

SERVICES OF GENERAL ECONOMIC INTEREST AND FOREIGN INVESTMENT: RISKS, OPPORTUNITIES AND PROTECTION OF HUMAN RIGHTS

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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. Their importance 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 dignified survival of citizens. These are activities that attract a great deal of interest from foreign investors, both in the EU economies and outside the EU. This study intends to reflect on the comparative principles in the analysis of the best model of market organization in the perspective of better serving the general interest of citizens and companies that operate in these markets. The research question, in summary, is: What are the risks of the global liberalization of the markets that supply goods and services of general interest?

Keywords: *SGEI, universal service, competition, foreign investment, human rights*

1. INTRODUCTION

The chosen theme for this research topic analyzes the potential of foreign investment in sectors designated by services of general economic interest, the resulting opportunities for the investor and the host state, also considering the risks that result for both. 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, and which some states cannot obtain without accepting and negotiating with foreign investors (Anjos, 2016). These sectors that we call SGEI play a key role for the whole economy and social life. That is why those who control SGEI control a large part of the markets, either directly or indirectly. 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 (Pego,2007). This research has its main focus in the major objective of foreign investment of providing a balanced

sharing of knowledge and natural resources (Soria, 2015), in order to provide greater progress in the social welfare of populations and protection of their human rights (Jacob, 2010). The development of the now carried out 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. In this context, the defense of the public service obligations' fulfillments, to which these services are subject, is assumed as essential and is widely recognized by the European institutions (Meilán-Gil, 2010). From the European experience, we can foresee what public service obligations are borne by the companies that are responsible for the SGEI, Member States in guaranteeing rights to their citizens (Laguna de Paz, 2009). Therefore, our research issue is about knowing the risks of the global liberalization of markets associated to the supply of services of general economic interest. What are the risks of the global liberalization of the markets that supply goods and services of general interest? 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 seek to define the essential lines of the legal status of the citizen as a SGEI consumer. This is the contribution of this work. In the concretion and development of our investigation, we concentrate the analysis on the existing doctrinal and jurisprudential production, trying to demonstrate the care to go through the main European authors of reference in the matter.

2. THE SGEI CONCEPT

Firstly, we can say that these 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 (ANJOS, 2016), such as energy, gas, water, postal services, telecommunications or transport. Using the concept resulting from the European Parliament, these are "activities considered vital for citizens and for society as a whole" (Miguéz, 2005). 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 (Anjos, 2016). The traditional concept of public service has always undergone great doctrinal complexity, giving rise, over time, to important and enriching legal constructions, with particular emphasis on the French school, where it was actually considered by GASTON JÉZE as a "cornerstone of Administrative Law" or, still, as the "true essence and foundation of the public power" (cit.by Anjos, 2016). The origin of the concept is commonly associated with LÉON DUGUIT and, strongly boosted since then, it was the source of many and very rich studies on Administrative Law (Meilán-Gil, 2006). 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:

- a) assuming a markedly economic nature, awakening interest in the business market, having been subject to a strong liberalizing impulse;
- b) they are essential to the life of citizens, to their well-being and to their proper subsistence, which determines the presence, more or less visible, of the State to ensure that their provision is ensured under the adequate conditions;
- c) being strongly influenced by the technological evolution, and this should be put at the service of developing better conditions of access to the goods and services in presence;

- d) being sectors where the companies that provide services have a large dimension and economic power, highlighting the need to ensure an efficient safeguard of the rights of citizens who use them (Costa, 2005-a).

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, that of a state or private monopoly under an 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 find that the market evolves to an oligopoly, and there it crystallizes. Conscious of this risk, the Green Paper on SGEI 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 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 if its application renders the fulfillment of the universal service or general interest obligations in question too expensive, difficult or inefficient. (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). It is true that, since the beginning of the 21st century, the EU has taken the political decision to liberalize the SGEI sectors. Several 2000, 2001 and 2003 Directives have imposed liberalization of the electricity, gas, telecommunications and other SGEIs. Even so, 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. However, its designation has always been, and still is, the subject of some doctrinal controversy in the European Union, so it seems useless to fuel controversy when the key is to find what unites the European peoples. In short, the idea of general economic interest, whether externalized by the concept of "public service" or by close concepts, or "idées voisines", "public utilities" or "service of general interest", is always present and this is where the conceptual heritage common to all Member States of the European Union resides. We can say that the concept of SGEI corresponds to a meeting point, a common denominator, between two slightly different perspectives on the subject (French and Anglo Saxon) that allowed overcoming the conceptual differences around the theme.

3. OPPORTUNITIES AND RISKS OF FREE COMPETITION IN SGEI

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 (Shreuer, 2010). 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, etc (Anjos & Mimoso, 2018). 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 diplomas regarding the different Member States which implement them. In the case of bilateral treaties or foreign investment contracts, Host States 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 (Chossudovsky, 2003). The more important aspects to be ensured by regulators in this area are:

- a) Ensure the competitive behavior of enterprises, equal opportunities for economic operators and favor small and medium-sized enterprises;
- b) Defend the interests of SGEI citizens by liberalizing markets;
- c) Ensure universal access to these SGEIs, by all its population, since we are talking about fundamental social rights;
- d) Avoid the partitioning of markets and their possible "cartelization";
- e) Prevent market enlargement from strengthening the domain of those who are strong enough to control and define the essential elements of the market, to the detriment of its users (Costa, 2005-b).

The idea of general interest, whether expressed by the concept of "public service", or through close concepts, or "idées voisines", "public utilities" or "service of general interest", is always present. As we see it, 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 (Bohoslavsky, 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 (Anjos, 2016). 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 (Nunes, 2015). The universal service guarantee includes a set of obligations that service providers are obliged 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 (Feeny, 2009; Jacob, 2010). In our opinion, these are real fundamental rights of a social nature, rights of citizenship, which must be defended and protected.

4. THE RELEVANT MARKET: OLIGOPOLY AND CARTELIZATION OF THE MARKET

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 (Costa, 2005-b). Therefore, market liberalization requires some intervention by the State to ensure the effective fulfillment of the public service obligations that these SGEI perform. 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 (Kaushal, 2009). 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 (Soria, 2015). 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 promising, as there is no doubt that the governments of these countries that need foreign investment 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 (Pérez, 2016). 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. The question that has been posed is: who does effectively regulate? The regulator or the regulated?

We believe that without fair and honest politics, the risk of capturing the governments of these host countries by the large investment firms is very real. So, the risk of the regulated impose the rules (regulation) it wants is enormous.

5. SGEI REGULATION: RISKS AND OPPORTUNITIES

As mentioned in section 3, in these sectors foreign investment poses some risks but also potentiates some opportunities. 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 (Feeny, 2009; Jacob, 2010). The risk of impoverishment of the middle classes has been evident in the EU countries (CE, 2011), with the exception of the Nordic countries, and a little around the world, especially after the crisis of 2008 and 2011.

6. CONCLUSION: THE NEED TO PROTECT THE FUNDAMENTAL RIGHTS OF THE SGEI'S CITIZENS USERS

It's possible to conclude that the basis for the concept of general economic interest is to defend the fundamental rights of European 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 European construction, achieving a fair balance between the market and the general interest of citizens of the European countries. Liberalization, in theoretical and purely abstract terms, can potentiate an advantage for the consumer... In the case of the SGEI, the relevant market tends to be monopolistic. As follows, liberalization results in the end of a monopoly and the creation of an oligopoly.

Oligopoly, by its very nature, is a catching market: the capture of consumers, the capture of governments and regulators, resulting in widespread capture of the market, definition of a general framework of rights and guarantees for SGEI citizens, systematized in part from the collection of the sectoral Directives applicable to SGEI. 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, namely:

- a) Guarantee of the universal service, concretized in the prediction of specific rights and duties;
- b) Guarantee of legal protection of the citizen users, materialized in the prediction of a set of procedural instruments adequate to safeguard the rights of citizens;
- c) Right of access and provision to these services;
- d) Right to be informed of market conditions and the transparency of the rules in force;
- e) Right to quality of the service;
- f) Right to change service providers without penalties for minimum contracting periods;
- g) Right to regularity and continuity of supplies;
- h) The right to transparency and fairness in the fixing of prices and tariffs and a detailed and enlightening billing;
- i) Ensuring the adaptation to technological progress;
- j) Protection of fundamental rights of privacy, freedom and other rights of personality, when they might be jeopardized by the use of these services, including the automatic barring of value-added services;
- k) Introduction of guarantees regarding the definition of the type of draft contracts proposed for the provision of services, namely through the figure of an Ombudsman of the Citizen-User;
- l) Establishment of special guarantees for the provision of these services to vulnerable users, person with disabilities or inhabitants of disadvantaged areas;
- m) Consecration of reinforced guarantees in the case of verification of some condition justifying the suspension of service provision, introducing alternatives that may avoid the interruption or suspension of the supply;
- n) Establishment of a set of procedural safeguards for users, namely, the introduction of mechanisms for complaints and appeals as well as rules of fair burden of proof, which affect, as a rule, the service provider;
- o) Introduction of simple mechanisms, using new technologies, for the presentation of complaints and resources, in a simple and accessible way to the user, in drafts or pre-defined forms, promoting informal but effective access to the exercise of the rights in person;
- p) Creation of alternative dispute resolution bodies in a swift, specialized and affordable manner, favoring the use of arbitration;
- q) Attribution of real competences and powers to these bodies to adjudicate disputes, to condemn in practice acts necessary for the effective recognition of users' rights, to impose fines or other penalties in case of repeated non-compliance, and also to cancel or withdraw authorizations and operating licenses from non-compliant enterprises;
- r) Consecration of short and imposing time limits for the decision of complaints and appeals presented by citizens.

The guarantee of the right of access to SGEI often imposes universal service obligations, as designated by the sectoral Directives, to clarify that their implementation, although costly, must be provided by the service providers. If the burden of complying with these obligations is excessive in relation to the financial resources generated by certain market segments, then the exception in Article 106 (2) TFEU can be triggered, granting exclusive rights to the provider as

a way of ensuring that the principle of universal service is followed. Their decisions or acts should be publicized to avoid lack of transparency; on the other hand this "media coverage" guarantees a suffrage by the public opinion that seems very important to us. It isn't enough to regulate. It isn't enough to consecrate rights and guarantees to citizens-users. One and other are worthy initiatives but may not be more than an illusion. In order to them to become really effective, they must be accompanied by a conflict resolution system, both affordable and prompt. Thus, in order to the access to justice to be an effective reality, it's necessary to create arbitration bodies that can function in a timely manner and that are truly accessible to the citizen. The great future challenge in SGEI is, therefore, the strengthening of the fundamental rights and guarantees of user citizens, which are increasingly necessary to safeguard of citizenship rights within the European Union.

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