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State Aid as a Risk in the Policy of Competitive Advantages in the European Union*

Pomoc udzielana przez państwa jako ryzyko w polityce przewag konkurencyjnych w Unii Europejskiej

ABSTRACT

Compatibility of economic advantages with the internal market refers to the economic impact of state aid that is permitted by EU competition rules. In general, this approach is based on the acceptance of derogations from basic obligations in a market economy, that may also be granted by the European Union to its Member States. Due advantages seem compatible with EU law *per se*, however, such compatibility also depends on the discretion of the competent administrative and judicial bodies. According to the analytical and empirical legal policy investigation presented in this article, the activity of the Court of Justice of the European Union is increasing in order to allow exceptions from general rules and extend the scope of compatibility in this field. This process may

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lead to enhance derogations from market-based commitments in Member States, typically in certain Central and Eastern European countries, which tend to emphasize the primacy of national regulation and are keen to exploit the potential of such broader regulatory autonomy. The aim of the study is to identify the origin and nature of this risk in order to support efforts that may diminish harmful effects in an EU-wide context. The empirical evidence of the paper derives from a systematically selected set of case law as a context by which the examined policy orientation is mirrored.

Keywords: internal market; EU competition rules; state aid; due advantage

INTRODUCTION

The borderline between those actions that are non-liberal or still comply with the economic law of the European Union seems to be more and more relative nowadays. Recent challenges like the global financial and economic crisis of 2008 or the coronavirus crisis may even strengthen this ambivalence. In spite of expectations of a deeper integration in the European Union, a contradictory tendency may arise concerning competitive advantages that are not classified as measures being incompatible with EU law. In European legislation, we can see a trend for almost two decades that Member States' governments get more influence in those economic sectors which are subject to regulation at the EU level, and consequently, their discretion has been increasing in the determination of national measures that comply with the EU requirements. It can also be observed that governments, typically in Central and Eastern Europe, which emphasize the primacy of national (central) regulation, are keen to exploit the potential of such broader regulatory autonomy. However, such a trend may lead to weakening of the integration as a whole, especially as an effect of nationalist powers showing scepticism towards a stronger Europe.

Our research question focuses on the effect of the above-mentioned trend on EU competition and state aid policy. We argue that the consequences of this trend are widespread, even if not with the same intensity in each country and also depending on the government policy in a given state. However, in some of the countries, such a trend poses objective risks on competition, notwithstanding negative political consequences. For instance, as the 2022 Rule of Law Report of the European Commission[1] highlights, some of the countries (esp. Hungary, Bulgaria, or Poland to a certain extent) are threatened by objective corruption risks due to unclear conditions in public procurement legal rules. Among others it seems to mean, that if the democratic control of a given political regime is unsatisfactory, granting direct and indirect state aid may be influenced by the government power in a way that goes against the normal operation of the market economy.

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2022 Rule of Law Report – The rule of law situation in the European Union, COM/2022/500 final.

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The analysis highlights the regulatory background for the tendency of extending Member States' discretionary powers in matters of EU state aid and competition law as described above. The role of the case law of the Court of Justice of the European Union (the CJEU) is of particular importance in supporting this line of development.

According to our hypothesis, there is a correlation between broadening the scope of derogations allowed for Member States and changing the approach of the CJEU to be increasingly acceptive towards national derogatory instruments. This is because the jurisdiction of the CJEU is more than a simple application of derogated rules in a mechanic way since a general policy approach is always mirrored in any exemptions. In other words, it means that the broader the scope of Member States' power to derogate from general rules is, the more the CJEU uses the limits of its discretionary powers in jurisdiction.

Our study seeks to prove the above statement by way of a statistical analysis on the relevant decisions of the CJEU. The analysis also attempts to highlight those characteristics of the EU regulatory context that may explain why enhancing Member States' powers in competition and state aid regulation may have a risk of causing long-term negative effect on the EU economic integration.

Firstly, the relevant rules of the EU legal framework are analyzed with a particular emphasis on the scope of discretionary powers left to national authorities in the implementation of such rules. Then, the underlying arguments of this study are tested by an empirical analysis on the basis of a dataset containing selected cases of the CJEU. Finally, we summarize and discuss our findings, aiming at contributing to the debate on recent changes in EU competition policy and market regulation,[2] in particular regarding to the limits of state intervention.

THEORIES AND METHODS

1. Theoretical framework

The above-mentioned trend towards giving more influence for Member States' governments is a part of a development process[3] in EU competition law and regulation of services of general economic interests at the EU level. This process has assumed particular importance in the liberalization of specific sectors, especially in

[2] For example, see P.I. Colomo, *Will Article 106 TFEU Case Law Transform EU Competition Law?*, "Journal of European Competition Law and Practice" 2022, vol. 13(6), pp. 385–386; J. Haas, V.J. D'Erman, D.F. Schulz, A. Verdun, *Economic and Fiscal Policy Coordination After the Crisis: Is the European Semester Promoting More or Less State Intervention?*, "Journal of European Integration" 2020, vol. 42(3), pp. 327–344.

[3] J.J.P. López, *The Concept of State Aid under EU Law: From Internal Market to Competition and Beyond*, Oxford 2015.

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the field of utilities.[4] Essentially it means that although market opening and access remained a central policy objective, other priorities were also being promoted. This "paradigm shift"[5] is an important factor in the explanation why the degree of liberalization varied from sector to sector. The liberalization was extensive, for instance, in telecommunications or electronic communications. The energy market, however, remained dominated by the presence of natural monopolies, where the specific public service grounds (universal service obligation, security of supply, environmental concerns) gave Member States more opportunities to derogate from market liberalization.[6]

A change of a similar nature can be observed in the Commission's attitude in state aid cases which should not be seen as isolated from the financial and economic environment of that time. In this sense, the first significant factor was the wake of the global financial and economic crisis of 2008, when the Commission assessed, within one year, over 100 national schemes or measures to support financial institutions under EU state aid rules.[7] The Commission also adopted its first Temporary Framework,[8] as well as communications and regulations in order to allow Member States to grant certain types of aid to structurally weak companies and those facing a sudden shortage or unavailability of credit in order to reduce the negative effects of the crisis. The Temporary Framework also pointed out that a strict interpretation of any derogating provision had been consistently applied by the Commission in its decision-making previously. However, global crises like the one of 2008 or the COVID-19 pandemic and the ongoing Russian–Ukrainian war required (and still require) exceptional policy responses such as the application of Article 107 (3) (b) TFEU (allowing aids to remedy a serious disturbance in Member States' economy) which was not invoked before such crises. These measures left more room for Member States to grant state aid in those sectors that are affected by the negative economic consequences, even indirectly.[9] The crises thus served as an opportunity

[4] G. Bruzzone, M. Boccaccio, *Infrastructures and SGEI: The Scope of State Aid Control and Its Impact on National Policies*, [in:] *EU State Aid Law: Emerging Trends at the National and EU Level*, eds. P. Parrcu, G. Monti, M. Botta, Cheltenham 2020.

[5] L. Hancher, P. Larouche, *The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest*, [in:] *The Evolution of EU Law*, eds. P. Craig, G. Búrca, Oxford 2011.

[6] T. Prosser, *The Limits of Competition Law: Markets and Public Services*, Oxford 2005, pp. 174, 192–194; L. Hancher, P. Larouche, *op. cit*.

[7] P. Lowe, *State Aid Policy in the Policy of the Financial Crisis*, "Competition Policy Newsletter" 2011, vol. 16(3).

[8] Communication from the Commission – Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 16/1, 22.1.2009).

[9] While after the wake of the crisis of 2008, only financial institutions received such exceptional aid, the COVID-19 outbreak is seen as "affecting undertakings in all sectors and of all kinds" and therefore all of them can be a beneficiary. See in particular Communication from the Commission

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for influencing EU state aid and competition policy, this way giving national governments an impetus for experimenting with "patriotic" national policies.[10]

Regulatory changes in the above direction have been justified by legitimate European interests other than the proper functioning of the internal market like consumer protection and the weight of such interest at regulatory level seems to be growing. Taking the example of energy, public service obligations and consumer rights (in particular, for vulnerable groups of consumers) have been extended with each generation of the EU regulatory regime and we can also observe a wide range of other legitimate objectives (environmental protection among others) accompanied by a high tolerance for public service obligations in the energy sector.

However, national policies of certain Member States' governments may also be served by these preferences in a way to get more influence in those economic sectors which are subject to regulation at the EU level. Although the degree of liberalization and the level of national autonomy obviously differ sector by sector, similar tendencies or at least a step towards the above direction can be seen in each area.

Our analysis mainly focuses on changes of European Union rules, in particular on the exemptions which apply in specific sectors like energy (electricity and gas), postal and communication services, waste, water and wastewater. These changes in the regulatory background have an influential effect on the wider context of competition extending well beyond the scope of the above-mentioned areas, because in these sectors services of general economic interest are closely connected to ordinary services of economic interests. It also means that the profile of companies entrusted the provision of services of general economic interest often includes entirely private services additional to the former. Contrary to the expected separation, the application of exceptional rules addressing only services of general economic interest may even extend to private service provision activities of such companies, raising the risk of distortion in the competitive market. Nevertheless, this phenomenon also explains why the above-mentioned sectors (regulated sectors) are more important for national governments than the others.

In the competition policy of the European Union, there is a twofold usage of state aid as terminology as direct aid approach or compensation approach[11] as explained below. It also applies to competitive advantages other than those constituted by such aids, i.e. to all kinds of economic advantages which may even negatively influence the competition on the internal market by strengthening the competi-

– Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 91I/1, 20.3.2020), hereinafter: the 2020 Commission Communication.

[10] M. Varju, M. Papp, *The Crisis, National Economic Particularism and EU Law: What Can We Learn from the Hungarian Case?*, "Common Market Law Review" 2016, vol. 53(6), pp. 1647–1674.

[11] L. Zhu, *Services of General Economic Interest in EU Competition Law: Striking a Balance between Non-Economic Values and Market Competition*, Heidelberg 2020, p. 18.

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tive position of a company and which is attributable to states or any other public entities. In this context, the term "due advantage" refers to economic advantages which are qualified as being lawful under EU rules, either as "no advantage" or as an advantage declared to be compatible with the internal market.

2. Methodology

There are two main methods applied in this paper. Our analytical approach focuses on gradual changes of the policy on due advantages in EU law. The study combines its analytical research with legal empirical, especially statistical, evidence in a way to analyze the case law of the CJEU.

We developed an original data basis containing selected cases completed by the CJEU – that is, the Court of Justice (hereinafter: the Court) and the General Court – between 2000 and 2020. Based on the categories of particular subject matter tables on the whole judicial activity,[12] 11 subject areas (approximation of laws, competition, consumer protection, energy, freedom of establishment, freedom to provide services, free movement of capital, public health, public procurement, state subsidies, transport) have been selected, i.e. those where the sector involved or the contested national instruments where relevant from the point of view of our research focus. The sample selection is focused on mixed cases in which the issue of competition and liberalization is supplemented by any type of correction (restrictions, state aid, etc.).

As a first step in finding the relevant cases, we examined all decisions of the above 3,878 cases where the judgment's text mentions at least one of the following options: (1) one of our previously defined keywords; (2) one of the relevant EU Treaty provisions or secondary legislative acts; (3) one of the most cited cases of the CJEU in the literature. After filtering from the point of view of relevancy we collected a total of 274 decisions (hereinafter: selected sample cases).

ANALYTICAL FRAMEWORK

In fact, general economic services are highly important areas of policy formulation at different government levels. In specific sectors, the term "competitive advantage" arises with two meanings. Firstly, it is a matter of general EU competition policy, because there is a real market of service provision by both public and private undertakings. Secondly, it has a specific meaning in those parts of service provision that aim at serving general interest.

[12] Annual reports of the CJEU 2000–2020 are available at https://curia.europa.eu/jcms/jcms/Jo2_7000/en and https://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels.

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As a main rule, competition law provisions in the Treaty on the Functioning of the European Union also apply to undertakings entrusted with the operation of services of general economic interest. However, such provisions apply only in so far as their application does not obstruct the performance of the particular public service obligation assigned to these undertakings (Article 106 (1) to (2), Articles 107 and 102 TFEU). Other derogations for services of general economic interest may also be derived from specific EU law rules and the case law of the CJEU. We will see that the relationship between generally applicable derogations and those for such services is not without controversy and raises several questions regarding competitive advantages in the services market as a whole.

Most cases concerning EU competition rules and public services arise in the context of state aid rules, dominance abuse, or specific sectoral legislation.[13] The obligation of Member States to adjust their law regarding commercial monopolies in a non-discriminatory manner might also be relevant here if goods produced or distributed by such monopolies are subject to public service provision.

1. Competitive advantages in the services market

Advantages constituted by derogations from general EU competition and internal market rules can be maintained for several reasons, in the ordinary services market too. State aids, as instruments being able to generate competitive advantages in a selective way, are generally prohibited, unless they are found to be compatible with the internal market because of their specific objectives. Nevertheless, the application of the test of identifying aids incompatible with the internal market (i.e. the aid is granted by the state or through state resources, creates an economic advantage, which is selective and distorts or threatens to distort competition and trade between EU countries) allows discretion in establishing compatibility of the given state aid which is a relevant factor in the development of the practice of the Court and the Commission. In addition, EU law rules provide for many reasons for qualifying such aids as due advantages. Firstly, market economy investor principle and market economy operator principle test must be mentioned. These tests are based on a comparison between a state investor/operator and a private one and if the latter one provides such sums or support in similar conditions, the public grant at issue does not constitute an economic advantage and, consequently, does not qualify as a state aid in the meaning of TFEU. Secondly, there are several advantages classified as "compatible aids" based on specific EU policy objectives (see Article 107 (2) to (3) TFEU) set out in the TFEU. Thirdly, as a main rule, all new aid measures must be notified to the Commission for approval prior to putting them

[13] W. Sauter, *Public Services in EU Law*, Cambridge 2014, p. 75.

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into effect. There are, however, many exceptions to mandatory notification, and the scope of these have gradually been extended.[14]

Revenue producing monopolies may also be saved from the application of general EU competition and internal market rules, not only if they perform a public service obligation but also when their activities include (even though not exclusively) production or distribution of goods that may be subject to or resource of public service provision like electricity.

2. Competitive advantages in the market of services of general economic interest

The development process in EU market integration outlined above is more characteristic in the changing law of services of general economic interest.[15] It seems to have a wider importance spreading well beyond the context of regulation because a shift in the understanding of compliance[16] allowed a wide room for a gradual enhancement of Member States' powers.

First of all, there is a gradual change in the interpretation of compensation for public service provision. In 2001 the CJEU reversed its former position and established that the discharge of public service obligation is not covered by state aid prohibition where it merely compensates the provider of a public service mission for the costs that arise due to the performance[17] which, by its nature, cannot be operated under normal market conditions. The *Altmark* decision[18] of 2003 confirmed that principle and determined further four cumulative criteria which have to be met for not qualifying public service compensation as state aid. According to the Court's interpretation, these measures as being no more than corrections for market failures do not constitute a real economic advantage. It is however doubtful whether this conclusion adequately reflects the market reality in all cases. In addition, compensations that do not comply with the Altmark conditions may also be saved as "compatible aids" if these are necessary for the operation of a given public service.[19]

By declaring financial compensation to service providers out of the realm of state aid concept, the Court, in essence, significantly reduced the monitoring and decision-making competence of the Commission over national measures granting compensation for public services, as the judgment allows for a self-assessment by

[14] See the 2020 Commission Communication.

[15] P.I. Colomo, *op. cit*.

[16] I. Bartha, T.M. Horváth, *Does Not It Matter? Widening of Derogation for Services of General Interests*, "Maastricht Journal of Comparative Law" 2020, vol. 27(1), pp. 1–20.

[17] Judgment of the ECJ of 22 November 2001, case C-53/00, *Ferring*, ECLI:EU:C:2001:627.

[18] Judgment of the ECJ of 24 July 2003, case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg*, ECLI:EU:C:2003:415, paras 89–93.

[19] See Article 106 (2) TFEU.

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Member States[20] of that issue. This means in fact, that Member States were left relatively free under the criteria defined by the *Altmark* judgment. In particular, the fourth condition (the option of using a benchmark as an alternative for a tendering procedure in order to ensure efficiency) leaves wide room for Member States' discretion.[21]

After delivering the *Altmark* judgment, the Commission's legislative activity (in particular the "Monti-Kroes" package in force between 2005 and 2013, the Almunia package in force since 2013, and the latest State Aid Notice of 2016) gradually extended the scope of those Member States' measures granted to finance public services which are not covered by the prohibition of TFEU. For instance, in the State Aid Notice of 2016, Member States won more room for "purely local interventions" to be treated as exemptions from the general state aid rules on the basis that such local services do not affect trade. Furthermore, the Notice also confirms that public investments in roads, inland waterways, rail and water distribution networks can typically be carried out without prior scrutiny by the Commission. On the basis of TFEU and related case law, these packages (together with the latest Notice) created the evolving regulatory framework of the "EU public service of general interest policy".

The rule on prohibition of abuse of dominant position also aims to eliminate undue advantages of certain undertakings. Nevertheless, granting exclusive or special rights by a Member State to an undertaking often generates the dominant position itself.[22] If there is a causal link between the grant of the exclusive right and the undertaking's abusive behaviour, the latter will fall under prohibition, but may also be "tolerated" if it is needed to fulfill public service obligations.

In the EU regulatory context, the scope of the "general interest" criterion may extend beyond the traditional understanding of "public" services in a strict sense. Therefore, we can say that public service obligations have a mixed profile which is also indicated by the different sets of exclusive rights or other privileges declared to be compatible with EU law. The compatibility may be based either on the provision of general interest services or on other "good reasons" (like environmental protection) which may justify the granting of state aids or maintaining state monopolies.

Consequently, due competitive advantages may be derived from either the provision of services of general economic interests or from other legally accepted objectives. Nevertheless, these are interlinked in the regulated sectors because companies, many times public companies (public utilities), simultaneously provide public services and private services, and, in addition, produce goods as a subject

[20] L. Zhu, *op. cit.*, p. 96.

[21] F. de Cecco, *State Aid and the European Economic Constitution*, Oxford 2013.

[22] Judgment of the ECJ of 3 March 2011, case C-437/09, *AG2R Prévoyance v Beaudout Père et Fils SARL*, ECLI:EU:C:2011:112.

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of these services. For instance, energy production and electricity are regarded as a service or a public service that is based on an obligation to be fulfilled to consumers' community.

In the case of undertakings providing public services, the exemptions from state aid prohibition not related to public service obligation and the conjunctive criteria of the *Altmark* decision may be cumulated. Notwithstanding their function of providing public services, these undertakings are subjects to competition rules simultaneously, because they often provide private services as well, in the framework of their same sector activity. For instance, solid waste management includes not only a public service for local inhabitant, but also a private service for the collection of non-hazardous waste arising from the activity of companies.

In sum, the scope of due advantages arising from the above derogations (whether "no advantages" or "competitive advantages") have gradually been extended. It means in fact that Member States are increasingly empowered to take national measures that depart from the EU's main market rules. This process has a direct impact on the course of the integration during the last decades.

EMPIRICS

As mentioned, the sample selection is focused on mixed cases in which the issue of competition and liberalization is supplemented by certain type of correcting measures. In cases like this the nature of the service at issue requires some degree of public involvement (or even intervention) bringing companies providing such services in a privileged situation against those operating under normal market circumstances where general rules of EU internal market and competition law apply. The form of competitive advantages triggered by these measures may be manifold. In our set of selected sample cases, the contested issues in the case law – based on the specific categories of Member States' regulatory instruments and taking into account their frequencies – have been classified into the following main groups as indicators of advantages: transfer of exclusive rights to particular undertakings, exceptional rights from obligation on public procurement, transferring direct subsidies from general government expenditures, pricing by government (public price intervention) of service provision and maintaining state-owned enterprises (state-owned shares of companies in service provision). This way, we identified 360 SGI-related individual problems in the total of 274 selected cases.

The reason why the number of such problems is higher than the number of the selected sample cases is that often more than one of these issues is involved in a single judicial case. This is the case, e.g., with state-owned companies being beneficiaries of both exclusive rights to provide certain services and aids granted by the central or local government. The essence of our selection is to collect any

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instruments derogating from generally applicable internal market and competition rules. This way, the cases have been categorized according to the most widespread tools of service provision (see Figure 1).

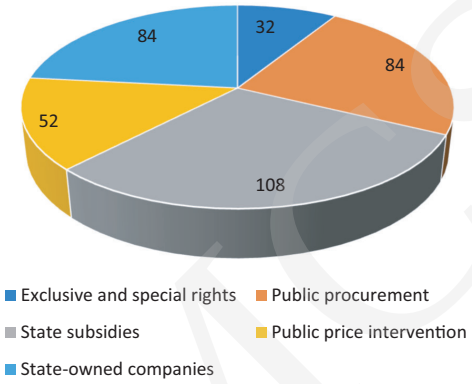


Figure 1. Indicators of competitive advantage by subjects (n = 360) of the selected cases

Source: Authors' own elaboration.

According to Figure 1, the effect of derogation is mirrored in the number of cases before the CJEU. It is measurable by the mentioned indicators as a basis of grouping of the analysed judicial cases according to their contents.

1. As regards services of general economic interests, EU law allows wide discretion to Member States in defining the scope of such services and in choosing the instruments for their operation, granting *exclusive rights* among them. The case law of the Court also confirms that exclusive rights granting competitive advantage by restricting or even excluding competition in the internal market are not necessarily incompatible with EU law if they are inevitable to ensure the performance of public service obligation assigned to the company concerned.

2. EU *public procurement directives*[23] declare a number of reasons that allow Member States/competent authorities to make exceptions to the generally applicable rules of the directives. First of all, their provisions did not apply to "in-house" operation. The concept of "in-house" involves the direct provision of services by public means, i.e. their own means of the contracting authority (which may also be operated under market rules), as opposed to contracting with private economic operators. The directives do not prevent the imposition or enforcement of measures

[23] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94/65, 28.3.2014); Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94/243, 28.3.2014).

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necessary to protect public policy, public morality, public security, health, human and animal life, the preservation of plant life or other environmental measures, or to organize the Member States' social security systems.[24] Furthermore, a new clause[25] was added to the latest generation public procurement directives emphasizing Member States' freedom in public service provision.

3. The lawful ways of avoiding state aid prohibition under TFEU were already discussed above. As was already mentioned, state aid is not only constituted by *subsidies*, but also by *measures reducing costs of undertakings*. The latter category typically includes tax or payment advantages, advantageous interest rate for loans, etc.

4. *Interventions in price regulation* might be among the most serious interventions into market trends. The question, whether these might be compatible with the internal market, arises first and foremost in relation to universal services as ensuring access to basic public services at affordable prices is an essential element of a universal service obligation. According to data from 2019, public price intervention still exists in certain Member States, both in the electricity and the gas sectors.[26]

5. *State-owned companies* are important elements of national economies and also increasingly active internationally,[27] which has led to renewed concerns in recent years about whether their competitive conditions in home markets might adversely impact "fair" competition with companies abroad.[28]

Based on the analysis of the respective categories, we may conclude that the CJEU, within the scope of its discretionary power represents a relatively extensive approach which is rather acceptive than rejecting towards Member States' derogatory instruments.

The above-mentioned acceptive approach is manifested, first of all, in the broad interpretation of the concept of services of general economic interest. For example, the Court did not exclude this qualification for services of rather supplementary nature (typically payment services). This was the case with a Bulgarian regulation granting exclusive right to the national postal operator, a commercial company wholly owned by the state, to provide a money order service for paying retirement pensions;[29] or a Hungarian act establishing a monopoly operating a "national mobile

[24] Recital (41), Article 1 (3) to (4) of the Directive 2014/24/EU; Recital (56), Article 1 (3) to (4) of the Directive 2014/25/EU.

[25] Article 1 (4) of the Directive 2014/24/EU; Article 1 (4) of the Directive 2014/25/EU.

[26] European Union Agency for the Cooperation of Energy Regulators, *ACER-CEER Market Monitoring Report (MMR) 2019*, vol. 3: *Energy Retail and Consumer Protection*, 26.10.2020, https://www.acer.europa.eu/en/Electricity/Market%20monitoring/Pages/Current-edition.aspx (access: 8.5.2023).

[27] B. Rygh, *Governmental Goals and the International Strategies of State-Owned Multinational Enterprises: A Conceptual Discussion*, "Journal of Management and Governance" 2022, vol. 26, pp. 1155–1181.

[28] OECD, *The Size and Sectoral Distribution of State-Owned Enterprises*, Paris 2017.

[29] See judgment of the ECJ of 22 October 2015, case C-185/14, *EasyPay*, ECLI:EU:C:2015:716.

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payment system" for the electronic payment[30] of public parking service fees, user charges for accessing road network and certain types of public passenger transport services. Similarly, concepts closely linked to services of general economic interest exceptions like "in-house" are also extensively interpreted.

As mentioned, the scope of "general interest related" exceptions often goes beyond the traditional categories of public service obligation. Taking the example of public procurement, Directive 2014/24/EU, as opposed to Directive 2014/25/EU, is not only addressed to contracting authorities being in charge for the provision of services of general economic interest. However, the wording of the above "exception clauses" is the same in both directives. This tendency of expanding the scope of exemptions is justified by the case law, concerning activities like modernisation of airport infrastructure, construction and maintenance of roads, urban planning or environmental hygiene services.

The acceptive approach of the CJEU towards Member States' derogatory measures can mainly be explained by the changes in the relevant legislative framework and policy considerations behind them. As a striking example, the conditions for granting compensation for the fulfillment of public service obligation have gradually been expanded (as detailed above) by the Commission's legislation and communications after the *Altmark* judgment and such an approach was also reflected by the Court's subsequent decisions. In this sense, price regulation in the energy and gas sectors should also be highlighted. Member States, from the adoption of the second energy package onwards, are expressly authorized to impose public service obligation in relation to "the price of supplies" and the scope of those measures that Member States are permitted to take for the protection of consumers have gradually been expanded by the subsequent energy packages. When interpreting these provisions in the *Federutility* judgment,[31] the Court established that the second gas directive did not preclude national legislation allocating to the national regulatory authority the power to define "reference prices" for the sale of gas to costumers (not only to household consumers!) provided that certain conditions were met and this interpretation was also extended to the third gas directive[32] currently in force.

The approach of the CJEU seems to be acceptive in those areas as well where the authorization given to the Member States was originally broad. In this context we mean, in particular, rules like the neutrality of ownership (Article 345 TFEU) which states that EU law does not concern the rules in Member States governing the system

[30] See judgment of the ECJ of 7 November 2018, case C-171/17, *Commission v Hungary*, ECLI:EU:C:2018:881.

[31] See judgment of the ECJ of 20 April 2010, case C-265/08, *Federutility and others*, ECLI:EU:C:2010:205.

[32] See judgment of the ECJ of 7 September 2016, case C-121/15, *ANODE v Premier ministre and others*, ECLI:EU:C:2016:637.

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of property ownership. In the *Essent* case[33] concerning Dutch law prohibiting privatization of electricity and gas distribution system operators, the Court also confirmed that the reasons underlying national property ownership rules may be taken into consideration as potentially justifying restrictions on the free movement of capital.

Even if a state instrument or regulatory solution is qualified, based on the content of the judicial decision, as due or partly due advantage, the *de facto* impact of its existence or operation on the market may lead to serious distortion of competition, in particular, if the advantage granted in form 1–5 above is misused.[34]

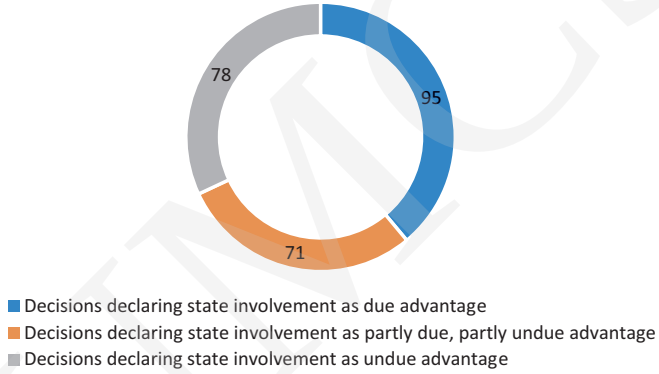


Figure 2. Decisions (n = 274) of the CJEU on state measures granting competitive advantages in cases completed in 2000–2020 (%)

Source: Authors' own elaboration.

Figure 2 classifies the relevant judicial decisions according to their outcomes. However, this type of classification cannot simply correspond to the question of whether a Member State's action is lawful or unlawful in light of a judicial decision. On the one hand, the outcome of the decision will be determined by the relevant procedural framework. In preliminary ruling proceedings, for instance, the competence of the Court is limited to interpretation of EU law (without taking a final decision in the case), therefore, the impact of such interpretation must be considered in order to assess the EU law compatibility of the contested national action. In the *Federutiliy* case, e.g., the Italian regime survived the judgment of the Court and remained, with some modification, in force.[35] On the other hand,

[33] See judgment of the ECJ of 22 October 2013, joined cases C-105/12 to C-107/12, *Essent and others*, ECLI:EU:C:2013:677, para. 55.

[34] See judgment of the ECJ of 21 March 2019, joined cases C-266/17 and C-267/17, *Verkehrsbetrieb Hüttebräucker and BVR Busverkehr Rheinland*, ECLI:EU:C:2018:723.

[35] P. Cavasola, M. Ciminelli, *Italy*, [in:] *Gas Regulation in 32 Jurisdictions Worldwide: Getting the Deal Through*, eds. F.F. Ninane, A. Ancel, L. Eskenazi, London 2021, pp. 111–116.

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even if the judgment itself is obvious as regards the incompatibility of the national action under review (typically in infringement procedures) with EU law, the solution to comply suggested by the Court's reasoning may not always be "the worst" scenario from the Member State's perspective, exemplified by the Bulgarian *Easy Pay* and the Hungarian mobile payment cases. In the former case, the Court left the qualification, whether the service at issue constitutes a service of general economic interest, to the national court requesting a preliminary ruling, suggesting that if this is the case, granting the contested exclusive right does not conflict with the relevant provisions of EU law. In the latter case, the positive outcome from Member State's perspective (i.e. that the mobile payment system did not have to be abolished entirely) resulted in the conclusion of the Court that granting competitive advantage was not categorically excluded but less restrictive measures were required from the government.

Considering the above particularities, three groups of cases have been identified. Decisions in cases of our database were coded as declaring state involvement as (1) due advantage, (2) partly due, partly undue advantage, or (3) undue advantage. Category (1) covers decisions of the CJEU declaring the competitive advantage given by the contested Member States' instrument(s) as compatible with EU internal market and competition rules or as "no advantage". Category (2) includes decisions, the outcome of which is that the national measure(s) at issue resulting in competitive advantage is only partly in line with the relevant EU law provisions. This is the case in particular with judgments brought in infringement procedures finding only in part the Commission's action as well-founded or with annulment procedures bringing mixed results from Member States' perspective (i.e. a Commission decision declaring state aid measures as incompatible with the internal market is not annulled in its entirety by the court). Preliminary rulings leaving the final decision on compatibility to the national courts (see above) are also included in this category if the interpretation given by the judgment is not obviously supporting or rejecting in relation to a contested national measure or regime. Category (3) refers to decisions with the opposite result as Category (1).

In sum, Figure 2 shows a large percentage of decisions representing an acceptive approach in the case law of the CJEU. Our quantitative results confirm that the decisions of the Court clearly support the extension of Member States powers on the basis of the exemption rules provided by the relevant EU legal framework.

DISCUSSION

Tendencies to widen the scope of due advantages have already been presented above. The case law of the CJEU also supports such a direction. Figure 3 shows that the approach of the Court is not simply acceptive but the percentage of de-

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cisions representing this approach is growing in time. The particular segments of this process can be summarised as follows.

One of the reasons of the above trend is that the Court interprets Member States' freedom extensively and there is an even broader understanding of services of general economic interest, increasingly extending to those sectors as well that fall outside the traditional meaning of this concept (e.g. operation of a mobile payment system).

The same is true for other aspects of Member States' competence in relation to services, the organization and regulation of which require a certain degree of public involvement, as it is highlighted by the following examples:

1. Going back to public procurement, the Court, since the first use of the concept in 1999 gradually relaxed the conditions to be met for the qualification as an in-house award[36] and these criteria have also been codified in the EU directives.[37] In this regard, the Court also confirmed national powers by saying that the definition in the directives does not constitute a full harmonization of the in-house concept and Member States remain free to provide for additional criteria for qualifying awards as in-house transactions.[38]
2. While in its Golden Share judgments[39] from the 2000s the Court consistently held the view that special rights reserved for states in privatized companies were incompatible with the principles of free movement of capitals and the freedom of establishment, recent decisions are more tolerant towards that kind of public ownership in commercial undertakings. In addition, the Court made a direct link between the market economic investor principle and the rule of ownership neutrality by pointing out that the latter implies that the Member States may invest in economic activities and that the capital placed directly or indirectly at the disposal of a State-owned company in circumstances which correspond to normal market conditions cannot be regarded as State aid.[40]

Our case law analysis highlights several factors to which the changes in the approach of the CJEU can (at least partly) be attributed. Regarding subsidies for both services of general interests and other services, the global financial and economic crises of 2008 have a decisive impact. In particular, Article 107 (3) (b) TFEU ("The

[36] See judgment of the ECJ of 5 October 2017, case C-567/15, *"LitSpecMet" UAB*, ECLI:EU:C:2017:736.

[37] Directive 2014/24/EU; Directive 2014/25/EU. The impact and effect of the Court's judicial activism on the evolution of EU public procurement acquis are also confirmed by the analysis of C. Bovis (*The Nature and Character of the Public Markets and Their Effects on Public Procurement in the European Union*, "Studia Iuridica Lublinensia" 2022, vol. 31(4), pp. 9–27).

[38] See judgment of the CJEU of 3 October 2019, case C-285/18, *Irgita*, ECLI:EU:C:2019:829.

[39] B. Werner, *National Responses to the European Court of Justice Case Law on Golden Shares: The Role of Protective Equivalents*, "Journal of European Public Policy" 2017, vol. 24(7), pp. 989–1005.

[40] See judgment of the ECJ of 11 September 2012, case T-565/08, *Corsica Ferries*, ECLI:EU:T:2012:415.

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following may be considered to be compatible with the internal market: (…) (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a member state (…)") had been applied very few times earlier but things changed when the crisis broke out in Europe.[41] When applying this provision, the Commission showed more understanding towards state aids and more flexibility in assessing the compatibility of these national measures with Article 107 TFEU than before and, in the majority of cases, the Court did not (or only partly) modified the qualification of the aid in question. A similar tendency seems to emerge in relation to aids amid the COVID-19 crisis. (However, the number of cases leading us to this conclusion is limited. So far, the Court has ruled on the legality of a total of 14 aid measures taken in the context of the COVID-19 crisis, three of which were found to be illegal.)

However, the impact of such external factors on tendencies in case law is limited. Remaining with state aid, our analysis shows that the percentage of judicial decisions supporting or partly supporting Member States in granting subsidies is the highest between 2015 and 2020 (i.e. between the two crises) in comparison with the previous years' practice.

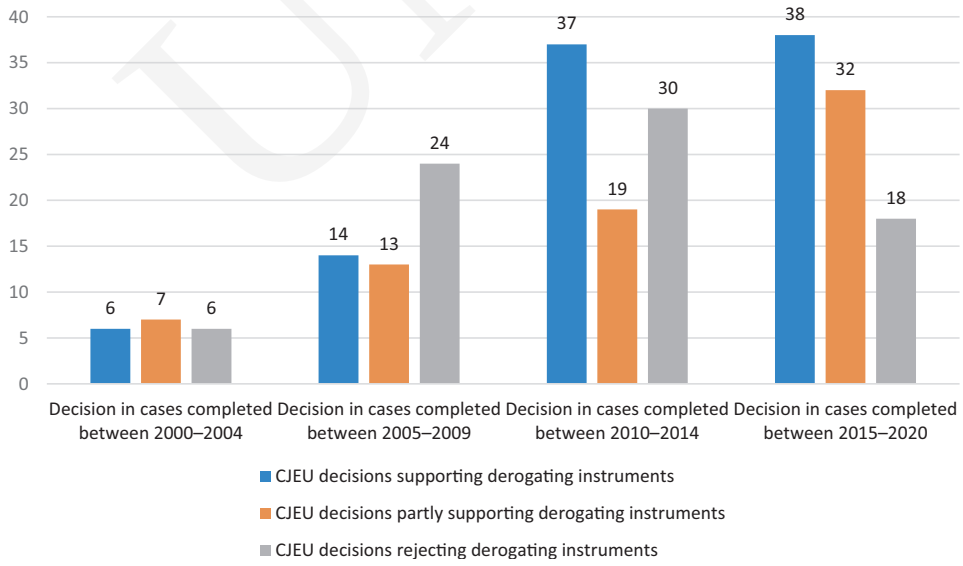


Figure 3. Decisions (n = 274) of the CJEU assessing the compatibility of Member States' derogative measures with the general rules of the EU internal market

Source: Authors' own elaboration.

[41] A. Rosanò, *Adapting to Change: COVID-19 as a Factor Shaping EU State Aid Law*, "European Papers: Journal on Law and Integration" 2020, vol. 5(1), pp. 621–631.

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The extension of derogations in EU law leads to an increase in the number of derogatory measures in national laws. The percentage of decisions accepting such "derived" derogation is increasing in the case law of the CJEU. The percentage of judicial decisions supporting or partly supporting Member States' derogatory actions is the largest (74%) regarding the subject of public procurement (group 2 out of the five groups identified in Figure 1). This way our statement has been proved that the wider the effect of derogation is in legislation, the wider the discretion in the jurisdiction of the CJEU in the last two decades.

CONCLUSIONS

Due advantages may be derived from both general EU competition rules and provisions relating to services of general interest. However, these different origins may be combined in the case of certain services constituting economic activities. The twofold legal basis for derogations in a given sector may lead to a widening of Member States' freedom in their competition and state aid policy. This phenomenon has a wider consequence on the development of the EU internal market.

As was described, exemptions in EU law may lead to a wider scale of derogatory instruments for Member States. The increase in the number of Member States' derogatory measures is also reflected in the growing number of our selected cases concerning public services and other regulated sectors. The ratio of (at least partly) acceptive judicial decisions has also been measured. Declaring government measures as partly and completely due advantages in such a large proportion (more than two-thirds of the decisions examined) clearly indicates the attitude of the Court.

In spite of the doctrinal expectation, the relevance of this attitude is increasing. Our analysis has proved that the percentage of judicial decisions representing an (at least partly) acceptive approach has been growing in time. The results also confirmed our initial statement that there is a correlation between extending derogations in EU law and changing the approach of the CJEU to be increasingly acceptive towards Member States' derogatory instruments.

This conclusion highlights systemic concerns. The process outlined above may not simply mean that Member States are exploiting due advantages, but also that the very essence of European integration is being called into question by overemphasizing exceptions to the basic principles of the internal market. Nevertheless, this tendency is increasing, as the discretionary decisions of the CJEU in a given case legitimately widen the options available to Member States in shaping their regulatory environment.

The problem is that, while this way of development may even be promising for a new perspective of the integration, widening Member States' power might also lead to disintegrative efforts giving further possibilities to Member States to

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claim exceptions for their regimes in a way that limits the implementation of EU competition policy. This is particularly so in those countries where the political ideology of the central government also supports such disintegrative efforts. Unsurprisingly, there is a strong interest on the part of certain Member States to maintain this direction as it is indicated by our analysis in a very plausible way.

Further empirical research will focus on the issue of whether the risk factors outlined above may actually lead to any detectable consequences in particular countries. Based on the indicators identified above, their effects on policy of competition and public services should be analysed in a wider context and more detailed way. The trend that has been proved by our investigation in the CJEU case law on due advantages hides both challenges and risks from the point of view of the internal market and the integration as a whole.

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ABSTRAKT

Zgodność przewag konkurencyjnych z rynkiem wewnętrznym dotyczy wpływu gospodarczego środków pomocy udzielanej przez państwa dopuszczonych przez unijne przepisy o ochronie konkurencji. Podejście to jest zasadniczo oparte na przyjęciu odstępstw od podstawowych zobowiązań w zakresie gospodarki rynkowej, które to mogą zostać przyznane również przez Unię Europejską jej państwom członkowskim. Odpowiednie przewagi wydają się być w zgodzie z prawem unijnym jako takim, jednak zgodność ta zależy również od swobody decyzyjnej właściwych organów administracyjnych i sądowych. W świetle analitycznego i empirycznego badania polityki prawnej przedstawionego w niniejszym artykule wzrasta aktywność Trybunału Sprawiedliwości Unii Europejskiej w kierunku dopuszczania wyjątków od zasad ogólnych i rozszerzania zakresu zgodności w tej dziedzinie. Proces ten może prowadzić do nasilenia odstępstw od rynkowych zobowiązań państw członkowskich, w szczególności w krajach Europy Środkowej i Wschodniej, które coraz bardziej kładą nacisk na pierwszeństwo regulacji krajowej i są skłonne do wykorzystania potencjału takiej szerszej autonomii regulacyjnej. Celem badania jest wskazanie pochodzenia i natury tego ryzyka celem wsparcia starań, które ograniczyłyby szkodliwe skutki w kontekście ogólnounijnym. Dowody empiryczne wskazane w artykule wynikają z systemowo dobranego zestawu orzecznictwa jako kontekstu odzwierciedlającego badaną orientację polityki.

Słowa kluczowe: rynek wewnętrzny; unijne przepisy o ochronie konkurencji; pomoc państwa; odpowiednia przewaga