NOT FINAL VERSION!!!

EU STATE AID RULES IN THE AREA OF SERVICES OF GENERAL INTERESTS: AN ANALYSIS FROM CITIZENS' PERSPECTIVE

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Abstract

The right to have access to public services (in EU terminology 'services of general interests', SGIs and 'services of general economic interests', SGEIs) is of crucial importance for every citizen. It has been also confirmed by the Charter of Fundamental Rights of the European Union. Due to the evolution of the legal framework in this area, the EU is an important supranational actor in the regulation of such services today, even for those provided at the local level. The paper aims to highlight the challenges of application of those EU law rules which directly or indirectly concern public service provision in the Member States. In doing so, it also considers the possible ways as citizens (consumers of SGIs) may be involved to influence the content of these rules.

The analysis focuses, in particular, on the development of the European Union's state aid regime in this area. EU state aid rules come into play when SGIs are regarded as an economic activity on the market and are (wholly or partially) financed through public resources. Such compensation measures are also subject to the European Commission's legal acts and policy documents adopted as part of its 2005 and 2012 SGEI packages. Based on the Commission's legislation, the paper also highlights the conditions under which public service compensation does not constitute state aid under the exceptional circumstances created by the COVID-19 outbreak.

We argue that, despite the fact that the effective allocation of state resources has a fundamental importance in responding to pressing public concerns about the quality and accessibility of SGIs, citizens have a limited and rather indirect role, both at the national and the EU level, in influencing policies and decision-making processes for regulating state aids for public service provision. The practice of the EU institutions (Commission and the Court of Justice of the European Union, CJEU) and national reports also show that there are severe challenges when applying and enforcing EU state aid rules relevant to SGIs/SGEIs. Problems may rightly be derived from the terminology itself since there is a quite unclear borderline between the respective terms (like economic activities and non-economic activities). In this context, a particular emphasis is laid to the role and degree of discretionary powers left to national authorities in defining the underlying concepts and measures needed to take to fulfil the Member States' public service obligations. We can see that national competence is quite broad in this respect and has even been extended by the Commission's recent legislative acts and practice related to state aid measures taken in the context of the COVID-19 crisis. These factors may also influence (directly or indirectly) the conditions for access to SGI's provided in the EU Member States – often not towards better serving citizens' needs and interests.

The paper is based on comparative policy investigations and analysis of the European legal framework including the practice of the Commission and the case-law of the CJEU. The analysis is also built on national SGI reports, as well as on the results of a consultation process, initiated and closed by the Commission in 2019, which aimed at collecting evidence and views from citizens and stakeholders in order to assess the effectiveness of the 2012 SGEI package with regard to health and social services. These findings will be also assessed in light of the results of Eurobarometer surveys measuring citizens' satisfaction in particular sectors (like health services).

Points for Practitioners

The paper may contribute to highlight the practical challenges of effective application and enforcement of EU rules in the field of services of general interests.

Key words
Services of general interest, State aid, Citizen's involvement, COVID-19 crises

1. Introduction

The right to have access to public services (in EU terminology 'services of general interests', SGIs and 'services of general economic interests', SGEIs) is of crucial importance for every citizen. It has been also confirmed by

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the Charter of Fundamental Rights of the European Union. Due to the evolution of the legal framework in this area, the EU is an important supranational actor in the regulation of such services today, even for those provided at the local level. The paper aims to highlight the challenges of application of those EU law rules which directly or indirectly concern public service provision in the Member States. In doing so, it also considers the possible ways as citizens (consumers of SGIs) may be involved to influence the content of these rules.
The analysis focuses, in particular, on the development of the European Union's state aid regime in this area. EU state aid rules come into play when SGIs are regarded as an economic activity on the market and are (wholly or partially) financed through public resources. Such compensation measures are also subject to the European Commission's legal acts and policy documents adopted as part of its 2005 and 2012 SGEI packages. Based on the Commission's legislation, the paper also highlights the conditions under which public service compensation does not constitute state aid under the exceptional circumstances created by the COVID-19 outbreak.
It is a widely accepted argument that citizens' perceptions are important because the provision of fundamental services is at stake and because they constitute the infrastructure necessary for social and economic development. Citizens' 'voice' can, therefore, be known, analyzed and used in the design of improved policy on public services along with other indicators (Clifton – D´Iaz-Fuentes).
We argue that, despite the fact that the effective allocation of state resources has a fundamental importance in responding to pressing public concerns about the quality and accessibility of SGIs, citizens have a limited and rather indirect role, both at the national and the EU level, in influencing policies and decision-making processes for regulating state aids for public service provision. The practice of the EU institutions (Commission and the Court of Justice of the European Union, CJEU) and national reports also show that there are severe challenges when applying and enforcing EU state aid rules relevant to SGIs/SGEIs. Problems may rightly be derived from the terminology itself since there is a quite unclear borderline between the respective terms (like economic activities and non-economic activities). In this context, a particular emphasis is laid to the role and degree of discretionary powers left to national authorities in defining the underlying concepts and measures needed to take to fulfil the Member States' public service obligations. We can see that national competence is quite broad in this respect and has even been extended by the Commission's recent legislative acts and practice related to state aid measures taken in the context of the COVID-19 crisis. These factors may also influence (directly or indirectly) the conditions for access to SGI's provided in the EU Member States – often not towards better serving citizens' needs and interests.

2. Methodology

The paper is based on comparative policy investigations and analysis of the European legal framework including the practice of the Commission and the case-law of the CJEU. The analysis is also built on national SGI reports, as well as on the results of a consultation process, initiated and closed by the Commission in 2019, which aimed at collecting evidence and views from citizens and stakeholders in order to assess the effectiveness of the 2012 SGEI package with regard to health and social services. These findings will be also assessed in light of the results of Eurobarometer surveys measuring citizens' satisfaction in particular sectors (like health services).

3. Conceptual background

The EU terminology is based on the categories of Services of General Economic Interest (SGEI), Services of General Interest (SGI), and Services of Social General Interest (SSGI) recently, together with emergence of the 'European Social Model' (European Commission 2006). The former (SGEI) is used in primary law texts, without being defined in the Treaty or in secondary legislation. However, in the case-law of the European Court of Justice (hereinafter ECJ) and EU Commission practice there is a broad agreement that SGEI refers to services of an economic nature, with the Member States or the EU being subject to specific public service obligations (PSO) as compared to other economic activities by virtue of a general interest criterion.[2] The term SGI, the closest EU law equivalent to the traditional notion of public services (Sauter 2014, 17), is also derived from the practice. It is broader than SGEI and covers both market and non-market services which the public authorities classify as being of general interest and subject to specific public service obligations (Bauby and Similie, 2016a).
As a general rule, EU internal market and competition provisions apply to services of general economic interest as well, save where they fall under specific regulations or exceptional clauses of the EU Treaties, only non-market services[3] are exempted from these rules. In this section, we will briefly outline the legal fundamentals relevant to SGIs including those provisions escaping them from the generally applicable market rules. In doing so, those EU law obligations of the Member States will be highlighted which may indicate conflict with their interest and traditional functions to provide and finance public services (SGIs).

[2] See in particular the definition given by the ECJ in its judgments in cases C-179/90 *Merciconvenzionaliporto di Genova*, ECLI:EU:C:1991:464 and C-242/95 *GT-Link*, ECLI:EU:C:1997:376.
[3] Mainly SSGI-s but the term 'non-market services' (NSGEIs) does not cover completely the former category.

4. Legal context

Article 106(1) TFEU states that public undertakings and those entrusted with special or exclusive rights are not exempted from EU competition rules. Article 106(2), however, lays down a derogatory regime for services of general economic interest (Bauby and Similie, 2016b), providing that these undertakings are subject to EU competition law provisions (that is Articles 101, 102 and 107 TFEU) only in so far as the application of such provisions does not obstruct the performance of their particular public service obligation. As regards its legal implication, Article 106(2) TFEU has been determined by the ECJ as "In allowing [...] derogations from the general rules of the Treaty, Article [106(2) TFEU] seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and preservation of the unity of the common market."[4]

Most cases concerning the EU competition rules and public services have been examined in the context of dominance abuse (Article 102 TFEU) and state aid (Article 107 TFEU) rules (Sauter 2014, 75).

Prohibition of State aids having distortive effect on the operation of the internal market is among the fundamental rules of the European integration. It is as old as the integration itself; State aid provisions formed part of the European Coal and Steel Community Treaty in 1952, and the current provisions in the TFEU are essentially the same as those in the 1957 Treaty of Rome (Peretz–Bacon 2016). As a main rule, Article 107(1) of the Treaty on Functioning of the European Union provides that "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market". Article 107 (2) and (3) provides exceptions to the general prohibition by defining categories of acts that are or can be regarded as compatible with the internal market, further detailed rules on exemptions are laid down in secondary legislation of the European Union.

In the case of SGEI, however, public service obligation compensation (that is where the State pays aid to undertakings as a compensation for fulfilment of PSOs), under certain conditions,[5] does not qualify as state aid. In addition, non-economic SGI a priori fall outside the scope of Article 107 TFEU, since state aid rules only extend to services that qualify as economic activities (Sauter 2014, 76). Finally, Article 93 TFEU is a sector-specific provision with regard to state aid for transport which expressly excludes 'reimbursement for the discharge of certain obligations inherent in the concept of public service' from the category of illegal aid under Article 107(1) TFEU.

5. The Europaization of Services of general interest

The "Europeanization of public services"[6] started only in the mid-eighties with the entry into force of the Single European Act. The SEA, together with the Commission's white paper on reforming the common market, set the objective of the creation of a single market by 31 December 1992. As the national markets in transport and energy have become integrated with this conception, public service obligations have been obstacles to market creation (Opinion of AG Colomer in case C-265/08 *Federutility*; Prosser 2005, 121). Thus, the process engaged by the SEA and confirmed by the Maastricht Treaty of 1993 led to a progressive liberalisation, sector by sector (Bauby and Similie, 2016b).

5.1. From 'citizens' to 'consumers'

In EU consumer law documents [see for instance Directive 1999/44/EC, Art. 1(2)(a)] the 'consumer' is generally defined as a private, human person who purchases goods or services for purposes outside their trade, business or profession. Therefore, at the very beginning stage of the European integration, the 'consumer' has fallen outside the realm of SGI regulation, since these sectors (telecommunications, railways, postal services, electricity and gas) were traditionally operated under the ownership, control or strong oversight of the state and public bodies (Johnston 2016, 93). It means that there was a quite clear distinction between 'citizens' as recipients of public services and consumers as equivalent category in other sectors operating under normal market rules.

Such a distinction is a logical consequence of the fact that, before the adoption of the Single European Act (SEA) of 1986, the matter of public service provision was not at the heart of the European integration process. In line with the principle of subsidiarity under Article 5 of the Treaty of European Union (hereinafter TEU), a

[4] (Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 12, and CaseC-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 39, Case C-67/96 Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie [1999] ECR I-5751, para. 103; Case C-265/08 Federutility et al. v. Autorità per lénergia elettrica e il gas [2010] ECR I-3377, para. 28.).

[5] Judgment of the ECJ in case C-280/00 *Altmark Trans,* ECLI:EU:C:2003:415, paras 89-93.

[6] Term borrowed from Bauby & Similie (2016a, 27).

consensus has been reached between the Member States that each country has the competence to organize and finance its basic public services (Bauby 2014, 99). It was based on the general idea to balance the EU interest in the free market with the national public interests, which means that public enterprises, state monopolies, special and exclusive rights as well as SGIs are compatible with EU law to the extent that they involve proportionate restraints with regard to the internal market and competition rules (Sauter 2014, 20–21 and 41). This early economic compromise has been expressed in certain (and still existing) provisions dating back to the original Rome Treaty of 1957 (currently Articles 37, 93, 106 and 345 of the Treaty on Functioning of the European Union, hereinafter TFEU), as guarantees for safeguarding the interests linked to the provision of public services.

The opening of SGI markets also brought certain benefits for consumers. The introduction of competition has enabled them to change their supplier in search of better prices and/or higher quality in service provision, and thus it improved the consumer's bargaining position vis-à-vis businesses due to the possibility of shifting to another provider (Nihoul 2009; Johnston 2016). As a result, companies were pushed to perform better on price, quality of services, granting access to information, management of consumer claims etc. (Nihoul 2009; Johnston 2016).

At the same time, the benefits of the introduction of competition do not resolve any problems related to consumer protection. As was emphasised by Nihoul and Johnston, companies faced with new competitive pressures to attract revenues to survive (even extending their activities to illegal behaviour), even at the expense of treating consumers better (Nihoul 2009; Johnston 2016). EU sector regulations were primarily based on the idea of leaving the task of safeguarding consumer interest on independent national regulatory authorities (NRAs). This effort was only partly successful as the analysis below shows.

5.2. The role of regulatory authorities in consumer protection

As was already mentioned, the regulatory functions assigned to NRAs encompasses the safeguard of consumer interests against unwanted consequences of liberalization. The first experiences with the operation of NRAs were similar in each of the three sectors: the responsibilities and tasks of the national regulatory authorities differed significantly between the Member States and national (governmental) influences on decisions of NRAs could not be excluded.[7] Therefore, NRAs could not deliver the consistent regulatory practices that were demanded by market players and consumers (EC 2006). EU decision-makers opted for enhancing the duties and powers of NRAs, with the aim of ensuring consumers' interests and the protection of their rights, as well as promoting effective competition (Bordás 2019; Bordás 2020; Johnston 2016; Lovas 2020b). Parallelly, EU regulatory entities have been established for the coordination of the work of NRAs in each sector [Body of European Regulators for Electronic Communications (BEREC), European Regulators Group for Postal Services (ERGP), European Union Agency for the Cooperation of Energy Regulators (ACER)], in the hope of ensuring a more consistent regulatory practice throughout the EU (Bordás 2019; Bordás 2020; Lovas 2020b). Although these entities played an important role in enhancing coordination and cooperation among NRAs, the results of their activities were limited. Divergencies in practices of NRAs and ensuring their independency from national governments still remained challenges that could not be completely solved.[8]

5.3. Changes in the 'EU SGI Policy'

There is a common tendency in all SGEI sectors that consumer rights have been extended by each 'generation' of the legislative packages. It is not independent from the process started in the late nineties that, although market opening and access remained a central policy objective, a stronger emphasis was being given to other priorities. It has been clearly expressed by the first Commission Communication on services of general interest of 1996, which laid a particular emphasis on the social elements of public services as well as the limits of market forces (Prosser 2005, 156). Then, the Treaty of Amsterdam has been amended by a new Article 16 of the Treaty of European Community (TEC) which reinforced the constitutional importance of the role and protection of SGEIs and therefore can be seen as a confirmation of the Member States' traditional prerogatives and discretionary power in the organization of such services (Rusche 2013, 102; Schweitzer 2011, 55). This approach was also confirmed by the adoption of the Charter of Fundamental Rights of the EU (in 2001) including a separate provision (Article 36) on the right to access to SGEIs. The amendments brought by the Lisbon Treaty (ex-Article 16 TEC, now Article 14 TFEU and Protocol No. 26 on SGIs) placed an even higher emphasis on national and local interests and Member States' competence in the organization of such services. Such a change in the approach towards SGIs shed new light on the position of consumers as recipients of public services, as was reflected by sector regulations analysed in Chapter 3 above. At the same time, consumer

[7] For more on these difficulties see EC 2006; Bordás, 2019 (electronic communication); EC 2015; Bordás, 2020 (postal sector); Lovas, 2020b (energy sector)

[8] Of course, the challenges are specific in each sectors and the degree of the problem varies country by country.

protection became one of the ‘good reasons’ for ‘a high tolerance for public service obligations’ and thereby the maintenance and even extension of national regulatory competences in this field.

The process of Europeanisation of SGEI and the 'paradigm shift' outlined above in the context of the Treaty provisions was also manifested in the case-law of the ECJ and largely influenced the Commission's legislation (including soft law) and practice from the mid-2000s. In 2001 the Court reversed its former position[9] and established that the discharge of PSO is not covered by Article 107(1) TFEU where it merely compensates the provider of a public service mission for the costs that arise due to the performance of the PSO.[10] In its *Altmark* decision of 2003 the ECJ confirmed that principle and determined four cumulative criteria which have to be met for not qualifying public service compensation as state aid.[11]

By declaring this kind of financial compensation out of the realm of state aid concept, the ECJ, in essence, significantly reduced the monitoring and decision-making competence of the Commission over national measures granting compensation for public services (Bauby and Similie, 2016b), as the judgment allows for a self-assessment by Member States of that issue. This means in fact, that Member States were left relatively free under the criteria defined by the *Altmark* judgment. In particular, the fourth condition (the option of using a benchmark as an alternative for a tendering procedure in order to ensure efficiency) leaves wide room for Member States discretion. Such an outcome of the judgment clearly follows from the paradigm shift in the constitutional framework above mentioned whereby the EU leaves the Member States free to organise the SGEI markets themselves (Vedder and Holwerda 2013, 66).

After delivering the Altmark judgment, the Commission's legislative activity (in particular the 'Monti-Kroes' package in force between 2005 and 2013, the Almunia package in force since 2013, and the latest State Aid Notice of 2016) gradually extended the scope of those Member States' measures granted to finance public services which are not covered by the prohibition of Article 107(1) TFEU.[12]

This change in the Commission's attitude should not be seen as isolated from the financial and economic environment that time. After the wake of the global financial and economic crises of 2008, the Commission has assessed, within one year, over 100 national schemes or measures to support financial institutions under EU state aid rules (Lowe 2009, 3). The Commission also adopted communications[13] and regulations in order to allow Member States to grant certain types of aid to the financial sector in order to reduce the negative effects of the crisis, providing guidance on the criteria for the compatibility of State aid with the internal market pursuant to Article 107(3)(b) TFEU.[14] These measures, basically aiming at ensuring fair competition between banks and return to normal market functioning, leave more room for Member States to grant state aid in the financial sector. The crises thus served as an opportunity for influencing EU state aid and competition policy, giving this way national governments an impetus for experimenting with 'patriotic' national policies (see also Varju and Papp 2016, 28) – not only in the financial sector but in other regulatory fields, as well.[15]

As far as the changes in EU approach to internal market liberalization, welfare and national regulatory competences are concerned, the tendency in the field of sector regulation has been more or less the same as explained above. Generally, the level of consumer protection (in particular for vulnerable groups of consumers) incorporated in specific rules seems to be in the ascendance (Sauter 2014, 215). Taking the example of energy, public service obligations and consumer rights have been extended with each 'generation' of the regulatory regime (Sauter 2014, 202).[16] By now, a separate consumer protection clause have been added to both the electricity and gas directives.[17] We can also observe (both in cases of electricity and gas directives) that, beyond consumer welfare, there is a wide range of other legitimate public interest objectives (environmental protection, among others) accompanied by a high tolerance for public service obligations in the energy sector (Sauter 2014, 199). Although the degree of liberalization and the level of national autonomy obviously differs sector by sector (Marcou 2016, 18), similar tendencies or at least a step towards the above direction can be seen in other fields, as well.

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[9] For the former approach see the judgment of the Court of First Instance of 1997 in case T-106/95 *FFSA and Others* (ECLI:EU:T:1997:23) where the Court still held that compensation awarded to firms implementing a public service mission should be regarded as State aid.

[10] In its judgment in case C-53/00 *Ferring* (ECLI:EU:C:2001:627) the ECJ already established that the compensation could be considered State aid only if it exceeded the additional costs borne by the designated provider.

[11] C-280/00 *Altmark Trans* (n. 10), paras 89-93.

[12] The detailed analysis of this process see below.

[13] As an example, see Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (‘2008 Banking Communication’) (OJ C 270, 25.10.2008, p. 8).

[14] Before the crises, the Commission has been reluctant to invoke Article 107(3)b that allows state aid "to remedy a serious disturbance in the economy of a Member State." but the financial crisis was considered to be significant enough to justify state aid to credit institutions on the basis of that provision.

[15] For a more detailed analysis of the crisis' impact on natinal public service markets and the Hungarian example, see Varju and Papp (2016, 13–14).

[16] These 'generations' are known as 'packages' of energy regulation at the EU level:

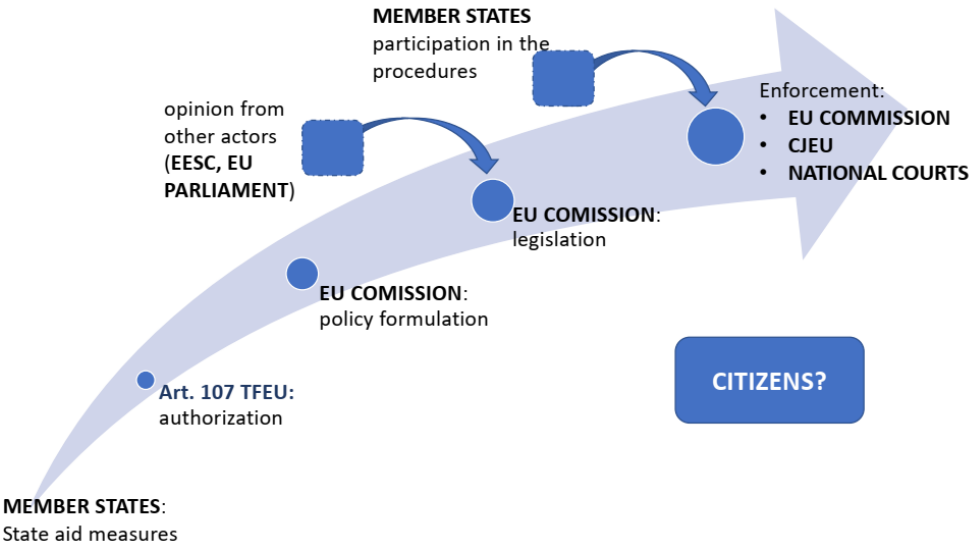
[17] See Article 3(7) of Directive 2009/73/EC and Article 3(3) of Directive 2009/72/EC. Both directives are part of the "third energy package".

As a general rule, the Commission's above mentioned state aid packages cover only those sectors in which no specific rules exist. Nevertheless, there are exemptions. These instruments also apply in the field of energy (electricity and gas), postal and communication services, waste, water and wastewater even if provisions regarding the financing of SGEI exist in corresponding sectoral Directives (Bauby and Similie 2016b)

6. Instruments for engaging citizens in decision-making at EU level

Scholz identified three bottom-up participatory instruments, namely the European Citizens' Initiative (ECI), complaints to the European ombudsman and petitions to the European Parliament with which citizens can challenge policies or the EU institutions (Scholz 2021).

Figure 1 Decision-making and enforcement in the European Union



Source: author

6.1 European Citizens Initiative: The Right2Water ECI

While the ECI could be an important tool of participatory democracy at the EU decision-making level, its legal and political impact has been minimal (Scholz 2021). While 85 ECIs have been registered since 2012, only six have reached the threshold of one million signatures to be examined by the European Commission. Only one of them connected directly to public service provision, i. e. the initiative titled „Water and sanitation are a human right! Water is a public good, not a commodity!" (hereinafter Right2Water ECI). The initiative called on the European Commission to propose legislation that ensure that all EU citizens enjoy the right to water and sanitation, exclude water supply and management of water resources from internal market rules and liberalisation, and increase EU's efforts to achieve universal access to water and sanitation around the world. The Commission reacted positively to the initiative by committing itself to take a number of actions. A majority of them was consultative or soft law action (f. e. launching an EU-wide public consultation on the Drinking Water Directive; bringing about a more structured dialogue between stakeholders on transparency in the water sector; cooperating with existing initiatives to provide a wider set of benchmarks for water services). At the level of legislation, the main achievement triggered by the ECI was the revision of the Drinking Water Directive. The modified directive introduced more efficient monitoring of drinking water in the Member States and foresees inter alia an obligation for Member States to improve access to water and ensure access for vulnerable and marginalised groups. As regards the citizens' concerns about the application of internal market rules and liberalization, the Commission only confirmed that the existing EU rules „fully respect the competence of public authorities", „public procurement legislation does not apply when local authorities decide to provide the services themselves" and „[d]rinking water concessions […] are […] excluded from the scope of the new EU rules" without taking any further steps at the level of legislation or consultation to comply with the ECI.

6.2 The European Ombudsman and SGIs

The role of the European Ombudsman (hereinafter Ombudsman) is to improve the protection of citizens in connection with cases of maladministration in the activities of the Union institutions, bodies, offices or agencies

(Scholz 2021). Every citizen of the EU or natural or legal person residing or having its registered office in a Member State have the right to apply to the Ombudsman. She may conduct inquiries for which she finds grounds and make recommendations, proposals for solutions and suggestions for improvement to address the issue, these are, however, not legally binding instruments.
Between 2012 and 2020 the Ombudsman received 6874 complaints falling inside her mandate, we identified 30 among them which directly or indirectly concern public service delivery in the Member States. As the Ombudsman's procedure basically targets the activities of EU institutions/bodies, the main reason for the small number of cases might be the limits of the European Union's competences in this field as detailed above. In our classification, complaints directly concerning public service provision (17 complaints) are those relating to the conditions of access to these services (like prices, access to information on supply, etc.) or the ways of organizing or financing them, while „indirectly concern" (12 complaints) refer to situation where, for instance, the rights or competitive position of service providers or other market actors were affected by legislative or administrative measures connected to public services. In line with the general tendencies, i. e. that most cases before the ombudsman are closed with the result that „no maladministration found" on the institution's side or „the case was settled by the institution", there were only eight of our collected cases where the Ombudsman made suggestion or recommendation; maladministration was not established at all. In 24 of the 31 cases, the complaint was submitted against the European Commission which is a higher rate than the avarage but fits in with the general trend that the majority of complaints target this institution. In our collected cases, most of the complaints against the Commission originates in the alleged maladministration of national authorities and the Commission is addressed as the institution mainly responsible for the investigation of breaches of EU law by Member States.

6.3 Measuring citizen's satisfaction with public service delivery

Based on a Eurobarometer survey made in 2016, the European Commission published a report on the awareness about state aid amongst European citizens, as well as their perceptions about the transparency of information in this area (EC 2016). The report established that European citizens are insufficiently aware about state aid, most Europeans think information about state aid is difficult to find. Most respondents (58%) have never heard about state aid. A majority of respondents (84%) agree citizens should have full access to information about state aid granted to companies by public authorities. Among information that should be publically available, most respondents (63%) mentioned the purpose of state aid, while at least half also said the amount of the state aid (58%), the company name (58%) or the results of state aid measures (55%). Most respondents mentioned the health care and pharmaceutical industry (48%), and the financial services sector (43%) as needing more transparency about state aid (EC 2016).
The Member States' SGEI reports also made clear that information regarding the financing of public services and obligations towards entities that receive public funding (such as accounting obligations) is in general difficult to find as this information is either not collected in a systematic way across Member States or considered confidential (for the purposes of ongoing MS-Commission cases, but also in terms of commercial interests) (MS SGEI reports 2012–2019, EESC 2017, 37).

Figure 22 shows the evolution of the overall expenditure across the EU, from 2009 to 2019. With the exception of a decreasing trend during the financial and economic crisis (2010 - 2011) and a minor increase in 2015 and reduction in 2016, subsidies to the rail sector tend to be stable. The total compensation and aid granted to the rail sector amounts to EUR 50.6 million in 2019, which represent 0.83% of the total State aid expenditure in 2019 (excluding aid to the financial sector). This proportion has sharply decreased since 2013 (2.51%) (EC, 2021).
Since 2012, figures are broken down into public passenger rail transport services (PSO) under Regulation 1370/2007 and infrastructure and other aid.

The Member States are increasingly using GBER measures since the SAM. Member States implemented 1473 new GBER measures in 2018, now representing 95.5% of new State aid measures (EC 2021).
As regards the distribution of rail sector spending as a share of GDP (Figure 17), Austria, Belgium, Germany, France, Croatia, Hungary, Italy, Luxembourg and Slovakia spend more than the EU 28 average (0.31% of GDP). Austria is the Member State spending relatively most and Finland relatively least (EC 2021).

6.4 Public consultations

Article 11(3) of the Treaty on European Union (TEU) provides that „The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent." The consultations are available on the website of the Commission and open to everyone interested in the matter to express his/her/its views on the scope, priorities and added value of new EU initiatives, or

evaluations of existing policies and laws. The consultations are organised on major initiatives of the Commission, but not on every proposal. This is done before the Commission tables the proposal and gives citizens a minimum of 12 weeks to react (Russack 2018). Although participation is open to any individual citizen, the Commission usually identifies a target group, so participants mostly represent organised interests (Scholz 2021).

Between January 2015 and September 2021, the Commission initiated 39 consultations in the field of state aid. 5 of them directly concern SGIs while further 12 may also be linked to certain elements of public service provision (energy prices etc.) in the Member States. Table 1 below summarises the details of the first group.

Table 1. Public consultations between 2015 and 2021 concerning regulation of public service delivery

Title of consultation	**Number of all respondents**	**Number of respondents**			
		Public authorities	**Organizations**	**Citizens**	**Other**
Targeted consultation on the ex-post evaluation of the 2014 Aviation Guidelines	76	19	53	0	4
Targeted review of the General Block Exemption Regulation (State aid): extension to national funds combined with certain Union programmes	106	50	55	1	0
State subsidy rules for health and social services of general economic interest (evaluation)	51	10	31	5	5
Targeted review of the General Block Exemption Regulation (State aid): extended scope for national funds to be combined with certain Union programmes (2nd consultation)	98	39	49	0	0
Prolongation of the SGEI de minimis Regulation and a time-bound derogation for undertakings in difficulty to take into account the impact of the COVID-19 pandemic	5	0	5	0	0

Source: https://ec.europa.eu/competition-policy/public-consultations_en

In the following, the results of the consultation related to state subsidy rules for health and social services of general economic interest will be analysed in more details. This consultation did not address an initiative for new legislation but the evalution of existing ones, i. e. to check whether the rules on SGEIs in these sectors meet their objectives under the 2012 services package. When the consultation started, the rules applicable to health and social SGEIs had been in place for more than seven years. National SGEI Reports issued in 2012-2019 highlighted several conceptual and methodological challenges when applying the SGEI rules in this field (EC 2019). In addition, as a reason for initiating the consultation, the Commission also referred to recent developments in the jurisprudence of the CJEU that „may have led to legal uncertainty on how Member States can fund services of general economic interest in these sectors that are of key importance for citizens and society as a whole, while preserving the key aspects of State aid control." The consultation also concerned the relevant parts of the SGEI de minimis Regulation which should have expired on 31 December 2020.

In total, the public consultation received 51 replies but only 5 of them came from EU citizens and other 15 from organisations representing citizen or consumer interests. Companies' interests were represented by 16 organisations/associations and 10 public authorities also took part in the consultation (5 remaining respondents could not be categorised). The online questionnaire was structured around five evaluation criteria, i. e. effectiveness, efficiency, relevance, coherence and EU added value, and there was a specific section on the SGEI de minimis Regulation.
The majority of the respondents was on the opinion that SGEI rules applicable to health and social services had contributed to the clarification of basic concepts for the application of state aid rules in this field to sme extent (19) or to a large extent (13).
The respondent were also asked (in two separate questions) whether the 2012 SGEI package with regard to health and social services had any positive or any negative impacts that had not been expected or not intended. Only 13 respondents were of the opinion that the 2012 SGEI rules had such positive impacts. 6 of them were company or business organisations, while other type of respondents included public authorities (2), NGOs (3), trade unions (1) and other (1). At the same time, 24 respondents expressed a view that the 2012 SGEI rules had negative impacts that were not expected or not intended.
The questionaire also inquired whether the publication of SGEI compensation for health and social services above EUR 15 million made it easier to check the entrustment acts (i. e. Commission decisions declaring the compensation compatible with the EU internal market), possibly to challenge them and whether it made aid transparent for stakeholders, companies and the general public. 16 participants responded that the publication obligation increased, at least to some extent, the transparency of SGEI compensation, while 17 respondents were of the opinion that it enabled, at least partially, interested parties to check whether aid is granted in line with SGEI rules.
One of the main objective of the Almunia Package was to reduce the administrative burdens of the stakeholders, in particular with the reduction of the scope of compensation measures fallingunder notification obligation. The results of the questionaire also made clear that the 2012 SGEI package did not appreciably reduce the administrative burdens of public authorities and service providers.

One of the main reason for such a law percentage of citizens participation might be that the majority of questions concerned, first of all, the interest of governments/public authorities or service providers and other business stakeholders but much less the interests of citizens/consumers (like the prices of social and health services, possibility to choose between service providers, specific needs of vulnerable citizens and so on).

The main challenges and problems that have been mentioned in the individual contributions are as follows.
Aedes, representing 90% of the social housing sector in the Netherlands, argued that the definition of 'social housing' in the 2012 SGEI Decision should be revised, since the landscape of the housing market has changed since the introduction of the Decision. In this respect, Aedes pointed out the current affordibility crises in housing. Recital 11 of the Decision provides that „…undertakings in charge of social services, including the provision of *social housing for disadvantaged citizens or socially less advantaged groups*, who due to solvency constraints are unable to obtain housing at market conditions, should also benefit from the exemption from notification provided for in this Decision, even if the amount of compensation they receive exceeds the general compensation threshold laid down in this Decision." Aedes argued that the group that is *unable to obtain housing at market conditions* has moved beyond *disadvantaged citizens or socially less advantaged groups* to middle income households. There is therefore a need for a SGEI Decision that is fit to this new housing reality.

The CEEP also confirmed (not specifically focusing on housing but generally) that there is a need, in relation to the definition of the public need or target group in relation to SGEI provision, fostering more qualitative definition criteria instead of focusing on income level.

The questionnaire also highlighted the challenges in applying the "reasonable profit" requirement of the Altmark judgment as explained in Article 5 of the 2012 SGEI Decision. 20 respondents said that they experienced difficulties in this respect, while 28 participant gave neutral answer and only 3 were who expressly denied the existence of such difficulties.
We still don't know what will be the long-term result of the consultation at the level of legislation and policy formulation in the field of SGEIs, but the results of the questioners and certain individual contributions of the participant definitely highlighted certain challenges of weaknesses of the EU regulatory framework in this area.

Another problematic issue is getting information about the announcement of such consultations. Lack of language knowledge of citizens should not be a problem since calls for consultation are available in all official languages of the EU and the contributions may also be submitted in all official languages. However, the way these consultations are promoted (whether they are promoted at all) varies considerably from country to country.

Our analysis indicated that, in tha typically businesses, interest groups and citizens from Western European countries take part in these consultations, CEE countries are less represented.

The majority of the additional written contributions submitted by the respondents pointed out the need for taking into account the particularities of NSGEIs, as a reason for exempting them from the application of the general competition rules, to a larger degree.
It was a quite unanimous view communicated by the respondents to the Commission that the de minimis threshold must be increased and the broad scope of exemptions for social and health services must be maintained. However, the expansion of the scope of state aid measures that do not need prior notification does not necessarily serve the interests of citizens. (We can make distinction between horizontal and vertical dimensions of this expansion.)
CEEP calls for a paradigm shift away from the prevalence of economic aspects over common interest issues and for an extended use of SGEI notion beyond the sole remit of Competition Policy.

Procedural rights of citizens (private persons) in EU court's procedures is very limited and therefore tension may arise between the results of such consultations and the outcome of CJEU procedures concerning similar matters.

Conclusions

References

Bartha, Ildikó and Horváth, Tamás M. 2020. An extension of exemptions: Systemic shifts in European Union law and policies. *International Review of Administrative Sciences* 88. online first publication: 2020.03.08. DOI: 10.1177/1023263X19890211

Bauby, Pierre and Similie, Mihaela M. 2014. Europe. In UCLG (United Cities and Local Governments), GOLD III. (Third Global Report on Local Democracy and Decentralization) Basic Services for All in an Urbanizing World. Abingdon: Routledge, 94–131.

Bauby, Pierre and Similie, Mihaela M. 2016a. What Impact Have the European Court of Justice Decisions Had on Local Public Services? In I. Kopric, G. Marcou & H. Wollmann, (Eds.), *Public and Social Services in Europe. From Public and Municipal to Private Sector Provision*. Basingstoke: Palgrave Macmillan, 27–40.

Bauby, Pierre and Similie, Mihaela M. 2016b. The European Union's State aid rules and the financing of SGEIs' tasks. (Manuscript)

Clifton, Judith and Díaz-Fuentes. 2010. Evaluating, Daniel EU Policies on Public Services: A Citizens' Perspective. Annals of Public and Cooperative Economics 81: 281–311.

European Citizens' Initiative. Water and sanitation are a human right! Water is a public good, not a commodity! (referred to as Right2Water EU homepage) https://europa.eu/citizens-initiative/initiatives/details/2012/000003_en (accessed September 20, 2021)

European Commission (EC): Communication from the Commission on the European Citizens' Initiative "Water and sanitation are a human right! Water is a public good, not a commodity!" COM(2014) 177 final

European Parliament. 2021. Report on Citizens' Dialogues and Citizens' Participation in the EU Decision-making. A9-0213/2021. 24 June. https://www.europarl.europa.eu/doceo/document/A-9-2021-0213_EN.html (accessed September 5, 2021).

Horváth, Tamás M. and Bartha, Ildikó. 2018. EU-Compatible State Measures and Member States Interests in Public Services: Lessons from the Case of Hungary. *Central European Public Administration Review* 16: 137–159.

Pezzullo, Angelo Maria, Sassano, Michele et al. 2021. Citizen Engagement Initiatives in Precision Health in the European Union Member States: A Scoping Review. *BMJ Open* 11: e045846. doi:10.1136/bmjopen-2020-045846

Scholz, Helmut. 2021. A stronger voice for citizens in EU decision-making. *Social Europe*, July 14. https://socialeurope.eu/a-stronger-voice-for-citizens-in-eu-decision-making (accessed September 5, 2021).

Sauter, Wolf. 2014. *Public Services in EU Law*. Cambridge: Cambridge University Press