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On public service and service of general economic interest: a conceptual approach

Do serviço público e do serviço de interesse econômico geral: uma abordagem conceitual

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Abstract

The economic integration and the creation of a European common market brought as a consequence the transformation of the public service concept, making way to services of general interest (SGI), services of general economic interest (SGEI), and Non-economic services of general interest (NESGI). This paper, reviews this process of transformation from the original idea of the Bordeaux School, to the notion of service of general economic interest (SGEI), coined by European Union law.

Keywords: *administrative law; public service; service of general economic interest; publicatio.*

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Resumo

A integração económica e a criação de um mercado comum europeu levaram à transformação do conceito de serviço público, dando lugar aos serviços de interesse geral (SIG), Serviços de interesse económico geral (SIEG) e serviços de interesse geral não económicos (SIGNE). Este trabalho, revê este processo de transformação desde a ideia original da Escola de Bordeaux até à noção de serviço de interesse económico geral (SIEG), cunhado pelo direito da União Europeia.

Palavras-chave: Direito administrativo; serviço público; serviço de interesse econômico geral; *publicatio*.

Sumario

1. Introduction

Three are the figures on which the Administrative Law was built: police, promotion and public service. The latter has perhaps been the most controversial because of the difficulty of its delimitation, to the point that, in its beginnings, it was considered as the activity that covered all or the main functions of the State (CASSAGNE, 2015). In the words of VEDEL, public service "is one of the notions that has become more confused with the modern evolution of administrative law" (VEDEL, 1990, p. 703), to the point of according to ALESSI "are as many as authors have dealt with it, even occasionally" (ALESSI, 1946, p. 24).

The profound crisis that the public service endured during the middle of the 20th century, has allowed transforming the concept from the original idea of the Bordeaux School that started from a statist and authoritarian conception, to bring it to the stage of free competition between companies, which can -in a free market scheme- develop activities with a view to meeting collective needs.

In this process of transformation, Community law, a right that "has evolved from the primary purpose of European construction through a

gradual process of shaping a single market, the complementary aim of achieving economic and social cohesion and solidarity between Member States" (TORNOS MAS, 2016), building, along this path, the concepts of economic services of general interest and services of general interest, to which we shall refer in this chapter.

It will be based on a review of the classical definitions of public service, including the Spanish doctrine, and then review the influence of European legislation on this concept and its move towards the notion of economic service of general interest.

2. The Public Service: A concept in constant evolution

2.1. The origins of the public service

Since there are organizations endowed with power and public nature, whether states —obviously autonomous communities would enter into that concept— or municipalities; they perform to a greater or lesser extent a certain part of their activity in a service to the subjects integrated in them, whether subjects, citizens or administered. This service to citizens is now called a public service.

The birth of public service theory took place in France, thanks to the development of two major sources: 1. The case law, namely the continuous *arrêts* of the Council of State of that nation, which not only contributed to the development of the concept of public service, but also contributed to the construction of other figures of administrative law; and, 2. The doctrine with DUGUIT and HAURIOU at the head who constructed and reconstructed the concept from a more abstract perspective.

With regard to the jurisprudential source, the *arrêt* Blanco of February 8, 1873, issued by the French Court of Disputes, is the one that marks the foundational milestone of the public service in the Administrative Law. Following an accident involving a young girl injured by a trolley in Bordeaux, an action for compensation was brought before the Civil Court, a body which referred the determination of jurisdiction to the French Court of Disputes. Among other things, this ruling considers that liability for damage caused by public services should be regulated by autonomous principles other than those enunciated by the Civil Code for relations between private persons,

besides, it uses the criteria of the *puissance publique* (public authority) identified with the public service concept.

For FERNÁNDEZ GARCÍA, the contribution of *arrêt* Blanco was not only to turn the public service into a criterion for the delimitation of the contentious-administrative jurisdiction, but also to include the acts of management of public services in the category of acts of *puissance publique* (FERNÁNDEZ GARCÍA, 2003, p. 73). "L'État, dans leur gestion (celle des services publics) agit toujours comme puissance publique, et ace titre, il n'est justifiable aleur égard que de la jurisdiction administrative" (LONG, WEIL, BRAIBANT, 1984, p. 15). This thesis was confirmed in the judgment of the Tribunal of Conflicts of May 20, 1882, De Divonne et Rome: "Il ressort de l'ensemble des lois qui ont établi le principe de la séparation des pouvoirs (".) qu'en général, et, sauf les exceptions formellement exprimées, l'autorité administrative est seule compétente pour connaltre des actions en responsabilité dirigées contre l'État, considéré comme puissance publique, et représenté par l'une de ses administrations, chargée de pouvoir dans l'intéret général a un service public" (FERNÁNDEZ GARCIA, 2003, p. 74).

Subsequently, the Council of State will issue the *arrêt* Vosges, on October 31, 1912, in which —in a claim that has its origin in a penalty imposed by the municipality of Lille on the occasion of the partial breach of a contract of supply of pavers—, is declared incompetent because it was a contract that did not have exorbitant clauses and where the Administration had the same conditions as if it were an individual (MARTÍN REBOLLO, 1983, p. 2482).

In parallel with the construction of case law, the French doctrine will work on the construction of the concept of public service, although there are discrepancies on the "paternity" of it.[1] The fundamental concern of the public service doctrine will be to lay the foundations for an objective limitation of the State by law and, above all, to emphasize the performance dimension of the State or its duty to ensure certain benefits (CASSAGNE, 2015, p. 19).

They are Leon DUGUIT and Maurice HAURIOU, the main exponents of the doctrine of public service in France. DUGUIT, teacher of the Bordeaux School, developed a statist conception of public service in which the State

[1] For professor Juan Carlos Cassagne it is wrong to attribute it to Duguit, since the concept of public service, is a category that is nourished by the historical reason that tends to resolve the social tensions that struggle for the satisfaction of collective needs in a dialectical process that, if not resolved in a harmonious way, ends up confronting the State with society (CASSAGNE, 2015, p. 405).

was idealized as the holder of the objective law. Under these ideas, the public service was defined by DUGUIT as "any activity whose compliance must be regulated, assured and monitored by the rulers, because the fulfillment of this activity is indispensable for the realization and development of social interdependence and of such a nature that it cannot be completely assured except by the intervention of the governing force" (DUGUIT, 1923, p. 54-56).

However, this concept would be revised by the same author, who already by the end of the 19th century, intends to proclaim the submission of the State to the Law — which corresponds to the submission of the State's action to the law and the proclamation of the rule of law— and thus replaces the absolutist concept of sovereignty with that of public service, the latter becoming the foundation of public law.

DUGUIT attempts to overcome the Germanic doctrine of the State-power or State-person which, as the holder of sovereignty, imposes the Law through a purely performing administration. The limitation of power and its subjection to the law, as an expression of popular sovereignty, makes this concept unworkable. Consequently, the State consists of a set of public services organized and controlled by the rulers.

DUGUIT finds these new bases in the formula according to which the rulers must govern for the citizens and not for themselves. Therefore, authority is not based on a subjective right, but on the duty that arises from life in society.

In this way, it affirms that a government does not exist, nor can it be maintained, except insofar as it relies on certain elements of political force existing in the country concerned and fulfils the social task imposed or entrusted to it. The duties of the rulers are not abstract, but derive from the necessary social solidarity, which is materialized through the exchange of services. Citizens provide services to each other according to their abilities and needs; but those of general interest must be provided by the rulers. Activities of this nature integrate public services.

According to his new position "there is a state intervention that must be subject to law, regulated and disciplined by a system of public law. But that system cannot be based on the concept of sovereignty (…). Thus, a new system is necessarily constituted, which is intimately related to the previous one, but based on a different notion, which manifests itself in everything,

which shapes all the modern institutions of public law (...) such is the notion of public service" (DUGUIT, 2007, p. 15-30).

It was then born with DUGUIT, a broad and objective concept of public service, which encompasses all administrative law, making it public service law (PAREJO ALFONSO, 2019, p. 83-88)

The ideas of DUGUIT would be reviewed and reconsidered by Gastón JÈZE, who will give way to a procedural and final conception of the public service (FERNÁNDEZ ALLES, 2019, p. 35). JÈZE, also a member of the Bordeaux School, continued the doctrinal construction of its teacher DUGUIT, starting from a capital idea: public agents do not act on their own, but to satisfy the general interest (JÈZE, 1958).

For JÈZE, the acts of public agents are manifestations of the will of individuals in the exercise of a legal power and in order to produce a legal effect, that is, real legal acts based on a legal power.

The author states that administrative law is the public law that deals with the legal regime of manifestations of will that occur during the management of public services, defining it as "set of special rules concerning the operation of public services" (JÈZE, 1958, p. 125).

JÈZE considers that administrative law deals with three main areas: public service agents, administrative assets and the legal means for the regular operation of public services. In this conception, based on the notion of general interest, public service is of such importance that, according to JÈZE: "Le service public est aujourd'hui la pierre angulaire du droit administratif français" (JÈZE, 2005).

According to JÈZE "to determine whether an activity is a public service ' (in order to give regular and continuous satisfaction to a certain category of needs of general interest there is a special legal regime and that this regime may at any time be amended by laws and regulations)' it is necessary to find out if this has been the intention of the rulers, and this will is appreciated not by an essential characteristic, but by a set of signs" (JÈZE, 2005, p. 30-32). Of which, once it is determined that a certain activity is a public service, procedures of public law may be applied "that the laws and regulations may at any time modify the organization of the service, without any insurmountable legal obstacle" (JÈZE, 2005, p. 30-32).

Consequently, it concludes that, in order to give regular and continuous satisfaction to a certain category of needs of general interest, there exists a special legal regime, composed of special rules that can be

modified at any time by laws and regulations, and which are intended to facilitate the regular and continuous operation of the service meeting the need of general interest. This special legal regime, integrated into public law, constitutes for JÈZE the proper content of administrative law.

The third referent of the French doctrine and perhaps one of the main critics of the ideas of DUGUIT, is Maurice HAURIOU, who raises a limited notion of public service considering it "a technical service provided to the public on a regular and continuous basis for the satisfaction of a public need and by a public organization" (HAURIOU, 2002, p. 44).

For HAURIOU, neither the legislative activity nor the jurisdictional activity are considered public service, but it will be an activity framed within the administrative activity. However, the author also distinguishes between the fact that not all the activity of the public administration constitutes a public service, but only a part of it.

The doctrine of the public service continued until the interwar period, but entered into crisis with the hand of the French Council of State, which in *arrêt* Bak d'Eloka admitted the validity of the private management of a public service.

In addition, the wave of nationalizations following the Second World War showed that the management of services by the Administration itself was a purely instrumental issue, since it can operate under public and private law, and may even constitute public entities engaged in private activities.

2.2. The public service in the Spanish law[2]

States FERNÁNDEZ GARGÍA, that in Spain, contrary to what happened in France, the development of the public service is the work of legislation rather than of case law, which in its opinion explains that both doctrinal and jurisprudential drafting have focused on specific aspects without there being a central concept that has presided over each of the existing perspectives, as happened in France. Thus, it indicates that the term public service began to be used at the beginning of the nineteenth century, highlighting as a first normative milestone, the third paragraph of article 8 of the Law of April 2, 1845, issued for the organization and powers of the Provincial Councils, which, for the first time, in the area of contracts, formulates the criteria of

[2] *Vid. in totum*, GARCÍA RUBIO, 2004; GARCÍA RUBIO, 2020; FUENTES I GASÓ, 2019.

the purpose of the contract for public works or services (FERNANDÉZ GARCÍA, 2003, p. 105).

More recently, ARIÑO ORTIZ has discovered up to four major approaches present in the Spanish legal system, referring, for example, that financial legislation offers an organic concept by qualifying as a public service any State activity involving public expenditure, while general civil, criminal, commercial and procedural legislation meets a substantive or material criteria; the general administrative legislation in an ambivalent manner, sometimes opting for the organizational design and sometimes for the material, to the point of referring in some cases "to any administrative activity involving the exercise of specific competences for the achievement of the particular purposes which the Administration has now entrusted" and finally, sectoral legislation refers to specific sectors of activity (NAVARRO, 2017, p. 109).

The doctrine, on the other hand, was strongly influenced by foreign doctrine, both Italian and German, but, above all, French. It is JORDANA DE POZAS who coins the idea of public service in its classic tripartite classification of administrative activity: police, promotion and public service (JORDANA DE POZAS, 1949, p. 41-54). Although the public service has proved to be an insufficient notion to conceptualize the object of administrative law, this reworking has made it possible to understand one of the ways in which the State fulfils its purposes. Thus, a double conception of the public service emerges; as an element of the objective construction of administrative law and as a form of activity of the administration, as SALA ARQUER has pointed out (SALA ARQUER, 1977, p. 10-11).

However, we warn that, have been very varied the theories that have emerged to try to delimit the concept of public service, to the point of raising in past times, polemics as the one emerged between GARRIDO FALLA and VILLAR PALASÍ. For VILLAR PALASÍ, the public service in the strict sense had a clear vocation to the monopoly that derived from the declaration of a certain activity as a public service. This ownership of the activity by referring to the Administration meant that it was closed to individuals, who could only carry it out in the event that they obtained an administrative concession (VILLAR PALASÍ, 1950, p. 64).

In this sense, if an activity was carried out freely by the private individual -without concession- and at the same time carried out by the Administration, then it should not be considered a public service, with which,

social services, healthcare, educational or cultural services could not be technically qualified as public services, even if in a vulgar non-legal sense they were so called (VILLAR PALASÍ, 1950, p. 64).

For its part, GARRIDO FALLA understood that "the monopolistic nature of the public service is so only in certain services, but it is not a general or essential note to the public service" (GARRIDO FALLA, 1954, p. 140), would be revised to consider public ownership as an inherent note to the definition (GARRIDO FALLA, 1954, p. 140).

More recently, the Spanish doctrine has attempted to construct the concept of public service on the basis of the subjective conception. In this sense, SANTAMARÍA PASTOR states that "from a formal perspective the basic data is that formally the State (or other territorial entity) assumes the duty and responsibility to guarantee its regular and correct provision to citizens, either by performing it by itself or by securing its performance by a third party; an act of assumption that is usually known as *publicati*" (SANTAMARÍA PASTOR, 2009, p. 304).

Meanwhile, SÁNCHEZ MORÓN points out that the rejection of the conception of the School of Public Service has given way to a second notion of more restricted public service, which identifies it only with publicly owned activities aimed at the material provision of a service to citizens (SÁNCHEZ MORÓN, 2011, p. 766). And, finally, we will refer to FERNÁNDEZ FARRERES, for whom the public service is referred to the set of service activities assumed or reserved to the State in order to satisfy collective needs of general interest, whose distinct note is the *Publicatio,* that is to say, the public ownership of the activity in question and the subsequent failure of freedom of enterprise. *Publicatio* which is sometimes accompanied by the direct management of the public service by the administration itself (FERNÁNDEZ FARRERES, 2012, p. 420).[3]

Based on the above references, TORNOS MAS concludes that, in Spain, the concept of public service is mostly identified with those services of general interest whose ownership has been assumed by the Administration —*publicatio*—, for its provision in accordance with the principles of affordability, equality, continuity and quality, stressing that the assumption

[3] It should be noted that the publicatio of activities began in the 19th century, because of the link between certain activities and the concept of public works, whose state property nature will cause the concessional technique will be applied to its exploitation -behind which the reserve or publicatio with ownership.

of ownership may or may not be exclusive of the free economic initiative (TORNO MAS, 2016, p. 200).

Thus, for more than a century, the concept of public service was subject to conceptual reconfiguration that has not been exhausted in the construction and development of national doctrine and legislation, but has been impacted — as will be examined in the following paragraphs— by European Union law which would replace the term public service by the term "service of general interest" (SGI), whose European regulatory rules apply to a wide range of activities, ranging from social services managed by local and regional authorities to private economic activities of general interest.

3. Impact of European Union law on the reconstruction of the public service: services of general economic interest

European Union law has had a significant impact on the reconstruction of the concept of public service. It should be recalled that, in its classical sense, public service has two relevant characteristics: 1. The ownership of the service is in hands of the public administration; 2. The service is translated into a material type of service, which is accompanied by a legal-administrative regime that will seek to guarantee the continuity, equality, quality, mutability and affordability of the service, all of which are geared to the satisfaction of the general interest (GONZÁLEZ RÍOS, 2018, p. 26). However, this concept is obsolete in the face of the construction of Europe, which is the result of economic integration and the creation of a common European market, where the rules of competition prevailed, for which classical public services are found to be anti-competitive and uneconomical (TORNO MAS, 2016, p. 201).

In this sense, European law introduces the concept of service of general economic interest (SGEI), which seeks to identify those activities with economic content that have been the subject of liberalization processes, and should therefore be carried out in accordance with the principles of competition (TORNO MAS, 2016, p. 201).

3.1. Evolution of services of general economic interest (SGEI) in the European Union law

FERNÁNDEZ ALLES, places the historical basis of the concept of services of general interest at the origin of the process of European

integration; however, highlights that it is based on the draft European Charter of Public Services —1993—, when the Commission issued a Communication on "Services of general interest in Europe", stating that the defense of services of general economic interest, was one of the common values of the European Union and its essential role in the social and territorial cohesion of Europe in accordance with the principles of equality, quality and continuity of those services (FERNÁNDEZ FARRERES, 2012, p. 51).

It is in 1996 that the Commission Communication is published and the final version of it mentions: 1. Services of general economic interest (SGEI); and 2. Non-economic services of general interest (NESGI). The firsts are subject to a moderate liberalization regime, where competition may be limited by the imposition by public authorities of public service or universal service obligations where the provision of such obligations is in the hands of private companies. On the other hand, the rules of competition do not apply to the latter, since they are services that serve to meet social needs[4].

In 2003, the Green Paper on services of general interest was adopted, stating that services of general interest are those which "the public authorities consider to be of general interest and are subject to specific public service obligations[5]", which range from the large networks industries —energy, postal, transport and telecommunications— to health, education and social services—. Later in 2004, the White Paper on Services of General Interest was published, setting out the principles for ensuring access for citizens and businesses to quality services of general interest[6]. This book proposes a division of responsibilities between the Union and the Member States and their regional -and local authorities- in the definition, organization, financing and control of services of general economic interest in art. 86.2 of the TEC (LÓPEZ GARCÍA, 2008, p. 113-114).

New European commitment in the field of services of general interest adopted in 2007[7]; document which, in the words of GONZÁLEZ RÍOS, is the

[4] Underlying both services is the idea of ensuring the provision of quality and affordability to all European citizens; the protection of users is the foundation of these services.

[5] Green Paper on Services of General Interest (Brussels May 21,2003).

[6] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 12 May 2004 entitled "White Paper on services of general interest.

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 20 November 2007, accompanying the Communication on "A single market for 21st century Europe" - Services of general interest, including social services of general interest: a new European commitment.

prelude to the Treaty of Lisbon and the Protocol on services of general interest which accompanies it. The commitment indicates that services of general interest cover a wide range of activities, ranging from large network industries such as energy, telecommunications, transport, audiovisual broadcasting and postal services, education, water supply, waste management, health and social services. Similarly, the shared responsibility between the EU and the Member States is reflected in the regulation and definition of services of general interest, although it is up to the Member States to decide on their nature, scope and mode of provision[8].

In this communication it divides services of general economic interest into two categories: 1. SGEI which are provided for remuneration and are subject to European internal market and competition rules, which in some cases have a European dimension, in particular the large network industries —postal services, telecommunications, transport or supply of gas and electricity— and are regulated by specific European rules; and, 2. The NESGI, such as the police, justice and compulsory social security schemes which are not subject to specific European legislation, nor to Treaty rules on the internal market and competition.

It also mentions social services of general interest (SSGI) which are provided on a personalized form in order to meet the needs of vulnerable users and are based on the principle of solidarity and equal access. The latter may or may not be of an economic nature, depending on the manner in which the service is provided, organized and financed.

Finally, on this point, we refer to the 2011[9] Communication on a Quality Framework for Services of General Interest in Europe, which emerges in the midst of the EU's economic and financial crisis, which became an appropriate opportunity to propose a reformulation of the Community position on services of general interest. Therefore, the objectives of the Communication are mainly aimed at users who must be guaranteed access to them and quality; and the providers of these services —to give them legal certainty—. It also highlights the role of these services in social cohesion and the important role they play in services such as health care, children, the elderly, the disabled, social housing, education services, training, employment, among others.

[8] *Ibídem,* p. 30.

[9] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions a Quality Framework for Services of General Interest in Europe COM/2011/0900.

3.2. The TFEU and the services of general economic interest (SGEI)[10]

In accordance with Article 14 TFEU, SGEIs are part of the common values of the Union and play an important role in promoting social and territorial cohesion, the Union and the Member States. Although it does not define them, it introduces a new legal basis enabling the European Parliament and the Council to lay down the principles and conditions —economic and financial— enabling services of general economic interest to fulfil their tasks (PIERNAS LÓPEZ, 2017, p. 103).

Article 106.2 of the TFEU reintroduces the term SGEI, without giving it a specific definition; however, it points out that the companies entrusted with the management of the SGEI are subject to the rules of competition "in so far as the application of those rules does not prevent de facto or de jure the performance of the specific task entrusted to them".

For its part, Protocol No 26 to the Treaty of Lisbon, in developing the common values of the European Union with regard to services of general economic interest —with reference to Article 14 TFEU—, states that these include: 1. "The essential role and wide discretion of national, regional and local authorities to provide, commission and organize services of general economic interest as close as possible to the needs of users;" 2. "The diversity of services of general economic interest and the disparity in user needs and preferences that may result from different geographical, social and cultural situations"; and, 3. "A high level of quality, safety and affordability, equal treatment and the promotion of universal access and user rights[11]".

For SEGURA SERRANO (2011, p. 65), despite the fact that the above-mentioned rules do not provide a concept of SGEI, the starting point of the SGEI is a broad freedom of appreciation of the States to define them, which, in his opinion, has necessarily led to a lack of unity of opinion, on the understanding that what for some Member States could constitute a general economic interest for others could not.

This same "conceptual indeterminacy" can be observed in some Directives, including Commission Directive 2006/111/EC of 16 November

[10] FRANCO ESCOBAR, 2017.
[11] Protocol (No 26) on services of general interest.

2006 on the transparency of financial relations between Member States and public undertakings, as well as the financial transparency of certain undertakings, which in Article 2.d) includes undertakings entrusted with the management of services of general economic interest among those required to keep separate accounts under the terms of that Article; or the Directive 2006/123/CE of European Parliament and Council of 12 December 2006 on services in the internal market, which does not require Member States to liberalize services of general economic interest or to privatize public entities providing such services[12].

However, PIERNAS LÓPEZ considers that it is possible to find in the aforementioned rules some elements that the SGEIs must gather, among which he mentions: 1. They are services that are performed for an economic consideration; 2. They lend themselves in the performance of a special public interest task entrusted to the provider by a public authority of a Member State; 3. They should promote social and territorial cohesion; and, 4. Public authorities should promote universal access to them, as well as a high level of quality, security and affordability, and equal treatment in their provision (PIERNAS LÓPEZ, 2017, p. 107).

For CHINCHILLA PEINADO and DOMÍNGUEZ MARTÍN (CHINCHILLA PEINADO, 2018, p. 59-85), SGEIs are characterized by their diversity, and it may be agreed that, from a positive perspective, the key element in SGEIs is that the service should be directed to the satisfaction of a general interest —public— at the service of the community, understood as a whole or referred only to some of its parts, which may be limited geographically or objectively. The social needs to be addressed by each Member State differ from one another, so that the same activity may or may not be classified as an SGEI in terms of economic development and the model of social constitution adopted by each Member State.

And the generality —relevance— of the interest in the provision of the service derives from the fact that its provision can only be guaranteed by the public authority or by a company authorized by the public authority. In all of them, the key element is quality assurance and accessibility of SGEIs provided to users.

The public interest lies not so much in ownership, but in its universality. From a negative perspective, services provided in a particular interest are not considered as SGEIs, even if it has a more or less collective

[12] See the preamble and article 1.2 of that Directive.

dimension, or is recognized by the Member State as legitimate or beneficial. Nor those activities where the State exercises its sovereignty or acts as such.

In opinion of PARICIO RALLO (2013, p. 103-116) the differences between the network industries —telecommunications, energy, transport, postal services—, financial services, the media or many of the activities related to the protection of the environment.

However, —below the regulatory surface—, they all have common lines of force, which approximate essential aspects of their legal regime. SGEI are, —by definition—, relevant in any organized society. What is happening is that, —at Community level—, they are an even more sensitive matter. The explanation can be found in their greater propensity to guarantee with public means essential benefits, especially those with greater social component.

However, in the absence of a legal definition, the CJEU has made some contributions towards the construction of a concept of services of general economic interest. Thus, in judgment C-66/86, it specified the obligatory nature and universality as characteristics of these services, together with the fact that a measure of public authority exists by which tasks or tasks of general interest are entrusted. In judgment C-18/88, it held that the exclusion or restriction of competition in certain markets may be regarded as unjustified, even if there is a public service mission of general economic interest.

3.3. Services of general economic interest (SGEI) and their impact in the public service concept

The liberalizing effort undertaken by the European Union, which led, inter alia, to the incorporation of the term "services of general economic interest" in certain sectors such as telecommunications, energy, postal services and/or transport, will undoubtedly mean a reconfiguration of the public service concept.

According to SEGURA SERRANO (2011, p. 73), the regulatory development of services of general economic interest has given way to the introduction of terms "substitutes for the traditional public service", including universal service, base service and value-added services.

We will refer to the universal service, as it has had the greatest impact on the concept of public service, to the point that, for the aforementioned

author, is the "call to replace or at least modify the concept" (SEGURA SERRANO, 2011, p. 33). This concept was introduced by the Commission and forms part of European Union law, in view of the Directives adopted in the late 1980s and early 1990s.

Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), points out to us in Article 3.1 that universal service is an obligation that must be complemented by others, such as quality, affordability and continuity; it must also respect the principles of objectivity, transparency, non-discrimination and proportionality (Article 3.2 of the Directive).

For GONZÁLEZ RÍOS (2018, p. 33) universal service obligations are a type of public service obligation whose function is to ensure that certain services are available to all consumers and users in a member State, irrespective of their geographical location, of a certain quality and, taking into account specific national conditions, at an affordable price. This concept of universal service resembles the concept of general economic interest established by the CJEU in the Corbeau and Almelo judgments, in which it was highlighted that the characteristics of continuity and equality in the provision of the service already played an essential role. In the Corsica Ferries France case, the Court in its analysis of the costs of mooring service points out that it is not incompatible with the TFEU to "include in the price of the service an element intended to cover the cost of maintaining the universal mooring service, in so far as it corresponds to the additional cost entailed by the specific characteristics of that service, nor to establish, for that service, different tariffs depending on the specific characteristics of each port", to continue pointing out that "the Member State has effectively entrusted the mooring corporations with the management of a service of general economic interest within the meaning of Article 90, paragraph 2, of the Treaty, and that the other conditions for the application of the derogation from the rules of the Treaty provided for by that provision are met, legislation such as that under examination does not infringe Article 86 of the Treaty in conjunction with Article 90.1[13]"; that is, the direct link between service of general economic interest and universal service is recognized in this decision.

[13] Judgment of June 18, 1998, *Corsica Ferries France*, C-266/96.

SEGURA SERRANO (2011, p. 75), to paraphrase KOVAR, points out that, in principle, nothing separates the notions of service of general economic interest from the more traditional notion of public service, at least from one point of view; and that in the end, services of general economic interest, universal service and public service obligations are very closely related notions.

Thus, the old concept of public service —that in DUGUIT words— could be considered as an "activity which is indispensable for the realization and development of social interdependence and of such a nature that it cannot be completely ensured except by the intervention of the governing force" (DUGUIT, 2007, p. 37) — identifies in FERNÁNDEZ RODRÍGUEZ's opinion— with the notion of service of general interest —commercial or not— and with the ideas of universal service and public service obligations in whose definition and guarantee the intervention of the governing force is concretized (FERNÁNDEZ RODRÍGUEZ, 1999, p. 70).

In addition, the author points out that where the service of general interest is of a commercial nature, that is to say a service of general economic interest, its compatibility with free competition is also assured with the express acceptance of the partial derogations of this that keep the due proportion with that interest (FERNÁNDEZ RODRÍGUEZ, 1999, p. 70).

It would appear that the concept of universal service has given way to a new conception of the functioning of services provided in the general interest, forcing changes in the legal regime of some national public services, such as telecommunications or electricity, which have had to get used to operating in a competitive environment. However, following FERNÁNDEZ RODRÍGUEZ, this is a change in the starting point, but not so in the point of arrival; in other words, the legislative amendments still contain the express guarantee of supply to all users who demand the service, with the consequent imposition of obligations on the companies that provide them, which leaves "the things where they were from the point of view of the user", with the advantage for the user of any tariff reductions that may result from the introduction of competition in the sector. Thus, the change from the *publicatio* —that excluded the concurrence—, to the current regulations, continue to preserve the public service obligations that guarantee the effectiveness, continuity and quality of services, which was and is an essential note of the concept of public service (FERNÁNDEZ RODRÍGUEZ, 1999).

3.4. Services of general economic interest (SGEI) in the Spanish law

SGEIs despite being a figure created by Community law and adopted by the Member States, it does not have a counterpart in Spanish law, however, —as stated by GONZALEZ RÍOS (2018, p. 41) — its use in domestic legislation deriving from the ratification by Spain of the Treaty, and based on this, we can observe that in sectors such as airport, audiovisual, electric or postal, certain services are classified as SGEIs.

In this regard, mention may be made of Law 7/2010 of 31 March, General of Audiovisual Communication, which in its article 40 defines the "public audiovisual communication service" as an essential service of general economic interest “whose mission is to disseminate content that promotes constitutional principles and values, contribute to the formation of a pluralistic public opinion, raise awareness of Spain’s cultural and linguistic diversity, and disseminate knowledge and the arts, with particular emphasis on the promotion of an audiovisual culture", which may be State-owned and publicly funded —Articles 43. 2 and 4—.

Similarly, Law 43/2010 of 30 December on the universal postal service, users' rights and the postal sector, in its article 2, classifies postal services as "services of general economic interest provided on a competitive basis". And finally, Article 2 of Law 24/2013 of 26 December on the Electricity Sector recognizes the supply of electricity as a service of general economic interest; whereas the preamble to that act states that the organization of that service distinguishes between activities carried out under a natural monopoly and those carried out under a market regime.

However, nota ll the Spanish legislation has included the SGEI concept. In fact, for GONZALEZ RÍOS (2018, p. 43) the term that appears in a more precise form is the public service concept, which may be observed when talking about the financial responsibility of the Administration, the public domain or when reviewing the competences of local authorities.

Thus we have that, Law 40/2015, of 1 October, of Legal Regime of the Public Sector, when regulating the patrimonial liability of the public administrations subject the provenance of said claim, to which the injury "results from the normal or abnormal functioning of public services" (article 32.1), not mentioning in that Act what is to be understood as a public service. To which it may be understood that responsibility is identified with an act or

omission of the public administration that produces a damage — *estrictu sensu* — without linked to services, which, as mentioned by GONZALEZ RÍOS GONZALEZ RÍOS (2018, p. 43), the liability of private-law entities linked to or dependent on public administrations may be excluded unless they exercise administrative powers.

The public domain is a figure that has always gone hand in hand with the public service, and that, despite the construction of the term "SGEI" in European law, has not been the subject of major changes in domestic legislation. An example of this can be seen in Article 5.1 of Law 33/2003, of 3 November, on the Heritage of Public Administrations, which, when defining the assets and rights in the public domain, states that these will be those that “being of public ownership, are affected by the general use or public service, as well as those to which a law expressly grants the status of public domain”. Article 79.3 of Law 7/1985 of 2 April, Regulating the Bases of the Local Regime, also indicates that when listing the assets in the local public domain these are "those intended for a public use or service”, so that the categorization of a good as a state property will depend on; 1) its affectation to a public service, and 2) the public ownership of the good.

Finally, we will refer to the local level, which, as TORNOS MAS states, has been less influenced by Community law and in its legislation —Law 7/1985 of 2 April, Regulating the Bases of Local Government—, there are still genuine subjective public services (TORNO MAS, 2016, 210)..

Article 25.1 of Law 7/1985 of 2 April, Regulating the Bases of Local Government, states that municipalities may "provide public services that contribute to meeting the needs and aspirations of the neighborhood community”, and in this sense, incorporates important determinations regarding the legal regime of these, among which are: 1. The necessary reservation of law (article 86.2); 2. The economic efficiency of the service —term coined in article 57 of the Law—, and; 3. The link of the provision of public services to local competencies (article 86.2), it follows that the concept of a local public service responds to the concept of a subjective public economic service and therefore remains outside Community law.

4. Conclusions

Following NAVARRO (2017, p. 103), we can state that the public service —at the same that Public Administration— is a figure easy to

describe, but hard to define, and this difficulty derives of the fact that its creation and developing is product of the historic reason, tight to the idea of the State hold in a specific time, thus, the public service will vary to the extent that change the purposes that the State assumes.

From this chapter we can highlight three very different stages in the evolution of the concept of public service from a legal-administrative point of view:

The first, originating from the last third of the 19th century until the Second World War, which involves the construction of the concept in the framework of a liberal State in which services are provided by private managers under public administrative police.

The second, which we must include within the called welfare state after the Second World War and within the framework of an expansion of the state in the provision of services directly, which implies the hatching of the crisis of the denomination of public service by the expansion of the service scope of the public administrations in relation to the concept of public service originating from the administrative law of the first third of the twentieth century.

The third, related to its conception and permanent crisis. In that sense, some have come to speak (GONZÁLEZ-VARAS IBAÑEZ, 2002, p. 1345-1362) even of a *requiem* for public services, based on the phenomena of privatization and deregulation[14] started in the 1980s in Great Britain and other European countries and sacralized around the principles of free movement of goods, capital, workers and services envisaged by the Single Act of 1987, on the basis of the subsequent Treaty of Maastricht in 1992 and the subsequent Treaty of Amsterdam in 1997 and the Treaty of Nice in 2002, Lisbon in 2007 and Rome, that is to say, by the Community regulation moving from a concept of the public service provided directly by the administration to free competition in the provision of services and therefore to mere supervision of services from an administrative point of view, with the introduction of different concepts such as SGI or SGEI, the main features of the classical concept of public service. This is further deepened by the Directive 123/2006/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, or BOLKESTEIN Directive[15], in this case we can talk about three models in the former public

[14] Acerca de este fenómeno, *vid.* SORIANO GARCÍA, 1993.
[15] About the Services Directive, *vid.* RIVERO ORTEGA, 2009.

service category as highlighted by SORACE (2006, p. 18-58) and so the public services in their original dimension that we can call the French way. Secondly, the North American model of public utility regulation and, thirdly and finally, the European model of SGEI.

At the present time we can consider the existence or not of a fourth stage characterized in a framework of strong susceptibility to the European authorities, of a rise of populist political forces, of a need for the State to retake the direct provision services because of the ravages of the economic crisis, so it is likely that there will be a new stage characterized by the publication of services, which at European level we can date from the Lisbon Treaty.

In Spain, although some of its laws include the term SGEI, it has not been fully incorporated into its legislation, nor has it developed a normative definition of SGEI. The meaning "public service" is still found in our legal system from a subjective point of view, that is to say, with reference to all the service activities assumed or reserved for the State in order to satisfy collective needs in the general interest, whose distinct note remains the public ownership of the activity.

This is undoubtedly a concept that continues and will continue to be reviewed, not only by doctrine but also by case law, and which will be influenced by the current and subsequent internal regulatory developments in the European Union, but which, despite its transformations, continues to focus on meeting collective needs through the development of services.

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