Legal Issues of Services of General Interest

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Services of General Economic Interest in EU Competition Law

Striking a Balance Between Non-economic Values and Market Competition

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Series Information

Services of general interest have been high on the political agenda in Europe in recent years as a result of EU liberalisation measures and the case law of the European Courts. At the heart of the debate is the question of how to balance market economies with the pursuit of public policy. Of crucial concern are questions on the role of services of general interest and other public policies essential in modern society.

The aim of the series is to sketch the framework for regulating markets and public interests in Europe and to explore the legal issues raised by developments related to services of general interest and other public policies. The series encompasses, inter alia, analyses of EU internal market and competition law, as well as EU legislation impacting particular public policies, international and domestic law, often from a comparative perspective. Sector-specific approaches will be covered as well (for instance, health, social services, energy, education, environment and communication). Furthermore, the present series also addresses the emergence of a European Social Union and will therefore raise issues of fundamental and theoretical interest in Europe and the global economy.

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Foreword

European Union (EU) law and regulation on 'services of general economic interest' (SGEI) has been evolving rapidly since the late 1980s. When the Treaty of Rome was adopted in 1957, there was strong State involvement in SGEI sectors, such as telephony, the postal service, public transportation, energy production and distribution. These areas were traditionally dominated by publicly owned undertakings, granted exclusive production and distribution rights by law, with protection from internal or external competition by State-sanctioned monopoly rights. Unlike normal market activities, these activities were regarded as public services, essential for the welfare and advancement of modern society, and their provision was guaranteed on a universal basis by the State.

This reality was largely respected, by the founders of the EU, but they did have an eye to the future when they drafted the original Article 90 EEC (now Article 106 TFEU): while that Article did provide that the Member States could grant Article 106(1) 'special and exclusive rights', the Member States had to be mindful that such grants did not lead to other rules of the Treaty being breached, such as the competition rules; furthermore, when Member States entrusted an undertaking with the performance of an Article 106(2) SGEI, the Member States still had to respect the rules of the Treaty unless the Treaty's rules would obstruct the provision of the core service whose provision was entrusted to the undertaking.

However, in practice, there was little activity pursuant to Article 106 at the EU level for the first 30 years of the EU's existence: State-created monopolies provided valuable services, on a universal basis, although their cosseted existence did inhibit new innovative competing services from coming into existence. One recalls the ban on importing telephone equipment in *RTT* by anyone except the monopolist; or the ban on providing a competing form of postal service in *Corbeau*; or the restrictive ship unloading practices in *Merci*; or the cross-subsidisation of the monopolist national postal service in *TNT Traco* by its private courier competitors to compensate it for loss of business: one could go on; the point is that while the services were provided by the State-owned monopolist, at a certain level of quality and universality, the objectionable aspects of such regimes were that the laws of the

Member States also gave the incumbent monopolists control over who else, and under what conditions, could compete against the monopolist, even in neighbouring, upstream or downstream markets, if ever.

However, the traditional model of SGEI provision, protected from competition, was not conducive to the fostering, development or promotion of innovation, for the very reason that it generally sought to prevent new services reaching the market. Also, the Member States were anxious to move many thousands of public servants off the State's payroll, so that they would no longer appear as a liability on the States' balance sheets. And, of course, the Internal Market Programme, which commenced with the Single European Act 1986, saw the start of a massive programme of harmonisation of laws to underpin the EU's Single Market Programme in the lead-up to 1992: in this environment, the straws in the wind made it clear that having national markets in SGEI sectors insulated from competition, or tolerating them controlling who else (and how) could compete against them, was past its sell-by date.

Hence, starting with key Commission Directives in the late 1980s requiring the Member States to remove national telephone monopolists' special and exclusive rights in activities outside their core telephony service activity, followed by an emergence of judgements from the European Court of Justice in Luxembourg, these once-protected sectors were sent a clear signal in the late 1980s and early 1990s that they would, quite rapidly, be transformed into competitive activities driven by an EU liberalisation programme that called for obstacles to competition and market entry to be removed in activities that fell outside of a State-entrusted area of core activity (the SGEI). This new approach called for 'greenfield' independent market entry regulators to be established, which were not to be subject to either the control or influence of the State or the SGEI monopolist. This development, with its potential to jeopardise the non-economic public service values that underpinned the traditional universal service model, naturally caused concerns for stakeholders and the Member States themselves. The key question was, how does one reconcile the introduction of market competition into areas where, traditionally, many consumers of the services do not regard the provision of such services as economic activities per se?

Article 106(2) of the TFEU Treaty, which had long lain dormant, now became the focal point in the struggle between innovation, market forces, liberalisation and the need to introduce cross-border competition, while at the same time maintaining vital services provision to all of the population in a universal manner. How does one 'square the circle' of allowing the Member States to create monopoly rights yet requiring other Treaty rules such as competition and free movement of goods and services to be respected? Slowly, but then rapidly, via a series of Court of Justice of the European Union (CJEU) judgements and EU legislation, the EU legislation shrank national monopolies' permissible scope of protected activities to the core activity, catapulting the now liberalised ancillary activities into 'competitive markets'. In this way, the notion of 'controlled liberalisation' came into being: yes,

others could supply new and innovative types of telephones; yes, others could sell new types of telephones or supply new types of courier services without needing permission from the monopolist to compete against them, but at the same time the State could still require operators to respect certain public interest objectives, such as the provision of universal services such as landline telephony services, postal delivery services and public transport services.

The current EU regime was developed during this process, largely using a combination of the Internal Market legal base in the Treaty and the legal base of Article 106, with its particular brand of balancing respect for competition while acknowledging that the provision of SGEI was seen as an acceptable reason for permitting a derogation from the application of Competition Law (or indeed other Treaty rules). The focus was to ensure that the provision of SGEIs did not distort market competition in ancillary activities markets. However, in the intervening years, this mindset has already undergone some fundamental change. Access to SGEI has been recognised as a shared value of the EU and as a fundamental right of its citizens. In the new 'constitutional arrangement', maintenance of SGEI provision is arguably placed on an equal footing with competition as a core value of the EU. For this very reason, this area remains fascinating to observe, and the question continually arises: How will this area of law and policy evolve in the future?

Scholars, students, legislators, industry players and policymakers, all seeking an answer to this question, will find this book an authoritative, well-researched study for anyone seeking a deep understanding of how the law and policy in the SGEI area have evolved and how it might evolve in the future. In undertaking a learned and authoritative study of the evolution of Article 106, Dr. Lei Zhu has demonstrated in this study of sectors as diverse as postal liberalisation, the energy sector, transport liberalisation, telephony liberalisation, etc., that what is tolerable from a restriction of competition perspective, in order to maintain the provision of an SGEI, varies from sector to sector. In other words, the author has demonstrated that while there may be consistency of application of EU principles across the different sectors as they liberalise, there is, on the other hand, no uniform consistency of application of those principles to the different sectors, as liberalisation (toleration of a certain measure of competition, accompanied by a corresponding shrinkage of the area to remain protected from competition) varies from one sector to another. The author's industry, background research and clarity of writing bring often obscure arguments to a clearer understanding and help us to understand emerging SGEI trends and where they might be headed in the future. It was a pleasure to read this book, and a particular pleasure to see one's PhD student emerge as a fully fledged scholar with this magnificent contribution to enhancing our understanding of SGEIs. Illustrating how the EU has attempted to maintain a balance between the need to allow competition, on the one hand, thereby energising once-protected languid sectors by allowing citizens to benefit from the innovation that flows from liberalisation and competition, yet at the same time keeping an eye on the need to ensure citizens continue to have available to them essential services on a universal

basis, this book demonstrates how such an approach allows the EU citizen to appreciate the value of the role of both the State and the greater EU project, as guarantors of both innovation and high-quality public services in the Europe of the twenty-first century.

All Souls' Day, 1 November 2018

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