Chapter 2
From Rome to Lisbon: SGIs in Primary Law

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Abstract This chapter is a discussion of the historical, political and, cultural specificity of the generic concept of 'public services' in Europe. The enlargement of the EU in 2004 and 2007 has added even greater complexity to the diversity of concepts of public services already found in the EU. Bauby notes that it is interesting to see that in 1957 (what is now) Article 93 TFEU (in the Chapter on Transport) used the term 'public service', whereas, Article 106(2) TFEU (ex Article 90(2) EEC, Article 86(2) EC) created a new concept of 'services of general economic interest' but this was a derogation from the fundamental economic freedom and competition law of the EU. This was an entirely new concept which was not recognised in any language of the original Member States or in scientific literature. However, attempts to put SGEIs on a positive footing in EU legislation have met with resistance and it is questionable how far the new Treaty of Lisbon 2009 will provide an adequate legal basis for EU legislation.

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Each society, within its long history, built and defined its 'Public Services', according to its own way of development, its traditions, institutions, culture, social movements, and the relations of force that structured it. So, it is nothing surprising that we find in Europe a series of diversity in the field of 'Public services'.[1]

2.1 Diversity and Unity in Europe

The first element to take into account is the terms and concepts used to define the 'Public Services'. They reflect historical developments, national cultures, and politico-ideological conceptions, and they are not necessarily equivalent in the actual 23 official languages of the EU.

The British use the expression either as singular concept—'Public service' equivalent to the concept of 'Civil Service', which means essentially, the administration and the civil servants, or as a plural concept 'Public Services', which refers to the various services provided to citizens by local authorities, central government, health care, education, policing, etc. The British also use the expression 'Public Utilities', which corresponds to the major network services (gas, electricity, water and wastewater, post and, telecommunications), but does not have a genuine explanatory value.[2]

We cannot establish a univocal glossary setting up the exact equivalent of 'Public Services' in all 23 official languages of the EU and each Member State. The successive enlargements, especially those of 2004 and 2007,[3] came to complicate the situation. In this field, each language refers to national histories, cultures, traditions, identities, etc., on the basis of which a national vocabulary, sometimes a specific doctrine has been developed: 'public services', 'public service', 'public utilities', 'service public', 'öffentliche Dienstleistungen', 'öffentlicher Dienst',[4] 'Daseinsvorsorge', etc., terms that cover various concepts in the European Member States.[5]

In attempting to develop a better comprehension between different languages and cultures, European construction had to create a common language, here by creating new terms—'services of general interest SGIs', 'services of general economic interest—SGEIs', we will return to that.

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[1] According to, in particular, *Cahiers français*, no 339, Les services publics, juillet-août 2007, La Documentation Française; Valin 2007.

[2] Marcou and Moderne 2005; Bell and Kennedy 2001.

[3] Andreff 2007; Atilla 2003.

[4] Forsthoff 1969; See also the translation of the term 'service of general interest'—*Dienste von allgemeinem Interesse*, or of the concept 'public service' used in the Community law—*öffentlicher Dienst*.

[5] Mangenot 2005.

More deeply, behind the same expression 'Public Services', there is often an amalgamation or confusion between missions, objectives, finalities, and organisation.

Thus, it coexists in two particular conceptions:

- a functional conception, which emphasises objectives and finalities of 'Public Services';
- an organic conception, which assimilates 'Public Services' to the entity that provides the service.

We also often understand 'Public Services' as public enterprises. The attribute 'public' within the expression 'Public Service' is sometimes considered as a reference to an enterprise having a public statute, or even activities of the state or communities, while 'Public Service' missions can also be entrusted to private enterprises (delegation, concession, etc.).

Another diversity is reflected in the fact that the competent territorial levels are not the same in the sectors and the structure of each state: between local, regional and national levels, the activities in question can have a market or non-market nature; organisation methods may be subject to different types of actors—public, mix, private or associative; doctrines and concepts, in particular the legal ones, are more or less formalised.

Thus, France built a strong concept of 'Public service' (*service public*), a sound legal doctrine (the principles drawn by the Council of State for more than one century of equality, continuity, and mutability-adaptability), a series of economic reasons (linked to 'market failures') and finally a political content, assimilating it to social link, the Republic, and the national identity. Other countries, as for example, the countries of Northern Europe (Sweden, Finland, Denmark) and The Netherlands, have not adopted a legal definition of 'Public Services', but based on the legislative intervention; there is no equivalent concept of 'Public Services' in Sweden and Finland, even if these countries are considered as typical examples of a welfare state thanks to a very active social policy and the relative autonomy of public law as developed in both countries.[6]

But, within this diversity, there is in Europe a profound unity[7]: in all European countries, public authorities—local, regional and/or national, were led to consider that some activities could not only be subject to the common law of competition and market rules, but to specific rules of definition, organisation and, regulation, with three objectives:

- to guarantee the right of each inhabitant to access basic goods and services (right to education, health, security, transport, communications, etc.);
- to build solidarities, guarantee economic, social and territorial cohesion, develop social link and promote the general interest of concerned community;

[6] Modeen 2001.

[7] According to, in particular, Bauby 1997; Lyon-Caen and Champeil-Desplats 2001; Bauby 2008, 2007.

- to take into account the long-term and the interests of future generations, to create conditions for a sustainable development, both economic, social, and environmental.

These aims and objectives of general interest are at the centre of the system of values that characterises all European countries and form a set of common value for Europe. 'Public Services' (or their equivalent) represent a key element of the European social model characterised by interactions and the integration of economic and social progress, which shape a 'social market economy'.

Thus, 'Public Services' are both characterised by their important national specificity, revealing a real diversity, and by a unity of tasks, resulting from history.

How should the European integration process approach 'Public Services'? Will they continue to lie outside the process, thus continuing to be defined and organised within the national framework, or will they be the subject of Europeanisation process? This question was not clarified by the Treaty of Rome of 1957, whose object was to progressively eliminate different obstacles to exchanges of goods.

2.2 The Treaty of Rome of 1957

The process of European integration began after the Second World War with the ECSC Treaty of 1951, and then with the Treaty of the European Defence Community (EDC) of 1953, it rests on an approach of progressive political integration starting with six Member States. But the failure of the EDC led to a clear inflexion, because the way for a direct political integration seemed impossible in the short term: instead, governments decided to follow the way of a progressive economic integration, starting with the construction of a 'Common market'.

This is what the Treaty of Rome of 1957 embraced. European construction was defined by three characteristics: a progressive supranational set, with common policies and some delegated powers to new institutions; its intimate legal nature (treaties, regulations and directives with a priority legal position over the national law); economic liberalism and the principles of free exchange and free competition, then free movement (workers, goods, services and capital), thus making the market the main regulator of European integration. Nevertheless, for the founders of Europe, the economy was only a way of integration that served a political objective with a federal nature.

The Treaty of Rome objective was to progressively eliminate different obstacles to goods exchanges, both by creating four common policies (commercial, competition, agriculture, and transport) but not to harmonise 'Public Services'. It evokes them only twice: Article 93 TFEU of the Chapter on Transport[8] refers to

[8] We use the numbering of articles in the current treaties (the so-called Lisbon), in force since 1 December 2009.

'obligations inherent in the concept of a public service',[9] whilst Article 106(2) TFEU recognises possible derogations from competition rules for 'services of general economic interest'.

Article 106 TFEU (ex Article 90 Rome, Article 86 EC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, particularly those rules provided for in Article 18 and Articles 101–109.
2. 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 the Treaties, in particular to the rules on competition, in so far 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 Union.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

We should note here the innovative approach of the authors of the Treaty of Rome: in order that representatives of different countries with different histories, cultures, and languages understand themselves, they create the expression 'services of general economic interest', which pre-existed in no national language or tradition. And to avoid any misunderstanding, in particular between French and German, they did not use the word 'public', that could lead to confusion (Is it about services' beneficiary or of the status of entities providing them?), but they clearly accentuate the objectives and finalities, the general interest, suggesting a functional meaning. Besides, they insist on 'the particular tasks assigned to them'. Certainly, the expression 'services of general economic interest' is particularly improper, because the authors' main aim was the 'economic' nature of the services rather than any particular 'economic' category of general interest. But even if invented in 1957, this expression has not been changed and Article 106 TFEU remains unaffected by the multiple revisions of the treaty.

In the White Paper on SGIs, the European Commission proposes a clarification of the terminology and definitions of the Community terms which are subject to a certain consensus among all stakeholders[10]: 'services of general interest covers both market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations' and that 'services of general economic interest refers to services of an economic nature.' Thus, it appears clear that this expression reflects the only common conception for European countries, the functional sense, which focuses on objectives, missions and finalities, general interest, and not the organic sense and the ownership type of operators.

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[9] 'Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.'

[10] COM(2004) 374.

Even if before, the Single Act of 1986, Article 90 EC (Article 106 TFEU) did not produce effects, it led to very different representations and interpretations by the Community institutions, including in the last period, and most often presented as allowing 'derogations' of Community rules in the field of SGIs. In particular, derogations from competition or of freedom of movement rules,[11] on the condition that they are justified and proportionate and often identified as an 'exception' to these same rules. The White Paper of the European Commission of 2004[12] said that 'the effective performance of a general interest task prevails, in case of tension, over the application of Treaty rules.'

The expression of 1957 'services of general economic interest' (SGEIs), was not changed by the adoption of new treaties,[13] and is now expressed in the primary law of the European Union, by the Treaty of Lisbon, as 'services of general interest' (SGIs) and 'non-economic services of general interest' (NESGIs). Furthermore, from the Community debates and the communications of the Commission has emerged the concept of 'social services of general interest' (SSGIs).

A careful study of, on the one hand, the secondary law and, on the other hand, the judgments of the Court of Justice and of the General Court reveals a frequent use of the term 'public service', but never in a general or global sense, as is the case in France or in certain countries of Roman law. It is always used as a qualifying term, a concept or a particular service: 'public service mission', 'public service obligation', 'obligation inherent in the concept of public service', 'public service requirement', 'delegation of public service', 'public service concession', 'public service contract', 'concessionaire or manager of a public service', 'public transport service', 'public service delivery of drinking water or gas distribution', or, furthermore, in respect of a particular service, 'guaranteeing that the public service will be executed', 'object of the public service', etc. It is through an improper extension that the use by the Court of the expression 'postal public services' was sometimes interpreted as a general or nominal definition of 'the public service' or of 'the public services'.[14]

But between 1957 and 1986, there is a consensus: each Member State continues to be responsible for defining, organising, implementing, financing its public services of general interest, according to its history, traditions, institutions, and culture. For almost 30 years there is no European integration of 'Public services'.

2.3 The Single Act of 1986: Nothing Changes, All Changes!

The Single Act of 1986, which amended and completed the Treaty of Rome, entrusted European institutions with the mission to implement the four freedoms of movement (people, goods, services, capital) and the single market. The articles

[11] Directive 2006/123/CE on services in the internal market.

[12] COM(2004) 374, point 3.2.

[13] It is significant that Article 90 of the Treaty of Rome has not been changed since 1957.

[14] For example, Guglielmi and Koubi 2009.

that made reference to public services and services of general economic interest were not changed, but the objective of free movement of services gave a mandate to the European institutions to eliminate obstacles to exchanges and to realise the internal market of … 'services of general economic interest', but without defining the specific provisions that would ensure their goals and develop European solidarity.[15] Even though not defined, the consensus of that time limited 'services of general interest' to the sectors of communications, transport and energy, key infrastructure networks necessary to the realisation of internal market and the four freedoms of movement.

A process of Europeanisation of services of general economic interest started then, sector by sector with three possible directions for the Europeanisation of public services[16]:

- Reject Europeanisation on behalf of specificities of SGIs or of each national state (on behalf of the principle of subsidiarity). This led to defensive strategies, which delayed the process and deadlines, but did not hinder the process, because they did not fall within European integration.
- Building European SGIs, as each member state did in its history, but no actor has proposed at this time, as this would put into question the practices, traditions, and usual organisational methods.
- To use the arms of the Treaty, developed since 1957 (competition, free trade), to break frontiers and improve the efficiency of often inefficient services. It is this strategy that will prevail. Why?

The implementation of the four freedoms of movement resonated with the essential changes of the 1980s and 1990s: rapid technological changes; internationalisation of economies and societies; diversification and territorialisation of needs; questioning burdens and inefficiencies of many public services; the strategies of major industrial and financial services groups; the development of the influence of the neo-liberal theories and the virtues of competition, etc.

The combination of these factors has led to a growing gap between national modes of definition and organisation of public services (communication, transport and energy) and the EU objectives of free movement. Europeanisation aimed both at breaking down national barriers, implementing European integration and introducing greater efficiency in areas that were often 'protected' by monopolies or exclusive local, regional and/or national rights.[17]

The European Union gradually called into question the national forms of organisation and regulation of public services that had been defined by the history of each EU Member State as it developed strategies for the creation of internal markets in network sectors, based on 'liberalisation', the introduction of competition and market logic.

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[15] See in particular CEEP 1995; Mangenot 2005.

[16] Bauby 2007–2008.

[17] Bauby 1998; Savary 2005.

However, these network sectors cannot be totally liberalised in order to make them subject only to the Community law of competition. The liberalisation logic leads to a series of polarisations in the network sectors calling into question some SGI objectives. There can be an oligopolistic competition among a few large groups, leading to new concentrations, to the detriment of users. Liberalisation overvalues the short-term, for which the market provides valuable information, to the detriment of the long-term for which the market is myopic. It focuses on large consumers who have 'market power' over small ones. It calls into question the equal treatment and the opportunities for equalisation (*péréquation*) of tariffs. Liberalisation takes into account neither territorial effects nor environmental consequences. It leads to forms of social dumping.

Under these conditions, apart from some pressure groups proposing a complete deregulation of SGIs by removing them from the common law of competition, the European rules, resulting from debates, initiatives of actors, and social movements, implement a controlled, organised and regulated liberalisation. The European Union has had to complete sectoral projects of liberalisation by creating new concepts and norms. We saw the concept of 'universal service' appear in telecommunications and postal services, then for electricity, guaranteeing some basic services to all residents and citizens; the public service was defined in energy and transport. The European Commission held public debates and proposed a set of principles that could form the basis of a Community doctrine.

2.4 Premises for a Community Doctrine

Progressively, a series of elements came to testify the research of a European conception of Public Services or Services of General Interest.

The Treaty of the European Union (Maastricht) of 1992 had already opened the potential for taking better account of and legitimising public service missions, even if most of these provisions continued to be often no more than potentials and subject to the priority of competition rules. The potentialities of the Treaty of Maastricht included:

1. The Article 8, establishing 'citizenship of the Union', whose content was largely to develop, for example, in terms of guaranteeing access to certain essential goods and services.
2. The Title XI (Article 129 A) 'Consumer protection': the satisfaction of consumer needs is their *raison d'être*, their purpose, the foundation of their legitimacy.
3. The Title XII (Articles 129B, C and D) 'Trans-European networks' provides for their development, interconnection, interoperability, and reveals a collective European interest.
4. The Title XIII aims to provide 'conditions necessary for the competitiveness of the Community's industry', whose foundations are based largely on the existence of efficient infrastructure.

5. Title XIV 'Economic and social cohesion' set the goal of 'reducing disparities between the levels of development of the various regions', which directly affects the services of general interest (social, territorial and generational solidarities)
6. Title XVI extended EU responsibilities in the area of protection of environment and concerned services of general interest, whose feature is to generate significant externalities.
7. The Protocol on the social policy, annexed to the treaty, established as objectives 'the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.' Services of general interest can contribute to realise these objectives.
8. More generally, the Articles A and B set objectives for a balanced and sustainable economic and social progress, 'to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion.'

In parallel, the case law of the Court of Justice has recognised since the *Corbeau*[18] and *Commune Almelo*[19] judgements that Article 106(2) TFEU can justify a limitation of competition for some services of general economic interest, which has been confirmed since then in many judgements. Thus, the Court of Justice defined progressively a jurisprudence recognising that services of general interest may fall within other objectives, missions, and forms of organisation than the general laws of competition.

Other evolutions occurred, resulting from debates, initiatives of different actors and of European networks such as the European Centre of Employers and Enterprises providing Public Services (CEEP), the European Trade Union Confederation (ETUC), the European Liaison Committee on Services of General Interest (CELSIG), and social movements, in particular of November–December 1995 that called into question the issue of total liberalisation and proposing a re-balancing of competition rules and general interest: both being considered not as finalities but as two ways for advancing EU objectives.

However, we had to wait 11 years after the Single Act, for the Treaty of Amsterdam to refer, in Article 16 EC, to SGEIs (without clear definition of the conditions of their particular tasks) as part of the common values of the European Union, with regard to their role in social and territorial cohesion and for which it establishes a shared competence between the EU and the Member States to enable them to fulfil their missions. However, this Article provided merely for a general, rather than legally specific, Treaty objective for SGEIs.

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[18] ECJ, Case C-320/91 *Procureur du Roi v Paul Corbeau* [1993] *ECR* I-2533.

[19] ECJ, Case C-393/92, *Municipality of Almelo v NV Energiebedrijf IJsselmij* [1994] *ECR* I-1477.

Article 16 EC
Without prejudice to Articles 83, 106, and 107, 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 fulfil their missions.

In 2000, the Charter of Fundamental Rights of the European Union was proclaimed. Article 36 'recognises and respects access to services of general economic interest.' Even though the Charter was not binding for 9 years it was for the first time that a declaration of rights at supranational level embraced an article on public services. Since 1 December 2009, the Charter 'has the same legal value as the Treaties' (Article 6 TEU).

Article 36 of the Charter of Fundamental Rights of the European Union
The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

It seems that this article may have two contradictory interpretations. On the one hand, we could read it as giving no competence or obligation to Community institutions, because the respect for access to SGEIs makes reference to 'national legislations'. But on the other hand, this text may be interpreted as imposing on the Community institutions the obligation to respect 'the access to services of general economic interest as provided for in national laws.' It will rely on future litigation before the Court of Justice of the European Union to bring clarity to the meaning of this article.

These two advances were linked with a series of other debates and positions, which gradually came to open a Community discussion on the future of public services. Thus, the European Commission has committed itself, since 1996, to a reflective and cross-cutting series of publications: two Communications (1996 and 2000), a report (2001), a Green Paper (2003) and a White Paper (2004), all entitled *Services of general interest in Europe*.[20]

In the White Paper of 12 May 2004, the Commission stressed that the debates had revealed important differences of views and perspectives, but that they seemed to have reached a consensus on the necessity to ensure a harmonious combination of market mechanisms and public service missions. The White Paper stresses the responsibility of public authorities: whereby, if the supply of services of general interest is organised in cooperation with the private sector or entrusted to private or public enterprises, the definition of public service obligations and missions remains the responsibility of public authorities at the appropriate level. The public

[20] European Commission, *Green Paper on Services of General Interest*, 2003, COM(2003) 270 final; European Commission, *White Paper on Services of General Interest*, 2004, COM(2004) 374 final; European Commission, *Communication on 'Services of general interest, including social services of general interest: a new European commitment'*, 2007, COM(2007) 725 final.

authorities are also responsible for market regulation and the monitoring of the operators that perform the public service missions entrusted to them.

The White Paper also identifies nine principles that have emerged from European debates as the basis of a developing common doctrine. A doctrine now reinforced with Article 14 TFEU and Protocol 26 on Services of General Interest of the TFEU and the TEU, introduced in the Treaty of Lisbon in 2009, which takes up most of these principles. The nine guiding principles of the White Paper can be set out as:

1. *Enabling public authorities to operate close to the citizens*: Services of general interest should be organised and regulated as closely as possible to the citizens and the principle of subsidiarity must be strictly respected.
2. *Achieving public service objectives within competitive open markets*: the Commission remains of the view that the objectives of an open and competitive internal market and of developing high quality, accessible and affordable services of general interest are compatible: under the TFEU Treaty and subject to the conditions set out in Article 106(2), the effective performance of a general interest task prevails, in case of tension, over the application of Treaty rules.
3. *Ensuring cohesion and universal access*: the access of all citizens and enterprises to affordable high-quality services of general interest throughout the territory of the Member States is essential for the promotion of social and territorial cohesion in the European Union. In this context, universal service is a key concept the Community has developed in order to ensure effective accessibility of essential services.
4. *Maintaining a high level of quality, security, and safety*: Furthermore, the security of service provision, and in particular the security of supply, constitutes an essential requirement which needs to be reflected when defining service missions. The conditions under which services are supplied also have to provide operators with sufficient incentives to maintain adequate levels of long-term investment.
5. *Ensuring consumer and user rights*: These include in particular the access to services, including to cross-border services, throughout the territory of the Union and for all groups of the population, affordability of services, including special schemes for persons with low income, physical safety, security and reliability, continuity, high quality, choice, transparency, and access to information from providers and regulators. The implementation of these principles generally requires the existence of independent regulators with clearly defined powers and duties. These include powers of sanction (means to monitor the transposition and enforcement of universal service provisions) and should include provisions for the representation and active participation of consumers and users in the definition and the evaluation of services, the availability of appropriate redress and compensation mechanisms, and the existence of an evolutionary clause allowing requirements to be adapted in accordance with changing user and consumer needs and concerns, and with changes in the economic and technological environment.

6. *Monitoring and evaluating the performance*: in line with the prevailing view expressed in the public consultation, the Commission considers that any evaluation should be multi-dimensional and cover all relevant legal, economic, social, and environmental aspects.
7. *Respecting diversity of services and situations*: any Community policy in the area of services of general interest must take due account of the diversity that characterises different services of general interest and the situations in which they are provided. However, this does not mean that it is not necessary to ensure the consistency of the Community's approach across different sectors or that the development of common concepts that can be applied in several sectors cannot be useful.
8. *Increasing transparency*: the principle should apply to all aspects of the delivery process and cover the definition of public service missions, the organisation, financing and regulation of services, as well as their production and evaluation, including complaint-handling mechanisms.
9. *Providing legal certainty*: the Commission is aware that the application of Community law to services of general interest might give rise complex issues. It will, therefore, make a continuous effort to improve legal certainty regarding the application of Community law to the provision of services of general interest, without prejudice to the case law of the European Court of Justice and the Court of First Instance.

2.5 From the Constitutional Treaty to the Treaty of Lisbon

In these circumstances, the Convention on the Future of Europe, charged with the preparation of a draft of European Constitution, and after conducting a deep review of the framework of its Working Group XI 'Social Europe', proposed to complete and consolidate the Article 16. On the one hand, by making it a 'general provision' at the beginning of the third part of the Treaty, therefore, applicable to all policies and the functioning of the European Union (including competition and internal market), and on the other hand, by making it the basis of a secondary legislation (a European Act), allowing to guarantee the existence, operation and financing of public services, and finally by making express reference to the freedoms of national and local authorities.

> *Article III-122*
> Without prejudice to Articles I-5, III-166, III-167, and III-238, and given the place occupied by services of general economic interest as services to which all in the Union attribute value as well as their role in promoting its social and territorial cohesion, the Union and the Member States, each within their respective competences and within the scope of application of the Constitution, shall take care that such services operate on the basis of principles and conditions, in particular economic and financial conditions, which enable them to fulfil their missions. European laws shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Constitution, to provide, to commission and to fund such services.

The Treaty of Lisbon, signed on 13 December 2007 by the heads of state and government of the 27 Member States of the European Union, following the 2004 rejection of the 'Constitutional Treaty' in the referendums of France and The Netherlands, came into force on 1 December 2009 after ratification by each State. It amended the Treaty of the European Union (TEU) and the Treaty establishing the European Community, which became the Treaty on the functioning of the European Union (TFEU).

The Treaty adopts, in many areas, the proposals from the Convention for the Future of Europe and the Treaty establishing a Constitution for Europe of 2004, although in some areas it is withdrawn and shows a re-focus on the role and prerogatives of the Member States and a resistance to any further Europeanisation. As regards services of general interest, it contains major innovations with Article 14 of TFEU, the legal force of the Charter of Fundamental Rights and Protocol 26 annexed to the treaties: provisions that complete themselves and set out in the primary law the framework for a European conception of services of general interest, guaranteeing their objectives and the diversity of their forms of organisation.

The Article 14 of the Treaty on the Functioning of the European Union continues the progress of Article III-122 of the draft Constitutional Treaty of 2004: it is an explicit legal basis for secondary law; the corresponding secondary law is subject to the co-decision of the Council and the Parliament and not only of the Commission (as was the case with Article 106 EC); it explicitly refers twice to the prerogatives and duties of Member States and their communities (reference to Article 4); it must be applied in all EU policies, including internal market and competition ('Provisions having general application'); and it also indicates that the legal tool for legislation should be regulations, which are immediately and directly applicable in national law.

> *Article 14 TFEU*
> Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, 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, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

With regard to the legal status of the Charter of fundamental rights, the new Article 6(1) of the EU Treaty provides that 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg,[21] on 12 December

[21] JOEU C 303 of 14.12.2007.

2007, which shall have the same legal value as the Treaties.'[22] With regard to access to services of general economic interest, the Charter provides:

> *Article 36 Charter of Fundamental Rights*
> The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

Protocol 26 TEU and TFEU on Services of general interest has, as an integral part of the Treaties, the same legal value as the remainder of the Treaties.[23] The Protocol is the result of a demand from the Prime Minister of The Netherlands at the European Council of June 2007 which adopted the contents of the reforming treaty in response to a demand from European Commission that involved the organisation of social housing in The Netherlands. In 2005, the European Commission had considered that the qualification of the housing system of The Netherlands as a SGEI was subject of an obvious error in that it went beyond the social character that a 'public service' should have: 'letting homes to households that are not socially deprived cannot be regarded as a public service.' The structural overcapacity on the housing market was not appropriate for the execution of public service; it represented a barrier to competition that should be addressed through the sale of the houses.

In doing this, the European Commission developed a restrictive conception of missions of general interest and public service obligations and called into question the competence of decision of a Member State. Primacy was given to the application of competition rules in relation to missions of general interest. To avoid such drifts, which might affect in future many other sectors or activities, the government of The Netherlands introduced the Protocol as a condition of acceptance of the reforming Lisbon Treaty and its ratification in The Netherlands:

> *Protocol (No 26) on Services of General Interest*
> The High Contracting Parties, wishing to emphasise the importance of services of general interest,
>
> Have agreed upon the following interpretative provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:
>
> *Article 1*
> The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:
>
> - the essential role and the wide discretion of national, regional, and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
> - the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;

[22] Except for the limited application in Poland and the UK.

[23] Article 51 TEU.

- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

Article 2

The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.

Unlike the previous treaties, it concerns not only services of general economic interest but all SGIs, regardless of whether they are classified as economic or non economic. If a service is qualified as 'non economic', the Article 2 of the Protocol clearly identifies that the Treaties 'do not affect in any way the competence of Member States to provide, commission and organise…' this service. If a service is qualified as 'economic', which is the case in a growing number of areas, Article 1 of the Protocol requires the EU institutions to respect both 'the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising' this service; to respect 'the diversity between various services of general economic interest and the differences (…) that may result from different geographical, social or cultural situations'; and also the principles 'of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.'

2.6 What Potentialities from the Lisbon Treaty?

The Treaty of Lisbon is quite a step forward compared to the earlier Treaties in that it creates new possibilities for clarifying the EU rules governing the definition, organisation, and operation of services of general interest, to guarantee and secure them. But it will require a strong political pressure for these potentials to lead to action. The Article 14 of the Treaty on the functioning of the EU provides in particular that 'the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions', …'particularly economic and financial conditions, which enable them to fulfil their mission.' So, the question to ask is whether the current secondary legislation of the EU is sufficient or not for this purpose. A pragmatic approach should seek not to legislate for the sake of legislation but should consider how any new EU legislative initiative could add value compared to the current situation and objectives of the treaty. In other terms, it is about examining whether the European positive law in force is sufficient or not.

Clearly, social services of general interest are, on the whole, subject to a series of legal incertitude's and insecurities detrimental to their proper operation. Of what EU standards and norms are they subject and under what conditions? Most of them are now part of a vast 'grey area'. It is a paradox, given their 'social' function, that they are less guaranteed than economic SGIs such as transport or

energy whose sectoral secondary legislation contain definitions of public service obligation, universal service, or consumer protection, etc. Therefore, in the area of SSGIs, it is necessary to clarify in legislative instruments the rules necessary for them to accomplish their missions, as is the case for other sectors of SGEIs.

The Treaty of Lisbon introduced the notion of 'non-economic services of general interest' (NESGI) which is neither a matter of the internal market or the law of competition. But the lack of definition of these non-economic services in primary or secondary law generates legal uncertainties and insecurities which affect the performance of their duties. It is not the Commission nor the Court of Justice but the ordinary legislative procedure that must clarify these categories and establish the norms governing each non-economic sector.

Even if all stakeholders acknowledge the principle of subsidiarity in the context of a shared competence between the Union and the Member States in the field of SGEIs,[24] there remain a number of uncertainties and insecurities in terms of the implementation of this principle. Under what conditions can Member States or local authorities define SGEIs: their missions; their forms of organisations (for example, in the area of special or exclusive rights); the modes of management (for example, the management 'in house' is now defined and clarified only in the field of transport); cooperation and mutualisation between public authorities? What rights and duties in the areas of non-economic services of general interest? Here again, the legislative procedure should clarify the rights and duties of public authorities to define, organise, and manage the SGI(E)s.

Article 14 TFEU emphasises the economic and financial conditions relevant to the missions of SGEIs. From this point of view, the 'Monti-Kroes package'[25] came with clarifications and guarantees in the area of the compensation for a public service obligation. It exemplifies the added value of a cross-cutting European positive law and, although it needed to be re-evaluated in 2009–2010 and eventually modified, according to Article 14 TFEU by the ordinary legislative procedure, it remains that the path outlined by the ECJ in the *Altmark* judgement distinguishes such compensations from the provision of the Treaty on state aids.

In terms of economic and financial conditions, the uncertainties and insecurities of the current period have led economic operators, in some sectors, to slow or postpone some infrastructure investments which are necessary for the safe operation of SGEIs, and therefore, for the continuity of services in long-term. Here

[24] Hoorens 2008.

[25] Three texts concerning state aid in the form of public service compensation (two texts of 28 November 2005: a decision 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 services of general economic interest and a Community framework for State aid in the form of public service compensation) and a Directive on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (obligation of keeping separate accounts), replaced on 16 November 2006 by the Directive 2006/111/EC. These texts are currently under review by the Commission: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/715&format=HTML&aged=0&language=EN&guiLanguage=en

again, a clear and stable legal framework will give investors the focus they need for long-term financing.

In some sectors (transport, energy, communications), the European secondary law has provided explicit detail of the guarantees that are to be provided to consumers and end-users, thereby allowing the realisation of the content of Article 36 of the Charter of Fundamental Rights. However, a broader European base for developing consumer and end-user rights should be defined and added to the principles contained in Protocol 26 on the services of general interest that is now annexed to the Treaties.

The sectoral secondary law in force places the main responsibilities of regulation on Member States and on national sectoral agencies.[26] While the rules are defined at European level harmful distortions are created, especially as a process of oligopolisation of operators develops in each sector and at multi-service plan with few dominant players. European secondary law should, therefore, define a general regulatory framework focusing on the necessary involvement of all stakeholders in regulation development in order to help ensure that SGEIs can accomplish their missions.

Also, it is necessary to define a framework providing for the efficient monitoring and evaluation of the effectiveness and performance of services of general interest and necessary for European governance in complex fields and sectors.[27] This framework should clarify the objectives of evaluation; the methodology necessary to take into account all the objectives of the SGI by crossing indicators; the relations between the European and national level; the necessarily pluralistic and independent management arrangements and the organisation of public debates.

The secondary European law should further clarify the conditions of implementation of Article 106(2) TFEU and define under what conditions the directions proposed by the European Commission's White Paper of 2004, according to which 'the effective performance of a general interest task prevails, in case of tension, over the application of Treaty rules' can be realised.

Finally, there should be clearly established a coherence between the internal norms of the European Union on SGIs and the guidelines it defends in negotiations with WTO, the GATS and more generally in any international trade negotiation.

These 10 challenges are now the subject of actual shortcomings and insufficiencies in the European secondary law that are detrimental to the accomplishment of the tasks of services of general interest. They should, therefore, be subject to a European legislative process to ensure greater legal certainty for all actors and stakeholders. However, there is a question, should we conduct a comprehensive approach that will yield a comprehensive and coherent European legal framework or should we proceed pragmatically on a case by case basis? Certainly it is the approach that may be the most effective that should be favoured.

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[26] Rodrigues 2005; Bell 2001.

[27] CEEP-CIRIEC 2000.

It is by responding point by point, in concrete terms, to uncertainties and insecurities of the European law for all actors concerned—public authorities (at all levels), SGI, SGEI, SSGI operators, regulatory agencies, users, staff, and trade unions—that we can both guarantee the existence of services of general interest of quality and build a European conception that will make one of the pillars of the future European Union.

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