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The public power spillover in technology markets – does it leave room for any competition?

In a general fashion, even though trying different logics of argumentation, competition law proves its limits when it comes to having the effects spilled over activities carried out by undertakings invested with public powers purposes. From a policy perspective this represents a predictable finality; however, in arguing on the same facts, the methodological stance used by the Union's judiciary differs depending on the appetite towards formalistic or modern, economic-based argumentations. Even though the outcome (i.e. decision) might seem the same, the tests applied are of great importance for shaping a future, more efficient, competition legal infrastructure.

Category: Articles
Region: Romania
Field of law: Competition law

Citation: Vlad Dan Roman, The public power spillover in technology markets – does it leave room for any competition?, in: Jusletter IT 22 September 2016

ISSN 1664-848X, http://jusletter-it.weblaw.ch, Weblaw AG, info@weblaw.ch, T +41 31 380 57 77

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1. Introduction

[Rz 1] As we live in a dynamic world, meeting the requirements of business, society and governments by responding to the rapidly changing needs of the world, including the development and convergence of technologies, the improvement of product safety and welfare for citizens,[1] becomes fundamental.

[Rz 2] With this regard the European Union (EU) and its Member States created complex collaborative instruments which are configured to achieve such goals.

[Rz 3] By having as its primary attribute the definition of technical or quality conditions with which actual or next generation products, manufacture processes, services or methods need to comply, standardization has a leading role in reaching the above mentioned desiderates.[2]

[Rz 4] Standards are often set by formal or informal standard setting organizations.[3] It has been shown that standardization agreements have positive economic outcomes such as interoperability, economic interpenetration as they also promote new and better products.[4] All of these consumer welfare and efficiency features are doubled by safer goods and services that impact on areas such as public security. On the other hand, in order to be in line with the free market exigencies, standardization agreements must cover only what is necessary to conclude their aims.[5] Diluting the process's proportionality can amount to competition harm caused by the power asymmetries that, for example, the monopolistic characteristics of a patent can generate.

[Rz 5] It is for sure that standardization can give way to competition problems as, it has emphasized in the US case *Broadcom v Qualcomm*, despite which firm's patented technology is preferred, the acceptance of a standard shall eliminate competition; once the standard is established, inter-technology competition vanishes for the main parts of the standard.[6]

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1 Report of the Expert Panel for the Review of the European Standardization System, Standardization for a competitive and innovative Europe: a vision for 2020, February 2010 (http://www.anec.eu/attachments/Definitive%20EXPRESS%20report.pdf [all web pages last visited on 1 July 2016]).

2 European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Official Journal C 11 of 14 January 2011, para. 257.

3 Moritz Lorenz, An Introduction to EU Competition Law (New York, Cambridge University Press 2013), p.156.

4 Lorenz (note 3), p.155.

5 Hans Henrik Lidgard/Justin Pierce/Marcus Glader, Dynamic Competition (Lund, Lund University 2013), p. 375.

6 Lidgard/Pierce/Glader (note 5), p. 396.

[Rz 6] To this extent, whether the process of competition is «guarded in itself» or as an outcome for what it delivers is a fundamental division, as the former does not accommodate any restriction on the process of competition whereas the latter allows the competitive process to be restricted in order to reach a finality that the process *per se* could not itself add.[7] This second policy paradigm applies to undertakings invested with public power purposes; in their case, the Union judiciary tends to impose a special status to the markets linked with the scope of their existence and function.

[Rz 7] Having made this distinction, in the subsequent parts I shall focus my attention on the interaction that takes place between the formal standardization process and EU Competition Law, with reference to a particular technology market (i.e. air space management and safety).

[Rz 8] Event though, *lato sensu*, both have very similar goals (e.g. consumer welfare, increased efficiency), as a rule, the standardization process should be guided by Competition Law provisions. However, as it will be seen in the case study, it is not always the situation. In some points, it can be suspected that the Court involves in a judicial policymaking process[8] by regulating/foreclosing markets where competition has not necessary been excluded by the legislators' will. With this regard, equality issues, definition of property, aspects related to commerce and trade are being addressed at a policy level through judicial decisions.[9] The opinions reflected in the next sections represent the author's point of view and are not to be considered as being an official position of any public entity.

2. All the way to «Selex»

[Rz 9] The decision is considered «new law» as the Court of Justice of the European Union's (CJEU) motivation had been released in March 2009. However, *ad abundantiam*, the case's outcome strengthens a way of reasoning that the Court has embraced from the middle of the 70s.[10] On the other hand, in terms of grounds of the judgment, it must be admitted that there are some differences (i.e. between General Court v. Advocate General [AG] and Court of Justice interpretation).

[Rz 10] This line of case law concerns Eurocontrol, a regionally based international organization that was created by most of the European States under the International Convention on Cooperation for the Safety of Air.[11]

[Rz 11] In order to achieve its very broad aim of developing a uniform system of air traffic management in Europe, Eurocontrol «develops, coordinates and plans the implementation of pan-European strategies».[12]

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7 Liza Lovdahl Gormsen, A Principled Approach to Abuse of Dominance in European Competition Law (Cambridge, Cambridge University Press 2010), p.87.

8 Pilar Domingo, Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America, in: Democratization, Vol. 11, No. 1 (2004), p. 110.

9 Ran Hirschl, The New Constitutionalism and the Judicialization of Pure Politics Worldwide, in: Fordham Law Review, Vol. 75 (2007), p. 721.

10 Case T-155/04 of 12 December 2006 (*SELEX Sistemi Integrati SpA v Commission of the European Communities*), ECLI:EU:T:2006:387, para.16.

11 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 1.

12 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 1.

[Rz 12] At stake, in the most important cases concerning it – *SAT Fluggesellschaft mbH v Eurocontrol and SELEX Sistemi-Integrati SpA v Commission of the European Communities* – the main point of law under scrutiny was weather or not the organization is an «undertaking» within the meaning of EU competition law rules and if its activities fall within the realm of Article 102 of the Treaty on the Functioning of the European Union (TFEU).

[Rz 13] Detailing, in both cases Eurocontrol had to defend itself in front of private undertakings which have pleaded for a more liberal perspective when dealing with the different functions of the standardization process and their influence on the air management and safety technology market.

3. Eurocontrol I – a conflicting outcome

[Rz 14] SAT is an airline company governed by German law while Selex represents an operator in the sector of air traffic management systems based in Italy. In order to justify its refusal to pay its route charges, SAT claimed that Eurocontrol had breached what today is Article 102 TFEU by establishing charges at different amounts for equivalent services.[13]

[Rz 15] The Court initially cited *Höfner* and *Poucet* to support the view that, in defining an undertaking, the «legal status or means of financing were not determining factors». Surprisingly, the criterion which proves to have «tipped the balance» decisively in favor of the non-economic nature of the activity was the exercise by Eurocontrol of «powers [...] which are typically those of public authority» and of «powers of coercion which derogate from ordinary law and which affect users or air space». The confusing fact is the clear contradiction between adhering to this criterion and the enunciation of the insignificance of the legal status for the assessment;[14] the surprise is consolidated when the Union judiciary considers the public contributions scheme to be also a decisive mark for its decision.[15] In this early reasoning, the Court seems to only look at the legal nature of the undertaking without approaching the activity typology or market characteristics.

[Rz 16] Despite the hesitating reasoning delivered by the judges, a clear outcome regarding the non-application of competition law rules to undertakings carrying public power duties is being delivered.

[Rz 17] On the other hand, it looks to me that the Court «chased» an outcome that is not backed by a firm reasoning and that is somehow forced by the endeavor of protecting the public power paradigm.

[Rz 18] Time passed and, after more than ten years, Selex brought proceedings to the CJEU for an alleged abuse of dominance by Eurocontrol. The complaint focused on three areas: technical standardization, the research and development activity of Eurocontrol and the assistance given to the national administrations.[16]

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13 Case C-364/92 of 19 January 1994 (*SAT Fluggesellschaft mbH v Eurocontrol*), ECLI:EU:C:1994:7, para. 6.

14 Jose Luis Buendia Sierra, Exclusive Rights and State Monopolies under EC Law (Oxford, Oxford University Press 1999), p. 51.

15 Peter M. Roth (ed.), Common Market Law of Competition, Fourth Edition (London, Sweet &Maxwell 1996), p. 13.

16 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 4.

[Rz 19] In the following parts, I will develop more on the Selex case, focusing my attention on the different ways of reasoning that the General Court (GC) and the CJEU (backed by the AG) embrace in the two procedural stages.

4. Being considered an undertaking and the limits to the assessment

[Rz 20] When assessing on such an issue it must be stated that the term «undertaking» has been interpreted in an extensive way by the Commission and by the EU Courts. By acknowledging the jurisprudence, it is clear that the entity must be engaged in an economic activity and that its legal status does not necessary weight much in the evaluation.[17]

[Rz 21] With this regard it may be a natural person or have legal personality, it may be a company or another corporate body; it may be governed by public or private (civil or commercial) law and so on;[18] moreover, the definition can encompass groups of companies under current economic control (e.g. parent company – subsidiary)[19].

[Rz 22] The CJEU held in *Höfner* that «the concept of an undertaking covers every entity engaged in an economic activity regardless of the legal status and the way in which is financed»; in *Pavlov*, added that: «it has also been consistently held that any activity consisting in offering goods or services on a given market is an economic activity» while in *Wouters*, by embracing a functional approach, stated that competition rules do not apply: «to activities which, by its nature, its aim, and the rules to which it is subject does not belong to the sphere of economic activity [...] or which is connected with the exercise of powers of a public authority».[20] Adding, the CJEU had stated that the «exclusive social function based on the principle of solidarity»[21] or «activities aiming at protecting the environment»[22] can also evade competition rules.

[Rz 23] Besides the jurisprudence, the Treaty provides some exceptions based on the tensions between different areas of activity and the competition law provisions. This is the case regarding the agricultural sector (i.e. common agricultural policy), certain elements of the traffic sector, defense industry and Services of General Economic Interest.[23]

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17 Ivo Van Bael, Due Process in EU Competition Proceedings (Alphen aan den Rijn, Kluwer Law International 2011), p. 18.

18 Buendia Sierra (note 14), p. 32.

19 Hans Henrik Lidgard, Competition Classics (Lund, Media-Tryck 2010), p. 32.

20 Richard Whish, Competition Law, Sixth Edition (Oxford, Oxford University Press 2009), p. 83.

21 Case C-67/96 of 21 September 1999 (*Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*), ECLI:EU:C:1999:430, para. 4.

22 Case C-343/95 of 18 March 1997 (*Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA [SEPG]*), ECLI:EU:C:1997:160, para. 25.

23 Einer Elhauge/Damien Gerdain, Global Competition Law and Economics, Second Edition, (Oxford, Hart Publishing, (2011) pp. 67–70.

5. «Selex» and the General Court's detailed approach

[Rz 24] The applicant brought the present action at what that time was the Court of First Instance[24], after, previously drawing the Commission's attention to specific alleged infringements of the competition provisions by Eurocontrol;[25]

[Rz 25] The complaint related to three aspects: the technical standardization feature (i.e. adoption v. preparation), the Research and Development (R&D) activity carried by Eurocontrol[26] and the assistance provided, on request, to the national administrations.[27]

[Rz 26] The Commission notified the applicant that, from its perspective, the activities were not of economic nature and Eurocontrol could not be considered to be an undertaking within the meaning of Article 102 TFEU; moreover, in any event, even if those facts were perceived to be activities of an undertaking, they would not be in breach of the Treaty provisions.[28]

[Rz 27] In its preliminary analysis, the GC takes a very cautious and diligent position by relying on its case-law, and especially on *Aéroports de Paris v Commission*, when emphasizing that the various activities of an entity shall be assessed individually and the consideration of some of them as attributes of a public authority does not mean that without exception the other activities are non-economic as well.[29] By interpreting the previous case-law in an extensive way, the Court refuses a *per se accesorium sequitru principale* perspective to the detriment of breaking down sets of activities and assessing on each of them.

[Rz 28] Having this as a starting point, the Court engages itself in a detailed analysis giving primacy to an effect based type of logic.

5.1. No market or innovation market?

[Rz 29] When it comes to the technical standardization duty of Eurocontrol[30], the judgment acknowledged that the organization's public service mission refers only to the adoption of the technical standards and not to their production.[31]

[Rz 30] Having this as a premise, the Court, in contrast with the Commission's decision, moved forward and drew distinction between the production of technical standards by Eurocontrol and its main tasks of managing air space and improving air safety.[32]

[Rz 31] The separation tends to be a natural one as the legislative attribute of enacting standards, which trough analogy can be compared with that of a regulatory act which is adopted by an

24 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 16.

25 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 9.

26 With emphasis on the acquisition of prototypes and its IPR regime.

27 Julian Nowag, Case C-113/07P Selex Sistemi Integrati SpA. v Commission [2009] ECR I-2207: Redefining the Boundaries between Undertaking and the Exercise of Public Authority, in: European Competition Law Review, Vol. 31, No. 12 (2010), p. 483.

28 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 15.

29 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 54.

30 Article 2(1)(f) of the Convention on the Safety of Air Navigation states that Eurocontrol is responsible for developing, adopting and keeping under review common standards, specifications and practices for air traffic management systems and services.

31 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 60.

32 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 60.

executive body, is by its own nature based on the constitutional prerogative of Member States to gather and create frameworks for public safety. Following this line of reasoning, it is further argued that the production functions are not intrinsically linked with the subsequent stage of production;[33] at a principle level, the Court lives the door opened for a separation of the two.

[Rz 32] However, when it comes to the actual facts of the case, the judges indicate that and alleged economic activity should consists of the offering of goods and services on a certain market and not only the acquisition (i.e. prototypes) of such goods and services; they emphasized that it would be incorrect to divide the activity of purchasing goods from the subsequent utilization to which they are put[34]as the only purchasers of such services could be Member States in their position of air traffic control authorities.[35] In spite of the Court's previous logic, this second reasoning – based on the case facts – might be suspected of lacking visionary spirit. As today the European Union economy is mostly based on ideologies such as neo-liberalism with strong accents on liberalization of markets, it must be anticipated that member governments have the option to fully externalize the service in the future and involve maybe more efficient, private, undertakings in the process of assuring air safety. In this type of scenario, the purchasing market might also accommodate independent businesses and generate a competitive environment. At a principle level, this hypothesis is strengthened by the fact that Eurocontrol contracted with an undertaking in order to conceive a prototype for standardized elements. It may follow that, in the future, Member States could engage with private businesses for the desire of delivering better results.

[Rz 33] Exemplifying, the Romanian Administration of Air Traffic Services (ROMATSA) has been involved in several scandals involving corruption[36], efficiency issues[37] and labor unrest[38]; these were consequences of fraudulent management of the state entity, lack of reactivity in an airplane accident or the inadequacy of logistics used by employees to perform a quality and safe service. With this regard, questioning the public sector way fo acting becomes more than legit.

[Rz 34] Continuing, from another perspective but regarding the same point of law (i.e. the non existence of a market), the doctrine has concluded that even in cases where a market does not exist, it is possible, especially on technology markets, to assess the anti-competitive effect with regard to the future.[39]

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33 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 59.

34 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 65.

35 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 61.

36 «Director ROMATSA cercetat de DNA pentru corupie!», in: Special Arad, 7 October 2014 (http://specialarad.ro/director-romatsa-cercetat-de-dna-pentru-coruptie/).

37 «Document / Raportul Oprea despre accident: Vina aparine Romatsa, s se creeze un sistem de localizare a telefoanelor pe cheltuiala operatorilor», in: cursdeguvenare, 22 January 2014 (http://cursdeguvernare.ro/document-raportul-oprea-despre-accident-vina-apartine-romatsa-sa-se-creeze-un-sistem-de-localizare-a-telefoanelor-%E2%80%9Dpe-cheltuiala-operatorilor%E2%80%9D.html).

38 «Greva de la ROMATSA, declarat legal. Controlorii de trafic aerian opresc lucrul de la 1 septembrie», in: REALITATEA.NET, 28 August 2015 (http://www.realitatea.net/greva-de-la-romatsa-declarata-legala_1780155.html).

39 Josef Drexl, Anti-Competitive Stumbling Stones on the Way to a Cleaner World: Protecting Competition in Innovation without a Market (Munich, Max Planck Institute for Intellectual Property and Competition Law 2012), p. 12.

[Rz 35] This logic is based on the fact that firms do not only compete in terms of price. Another, nowadays very important, parameter of competition is innovation;[40] competition in innovation «takes place outside and before the emergence of markets».[41]

[Rz 36] On this topic, the Commission distinguishes between three different levels of assessing such agreements: «existing product markets»; «existing technology markets» and «competition in innovation».[42]

[Rz 37] Engaging in such logic, it must be said that «innovation market consists of the R&D directed to particular new or improved goods or processes, and the close substitutes for that R&D».[43]

[Rz 38] Once agreed that there exists such an innovation market, the emphasis on the substance of an economic activity rather than the undertaking's legal status or organization will decide whether it is subject to competition rules or not.[44] Following this type of logic, Eurocontrol might be considered to be an undertaking to the extent that it carries out an economic activity projected on future products and services and that might be produced/bought by private entities which could enter the market, both, upstream – at the production level (e.g. competing with Eurocontrol) and downstream – at the management level (e.g. competing with national authorities such as ROMATSA).

[Rz 39] Moreover, in his opinion the AG partially agrees with such a view; he concludes that the appellant is correct in his argument that, the development of new technologies can, under specific conditions, constitute an economic activity.[45] Summing up, a more courageous and anticipative approach based on the ideas of future liberalization and/or the characteristics of an innovation market could have brought this particular type of activity (production in our case) under the effects of art. 102 TFEU not only on points of law but on points of fact as well.

5.2. Competition on merits or unfair advantage?

[Rz 40] When investigating the R&D activity of the organization, the GC focuses its attention in particular on the acquisition of prototypes and the regime carried by the developed Intellectual Property Right (IPR).

[Rz 41] The applicant claimed that the undertaking which took part in the procedure and was awarded the contract to conceive a prototype for standardized ATM equipment had an unlawful advantage on two counts: first, at the time of the «arbitrary selection» which resulted in it receiving the project contract for the conception of the prototype, and, secondly, because it could subsequently be selected in the context of national tendering procedures.[46]

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40 Drexl (note 39), p. 1.

41 Drexl (note 39), p. 1.

42 European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Official Journal C 11 of 14 January 2011, para. 112–126.

43 Drexl (note 39), p. 13.

44 Buendia Sierra (note 14), p. 39.

45 Opinion of AG Trstenjak of 3 July 2008, Case C-113/07 of 26 March 2009 (*P SELEX Sistemi Integrati SpA v Commission of the European Communities*), ECLI:EU:C:2008:382, para. 145.

46 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 98.

[Rz 42] Picturing the possible outcome of such a situation, it must be stressed that a patent confers market power «both in regards to the licensing of technology and the sale of the products or services that result from the exercise of the technology».[47]

[Rz 43] However, the Court's case-law states that the possession of IPR does not *per se* amount to a position of dominance as the effects on the market must be analyzed.[48]

[Rz 44] It is however for sure that, as previously mentioned in *Broadcom v Qualcomm*, «no matter which company's patented technology ultimately is chosen, the adoption of a standard eliminates competition».

[Rz 45] On the other hand, it is essential to avoid a case in which an entity controls the most important innovation pole for the future even in the context in which that latter firm is a non-competitor or a potential competitor with a very little market share rate.[49] Also, the IPR beneficiary must assure that by subcontracting with private undertakings for the development of the standard, it does not offer them an undue advantage.

[Rz 46] Two recent legal safeguards were released to assure that competition for a future markets is protected:

[Rz 47] First of all, Commission guidelines on horizontal co-operation agreements provide that «standard-setting organization shall ensure unrestricted participation and will need to guarantee that all competitors [...] can participate in the process leading to the selection of the standard». They would also need to have objective criteria for selecting the technology that will be included in the standard.[50] Overall, it appears that the Commission is unlikely to take action against standard setting if it is open and transparent.[51]

[Rz 48] Second, standard setting organizations usually require patent holders engaged in the process to disclose their relevant IPRs ex-ante and/or to commit to license IP on fair, reasonable and non-discriminatory terms (FRAND).[52] Also, the «open standard» system where «royalty free» full access to vital information is given can be a guarantee regarding a possible abuse.

[Rz 49] In our case, the acquisition of prototypes was considered only an activity that is subsidiary to their development and because of this the whole R&D was considered non-economical in nature; however, as the applicant claimed, such development was not carried out by Eurocontrol itself, but by undertakings in the relevant sector to which the organization grants public subsidy incentives.[53]

[Rz 50] The public subsidies must be assessed separately as they can give raise to a selective advantage. In this regard, many types of public support for R&D do not constitute State aid, since they involve non-economic activities, such as the public financing of non-economic R&D

47 Lidgard/Pierce/Glader (note 5), p. 405.

48 Steven D. Anderman, EC Competition Law and IPR Rights (New York, Oxford University Press 1998), p. 169.

49 Drexl (note 39), p. 18.

50 European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Official Journal C 11 of 14 January 2011, para. 281.

51 Ruben Schellingerhout, Standardsetting from a competition law perspective, in: Competition Policy Newsletter No. 1-2011, p. 4.

52 Giantonato Caggiano/Gabriella Muscolo/Marina Tavassi, Competition Law and Intellectual Property – A European Perspective (Alphen aan den Rijn, Wolters Kluwer International 2012), p. 123.

53 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 76.

activities by research organizations.[54] At this, it is necessary to consider whether the private entity concerned obtains an advantage as a consequence of its association with the publicly funded body, which it would not have benefited from under normal market conditions.[55]

[Rz 51] The Commission has been prepared to recognize that «where the subsidy for the innovation is strictly ring-fenced from other activities and the provider obtains no financial advantage or benefit at any stage»[56] it can give clearance. In our case the subsidy contracts provided by Eurocontrol to acquire ownership of the prototype and the IPR resulting from the research seem to fall within this threshold and do not interfere with downstream competition; the IPR which it owned in the results of the R&D activities was made available to the sector at no cost;[57] as a consequence, this activity was considered to be ancillary to the furtherance of technical development as part of the public service duty.[58]

[Rz 52] In a short conclusion, the standardization and R&D processes shall be in conformity with the legal exigencies if the selection procedure, subsidy terms (compensation) and royalty free clause are fully respected. This comes in line with the doctrine, which has pleaded for «more economically-sound approaches» that can develop a solid panel of competition rules related to competition-distorting public procurement interventions. This «reinterpretative task» might however not be easy to implement as it affects some solid trends of CJEU jurisprudence which have been consolidated over time (e.g. the one discussed in this paper).[59]

[Rz 53] However, by referring to the recent case law, it can be interfered that the CJEU has also created other type of mechanisms to safeguard the access to vital technology; in a decision from 2015[60] it has concluded that patents essential to a standard generated by a standardization organization can be used, under certain conditions (e.g. «willingness to negotiate, diligently respond to that offer, provide appropriate security – in accordance with recognized commercial practices»), even without reaching an agreement regarding the royalty terms (i.e. FRAND criteria) with the proprietor.[61]

[Rz 54] To this extent, it can be interfered that even if the IPR would not have been transferred free of charge to the interested parties, the CJEU created sufficient safeguards trough its binding jurisprudence as to avoid exclusionary or exploitative abuses. However, this is a purely theoretical example as our case is completely different (i.e. no royalty, public body involved).

[Rz 55] On points of fact, Selex considered the participating undertakings to be favored in the context of tendering procedures organized by National Authorities (NA, i.e. with the aim to acquire equipment); it also criticized Eurocontrol's failure to require undertakings that had ob-

54 Kelyn Bacon, European Community Law of State Aid (Oxford, Oxford University Press 2009), p. 230.

55 Bacon (note 54), p. 233.

56 Bacon (note 54), p. 235.

57 Ibid. para.77.

58 Ibid.

59 Albert Sánchez Graells, Distortions of Competition Generated by the Public (Power) Buyer: A Perceived Gap in EC Competition Law and Proposals to Bridge It, The University of Oxford, Center for Competition Law and Policy, Working Paper CCLP (L) 23 (2009), p. 47.

60 Case C-170/13 of 16 July 2015 (*Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH*), ECLI:EU:C:2015:477.

61 Case C-170/13 (note 60), ECLI:EU:C:2015:477, para. 67, 71

tained research contracts to make available to their competitors the source codes of their own products, which have been reused in the context of research projects awarded by Eurocontrol.[62]

[Rz 56] The GC *expresis verbis* admits the possible negative effect that such practices can have on the competition in the sector of ATM equipment; it however emphasizes that the birth of such dispute is not of its own nature capable of proving «that the regime of IPR implemented by Eurocontrol is economic in nature».[63]

[Rz 57] The reasoning seems legit; treating the dispute by only touching on the legal nature of Eurocontrol and concluding that the facts «do not satisfy the test for an economic activity»[64] is in line with the litigation object as this was mostly related to Eurocontrol's legal nature. However, the facts *per se* are capable of hindering competition and provide sufficient grounds for different trials, this time involving the undertakings that have been awarded the contracts by Eurocontrol and the plaintiff.

[Rz 58] Firstly, ensuring access to technology is fundamental for market access and competitiveness. A guarantee that the IPR is revealed in due time and no undertaking can have an unfair gain by cheating on the disclosure timetable is needed. Also, by only allowing the undertakings involved in the standardization process to use these developments in other matters than the standard itself (e.g. neighboring product markets) would amount to an artificial advantage (e.g. increase market share). The rest of the competitors will experience extra costs and need more time in order to reach the relevant technological level; in this second scenario innovation can be also severely injured.

[Rz 59] Secondly, scholars have underlined that the «absence of restraint over and undertaking's economic activities by another undertaking» is very important for achieving consumer welfare. [65] This would be the case especially in a, still hypothetical, liberalization context, where more and more private businesses would be involved in the production of standards.

[Rz 60] Thirdly, a restraint in the technology market will surely produce anti-competitive results on the downstream product markets as well,[66] principle suiting both situations mentioned above.

[Rz 61] Having the three arguments taken into consideration, even though Eurocontrol has no economic interest in the air safety market, it must make sure that the downstream undertakings that were involved in the process act in compliance with competition principles, continue the «on the merits» game as no monopolistic advantage is being passed on.

5.3. Assisting on an opened market

[Rz 62] The fact that Eurocontrol assisted the NAs by drafting contract documents of public tenders or by taking part in the selection procedure of undertakings participating in public tenders had been considered by the GC to be an intrinsically economic activity.[67]

62 Case C-170/13 (note 60), ECLI:EU:C:2015:477, para. 81.

63 Case C-170/13 (note 60), ECLI:EU:C:2015:477, para. 80.

64 Case C-170/13 (note 60), ECLI:EU:C:2015:477, para. 81.

65 Eugéne Buttigieg, Competition Law: Safeguarding the Consumer Interest (Alphen aan den Rijn, Kluwer Law International 2009), p.4.

66 Drexl (note 39), p. 9.

67 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 83.

[Rz 63] In its findings, the GC stated that even though that activities «were normally entrusted to public offices, were not remunerated as such, were offered in pursuit of a public service objective or the fact that there was no private alternative», did not amount to a irrebuttable argument to prove a non-economic activity.[68] With this regard, as scholars have stated, the activity might have a nexus to the body's task of ensuring the air safety and the connection can only be perceived as being indirect.[69]

[Rz 64] Supporting its argument, the GC gave the example of bodies managing statutory social security systems, which are non-profit-making and engage in activities of a social character but are subject to State rules which were considered to be undertakings engaging in economic activities.[70]

[Rz 65] It concluded that the activity of assistance was therefore in no way indispensable to ensure the safety of air navigation. The fact that an activity may be exercised by a private undertaking was a further indication that the task in question can be described as business practice.[71]

[Rz 66] This conclusion is the outgrowth of the market-based approach assumed by the GC; I consider that the same outcome would have been reached regarding the first plea if the judges were ready to accept the courageous idea of an innovation market for technology or were opened to the perspective of possible market liberalization in this area.

5.4. Alleged abuse of dominance

[Rz 67] Since the contested decision was based on the Commission's finding that, «even if Eurocontrol's activities are considered to be economic activities, they are not contrary to Article 102 TEFU», this second plea shall be examined only in relation to Eurocontrol's assistance to the domestic administrations.[72]

[Rz 68] The applicant considered that Eurocontrol engaged in and abusive conduct as it failed to observe the principles of equal treatment, transparency and non-discrimination when invitations to tender were launched.

[Rz 69] In other words, that applicant claimed a lack of compliance with the rules imposed by the public procurement *acquis*.

[Rz 70] It was however argued that the NAs had the power to award contracts and were responsible for compliance with the tendering procedures. On the other hand, Eurocontrol's contribution as an adviser «was neither mandatory nor even systematic»; it contributed only when *expressis verbis* requested.

[Rz 71] Moreover, the Court considerd that the applicant failed, under the objective abuse of dominance test, to prove that in a specific case Eurocontrol had actually influenced the fact of awarding a contract, and that Eurocontrol had done so on the basis of «considerations other than those seeking the best technical solution at the best price».[73] In other words, from a concep-

68 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 83.

69 Nowag (note 27), pp. 483–484.

70 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 91.

71 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 6.

72 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 94.

73 Case T-155/04 (note 10), ECLI:EU:T:2006:387, para. 104.

tual perspective, it is to be analyzed whether the procurement activities carried by the public body amount to «normal commercial transactions»; the possible tests to be applied are these of a «disinterested buyer» or a «market economy buyer».[74]

[Rz 72] Extrapolating, the facts can be as well of criminal relevance if the legal requirements are not satisfied; however, there is not enough information regarding this point of fact.

[Rz 73] To sum up, the GC has a dynamic interpretation of the competition provisions as it considers not only the text, but also its «subsequent interpretational history, related developments, and current societal facts»;[75] it gives primacy to a more economical based approach while looking in a separate and detailed way at each activity. However, as in the previous scenario, even though at a principle level, it leaves the door opened for the «creation of a market», the factual situation is not capable to prove an infringement under art. 102 TFEU.

6. CJEU – a holistic and abstract view

[Rz 74] In this section I will analyze the CJEU's point of view with regard to the three main pleas raised in front of the GC.

[Rz 75] The Court did not set aside the preliminary decision, «even though it found legally flawed reasoning», as the GC's conclusion was perceived as being coherent and valid on most legal grounds.[76]

[Rz 76] Regarding the relevance of Article 102 TFEU to the activity of technical standardization, the applicant emphasizes that: «not offering goods or services on a given market to be irrelevant» and that the essential pointer is wheatear the activity may be regarded intrinsically and objectively as economic.[77]

[Rz 77] The CJEU agrees on this point of law but brings upfront the idea of «exercise of public power» which is aimed at establishing a uniform air traffic management system – dimension which in the Court's view is self explanatory for the non applicability of the *aquis* on competition.[78] By not analyzing the market and without separating the preparation from the production of the standards,[79] it concludes that both play a direct role in the achievement of Eurocontrol's objective and they are deeply interdependent.[80]

[Rz 78] When discussing the R&D activity of Eurocontrol, Selex invokes *Enirisorse*, and puts upfront the argument that «the task of developing new technologies may be economic in nature» and, second, referring to the judgment in *Ambulanz Glöckner* , the idea that an operator may

74 Sánchez Graells (note 59), p. 20.

75 William N. Eskridge Jr., Dynamic Statutory Interpretation (New Haven, Yale Law School Faculty Scholarship Series 2007), Paper 1505, p. 1 (http://digitalcommons.law.yale.edu/fss_papers/1505).

76 Nowag (note 27), p. 484.

77 Case C-113/07 of 26 March 2009 (*P SELEX Sistemi Integrati SpA v Commission of the European Communities*), ECLI:EU:C:2009:191, para. 94.

78 Case C-113/07 (note 77), ECLI:EU:C:2009:191, para. 92

79 Nowag (note 27), p. 484.

80 Case C-113/07 (note 77), ECLI:EU:C:2009:191, para. 92.

incubate public service tasks does not prevent the activity in question from being regarded as economic.[81]

[Rz 79] In contrast, by correlating that no charge was made for the management of IPRs and more important – the fact that Eurocontrol's mission was carried in the interests of public service – the Court concludes that the activity was not economic in essence[82] as it formed part of the task of ensuring the safety of air navigation.[83] Also, regarding the acquisition and IPR terms, the Court considered these to be ancillary to the R&D activities.[84]

[Rz 80] The Union judiciary concludes that tasks falling within the exercise of public powers are not of an economic nature, justifying the application of the Treaty rules of competition.

[Rz 81] By building on this line of reasoning, that solution is also applied with regard to the assistance which Eurocontrol provides to the NAs (i.e. when so requested by them) in connection with tendering procedures carried out by administrations (i.e. for the acquisition of resort logistics). This was considered to have a «direct role in the attainment of the objective» connected with the objective of «safety of air navigation as an exercise of public powers».[85] As a result, the GC was considered to have erred in law; the threshold in assessing the linkage between the different activities was, in the CJEU's view, the connectivity criteria and not the indispensability or essentialness of the linkage. [86] With this regard, the standard was considerably lowered as any activity might satisfy a connectivity relation.

[Rz 82] Summarizing, the CJEU does not involve itself in a more elaborated analysis and prefers to stick with the public power stereotype, bringing it at a *per se* level; it moreover develops a different test than the GC as it relies on a purposive interpretation of the Convention in order to justify the inapplicability of competition rules. Such doctrine gives full effect to a public power spillover effect which covers any type of ancillary function, without differentiating. It seems that the judicature creates the impression of a closed market more than the non-existence of an economic activity.

7. Conclusions

[Rz 83] It is hard to argue against a uniform outcome reached by the European Courts in the whole line of case-law. The situation is even more difficult when the Eurocontrol case is the favorite example given by the Commission guidelines on horizontal cooperation and scholars for activities connected with the exercise of the powers of a pubic authority or to procurement that is ancillary to a non-economic activity.[87]

[Rz 84] Moreover, by giving primacy to the same type of logic, in the US, the elaboration of a standard by public authorities falls outside the scope of competition law. In this matter, lobbying

81 Case C-113/07 (note 77), ECLI:EU:C:2009:191, para. 118.

82 Case C-113/07 (note 77), ECLI:EU:C:2009:191, para. 119.

83 Nowag (note 27), p. 484.

84 Case C-113/07 (note 77), ECLI:EU:C:2009:191, para. 118–119

85 Nowag (note 27), p. 484.

86 Nowag (note 27), p. 484.

87 Please see Nowag (note 27), and Sánchez Graells (note 59).

activities meant to influence the determination of the standards have been, in certain circumstances, immunized by US antitrust law.[88]

[Rz 85] This comes in line with a recent perspective which states that the definition of abuse «is treated more as a matter of policy than as a matter of law subject to full review by the EU Courts».[89]

[Rz 86] It seems to be the case in the litigations involving Eurocontrol during time as, even though embracing different reasoning patterns, the European Courts reach the same outcome.

[Rz 87] The GC develops a more detailed and courageous approach in its analysis; in order to establish whether an activity falls within the scope of EU competition rules, the first criteria established is to identify the activity in order to analyze to what extent it can be perceived as economic.[90] At this, there are no entities that cannot be seen as undertakings, only market behavior that is not perceived as economic.[91]

[Rz 88] Even though at a principle level the GC has this dynamic view, the outcome of the case's particularities is still the non-application of competition rules. However, this way of arguing is opened to challenge especially if one agrees with the «innovation markets» and/or liberalization doctrines.

[Rz 89] In contrast, the CJEU sticks to its constant formalistic and purposive approach when delivering the reasoning. By arguing in a very rigid way, the CJEU keeps itself on the safe side. It does not develop too much on the non-economical character of the activity as it imposes a *per se* presumption of exemption from competition rules when an activity is regulated by *jus imperii*. Its two steps approach follows a reverse order as it first examines the «separability» criteria before assessing the economic nature of the activity.[92]

[Rz 90] It looks for me that the reasoning fallows a top-down pattern: from the outcome to the reasons; this is why it invokes as much as possible the Treaty provisions without analyzing in detail the economical character of Eurocontrol's activities. Furthermore, even though exercising the test of separation, this logic will always lead to the same outcome due to the «being connected» standard; maybe an «indispensably connected» test would have been a proper methodology.

[Rz 91] In the same time, the economic activity test seems influenced by the public power purpose as the question answered is not whether a private market player might possibly provide the service for remuneration but instead the «purpose of entity which is engaged in the activity in question» appears to be under scrutiny.[93]

[Rz 92] However, when facing Eurcontrol's plea regarding an alleged immunity under international public law, alike in the GC's decision, it hesitates to proclaim it; by invoking procedural issues regarding the intervener's (Eurocontrol) plea, the judiciary avoids answering to this point

88 Caggiano/Muscolo/Tavassi (note 52), p.119.

89 Federico Etro, Ioannis Kokkoris, Competition Law and the Enforcement of Article 102, (Oxford, Oxford University Press, 2010) p.113.

90 Nowag (note 27), p. 485.

91 Okeoghene Odudu, The Meaning of Undertaking within 81 EC, The Boundaries of EC Competition Law (Oxford, Oxford University Press 2006) p. 213

92 Nowag (note 27), p. 485.

93 Nowag (note 27), p. 485.

of law. The only one who develops a bit is the AG who characterizes Eurocontrol as a *sui generis* subject of international public law.[94]

[Rz 93] In brief, modern competition law, which «strongly focuses on market analysis», may face a serious problem in appropriately addressing restraints of competition in the technology innovation sector.[95]Moreover, restrictions of dynamic competition, might have a much more negative effect on economic growth than restrictions on static price competition.[96]

[Rz 94] As the rise of the school of Law and Economics is one of the essential developments in legal theory in the second half of the 20th century,[97] what is really desirable is a «close cooperation with economists who are ready to look beyond the theoretical limitations»[98] and to configure markets in a visionary way.

[Rz 95] This process implies a layering activity in which, only the first level – intrinsically linked with the idea of public power – should be excluded from the scope of free market economy rules while the other layers must have the same status only if they satisfy an essential (and not merely connected) linkage. Approaching the issue this way (i.e. as the GC did) would bring within the scope of market economy exigencies goods and services that are currently non-existent from a competition law point of view.

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94 Opinion of AG Trstenjak (note 45), Case C-113/07 para.110.

95 Drexl (note 39), p. 1.

96 Drexl (note 39), p. 5.

97 Drexl (note 39), p. 50

98 Drexl (note 39), p. 3.