

Varazdin Development and Entrepreneurship Agency  
in cooperation with  
Facultad de Ciencias Economicas, Universidad de Buenos Aires  
University North  
Faculty of Management University of Warsaw  
Faculty of Law, Economics and Social Sciences Sale - Mohammed V University in Rabat



# Economic and Social Development

40<sup>th</sup> International Scientific Conference on Economic and Social Development

## Book of Proceedings

Editors:

Victor Beker, Ana Lackovic, Goran Pavelin



Universidad de Buenos Aires  
Facultad de Ciencias Económicas



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## **CONTENTS**

<b>A MULTIFACED ANALYSIS OF FOREIGN TRADE IN VARIOUS TIME TRENDS... 1</b> Monika Hadas-Dyduch	
<b>THE IMPACT OF BRANDING ON CONSUMER SATISFACTION IN MOBILE TELECOMMUNICATIONS SERVICES..... 11</b> Milan Džupina, Zuzana Schlosserová, Michaela Culiková	
<b>GLOBALIZATION OF THE WORLD ECONOMY: FEATURES OF THE CURRENT STAGE ..... 27</b> Victor S. Efremov, Irina G. Vladimirova	
<b>COMPROMISE OR ELSE: MANAGING CONFLICTS IN THE NEGOTIATION PROCESS ..... 37</b> Katija Vojvodić, Marija Martinović, Ana Pusić	
<b>DETERMINATION OF DOMINATING PROJECT COMPETENCES AIMING TO ENHANCE ORGANIZATIONAL COMPETITIVE ADVANTAGE ..... 47</b> Zlatko Barilović, Kristina Kobrehel Preskar, Ernest Vlačić	
<b>AN EMPIRICAL EVALUATION OF LABOUR TRENDS AMONG THE CROATIAN YOUTH ..... 57</b> Filip Kokotović, Marina Kontić, Petar Kurečić	
<b>MANAGING ORGANIZATION OF KARTEL PETROLEUM EXPORTING COUNTRIES ..... 64</b> Martina Šopta, Paulina Palić	
<b>FRAMEWORK FOR ASSESSING THE COMPANY'S MATURITY OF DIGITAL BUSINESS TRANSFORMATION..... 80</b> Melita Kozina	
<b>OPPOSING VIEWS AND TRADE-OFFS IN CORPORATE SUSTAINABILITY (A LITERATURE REVIEW) ..... 88</b> Nancy Diana Panta	
<b>IS THE FINANCIAL SYSTEM PREPARED FOR A NEW FINANCIAL CRISIS?..... 96</b> Victor A. Beker	
<b>RESTRUCTURING THE NIGERIA OIL INDUSTRY AND THE REASSESSMENT OF SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA'S COMPLIANCE WITH CORPORATE SOCIAL RESPONSIBILITY IN DELTA STATE 2010-2017.. 114</b> Idama Oghenerobo Supreme	
<b>THE ACCESS TO SERVICES OF GENERAL ECONOMIC INTEREST AS HUMAN RIGHT..... 121</b> Maria do Rosario Anjos, Maria Joao Mimoso	

# THE ACCESS TO SERVICES OF GENERAL ECONOMIC INTEREST AS HUMAN RIGHT

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## **ABSTRACT**

*The concept of services of general economic interest (SGEI) was enshrined in the Treaty of Rome in Article 90 (2) of its original version. It remained unchanged until the current version introduced by the Treaty of Lisbon. The services that public authorities of the EU member countries classify as being of general interest are, therefore, subject to specific public service obligations. They can be provided either by the state or by the private sector. The article 106 (2) TUE shows the importance of SGEI's by preserving the possibility of subtracting them from the principle of free competition which underlies the entire economic law of the EU. These are very profitable, monopolistic or oligopolistic economic activities, with all the resulting risks. We are talking about electricity, gas, water, telecommunications, transport, postal services, among others. The importance of access to these SGEI's led to the concept of universal service, it means that the goods and services they produce are essential to citizens life and social welfare (general interest), and, therefore, they are very important to the accomplishment of human rights and safeguard the survival and dignity of citizens. It is in this context that the principle of banning social setbacks is particularly important. This study intends to reflect about the fundamental right of access to the services of general economic interest as an effective human right.*

**Keywords:** *accessibility principle, human right, SGEI, social setbacks, universal service*

## **1. INTRODUCTION**

The theme for this research analyzes the importance of guarantee the citizens access to services of general economic interest (SGEI), in adequate conditions of quality, price and good conditions for use. This issue is quite important in UE Treaty and is one of the most sensitive question in discussion about SGEI. In fact, all European Directives, from Commission, try to impose this guarantee by introducing the concept of “universal service”. This is a true human right for all citizens in a modern welfare state, and it is fundamental for European project of construction a real Union based in economic and social cohesion (Anjos, 2016). The concept of a service of general economic interest (SGEI) originates from European Union law and applies to sectors such as energy, telecommunications, water, gas, postal services and transport (Anjos & Mimoso, 2018). These are sectors with high economic and profit potential, subject to rapid and demanding technological progress, which require a high capital investment and know-how (Anjos, 2016). These sectors play a key role for the whole economy and social life. That is why those companies or corporations who control SGEI control a large part of the markets, either directly or indirectly. These sectors are particularly demanding, so States often fail to ensure their smooth operation and development without resorting to partnerships with large multinational companies. These have the appropriate technical and scientific knowledge and the financial means to guarantee the operation of these services. The question, however, is to know: at what price and in what conditions of access?

Can these guarantees ensure universal access to these essential goods? Sometimes, the States invited multinational companies to celebrate foreign investment contracts or partnerships provide a unique opportunity for social progress for host States (Pérez, 2016), but also pose risks of capturing their people and governments by powerful economic agents operating in cartelized multinational markets. In a globalization context of the economy, this issue is even more important (Anjos & Mimoso, 2018). This research has its main focus in the objective of providing a universal service to all citizens in good conditions of access, equity and respect for the human right to access to SGEI. This study is intended to highlight the issue of citizens' rights and guarantees face to liberalized and competitive markets but, general rule, organized in the form of an oligopoly (Pego, 2007). In this context, the defense of the public service obligations' fulfillments is essential and is widely recognized by the European institutions (Anjos, 2016; Meilán-Gil, 2010). The question is what kind of public service obligations must be guaranteed by companies responsible for the SGEI? How can States assured the public utilities to the people? The research carried out focuses on the most relevant consequences for citizens' rights and guarantees, since we consider that access to SGEI's is a fundamental right of the human person. We appreciated doctrinal and jurisprudential production, trying to demonstrate the care to go through the main European authors of reference in the matter. Actually, for us this is not only an economic and social fundamental right but also an essential condition to guarantee all human rights. This is the contribution of this work.

## **2. THE SGEI CONCEPT**

SGEI's are economic activities essential to the well-being of the population, both from the point of view of meeting individual needs as well as collective needs (ANJOS, 2016), such as energy, gas, water, postal services, telecommunications or transport. Relevant doctrine, the European Court of Justice (ECJ) and the European Institutions, consider all these services as "activities considered vital for citizens and for society as a whole" (Anjos, 2016). Within a community of countries as broad as the one we are part of, it's necessary to circumvent differences of conceptions and to find the "minimum common denominator" that can unite all around common goals. It's precisely in this context that we have included this important concept of service of general economic interest, which was enshrined in Article 90 (2), now Article 106 (2) of the Treaty of Lisbon (TFEU) in a careful, minimalist yet efficient reading that, perhaps because of it, has resisted intact in the successive revisions of the Treaty (Anjos, 2016). However, we can say that this concept is very close to the concept of public service, well known to the French, Italians, Portuguese and Spanish, or the public utilities of the Anglo Saxons countries (Anjos & Mimoso, 2019). The traditional concept of public service is complex, giving rise, over time, to important and enriching legal constructions, with particular emphasis on the French school, where it was actually considered by GASTON JÈZE as "basis stone of Administrative Law", true essence of the public power. The origin of the concept is commonly associated with LÉON DUGUIT and it was the source of many and very rich studies on Administrative Law (Anjos, 2016). Equal opportunities and fight against poverty demand, first and foremost, the access of all citizens to SGEI's, (electricity, water, gas, communications, etc.) in order to allow access to the minimum living conditions. Only in this way we will it guarantee access to education, information, work and professional, personal and family achievement. Without access to these services, there is no guarantee of equal opportunities, nor respect by the more essential human rights. That's why the EU, since the last decade of the XX century, has elected the guarantee of "universal service" as the fundamental basis of economic and social cohesion. Thus, the universal service guarantee means guaranteeing all European citizens access to SGEI's in conditions of equality, adequacy and affordability. The evolution of modern society depends, largely, on the technological evolution of these services, and its indispensability for the economic and social cohesion of the European peoples is now recognized. On them depends

the progress of the peoples (Arenhart, 2013) and their social welfare. These SGEI's are characterized by assuming an economic nature, awakening interest in the business market, having been subject to a strong liberalizing impulse. That is what has happened throughout the EU over the last twenty years, in which we have witnessed the privatization of electricity, gas, postal services, telecommunications, transport and, even, water. We can't forget that they are essential to the life of citizens, to their well-being and to their proper subsistence and their provision must be ensured in conditions of accessibility (price and quality). This last feature highlights the importance of defending the legitimate rights and guarantees of citizens as users or consumers of SGEI, in the face of all the powers that are strongly established in these sectors of activity. In fact, in all these sectors we have verified that the natural market form is, mainly, the monopoly (private or public), and sometimes the administrative concession (Anjos, 2016). When exposed to market liberalization, by legal means or, in the case of the EU, by economic policy decision for these sectors, we note that the market evolves to an oligopoly, and there it crystallizes. Conscious of this risk, the Green Paper on SGEI's expressly refers to the crucial importance of these services to the quality of life of European citizens and to the competitiveness of European companies and has defended the liberalization of these markets with caution, which means "the definition of universal service objectives pursued by the general interest." The numerous sectoral directives applicable to SGEI also frequently and recurrently refer to the universal service obligations inherent in these services, which are, after all, their greatest distinguishing feature. On the other hand, the European Court of Justice (ECJ) case-law, in its numerous judgments in this matter, is quite regular in its assessment of the possibility of applying the exception regime provided for in Article 106 (2) TFEU: the exception to competition may be acceptable for provide the fulfillment of the universal service or general interest obligations (Anjos, 2016). This explains why, in the EU, these sectors were named 'excluded sectors', that is, sectors where the principle of free competition can be estranged or excluded (Laguna de Paz, 2009). Whenever European Directives have excluded these services, they have done so to ensure citizens' accessibility to these services. But, it's true that, since the 90's of the XX century, the EU has taken the political decision to liberalize the SGEI's sectors. Several Directives about SGEI's (2000, 2001 and 2003 Directives) have imposed liberalization of the electricity, gas, telecommunications and other services as the same time they did imposed the universal service guarantee. So, the question is: how can we sustain this guarantee?

### **3. UNIVERSAL SERVICE GUARANTEE IN SGEI'S: THE PUBLIC SERVICE OBLIGATIONS**

The liberalization of these sectors and their subjection to the competition rules implied a strong regulatory intervention, fulfilling the idea that "more market, more rules". It is undeniable that the conquest of international markets for these sectors is of fundamental importance and it increases the access to important resources for these activities, it increases the number of consumers and the final profit of these companies. It may be, also, the way for economic and social development, for the elimination of poverty and social exclusion by increasing the accessibility of all citizens to these services. So, we face risks and opportunities. Because we are facing sectors that require a large continuous investment in modernization and technological progress, the size of the market is of the utmost importance for the profitability of these activities (Lopez-Muniz, 2000). On the consumers' side, their lives are greatly improved by access to these goods, enabling effective progress to be made to those who have access for the first time to electricity, gas, quality drinking water, affordable telecommunications, high quality in all other SGEI's. (Anjos & Mimoso, 2018). To answer the question of how we can guarantee the universal service, we must be aware that each Government must impose to the market operators some public service obligations to provide to citizens in conditions of accessibility, quality and suitability. This is the only way to do it.

It is up to the governments of each State to oversee compliance with of these public service obligations. They must be particularly demanding in this matter and to condition the granting of license's and operating authorizations for the scrupulous fulfilment of these public service obligations. In the event of non-compliance, substantial fines must be imposed on operators and, in the most serious cases, their operating license's, shall be withdrawn. In fact, it is logical to be so, and to do it we just need a firm and clear law, accompanied by a well-delineated model of regulation and oversight of each sector. These suggestions are very important for countries with problems of growth asymmetries. Emerging Continents and countries, in Africa, Asia, Latin America or South America, must pay attention to this process of controlling SGEI's markets. Like this on the one hand, it was intended to take advantage of the opportunity of the free initiative to explore these sectors, leveraging its modernization, a greater investment in the technological progress of these services and making everyone much more accessible to a greater number of citizens (Dony, 2006). Yet, on the other hand, the risk of market cartelization and the imposition of high prices and exclusion for a large number of people, led the Member States to strengthen the regulation of these markets (Nunes, 2015). This regulatory intervention, in the EU, takes place through the application of the Treaty rules but, above all, of the many Directives which have been issued on the various sectors in question and of the respective national laws regarding the different Member States which implement them. The States governments should also be concerned to regulate the operation of these sectors by strengthening the public service obligations to be imposed on investment firms in their countries in order to ensure a universal access to these SGEIs, by all its population, since we are talking about fundamental social rights. As we see, this was the simple and pragmatic reason that led to the establishment of the concept of services of general economic interest, which are at the heart of the European model of society and which is a source of inspiration for all other continents (Nunes, 2015). In this context, a ubiquitous guarantee in all sectors stands out, which is the guarantee the fulfillment of universal service obligations in the provision or supply of these goods and services. It is understood that there are social rights that must be considered as irreversible achievements of the social state of democratic law, including the right to services of general economic interest (Anjos, 2016). The universal service guarantee includes a set of obligations that service providers have to comply with, such as: the right of access to goods and services under conditions of equality and universal coverage (total coverage of the territory), the prohibition of any discrimination based on social, personal and territorial status (CE, 2011). We can say that the concept of universal service means a set of principles and obligations that certain services must fulfill in order to make them accessible to all citizens at appropriate prices and conditions (Anjos & Mimoso, 2018). However, the implementation of these principles requires that, by internal legislation, they effectively guarantee the legitimate rights of the user citizens regarding access to services of general economic interest, under conditions of universality. In our opinion, these are real fundamental rights of a social nature, rights of citizenship, which must be defended and protected.

#### **4. REGULATION OF SGEI'S: THE PROBLEM, THE ANSWER AND THE HARD REALITY**

The regulation of these sectors is, really, a great challenge. The problem is: who regulates who? How to choose the regulator? In this regard, we must not forget that these markets take on an enormous dimension, without natural or geographical borders, and have a clear international profile, which far exceeds the borders of each country. Therefore, market liberalization requires some intervention by the State to ensure the effective fulfillment of the public service obligations. So, the answer to both questions seems easy: we should regulate these sectors with good laws and transparency in public choice. But this answer leads to another question: what happens if the law displeases companies in the sector?

We know that in oligopoly it is the companies that dictate the rules. And the oligopolistic trend, typical of SGEI markets, compromises the great advantage of liberalization: better price and better quality of goods and services accessible to all citizens (Pego, 2007; Anjos, 2016). Added to all that has been exposed, there's the problem generated by globalization, which has generated in these sectors oligopolies of global dimension, true economic giants. Their economic power and influence facilitate the capture of governments and sector regulators. Economic theory itself tends to point to the theory of natural monopoly, the idea of destructive competition, and public-interest missions as grounds for exempting these services of general economic interest from the competition regime (Anjos, 2016). This benchmark raises some very important issues with regard to liberalization and the introduction of competition in these sectors with the possible entry of foreign investors. The scale of the problem in developing countries is very difficult, as there is no doubt that the governments of these countries have no power to face this problem. After to liberalize these sectors, in fact, they lose power over the investing companies, which are almost always multinationals with a great dimension. The States, in turn, need them to make progress in the living conditions of their citizens and the support structures of their economy, are in a position of need, of some discomfort, have little bargaining power to demand fair compensations and are able to guarantee progress at the best price. Many of these governments are virtually captured by the scarcity of resources and the economic power of investors (Anjos, 2016). The role of regulators is fundamental, but it is not easy, for the same reasons. So, the risk of the regulated impose the rules it wants is enormous. We need to understand that between economy and the rule of law must have an understanding and a connection that doesn't always exist. Often the good economic theory, abstract and disconnected from the political and social reality, generates more problems than solutions. The power of SGEI's suppliers is so great that it can bring down governments, sow economic, social and political chaos. Simply suspend or disturb the regular functioning of goods and services to the population, for a short period of time, can generate a chaotic situation. At these moments the rule of law fails, and the economic power plays the game he wants to play. So, the rules of the game have to be imposed first of all. The rules we need are, precisely, the public service impositions to the corporations exploring the SGEI's. It is possible to take profit with these services and respect it's social interest. We call this: justice.

## **5. THE PROTECTION OF CITIZENS RIGHT TO ACCESS SGEI'S**

The problem of guaranteeing universal service has led us, as we can see, to a complex issue of an economic, social and political nature. In fact, we have to ensure efficiency in the production of the goods and services designated by SGEI's, the universal access of all citizens to these goods and services and a high degree of satisfaction of citizens who, on a democratic basis, have the right to elect their representatives. This is a very sensitive matter. The role of regulating entities should be decisive in order for this investor-recipient relationship to be fair and balanced. First of all, imposing rules which reduce the risk of market cartelization and imposing appropriate penalties for non-compliance. On the other hand, they can and should establish rules of transparency and publicity of procedures that avoid or reduce the risks of the regulator by those regulated. They can also establish clear rules to avoid the risk of transferring the social costs imposed by universal service to the middle class, impoverishing the country. The middle class ends up being the big funder of the universal service, since the oligopoly turns what should be a cost of the business into income for its own benefit. The risk of impoverishment of the middle classes has been evident in the EU countries (CE, 2011) since 2008 crises.

## **6. CONCLUSIONS**

It's possible to conclude that the basis for the concept of general economic interest is to defend the human right of citizens in access to the essential goods and services that characterize these

activities. In this sense, we understand that the spectrum of the sectors of activity that some of the member countries classified as economic public services has not been reduced, but that this reality has been adapted to the objectives of achieving a fair balance between the market and the general interest of citizens. In the case of the SGEI, the relevant market, after a liberalization process, tends to be oligopolistic. As follows, oligopoly, by its very nature, is a catching market: it captures the consumers, the governments and the regulators, resulting in widespread capture of the market. So, we must to fight against this capture. There is a clear link between the concept of SGEI and the traditional concept of public service to citizens, which the doctrine of southern Europe has elevated to a place of great importance in its legal system. It is impossible to resist the charms of the strongest doctrines that have been formulated around this traditional and deeply structuring in the conception of a democratic state of law in a great part of the European Union countries. This is a good model to the other countries all over the world, if we really want to fight against poverty. We can say that the concept of SGEI corresponds to a meeting point, a common denominator, between two slightly different perspectives on the subject that allowed overcoming the conceptual differences around the welfare state objective. Thus, we conclude that this general framework, which we could designate as a statute or a code of rights and guarantees for the citizen users, should integrate and concentrate, in a systematized and clear way, a fundamental core of rights and guarantees. First of all, we must guarantee the right of access and provision to these services, with quality and as a universal service. It isn't enough to regulate. It is necessary to recognize in the Constitution of each State the fundamental right to access to SGEI's with the dignity of human right.

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