

SOME CONSIDERATIONS REGARDING THE APPLICATION OF THE EU COMPETITION RULES IN THE CONTEXT OF SERVICES OF GENERAL ECONOMIC INTEREST

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ABSTRACT: *In the EU the concept of services of general economic interest covers different types of services with an economic nature, the provision of which can be considered to be in the general interest, such as energy supply, telecommunication, postal services, transport, water and waste management services. The Member States are primarily responsible for defining what they regard as services of general economic interest and will designate the public or private undertakings responsible for providing these types of services.*

The provisions of EU competition law will prevail over any other contrary national regulations and should be respected by all the public or private undertakings activating on the internal market. One of the most important exceptions from this general rule regards the provision of services of general economic interest. The EU primary law, confirmed by the jurisprudence of the EU Courts provides that EU competition rules do not apply when the proper provision of a service of general economic interest (SGEI) requires such a measure. The exact conditions in which the above-mentioned exception applies in practice, were clarified by the ECJ case law.

The article at hand defines the concept of services of general economic interest and the different related concepts, briefly presents the EU legislation applicable in the field, exemplifies the way EU competition rules find their applicability in the context of the provision of the mentioned services and presents some of the most important ECJ case-law related to the provision of SGEI in the EU Member States.

KEYWORDS: *services of general economic interest; services of general interest; competition law; public interest; public services; state aids.*

JEL Code: *K20, K21, K30*

1. INTRODUCTION

The history of Services of General Economic Interest (hereinafter, SGEI) in the context of the EU dates back to the Treaty of Rome from 1957, which had introduced this concept as a new one for the Member States. (Hofmann & Micheau, 2016)

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The importance of SGEI begun to increase with the adoption of the Commission's White Paper¹ regarding the completion of the Internal Market until 1992. The adoption of White Paper had marked the beginning of EU widespread intervention in the economy in a number of sectors regarded as falling under the sovereign power of Member States (Zhu, 2020, p. 4).

The activity in these sectors (telecommunication, postal services, broadcasting, transport, energy, electricity etc.) was considered essential and linked to social and economic human rights which the state should guarantee universal access to everyone on its territory. The undertakings activating in these sectors usually were owned or controlled by the state, the state authorities being directly involved in the production and delivery of these sectors and where profit-making was not the priority.

The necessity to create a functional internal market, characterized by undistorted competition on the EU territory came in contradiction with the creation of state monopolies and granting of exclusive rights to public or private companies fulfilling public service obligations.

Regarding the granting of exclusive or preferential rights by the Member States the case-law of the European Court of Justice (ECJ) shows the evolution of the importance of SGEI and helps to create the criteria to create the balance between the necessity to ensure undistorted competition between undertakings on the territory of the EU and the proper fulfillment of SGEI by the Member States (Zhu, 2020, p. 7). Initially, the case-law of the ECJ had granted the freedom to the Member States to create national monopolies and to grant exclusive rights to companies². Lately, the granting of monopolies and exclusive rights was permitted if the restriction or exclusion of competition was necessary to ensure the performance of SGEI under economically acceptable conditions³.

The importance of SGEI had increased from a legal perspective after the adoption of the Lisbon Treaty⁴, which endorsed access to SGEI as a fundamental right of citizens which promotes social and territorial cohesion.

The article at hand tries to define and identify the major characteristics and types of SGEI and how the EU Competition Law provisions are applicable to them (especially those regarding state aids), with special importance given to the case-law of the ECJ.

¹ *Completing the Internal Market: White Paper from the Commission to European Council* (Milan 28-29 June 1985), COM (85) 310, <https://op.europa.eu/en/publication-detail/-/publication/4ff490f3-dbb6-4331-a2ea-a3ca59f974a8/language-en>.

² See for example, C-155/73 *Giuseppe Sacchi*, EU:C:1974:40.

³ See Case C-320/91 *Paul Corbeau*, EU:C:1993:198.

⁴ Article 1 of the Lisbon Treaty Protocol (no. 26) on Services of General Economic Interest declares: *The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:*

- *the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;*

- *the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;*

- *a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights*, published in OJ no. 115 from 09.05.2008, p. 308, Online <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A12008M%2FPRO%2F26>.

Firstly, we will try to define the concept of services of general economic interest by delimitating it from other related concepts. Then, we will present the conditions in which EU Competition Law norms can be applied to Services of General Economic Interest.

Finally, we will briefly analyze some of the most important ECJ decisions related to the topic of our paper, namely decisions that clarify the criteria EU authorities are using to permit derogations from EU norms in the interest to ensure the provision of these kinds of public services, or to determine if a compensation given for a service of general economic interest could be qualified as state aid.

2. SERVICES OF GENERAL ECONOMIC INTEREST – DEFINITION AND CHARACTERISTICS

Despite its importance, the term "service of general economic interest" does not have a legal definition in EU primary and secondary legislation. The explanation is related to the fact that the concept of SGEI is dynamic and constantly evolving (Burke, 2018).

The nature of services qualified as SGEI varies on time and space and it adapts to changes and social perceptions. This reality is related to the fact that every Member State of the EU can determine what kind of services could be qualified as SGEI, depending on national necessities, the modalities to regulate and finance these kinds of services (Hatzopoulos, 2012).

When we try to define the concept of SGEI, the major aspects we need to clarify are related to what we can qualify as "economic activity"⁵ and what the meaning of concepts like "service" and "public interest" is in the EU Law.

According to the case law of the ECJ, *any activity consisting in offering goods and services on a given market is considered an economic activity*⁶. *The fact that the offer of goods or services is made on a not-for-profit basis does not prevent the entity which carries out those operations on the market from being considered an undertaking, since that offer exists in competition with that of other operators which do seek to make a profit*⁷. *Services normally provided for remuneration are services that may be classified as 'economic activities'. The essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question*⁸.

The concept of "service" in EU Law covers *economic activities that are ordinarily provided for remuneration and where the remuneration constitutes consideration for the service in question and is agreed upon between the provider and the recipient of the service*⁹.

⁵ See C-74/16 *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, EU:C:2017:496, par. 44-47.

⁶ See C-222/04 *Cassa di Risparmio di Firenze and Others*, EU:C:2006:8, par. 108.

⁷ See C-49/07 *MOTOE*, EU:C:2008:376, par. 27.

⁸ See C-76/05 *Schwarz and Gootjes-Schwarz*, EU:C:2007:492, par. 37-38.

⁹ See C-263/86 *Humbel and Edel* EU:C:1988:451, par. 17; C-109/92 *Stephan Max Wirth v Landeshauptstadt Hannover*, ECLI:EU:C:1993:916, par. 15; and C-355/00 *Freskot AE v Elliniko Dimosio*, ECLI:EU:C:2003:298, par. 54-55.

Besides the definition provided by the ECJ case-law, the EU the Services Directive no. 2006/123/EC¹⁰ contains a list of services covered by the provisions of the directive¹¹, as well a list of services not covered by the provisions of the directive¹².

The concept of "*general interest*" is related to terms like *the common good, the public good, the common interest* and in general terms designates *the sum of special interests or the sum of all private interests*. More precisely, general interest can be defined as something which serves the advancement of the interest, or welfare of the public, society, or nations and its content will depend on each particular set of circumstances¹³.

As a conclusion to those mentioned above, the concept of services of general economic interest can be defined as *economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention*¹⁴. These services are subject to European internal market and competition rules. However, there may be derogations to these rules if necessary, to protect citizens' access to basic services¹⁵.

Another important aspect is to differentiate, between the concept of *service of general economic interest* and other *related concepts* having another meaning.

So, the concept of *service of general interest*, for example, is a larger concept than that of the service of general economic interest and it refers to *all economic and non-economic services which deliver outcomes in the overall public good*.

In the context of EU norms, services of general interest are *services that public authorities of the EU member countries classify as being of general interest and, therefore,*

¹⁰ Published in *OJ L 376, 27.12.2006, p. 36–68*.

¹¹ Distributive trades including retail and the wholesale of goods and services; activities of most regulated professions such as legal and tax advisers, architects, engineers, accountants or surveyors; construction services and crafts; business-related services such as office maintenance, management consultancy, event organization, debt recovery, advertising and recruitment services; tourism services such as travel agents; leisure services such as sports centers and amusement parks; installation and maintenance of equipment; information society services such as publishing for print and web, news agencies, computer programming; accommodation and food services such as hotels, restaurants and caterers; training and education services; rentals and leasing services including car rentals; real estate services; household support services such as cleaning, gardening and private nannies. See for more details: https://ec.europa.eu/growth/single-market/services/services-directive_en.

¹² Financial services, electronic communications services concerning matters covered by other EU instruments, transport services falling within the scope of Title VI of the Treaty on the Functioning of the European Union (TFEU), healthcare services provided by health professionals to assess, maintain or restore the state of patients' health where those activities are reserved to a regulated health profession, temporary work agencies' services, private security services, audio-visual services, gambling, certain social services provided by the State, by providers mandated by the State or by charities recognised by the State, services provided by notaries and bailiffs appointed by an official act of government. See for more details: https://ec.europa.eu/growth/single-market/services/services-directive_en.

¹³ Ch. Wheeler, *What is the Public Interest?*, Government Solicitors Conference, 6 September 2016, Sydney, available online on: https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0009/41967/What-is-the-public-interest-Presentation-Government-Solicitors-Conference,-Sydney-6-September-2016.pdf.

¹⁴ See the preamble of *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Quality framework for services of general interest in Europe*/* com/2011/0900 final*/, available online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0900>.

¹⁵ See for more details, information available at: https://ec.europa.eu/info/topics/single-market/services-general-interest_en.

subject to specific public service obligations. They can be provided either by the state or by the private sector.

There are three categories of services of general interest: economic, non-economic and social.

Non-economic services of general interest (U. Neergaard et al., 2013), on the other hand, are *services furnished even in economically unfavorable conditions because they serve to ensure public order* (like the police or the justice) *or other socially important goals*, which is the case for example in the case of statutory social security schemes. These services are not subject to specific EU legislation and are not covered by the internal market and competition rules of the EU Treaties¹⁶.

From the variety of public services, we can also distinguish the *social services of general interest*, which *respond to the needs of vulnerable citizens, and are based on the principles of solidarity and equal access*. One of the major characteristics of these services is that they can be both of an economic or non-economic nature. In the EU, social services play a crucial role in improving the quality of life and providing social protection. They include social security schemes, employment and training services, social housing, childcare, long-term care and social assistance services. These services are a vital means of meeting basic EU objectives such as social, economic and territorial cohesion, high employment, social inclusion and economic growth¹⁷.

As regards the major characteristics of services of general economic interest, they can be summarized as follows:

1, they are services which by their nature are essential for the well-being, health and fundamental rights of European citizens, for European cohesion as well as sustainable development¹⁸;

2, they are *economic activities*, that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment and universal access) if there were no public intervention¹⁹;

3, they are services that public authorities of the EU member countries classify as being of general interest and, therefore, subject to specific public service obligations²⁰;

4, they can be provided either by the state or by the private sector²¹;

¹⁶ See the preamble of *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Quality framework for services of general interest in Europe*/* com/2011/0900 final*/, available online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0900>.

¹⁷ See for more details, official information available at: <https://ec.europa.eu/social/main.jsp?langId=en&catId=794>.

¹⁸ See the preamble of *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Quality framework for services of general interest in Europe*/* com/2011/0900 final*/. Available online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0900>.

¹⁹ COMMISSION STAFF WORKING DOCUMENT *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*, Brussels, 29.4.2013 SWD(2013) 53 final/2, p. 21, available Online at: https://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf.

²⁰ https://ec.europa.eu/competition/state_aid/overview/public_services_en.html.

²¹ Idem.

3. SERVICES OF GENERAL ECONOMIC INTEREST – LEGAL PROVISIONS

As we have mentioned before, EU Treaties does not define the concept of services of general economic interest, however, the analysis of the primary law provisions of the EU is important. Below, we will briefly mention some of the most important **primary law** provisions regarding SGEI.

- *Article 14 TFEU*²² refers to the competence of the Council and the European Parliament and allows the mentioned institutions to act by using regulations and following the ordinary legislative procedure, to establish the principles and conditions for the operation of SGEI, particularly economic and financial conditions, without prejudice to the competences of the Member States;
- *Article 56 TFEU* guarantees the freedom to provide services for a remuneration²³;
- *Article 106 of TFEU* mentions that EU competition rules apply to public undertakings and also to undertakings that are the beneficiary of special or exclusive rights granted to them by the Member States. These undertakings will respect EU Competition rules even if they offer on the market SGEI, except when the application of EU rules would obstruct the performance of these services²⁴;
- *Article 36 of the EU Charter of Fundamental Rights* guarantees the access to services of general economic interest²⁵.

As well, it is worth mentioning that the EU legislator has dedicated an entire protocol, *Protocol no. 26 of the TEU*²⁶, especially to Services of General economic interest. The mentioned protocol contains only two articles. Article 1 of the protocol reiterates the essential character of SGEI and provides wide discretion for national, regional and local

²² "Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions (...)" Article 14 TFEU, OJ 115, from 09.05.2008 p. 54.

²³ "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union." Art. 56 TFEU, OJ 115, from 09.05.2008 p. 70.

²⁴ Par. 1 "In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties (...)

Par.2. "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union." Art. 106 TFEU, OJ 115, from 09.05.2008 p. 91

²⁵ "The Union recognizes and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union" OJ C 202 from 07.06.2016, p. 401,

²⁶ Protocol (No 26) on services of general interest, OJ C 115, 9.5.2008, p. 308.

authorities regarding the provision, commissioning and organising of these services, to be as close as possible to the needs of the users. The first article of the protocol also emphasizes the diversity of SGEI resulted from the diversity of needs and preferences these kinds of services are meeting. At the end of the article, the legislator mentions some of the basic characteristics of SGEI, respectively high-level quality, safety, affordability, equal treatment and universal access.

In what regards the provisions of the *secondary law* of the EU, we can mention that the EU Commission has adopted several *soft-law* type documents, related to SGEI. From the list of these documents, we especially want to mention the *Commission's Communication, entitled Quality Framework for Services of General Interest (SGI) in the EU*, adopted in 2011²⁷, which: clarifies how EU rules apply to basic services, as well as the revisions that have been made to these rules, where necessary, to ensure that specific needs of beneficiaries are addressed; ensures access to essential services for all citizens and promotes quality in the field of social services and highlights achievements as models for other basic services.

As well, we mention the *Commission Staff Working Document* from 2013, entitled *A Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*²⁸. The latter document is meant to answer several questions that have been raised by public authorities in the Member States, citizens, civil society organizations and other stakeholders on the application of the EU rules, notably those on State aid, public procurement and the internal market, to services of general interest and, in particular, to social services of general interest (SSGIs), being an important tool of the mentioned authorities in applying EU legislation on SGEI.

The above-mentioned documents from the Commission have the role to ensure the correct interpretation and application of EU norms to services of general economic interest by national authorities.

4. SERVICES OF GENERAL ECONOMIC INTEREST – THE COMPETENCE OF THE NATIONAL AND EU AUTHORITIES

The problem of competence sharing between national and EU authorities is a delicate one, resolved with the help of the principle of subsidiarity²⁹ and the principle of proximity³⁰. According to these principles, powers are exercised as close to the citizen as

27 COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS *A Quality Framework for Services of General Interest in Europe*, COM/2011/0900 final */, available Online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011DC0900>.

28 COMMISSION STAFF WORKING DOCUMENT *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*, Brussels, 29.4.2013 SWD(2013) 53 final/2, available Online at: https://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf.

29 See art. 5, par. (3) of the Treaty on European Union (TEU, OJ C 115, 9.5.2008, p. 18) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality (OJ C 115, 9.5.2008, p. 206–209).

30 See article 10, par. (3) of Treaty on European Union (Consolidated version of TEU, OJ C 202, 7.6.2016, p. 20).

possible and the ability of the Member States to take decisions and action is safeguarded, as far as the Union intervention will take place only based on authorization and if the objectives of an action cannot be sufficiently achieved by the Member States, but can be better achieved at Union level, ‘by reason of the scale and effects of the proposed action’³¹. (<https://www.europarl.europa.eu>)

National authorities have a relatively extensive discretion related to the definition and regulation of SGEI³². National, regional and local authorities, representing citizens’ interests, have full freedom of choice concerning the establishment of standards, the organization and the financing of these services. As well, every Member State has the liberty to define the services which can be qualified as SGI according to their needs (Craig & Burca, 2015, p. 1126), that is why a “one-size-fits-all” market approach is not appropriate because it does not comply with the multi-dimensional challenges of these services throughout Europe.

At the same time, the concept of services of general economic interest needs to be interpreted narrowly by the Member States, to not circumvent the obligation to obey to EU norms. Although, there is no official definition of SGEI, there are a set of common features that are characteristic to the most SGEI, namely: a) *universality* – services are available to all consumers and users throughout the territory of a Member State; b) *continuity and regularity* – suppliers provide uninterrupted access to services; c) *quality* – services fulfill a given level of quality; d) *affordability* – reasonable, or regulated prices to permit universal access; e) *consumer protection* – services address specific needs of consumers (Eekhoff, 2004).

Article 106, par. 1 TFEU, requires that a Member State shall neither enact nor maintain in force any measure that is contrary to the EU provisions, when adopts legislation or enacts measures regarding the public undertakings (Craig & Burca, 2015, p. 1120), or undertakings detaining special or exclusive rights which are involved in supplying SGEI. The objective is to ensure that Member States will not use the provisions of article 106 in order to circumvent the application of EU norms.

The European Commission has the power to ensure the application of EU norms regarding SGEI by the undertakings supplying these services and as well, it has legislative competencies (the right to make legislative proposals and as well to enact directives or decisions addressed to Member States related to the application of article 106 TFEU³³) regarding EU norms governing SGEI.

National and EU Courts will have the competence to apply national and EU norms regarding SGEI to ensure that the measures taken at a national level will not affect the development of trade at the EU level to an extent that would be contrary to the interests of the EU³⁴. So national courts, will be able to decide if undertakings supplying SGEI had been abused by the special or exclusive rights conferred on them by national authorities, or if the above undertakings had an anticompetitive behaviour on the market apparently justified by the necessity to supply SGEI. The involvement of national courts in

³¹ See for more details the information available on <https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity>.

³² See art. 1 of Protocol (No 26) on services of general interest, *OJ C 115, 9.5.2008, p. 308*.

³³ See Article 106, par. 3 TFEU (*OJ C 9.5.2008, p. 93*).

³⁴ *Ibidem*, p. 1127.

determining the legal or illegal character of undertakings` actions from the perspective of the EU norms is possible because of the direct applicability of Article 106 TFEU.

The European Commission and the CJEU are strictly limited to control on manifest errors in qualifying public services as being services of general economic interest and the proper application of legal rules.

5. SERVICES OF GENERAL ECONOMIC INTEREST AND EU COMPETITION RULES

The provision of services of general economic interests is at the confluence between two major interests at the level of the EU: providing equal and non-discriminatory access to quality public services presenting general interest and ensuring the uniform application of EU norms and especially EU Competition norms in the Member States.

According to Article 106, par. 1 TFEU, EU competition rules apply to public or private entities which are supplying services of general economic interest. On the other hand, the providers of SGEI enjoy economically acceptable conditions that may justify limitations on competition to secure the general availability of alleged indispensable service. So, following the provision of par. 2 of Article 106 TFEU if the application of EU competition norms would obstruct the performance of SGEI undertakings entrusted with the operation of these services can derogate from EU competition norms as far as the development of trade at EU level is not affected to an extent contrary to the interests of the EU.

In what regards the application of the provisions of Article 101 TFEU on *anticompetitive agreements* Member States can reduce the effectiveness of the provisions contained by this article or can prevent its uniform application when they require or encourage undertakings to conclude cartels, or by supporting anticompetitive cartels through national legislation, by offering tax exemptions or interest rates below the general threshold for a given category of companies, or for example by limiting price competition between companies activating in a given economic sector etc. Such kind of measures cannot be justified if the provision of SGEI in good condition would be possible also without the competitive restraint (Craig & Burca, 2015, p. 1130).

Special or exclusive rights granted to public or private undertakings in the context of SGEI provision can lead also to the breach of Article 102 TFEU regarding abuse of dominant position. The granting of exclusive or preferential rights to companies does not breach in itself the provisions regarding *abuse of dominance*. However, undertakings having exclusive or special rights can be induced to commit abuses on the market due to the excessive market power these companies are detaining as an effect of the measures adopted by national authorities³⁵.

³⁵ See for example the Höfner and Elser case-law (C-41/90 Höfner and Elser v. Macrotron GmbH, ECLI:EU:C:1991:161), where German legislation required certain categories of job-seekers to use the services of a state agency detaining exclusive powers on the market of employment consultancy in Germany. The existence of national provisions was not justified by the necessity to provide quality and non-discriminatory access to an SGEI, because the mentioned objective could be ensured also without the granting of exclusive rights. See also *Ibidem*, p. 1122.

The provision of SGEI can also interfere with the equitable application of *state aid* rules in the EU. The payments or general business conditions offered to undertakings supplying SGEI can distort competition on a given market, so its justification needs to be analyzed carefully.

*"SGEI are services of an economic nature that public authorities identify as being of particular importance to citizens, but which are not supplied by market forces alone, or at least not to the extent and under the conditions requested by society. Their provision may therefore require public intervention. So, SGEI providers are often operating under public service obligation. Since SGEI provision under such conditions may not generate a (sufficient) profit for the provider, public service compensation might be needed to offset the additional costs stemming from the public service obligation. Nonetheless, State intervention on a market alters the market mechanism and can be a source of distortion, unless properly targeted. Therefore, State aid control aims to ensure that public service compensation is necessary and proportionate to the objective pursued, to avoid distortions of competition and trade contrary to the interest of the EU"*³⁶. To respect the EU state aid rules, public compensation given to the undertaking operating a SGEI must be given for fulfilling a clearly defined public service obligation, it must be calculated transparently, based on previously established criteria and it cannot exceed the real costs of providing the given service and a reasonable profit³⁷.

The next section of our paper will show in a nutshell some of the major judgments of the EU courts related to the application of EU competition norms in the context of ensuring access of citizens to SGEI.

6. SERVICES OF GENERAL ECONOMIC INTEREST AND EU COMPETITION RULES – ECJ CASES

Taking into consideration the fact the concept of services of general economic interest does not have a legal definition and as well the fact that the delimitation of situations when national authorities can derogate from EU competition norms is not so easy to determine, the European Court of Justice had an essential role to offer guidance by its decisions to national authorities.

One of the most important decisions in this regard is the Corbeau case-law³⁸. This case *helps national authorities to determine if the existence of an exclusive right to furnish a given economic service of general interest precludes or not the possibility to permit for another undertaking from the market to supply services that are complementary to the exclusively supplied service, but which are not supplied by the beneficiary of the exclusive rights and consumers are interested in these complementary services*. In this case, for example, exclusive right to supply postal services was allocated to an undertaking that does not offered also services of speedy delivery of correspondence in a local area.

³⁶ N. Pesaresi et al., *The New State Aid Rules for Services of General Economic Interest (SGEI)*, available online at https://ec.europa.eu/competition/publications/cpn/2012_1_9_en.pdf.

³⁷ See for more details the explanations offered in relation to the Altmark judgment in the section below.

³⁸ See C-320/91 *Criminal proceedings against Paul Corbeau* from the 19th May 1993, ECLI:EU:C:1993:198.

- C- 320/91 CRIMINAL PROCEEDINGS AGAINST CORBEAU³⁹

In 1991 had initiated before the ECJ a preliminary action related to the interpretation of Articles the Criminal Court from Liège 86 and 90 of the EC Treaty, to enable it to determine the compatibility with those articles of the Belgian rules on the postal monopoly.

In the front of the national court, criminal proceedings were initiated against Paul Corbeau, a businessman from Liège, charged with infringing the Belgian legislation on the postal monopoly. In Belgium, since 1956, the, a legal person under public law, had an exclusive right to collect, carry and distribute throughout Belgium all correspondence of whatever nature, and lay down penalties for any infringement of that Régie des Postes exclusive right. Mr. Corbeau was considered to infringe the exclusive rights of the Régie des Postes by providing, within the City of Liège and the surrounding areas, a service consisting in collecting mail from the address of the sender and distributing it by noon on the following day, provided that the addressee is located within the district concerned. the Criminal Court from Liège

The questions addressed by the Criminal Court from Liège was if the context of the provision of SGEI a certain complementary economic service offered by an undertaking in a domain of activity where another undertaking has exclusive rights to operate a service of general economic interest (in this case postal services) could affect the overall provision of the SGEI?

In its judgment, the Court considered that the derogation from competition norms in such case is not justified by the necessity to ensure the provision of SGEI, because the economic service supplied by the private agent has a complementary and dissociable nature regarding the SGEI. This is the case especially when the operator of the SGEI does not offer the services supplied by the private agent (in this case, the speedy delivery of correspondence in a local area, right from the sender's office by granting greater reliability of distribution).

Another important decision of the ECJ came in the *Municipality of Almelo* case-law⁴⁰. In this case, an undertaking was supplying electricity services, without having attributed an exclusive right in this sense. The question was if this undertaking can restrain competition by signing exclusive purchase agreements with local distributors.

- C-393/92 – *MUNICIPALITY OF ALMELO* (<https://eur-lex.europa.eu>)⁴¹

Since 1918 the Energiebedrijf IJsselmij NV ("IJM"), an undertaking engaged in the regional distribution of electric power was granted a non-exclusive concession to distribute electricity to local distributors, in particular, the Municipality of Almelo and other consumers in rural areas. From 1985 to 1988 the IJM prohibited local distributors to import electricity under an exclusive purchasing clause contained in the general conditions for the supply of electric power to municipalities.

³⁹ The summary of the case is available on <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61991CJ0320>

⁴⁰ See C-393/92 *Municipality of Almelo and others c. NV Energiebedrijf IJsselmij* from the 27th of April 1994, ECLI:EU:C:1994:171.

⁴¹ The summary of this case law can be consulted on <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61992CJ0393#SM>.

From the 1st of January 1985, the company also charged the local distributors an equalization supplement, a surcharge intended to offset the difference between the higher cost incurred by the company in distributing electricity to consumers in rural areas and the lower cost incurred by the local distributors in distributing electricity to consumers in urban areas. The local distributors had initiated arbitration proceedings regarding the general conditions of supply of electricity services owned by the company and to obtain a decision on the legality of the equalization supplement imposed by IJM. *The arbitrators rejected their claim and the local distributors appealed to the Gerechtshof te Arnhem. The national Court had started a preliminary ruling procedure in 1992.*

The major question of the court was related to the aspect if a regional authority having non-exclusive rights regarding the distribution of electricity could legally restrain the competition by signing exclusive purchasing agreements with local distributors.

In its judgment, the ECJ has given a clear answer, by mentioning that *reasons related to extra costs generated by the obligation of the undertakings to respect environmental protections standards can justify the acquisition of exclusivity on the market via signing exclusive distribution agreements.* So, the Court has confirmed once again that *competition can be restrained, if the necessity to ensure economically profitable conditions for the provider of the public service imposes that.*

In the famous *case-law of Ambulanz Glöckner*⁴², the ECJ had reiterated the fact that *competition can be restrained* (in this case by not permitting the access of an undertaking to market), *without the practice being qualified as an abuse of dominance if the competitive restraint is necessary to create an economic balance for the undertaking which supplies a public service which implies also the conduct of less profitable activities.*

- C- 475/99 – AMBULANZ GLÖCKNER

In Germany, the public ambulance service is governed by laws adopted at the level of the *lands*. In the *Land* of Rheinland-Pfalz, the Law on the public ambulance service from 1991 distinguishes between two types of ambulance services: emergency transport and patient transport. *Emergency transport* consists of the conveyance, with the provision of appropriate medical care, of persons with life-threatening injuries or conditions using patient transport ambulance or emergency ambulance. *Patient transport* consists of the conveyance of persons who are ill, or injured, or otherwise in need of help but who are not emergency patients. Responsibility for the public ambulance service lies in principle with the *Land*, the administrative districts of each *Land* and the towns which are administrative districts in their own right.

In 1990, before the entry into force of the Law on the public ambulance service from 1991, Ambulanz Glöckner (an undertaking offering non-emergency services for patients) was granted an authorisation to provide patient transport services which was due to expire in October 1994. In July 1994, the undertaking applied for a renewal of its authorisation to the Landkreis, which then invited the two medical aid organisations entrusted with the public ambulance service in the Pirmasens area to express their views on the effects which the requested authorisation could have. Both organisations informed the Landkreis that their own emergency assistance facilities in the area were not being

⁴² See C-475/99 *Firma Ambulanz Glöckner c. Landkreis Südwestpfalz* from the 25th of October 2001, ECLI:EU:C:2001:577.

fully exploited and were operating at a loss, so that the addition of a new operator would require them either to increase user charges or to reduce their services. Consequently, the Landkreis refused the renewal of the authorisation for Ambulanz Glöckner.

After lodging an unsuccessful objection against that decision, Ambulanz Glöckner brought an action before the Administrative Court of Neustadt, which ordered the

Landkreis to issue the authorisation applied for. The local public authorities lodged an appeal against that judgment before the Oberverwaltungsgericht Rheinland-Pfalz. This latter court referred to the Court for a preliminary ruling in 1999. The question was if it could be considered an unjustified abuse of dominance the practice to refuse the granting of a new authorisation for a medical aid organisation to supply non-emergency transport services for patients in Germany, taking into consideration the existence of two medical aid organisations operating in the public sector ambulance services.

The ECJ in its decision had held that *the general interest task of transporting patients entrusted by law to medical aid organisations may justify a restriction of competition in a geographically limited area, if that restriction is necessary for the task concerned, in order to achieve an overall economic balance (in this case a need to offset the costs of providing the emergency transport service with revenue from non-emergency transport, which is a more lucrative activity).*

On the other hand, the Court had established that *in cases where competitive restraint cannot be justified by the necessity to supply the economic service of general interest, the restrictive practice will not be permitted.*

Such was the situation in the *Deutsche Post case-law*⁴³, where the Court had considered that the necessity to deliver postal services as a service of general economic interest by Deutsche Post could not justify the accordance by the undertaking of loyalty rebates for customers and the appliance of predatory pricing practices.

The last decision of the ECJ we want to bring into your attention is the famous *Altmark case-law*⁴⁴, which addresses the problem of compensations offered by public authorities for services of general economic interest. The decision offers the necessary criteria to determine in which cases these compensations do not trigger a state aid.

- *C-280/00 ALTMARK*

In this case the Altmark Trans GmbH (Altmark Trans) was granted by the Magdeburg Regional Government a license for scheduled bus transport services in the *Landkreis* of Stendal (Germany) and public subsidies for operating those services.

Licenses had originally been granted to Altmark Trans for the period from 25 September 1990 to 19 September 1994. By the decision of 27 October 1994, it was granted new licenses to run to 31 October 1996. Following a complaint by Altmark Trans, the local authorities extended the licenses to 31 October 2002, by decision of 30 July 1996.

Nahverkehrsgesellschaft Altmark GmbH, a competitor of Altmark Trans brought a complaint against the decision of 27 October 1994, submitting that Altmark Trans did not satisfy the requirements of national legislation to provide the above-mentioned

⁴³ See joined cases of Deutsche Post AG c. Gesellschaft für Zahlungssysteme mbH GZS (C-147/97) and Citicorp Kartenservice GmbH (C-148/97) from the 10th of February 2000, ECLI:EU:C:2000:74.

⁴⁴ See C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg c. Nahverkehrsgesellschaft Altmark GmbH, from the 24th of July 2003, ECLI:EU:C:2003:415.

services. It was not an economically viable undertaking, since it was unable to survive without public subsidies. The licences granted to it were therefore considered unlawful. Local authorities had rejected the complaints of the company Nahverkehrsgesellschaft. The latter, brought proceedings against the decisions of 27 October 1994 and 30 July 1996 before the Administrative Court of Magdeburg (Germany), which as well had dismissed the action.

On appeal, the Higher Administrative Court of Saxony-Anhalt (Germany) allowed Nahverkehrsgesellschaft's application and therefore set aside the issue of licences to Altmark Trans. It considered in particular that at the time when the decision of 30 July 1996 was taken the financial solvency of Altmark Trans was no longer guaranteed, as it needed subsidies from the *Landkreis* of Stendal for operating the services licensed. It further held that those subsidies were not compatible with Community law on State aid, in particular, Regulation no. 1191/69.

The court had considered that, from 1 January 1996, the *Landkreis* had no longer been authorised to subsidise Altmark Trans to operate the services covered by the licenses granted. Altmark Trans appealed on a point of law to the Federal Administrative Court against the decision of the Higher Administrative Court of Saxony-Anhalt.

In 2000 the Federal Administrative Court referred to the ECJ for a preliminary ruling, questioning if financial support that merely represents compensation for public service obligations (urban, suburban or regional scheduled transport services) imposed by EU member states constitutes a state aid.

The Court had established in its decision that in order to prevent the application of state aid norms the recipient undertaking needs to be a supplier of public service obligations; the obligations of the recipient undertakings need to be clearly defined and the compensations for the service should be calculated in a transparent manner; and should not exceed the coverage of all costs related to the supply of service and a reasonable profit.

7. CONCLUSIONS

The concept of service of general economic interest does not have a legal definition for the moment;

Member States of the EU has the discretion to define what kind of economic services do they consider to be of general interest, so the concept is an evolving one and which adapts to the realities of the place where it is applied;

Undertakings supplying services of general economic interest needs to obey EU competition norms like any other undertaking active on the internal market, unless the provision of the service would be jeopardized by this;

Applying competition norms to services of general economic interest implies weighing between the public interest, which needs to be satisfied by supplying a given service and the public interest related to maintaining a competitive internal market which ensures a level playing field for all the economic actors;

The ECJ by its jurisprudence did exemplify the types of public services which can be considered as being services of general economic interest and the situations when the undertakings which supply these services can derogate from the general obligation to

apply EU competition norms (especially those related to abuse of dominance, state aids, public acquisitions etc.).

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