CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
November 2015 (1)

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I. INTRODUCTION

EU law does not provide a definition of Services of General Economic Interest ("SGEI");[2] simply, it gives a wide discretion in the introduction of these services and their performance to the Member States. But this does not mean that every service can be regarded as SGEI; such status can be given only to those services which are indispensable for every member of society. Moreover, such services need to be supported by the state because of the market failure in their provision. Simply put, companies would not deliver such services to every interested citizen because they would be unprofitable. When the market is unable to provide society with essential needs there is a place for state intervention in the form of SGEI.

The concept of SGEI is very misty. It gives a lot of room for interpreting which service can be regarded as a SGEI. The European Commission states that Member States are, in general, free to define such services.[3] However, the Court of Justice of the EU ("CJEU") has stated that Member States are not unlimited in their recognition of SGEI and that they cannot do it in an arbitrary manner.[4] In several judgments, the CJEU has pointed out that the classification of a service as a SGEI by a Member State may be challenged by the European Commission in the event of manifest error. In another judgment, the Court has stated that such services relate primarily to an individual Member State.[5] It means that recognition of a SGEI may differ from one Member State to another.

The telecommunication sector is one of the sectors of economy in which SGEI can be provided. But because there is no clear guidance which services in this sector can be regarded as a SGEI per European court judgments a Commission decision is needed. The aim of the article is to answer which telecommunication services can be classified as a SGEI, and if it is possible to find common elements of such services.

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[2] "Services of general economic interest are economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention" (as described by the European Commission at http://ec.europa.eu/competition/state_aid/overview/public_services_en.html).

[3] European Commission, Green paper on services of general interest, COM(2003) 270 final.

[4] Case T-442/03, SIC v. Commission [2008] ECR II-1161, ¶ 195; T-289/03 BUPA and others v Commission,]2008] ECR II-8, ¶ 166; T-17/02 Fred Olsen, SA v Commission [2005] ECR II-02031, ¶ 216.

[5] Case C-159/94 Commission v France [1997] ECR I-5815, ¶ 56.

II. SGEI AND UNIVERSAL SERVICES IN THE TELECOMMUNICATIONS SECTOR

First we need to draw a clear distinction between universal services and SGEI. The concept of universal services comes from the European Union. The European lawmaker decides which services are so basic and needed by society that they should be provided in every Member State. So it is up to the European legislator to decide which services are universal services.

SGEI are services which are defined by an individual Member State, and they can cover the whole territory in any given Member State or even part of it. They are introduced by an act of public authority—e.g. an administrative decision, normative act, or agreement.[6] The proper assignment of a SGEI label is only possible when an exemption of applicable competition rules to undertakings providing that SGEI is necessary. Moreover, there must not be any infringement of the development of trade to an extent contrary to the interests of the European Union.

It can be said that SGEIs are defined locally by every Member State while universal services are defined for the whole European Union. The second difference is that universal services are defined in directives while SGEIs are defined by different public acts of Member States. Only in case of a SGEI is it necessary to fulfil the conditions set by European lawmaker. Many authors claim that those terms are used interchangeably, which is clearly misleading. Neergaard states that universal services express the interests of the European Union, while SGEIs express the interests of particular Member States.[7]

In the telecommunications sector there are plenty of directives introducing universal services. One of the first directives was Directive 98/10/EC of 26 February 1998 on the application of open network provision ("ONP") to voice telephony and on universal service for telecommunications in a competitive environment.[8] This Directive required Member States to ensure the availability of telecommunications services for all users in their territory irrespective of geographical location. The Directive required affordability of these services to be assured, especially for such user groups as the elderly, people with disabilities, and people with special social needs. Their provision had to be guaranteed throughout the territory of the Member States for every user at an affordable price.

Directive 2002/22/EC of 2002 on universal service and users' rights relating to electronic communications networks and services[9] recognized as universal services (i) access to fixed networks, (ii) directory inquiry services, (iii) public directories, and (iv) public pay telephones. Moreover, Member States were obliged to designate companies to provide universal services. This directive was later amended by Directive 2009/136/EC amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, and Regulation (EC) No 2006/2004 concerning cooperation between national authorities responsible for the enforcement of consumer

[6] Case C-475/99 Firma Ambulanz Glöckner v Landkreis Südwestpfalz, ECR [2001], p. I-8089.

[7] THE SERVICES DIRECTIVE, CONSEQUENCES FOR THE WELFARE STATE IN THE EUROPEAN SOCIAL MODEL, 73 (U. Neergaard, R. Nielsen, & R.M. Roseberg, eds. 2008).

[8] OJ L 101/47, 01.04.1998.

[9] Universal Service Directive; OJ L 108/77, 24.04.2002.

protection laws.[10] New provisions broadened the scope of universal services in telecommunications, including connections (supporting voice, facsimile, and data communications at data rates that are sufficient to permit functional internet access); providing public pay telephones and other public voice telephony access points; telephone directory inquiry services; and emergency services.

III. CASE LAW ON SGEI IN THE TELECOMMUNICATION SECTOR

One of the first cases concerning the SGEI and the telecommunication sector was *British Telecom*.[11] In that case the CJEU stated that British Telecom had a statutory monopoly on running the telecommunications network and was obliged to ensure phone and telex connections. Moreover, British Telecom had imposed schemes by which it specified charges and conditions of usage of the network. In one such scheme British Telecom limited the services of private message-forwarding agencies. In this case the CJEU did not agree that British Telecom, as a monopolist, had abused its powers in order to limit competition.

It can be said that the running of a public telecommunication network is more important that the existence of competition which can provide services at lower prices. In this case we can see that the Court had divided services into two categories. The first category, which was considered as a SGEI, consisted of running a telecommunications network. The second category were services which were not standard at the time. In order to protect the proper provision of a SGEI this second category of services could be sacrificed. Why? Because such "premium" services allow for extra revenue, and they give greater profits. But such profits should be used in order to guarantee the provision of a SGEI.

In *British Telecom*, there is only one conclusion. At that time, such services like telex were relatively new, and by limiting competitors from providing them technological progress was also limited. Once more, then, it can be concluded that the provision of a SGEI was the most important task and other values such as competition or technological progress were simply less important.

The second case which concerned operating a public telephone network was the *RTT* case.[12] In this case two findings about SGEI in the telecommunication sector were made. First, the CJEU found that operating a public telephone network, which is available for all users, is a SGEI. However, the Court also found that excluding competition rules in the marketing of telephone devices could not be justified by the provision of a SGEI within the meaning of Art. 106 (2) TFEU—the production and sale of such devices should be freely available for other companies. However, in order to ensure the safety of users and protect the safety of operators of public networks against damages, required compliance with technical specifications of such equipment can be required.

This position was also expressed by the Court in the case of *France v European Commission*.[13] Here the Court found that assigning a single company, which sells a certain type

[10] OJ L 337/11, 18.12.2009.
[11] Case 41/83 Italy v Commission [1985] ECR 873.
[12] Case C-18/88 RTT v GB-Inno-BM [1985] ECR 873.
[13] Case C-202/88 France v Commission "Telecommunications terminals," [1991] ECR I-1223, ¶ 51.

of equipment, the right to determine the technical specifications of that equipment and mandating the use of those specifications puts that company in an advantageous position against competitors. It emphasized that the exclusion or restriction of competition was not justified by performing a public service. Such measures limit not only competition but also limit consumers' choices when buying products. Such rights also limit the choice of technology provided on the market, because it is doubtful that the holder of exclusive rights would offer as wide a range of equipment as would be produced by different companies.

The Court found that this market failure is the key factor to take into account when introducing a SGEI, but other factors have to also be taken into account. It can be even argued that in this case the Court used a test of proportionality and considered what was essential for the provision of SGEI. It put on the scales SGEI and intra-Community trade and checked which one was more important.

In these two cases we can see that there is always tension between providing SGEI and expanding monopolies. In accordance with Art. 106 (2) TFEU undertakings providing SGEI are subject to the rules contained in the Treaties insofar as the application of those rules does not constitute legal or factual obstacles to the provision of such services. This means that every SGEI must be in accordance with the rule of proportionality. According to Sierra's analysis of the principle of proportionality, this presupposes a very strict interpretation thereof. The SGEIs will be allowed only those restrictions that are necessary to meet the objectives of SGEI.

This leads to the conclusion that if the provision of those services is possible by means of other, less restrictive means it cannot use the exclusion contained in Art. 106 (2) TFEU.[14] We can see that in the *RTT* case the Court found that a provision of SGEI was not enough to limit the market for telecommunications equipment. Such limitation would be justified, however, if e.g. profits from such a market were necessary to cover losses connected with the provision of SGEI.

In recent years the European Commission has considered whether operating a high-speed broadband network constitutes an SGEI. In the *Colt Telecom* case, the French government recognized as a SGEI the operation of a high-speed broadband network in an area close to Paris. The area in which this service operated was very wealthy, and was also covered by other networks. In that case the SGEI was not the only service provided; there were already available services which enabled access to the internet.

This latter factor was crucial for CJEU. The Court underlined that market failure is a necessary element for classification as a SGEI. The court stated also that such services must be universal and compulsory in their nature. High-speed connectivity can be regarded as a SGEI only if the whole population is covered.[15] This case shows the problem of overlapping an SGEI with similar services that are already on the market. The problem would be easy if broadband networks did not cover all areas. In such a situation the Member State could introduce an SGEI in order to fill the gaps in the coverage.

[14] J. BUENDIA SIERRA, EXCLUSIVE RIGHTS AND STATE MONOPOLIES UNDER EC LAW ARTICLE 86 (FORMER ARTICLE 90) OF THE EC TREATY, 304 (2000).

[15] Case T-79/10 *R* COLT Télécommunication France v Commission [2010] ECR II-00107.

But in the *Colt Telecom* case there is one more issue to discuss. It can be agreed that access to the internet is so essential that every member of society should have access and thus such access can qualify as a SGEI. Broadband networks enable high-speed access to internet connections and could be regarded as a way of providing a SGEI—even high-speed internet can be regarded as SGEI. There is no clear answer as to which of this two services could be classified as a SGEI. If we consider the technology in proving an SGEI in the *Colt Telecom* case, it must be observed that there were other operators that already provided similar services.

But we have to keep in mind that SGEI is a very dynamic concept and it changes over time. It can be argued that nowadays access to high-speed internet connections is essential for a given society. But such finding should be made based on actual needs of society. In the European Commission's Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband it is stated that, in metropolitan areas in general, such services exist, and there is no need for a SGEI.[16]

These guidelines provide two examples of cases concerning SGEI and broadband connections in metropolitan areas. In the first case, described more fully below, the Commission refused to classify as a SGEI the roll-out and operation of Metropolitan Area Networks ("MANs"), which were introduced in Ireland.[17] The Commission found this initiative to be a private-public-partnership, which was business-oriented. In the second case, the Commission found that broadband services were provided only for business parks and public sector organizations, excluding sectors that were inhabited by citizens.[18]

A very different view on broadband services was made in the *Limusin* case. This case concerned providing such services in rural and remote areas. The Commission found that providing broadband services in such areas classified as a SGEI. This finding was made on the basis that there was a market failure in not providing services to these areas—and that broadband services were essential for society.[19] This finding was supported in the Community Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks. Broadband deployment can be classified as a SGEI, especially in the case of rural and underserved areas where there are hardly any providers.[20]

Another case concerning SGEI in providing broadband network was *Pyrénées-Atlantiques*, which concerned granting a 20-year public service concession providing broadband services to cover the entire Pyrénées-Atlantiques region of France. The Commission had no doubts that such a service consisted a SGEI. It underlined that concessions were required to build a network infrastructure that was open for every other network operator and available for every end user, even though France Telecom's services partly covered that region. Again it was

[16] OJ C25, 26.01.2013, p.1.

[17] European Commission decision No 284/2005-Ireland, C(2006)436 final.

[18] European Commission decision No 890/2006 – France, "Aide du Sicoval pour un réseau de très haut debit," C(2007) 3235 final.

[19] C. KOENIG, EC COMPETITION AND TELECOMMUNICATIONS LAW (2009).

[20] European Commission, Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, OJ C 235/7, 30 September 2009.

confirmed that services can be classified as SGEIs in situations where is there is a market failure in providing such services.[21]

In the *Deutsche Telekom* case the CJEU stated that a telecommunications company that is preforming SGEI can abuse its dominant position by margin squeezing, and charging its competitors prices that are higher that prices offered to end-users is incompatible with Treaty rules. The Court found that there was no justification for Deutsche Telekom to do so and such pricing practices were not connected with assigning a SGEI status to this company.[22] The Court found that such a practice was a form of abuse of dominant position that aimed at limiting competitors.

It has to be underlined that SGEI is a form of public intervention on the market, which aim is to guarantee the provision of specific services. This means that there is no possibility of creating public-private partnerships or other forms in which public bodies participate in providing this service. An example from the telecommunication sectors is the *MAN* case, which concerned building a high-speed broadband infrastructure in Ireland in over 120 towns where there was no such infrastructure.[23]

The Commission found that in this case there was a public-private partnership entrusted with providing a SGEI.[24] There were also more elements missing that were needed to classify the MAN project as a SGEI. First, there was no obligation to provide services to citizens. The project assumed that public bodies would choose an infrastructure operator to offer services to telecommunication companies. This meant that the project was business-oriented and no obligations were designed for citizens. In the cases mentioned above there was a clear public mission for the SGEI, but in this case it was just a business, which helped provide telecommunications services to those areas which were cut off.

IV. CONCLUSIONS

In the telecommunications sector there are plenty of universal services defined by the European lawmaker. But it does not mean that there is no place for a SGEI. As mentioned above, universal services are introduced in every Member State while SGEIs can be introduced only in one Member State or even in part of it. This means that a SGEI can reflect those needs of a given local community that are different from those in other parts of the European Union. Technological progress results in telecommunication services that are recognized as premium in one area, while in another area the same service is a standard that is needed by everyone. Such needs can be reflected by a SGEI but it has to be underlined that a SGEI must be provided for every citizen interested in these services.

In many cases the CJEU or European Commission found that it was right to classify as a SGEI the operation of a public telecommunication network but in some cases it challenged certain special or exclusive rights that were given to the companies performing the SGEI. Very often the CJEU has to determine what values can be sacrificed in order to guarantee the

[21] Case N 381 / 2004 - Haut débit en Pyrénées-Atlantiques - France.
[22] Case T-271/03 Deutsche Telekom AG [2008] ECR II–477.
[23] Commission Decision 284/2005.
[24] Koenig, *supra* note 18.

provision of SGEI; for example, in many cases it has clearly recognized that the sale of telecommunication equipment cannot be recognized as SGEI. This means that a SGEI cannot be provided at any cost and that competition limitations have to be proportionate.