

**Basar F. G.**  
Assistant Prof. Gedik University,  
Faculty of Economics, Administrative  
and Social Sciences Department of  
International Trade and Finance,  
Istanbul, Turkey

## **THE NOTION OF ECONOMIC ACTIVITY AND SERVICES OF GENERAL INTEREST IN EU COMPETITION LAW**

European Union (EU) was established to realise, *inter alia*, “the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy aiming at full employment and social progress and a high level of protection and improvement of the quality of environment.”<sup>47</sup> In order to achieve this objective Member States shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles of stable prices, sound public finances and monetary conditions and a sustainable balance of payments.<sup>48</sup>

In the light of the objectives stated in the Treaties<sup>49</sup>, EU competition rules, in its broader meaning, regulate both the conducts of the market players, i.e undertakings, through Articles 101 and 102 and those of the Member States through the application of Article 106 and the rules on State aid. The competition rules, in its narrower meaning, are addressed to entities engaged in economic activities. However, not only the private entities but also the State itself may be involved in different types of economic activities for different reasons and through various means. Although the means and extent of this involvement varies, it is already confirmed by the case law of Court of Justice of the European Union<sup>50</sup> that the State may act either by exercising public powers or by carrying out economic activities of an industrial or commercial nature by offering goods and services on the market.

The State is responsible for carrying out certain tasks that only the State can perform and the degree of its involvement in the economic activities largely depends on the system or policy it has adopted. As the European Union is originally and primarily an economic community, the Member States are subject to certain rules of the European Treaties when they deal with or regulate such activities which have an impact on the internal market. On the other hand, the State will be subject to different rules of the Treaties according to the nature of the activity or the type of the goal it pursues.

Consequently, it is important to distinguish between State activities which are economic and open to actual or potential competition from the local or foreign enterprises and the ones which flow directly from the state’s *imperium*. In this presentation, the State’s involvement in economic activities on the market place

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<sup>47</sup> Article 3(3) of the Treaty on European Union (TEU), Consolidated Version, OJ C 83, 20.3.2010.

<sup>48</sup> Articles 119 and 120 of the Treaty on Functioning of the European Union (TFEU), Consolidated Version, OJ C 115, 9.5.2008.

<sup>49</sup> Hereinafter Treaty on the European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) together shall be referred to as “Treaties”, unless otherwise stated.

<sup>50</sup> Hereinafter Court of Justice of the European Union shall be referred to as “Court of Justice”, “ECJ” or merely “the Court”, unless otherwise stated.

through public undertakings and undertakings having exclusive and special rights, and the application of the competition and State aid rules to these undertakings under the provisions of Article 106 TFEU shall be analysed.

According to this Article 106;

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives and decisions to Member States.

However, in order for competition and State aid rules of the Treaty to be applicable to the types of undertakings under Article 106 of the Treaty<sup>51</sup>, it is a precondition that there should be an economic activity. In other words, the distinction between economic and non-economic activities is important because non-economic activities are not subject to specific EU legislation, nor are they covered by the internal market or competition and State aid rules.<sup>52</sup>

The EU institutions usually start their analysis by determining whether there is an economic activity in question, when they have to deal with allegations regarding an infringement of EU competition and/or State aid rules. However, defining the notion of economic activity is a very difficult and demanding task. Like other areas of the EU law, especially with regard to the competition rules, the dividing line between economic and non-economic activity is not always clear and it shifts from time to time following the rulings of the EU Courts. It is due to the fact that the EU Courts do not adopt a pure economic approach for defining the concept of economic activity as the EU has also other social objectives to pursue. Moreover, economic activity is an evolving concept in the EU law and its definition had gained significance with the rapid technological change, globalization, the development of capital markets, the liberalization and restructuring of product and service markets.<sup>53</sup>

For this reason the first part of the presentation shall be devoted to the notion of economic activity under the principles developed by the case law. Within this part, the applicability of competition rules to the regulatory activities of the State, which is deemed to be non-economic in principle, shall also be discussed to understand that not all non-economic activities of the State are immune from the application of competition rules or some of the regulatory activities of the State which appears to be non-economic on the surface are actually of economic nature.

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<sup>51</sup> Hereinafter Treaty on the Functioning of the European Union (TFEU) shall be referred to as simply “the Treaty” or “Treaty”, unless otherwise stated.

<sup>52</sup> Some aspects of the organisation of non-economic activities may be subject to other rules of the Treaty, such as the principle of non-discrimination.

<sup>53</sup> Erika Szyczak, “Public Service Provision in Competitive Markets”, *Yearbook of European Law*, Vol.20, 2001, p.35.

Article 345 TFEU states that the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership. Although the economic policy objectives adopted by the EU favour private over public ownership in the market place, it is not prohibited for the States to own undertakings, which flows from the principle provided by Article 345. However, irrespective of their public or private status and how they are financed, all entities shall be subject to the competition and State aid rules of the Treaty as long as they engage in economic activity. In this respect, Article 106(1) of the Treaty indicates that in case of public undertakings and undertakings having special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary, *inter alia*, to the competition and State aid rules. On the other hand, according to Article 106(2) of the Treaty, the undertakings entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly shall be subject to the rules, *inter alia*, on competition as far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

The 'services of general economic interest' is one of the key concepts in the EU law, which plays an important role in the provision of public services. This is because they constitute a limit to the application of competition rules, in its broader meaning that includes State aids, provided that other conditions stipulated in Article 106(2) are also fulfilled. Thus, there are two ways in which the application of competition law to the public services can be limited. First, they may be considered as non-economic and held outside the scope of competition rules or secondly, they benefit from the derogation in Article 106(2) TFEU, despite their economic nature. This subject shall be discussed in the second and final part of the presentation.

**Cordes S.**

Research Assistant at the Chair for  
European and Polish Private Law and Comparative Law,  
University of Osnabrueck

## **THE CHALLENGE OF COHERENCY IN THE PROCESS OF IMPLEMENTATION DIRECTIVES INTO NATIONAL LAW SYSTEM**

This essay deals with the transposition of EU directives into national law of the Member states. It shows the influence of EU private law on national private law by using the example of the implementation of the Consumer Sales Directive into German law and outlines the occurring problems for the coherency of the German legal system.

Starting from scratch it can be said that EU private law is made by the European commission, the European council and the European parliament [1, 69]. These institutions are only allowed to legislate in areas where they are specifically authorised by the Treaties. There are three main legal instruments to legislate in the EU: regulations, directives and decisions. All of them are laid down in Art. 288 TFEU. Decisions are the means by which the EU adopts certain individual administrative acts [2, 287]. They are not relevant for European private law. Regulations are frequently used in the EU system, both as administrative and legislative instruments [3, 280]. The key elements of a regulation are its general