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EU Competition Law Aspects of Public Services**

Abstract

The aim of this article is to distinguish between economic and non-economic public services, as the latter are not subject to EU competition law and Member States are free to regulate them themselves. EU competition law is applicable to public services having an economic nature, with a certain degree of derogation available under Article 106 TFEU.[1] It should be noted that Article 106 TFEU also provided the legal basis of market liberalisation.

Keywords: competition law, EU law, national regulation, public services, provision of public services

I. Introduction

Two Articles of the TFEU comprise the core of EU competition law. Article 101 TFEU prohibits anti-competitive agreements, while Article 102 TFEU prohibits the abuse of a dominant position. However, both of these Articles are only applicable to entities qualifying as undertakings as defined by EU competition law. According to the European Court of Justice, an undertaking 'encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.[2]

EU competition law is applicable to an economic activity, regardless of whether the legal status of the entity in question is public or private. Consequently, a public service can be subject to EU competition law if it is economic in nature. In contrast, EU competition law is not applicable to a public service if it is not economic in character. In such cases as the latter, Member States are free to regulate public services. Otherwise, Member States must refrain from hindering the applicability of EU competition law to public services having an economic nature according to the *effet utile* principle and its *lex specialis,* Article 106 TFEU. Before discussing these rules, I would like to provide

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1 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/1.

2 Case C-41/90 – *Klaus Höfner and Fritz Elser v Macrotron GmbH,* [1991] ECR I-01979, para 21.

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a few examples of the economic nature of an activity. According to the EU Courts 'any activity consisting in offering goods and services on a given market is an economic activity'.[3]

It is irrelevant whether the activity is carried out by a public or a private entity. Public entities can be regarded as undertakings in the meaning of EU competition law, as elaborated in the German *Höfner case*.[4] In this case, a public agency had been entrusted to provide employment procurement services, which had an economic nature according to the EU Court. The opposite can also be true: a private entity entrusted with the enforcement of public interests can be deemed as acting on behalf of the State and as not having an economic nature.[5] According to the case-law, an activity cannot be regarded as an economic activity if the 'activity in question is based on the principle of national solidarity. For example, the benefits paid are statutory benefits bearing no relation to the amount of contributions'.[6]

However, accountants[7] and members of the bar who 'offer, for a fee, services [...] In addition, they bear the financial risks'[8] must be regarded as an undertaking under EU competition law. In contrast, rules adopted by an association of undertakings remain State measures and are therefore not covered by the Treaty rules applicable to undertakings, if the association exercises the regulatory powers of a public authority granted by the State.[9]

In sum, EU competition law is not applicable to a public service lacking an economic nature e.g. the social security system, health care or education. In such a case, the Member State is free to 'provide and organise non-economic services of general interest' according to Protocol 26 TFEU. However, EU competition law remains applicable to public services having an economic character. Moreover, according to the effet utile principle and its lex specialis, Article 106 TFEU, the Member State must refrain from hindering the applicability of EU competition law to public service providers – such as publicly owned companies or companies enjoying exclusive or special rights granted by the Member State. This prohibition stems from the fact that 'if undertakings are required by national legislation to engage in anti-competitive conduct, they cannot be held accountable for infringements'.[10] The Member State shall be held responsible for ensuring the correct application of EU competition law on its territory,

[3] Case C-309/99 – *Wouters and Others,* [2002] ECR I1577, para 47.
[4] Case C-41/90.
[5] Case 118/85 – *Commission v Italy,* [1987] ECR 2599, para 8.
[6] Cases C-159 – 160/91 – *Poucet et Pistre v. Assurances Générales de France,* [1993] ECR I-637, paras 18–19.
[7] Case C-1/12 – *Ordem dos Técnicos Oficiais de Contas* (Court, 28 February 2013), para 37.
[8] Case C-309/99, para 48.
[9] Ibid, para 68.
[10] Joined cases C-359/95 P and C-379/95 P – *Commission and France v Ladbroke Racing,* [1997] ECR I-6265, para 33.

given the fact that competition law is one of the major pillars of the European Union's Economic Constitution.[11]

II. The *effet utile* principle and Article 106 TFEU as *lex specialis*

The *effet utile* principle can be derived from the Member State loyalty clause of TEU and the common goals of the EU, the latter of which encompass the use of EU competition law to secure the proper functioning of the single market of the EU.[12] The *effet utile* principle means that 'Member States cannot introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings'.[13] In the *Van Eycke case* the EU Court stated that a state

> renders ineffective the competition rules applicable to undertakings if: *i)* [it] requires or *(ii)* favours – the adoption of agreements, decisions or concerted practices contrary to Article 101 of TFEU or *(iii)* reinforces their effects, or *(iv)* delegates to private economic operators responsibility for taking decisions affecting the economic sphere.[14]

Article 106 TFEU is *lex specialis* of the *effet utile* principle for two reasons. First, it prohibits a Member State from *rendering ineffective the competition rules applicable especially to publicly owned companies or companies enjoying exclusive/special rights granted by the Member State*. Second, the EU Commission can directly act against the Member State by adopting decisions pursuant to Article 106 TFEU. Furthermore, the Commission may sue Member States for breaching the *effet utile* principle. Accordingly, EU competition law is applicable to public services having an economic nature. Additionally, the Member State can be held liable for *rendering ineffective the competition rules applicable to it*.

[11] Article 119(1) TFEU.

[12] Consolidated version of the TFEU. The member state obligation to respect the EU competition law is driven from Article 4(3) TEU, which stipulates that the Member States shall refrain from any measure which could jeopardise the attainment of the Union's objectives. According to Article 3(3) TEU, the Union's aim is to establish an internal market. According to the Protocol No. 27 on the internal market and competition, the internal market includes a system to ensure that competition is not distorted.

[13] Case 267/86 – *Pascal Van Eycke v ASPA NV.,* [1988] ECR 1988-04769, para 16.

[14] Ibid, para 16.

However, paragraph (2) of Article 106 TFEU grants immunity from the application of EU competition law to public services providing services of general economic interest (SGEI). Article 106(2) TFEU states that

> undertakings entrusted with the operation of services of general economic interest 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.

This derogation rule can be regarded as the balancing factor between the applicability of EU competition law and the EU interest in maintaining the operation of SGEI.

According to Article 36 of the Charter of Fundamental Rights of the European Union,

> The Union recognises 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.[15]

According to Article 14 of TFEU,

> the Union and the Member States, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions.

According to Article 2 of Protocol 26 of TFEU, Member States enjoy a wide range of discretion 'in providing and organising services of general economic interest as closely as possible to the needs of the users'.

According to the General Court, there is 'no clear and precise regulatory definition of the concept of a "service of general economic interest" mission and no established legal concept'.[16] According to the case-law, the SGEI must be clearly assigned to provide services having universal character.

However, the clear assignment and the universal nature cannot result in full derogation from the applicability of EU competition law. The case-law adopted a compensatory approach, which means that the aim of the derogation is to maintain the

[15] Charter of Fundamental Rights of the European Union OJ 2012/C 326/2.
[16] Case T-289/03 – *BUPA and Others v Commission,* [2008] ECR II-00081, para 165.

> economic equilibrium of the service of general economic interest. Member States must set out in detail the reasons for which, in the event of elimination of the contested measures, the performance, under economically acceptable conditions, of the tasks of general economic interest which it has entrusted to an undertaking would, in its view, be jeopardised

– as the EU Court emphasised in its recent judgment in *Slovenska Posta* in 2015.[17] According to the interpretation of Article 106(2), cross subsidy should be allowed in order to maintain the 'economic equilibrium of the service of general economic interest by covering the cost of the SGEI from non-SGEI profitable services'.[18]

III. Derogation from Article 106(1) TFEU

The State Aid approach resulted from the compensation approach, according to which the derogation under Article 106(2) TFEU means the allowance of granting state aid to SGEI to perform their tasks, according to the EU Court, there is no state aid at all if four criteria were met, as elaborated in the *Altmark case*[19] (because the advantage cannot be ascertained):

– the undertaking which provides SGEI is obliged to provide a public service *(upon clear authority);*

– the state reimburses the losses deriving from provision of SGEI calculated upon a *methodology fixed in advance;*

– the granted subsidy does not exceed the expenses of the SGEI (i.e. the subsidy is *not extra compensation*);

– the methodology shall only model the expenses of an effective undertaking if the public service provider was *not chosen in the course of an open tender.*

Inasmuch as any of the above criteria is not met, the *reference to the exception of the SGEI provided under Article 106(2) TFEU is still available*; however, in this case the state subsidy shall be notified, but there is *no need to comply with the economic effectiveness requirements* (fourth element of the above Altmark criteria).

[17] Case T-556/08 – *Slovenská pošta v Commission* (General Court, 25 March 2015).
[18] Case C-320/91 – *Criminal proceedings against Paul Corbeau,* [1993] I-2533, para 19.
[19] Case C-280/00 – *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht,* [2003] ECR I-07747.

IV. Exclusive rights

Article 106 TFEU raises the question of the acceptance of exclusive rights in EU law. According to the case-law, granting exclusive rights is not in itself a breach of Article 106 TFEU.

> A Member State is in breach of the prohibitions laid down by Article 106 if it adopts any regulation that creates a situation in which a public undertaking can afford to abuse its dominant position. It is not necessary that any abuse actually occurs. Inequality of opportunity between economic operators or the extension of a dominant position without any objective justification constitutes an infringement of Article 106 TFEU.[20]

Recently, a Bulgarian case[21] raised the question as to whether granting an exclusive right to pay retirement pensions by money order could be regarded as state aid. According to the CJEU, the first question was whether the payment of retirement pensions was part of the functioning of the public social security service. Accordingly, the relevant question was whether it should be regarded as an economic activity. The Court held that the payment of retirement pensions could be considered as separate from the national pensions system. Therefore, the second question was whether an exclusive right granted to pay retirement pensions by money order should be regarded as amounting to an advantage within the meaning of Article 107 TFEU. This judgment overruled the *Altmark case*. At this point, the Court called upon the *Altmark criteria* and emphasised that there is no advantage, consequently, nor state aid in question, if the service is considered such an SGEI, for which the given remuneration is compensation for the fulfilment of its public service obligation. The Court required the national courts to assess whether the granted exclusive right as compensation exceeded what was necessary to cover the costs of the payment by money order of retirement pensions.

V. EU competition law and liberalisation of public services in the EU

Eventually, Article 106 TFEU became the legal basis of market liberalisation as, through Article 106(3) TFEU, the Commission is empowered to issue directives ensuring the application of Article 106 TFEU. It should be noted that this is the only original law-making power of the Commission under which the Commission can adopt directives

[20] Case C-462/99 – *Connect Austria,* [2003] I-05197, para 80; Case C-49/07 *MOTOE*, [2008] I-04863, para 49.
[21] Case C-185/14 – *EasyPay and Finance Engineering* (Court, 22 October 2015).

without cooperation with the Parliament and the Council. However, historically the Commission used directives issued pursuant to Article 106(3) TFEU only to liberalise the telecommunication sector following a political compromise.[22]

In order to foster liberalisation, the Commission adopted the concept of universal services to clarify what kind of services could be exempted from the application of EU competition law pursuant to Article 106(2) TFEU. The concept of universal services eased the tension between the creation of competition and securing the public services in the liberalised sectors by allowing Member States to grant state aid to public services in the liberalised sectors. The concept of universal services limited the Member States' possibility to refer to the derogation clause in Article 106 TFEU. Furthermore, it helped to secure the provision of public services in the EU since universal services should be accessible to all – irrespective of geographic location – at a specified quality and at affordable prices.[23]

The European model of the liberalisation expressly takes into the consideration the complementary application of competition law. The competition law enforcement has served as a deepening factor of the liberalisation process several times in the past. We can find an example where the competition authority eliminated the regulatory errors in its procedures, as occurred in the *Deutsche Telekom margin squeeze case* (COMP/C-1/37.451), in which a margin squeeze evolved between the regulated prices. The Commission might have found it necessary to initiate proceedings against *Orange Polska* to increase the strength of the deterrence from the abuse that threatened the market opening process. The Commission fined the undertaking two years after that the company undertook, in the course of a national regulatory procedure, to terminate its restrictive practice (COMP/39.525.).

VI. Conclusion

To summarise, it is important to make a distinction between economic and non-economic public services because the latter category is not subject to EU competition law and the Member States are free to regulate it. EU competition law is applicable to public

[22] Despite the fact that the Commission has the right to adopt a directive under Article 106(3) independently of the Council and the Parliament, the Commission does not disregard these two institutions during the process, since, when adopting regulations under other provisions of the Treaty, they will have the final word. These circumstances led to political compromise between the Commission and the Council in 1989, as was declared in the 1995 Competition Law Report (49). The same political compromise is missing in other industrial sectors, for which reason the Commission did not use Article 106(3) TFEU for the commencement of liberalisation.

[23] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, Official Journal L 108, 24/04/2002 P. 0051 – 0077, Article 3(1).

services having an economic nature, with derogation permitted pursuant to Article 106 TFEU. Article 106 TFEU also serves as the legal basis of market liberalisation. Moreover, the Commission fostered the liberalisation process by adopting the concept of universal services and making competition enforcement in order to deepen the liberalisation process.