

Services related to water use and their reflection in jurisprudence

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Abstract. The paper highlights the role of services of general interest (SGIs) for the protection of the environment. Many environmental services (such as sanitation services, sewage disposal, wastewater treatment and collection) can be considered as public services or services of general interest. The water supply is a service of general interest as it is defined in the Commission Communication on services of general interest. SGIs are activities that public authorities identify as being of particular importance to citizens and fulfill people's daily needs and they are vital to their well being. The "water services" content is presented in light of European Union Court of Justice jurisprudence.

Key Words: water, services, SGIs, environment, jurisprudence, European terminology.

Introduction. According to World Trade Organization, environmental services include sewage services, refuse disposal, sanitation and similar services, reducing vehicle emissions, noise abatement services, nature and landscape protection services and "other" environmental services. It is difficult to draw the line between "environmental services" *per se* and other services coming into play for the protection of the environment in a broad sense. Many environmental services (such as sanitation services, sewage disposal, wastewater treatment and collection) can be considered as public services or services of general interest according to the European terminology. Traditionally, Services of General Interest (SGIs) were provided by the state or its regional, local authorities. Nowadays, these public monopolies are increasingly privatized. Nevertheless, strict regulatory control through exclusive contracts, technical standards, license requirements represents a key feature in many environmental services regimes (Krajewski 2004). The tendency towards privatization in the water sector has been more limited than in other infrastructure sectors, with private companies representing about 10 per cent of the worldwide market. There may be significant regional differences, though (UNCTAD 2008; UN-Habitat 2003). Involvement of the private sector can take several forms. Full divestiture of assets is uncommon in the water sector. Normally, the public sector retains ownership of infrastructure and involves the private sector through various contractual arrangements (Cossy 2005).

Water services include the supply of water for consumption and the treatment of wastewater (WTO 2010). Water supply involves the capture of the resource, its treatment to reach a determined level of quality, transportation through a primary network (aqueducts or mains) and delivery to users through the secondary network (pipelines and taps) (Kessides 2004). Wastewater services entail the removal of sewage through pipes and drains and treatment with various techniques (chemical, physical or biological) with the objective of removing contaminants and making water available for reuse or release into the environment.

The existence and correct definition of the water services related terms and activities within the legal framework is, indeed, one indispensable condition for an effective supply of water services. Obviously, the functioning of the service supplier has

the major influence on these. Additionally, the correct perception of the water services in customers'/final users' minds has also a contribution to the good functioning of the water services: it facilitates a better communication customers–service provider, it has an impact on how customers understand the water services impact on environment etc. (Petrescu 2013).

Services of general interest. Definition and reflections in Romanian and EU legislation. There is a wide interest in and support for the idea of treating water as an economic good. In 1992 the Dublin Water Principles claimed “water as an economic good” for the first time in a UN settings (Rogers et al 2002; Perry et al 1997). The Dublin proclamation is seen as a compromise between those who wanted to treat water as other private goods, subject to allocation through competitive market pricing, and those who wanted to treat water as a basic human need that should be largely exempted from competitive market pricing and allocation (Perry et al 1997). The water supply is a service of general interest as it is defined in the Commission Communication on services of general interest. SGIs are activities that public authorities identify as being of particular importance to citizens and fulfil people's daily needs and they are vital to their well being. Public services differ from other services in that public authorities have a responsibility to ensure their supply regardless of whether they are profitable in a free market.

Although SG(E)Is (Services of General Economic Interest) are difficult to define precisely because of variations between one Member State and another, they cover, for example, water, energy supply and waste disposal, healthcare and social services, education and postal deliveries (Van de Walle 2008). The distinction between SGIs and SGEIs is equally hard to pin down, and is also subject to interpretation by the European Court of Justice (“any activity consisting in offering goods and services on a given market is an economic activity”). Generally, SGIs could be defined as those provided directly by public authorities, such as compulsory education and security, whereas SGEIs indicates their economic character, entailing an economic relationship of some sort between supplier and consumer (<http://www.etuc.org/public-services-services-general-economic-interest-sgeis>).

A precise definition of “services of general economic interest” is also lacking in the EU Treaties as well as in secondary legislation. Article 14 of TFUE (Treaty on the Functioning of the European Union) specifically recognizes that services of general economic interest have a public service mission that distinguishes from other commercial services within the single market “(...) given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions (...)”. According to Article 57 of TFUE, “services” shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions. The Charter of Fundamental Rights states in art. 36 that “The Union recognizes and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.” The importance of such provisions relays on the fact that since 1 December 2009, with the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights became legally binding on the EU institutions and on national governments. According to article 2, point 38 of Directive 2000/60 water services include all services which provide, for households, public institutions or any economic activity: (a) abstraction, impoundment, storage, treatment and distribution of surface water or groundwater (b) waste-water collection and treatment facilities which subsequently discharge into surface water. Water use means water services together with any other activity identified under Article 5 and Annex II of Directive 2000/60, having a significant impact on the status of water.

Interpretation of "water services" content has been the subject of legal action before the Court of Justice of the European Union. In the case C-525/12, *European Commission v Germany*, the European Commission considered the Federal Republic of Germany has failed to fulfill its obligations under Directive 2000/60/EC (the Water Framework Directive) and in particular under Article 2(38) and Article 9, because it has adopted an interpretation which excludes certain services from the concept of "water services". The use of the concept "water services" by the defendant is considered to be contrary to Article 9 of the Water Framework Directive (WFD). The defendant excludes water services such as impoundment which is intended for hydro electric power production, navigation and flood protection from the scope of water services within the meaning of the Directive. Therefore, it all started from the fact that the Commission considers that the abstraction, impoundment, storage, treatment and distribution of surface water or ground water for the purposes of hydro electric power production, navigation and flood protection are also included within water services. Further, personal consumption is also be categorized under water services. Such a narrow defendant's interpretation of "water services" is not compatible with the WFD, undermines the effectiveness of Article 9 WFD and thereby jeopardizes the attainment of the Directive's objectives. It is true that the Member States enjoy a certain margin of discretion on the basis of Article 9 WFD to exclude water services from recovery of costs. They might first have regard to the social, environmental and economic effects of the recovery of costs as well as the geographic and climatic conditions. Further, a MS might under Article 9(4) WFD decide not to apply the provisions of the second sentence of Article 9(1) WFD in relation to water-pricing policies and recovery of the costs of water services. That option is subject to the condition that there is an established practice in the Member State and that the purposes and the achievement of the objectives of the Directive are not compromised. The complete exclusion of a substantial range of water services, as effected by the defendant, goes far beyond that margin of discretion (Court of Justice of the European Union 2012).

At national level, Law no. 241/2006 for service water supply and sewerage, republished in 2013, establishes a uniform legal framework regarding the establishment, organization, management, financing, operation, monitoring and control of the supply/rendering public service for water supply and sewerage of towns. Technical terms used in this Law are defined according to art. 3 (by way of example):

a) water supply and sanitation service - all the activities of public and general economic and social interest made for the collection, treatment, transport, storage and distribution of drinking and industrial water for users on the territory of a municipality, and for the collection, transport, treatment and disposal of wastewater, storm water and surface water derived from the built-up area;

b) water service supply - all activities necessary to:

- abstraction of raw water from surface or groundwater sources,
- treatment of raw water,
- transport of drinking or industrial water,
- water storage,
- distribution of drinking or industrial water;

c) sewerage service - all activities necessary to:

- the collection, transportation and disposal of waste water from users to sewage plants,
- waste water treatment and discharge of treated water into the emissary,
- the collection, disposal and treatment of waste from discharged storm water and the attempts to ensure their functionality,
- the disposal, treatment and storage of sludge and other similar waste derived from the activities mentioned above,
- the drainage of rainwater and surface water from the urban areas.

Chapter II of Law no. 241/2006 covers relevant authorities and their attributes in the organization and deployment of the public service of water supply and sewerage. Chapter III of the law is devoted to the organization and functioning of the water supply and sanitation service, and Chapter IV to operators and users. According to art. 26, the suppliers/providers of water supply and sanitation services that provide the operation,

management, administration and exploitation of the water supply systems and waste water and related services operating under license, have the status of operators. Operators of water supply and sewage services are defined according to Law no. 51/2006, as amended and supplemented. According to art. 28, any natural or legal person, which qualifies as owner or having a right of use of a building which has its own branching for drinking water or own sewage connection, and which has concluded an individual contract with the operator for the supply/provision of water, has the quality of an individual user of the water supply and sanitation service. Natural or legal persons are considered individual users of the water supply and sanitation service, even if they do not have proper drinking water branching, respectively own sewage connection, if there are technical conditions for the delimitation/separation of installations between users, for individualizing consumption and for conclusion of the supply/provision service contracts on their own (Petrescu-Mag & Petrescu 2014). Users of water supply and sewage service are:

- economic operators;
- public institutions;
- individual home users, natural persons;
- collective home users, associates of the owners / tenants with legal personality.

The terms of service and the supply service contract establish the legal relations between the operator and users, as well as the rights and obligations of users and operators.

Conclusions. Even if there are many different ways to promote equity, efficiency and sustainability in the water sector, most voices consider water pricing as the most appropriate way to achieve these goals. Even though water is an economic good, beyond this reality we must not forget that principle 4 of the Dublin Conference on Water and Sustainable Development explicitly reaffirmed the human right to water: "... it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price". The concept of water as human right has developed from the recognition that treating the right to water as economic good may result in an affordability problem for some communities, depriving them of access to water (McCaffrey 1992).

The access to a basic water requirement is a fundamental human right implicitly and explicitly supported by international law, declarations and state practice. By acknowledging a human right to water and expressing the willingness to meet this right for those currently deprived of it, the water community would have a useful tool for addressing one of the most fundamental failures of 20th century development (Gleick 1998).

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