# Expanding Privileges: Recent CJEU Case-Law in Times of Crisis
# An Analysis of Exclusive Rights of Public Service Providers

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The study examines the content of the exclusive rights of public service providers and, in this context, the scope of the in-house exceptions contained in the EU public procurement directives, in the light of the dynamics of EU public services legislation. Furthermore, the paper considers the implications of recent case law from the Court of Justice of the European Union and the subsequent evolution of relevant directives. It also outlines the potential impact of the Irgita ruling on future interpretations of the in-house concept, particularly in light of recent crises.

The rules of the internal market and competition law have consistently been applicable to public services (in EU legal terminology, services of general economic interest or SGEIs) under specific conditions. However, the scope and content of these have undergone significant transformations over the past decades of integration. This paper examines the content of the exclusive rights of public service providers and, in this context, the scope of the in-house exceptions in the EU public procurement directives, in light of the dynamics of EU public service law. In the latter context, the paper analyses the case-law of the Court of Justice of the European Union (CJEU) and the subsequent legislative development in the relevant directives. Furthermore, it reflects on the recent Irgita decision, outlining its possible implications for the future interpretation of the in-house concept.

## Theoretical background and methodology

The Court of Justice of the European Union (hereinafter CJEU) has played a role in all of the major crises afflicting the European Union (hereinafter EU) over the past decade (Conant 2021).[2] The CJEU has had to rule on a number of disputes linked to a crisis such as those affecting the economic and financial situation in 2008, the Eurozone, democratic backsliding, migration, Brexit, the COVID-19 epidemic and Russia's aggression in Ukraine.
This paper presents the partial results of a three-year comprehensive research project.[3] The hypothesis of the research is that the regulatory role of the state in various forms (exclusive rights, ownership, subsidies, etc.), both in Europe and outside Europe, has expanded significantly over the last decade and a half, mainly following the 2008 crisis and then in the context of the fight against the coronavirus crisis. In addition, the relevant EU internal market and competition rules have become more permissive (Horváth & Bartha 2018; Bartha & Horváth 2022; Horváth 2016; Horváth 2018). The research aims to examine these developments mainly in the context of public services in the EU Member States, in particular on the basis of the case law of the CJEU. The main research question is to what extent can the process of expansion of public roles be seen as a specific outcome of the crises of the last decades (the 2008 crisis, the climate change transition to a climate crisis, and the coronavirus crisis starting in 2020), or to what extent are they independent of all these effects.

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[2] The present paper was Supported by the ÚNKP-22-5 New National Excellence Program of the Ministry for Culture and Innovation from the source of the National Research, Development and Innovation Fund."

[3] I.e. the research project of the author entitled "Versenypiac vs. válságkezelés? Szabályozási kihívások az Európai Unióban" [Competitive market vs. crisis management? Regulatory challenges in the European Union] supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences.

EU law, though it also uses terms evolved at national level (i. e. public utilities or/and public services), has a distinct conceptual framework (in details, see Szyszczak 2017). The EU terminology is based on the categories of Services of General Economic Interest (SGEI), Services of General Interest (SGI) and Services of Social General Interest (SSGI) (European Commission, 2006). The former (SGEI) is used in primary law texts, without being defined in the Treaty or in secondary legislation. However, in the case-law of the CJEU and EU Commission practice there is broad agreement that SGEI refers to services of an economic nature, with the Member States or the EU being subject to specific public service obligations (PSO) as compared to other economic activities by virtue of a general interest criterion (Cases C-179/90 *Merci convenzionali porto di Genova* and C-242/95 *GT-Link*). The term SGI, the closest EU law equivalent to the traditional notion of public services (Sauter 2014, 17), is also derived from the practice. It is broader than SGEI and covers both market and non-market services which the public authorities classify as being of general interest and subject to specific public service obligations (European Commission 2011).

The present paper is based on a comparative analysis of EU regulatory frameworks, including an examination of the case law of the CJEU. Data was obtained from a specific CJEU case-law database[4] which contains a thematic collection of all CJEU cases relating to EU Member States' legislation and administrative practice in the provision of services of general interest. From the database, we selected 89 cases concerning exclusive and special rights of undertakings entrusted with the provision of services of general economic interest. The most relevant of these will serve as the basis for the analysis in the remainder of the study. National measures subject to the CJEU cases have been collected from a specific dataset[5] of EU Member States regulation in the field of SGEIs. In addition, annual reports of the CJEU (CJEU, 2000–2022) have been used for our analysis.

**Exclusive Rights of Undertakings Providing Services of General Economic Interest**

The establishment of conditions conducive to undistorted competition in trade between Member States represents a fundamental tenet of the internal market. In order to achieve this, the TFEU provides for the prohibition of anticompetitive agreements, concerted practices and decisions by associations of undertakings (Article 101 TFEU), the prohibition of abuse of dominant position (Article 102 TFEU) and the prohibition of State aid that distorts competition (Article 107 TFEU). According to Article 106(1) TFEU, public undertakings and undertakings entrusted with exclusive or special rights, or entrusted with the operation of services of general economic interest, are subject to these competition rules under specific conditions. However, paragraph 2 of the same provision provides that, in cases where such undertakings have been entrusted with the operation of services of general economic interest, the application of the general competition rules must not impede the performance of the specific tasks that have been assigned to them. The following section will examine the extent to which these provisions allow Member States the freedom to grant exclusive rights, with reference to the relevant EU legal sources and the case law of the CJEU.
One way of involving so-called "corporate resources" in the provision of public services in a Member State is for Member States to grant special or exclusive rights to specific undertakings entrusted with the provision of services of general economic interest. As these undertakings are in most cases in economic competition with other undertakings, the granting of a special or

[4] See fn. 3.

[5] Dataset of the project K 134499, K_20 'OTKA' NKFI Found, National Research, Development and Innovation Office (Hungary) (hereinafter OTKA/NKFI database).

exclusive right generally exempts them from the application of general EU competition rules. The economic rationale is that if other operators in the market were entitled to compete with the exclusive right holder, they would be able to focus on economically profitable activities for the services covered by the exclusive right and offer prices for those services that are more favourable than those offered by the exclusive right holder.[6]

The Transparency Directive defines an "exclusive right" as a right granted by a Member State to an undertaking by legislative, regulatory or administrative means to provide a service or carry out an activity in a given geographical area exclusively for that undertaking.[7] A special right, by comparison, is a right in a particular geographical area:

– sets the number of undertakings entitled to provide a service or carry out an activity under conditions other than objective, proportionate and non-discriminatory conditions at two or more; or

– designates and authorises several competing undertakings to provide a service or carry out an activity under conditions other than such conditions; or

– under conditions other than such conditions, confers by law or regulation advantages on an undertaking or undertakings which substantially affect the ability of any other undertaking to provide or carry out the same service or the same activity under substantially equivalent conditions in the same geographical area.[8]

However, the content of exclusive or special rights may vary from sector to sector and may be specific to the general definition above. For example, the Rail and Road Passenger Services Directive defines an exclusive right as "the right to authorise a public service operator to operate certain public passenger transport services on a specific route, network or territory to the exclusion of all other comparable operators".[9] In the telecommunications sector, the CJEU has defined the content of an exclusive or special right as a right granted by a Member State authority to an undertaking, or to a limited number of undertakings, on the basis of non-objective, proportionate and non-discriminatory criteria, which significantly affects the ability of other undertakings to establish or operate a telecommunications network or to provide a telecommunications service in the same geographical area under substantially equivalent conditions.

A strategic objective of European Union policy is to open up the market for public procurement, so that national governments and local authorities can award contracts not only to national companies but also to companies from other Member States, on a level playing field, if they are the most suitable on the basis of objective criteria. In the early stages of European integration, public procurement was traditionally treated as a national interest, i.e. it was essentially ordered from domestic suppliers; the public procurement system was not even included in the Treaty of Rome.[10] As part of the process of liberalisation of public services, the opening up of public procurement markets to businesses from other Member States is a development of recent decades. The rules have been laid down in Council Directives since the early 1990s, directly building on important fundamental freedoms and principles of the internal market, such as the free movement of goods, the free movement of services and the prohibition of discrimination on grounds of nationality. [11]There are currently two public procurement Directives in force in

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[6] Cf. the case-law of the CJEU, e.g. Case C-320/91 Corbeau, ECLI:EU:C:1993:198, paragraph 18.

[7]Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings. OJ L 318, 17.11.2006, 17-25, Article 2(f).

[8] ibid., Article 2, point (g).

[9] Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and (EEC) No 1107/70. OJ L 315, 3.12.2007, P. 1-13.

[10] Horváth, 2005, 187.

[11] Horváth, 2005, 188.

the European Union: Directive 2014/25/EU on procurement by contracting entities operating in the water, energy, transport and postal services sectors, [12] which applies to public service undertakings and institutions, and Directive 2014/24/EU,[13] which applies to procurement by governmental bodies.

The concept of exclusive rights in the public procurement Directives is mentioned, on the one hand, where the use of a negotiated procedure without (public) call for tenders may be justified because the protection of certain exclusive rights means that works, supplies or services can only be carried out by a specific economic operator. On the other hand, it is understood to refer to rights granted in other procedures, including concessions, where adequate publicity has been ensured and where the rights have been granted on the basis of objective criteria. The EU public procurement Directives exclude both forms from their scope.[14]

Two types of exclusive and special rights covered by the public procurement Directives can therefore be distinguished: (1) one category essentially includes rights protected by Article 106 TFEU, (2) the other category includes exclusive rights protected by other public procedures, in particular special procedures under sectoral legislation.

1. The exclusive and special rights protected by Article 106 TFEU are therefore also an exception to the application of the EU public procurement directives, which exclude from their scope public service contracts awarded by one contracting authority to another contracting authority on the basis of an exclusive right which they enjoy under a legislative, regulatory or administrative provision compatible with the TFEU.[15] In the definition of "contracting authorities" in the Public Procurement Directives, they are State, regional and local authorities, bodies governed by public law, and associations formed by one or more of such authorities or bodies governed by public law,[16] but the case-law of the CJEU has made it clear that this includes companies which are established and operate under private law but which are publicly owned.[17]

A specific exception to the above is the so-called "in-house" exception. In-house is a form of public service organisation where services are provided "in-house" (even under market rules) rather than through contracts (partnerships) with economic operators, using public sector instruments.[18] The in-house exception is intended to cover cases where the public authority itself provides a service through a legally distinct legal entity. In these cases, the public authority and the entity providing the service can be considered as a single entity. This could be the case, for example, for the provision of a task based on an internal organisational arrangement (a department of the agency carries out the task) or in-house based on ownership, where the activity is carried out by a company wholly owned by the government.

2. The other type includes public procedures provided for by sectoral legislation. The nature of these procedures, and the extent to which exclusive and special rights can be extended, can therefore be linked to the extent to which the market for services can be opened up in the area concerned. The degree of liberalisation varies from sector to sector, depending on the specific characteristics of the sector concerned. For example, already in the 1990s it was relatively

[12] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement procedures of entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. OJ L 94, 28.3.2014, PP. 243-374.
[13] 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, 28.3.2014, 65-242.
[14] Directive 2014/25/EU, recital 20.
[15] Directive 2014/24/EU, Article 11.
[16] Directive 2014/24/EU, Article 2(1), point 1.
[17] Horváth, 2015.
[18] Horváth, Bartha & Bordás, 2020, 91-14.

extensive in telecommunications and electronic communications;[19] in the energy sector, however, given the existence of natural monopolies, Member States still have greater scope to derogate from the main obligations of market liberalisation.

## Interpretation of 'In-House' in the Case-Law of the CJEU

The provisions of the EU public procurement directives are therefore not applicable to in-house service providers, as confirmed by the CJEU case law. The conditions for the applicability of the "in-house service provision" exception, as developed in the case law of the CJEU, are that (1) the control exercised by the public authority over the legally distinct entity, alone or jointly with other public authorities, must be similar to the control exercised by the public authority over its own departments; and (2) the legally distinct entity must carry out a substantial part of its activities for the authority or authorities controlling it. The Teckal judgment was the first in which the CJEU laid down the conditions under which a direct award (without competitive tendering) cannot be considered illegal.[20] And the Asemfo decision[21] set out the conditions under which a public contract may fall within the in-house exception,[22] but there are many other examples of the CJEU's jurisprudence in this area.

In the newer and newer generations of public procurement directives, the scope of in-house exceptions has become more and more extensive, precisely because of the extensive interpretation of the CJEU. The current public procurement directives[23] define this scope as follows:

"A public contract awarded by a contracting authority to another legal person governed by private or public law shall not be subject to this Directive if the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

more than 80 % of the activities of the controlled legal person is the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons under its control; and

(c) there is no direct private equity participation in the controlled legal person, other than a non-controlling and non-blocking private equity participation which is held to satisfy national legal requirements in accordance with the Treaty and which does not involve control of the controlled legal person.A contracting authority shall exercise over a legal person control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it has a decisive influence over the strategic objectives and the major decisions of the controlled legal person. Such control may also exist where it is exercised by another legal person controlled by the contracting authority."

Below, the latest case law interpreting the notion of in-house is examined on the basis of a 2019 decision.[24] In the Irgita case, the CJEU examined the question of whether a Member State may impose additional requirements on a contracting authority for the conclusion of an in-house contract where the above conditions set out in the Directives are otherwise fulfilled in relation to that contract. The case concerned two public service contracts, one of which was

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[19] Bordás 2019

[20] Case C107/98 *Teckal*, ECLI:EU:C:1999:562.

[21] Case C295/05 *Asemfo*, ECLI:EU:C:2007:22.

[22] The public authorities exercise over this undertaking a control similar to that which they exercise over their own bodies, and this undertaking carries out a substantial part of its activities for the same authorities.

[23] Directive 2014/24/EU Article 12(1)(b); Directive 2014/25/EU Article 28(1)(b).

[24] Case C-285/18 *Irgita*, ECLI:EU:C:2019:829

concluded in 2014, as a result of a public procurement procedure launched by the Kaunas City Municipality as contracting authority, between the contracting authority and Irgita as a private company, for the provision of park maintenance services in Kaunas city. Subsequently, in 2016, for the same subject matter, the contracting authority concluded an in-house contract with Kauno švara, which was the sole owner of the contracting authority and 90,07% of its revenues -were derived from the activities performed for the benefit of the contracting authority. Irgita brought an action before the Lithuanian court, claiming that the contracting authority was not entitled to enter into an in-house contract for the above services because the contract it had concluded with it was still in force. It won the case in the alternative after the Lithuanian Court of Appeal found, on the basis of the relevant national legislation and case-law, that the disputed contract was unlawful, since it had resulted in a reduction in the volume of orders placed with Irgita and, by concluding the in-house transaction without objective necessity, the contracting authority had granted the undertaking under its control privileges capable of distorting the conditions of competition between economic operators on the market for the maintenance of forest land in the city of Kaunas. In the context of the preliminary ruling procedure in the case, the question was raised whether the definition of in-house within the meaning of Directive 2014/24 precludes a national rule which makes the conclusion of in-house transactions subject to additional conditions (such as ensuring the quality, availability and continuity of services and preserving competition on the relevant market).

The CJEU has held that the definition in Directive 2014/24 does not preclude a provision of a Member State which makes the conclusion of an in-house transaction subject to the condition that "the award of a public contract does not make it possible to guarantee the quality, availability or continuity of the services provided, where a particular method of providing the service has been chosen at a stage prior to the award of the public contract and complies with the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency." Furthermore, this type of additional conditions should be defined by Member States through specific and clear positive public procurement law rules, which should be sufficiently accessible and foreseeable in their application in order to avoid the risk of arbitrariness.

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What lessons can be drawn from the developments in case law outlined above? First of all, we can see that the expansion of the in-house exceptions outlined above fits into a more general regulatory trend, which can be described as a “turn” in EU policies.[25] Until the entry into force of the Amsterdam Treaty in 1999, the European Union pursued a parallel policy of liberalisation, with a view to opening up national markets as fully as possible in the public services sectors. The Treaty of Amsterdam added a new provision to the founding Treaty[26] which reaffirms the importance of and the need to protect services of general economic interest as one of the fundamental principles of the European Union. This provision, which was seen as a reinforcement of the traditional prerogatives and discretion of Member States in the organisation of these services[27] , was already a foreshadowing of a change in EU policy in which the public service sector was being given a more prominent place in government policy, sometimes in opposition to the liberalisation agenda. The guarantee provision introduced by the Amsterdam Treaty was complemented by the Lisbon Treaty (2009) with an explicit reference to the protection of national autonomy and the regulatory powers of the Member States[28] , and

[25] Horváth, 2013.
[26] Article 16 of the Treaty establishing the European Community (TEC).
[27] Rüsche, 2013, 99-124.
[28] Currently, Article 14 of the Treaty on the Functioning of the European Union (TFEU).

by the Protocol on services of general interest (Protocol No 26). Article 14 TFEU and the Protocol read together give even greater weight to national and local interests and to the competences of the Member States. The political message of the Lisbon Treaty is therefore clearly to protect services of general economic interest and related local interests against liberalisation.[29] This shift in EU policies has been reinforced by the crises of the 2000s.

However, the Irgita judgment also led to the conclusion that the CJEU's previous jurisprudence, which had broadened the scope of in-house cases, appears to be changing, and in a direction that is more protective of private economic operators than in the past.[30] A more cautious view is that the judgment is rather a reaffirmation of a principle of reasonable transparency, i.e. that a reasonably informed bidder (in this case Irgita) should be clear about what to expect if it is awarded a contract. Consequently, the interpretation given in the judgment would only apply to a scenario such as the Irgita case, where two overlapping contracts were awarded.[31] The specific circumstances of the case are indeed decisive for the assessment of the message of the judgment. However, beyond the undoubtedly relevant fact of the overlapping contracts, it is also relevant that in this case it is the national legislation that contains the more protective market competition rule as opposed to the EU provision. In this way, Lithuanian law in fact provides more stringent protection of the fundamental principles and objectives of the Directive, such as the fundamental freedoms of the internal market, equal treatment, non-discrimination, protection of the principles of mutual recognition, proportionality, transparency and ensuring competition in public procurement, and its legitimacy is therefore difficult to dispute. Nevertheless, the final result of the decision is that, while respecting the above principles, it allows the national legislator to derogate from the definition of in-house, which may even lead to risks to market integration objectives in a regulatory environment and public procurement practice different from the Lithuanian context.

The case law of the CJEU has not yet examined the European Union's exclusive or special rights regime in an SGEI sector in the context of the effects of recent crises (COVID-19 or the energy crisis). However, on the basis of a previous decision, it can be concluded that security of supply (in this case, security of energy supply in the event of a crisis) is an important consideration in the case law of the CJEU when assessing the legality of an exclusive or special right, but that such a reason does not necessarily in itself render the privileged position of the undertaking responsible for the provision of an SGEI lawful.

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[29] Rusche, 2013, 106 ., Marćou, 2016, 14.
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