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Liberalization of SGEIs in European Union

Nicola Ruccia

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LIBERALIZATION OF SERVICES OF GENERAL ECONOMIC INTEREST IN EUROPEAN UNION

Nicola Ruccia

ABSTRACT

The definition of SGEIs is a notion in full evolution, flexible and with some gaps. This flexibility must be estimated positively as it concurs to preserve the peculiarities of national legal orders in EU in which the opening towards legal order of other States becomes more and more important. The acknowledgment of the role of the States in this field is realized in their freedom to delineate the existence and the structure of SGEIs. The promotion of competition policies in SGEIs has been operated through their liberalization processes. They have been put into effect through some exceptions to the rules of the common market, above all norms concerning freedom of establishment and State aids. The appropriate re-balance could have place through the antitrust vigilance. Such activity must prevent that exceptional devices acquire dimensions or produce effects exceeding their justification and must avoid alterations of the economic competition that do not answer to some authentic social public mission. As a result, antitrust rules can carry out a function of balance for the free market. In this way it must be observed the relationship between processes of liberalization of SGEIs and privatization of public enterprises providing them. Member States maintain an important role but change their function: from the supply of the services to the regulation of the forces of the market that guarantee the services themselves.

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I. Definition of Services of General Economic Interest

Although Services of General Economic Interest (SGEIs) are mentioned in Articles 16 and 86 (2) of the EC Treaty, nor primary sources neither secondary legislation contain a full definition of them\(^1\). The Commission, however, identifies them as those services which citizenship should be eligible even if their providers don’t receive benefits in terms of business\(^2\).

In particular, this refers to services of economic origin submitted by Member States and, in specific cases, by the European Union, to public obligations, taking into account a criterion of general interest for the community.

The first essential element of this definition is the public service obligation. It specifies the requirements that national and European authorities impose on the SGEIs provider to ensure the achievement of certain objectives of general interest, such as transports, supply and distribution of energy, postal services and telecommunications\(^3\).

The service must be guaranteed to the community, regardless of the fact that it is offered by the market or from a government authority. In the latter case, it is assumed that States also furnish

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\(^1\) Article 16 EC Treaty may be interpreted as an instrument for the interpretation of Article 86 (2) EC Treaty which allows providers of SGEI to escape the full rigour of the competition rules of the common market. See, Derrick Wyatt and Alan Dashwood, European Union Law, London, 1172 – 1176 (2006).

\(^2\) See, Communication on Services of General Interest in Europe, COM (2000) 580 final, para. 14: “Services of general economic interest are different from ordinary services in that public authorities consider that they need to be provided even where the market may not have sufficient incentives to do so. This is not to deny that in many cases the market will be the best mechanism for providing such services. Many basic requirements, such as for food, clothing, shelter, are provided exclusively or overwhelmingly by the market. However, if the public authorities consider that certain services are in the general interest and market forces may not result in a satisfactory provision, they can lay down a number of specific service provisions to meet these needs in the form of service of general interest obligations. The fulfilment of these obligations may trigger, albeit not necessarily, the granting of special or exclusive rights, or the provision for specific funding mechanisms. The definition of a specific mission of general interest and the attendant service required to fulfil that mission need not imply any specific method of service provision. The classical case is the universal service obligation, i.e., the obligation to provide a certain service throughout the territory at affordable tariffs and on similar quality conditions, irrespective of the profitability of individual operations”.

\(^3\) See, Green Paper on Services of General Interest, COM (2003) 270 final, para. 20: “The term «public service obligations» is used in this Green Paper. It refers to specific requirements that are imposed by public authorities on the provider of the service in order to ensure that certain public interest objectives are met, for instance, in the matter of air, rail and road transport and energy. These obligations can be applied at Community, national or regional level”.
special provisions although the market will provide them or have the means to operate independently. According to this opinion, it should be argued that SGEIs seem directed “downstream”, rather than “upstream”, in the sense that particular attention is paid to the guarantees to be provided to end-users of these services, as the nature of the provider – whether public or private – is given only marginal consideration. The need to ensure the use of certain services to all citizens would have prompted the authorities to maintain government control of utilities for such services.

The content of the SGEIs definition is flexible. They are identified as economic activities of any kind that are subjected to public obligations. In this formulation the prevailing element is the public obligation guaranteed to citizens, while in the first one the original emphasis is placed on the nature of economic performance.

Another innovative factor concerns the universality of services, which could be interpreted in two ways. Under the jurisprudential profile it is the instrument through which the European Union limits the State’s freedom to define public service obligations. Under the normative profile, the various liberalization directives are a means to guarantee the rights of citizens-consumer. In the latter valence, public service obligations are not only the guarantee of accessibility of the related service to all citizens but also the additional obligations arising from the need to protect the users,

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4 See, White Paper on Services of General Interest, COM (2004) 374 final Annex I, 22 – 23: “The term «services of general economic interest» is used in Articles 16 and 86 (2) of the Treaty. It is not defined in the Treaty or in secondary legislation. However, in Community practice there is broad agreement that the term refers to services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion. The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications. However, the term also extends to any other economic activity subject to public service obligations. Like the Green Paper, the White Paper focuses mainly, but not exclusively, on issues related to «services of general economic interest», as the Treaty itself focuses mainly on economic activities. The term «services of general interest» is used in the White Paper only where the text also refers to non-economic services or where it is not necessary to specify the economic or non-economic nature of the services concerned”. “The term «public service obligations» is used in the White Paper. It refers to specific requirements that are imposed by public authorities on the provider of the service in order to ensure that certain public interest objectives are met, for instance, in the matter of air, rail and road transport and energy. These obligations can be applied at Community, national or regional level”.


the environment and the public order\(^5\).

In identifying the services of general interest, Member States have a considerable discretionary power. Therefore, their national definition may be questioned by the Commission only in case of manifest error\(^6\). However, the margins of this freedom shrink significantly if SGEIs are intended as the set of universal benefits relating to a specific activity for which delivery takes place regardless of their economic viability. They are also the subject of certain public service obligations.

The autonomy of the States concerning the classification of SGEIs is limited not only through the possibility to impose certain obligations of public service but also in the quantification and qualification of those obligations. If the company operates in a specific area of public utility, there is a twofold consequence. On the one hand, it should be observed that the public interest operates an outer limit to the right of freedom of economic activity. On the other hand, the duty on the conduct of an activity to protect the public interest implies the limitation of applying market rules. In this case, the pattern of economic equilibrium of a firm submitted to public obligations will be integrated with specific corrective actions in order to restore a level-playing field operation between economic production in terms of competition. The exception to the common market rules suggest itself the possibility offered to Member States to impose public obligations, even in non-profit undertakings. Business can be addressed for social purposes, but within the narrow limits of Article 86 (2) EC Treaty. It represents a balance between the national interest to use certain facilities as an instrument of economic or social policy and the Community interest towards the observance of competition rules and preservation of the common market unity.

Member States should act as regulators of the market. Through the privatization process,

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\(^6\) See, Fred Olsen SA v. Commission, Case T-17/02, 2005 E.C.R. II-112, para. 216: “It must then be noted that, as the Commission states in point 22 of its Communication on services of general interest in Europe, Member States have wide discretion to define what they regard as services of general economic interest. Hence, the definition of such services by a Member State can be questioned by the Commission only in the event of manifest error”. 
they transfer enterprises providing SGEIs in accordance with the policy of surrender of interventionist economic models. In this context, the role of public authorities is reflected by the determination of external market operation rules according to the principles of neutrality and equality among all the actors involved therein. The notion of public service changes in comparison to its historical meaning.

According to the definition given by European Commission, SGEIs represent the economic activities submitted to service obligations under a contract with public authorities. Consequently, it should be argued that in the absence of a duty, such activities must not take place, due to the lack of profit. In this case, the provision would be made only if the public authorities shall make forced the execution. Economic activity carried on in relation to a service requirement is a provision that the market would not provide on its own mechanisms. The lack of profitability for the company charged with this activity requires the intervention of public authorities to guarantee all related performances. Finally, SGEIs, as defined by the Commission, presuppose the market failure. It seems that their definition has a dual meaning. The first one stresses the role they play for their national legal systems. The second emphasizes their communitarian essence, through the exemption from market rules and the restriction of entrepreneurial freedom deriving from the imposition of public service obligations.

Two additional factors are important in this definition. The first is the public interest that Member States intend to protect. The second is the business of the service production and delivery, submitted to the government control, which is necessary for the protection of the public interest itself.

SGEIs are a subset of the general category of services, which differs in the accomplishment

7 For a detailed analysis see, Peter Rott, A New Social Contract Law for Public Services? – Consequences from Regulation of Services of General Economic Interest in the EC, 1 EUR. REV. CONTR. L. 323, 323 – 331 (2005).
of a particular public interest. Their release is considered an essential public task that can be performed in two possible ways. The first one is more restrictive in scope and involves the assessment of possible exemptions from market rules, as set in Article 86 (2) EC Treaty. The second one has a higher impact and consists in the imposition of some specific activities, with the obligation to ensure a core of non-remunerative services, whether Member States consider that the market can guarantee the related benefits.

This evaluation, both political and economical, is based on three elements. The first is the qualification of an interest as essential and necessary for the involved community. The second is the identification of the business that can be considered functional to the preservation of that interest. The third is the evaluation of the microeconomic implications of the role of the market and the exceptions to the rules laid down by the EU legislation.

However, State’s autonomy in these assessments meets with the strict limits imposed by the Treaty, which identifies the free market system as the most appropriate means to achieve economic efficiency. Among the interests to be protected by public authorities, those having economic nature must be excluded.

In several judgements, the Court has emphasized that the objectives of economic nature cannot be considered as reasons of public interest that justify a restriction to one of the fundamental freedoms of the Treaty. The market mechanisms are submitted to the protection of certain public

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8 See Ministère public luxembourgeois v. Madeleine Muller, Veuve J.P. Hein and others, Case C-10/71, 1971 E.C.R. I-723, para. 10: “However, article 90 (2) [(86 (2))] provides that undertakings entrusted with the operation of services of general economic interest shall be subject to these rules, and 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 those undertakings, but subject to the condition that the development of trade must not be affected to such an extent as would be contrary to the interests of the community”.

9 See, Communication on Services of general economic interest, n. 1, cit., supra, para. 20: “To understand how these provisions affect the arrangements made by the public authorities to ensure that certain services are provided to the public, it is useful to articulate three principles that underlie the application of Art. 86. They are: neutrality, freedom to define, and proportionality”.

interests, whether set by the Treaty or identified by the Court through the category of “mandatory requirements of a general nature”\textsuperscript{11}. As a result, economic interests are excluded from this scheme.

Member State’s freedom to identify SGEIs is greatly limited when considering that they cannot be guaranteed by the market. If the latter can assure certain benefits, the fact that the authorities place them at the level of public interest and support their supply with governmental financial resources would be in clear contradiction with the spirit of the Treaty.

The difference between services of economic nature and services of non-economic nature can be found, respectively, in their presence or absence in a certain market\textsuperscript{12}. Their offer is submitted to technological, economic, social and political evolution. This distinction is therefore dynamic.

The content of SGEIs often comes from national traditions concerning public services. From this point of view, the communitarian concept receives substance from the national legal order and, at the same time, returns a wider meaning. The effectiveness of this operation is shown even though it fears the risk of forgetting that the concept offered at European level is the result of concepts that seem, in many circumstances, its antithesis.

\textsuperscript{11} See, Commission v. Italy, Case C-388/01, 200 E.C.R. I-721, para. 22: “As regards, first, the economic grounds put forward by the Italian Government, suffice it to note that they cannot be accepted, since aims of a purely economic nature cannot constitute overriding reasons in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty”.

\textsuperscript{12} See, Article 4 (2) Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (1977) OJ L 145/1: “The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity”. See, Landesanstalt für Landwirtschaft v. Franz Götz, Case C-408/06, 2007 E.C.R. I-5235, para. 18: “‘Economic activity’ is defined in Article 4 (2) of the Sixth Directive as including all activities of producers, traders and persons supplying services, inter alia the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis. The latter criteria, relating to the permanent nature of the activity and the income which is obtained from it, have been treated by the case-law as applying not only to the exploitation of property, but to all of the activities referred to in Article 4 (2) of the Sixth Directive. An activity is thus, generally, categorised as economic where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity”.

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Special attention should be paid to the considerable difficulties which occur when circumscribing the boundaries of the category of SGEIs and that are justified by the change of perspective adopted by the European legal order. Originally, the provision of public services was related to the State policies’ aimed at expanding significantly their demand that made them essential elements of the public policies themselves, through the interventionist and welfare master.

Market regulation, as envisaged in the EU is, however, a subsidiary of the same technique. It is characterized by the devices of exercise of activities rather than by its contents. It acts by external instrument that are not antagonistic to the market itself. In this sense it is sufficient to recall the funding criteria for obligations of universality and the method of choice of the undertaking charged of the service provision to confirm the compliance with the principles of neutrality and economic efficiency on which the competitive balance is based\(^\text{13}\). According to the Court, Member States may choose the criteria to finance SGEIs, with the burden of ensuring the financial stability of responsible companies. However, they must exercise them without altering competition. The additional costs that the companies bear in relation to SGEIs may be refunded to them when such funds are in accordance with the rules on State aid\(^\text{14}\). It should be argued that SGEIs, like public


\(^\text{14}\) See, Ferring SA v. Agence centrale des organismes de sécurité sociale, Case C-53/00, 2001 E.C.R. I-9067, para. 33: “Consequently, the answer must be that Article 90 (2) [86 (2)] of the Treaty is to be interpreted as meaning that it does not cover a tax advantage enjoyed by undertakings entrusted with the operation of a public service such as those concerned in the main proceedings in so far as that advantage exceeds the additional costs of performing the public service”; Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, Case C-280/00, 2003 E.C.R. I-7747, para. 88-93: “However, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied”. “First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. In the main proceedings, the national court will therefore have to examine whether the public service obligations which were imposed on Altmark Trans are clear from the national legislation and/or the licences at issue in the main proceedings”. “Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings”. “Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 92 (1) of the Treaty”. “Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position”. “Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing
services, are a universal and original category. Thus, the regulation of private activities is not a public service. It is a discipline of business even if it concerns measures not directly instrumental for the expansion of market.

The object of SGEIs is lucrative business. If the justification for the removal of these services from the competition system fails, market regulation will allow the allocation of efficiency criteria. Indeed, it is justified only when the results of competitive interaction are weak in comparison to the achievement of specific objectives of general interest.

The need to ensure free competition in the Common market has been emphasized by the Court in different circumstances. It has sanctioned the regulation of public services markets where competitive mechanisms were considered more appropriate to protect the interests of the users of such services. Restrictions on the principle of competition concerning grants that may be provided by the market are also judged unlawful.

those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations”. This approach seems to negate the function and relevance of Article 86 (2) EC Treaty regarding the control of State aid because the advantages conferred through public resources to compensate public obligations are considered as a legitimate device outside Article 87 EC Treaty or as a disproportionate cash-flow. See also Cesare Rizza, The financial assistance granted by Member States to undertakings entrusted with the operation of a service of general economic interest: the implications of the forthcoming Altmark judgment for future state aid control policy, 9 COLUM. JOUR. EUR. L. 429, 435 (2003).

15 See, Klaus Höfner and Friz Elser v. Macrotron GmbH, Case C-41/90, 1991 E.C.R. I-1979 (hereinafter Höfner), para. 17: “According to the appellants in the main proceedings, an agency such as the Bundesanstalt is both a public undertaking within the meaning of Article 90 (1) [86 (1)] and an undertaking entrusted with the operation of services of general economic interest within the meaning of Article 90 (2) [86 (2)] of the Treaty. The Bundesanstalt is therefore, they maintain, subject to the competition rules to the extent to which the application thereof does not obstruct the performance of the particular task assigned to it, and it does not in the present case. The appellants also claim that the action taken by the Bundesanstalt, which extended its statutory monopoly over employment procurement to activities for which the establishment of a monopoly is not in the public interest, constitutes an abuse within the meaning of Article 86 [82] of the Treaty. They also consider that any Member State which makes such an abuse possible is in breach of Article 90 (1) [86 (1)] and of the general principle whereby the Member States must refrain from taking any measure which could destroy the effectiveness of the Community competition rules”.

16 See, Criminal proceeding against Corbeau, Case C-320/91, 1993 E.C.R. I-2533, para. 18-19: “Indeed, to authorize individual undertakings to compete with the holder of the exclusive rights in the sectors of their choice corresponding to those rights would make it possible for them to concentrate on the economically profitable operations and to offer more advantageous tariffs than those adopted by the holders of the exclusive rights since, unlike the latter, they are not bound for economic reasons to offset losses in the unprofitable sectors against profits in the more profitable sectors”. “However, the exclusion of competition is not justified as regards specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not
As previously mentioned, according to Article 86 (1) EC Treaty, persons engaged in economic activity, are subject to market rules, regardless of whether they are a private or a public organization which is recognized as having a special or exclusive right. Although Member State can exercise discretion about the quality of the services of general economic interest they provide, it seems clear that this freedom is limited insofar as the provision of these services can be made by competitive market. It should be noted that the concept of market implies evaluations of a political nature. The absence of a precise definition of its boundaries gives flexibility to the structure of the SGEIs category, which remains suspended between government choices of policies and EU dynamics.

The regulation model imposed by the EU is intended to standardize the regulation of all SGEIs. The opening of markets resulting from the ongoing processes of liberalization implies the development in its propulsive motion, of its homogenizing forces and the operational rules of their work.

In the notion of SGEIs and their regulation takes part also the directive services 2006/123. It covers them if they have an economic relevance and considering two exceptions. The first one previews the exclusion from the field of application of the directive of some services: transports, comprised harbour, healthcare and social provisions. The second one regards the principle of free circulation of services contained in Article 16. It does not find application, according to Article 17,
to SGEIs provided in other Member States and, in particular, to mail services, electric power, gas, distribution and depuration of water and management refusals. In other terms, the directive leaves opened the gap of the definition of service of general economic interest, reaffirming the freedom of Member States in their formulation, with the single limit of the conformity to European law\textsuperscript{22}.

II. \textit{Influence of European Law on Liberalization}

The opening to competition for public services has invested and profoundly changed the Member States intervention in the economy\textsuperscript{23}. This process must be framed under the Treaty of Rome.

The first reference is Article 2 EC Treaty. It assigns the Commission the task to promote a harmonious and balanced development of economic activities, together with a high degree of competitiveness and convergence of economic performance and solidarity among the Member States. According to Article 3 EC Treaty, these objectives can be achieved through an internal market characterized by the abolition of obstacles to free movement of goods, persons, services and capital among Member States; a system which ensures that competition is not distorted in the internal market; the approximation of national laws necessary to the functioning of the Common market; a contribution to the strengthening of consumer protection. From the combination of these two rules it seems possible to say how the liberalization of SGEIs on the one hand contribute to the objectives identified in Article 2 EC Treaty and, on the other hand, are a necessary means to achieve

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\textsuperscript{23} Liberalization of services may take place without distinction of sector (horizontal liberalization) or concerning particular sectors (vertical liberalization). Moreover, their implementation may be with positive or negative methode. For the implication of these differences see Paul Demaret, \textit{Mondialisation et accès aux marchés}, RÉV. INT. DR. ECON., 259, 263 (2002).
\end{footnotesize}
those objectives. In this context, the completion of an area without internal frontiers – in which the free movement of goods, persons, services and capital in accordance with the principle of an open market economy with free competition – gives the European Commission the executive function to prepare the basic principles of a common model for the liberalization of SGEIs\textsuperscript{24}.

According to Article 86 EC Treaty, which has been addressed in the previous paragraph, Member States shall neither enact nor maintain in force any measure contrary to competition rules. Paragraph 2 contains an exception. Such rules shall not obstruct the performances of SGEIs providers. In other words, the prediction of a preferential regime in line with the principle of proportionality shall be strictly necessary and shall aim to the completion of a clear mandate to meet a specific interest. Its pursuit should justify the subjugation, by the undertakings, to special rule, different from that normally applicable to firms operating in similar conditions.

Liberalization processes must be necessarily considered in the light of Article 31 EC Treaty. It makes Member States to proceed in an adjustment of State monopolies with a commercial character, so that no discrimination results between nationals of Member States regarding the terms of supply. It is addressed to Member States and to those activities that are undertaken by these companies and that does not operate under monopoly conditions\textsuperscript{25}. It does not impose total and unconditional abolition of monopolies. Their maintainance, like that of exclusive or special rights, may be admitted under the condition that Member States comply with the provisions of the Treaty, in particular, with those relating to competition\textsuperscript{26}. However, Article 86 (2) EC Treaty is addressed to...


\textsuperscript{25}See Corinne Bodson v SA Pompes funèbres des régions libérées, Case C-30/87, 1988 E.C.R. I-2479: “In that regard, it must be pointed out that Article 37 [31] applies in particular to situations in which the national authorities are in a position to supervise, determine or even appreciably influence trade between Member States through a body established for that purpose or a monopoly delegated to others. That provision therefore covers a situation in which the monopoly in question is operated by an undertaking or group of undertakings, or by the territorial units of a State such as communes”.

\textsuperscript{26}See, Hansen GmbH & Co. v Hauptzollamt Flensburg, Case C-91/78, 1979 E.C.R. I-935, para. 8: “Article 37 [31] does not require the total abolition of state monopolies of a commercial character but only that they be so adjusted as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between
companies which provide SGEIs and not to Member States. Even this rule offers an exemption from competition rules when they do not cause prejudice to the development of trade in the common market and when they are compatible with the Treaty, in order to achieve certain goals deemed worthy of protection.

Article 31 EC Treaty justifies certain exclusive rights to import and trade. It also concerns market monopolies of goods having commercial nature. Article 86 (1) EC Treaty deals with the monopolies of goods of a non-commercial origin, service monopolies and special rights. Its second paragraph addresses the forms of privilege related to a particular mission of general economic interest.

Article 86 (3) EC Treaty gives the Commission exclusive powers, as they are not subject to limitations under the principle of subsidiarity as sanctioned by Article 5 (2) EC Treaty. The power to take actions against States that grant to companies exclusive rights that are contrary to the provisions contained in the Treaty is essential in the liberalization processes. Directives and individual decisions, both with direct legal effect in domestic legal systems, are the operational devices. Therefore, it seems interesting to study the directives issued by the European Commission under the processes of liberalization. However, before examining the various sectorial regulations, it should be noted that, like privatization, openness to competition of SGEIs must be placed in the legal and socio-economic path by Directive 80/723/EEC on the transparency of nationals of member states. It is further provided in Article 37 (2) [31 (2)] that the operations of a state monopoly shall not be employed to re-establish a customs barrier or quantitative restrictions in intra-community trade. Article 37 [31] remains applicable wherever, even after the adjustment prescribed in the treaty, the exercise by a state monopoly of its exclusive rights entails a discrimination or restriction prohibited by that article. In a case such as the present, which concerns an activity specifically connected with the exercise by a state monopoly of its exclusive right to purchase, process and sell spirits, the application of the provisions of Article 37 [31] cannot be excluded. It thus appears that the national court was justified in requesting clarification of the relationship between Article 37 [31] and the provisions of the treaty concerning official aids since the operations of the monopoly are closely linked with the support of certain categories of producer by means of purchase prices guaranteed by law. Article 1 Directive 90/388/EEC of the Commission of 28 June 1990 on competition in the markets for telecommunications services (1990) OJ L 192/10.
financial relations between Member States and their public enterprises. According to it, all businesses, whether public or private, must operate in conditions of perfect equality, consecrating the primacy of competition rules on monopolies and exclusive rights and special rights.

The areas that have been mostly affected by the processes of liberalization are telecommunications and energy.

### III. Main Sectors Involved

#### A. Telecommunications


These interventions took place on the basis of an precise power of the Commission, governed by Article 86 (3) EC Treaty. It has an explicit political foundation, which is obtained from Council Resolution of 30 June 1988, and a legal underpinning, i.e. Council Directive 90/387/EEC of 28 June 1990, based on Article 95 EC Treaty, concerning the establishment of the internal market.

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for telecommunications services through the implementation of the provision of a telecommunications network\textsuperscript{31}.

The Commission has given an orientation of curbing Member States management power in network infrastructure and delivery of services. Basing itself on the consultations which took place between operators and users and on the position expressed by the European Parliament, it unequivocally stated the willingness to open up the services of voice telephony by 1\textsuperscript{st} January 1998\textsuperscript{32}. Finally, a Green Paper on the liberalization of the networks was published\textsuperscript{33}.

In a resolution of 16 January 1993 the Council expressed its support for the Commission orientation. It shared its intent to carry out a progressive reorganization of tariffs, in line with the objective of seeking a balance between liberalization and harmonization, recognizing the importance of cooperation between telecommunications operators and ensuring the coordination of national measures with the EU in accordance with the principle of subsidiarity. With the subsequent resolution of 22 July 1993 it confirmed the proposed liberalization of public voice telephony services by 1\textsuperscript{st} January 1998. Finally, the resolution of 7 December 1993 invited Member States to adopt an adequate regulatory framework and to set the appropriate targets in order to ensure the complete implementation of the principle of universal service in the European Union.

The need to standardize liberalization programs, including through appropriate funding, to the universal services, must not prevent the achievement to provide a concrete answer to the problems relating to the peripheral regions and the little-extended networks. All of these needs makes it imperative for the adoption of the principles of liberalization the Communitarian legal

\textsuperscript{32} Communication to the Council and the European Parliament on the Consultation on the Review of the Situation in the Telecommunications Services Sector. COM (93) 159 final.
\textsuperscript{33} Council Resolution of 22 July 1993 on the review of the situation in the telecommunications sector and the need for further development in that market (1993) OJ C 213/1.
framework in line with the objective of open network provision. Essentially, the introduction of a system of mutual recognition of licenses should reflect the implementation of the provisions concerning the communications satellite. In addition, the Commission has launched a number of bilateral initiatives with Member States on the implementation of Directive 90/388/EEC concerning competition in markets for telecommunications services.

Mobile telecommunications sector is excluded from the scope of Directive 90/388/EEC. The Commission has ruled that Member States will not be able to extend the monopoly of its public operator and must ensure all disposals of waste products and special exclusive rights concerning the provision of the related services.

With regard to strategic alliances between companies, which may take place either through the establishment of joint ventures or through genuine merger, there is the need for careful monitoring them in the view of liberalization, in the light of Articles 85 and 86 EC Treaty and Regulation 89/4064/CEE. They must be shared between operations to achieve an increase in the principle of free competition in the telecommunications sector and in processes to maintain or strengthen the positions gained by discouraging the opening of the telecommunications sector to competition.

European legal framework recognizes the applicability of Article 86 (2) EC Treaty with regards to companies providing universal services or using a universal network. In this way users would be able to invoke the principle of equal treatment and could simultaneously use the telecommunications networks at the same price and without any discrimination of conduct.

The Commission also extends the applicability of competition rules to cases falling under

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Article 86 (2) EC Treaty, limiting the scope of the exemptions coming from the fulfilment of the tasks of general interest. It complies with a policy of the Court of Justice never unrecognized. The Commission was clearly recognized the power to take preventive measures to ensure equal opportunities in the markets for public operators or holders of special rights. Specific responsibilities were also confirmed in relation to the telecommunications sector, coming from Article 86 (3) EC Treaty.

The exclusive rights enjoyed by the providers of certain services can be maintained only if they are justified by reasons of public interest. These reasons include the need to arrange and carry on running a universal network, or a universal service at reasonable, fair and non-discriminatory conditions. Exclusive rights must not be seen as immutable. They must be modified and even eliminated when they do not respond anymore to a specific requirement of public interest.

The intervention is characterized by the attempt to liberalize networks and telecommunications services, away to a monopoly regime. They shall cease to be submitted to to a reserve to be configured as an essential public service, which delivery takes place in a competitive environment based on the freedom of economic initiative.

Under the Treaty of Rome the process of liberalization went through a considerable acceleration first by the Single European Act and, subsequently, by the Treaty of Maastricht. This path was particularly devious because of the existence of monopolies and dominant positions –

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35 See, Régie des télégraphes et des téléphones v GB-Inno-BM SA, Case C-18/88, 1991 E.C.R. I-5941 para. 22: “The exclusion or the restriction of competition on the market in telephone equipment cannot be regarded as justified by a task of a public service of general economic interest within the meaning of Article 90 (2) [86 (2)]of the Treaty. The production and sale of terminals, and in particular of telephones, is an activity that should be open to any undertaking. In order to ensure that the equipment meets the essential requirements of, in particular, the safety of users, the safety of those operating the network and the protection of public telecommunications networks against damage of any kind, it is sufficient to lay down specifications which the said equipment must meet and to establish a procedure for type-approval to check whether those specifications are met”. For the evolution of judgments about Article 86 (2) see, Daniel G. Goyder, EC Competition Law, Oxford, 482 (2003).

even after the opening of markets – that play the monitoring role in the area. This difficulty was due also to the fact that the monopoly did not exclusively concern the network and telecommunications services, but also many aspects of management. Moreover, their divestiture was made particularly difficult because of the widespread belief that the network constituted for cost and size a natural monopoly that individual companies could not manage, and that the services performed on the network were to be administered by public authorities in order to protect confidentiality.

The objective of the deregulation has been pursued by Community institutions in two directions. On the one hand, they have proceeded to the opening of the market by simplifying and reducing the steps necessary to enter it. On the other hand, a remarkable approximation of national legislation was launched37.

In relation to the first aspect, the abolition of special and exclusive rights provided by Article 86 (1) EC Treaty has been considered essential only if it were imposed by requirements of general interest. The removal of these rights did not occur because of an express prohibition by the Treaty, but because it represented a means to maintain measures contrary to its rules, especially those concerning competition.

It should be stressed that the Court has considered the conservation of special and exclusive rights as being in conflict with the principle of free competition. It has pointed out that the existence of such rights encouraged the maintaining of a significant market power, considering them like the

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37 See, Nuova società di telecomunicazioni SpA v. Ministero delle Comunicazioni e ENI, Case C-339/04, 2006 E.C.R. I-6917 (Opinion of Advocate-General Ruiz-Jarabo Colomer), para. 3-6: “In the final two decades of the last century electronic communications became one of the driving forces of the economy; the Community institutions decided to foster them, by promoting their liberalisation”. “With that aim, they took action in two directions: making the markets more flexible and harmonising the national legislations”. “In the first direction, the point of departure was Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, which has been amended on several occasions. That collection of legal provisions has been repealed and replaced by Commission Directive 2002/77/EC of 16 September 2002”. “In the second direction, the removal of the barriers required the harmonisation of the conditions of access to and use of the networks; this was carried out by Council Directive 90/387/EEC of 28 June 1990, adapted to a competitive environment by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997. Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002, which has replaced the above Directives, makes further advances in the task of legislative and technical harmonisation”.
elements of exploitation of a dominant position, which is inconsistent with European law\textsuperscript{38}. Its orientation was shared by the European Commission through the Directive 90/388/EEC concerning competition in the market for telecommunications services\textsuperscript{39}. Therefore, the restrictive interpretation of the Court conducted to the affirmation of the principle that the freedom of operators is the fundamental rule in telecommunications market and the recognition of special or exclusive rights is quite exceptional.

The Commission has also adopted the Directive 88/301/EEC concerning the creation of an internal market, by providing an open network and the Directive 96/19/EC, which has completed the opening to competition of the same market. In order to create a competitive market among service providers and to render it uniform in Member States, the Council Directive 90/387/EEC\textsuperscript{40} sets out the requirements of transparency and access to be fulfilled at the time of delivery of a network for service providers with no network. Based on this directive, several regulatory measures for the application of the principles of liberalization in other operational areas of the telecommunications sector were issued. Thus, there was considerable activity for national regulators. It was established at the express requirement of the Commission.

\textit{B. Energy}

\textsuperscript{38} See, Höfner 1991, E.C.R. I – 1979, para. 28 – 30: “It must be remembered, first, that an undertaking vested with a legal monopoly may be regarded as occupying a dominant position within the meaning of Article 86 [82] of the Treaty and that the territory of a Member State, to which that monopoly extends, may constitute a substantial part of the common market”. “Secondly, the simple fact of creating a dominant position of that kind by granting an exclusive right within the meaning of Article 90 (1) [86 (1)] is not as such incompatible with Article 86 [82] of the Treaty. A Member State is in breach of the prohibition contained in those two provisions only if the undertaking in question, merely by exercising the exclusive right granted to it, cannot avoid abusing its dominant position”. “Pursuant to Article 86 (b) [82 (b)], such an abuse may in particular consist in limiting the provision of a service, to the prejudice of those seeking to avail themselves of it”.

\textsuperscript{39} Cit, supra, note 30.

As to the energy sector, the creation of an internal market in accordance with Article 14 EC Treaty has found complete expression in the liberalization of electricity and gas provision. This process started with the proposal for two directives designed to establish common rules to guarantee market access and the criteria to be met for the granting of permits adopted by the Commission in January 1992 and based on Article 47 (2), 55 and 95 EC Treaty. Both proposals included the abolition of exclusive rights on the production of electricity and gas and on the organization of its distribution networks, the separation between administrative and accounting activities in vertically integrated companies and the access to third-parties to the transmission and distribution of the product system.

Subsequently, these proposals were modified and integrated. Producers of electricity and gas were allowed to negotiate the mode of entry into the network. This prerogative replaced the originally-planned regulated access and standardized the use of arbitration mechanisms for disputes resolution in case of difficulty in the negotiation or execution of the contract stating that the mechanisms does not nullify the actions foreseen by European law. In addition, the modifications has indicated a work program that allows the Council to establish the proposed harmonization necessary for the proper functioning of the internal market, without prejudice to the application of European law. In particular, for the electricity sector, in the alternative licensing system initially imposed the amended proposals determined the specific procedures for public tender for granting new lines of supply\textsuperscript{41}.

The legal framework is composed of Directive 90/547/EEC on the transit of electricity grids, of Directive 91/296/EEC on the transit of natural gas grids, and of Directive 90/377/EEC on the price transparency\textsuperscript{42}. In particular, it introduces a procedure which requires companies that provide

gas and electricity to communicate to OECD the tariffs applied to all categories of end users.

The goal of this legislation lies in providing a common legal framework for the production, transmission and distribution of electricity, though leaving to Member States the power to impose public service obligations on businesses.\textsuperscript{43}

\textit{IV. Liberalization and Freedom of Establishment}

Liberalization processes in European Union require a re-reading of the advantages enjoyed by companies that provide SGEIs. The pursued – namely to extend the principle of free competition in economic sectors characterized by monopolistic positions – often appears in stark contrast to the respect of several principles of law enshrined in the Treaty of Rome. Furthermore, one cannot forget other norms among primary sources subjected to violation by the national laws that are contrary to competition rules. The most important of these provisions deal with the right of establishment, the freedom to provide services and the prohibitions expressed in Articles 81 and 82 EC Treaty.

Freedom of establishment includes a number of distinct rights. One of these considers measures as unacceptable and contrary to Articles 31, 81 and 82 EC Treaty even when they affect domestic and foreign operators without distinction.\textsuperscript{44}

\begin{footnotesize}
\textsuperscript{43} The issue is a model of governance which diverges from the traditional European approach – based on the “national champions” and considers the evolution of the world market and the consequences related to the liberalization processes in the common market. See, \textit{e.g.}, Antonio Villafranca, \textit{Towards a New Governance of the European Gas Market}, EEGM PAPERS, available at \url{www.ispi.it/eegm}.

\textsuperscript{44} See, \textit{Costa v. Enel}, Case C-6/64, 1964 E.C.R. I-1129: “Article 37 (1) provides that member states shall progressively adjust any ‘state monopolies of a commercial character ’ so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of member states. by Article 37 (2) [31 (2)], the member states are under an obligation to refrain from introducing any new measure which is contrary to the principles laid down in Article 37 (1) [31 (1)]. Thus, member states have undertaken a dual obligation : in the first place, an active
\end{footnotesize}
The grant of special rights inevitably involves a limitation of the freedom of establishment – which is more and more compromised – when the State confers exclusive rights on several operators of the same nationality. These measures should be considered discriminatory in relation to the position of EU citizens.\(^{45}\)

Therefore, the Commission is given the task of assessing the compatibility of national monopolies with European law in consideration of the criteria inferable from Articles 45 and 46 EC Treaty.

Restrictions on freedom of establishment resulting from the existence of monopolies, exclusive rights or special rights may also give rise to abuses which fall within the scope of Article 86 EC Treaty. The existence of monopolies is submitted to its respect. They require a prior assessment of their legality and, conversely, economic operativeness. In this regard, the Court has ruled that the organization of radio and television programs, the provision of postal services and telecommunications and port operations are businesses that fall within the scope of application Articles 81 and 82 EC Treaty.\(^{46}\) In order to recognize a situation as an abuse of dominant position in relation to Article 82 EC Treaty, the fact that companies operating on an exclusive basis in the target

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\(^{45}\) See, Irène Vlassopoulo v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg, Case C-340/89, 1991 E.C.R. I-2357, para. 15: “It must be stated in this regard that, even if applied without any discrimination on the basis of nationality, national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment guaranteed to them by Article 52 [43] of the EEC Treaty. That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State.”

\(^{46}\) See, Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB), Case C-311/84, 1985 E.C.R. I-3261 (hereinafter CBEM) para. 12: “...it maintains that, according to the case-law of the court, an undertaking holding a monopoly in a particular service has a dominant position on the market in that service within the meaning of Article 86 [82] and that that article applies to the conduct of broadcasting organizations. Compagnie luxembourgeoise cannot rely on the proviso in Article 90 (2) [86 (2)], since it is not an undertaking entrusted with the operation of services of general economic interest for the purposes thereof”. See also, Merci Convenzionali Porto di Genova v. Siderurgica Gabrielli, Case C-179/90, 1991 E.C.R. I-5889, para. 27: “...it must be held that it does not appear either from the documents supplied by the national court or from the observations submitted to the Court of Justice that dock work is of a general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities or, even if it were, that the application of the rules of the Treaty, in particular those relating to competition and freedom of movement, would be such as to obstruct the performance of such a task”.

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market are unable to meet the demand of users of the services concerned is crucial. Furthermore, the extension of a monopoly is a form of abuse of dominant position prohibited by Article 86 (1) in connection with Article 82 EC Treaty when it is not supported by objective justification, although prepared by a State device.

V. Liberalization and State Aid

State aids granted to enterprises which provide SGEIs are submitted to particular rules. The control of dangerous relationships between Member States and companies, both public and private, has recently been revisited and further developed by the European institutions through several interventions, whether of a legislative or judicial in nature. The first of them is the Directive 2005/81/EC of 28 November 2005 amending and supplementing the Directive 2000/52/EC of 26 July 2000 which reforms in a relevant manner the Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings. The Court has clarified the

47 Höfner, cit., para. 25: “As regards the manner in which a public employment agency enjoying an exclusive right of employment procurement conducts itself in relation to executive recruitment undertaken by private recruitment consultancy companies, it must be stated that the application of Article 86 [82] of the Treaty cannot obstruct the performance of the particular task assigned to that agency in so far as the latter is manifestly not in a position to satisfy demand in that area of the market and in fact allows its exclusive rights to be encroached on by those companies”.

48 See, Damien Geradin, Limiting the Scope of Article 82EC: What can the EU learn from the US Supreme Court’s judgment in Trinko in the wake of Microsoft, IMS and Deutsche Telekom? 41 COMM. MARK. L. REV. 1519, 1545 – 1546 (2004): “Article 82 may only apply where three conditions are fulfilled:

– the refusal of access to a facility must be likely to prevent any competition at all on the applicant’s market;
– the access must be indispensable or essential for carrying out the applicant’s business; and,
– the access must be denied without any objective justification”.

49 See, Derrick Wyatt and Alan Dashwood, cit., supra, note 2, 1172 – 1176.


52 See, P. Nicolaides, The New Frontier in State Aid Control – An Economic Assessment of Measures that Compensate Enterprises, 37 INTERECONOMICS 190, 190 (2002). Public service obligations does not necessarily mean that State aid is needed to compensate enterprises providing SGEIs for any extra costs. Market players may voluntarily offer such services without State intervention and governments may establish a clear link with the costs they want to subsidise.
criteria for allocating States aid to public companies.\textsuperscript{53} The essential innovation posed by the Directive of 2000 is represented by the identification of specific obligations for transparency not only in respect of enterprises controlled by government authorities, but also for all facilities, both public and private, with which they maintain relationships likely to recognize them as a matter of law or fact an advantage over their competitors and that are also in a position to use this advantage for purposes other than those it is conferred for. Indeed, the Directive requires Member States to impose to keep separate accounting for each enterprise – carrying out economic activities detached – benefits of special and exclusive rights under Article 86 (1) EC Treaty, or is entrusted with SGEIs under Article 86 (2) EC Treaty, and receiving, for the making of this, some forms of State aid.\textsuperscript{54} The only exemption from this requirement is expected if the aid granted for the provision of SGEIs is fixed for an appropriate period, following an open, transparent and non-discriminatory procedure.\textsuperscript{55}

From the point of view of the strict legality of the norms one cannot raise doubts whatsoever. According to Article 86 (3) EC Treaty, the Commission can take the appropriate measures to ensure transparency in relations between the States and the companies controlled by them. This rule should afford to take the same order in relations between government authorities and certain categories of private enterprises. This conclusion appears to be shared on the basis of the finding that Article 86 (1) EC Treaty refers not only to public companies, but also to all other companies which are granted special or exclusive rights from the State, regardless of their framework of property rights. Similarly, the subsequent paragraph of the provision does not make a distinction between State-owned enterprises, companies controlled by public authorities by means

\textsuperscript{54} Article 1 (2) Directive 2000/52/EC cit., supra, note 47: “2. Without prejudice to specific provisions laid down by the Community the Member States shall ensure that the financial and organisational structure of any undertaking required to maintain separate accounts is correctly reflected in the separate accounts, so that the following emerge clearly:
(a) the costs and revenues associated with different activities;
(b) full details of the methods by which costs and revenues are assigned or allocated to different activities”.
\textsuperscript{55} Article 11 (2) Directive 2000/52/EC cit., supra : “In cases where the compensation for the fulfilment of services of general economic interest has been fixed for an appropriate period following an open, transparent and non-discriminatory procedure it does not seem necessary at this time to require such undertakings to maintain separate accounts”.
of golden shares and totally private firms. It regulates certain aspects of the legal system of all the companies that have entrusted the delivery of SGEIs, whatever being their nature 56.

VI. Relationship Between Privatization and Liberalization

At the first glance, the strictly neutral approach with regard to property right enshrined in the Treaty of Rome seems not to consider the privatization and liberalization as two related phenomena 57. First, European law has played a role in the sale of State companies. The establishment of an economic system intended to protect the competitive environment has in fact led the European Union institutions to have a role in boosting the sale of public enterprises 58. Admitting that liberalization processes render the market more efficient, it is possible to state that the privatization processes has been facilitated by the progressive liberalization of the movement of services and capital, by the application of competition law and State aid and, above all, declared the incompatibility of certain national rules relating to monopolies with the ultimate goal of market integration.

The formal privatization of public enterprises has been considered compulsory in view of their possible sale to private operators. This phase, in which the ownership of the companies

58 See, Parliament Resolution A4-0066/95 of 7 April 1995 “on the Commission’s Annual Economic Report for 1995 (COM(94)0615 – C4-0277/94) and on the Council’s report on the implementation of the broad economic policy guidelines (C4-0004/95)”, 1995 OJ C 109/304: “…that privatization of state-owned companies be conducted in the context of plans for increasing investment, injecting innovation and raising the level of competitiveness in the relevant sector, that mere substitution of public monopolies by private oligopolies be discouraged and that adequate provision for the redeployment of workers displaced by such reforms be made in every case”, privatization may come about at an earlier stage, when liberalization is announced but not yet completed. Generally, national governments sell off their monopolists, or at least force them to a strictly cooperation with the private enterprises, in order to strengthen the monopolist’s position for the future competitive struggle. See, e.g., Wouter Devroe, supra, note 5, at 298.
involved has remained firmly in the hands of the State, has recorded almost exclusively in the subjective view of the property. Indeed, it has left open questions concerning the regulation of the economic actors involved, both in public and private market. The set of rules introduced into national legal orders has affected the discipline, the structure and operation of privatized companies. It has manifested the danger to compromise the freedom of competition in the European Union.

Public offers of sale were to increase the participation, especially in the areas of public utilities or public services, of small savers in the establishment of shareholding companies with no members of control or reference on the basis of the U.S. corporate model.

Direct negotiations with potential buyers have taken place, however, where national governments had deemed necessary to develop a plan for economic rehabilitation and recovery, in consultation with the operators to which it was intended to transfer control of the company being privatized.

However, the process of privatization has unequivocally expressed its anti-competition nature supporting through the sale of state shareholdings, the transition from an organized market in the form of a public monopoly to a structured form of private monopoly. Since the annuity resulting from a monopoly position makes it more reliable to dispose of estimates of profit for the company and, consequently, more advantageous its purchase, direct negotiations has allowed national governments to determine the value of issue of shares at a level higher than the offer to the public depositors. Clearly in this case, the operation of disposal does not lead to improved efficiency of firms operating in a particular economic sector. There is no evidence to open a protected market.

59 The role of the States has changed from provider of services to regulator of markets concerning these services. See, Peter Rott, The Responsibility of the State and the State Liability with a View to Services of general Interest, DIRITTO E POLITICHE DELL’UNIONE EUROPEA, 89, 89 – 90 (2007).
but, rather, it merely reflects a desire to reduce public debt.

The creation of organized markets in the form of monopoly in the area of SGEIs is, in almost all cases, a choice. The process of their erosion does not cover their scope only in the transformation into private monopolies. In this case, the effective liberalization of protected markets would be frustrated. It should allow a general redefinition of skills, approaches and means of intervention models functional and compatible with the objectives of promoting competition and their protection. In this sense, direct government interventions to safeguard public interest gives way to a form of indirect intervention which for the government consist in determining the legal framework and thus the rules of competition law before letting the market make its interactions. Therefore, privatization and liberalization can be seen as two independent but joint phenomena employed by States to draw back their direct involvement in domestic economic systems for a new role of authority regulator. It should be noted that while the privatization remains a prerogative of Member States, liberalization is a responsibility of the European Union.

In this context the creation of independent and monitoring authorities by national governments is essential. By regulating tariffs and quality of services, they protect consumers and facilitate the review and possible repeal of the rules that assign special powers to States, coherently with the domestic discipline of corporate governance and the guidelines of the Commission.

Consequently, it is possible to say that privatizations have not implied deregulations. Their output is a new and profound re-adjustment on assumptions that differ from the previous regulations.

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60 In the common market, the supply of SGEIs from public enterprises has been compromised from privatization originated from public deficit problems and needs of increasing the competition undertaking level. See, e.g., Jacques Léonard – Sylvain Wickham, Privatisations partielles en Europe, différentes cas de figure, REV. MARC. COMM., 168 (1998).

61 The role of public authorities is more and more complex. They have to establish the framework of a market preventing anticompetitive effects not only for undertakings but also for customer. See, Dimitris N. Triantafyllou, De la libéralisation à la régulation des marchés, 3 REV. DR. UN. EUR, 653-660, 654 (2007).
Under this bivalent approach the relationship between the process of privatization and competition policies should be estimated. In particular, it is necessary to rearrange the monopoly sectors concerned, removing entry barriers for new competitors and taking into account the undergoing financial and technology changes at international level.

Finally, privatizations of public enterprises have taken place contemporary to the liberalization of sectors in which they operated, in order to maintain the proper functioning of competitive mechanisms. The safeguard of the public interest pursued by these firms has been guaranteed by the provision of instruments for national governments to control the privatized companies. The most relevant among these instruments are golden shares. On the one hand, through independent authorities, States have become the regulators of the liberalized market, according to the instructions and the requirements defined by European aw. On the other hand, they have continued to play an active role in the dynamics of the same market through the control of privatized companies’ work with the golden shares. If, through the processes of liberalization and privatization, States had tried to back their position in the European economic system, golden shares have been the instrument through which this decline has become modest and limited in scope.

VII. Conclusion

The definition of SGEIs remains a notion in full evolution, flexible and with some gaps, that will raise many interpretative issues in the future. The possibility to adopt a directive on them is still far in the time, and it is not therefore possible to supply a communitarian definition that on a national level leaves aside from the attribution of a detail mission. Their flexibility must be estimated positively as it concurs to preserve the peculiarities of national legal orders in EU in which the opening towards legal order of other States becomes more and more important. The

62 “…although EC law requires effective public service sto be facilitated, the relevant detailed instruments are not specified.” Malcolm Ross, Promoting Solidarity: From Public Service sto a European Model of Competition?, COMM. MARK. L. REV., 1057, 1059 (2007).
acknowledgment of the role of the States in this field is realized in their freedom to delineate the existence and the structure of SGEIs.

The promotion of competition policies in SGEIs has been operated through their liberalization processes. They have been put into effect through some exceptions to the rules of the common market, above all norms concerning freedom of establishment and State aids.

The appropriate re-balance could have place through the antitrust vigilance. Such activity must prevent that exceptional devices acquire dimensions or produce effects exceeding their justification and must avoid alterations of the economic competition that do not answer to some authentic social public mission. As a result, antitrust rules can carry out a function of balance for the free market.

In this way it must be observed the relationship between processes of liberalization of SGEIs and privatization of public enterprises providing them. Member States maintain an important role but change their function: from the supply of the services to the regulation of the forces of the market that guarantee the services themselves.