have recourse against the public authority through specialized administrative courts”.¹⁰⁵ Germany adopted this model rather than the English one that relied on ordinary courts to adjudicate disputes between citizens and the State. Foucault adds that “this is the starting point for the liberals’ attempt at defining a way to renew capitalism” after WWII. The specificity of the ordoliberal school

¹⁰³ Gerber, note 102, p. 247. This concern is very well reflected in Wilhelm Röpke’s *A Human Economy*, where he describes how the executive should gain independence for pressure groups, be they social (trade unions) or economic (businesses). He writes: “A solution must be found to the problem of how the executive can gain in strength and independence so that it can become the safeguard of continuity and common interest without curtailing the essentials of democracy, namely, the dependence of government upon the consent of those governed, which alone makes government legitimate, and without giving rise to bureaucratic arbitrariness and omnipotence”. Röpke was therefore perfectly aware of the need to curtail governments’ powers in the economy. The solution he gives is independence: “To this end, it is invaluable to have independent institutions beyond the arena of conflicts of interests-institutions possessing the authority of guardians of universal and lasting values which cannot be bought. I have in mind the judiciary, the central bank”. W. Röpke, *A humane economy: the social framework of the free market* (London, Oswald Wolff, 1960) pp. 148-149.

¹⁰⁴ On the idea of economic constitution, see also, S. Cassese (a cura di), *La nuova costituzione economica*, Roma, GLF editori Laterza, 2007.

¹⁰⁵ Foucault, note 103, p. 171.

in this sense as Foucault and Gerber noticed was the link between the rule of law and economic intervention.

The idea of the economic constitution helps understanding the specificity of European solutions in the field of economic interventions.

