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PUBLIC SERVICE OBLIGATIONS IN THE ELECTRICITY AND GAS SECTOR AND THE ISSUE OF STATE AIDS

В статье рассмотрена концепция *Public service obligations (PSO)* с позиции европейского законодательства. Особое внимание уделено вопросу классификации PSO в энергетической и газовой отраслях. Сделан акцент на формах финансирования, законодательных и регулятивных функциях PSO как общественного инструмента в вопросах защиты прав потребителей и свободы бизнеса.

Ключевые слова: public service obligations, бесперебойность поставок, директивы в энергетическом и газовом отраслях, Европейский Суд.

1. General remarks

Public service obligations (PSO) are quite common issue in the utility sectors of many Member States, although the concept itself and the importance of PSO to the national authorities and the industry vary significantly. In fact there is no European definition of public service obligations, what perhaps can justify differentiated approach to PSO among Member States.² Secondary legislation, soft law and the case law of the ECJ is somehow unclear in this regard. It is used interchangeably the concepts of public service obligation, service of general economic interest and service of general interest. Therefore in reality it is difficult to come up with one clear definition of PSO's which would apply to all sectors of the internal market. In general public services – most typically but not exclusively network services such as telecommunication, electricity, gas, transport and postal services – are services of commercial character, which are considered essential to the general public. For this reason authorities³ impose public services obligations upon certain undertakings to guarantee that such services are provided according to the conditions specified by the authorities. Moreover most PSOs are not justified in economic or business terms, since they are burden with losses. This means that under normal circumstances market would be very hesitant to provide them, or wouldn't provide them at all. Therefore to ensure the availability of such services national/public authorities grant funding/compensation to the selected public service providers under certain conditions. This on the other hand raise the issue of compensation for PSOs vis-à-vis the EC State aid law, which aims to prevent distortion of competition by prohibiting State measures granting advantages to certain undertakings that have a negative effect on competition. Natural, thus, is to ask under what conditions EC State aid law is applicable to the State funding of

² Mangenot in his book *Public Administrations and Services of General Economic interest: What kind of Europeanisation?* also maintains that in the former centrally planned economies of some of the New Members, PSO's are perceived as less important, than in the Old Members (with France being the greatest enthusiast and supporter). The existence of authoritarian regimes in the Central and Eastern Europe with domination of Soviet Union legal doctrine harmed the entire legal structure of the CEE states, where public service obligations were treated as an issue of irrelevant importance. It is only recently New States of the EU are recognizing the significance of the PSO for assuring benefits of the utility services for the public good, thus inducing changes to their doctrines.

³ The public authority entrusting the obligation can further be a national, regional or local. For more on this see Buendia Sierra, Jose Luis (1999). *Exclusive rights and State Monopolies under EC Law – Article 86 (formerly Article 90) of the EC Treaty*. Oxford University Press, p.284.

the undertakings entrusted with the public service obligations? However before getting to the core, some time needs to be devoted to the concept of *service public* in the electricity and gas sector.

2. Electricity and gas public service obligations (The concept of public service obligations within electricity and gas markets)

In case of the electricity and gas markets the secondary legislation, and case law of the European Court of Justice laid fundamentals for the common profile of PSO's and conditions/principles to be followed in setting the PSO scope. Although in reality it is the Member States who decide what public service obligation should encompass. In other words the classification of public service obligations is left, in accordance with the principle of subsidiarity, to the Member States. However this is done under the control of the Community, responsible for ensuring that the imposition of public service obligations does not affect the development of trade to such an extent contrary to the interest of the Community. In fact it is the European Commission's responsibility, under the supervision of the Court, to identify and classify the interest of the Community according to which the development of trade can be assessed.

The main acts for the electricity and gas sectors which deal with the PSO's are:⁴ Directive 2003/54/EC of the European Parliament and Council concerning common rules for the internal market in electricity repealing Directive 96/92/EC (so called Electricity Directive) and the Directive 2003/55/EC of the European Parliament and Council of June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (so called Gas Directive).

The Electricity and Gas Directives in Articles 3 allow Member States to impose on their electricity and gas undertakings public service obligations in the general economic interest. The scope of PSO's should comply with the specific criteria and objectives and should be strictly regulated. Article 3 para. 2 constitute:

Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the electricity (consequently gas) sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection, including energy efficiency and climate protection. Such obligations shall be clearly defined, transparent, non discriminatory, verifiable and shall guarantee equality of access for EU electricity (consequently gas) companies to national consumers. In relation to security of supply, energy efficiency/demand side management and for the fulfillment of environmental goals, as referred to in this paragraph, Member States may introduce the implementation of long term planning, taking into account the possibility of third parties seeking access to the system.

All Member States in general include in their internal energy policies concern to guarantee certain public service objectives. These objectives have been grouped into three wide categories: universal service,⁵ security of supply and protection of the environment.⁶ The obligations imposed upon Member States (either on network operators or suppliers) within the first category - concept of universal service include:

- the right to be connected to the power grid/gas pipelines,
- the right to be supplied electricity,
- the right to be supplied with high quality and appropriate quantity
- the right to be supplied electricity at reasonable and affordable prices
- the right to receive high standards of customer service

Within the first category there is also obligation to take appropriate measures by the electricity and gas companies to protect final consumers, especially vulnerable customers and those living in remote or rural areas, including appropriate measures to help consumers to avoid disconnections.

Public service obligations also relate to security, including security of supply, and environmental protection, including energy efficiency and climate protection. When dealing with the security of supply it should be noticed that this concept is understood in a different manner in electricity than in gas sector. In case of electricity, three aspects may be raised:⁷

- *System security in terms of safety of network infrastructure.* It is actually for each Member State to take appropriate regulatory and monitoring measures, to the security standards, which might differ among countries. The "physical" security of network infrastructure is not or at least should not be affected by the creation of the internal market for energy. Although the creation of the Internal Energy Market raises question of congestion resulting from unscheduled electricity flows due to trade activities across electricity systems in Europe. This especially has a considerable impact on the transit countries. For instance, on 14 July 1999 the Belgian TSO was faced with flows on its system exceeding those scheduled for this particular day. The TSO had to react immediately in order not to harm

⁴ Additionally the notion of PSO's and its importance for the Community at least in its psychological dimension has been recognized by the EC Treaty. Article 16 of the EC Treaty states: Without prejudice to Articles 73, 86 and 87, and 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 Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfill their missions. Unfortunately Article 16 so far has not played a significant role in neither the practice of the European Commission nor the Community Courts. In addition Article 16 establishes a principle, but doesn't provide the Community with a specific means of action. Therefore is has rather abovementioned so called psychological dimension, showing that the EU is aware of the importance of the PSO's for the citizens thus a special position to PSOs in the EC Treat has been assigned.

⁵ The concept of universal service is mainly considered for electricity rather than gas.

⁶ For more on this see Commission Staff Working Paper on completing the energy internal market, pp. 27 – 41, SEC (2001) 438 final, 12.03.2001. Available also at: <http://europa.eu.int/comm/energy/library/438.pdf>

⁷ DG TREN Note on Directives 2003/54/EC and 2003/55/EC on the Internal Market in Electricity and Gas. Measures to secure Electricity Supply. Available at: http://ec.europa.eu/energy/electricity/legislation/doc/notes_for_implementation_2004/security_of_electricity_supply_en.pdf

the entire system. Due to lack of information sharing and unaware of where those flows came from, Belgian TSO was legitimately obliged to limit scheduled dispatch. In 2003 similarly due to lack of information exchange between Italy and Switzerland the flow of electricity was blocked and the congestion problems appeared, significantly harming the infrastructure. Unfortunately the lessons from the 2003 Italian blackout have not been followed precisely and on 4 November 2006 large pan-European blackout accrued again. These are only few examples of congestion problems, which fortunately were taken care of right away, though some major damages were noticed. Nevertheless, in general when dealing with the electricity networks technical problems are unavoidable, and as such they have to be treated as priority for the sake of the overall system security. There is no doubt that the improvement of the co-operation between European electricity TSOs, which should be publicly accountable for their actions, is a necessity. Additionally an intermediate step in dealing with congestions problems is Article 23 of the Electricity Directive, which permits Member States to take appropriate measures and if it is necessary to suspend market access (TPA) for a limited time;

- *Supply security in terms of guarantying the existence of adequate generation capacity.* It is for Member States to specify in advance the criteria for authorization procedure for a new generation capacity. Authorization may relate to number of issues specified in the Electricity Directive such as the safety and security of the electricity system, installations and associated equipment, safety and security and the nature of the primary energy source⁸ – the body responsible for the authorization should be the National Regulatory Authority (NRA) or any equivalent not related to the generation, transmission, distribution, or supply of electricity;

- *Supply security in terms of the primary energy sources to generation* (gas, coal, uranium, etc). The main concern in the EU at this stage in terms of primary energy sources to generation is an excessive dependence on gas as a primary fuel for electricity generation. The growing dependence might produce potential intimidation to the electricity system within Europe. Therefore if the Member State assumes that installed capacity on the basis of a given primary source (in this case gas) is exceptionally high, or is growing to rapidly, so it constitutes a threat to overall security of electricity supply it may on the base of Article 6 para. 2) g) of the Electricity Directive, refuse granting of authorization for the construction of generating capacity on its territory. However the first step to deal with the issue of growing dependence on gas should be monitoring conducted both at the Community and domestic level. Afterward if it is determined, that certain actions must be taken to limit generation growth from a particular primary source, the Directive gives Member States appropriate measures.

As already mentioned the notion of security of supply is constructed differently in gas as in electricity sector. The reason for this seems to be very simple, whereas electricity can be generated in every country of the EU gas extraction can not. Natural gas is a good which constitute a major part of export policies of certain countries and as such belongs to the global trend of demand and supply.⁹ Moreover increased EU dependence on the gas supplies mainly from Russia, raise the question of security of the EU in relation to the internal market for gas. Therefore it is significant to hoist two issues with regard to security of supply of natural gas:¹⁰

- *Short-term security of supply* – This involves creation of safeguards measures as defined by the Article 26 of the Gas Directive, against supply disruptions, which are necessary in the context of the internal gas market. Short-term security supply issue, thus, is a responsibility of each Member State, which needs to take all necessary regulatory measures to clearly define security objectives and assign and distribute responsibilities among market players in accordance to the defined security objectives. What is obvious, this shall be done without violating competition rules on the internal market.

- *Long-term security of supply* – As contrary to the short-term security of supply, it involves strategic and geopolitical concerns at the EU level, with regard to providing adequate diversification of supplies and investments to meet growing demand for gas especially vis-à-vis growing dependence on Russian gas supplies.

Additionally Member States imposing public service obligations on gas undertakings in relation to security of supply may in accordance with Article 3 para. 2 of the gas Directive *introduce the implementation of long-term planning*, which however shall be non-discriminatory and shall take into account third parties seeking access to the system.

Last but not least Article 3 of both Gas and Electricity Directives endow Member States with the possibility to introduce public service obligations which may inter alia relate to the environment protection. Consequently Member States are taking measures to ensure high environmental standards in gas and electricity production and supply, which also involve application of competition rules, and particularly those concerning State aids.

Articles 3 of the Directives also put forward the conditions/principles to be followed in setting the PSO's scope. Public service obligations shall be clearly defined, transparent, non discriminatory, verifiable and shall guarantee equality of access for EU electricity companies to national consumers. Unfortunately Directives remain silent as to what clearly defined, transparent or non-discriminatory in fact is. Thus in order to deal with the shortcomings of the Articles 3, number of soft law instruments have been adopted. Additionally case law¹¹ of the European Court

⁸ Electricity Directive – Article 6 para. 2.

⁹ Of course there are other issues which should or could be taken under consideration when discussing demand & supply for gas such as for instance long term supply contracts or simply take-or-pay contracts. But this is issue for another discussion paper and as such it will not be cover in this paper.

¹⁰For more on this see also: DG TREN Note on Directives 2003/54/EC and 2003/55/EC on the Internal Market in Electricity and Gas. Security of Supply Provisions for Gas. Available at:

http://ec.europa.eu/energy/electricity/legislation/doc/notes_for_implementation_2004/security_of_gas_supply_en.pdf

¹¹ Judgment of the European Court of Justice of 27/8/ 1994, Municipality of Almelo and others, Case C-393/92.

of Justice has been seeking to clarify the limitation of PSO's. DG TREN Interpretation Note on Public Service Obligations,¹² Green Paper on Service of General Interest – COM (2003) 270 final¹³ and White Paper on Services of General Interest – COM (2004) 374 final,¹⁴ describe in more detail among other things, what are the conditions to be followed when setting the public service obligations scope. Generally speaking by clearly defined it is understood that: i) the PSO's imposed on the Member States have to be related to the supply of the service of general economic interest in question, ii) they have to contribute directly to satisfying this general economic interest, iii) they have to be imposed in such way in order not to affect the development of trade to an extent contrary to the interests of the Community. In order to be transparent, the Commission considers that the public service task must be assigned by way of an official public instrument that may take the form of a legislative or regulatory instrument or a contract or instruction. This instrument must specify: 1) *the nature of the public service obligations*, 2) *the undertaking and territory concerned*, 3) *the responsibility for determining the undertaking's selling prices and the conditions for reviewing such prices*, 4) *the nature of any exclusive or special rights assigned to the undertakings*, 5) *the amount of any compensation granted to the undertakings and any revision clauses*, 6) *the period covered by these obligations*.¹⁵ In the view of the Commission, the only way to effectively guarantee non-discrimination provided for in Article 3 is to use a tender procedure to carry out the public services obligations. It is also obvious that such call for tenders should be published in apparent way according to the related appropriate procedures of the interested Member State.

3. Public service obligations – dilemmas

Directives (Electricity and Gas) declare that *respect for the public service requirements is a fundamental requirement*.¹⁶ PSOs are regarded thus, as necessity and their achievement cannot be left to the operation of the market itself. Such PSO requirements may be interpreted by the Member States taking into account national circumstances. This raises fear that countries dominated by vertically integrated undertakings, might rely on PSOs to limit the competition or slow down market opening. For instance gas system operators may refuse access to the system, if the access would prevent them from carrying out public service obligations or it would be dangerous to security of supply.

Furthermore some of the Member States argue that liberalization of the sector together with increased competition leads to cost cutting and consequently to a reduction in public service standards. Although this view is abounded in France where lawyers and interested parties argue opposite, that a reformed and reinforced public service obligations were the main factor to ensure further liberalization in the energy sector in France.¹⁷ Moreover second set of Gas and Electricity Directives underline the improved standards of public service obligations as compared to the first set. Member States are under general obligation to notify all measures taken to fulfill PSOs, including consumer and environmental protection, to the Commission, with details of their possible effects on national and international competition.¹⁸ Member States are also required to introduce appropriate measures to protect final customers (e.g., protection of vulnerable customer, elderly, or unemployed) from unjustified disconnection and to protect final customers' basic rights (e.g. by requiring a minimum set of conditions for sale contracts, transparency of information, and a low cost and transparent dispute resolution procedure).

Furthermore there is an element of conflict between the obligation to serve the public interest and the fundamental right of business freedom. Such element of conflict arises directly from the nature of those issues. Every obligation which is imposed from top, by the State on the enterprise creates restraint to competition and entrepreneurship. On the other hand it is true that imposing "non – market" obligations on enterprises such as public service obligations is requirement if not derived from necessity than derived from the political status. Level of economic and social development, which has been achieved in the EU cause energy, especially electricity to be a public good, pertained to every one, without differentiation on material status. At the same time, paradoxically energy is perceived as commodity in case law of the ECJ, and as such its price should be determined by the relation of supply and demand and not by other non-market factors. The European Court of Justice stated very early,¹⁹ much before proposals for Electricity and Gas Directive were discussed, that the energy products including electricity and gas were commodities that are subject to the rules of the EC Treaty on the free movement of goods and services as set out in Articles 28 – 31 of the EC Treaty. Later on when the outlines of the Directives were known the Court confirmed its opinion.²⁰ Therefore having goods which on one side are to be accessible for every one and on the other their price is or should be set by the market forces of demand and supply introduce vagueness to the theme.

Moving forward PSO's have to respect the Community framework and cannot be used to favor say one elec-

¹² Note of DG Energy & Transport on Directives 2003/54/EC and 2003/55/EC on the Internal Market in Electricity and Natural Gas. Public Service Obligations, 16.01.2004. Among other things the Note deals with the important issue of compensation for the costs relating to carrying out PSO's.

¹³ Commission Green Paper of 21 May 2003 on services of general interest COM(2003) 270 final - Official Journal C 76 of 25.03.2004. Available also at: http://europa.eu/eur-lex/en/com/gpr/2003/com2003_0270en01.pdf

¹⁴ Commission White Paper on services of general interest COM(2004) 374 final. Available also at: http://europa.eu.int/eur-lex/en/com/wpr/2004/com2004_0374en01.pdf

¹⁵ DG TREN Interpretation Note on Public Service Obligations, p.5.

¹⁶ E-Directive, Recital 26; G-Directive, Recital 27

¹⁷ Lauriol T. (2005) National Approaches to implementation – France, in Cameron P. (ed) Legal Aspects of EU Energy Regulation. Implementing the New Directives on Electricity and Gas Across Europe. Oxford University Press p.123-143.

¹⁸ E-Directive, Art. 3(9) and G-Directive 3(6)

¹⁹ Case C-7/68, Commission v. Italy [1968] ECR I-633, 642.

²⁰ See Case C-393/92 Almelo v Energiebedrijf Ijsselmij [1994] ECR I-1477 (para 28), see also Case C-158/94 Commission v Italian Republic [1997] ECR I-5789

tricity producer over another or to hinder competition on the common market. Such activities are, though, possible especially given the lack of clarity between the public service obligation concept, the competition rules and Article 86 of the EC Treaty. Moreover after consulting Article 86 one might get the impression that it is possible for Article 86 to constitute an incentive for undertakings to accept public service obligations in order to obtain an exemption from the application of the competition rules under provisions of paragraph 2 of the same Article. Article 86(2) states: *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.* However providers of public service obligations/service of general economic interest may be exempted from application of the Treaty rules only to the extent that this is strictly necessary to allow them to fulfill their general economic interest mission. Nevertheless in the event of conflict, the fulfillment of public service mission can prevail over the application of Community rules including internal market rules, what on the other hand might be used to indirectly influence competition especially in markets dominated by vertically integrated undertakings. Therefore provisions of Article 86 are indeed an area of some sensitivity in relation to the PSO's and the Internal Energy Market since it raises the prospect of avoidance of market – opening on the ground that this is necessary for instance to protect security of supply or environment. Moreover such exemptions are source of constraint either actual or potential on actions to promote competition in the energy markets in the EU, therefore vulnerable to scrutiny under Articles 81 and 82 of the EC Treaty.²¹

4. Financing of the PSO and the issue of State aids

The question of compensation/financing of the PSO's either in the form of State aid or exclusive rights is a matter which concerns all liberalised sectors (or being in the process) in the European Union (post, telecommunication, gas, electricity, air transport, etc.). Although Electricity Directive in Article 3 (4) stipulates that (...) *when financial compensation, other forms of compensation and exclusive rights which a Member State grants for the fulfilment of the obligations set out in paragraphs 2 and 3 are provided, this shall be done in a non-discriminatory and transparent way*(...), there is unfortunately lack of clarity within primary and secondary law, as to what are the conditions under which compensation for PSO's would fall into category of State aid? Of course there are number of general requirements articulated in articles 87 – 89 of the EC Treaty, but sector specificity makes it somehow vague. The reference should be therefore made to the existing case law, soft law and the Commission Decisions taken on this subject matter.

According to the White Paper on Services of General Interest – COM (2004) 374 final, and the Green Paper on Services of General Interest – COM (2003) 270 final, the principle of the Member States autonomy to make policy choices as what is laid down within the scope of public services obligations applies to the financing as well. The financing mechanisms applied by the Member States include: direct financial support through the State budget (eg. subsidies or tax reductions), special or exclusive rights (eg. legal monopoly), contributions by market participants (e.g. universal service fund), tariff averaging and solidarity based-financing (eg. social security contributions). However as a general rule in the electricity and gas sector Member States can actually choose which financing instrument to use, though the requirement is that it can not distort competition within the common market and it should be with respect to the benefit of taxpayers and the economy at large.²² In the network industries Member States prefer to finance public service obligations through creation of specific funds financed by market participants or direct public funding through the State budget, as they are perceived the least distorting way of funding.

Unfortunately it has not been always clear, under what conditions compensation for PSO's would actually constitute State aid, and whether such aid could be considered compatible within the common market under Article 87 of the EC treaty. Therefore in order to increase legal certainty and transparency in the application of State aid rules to PSOs within the network industries number of measures has been adopted.

The first main step to clear out the situation was the judgement in the Altmark case.²³

(...) *Where a State measures must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 87(1) of the EC Treaty*(...).

Additionally for such compensation to escape classification as State aid four conditions must be met:

(i) There must be actual and clearly defined public service obligations.

(...) *the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined* (...)

(ii) The parameters for calculating the compensation payments must have been established in advance in an objective and transparent manner.

(...) *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 favor the recipient un-*

²¹ Article 81 of the EC Treaty prohibits anti-competitive agreements and concerted practices (unless they meet certain requirements) and Article 82 prohibits the abuse of a dominant position.

²² White Paper on Services of General Interest, COM (2004) 374 final p. 12.

²³ Case C – 280/00, Judgment of 24 July 2003, available also at:

<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62000J0280:EN:HTML>

dertaking 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 and within the meaning of Article 87(1) of the Treaty (...)

(iii) Compensation payments must not exceed the net total costs (including return on capital etc.) caused by the public service obligations.

(...) 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 (...)

(iv) The beneficiary is chosen in a public tender or compensation must have been set on the basis of a cost analysis for a hypothetical well-run undertaking equipped with the means to provide the public service.

(...) 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 tender capable of providing 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 (...)

The first three conditions are fairly unproblematic. It is more questionable whether a hypothetical test, as introduced in the fourth condition, is suitable in all situations of public service financing, because of the special characteristics of PSO's. Nevertheless if these four conditions are met, public service compensation does not constitute State aid, and Articles 87 and 88 of the EC Treaty do not apply. On this basis, compensation for public service provision doesn't have to be notified to the European Commission.²⁴ However if the Member States do not respect at least one of these conditions then the payment or other benefit granted out of State resources become State aid for the purposes of Article 87(1)²⁵ and subject to the other provisions of Article 87 and as such it is prohibited unless it is permitted by Article 87(2)²⁶ or a specific regulation; justified under Article 86 or cleared under Article 87(3)²⁷ of the EC Treaty.

In general Altmark conditions or the ECJ judgement in the Altmark case is seen as a positive step towards ensuring required legal clarity on financing PSO's. However they may also generate unnecessary administrative constraints for the small scale funding. Therefore to diminish negative consequences several additional measures have been proposed by the European Commission, that is: Commission Decision on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation and Community Framework for State aid in the form of public service compensation. Generally speaking the measures the European Commission has put in place are directed to the small scale funding. They actually seek to exempt public authorities that wish to compensate mostly locally active undertakings from the obligation of prior notification.

Commission Decision²⁸ specifies the conditions under which compensation to companies for the provision of public services is compatible with the State aid rules and does not have to be notified to the European Commission in advance. The conditions to be met are: funding proportionate to the actual costs of the services (what was underlined previously by the Altmark case), and certain thresholds are not exceeded. Article 5(1) of the Commission Decision states: *The amount of compensation shall not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit on any own capital necessary for discharging those obligations. The compensation must be actually used for the operation of the service of general economic interest concerned, without prejudice to the undertaking's ability to enjoy a reasonable profit*". Further on in the second clause, Article 5 deals with the issue of "reasonable profit" and with all benefits granted by the State which amount to compensation. *The amount of compensation shall include all the advantages granted by the State or through State resources in any form whatsoever. The reasonable profit shall take account of all or some of the productivity gains achieved by the undertakings concerned during an agreed limited*

²⁴ All forms of compensation which remain State aid are subject to the rule of prior notification to the European Commission.

²⁵ Article 87(1) of the EC Treaty states: Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.

²⁶ Article 87(2) of the EC Treaty states: The following shall be compatible with the common market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division.

²⁷ Article 87(3) of the EC Treaty stipulates: The following may be considered to be compatible with the common market: a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment; (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; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.

²⁸ The Commission Decision 2005/84 2/EC on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of service of general economic interest available also at: http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/l_312/l_31220051129en00670073.pdf or at: http://europa.eu.int/comm/competition/state_aid/others/action_plan/sgei_art86_en.pdf

For more on this see also press release IP/05/937 of: 15/07/2005 on State aid

period without reducing the level of quality of these services entrusted to the undertaking by the State.

In regard to thresholds the Decision is applicable to compensation of less than €30 million per year provided its beneficiaries have a turnover of less than €100 million per year. However when the compensation exceeds the above mentioned thresholds the European Commission proposed a Community Framework²⁹ which specifies comprehensive conditions under which compensation not covered by the Decision is compatible with State aid rules. Otherwise as stated in the Decision such compensation will have to be notified to the European Commission due to the higher risk of distorting the competition on the common market. The general meaning of the Framework is that the compensation which goes beyond the costs of the public service obligation, or is used by companies on other markets open to competition, is not justified, and thus, assumed incompatible with the Treaty's State aid rules.

The main advantage of the abovementioned package of measures is that it reduces the administrative burden for small and local services. Most small-scale public services are exempt from the notification requirement, provided that the compensation for the PSO's only covers the real costs of providing the service plus of course a reasonable profit margin.

In the meantime also an amendment to the Commission Transparency Directive³⁰ on financial transparency has been introduced. The amendment is enhancing transparency of financial relations between Member States and public undertakings. And as such it is applicable to the financing/compensation of the PSO's, whether in accordance with Altmark it is State aid or not and whatever the legal qualifications of these compensations are under Article 87 of the EC Treaty. In the second recital the Directive states that (...) *sectors of the economy which were characterized in the past by the existence of monopolies have been or are being opened to competition. This process has highlighted the importance of ensuring that the rules on competition contained in the Treaty are fairly and effectively applied in these sectors, in particular that there is no abuse of a dominant position within the meaning of Article 82 of the Treaty, and no State aid within the meaning of Article 87 of the Treaty unless it is compatible with the common market, without prejudice to the possible application of Article 86(2) of the Treaty.*

Among other things Directive clarifies that companies receiving compensation dealing with public service obligations and other market actions irrelevant to PSO's must have separate accounts for their different activities. In other words internal accounts of the undertakings entrusted with PSO's must, in particular, show separately the costs and receipts associated with the PSO and those of other services (which they provide), as well as the parameters for allocating costs. Calculation of costs must be based on generally accepted cost accounting principles. Article 1(2) of the Transparency Directive requires Member States to *ensure that the financial and organisational structure of any undertaking ... 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.*³¹

The abovementioned provision of the Transparency Directive simply serve as a guideline for undertakings in the gas and electricity sector with regard to drawing up and keeping separate accounts for the public service obligations.

To sum up there is no one clear definition of the public services obligations. In line with the subsidiarity principle, it is for Member States to define the PSOs. Although the present package of case law and soft law instruments require that the scope of public service obligations is clear and transparent, so that it is possible to assess whether the compensation paid is in accordance with defined State aid rules or not. Nevertheless the matter of compensation is fairly complex, thus some further dilemmas are unavoidable. Additionally apart of coming back questions as to financing, PSOs have many positive features especially for the consumers. But also with the instrument such as PSO it is possible for the authorities to exercise potentially large measures of control over the natural monopoly elements of an energy industry – irrespective of the form and pattern of ownership that is chosen.

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³⁰ Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings.

³¹ Different activities are defined by the Article 2(1)e) of the Transparency Directive stating that: "different activities" means on the one hand, all products or services in respect of which a special or exclusive right is granted to an undertaking or all services of general economic interest with which an undertaking is entrusted and, on the other hand, each other separate product or service in respect of which the undertaking is active

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Реутов В.Е.

РЕГИОНАЛЬНЫЕ АСПЕКТЫ ИСПОЛЬЗОВАНИЯ ЧЕЛОВЕЧЕСКОГО КАПИТАЛА В ЭКОНОМИКЕ УКРАИНЫ

1. Вступление. Современный этап развития в корне изменил представления о главных факторах конкурентоспособности региональной экономики, о соотношении разных факторов развития регионов и стран, роли и месте человека в цивилизационном прогрессе. Опыт регионального развития ведущих стран и стран, совершивших экономический рывок (в разные периоды XX века — Япония, Корея, Германия, Ирландия, Чехия, Венгрия, Словения), свидетельствует о решающем значении именно человеческого капитала, качества рабочей силы и мотивации эффективного труда. Эта новая концепция заменила устаревшую, движущей силой в которой признавалось накопление материальных богатства. Соответственно, изменились и критерии конкурентоспособности регионов. От ценового критерия передовые страны мира перешли к критерию качества, и именно качество (товаров, услуг, ресурсов) стало определять успешность регионального развития.

К сожалению, Украина придерживается абсолютно другой экономической доктрины, которая опирается на принципы не высокого качества, а низкой стоимости, дешевизны (сырья, товаров, технологий, рабочей силы). Такой подход может приносить успехи, но он характерен не для европейских, а для азиатских стран (Индия, Китай). Следствием его реализации является формирование социальной структуры, в корне отличающейся от европейской: вместо доминирования среднего класса и весьма умеренного уровня расслоения - поляризованное общество с высокой долей бедного населения в отдельных регионах страны.

2. Постановка проблемы. Региональные аспекты использования трудовых ресурсов исследовались в работах: Брич В.Я. [1], Дзюбы С.Г. [2], Долишного М.И. [3], Злупко С.М. [3], Бандура С.И. [3], Петровой И.Л. [4], Питолич М.И. [5], Бибен М.И. [4], Микловды В.В. [5] и др. Однако проблемы формирования экономического механизма эффективного использования трудового потенциала регионов Украины не решены и часто рассматриваются отдельно от общих тенденций развития региональных экономик.

Цель статьи – выявить региональные особенности и проблемы эффективного использования рабочей силы в Украине. В соответствии с поставленной целью необходимо решение следующих задач: установить предпосылки формирования существующей системы оплаты труда, оценить уровень соответствия производительности и оплаты труда, установить масштабы региональной дифференциации уровней жизни и оплаты труда в Украине, вычленив основные преграды эффективному использованию человеческого капитала и предложить направления оптимизации государственной политики в сфере оплаты и стимулирования труда.

Решение данных проблем находится в контексте научно-исследовательской работы Крымского экономического института Киевского национального экономического университета имени Вадима Гетьмана по проблеме "Реализация потенциала социально-экономического развития регионов Украины в условиях трансформации экономико-правовых механизмов хозяйствования" (государственный номер регистрации 0107U003053).

3. Результаты исследования. Декларируемое Украиной и её регионами стремление к европейской интеграции должно иметь целью и формирование европейского образа жизни, и переход на соответствующую модель развития. К этому же побуждает и распространение европейских стандартов жизни, неминуемое при интенсивных поездках украинцев за границу. На практике это означает стремление большинства наших граждан иметь европейское жилье, питаться, одеваться и отдыхать как средний европеец. Для этого необходимы соответствующие доходы, поэтому именно уровень оплаты труда стал основным критерием выбора рабочего места. В частности, по данным Института социальных исследований, так считают 95% жителей Украины.

Безусловно, низкая заработная плата - не следствие только государственной политики независимой Украины. В значительной мере низкие стандарты оплаты труда унаследованы от административно-командной экономиче-