

EUROPEAN REGULATORY FRAMEWORK FOR SERVICES OF GENERAL ECONOMIC INTEREST

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Abstract: *The new concept of public services defined at the level of the European Union is characterized by integration of elements of continental and Anglo-Saxon economic tradition. Public services are divided into two groups: services of general economic interest and services of general interest. The first group consists of services, which have strong economic nature and are hence subject to competition law on the internal European market (energy, gas, telecommunications, postal services, public transport). The second group consists of public services that do not have strong economic nature, and as such are exempt from the competition law (police, judiciary, defense, health, social care). The topic of this paper is the current European regulatory framework for services of general economic interest. The aim of the paper is to indicate that principles of common European regulatory framework for services of general economic interest reflect the conceptual idea of combining certain elements from two economic traditions.*

Key words: *services of general economic interest, European Union*

1. INTRODUCTION

The process of forming the European regulatory framework of services of general economic interest (SGEI) has been going through a long and continuous process, which is characterized by the active involvement of the state members, the formulation and updating of the official documents of the European Commission. Although the process of creating regulations in the area of services of general economic interest is still subject to amendments and modifications, it is possible to distinguished basic legislative and regulatory documents governing the area of services of general economic interest. These are: Treaty of the European Community ECT, in particular the Articles 86 and 16, Green Paper on SGEI, White paper on SGEI.

2. TREATY OF THE EUROPEAN COMMUNITY (ECT) – ARTICLE 86

Article 86 is a fundamental for defining the delicate balance between competition policy and specific treatment of services of general economic interest. It is divided into three interrelated provisions.

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Within the the first provision of Article 86 it is stated that member states have not to enact any measure contrary to the rules of Treaty when they grant special or exclusive rights to public undertakings.² The aim of this provision is to prevent a potential action of the Member States that would jeopardize the effectiveness of the Treaty. In the second provision of the Article 86 it is stated that services of general economic interest as well as all undertakings that function as a monopoly shall be subject to the rules on competition. State members shall take care of the preserving of general interest in the process of provision and delivery of SGEI in the competitive environment.³ In the third provision of the Article 86 it is stated that European Commission shall ensure the application of the provisions of the Article 86, wich refers also to addressing appropriate directives or decisions to member states if necessary.⁴

The Commission emphasizes that Member States have to give up a portion of their sovereignty when it comes to public services and allow the application of the competition rules. However, with the second provision of the Article 86, European Commission has opted for a limited approach when it comes to the competition in the area of services of general economic interest. Namely, services of general economic interest should be provided in competitive environment, although the possibility of giving the exclusive rights to the enterprises remains an option, but only in favor of general, public interest. The main objective of the Commission is to emphasize the deregulation and a higer degree of liberalization in the area of SGEI, necessary for future competativeness of Europe and its economic development and growth. Although the member states have the right to create public enterprises and to allocate the exclusive rights, they are required to monitor the activities of these companies, in order to prevent the abuse of dominant position and given exclusive rights.

Although the Commission is in charge to ensure the implementation of the provisions of the Article 86, the Member States are left the responsibility for the control of actions in the field of SGEI that could potentially hinder competition in the internal market. The most important issue relates to the granting of special and exclusive rights, and the prevention of their possible misuse.

The term “undertaking”, used in the Article 86, applies to all entities involved in economic activity, regardless of their status or the way they are financed. The undertaking has the character of economic activity, if three positive requirements are met: undertaking has the aim to supply goods and services in the market, the company bears some economic and financial risk, and there is a potential for making a profit from the activities that are made by undertakings.⁵ To avoid the arbitrariness of the term “public” and to ensure a coherent application of the Article 86, in the Directive on transparency public undertaking is defined as “any undertaking in which the public authorities shall have, directly or indirectly, a dominant influence by virtue of ownership, financial participation or the rules which govern it”⁶

² Consolidated version of the Treaty establishing the European Community, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>, Article 86 (1)

³ Ibid, 86 (2)

⁴ Ibid, 86 (3)

⁵ Odudu, Okeoghene, *The Boundaries of EC Competition Law: The Scope of Article 81* (England: Oxford University Press, 2006), 26-45

⁶ Directive No 80/723/EEC on the Transparency of Financial relations between Member States and public undertakings (OJ 1980 L 195, 35), accessed 1, July, 2013, <http://eur-lex.europa.eu/>

3. TREATY OF THE EUROPEAN COMMUNITY (ECT) – ARTICLE 16

In the year 1997, the Article 16 was added to the Treaty of the European Community, as a result of an international conference on the issue of limitation or expansion of the jurisdiction and competence in the field of public services and services of general economic interest.

Apart from the economic aspects, services of general economic interest also have the important role in promoting social and territorial cohesion, and reflect the common values of the European Union. Therefore, member states, within their possibilities and in accordance with the Treaty, should strive to organize the functioning of SGEI so that their mission can be accomplished.⁷ Although the system of SGEI is not left solely to the supranational institutions, still the competences of the European Commission are established predominantly in domain of defining the adequate principles and conditions for provision of SGEI in the internal market. According to the Article 16, SGEI should be provided and delivered through competition and market mechanisms, but with the balance of economic and social goals of the European Union. Hence, the Article 16 is also in line with the European unique concept of SGEI consisted from the elements of continental economic approach (social politics) and Anglo-Saxon economic approach (market mechanisms).

In terms of legislation concerning the liberalization of SGEI, the European Commission has opted for sectoral approach. This means that specific legislation is passed for every single service in the group of SGEI (telecommunications, postal services, energy-electricity, natural gas, rail transport). By sectoral approach the fact that each of these services has certain unique technological and market characteristics is highlighted.

However, the sectoral approach emphasizes that, despite specific, individual characteristics, there are some common elements that should be applied in all SGEI, such as, for example, the Universal Service Obligation, the separation of financial accounts between the various functions within the organization, the distinction between operational and regulatory bodies.⁸

European Commission seeks to develop a common European framework for services of general economic interest, in order to ensure a coherent implementation of the principles set out in Article 16 of the Treaty.

Accordingly, the Commission tends to legally formulate the best solutions that would ensure the development of high-quality services of general economic interest in the European Union, with strict adherence to all policies at Community level.⁹

4. GREEN PAPER ON SERVICES OF GENERAL ECONOMIC INTEREST

In addition to the Treaty of the European Community (ECT), particularly its Articles 86 and 16, which represents basic framework for SGEI in the broadest sense, in the year 2003 the European Commission published Green Paper on SGEI which is the first document

LexUriServ/site/en/oj/2006/l_318/l_31820061117en00170025.pdf

⁷ Ibid, Article 16

⁸ Koen Nomden, "Reconciling Liberalization and Public Service Obligations", http://aei.pitt.edu/869/1/scop97_1_3.pdf, 10

⁹ Green paper on services of general interest, Presented by Commission, Brussels, COM (2003) 270 final, 28, Jun, 2013, http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0270en01.pdf, sector-specific legislation and general legal framework, 13

at the supranational level dealing exclusively with the issues of SGEI. The goal of Green Paper on SGEI was to open the series of important questions in this area, and invite all member states, as well as other stakeholders, to actively participate in shaping the future of the European concept of public services. Hence, Green Paper on SGEI represents the first step toward the formulation of the official European regulatory framework for services of general economic interest. Green paper on SGEI is consisted of five main parts, in addition to the introduction and operational conclusions.

The first part refers to the new terminology and definitions, as well as the role of public authorities in the system of services of general economic interest. The second part deals with the objective that the Community wants to achieve through their engagement in the area of services of general economic interest. The third chapter deals with a number of elements that could potentially constitute a common concept of services of general economic interest. The fourth part covers issues relating to the organization, financing and evaluation of SGEI, while the fifth part is devoted to the international dimensions of services of general (economic) interest.

The third part of green paper on SGEI is given special attention in this paper because it deals with the basic common principles of SGEI that should be incorporated into the national legislative of member states. The common principles refer to: the universal access, continuity, quality of services, affordability, consumers' and users' rights protection. Additional principles had been later added as a result of member states' participation in the process of forming the final common European framework of SGEI.

5. WHITE PAPER ON SGEI

In the year 2004 the European Commission published the White paper on Services of General Economic Interest, based on the suggestions and conclusions of member states that took part in the constructive dialog at supranational level. Despite the expected differences in opinions and attitudes of member states, consensus was reached that services of general economic interest should be organized with a harmonious combination of market mechanisms and the specific mission of public service.

White Paper on SGEI is consisted of introduction as a first part of the document, second part deals with the issue of common responsibility of public authorities in the EU and the member states. In the third part there are basic common principles for SGEI defined and outlined. The fourth part deals with the policy improvement with the aim to accomplish the higher degree of coherency in the area of services of general economic interest along with the respect of diversity. Hence, even White paper on SGEI is final document regulating this field, it has not nevertheless to be understood as a finite step in shaping the common regulatory framework for SGEI.

In accordance with the aim of this paper, third part of White paper on SGEI is given a special attention. In the part three of White paper on SGEI, nine guiding principles of the Commission's approach are outlined:¹⁰ enabling public authorities to operate close to the citizens, achieving public service objectives within competitive open markets, ensuring cohesion and universal access, maintaining a high level of quality, security and safety, en-

¹⁰ White Paper on services of general interest, Commission of the European Communities, Brussels, COM (2004) 374 -final, accessed 29, Jun, 2013 http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0374en01.pdf, 7-11

sureing consumer and user rights, monitoring and evaluating the performance, respecting diversity of services and situations, increasing transparency and providing legal certainty. These common principles of SGEI are fully aligned with the rights defined in the Charter of Fundamental rights of the European Union.¹¹ Hence, the rule of mutual harmonization of the European legislation has been respected also in the case of regulatory framework of services of general economic interest.

Based on the analysis of the common principles defined in the White paper on services of general economic interest, it can be concluded that these are in line with the basic idea of linking up the elements from European continental and Anglo-Saxon economic traditions. Although the sharp line can not be underlined, still it is possible to note that the principles of cohesion and universal access to services for all citizens, respecting diversity of situations, maintaining safety and security, providing legal certainty reflect the traditional values of European continental economic approach. On the other hand, the principles such as achieving public service objectives within competitive open markets, highlighting the consumer rights, monitoring and evaluating the performance, increasing transparency are in line with the Anglo-Saxon economic tradition.

6. CONCLUSION

At the level of the European Union new, unique concept of services of general economic interest is conceptualized by combining the certain elements from continental and Anglo-Saxon economic approaches. Respecting the social inclusion and universal access to services for all citizens, the European concept has been enriched with the elements from Anglo-Saxons economic tradition such as the increasing of competition, forming the open internal market for services of general economic interest and focusing the attention to the users' needs, preferences and satisfaction. New terminology was also created in order to avoid the use of vague and ambiguous term of public services. According to that, all public services belong to the two different groups: services of general interest and services of general economic interest. The first group of services is exempted from the competition whereas the latter is subject to competition rules in the European internal market. According to the analysis of the European regulatory framework of services of general economic interest it can be concluded that its principles reflect the foundational and unique European idea of binding certain elements from two different economic approaches.

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¹¹ Charter of Fundamental rights of the European Union, (2000/C 364/01), accessed 30, Jun, 2013, http://www.europarl.europa.eu/charter/pdf/text_en.pdf, Charters IV, V

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