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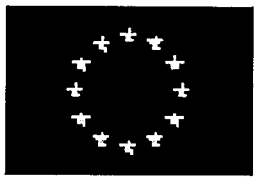

DG INTERNAL POLICIES OF THE UNION
- Directorate A -
ECONOMIC AND SCIENTIFIC POLICY

WORKING PAPER

SERVICES OF GENERAL INTEREST IN THE INTERNAL MARKET

PE 358.357

This study was requested by the European Parliament's Committee on Internal Market and Consumer Protection.

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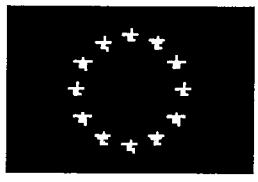

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Contents

Foreword

This study on "Services of general Interest in the Internal Market" was commissioned by the European Parliament with the aim of preparing background material and advising Members of the European Parliament Committee on the Internal Market and Consumer Protection on legal and economic issues related to existing and forthcoming proposals by the European Commission with respect to services of general interest.

For this purpose a working group was set up to examine the list of issues and questions given by the European Parliament (Directorate General Internal Policies – Policy Department A1 - Economic and Social Policies). This working group was headed by Prof. Dr. Gabriel Obermann (Wirtschaftsuniversität Wien, AT) with the collaboration of Prof. David Hall (Director of PSIRU, University of Greenwich, UK) and Mrs Barbara Sak (Assistant Director of CIRIEC, BE).

The study seeks to answer the questions listed in the study specification in the following sections devoted to the definition and scope of services of general (economic) interest (SG(E)I), to liberalisation and regulation measures related to SGI, to the financing of SGI, to employment issues and to impact assessment. A final substantial section is devoted to conclusions, which attempt to summarise the findings of the study, and also to present guidelines for policy options and suggest some recommendations. Questions regarding future EU legislation and comments with respect to existing proposals by the European Commission are dealt with in this latter section.

February 2005

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Executive summary

This paper seeks in sections 1-5 to answer questions of the European Parliament concerning:

- the definition and scope of services of general (economic) interest (SG(E)I);
- liberalisation and regulation measures related to SGI;
- the financing of SGI;
- employment issues affecting SGI; and
- impact assessment and evaluation of SGI.

Section 6 is devoted to conclusions, which attempt to summarise the findings of the study, and also to offer guidelines for policy options and make recommendations concerning possible future EU legislation on SGI and existing proposals by the European Commission. The conclusions in section 6 fall under 8 headings:

A. Definition and scope of SGI

The search for a definition becomes in practice an attempt to define the limits of SGI for EU purposes, which can simultaneously act as an acceptable definition of actual public services/SGI. Defining SGI by a list of services is problematic because there is a wide range of SGIs in Member States, which also change over time. An EU-level definition also risks giving too much weight to EU level provisions of the constitution and directives concerning SGEI and state aid, which were drafted to address specific objectives in relation to competition and the internal market, which are different and more limited objectives than the definition of SGI in general.

A possible and reasonable policy alternative for the future development of the SGI framework would be to accept that the principle of subsidiarity is of central importance, so that the EU definition of SGI/public services becomes simply: whatever Member States decide should be a public service/SGI. (This is elaborated below, in the conclusion concerning "Proposed definition of SGI in services directive or framework directive").

B. Liberalisation and regulation

The reconfiguration of relations between the authorities and the service-suppliers has numerous economic, legal and socio-political consequences the long-term repercussions of which on the range of SGIs are today only partially in evidence. EU law may have negative effects: for example the recent judgement in the *Halle* case is a particularly restrictive decision with potentially widespread ramifications, undermining the central basis of the French sociétés d'économie mixte, for example, as well as numerous PPPs.

From an economic point of view, especially with regard to transaction costs, there are strong arguments to choose as simple as possible models of provision, regulation and monitoring of specific tasks. According to the principle of subsidiarity - and also to the theory of fiscal federalism - decisions on the organisation and the model of the regulation of public missions are best taken at the lowest institutional (or federal) level.

C. Financing

The possibility of solidarity-based financing in its various forms (including solidarity between territories, socio-economic categories of population and/or economic actors/users, or even generations) should be kept open, including tariff perequation or charge equalisation and cross-subsidisation. Subsidiarity should prevail in establishing financing mechanisms.

Financing SGI using EU funds may be a reasonable and desirable solution if EU-wide homogeneous services are wanted and/or distributional aims should be addressed at the European level. Services determined by local, regional or national preferences and demands or needs, however, should be with the responsibility of the Member States for provision and funding of the services, unless that they do not have sufficient own means in order to provide such a SGI. The aim would be then the promotion of the regional and social cohesion over the whole European Union territory with corresponding funds.

D. Employment

The core SGI sectors of public administration, education and health are crucial to achieving the employment growth necessary, and that increasing public (and private) demand for these services is the key factor generating growth. These sectors are also central to the creation of a successful knowledge-based economy, and for cohesion policies, as these sectors are important to expand employment for women and in new Member States. EU policy on SGI should therefore concern itself with ensuring that there is growth in public demand and expenditure on these services.

The quality of employment should also become a focus of EU policy in these sectors, both for cohesion reasons and for economic performance. The protection of training in an environment of outsourcing is a EU-wide issue, as is the creation of two-tier workforces resulting from the same processes in both SGI and SGEI. These issues could be addressed through regulation either through EU-wide mechanisms or through the development of guidelines for national regulators.

E. Assessment of SGI

The EU should continue to pursue the objective of a comparative and transparent assessment of SGI and support corresponding initiatives in the Member States. The evaluation should be comprehensive and consider political, social, economic and environmental criteria. Analysis and interpretation should be done within a wide-ranging perspective encompassing the plurality of stakeholders.

A possible strategy for the near future could be to promote assessments of SGI organised by the Member States, to be published and compared across Europe. This task could be assigned to an observatory established on EU-level, which would have a coordination role. It is important to assess the existing and present consequences of sectoral directives already in place **before** going on with new legislative initiatives affecting SGI.

F. Draft Directive on Services and issues with respect to services of general interest

The conclusions of the working documents by the Committee on Employment and Social Affairs (PE 353.297v01-00) and the Committee on the Internal Market and Consumer Protection (PE 353.364v01-00), are supported by the arguments in this paper, in particular that "there is no distinction between what is purely commercial and what serves the public interest"; and the proposal "to exclude services of general (economic) interest (SG(E)I) entirely from the scope of the Draft".

G. Proposed definition of SGI in services directive or framework directive

The criterion for excluding SGI from the scope of the services directive should be the concept of the general interest as defined collectively (politically) through democratic processes by public authorities in the Member States. A SGI is always defined by reference to a public interest objective or objectives, not by reference to a particular activity, nor type of provider, nor the mode of market organisation or provision. Such public interest objectives are always explicable by reference to the benefits for the community under consideration. The public authority defines, at appropriate level, the conditions under which such objectives are to be realised in each specific service. It follows that the right to define SGI should be assigned to the public authorities at every level in Member States, according to the principle of subsidiarity. Consequently SGI should be simply defined as all those services designated by public authorities within the EU by reference to public interest objectives. This conception of SGI can then be used as the criterion for the exemption of SGI from the services directive, and could also form the core of a framework directive on SGI.

This system is regulated by democratic political activity, and allows for challenges to ensure against abuse of the process, because public authorities can be required to specify the public benefits accruing from any service designated by them as SGI. This approach to excluding SGI from the services directive is coherent with all the principles of the EU constitution.

H. Future of EU policy and services of general interest

The political decision to be taken by the European institutions about the future development of the legal framework with regard to SGI issues concerns ultimately the trade-off between the unaffected functioning of the internal market and a satisfactory supply of SGI according to local and regional preferences in the Member States.

If the EU is prepared to adopt a rule of blanket exemption of SGI under the principle of subsidiarity, a proper way to incorporate this into the legal framework has to be found. Maybe Art. 256 of the old Treaty could serve as an example or basis for a feasible solution for an operational exemption rule.

Introduction

Semantically, each word of this term of "services of general (economic) interest"[1] (SG(E)I) is difficult to define as such. And the concept as such - or is it the activity that is meant? - poses real linguistic and terminological difficulties, since it can be understood as an organic structure as a whole (the "service public"), as a national (even regional or local) prerogative, as a requirement imposed on the service, i.e. including a mission ("minimum universal service", "public service obligation") or a means to achieve general interest (see the use of "universal service" as part of the SGEI to achieve public interest goals).

Further, in some traditions and cultural environments, those concepts do not exist as such, and the achievement of general interest has been handled through other means.
Confusion is thus even greater when translated and related to national (and regional) realities, especially in an enlarged European Union.

The only certainty is the evolution from an organic/institutional view of SGI towards a more functional view, where public authorities regulate and frame their provision (see the "ensuring/enabling state").

Thus in this report, we will not state anew what has been laid down in several "political" and legal documents on services of general interest[2], nor review all the articles written on this subject, nor list the many possible options and orientations proposed by lawyers, economists, politologists, historians or sociologists.[3] But we will try to identify several issues that are important with respect to the definition question.

General interest is one of the foundations of society and state; it is immanent to a democratic juridical order. Public or collective interest and needs do not exist as such: they had to be progressively founded and legitimated, especially when considering conflicting priorities between general interest and individual needs (not forgetting the non-convergence of individual interests and thus the difficulty to aggregate them), conflicting interest between users and economic operators, between the interests of enterprises, workers, consumers, taxpayers, citizens. General interest is thus a " 'social construct', i.e. a common good which is defined in a given society at a given moment. Public authorities - but also social economy actors, the so-called third sector - intervene in the market sphere to supplement or complement market criteria for the well-being and the

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[1] Let us note that for some time now, confusion arose in the terminology and contents presented by European bodies, since some documents or texts only concern SGEI, while others deal with SGI in general, even if particular cases always seem to narrow back to SGEI.

[2] Among those (non-exhaustively), one can cite:
- articles 16 and 86(2) of the EC Treaty
- two horizontal Communications in 1996 (OJ C 281, 26.9.1996) and 2000 (OJ C 17, 19.1.2001)
- the Charter of Fundamental rights in 2000
- a Report to the Laeken European Council (COM(2001) 598 final)
- a Non Paper in 2002
- a Green Paper in 2003 (COM(2003) 270 final)
- a White Paper in 2004 (COM(2004) 2 final).

[3] Simply notice that even in internal French administrative law, the jurists came to the conclusion that there is no legal definition in positive law around this concept.

fundamental rights of citizens. Concepts of general interest therefore vary in time and space"[4]. This social construct rests on " 'solidarity perimeters' which group together individuals sharing approximately the same idea (or intuition) of the general interest"; considering the indefiniteness of general interest due to the diversity of its possible assessments, "each solidarity perimeter should therefore have a decision-making system".[5]

The EC Treaty was established on economic bases only at its start; thus European institutions did not possess either the legitimacy or the political foundation to impose on Member States a treaty based on general interest, as conceived in national internal law. Further, if a state is the guarantor for the collective interest, it has to assume responsibility for it in case of dysfunction and here starts a largely political debate: what public or collective interest, even restricted to general economic interest, should be assigned to the European Union, if any?

Circumstances, economic and technological evolutions, the necessary modernisation and quality improvement of services, increasing public deficits, globalisation, etc. came to shed more and more light on public services and services of general (economic) interest. Their place and role in the European Union and its internal market is questioned.

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[4] Enjolras B., General interest and social services in the European Union, in Observatory for the Development of Social Services in Europe, Documentation of the conference "Social services of general interest in the EU - Assessing their Specificities, Potential and Needs", 28-29 June 2004, Brussels, p. 110.

[5] Thiry B. & Monnier L., Introduction: the general interest: its architecture and dynamics, *Annals of Public and Cooperative Economics*, vol. 68 (3), 1997, pp. 321-322.

1. Definition

1.A. Description of the scope of the concept of services of general interest

1.A.1. What are the sectors or areas in which services of general interest are provided?

A meaningful answer to this question depends on the preferred definition of services of general interest (SGI). Many and various services and missions are regarded as SGIs, as the term is understood and in the tradition of most Member States. The range of SGIs also understood to be general interest services in the most general sense runs from traditional infrastructure services to the work of social, cultural and charitable institutions. These missions and national particularities are considered and regulated in various - and partially inconsistent - ways within the legal framework of the EU.

In the perspective of the terminology developed by the EU, such services support highly divergent welfare-oriented missions. These SGIs may be partly described as market/economic or non-market/economic services, as services of general economic interest or as universal services. Correct assignment of a particular service is of crucial significance regarding the applicable regulations of EU law, since different competences and legal effects attach to the designation of a service.

The term 'services of general interest' (SGI) is neither found in the EC Treaty itself, nor in secondary legislation. It is derived in Community practice from the term 'services of general economic interest' (SGEI), which is used in Articles 16 and 86(2) of the Treaty. It is broader than the term services of general economic interest and covers both market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations (European Commission 2004a). Like the Green Paper, the White Paper focuses mainly, but not exclusively, on issues related to this type of services of general economic interest.

Universal service is a concept developed by Community bodies. Universal service groups a set of general interest requirements which should be satisfied by telecommunications and postal services operators, for example, throughout the Community. The object of the resulting obligations is to make sure that everyone has access to certain essential services of high quality at prices they can afford (European Commission Communication 1996, p. 2, OJ C 281/3, 26.9.96).

The example of the municipal economy (municipal services) clearly illustrates the significance and problems of definition. In Germany, for instance - and likewise in other Member States - municipalities and cities have long provided and guaranteed under their own management numerous services for their inhabitants for which they keep and operate the corresponding enterprises and facilities (i.e. in the form of municipal self-administration). These are in part services of general economic interest (especially energy and water supply, waste disposal, district heating, local public passenger transport, savings banks), part non-market services of general interest, in particular those concerning culture and education (e.g., museums, theatres, public libraries, schools, nursery schools), sports grounds and entertainment related facilities, social and health-care institutions (youth centres and homes for the elderly, citizens counselling centres, hospitals, etc.) and other facilities (e.g., fire brigade, cemeteries, zoological and botanical gardens). According to the local conditions, municipalities and cities operate numerous other enterprises and facilities such as docks and harbours, airports, exhibition centres and health resorts.

With these market and non-market services of general interest, the local authorities bear a special responsibility for guaranteeing the intergenerational welfare of their citizens, for the structuring of

the local living quarter and for the stability of the infrastructural basis of economic activities ("Daseinsvorsorge") (Statement of the Scientific Council of the Gesellschaft für öffentliche Wirtschaft 2003).

Other important examples of services and missions with public service obligations are found in the areas of telecommunication, postal services, TV, radio, airlines, railroads and urban public transport. Further, in some Member States, services with respect to e.g. road maintenance, ferries, aqueducts, or collection of animal carcasses are defined as a matter of public interest.

Many persons and institutions rightly regard the uncertainty surrounding a legally correct definition and classification of specific public tasks and SGIs as unsatisfactory.

Generally, the principle applies that it is up to each Member State to define the SGI for their own area of competence. The EU accepts that the Member States themselves shall determine what is taken to be an SGI.

The concept and existence of public utilities must also be seen in close relation to the SGI. From an economic point of view, these are - public and private - enterprises that are active in particular missions and make an essential contribution to the provision of services of general interest. "Public utilities are enterprises which supply essential goods or services, where 'essential' means that they cannot be cut off without danger of total or partial collapse of an economy. From an allocative point of view, these enterprises contribute to the infrastructure of the economy, while from a distributional point of view they contribute to providing consumers with the necessities of life." (Bös 2003, p.477).

1.A.2. What is the relationship between public authorities and providers of services of general interest?

In recent decades important infrastructural services of general interest (SGI) were in most cases provided by the state, either directly in the framework of administrative activity or offered by public enterprises. In the past, certain key national economic public infrastructure enterprises were able to act in protected (monopoly) markets or enjoyed special rights.

The classical form of organisation of provision of services of general economic interest (exclusively) by the public administration or via internally regulated (public) enterprises has undergone lasting change in recent years (Bauer 2002).

The policy of the European Union has consistently followed through on the decisive impetus for remodelling the public enterprise sector in the Member States since the early 90s with the realisation of the concept of the internal market. The state is now more frequently inclined not to produce services of general interest (SGI) on its own account, preferring instead to farm them out to private and public enterprises that have to act in compliance with the rules of competition. Political guidance of enterprises and execution of missions is now (increasingly) effected through external regulation (Obermann 1999).

The relations between local government or authorities and the production of SGIs are thus characterised by the crossover from the traditional responsibility for production to the state responsibility of guarantee (Franzius 2003).

- This "responsibility of guarantee" therefore remains with the public authority that acts as a principal. The state accepts responsibility for the provision of a public mission and specifies

particularly the quantity and quality and any further rules and procedures governing the services included in that mission. Models for responsibility of provision are typified in that missions are usually transferred comprehensively. However, the state still has the obligation of current control of the due observation of the instructions and, by extension, final responsibility for the public mission.

- "Responsibility of provision or production" concerns the competence for the actual production of a service and its provision to the clients. Such responsibility may - as was the practice in the past - lie with the state or - as is increasingly the practice nowadays - with third parties (e.g. private suppliers, NPOs) (Reichard 2002).

- Closely akin to the responsibility for execution of service are "financing responsibility" (i.e. responsibility for financing the production and operation of public services) and "take-up responsibility" (i.e., determining who enters into the current service-provision process should the original contractor discontinue provision of the service).

The changes of distribution of responsibility or, rather, the divided perceptions of responsibility for production, financing and guaranteeing are generally also accompanied by a redistribution of the economic risks - the market risk is now shifted to the service producer/provider and finally (also) to the users and consumers. Examples from the more recent past include the well-known problems of the operability and safety of rail transport in Great Britain and mains power supply failures in the Californian electricity sector. The change of function of the state and the reform of the public enterprise sector therefore also involve distribution policy consequences.

By and large, this longer-term process of development towards guarantor state has the result that the modern performance state is becoming a regulator state that fulfils its guarantee obligations mainly through regulation (Franzius 2003, p. 499). However, the state - still obliged to provide a suitable range of general interest services - increasingly entrusts their operational execution to non-government players.

The relationships between the authorities and the suppliers of SGIs in the Member States differ according to sectors and levels:
- Regulation models were mainly implemented to guarantee and control supply of SGIs in the major infrastructure sectors energy, telecommunications, rail transport and postal services.
However, two different lines of development may be observed concerning supply of SGIs at local and regional level - especially in municipal economy:
- Service areas and sectors not involved in trade in the internal market and thus not subject to EU regulations continue to be dominated by traditional forms of public provision. The relations thus correspond to the internal regulation model.
- In other - for the most part economically more significant - mission areas, the public players room for manoeuvre is determined - more or less - by the European legal system.

The activities of EU policy in recent years have considerably curbed the possibilities for action by local authorities and public enterprises.
- One: the Maastricht criteria, which imposed debt limits on public budgets at all levels and contributed to the evolution of new forms of financing and organisation for SGIs (e.g., public-private partnerships, outsourcing and spin-offs).
- Two: Community law has done much to subject the provision of services by local authorities in particular to more stringent market and competition rules (liberalisation rules, elimination of exclusivity rights, prohibition of cross-subsidies, awards of contracts through competitive tenders, and so forth). In these areas the relations between authorities and enterprises are increasingly characterised by contractual regulations (contract award procedures, PPP models and the like).

These contractual relations are often very complex and, from an economic point of view, frequently involve substantial transaction costs.

The examination of dominant objectives and behaviour patterns in many studies shows that a system of outside regulation contains many (possibly) conflicting interests. These conflicts may result in a situation where the agents are no longer interested in an effective and rational regulation in the industry aiming at achieving economic and social goals. Assuming this to be so, fair competition cannot be assured and the safeguarding of the adequate supply of services of public interest is at stake (Obermann1999, Heritier 2002).

On the whole, the observed process of reconfiguration of relations between the authorities and the service-suppliers has numerous economic, legal and socio-political consequences the long-term repercussions of which on the range of SGIs are today only partially in evidence.

1.A.3. How do public authorities guide or direct services of general interest?

The task of guaranteeing the supply of specific SGIs essentially devolves to the individual Member States. The opening up of the relevant infrastructure markets was and will be realised and further pursued through national legal regulations and the creation of regulatory bodies.

The necessary measures for regulation policy require not only the establishment and persistent guaranteeing of a working competition on major infrastructure markets, but also the creation of institutional preconditions for the guarantee of a sufficient infrastructural supply of SGIs to the population. In the case of basic services, politically desirable and economically sound supplies of services of general interest must satisfy the known conditions of affordability of price, geographical coverage, security of supply and consumer protection (e.g., through universal service obligations). This implies to foresee appropriate financing mechanisms.

The economic policy practice of many Member States of the EU is occasionally attacked by the comment that the creation and guarantee of competition (in most cases) represents the be-all and end-all of regulatory measures, whereas public service in the sense of welfare-driven objectives appears to have been accorded of lesser importance. The regulatory authorities are taken in the first instance as being controllers/defenders of competition (Cox 2002; for the current economic view and practice see, e.g., Parker 2002, Parker/Saal 2003, Heritier/Thatcher 2002, OECD 2000, OECD 1999, Majone 1996).

Scientific research and empirical experience have led to the requirement that the economic policy of the EU and the Member States take explicit care, in the process of organisational reforms, that the liberalisation of hitherto protected markets brings about not only functional competition between private and public suppliers, but is also able to guarantee the politically desired supply via an appropriate system of regulations governing SGI and public task over the long term (Thiry 2003, Feld/Kirchgässner 2003, Ogus 2002, Miller/Samuels 2002).

The measures taken by the Member States in the individual sectors towards the structuring and guidance of the supply of SGIs are extremely diverse, and not least of all strongly imbued with national traditions. The organisational forms of political control of actual SGIs range from legal regulations and task descriptions in statutes and articles of association via awards of franchises and licences to contractual obligations tailored for individual cases.

At national level the content of the socially desirable general-interest or universal services is concretised by politically legitimated bodies and prescribed the service-provider in the form of operational specifications wherever possible. These specifications state the quality, quantity, price and other criteria regarding the required public service such as, for instance, equalisation payments for structurally deficit-making services. They must be constantly checked and, where necessary, modified since the socio-political ideas and the economic and the technical conditions of provision of a service may change in the course of time.

In the telecommunications and in the postal services sector the European Commission has already made its own preparations for the EU-wide guarantee of certain SGIs through the imposition of (uniform) universal service obligations. However, the Member States provided regulations at national level for other important sectors - such as, e.g., local public passenger transport, the energy sector and water supply - since a sufficient basic supply of infrastructural SGIs might not be guaranteed or might even appear to be jeopardised in the long term without strict regulation of services.

Any regulation of services must make provision for effective supervision of the actual task to be performed. Even an obligation of non-governmental institutions or enterprises to produce SGIs requires a corresponding guarantee in the wording of the contract and an accompanying, preferably current monitoring of the service provided.

A set operational objective and description of the service is, first, a condition for effective regulation; second, it forms the indispensable foundation for a subsequent assessment of the organisation and results of the regulation processes. For a reasonable evaluation sector-specific criteria must usually be developed and operationally manageable performance indicators must be defined (some examples may be found in the CEEP/CIRIEC 2000 study - for the executive summary, see http://www.ulg.ac.be/ciriec/intl_fr/research/publications/executsum.htm). In principle, similar considerations may also be made as for the assessment of the conditions and the success of outsourcing of missions from the public administration (e.g. Obermann/Obermair/Weigel 2002, Karl-Bräuer-Institut 2004). These considerations on the regulation of services likewise apply in cases of competitive tendering (Cox 2003).

1.A.4. What is the statute and type of management by companies providing services of general interest?

Organisations providing SGI in EU countries can be classified under six broad categories, according to their legal status and the degree of public sector ownership. Examples of these types may be found in a number of countries at both national and local level:

- public authorities, providing services directly through their own staff (including internal but separate entities such as régies (France), Regiebetriebe (Germany), DSOs (UK)
- special public sector entities which are wholly owned by public authorities
- companies which are wholly owned by public authorities (e.g. nationalised companies such as Vattenfall, the Swedish electricity company, or municipal companies under public law e.g. in Greece, Latvia)
- companies which are partly owned by public authorities and partly owned by private capital (e.g. the sociétés d'économie mixte (SEM) in France; some German and Italian municipal companies; water or electricity companies in Hungary and in the Czech Republic)
- companies which are wholly owned by private capital
- voluntary or not-for-profit organisations (including social, charitable or religious organisations).

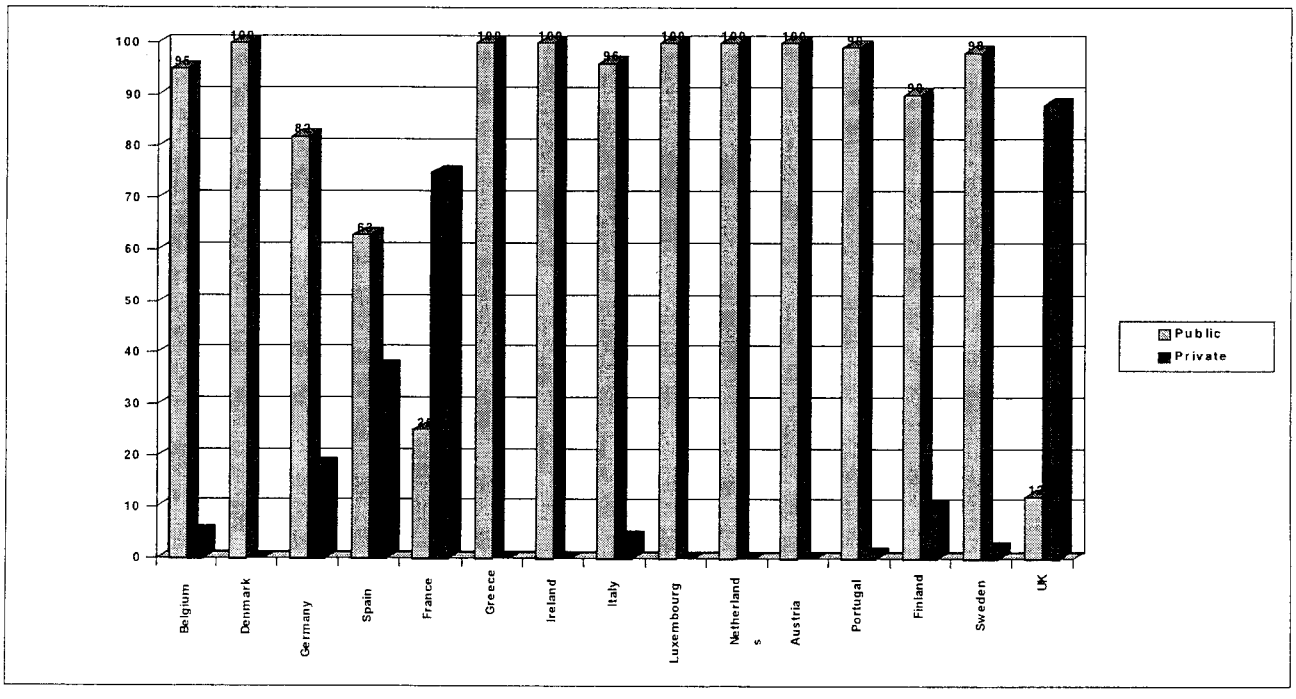
The use of the different forms varies between countries, services and over time (Camenen 1996). Administrative, social and cultural SGI - such as education, health, libraries and administrative services such as courts, police, planning regulation and tax collection - remain commonly provided through public authorities themselves. In trading services, such as electricity, gas and water utilities, there is a trend away from public sector entities with special status towards the use of companies with commercial status.
This variation in the form of direct provision of service means that the public authority may be providing services directly, but through an entity distinct from the authority itself, which is nevertheless owned or controlled by the authority. However, EU competition rules have enabled private contractors to argue that if a service is provided by an 'arms length' municipal company, they should be allowed to tender to provide a service: the ECJ has ruled in the *Halle* case that only 100% owned municipal companies may be exempt from exposure to competitive tendering (ECJ *Halle* 2005 - see Case C-26/03 under http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en).

The growth of privatisation, liberalisation and outsourcing has led to an increase in the importance of private companies, as well as jointly owned ventures. Organisations in the voluntary sector play a role in the provision of health or social services in a number of countries.

Despite the trends to privatisation and liberalisation, publicly owned companies remain the dominant form of provision: in the water sector, for example, only France, UK and the Czech Republic - have a majority of private provision, while in other Member States water is supplied wholly, or mostly, by public sector companies.

Water supply in EU: public or private/mixed

(Percentage of population supplied by each type. Source: EUREAU: Management Systems of Drinking Water production and Distribution Services in the EU Member States, 1996)



1.B. Services of general economic interest

1.B.1. What is a service of general economic interest (SGEI)?

All services whose purpose it is to ensure the exercise of fundamental rights and who serve the satisfaction of democratic, social and cultural needs in all sectors that contribute to the quality of life and sustainable development should be qualified as being services of general interest (SGI). This general interest is thus "plural" and encompasses areas as health, culture, education, transportation, territorial planning and development, communication, information, energy, water, housing, food security, environment preservation, etc, this list being non exhaustive and subject to regular revision according to the evolution of social needs and technology. Tradable or market services should then be considered as being services of general economic interest (SGEI), which clearly do have an economic (or market) orientation - contrarily to non-economic (or non-market) services.

As any concept, one could define it in a broad sense, where "a service of general interest is a service created, organised or regulated by a public authority to ensure that the service is supplied in the manner which it considers necessary to satisfy society's needs. Among services of general interest, services of general economic interest are services which are traded but which fulfil general interest tasks and are consequently subjected by public authorities to specific obligations." (CEEP-ETUC Proposal for a Charter for Services of General Interest, 2000).

As said in the introduction, the European Union is neither a federal state, nor able to define and organise general interest at its level. Consequently, the Treaty speaks of services of general **economic** interest. It is the jurisprudence and the community doctrine of the European Court of Justice that firstly tried to define general (economic) interest or public interest, in order to determine the respective competence of European authorities and Member States and define the relations between public services / services of general (economic) interest and competition law. The famous cases *Corbeau* and *Almelo* dealt with general economic interest. One possible interpretation of this jurisprudence is to maintain in the public area only the non-profitable services: we can indeed notice the extent of "normal" economic activities to the detriment of those presenting a specific character of general economic interest. Nevertheless, it appears that the Court of Justice tries to avoid presenting a general definition and always takes a casuistic approach, limiting its consideration to the specific case under consideration; it has indeed to base its sayings on the existing Treaty, which is principally economically oriented (Zorn 2000). More recent cases have brought the need to make precise the conditions whereby the financing of a SGI would or would not considered as a state aid (see *Altmark* case) (see section 3).

Thus the concept of general economic interest is a clear creation of the EU. At EU level, SGEI are essentially governed by two provisions: the submission to competition rules subject to art. 86(2) (somewhat reinforced by art. 16, but its legal use and consequences seem limited) and the fact that state aid distorting competition is prohibited in so far as it affects trade between Member States.

Another approach to try to define SGEI is based on the principles and missions that SG(E)I follow or fulfil. A SGI is not characterised by the provision of an activity as such, but by the public service obligations (PSOs) imposed on the provision of a service. This means that specific conditions and modalities of provision are to be respected within the general interest or public mission perspective. The determination of the specific contents of the PSO - and henceforth of the services - needs to rest on a political choice and decision process (see Obermann 1995, 1998, Wimmer 1998). Those specific conditions related to the service provision are determined by principles such as: universality, continuity (also in the long run), equality of treatment and access, affordability,

adaptability (since the SG(E)I are evolutive), quality of service (including safety, reliability, security of supply, etc.), taking account of users (protection of consumers' rights and interests, possibility of legal remedy, simplicity of use and of procedures, etc. Those principles are listed in several European documents.

Moreover, public services, public utilities and also services of general economic interest are concepts that evolve by nature considering the socio-economic and technological development of a society. It follows that various means and activities can achieve the service under consideration. Indeed, one should be aware of the fact that a SGI subject to a public mission task is closely related to activities necessary to ensure this service. And most EU documents consider the activities as such - performed on several distinct markets by various players - and not the public mission as a whole.

In the end, the definition purpose is essentially important when it comes to financial and compensation issues (see section 3). It then becomes a question of solidarity when considering the contribution of SGI to several common public policies of the EU and to social, economic and territorial cohesion that SGI are recognised to strengthen.

1.B.2. How do Member States distinguish economic and non-economic services of general interest?

They do not, since this terminology and vocabulary - created by the EU - is ambiguous and indeed "artificial"; within the Member States the terminology is not used and does not fit in the common understanding and tradition concerning missions with PSO.

Generally speaking, one distinguishes first between SGEI and SGI, the second term containing both economic and non-economic services which the public authorities class as being of general interest and subject to specific public service obligations (European Commission, White Paper on Services of general interest, COM(2004) 374, Brussels, 2004 - http://europa.eu.int/eur-lex/en/com/wpr/2004/com2004_0374en01.pdf).

Some states distinguish between "sovereign tasks" ("services régaliens", "services tutélaires", "kingly services"), i.e. the traditional prerogatives of a state as justice, police, defence, money, international relations, etc. on one hand, and public utilities (water, energy distribution, public transportation, etc.) on the other hand. In some cases, this division corresponds to market and non-market services. But services like education, health, social services or culture are not sovereign ones, nor can be classified as purely economic services.
The infrastructure or network may neither be a criterion, since next to purely economic networks, one can encounter social ones or informal and institutional infrastructures that do not support commercial services.
Moreover, depending on history and traditions, some of those "sovereign" services are outplaced to the private sector with a public regulation (see the recent evolution in the case of prisons' management). Other states or rather "currents" then distinguish between social/solidarity services and purely commercial ones. But a same service can encompass commercial and non-commercial aspects.

Even if the issue concerning the distinction between economic and non-economic services is not explicit at the level of Member States, one should be aware of the fact that numerous present legislation and laws inside Member States already deal with this issue through the angle of financing. Indeed, reimbursement schemes of medical treatments and medication, authorisation of public financing of medical equipment following territorial needs, differentiated fiscal treatments

for main and complementary activities of workers, differentiated application of intellectual property and copy rights in public libraries or public education institutions, between enterprises and individuals, etc. already tackle this issue. Contrarily to pure commercial services, financing the provision of services of general interest cannot be covered usually only by market mechanisms; thus additional schemes are provided for. Such schemes, characterised by coordination between various authorities and several public policy objectives and intrinsically linked to the provision of services of general interest, are essentially dealt with at Member State level and this should remain the case in future."

Finally, it may also depend on the perspective of analysis: philosophical, juridical, economic, social, sociological, political, ideological, etc.

It seems evident that it is not possible to draw at European level an unambiguous list of economic and non-economic services (see § 49 and ff. in the European Commission's Green Paper on Services of general interest - http://europa.eu.int/eur-lex/en/com/gpr/2003/com2003_0270en01.pdf).

The EU often transforms the concept of services into a number of more precise activities or service provisions, for which, taken individually, a market may exist. But this has an important consequence: it is then mostly verifiable that the implementation of a service involves activities of an economic nature.

However, in the case of social services and other services of general interest, one has to keep in mind that the objectives of those activities are not purely economic - profit is not the driving force -, either because the objectives are clearly social or collective and rest on solidarity perimeters, or because such services induce external effects and are performed with a non market orientation.

Non-economic services are mostly those offered on a solidarity basis (and not a commercial one) for social, health, cultural or educational purposes. Further, they are provided or subsidised by the state or through organisations that do not seek profit or exert an industrial or commercial activity.

The problem is that in the sphere of activities generated by such non-economic services, one might find either components of the service or additional activities or services proposed complementarily to the basic service; and those latter are and can also provided by private firms on a commercial basis. However, in this case, not all citizens or users would be able to benefit from the service at an affordable price (see, as matter of example, outermost and sparsely populated regions).

This question has become very acute recently following the debate on social services of general interest (see the definition in the White Paper on Services of general interest: long term care, social security, social welfare and employment services), notably in the frame of the WTO discussions of the General Agreement on Trade in Services (GATS), but also with respect to the "Monti package" on public procurement and interpretative communications, proposal of February 2004) or in relation to the Proposal for a Directive of the European Parliament and of the Council on services in the internal market (COM(2004) 2 final, Brussels, 2004 - http://europa.eu.int/comm/internal_market/en/services/services/index.htm).

Some would like to class public services whose first objective is not a commercial one as SGI and thus exclude them from the competition and internal market rules. But commercial private operators proposing services/activities in connected fields do not see it the same way, especially when considering the global world market.

1.B.3. Is there an evolution in the national definitions and practices regarding services of general interest?

Yes, of course, there are evolutions: own internal ones and consequently to European legislation evolution.

National states often define in a very broad manner the right or access to services of general interest (for example, in the Belgian national constitution: right to a decent housing or to social security, medical care and so on, or in the German and Austrian constitution, the devolution of the "Daseinsvorsorge" to the regional or local level). The implementation of those rights varies nevertheless with time and/or location.

Considering the economic, legal and legislative evolution of the provision of "public services", but especially the new transparency requirements and controls set on the financing of those services (see competition and internal market rules but also the recent Judgement of the Court in the *Altmark* Case), Member States of the European Union are obliged to define **precisely** what type of public service mission they devolve to some enterprises and indicate in advance what type of compensation may be obtained to provide to public service obligations. There is thus clearly an evolution towards more precision, but also a restriction of the definition and the extent of public service. Indeed with the requirement towards more transparency and the progressive disappearance of cross-subsidisation, the public authorities have to clearly state in advance what will be financed by the public budget or universal service funds or other taxation means. But it is very difficult to define ex ante and precisely quality criteria of those services. Nevertheless, this exercise is in principle useful if evaluation criteria are to be set up (see section 5).

Further, one has to be aware of the fact that in a liberalised and globalised context, the discussion on the provision of SG(E)I turns out to limit as much as possible the "burden" to be financed in terms of public service, since either the taxpayers or the operators on a market that have to participate in a fund will seek to limit their share as far as possible. Budget restrictions limit more and more the extent of public services. Consequently the social aspects of SGEI are being reduced, this also being a logical consequence of the provision by private operators: how could they be granted public responsibility? The universal service obligation is by definition very narrow.

Another problem might arise from privatisation or outplacement of services in case less public money is made available for delivering services of general interest. In the Czech Republic one could notice decrease in availability and in quality services.[6]

Depending on possible financial help and regional structural funds in the Central and Eastern European Countries, the definition of rural development and management of public services in rural areas might evolve. Some services might be declared of general interest, once financing possibilities are available, especially in order to reinforce the social and territorial cohesion.

Thus, the evolution noticed inside Member States mostly follows European legislative developments.

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[6] See Czech report of the joint ETUC/CEEP study (with the support of the European Commission), Services of General Interest and EU enlargement, May 2004

1.B.4. Are there any grey areas where the boundaries between economic and non-economic services of general interest are blurred?

Yes, in fact, there are many grey areas in each type of service; and because of the de-integration of service provision, those grey areas will rise in number in the years to come.

Economic and non-economic services have a tendency to blend into one another for several reasons. A service may simultaneously be economic and non-economic depending on the goal or on the conditions of its provision. "By the same token, a service may be of a commercial nature without the market necessarily being in a position to provide a service matching the general approach and principles governing services of general interest." (Opinion of the European Economic and Social Committee on the Green Paper on Services of General interest, 11 December 2003, section 4.3.2). A few sectoral illustrations can be presented: a same surgeon in a same hospital may operate with purposes of reconstructive surgery or cosmetic surgery; the case of public education and private courses delivered on a commercial basis to a different category of users; internet access in cafes or in public libraries; differentiated reimbursement schemes of fertility treatments depending on the Member State and on time.

Further, more and more services are offered on a detailed and individual-tailored basis: this evolution is partially explained by more demanding clients and actors, but also based on the exploitation of profitable "niches" selecting only some parts of services or some groups of clients.

And once the provision of a service is split up in its multiple components, one ends up with a series of individual tasks, which taken separately can be provided by different enterprises. As soon as a part of the service contains a commercial aspect, it is considered as economic. The entire question then becomes: is the whole service as such to be consequently considered as economic? In this latter case, the service is automatically subject to state-aid, anti-trust and internal market rules, since it can possibly affect trade between Member States. One should also note that any service of general interest represent a given economic value.

The answer to this question is essential for supra European issues, notably those within the WTO. The GATS aims notably at health and education services, two areas which are by nature or in common understanding non-market, non-profit services with a social aspect, even in presence of private and profitable niches in those sectors. There is moreover a real risk that Member States will loose their freedom to decide what services they would like to exempt from the GATS, since the decision could lie exclusively at the level of the European Union following new legislative development.

1.B.5. Would it be advisable to draw up a positive or negative list of economic and non-economic services of general interest which do not fall under the scope of the Treaties?

Considering the complex, nationally (even regionally) differentiated and evolutionary situation of SGI, such a list could only be set up with an illustrative purpose, unless there would be a democratic system to regularly review this list considering in each sector the evolution of technology, of innovations, of societal needs and contemporary demands. But again, this could create new uncertainty, if from one decision to another, a service would move from one category to the other.

We thus agree with the statements of the European Commission in the Report to the Laeken European Council - Services of general interest (COM(2001) 598 final - http://europa.eu.int/eur-lex/en/com/rpt/2001/com2001_0598en01.pdf):

"the abstract definition of "non economic" service has proven to be very difficult. In addition, the range of services that can be provided on a market is subject to technological, economic and societal change and has evolved over time. Therefore, whilst a list of examples can of course be drawn up, it would not be feasible to provide a definitive *a priori* list of all services of general interest that are to be considered "non economic"." (par. 30).

Nevertheless, if a clear democratic decision at European level could exempt some services of falling under the scope of the Treaties and hence under the scope of the GATS, a positive list of exemptions could clarify the situation for some sectors, as for example, hospitals, social housing, education, libraries and museums constituted as non-profit organisations, etc.

The clear question that has to be answered is what should prevail in case of collision between conflicting interests: those of the market (competition and internal market rules at EU-level) or those of the public/collective interest (cohesion). A balance is needed and with respect to SG(E)I, the Treaty and European legislation should be modified in a fair and operational way to secure and strengthen the scope and importance of SGI and public missions (see also section 6).

1.B.6. ANNEXE: Variety of service definitions and service delivery

A. National definitions of public services

The examples set out below show that there is a great variety in the ways and modes chosen in defining SGI/public services by the Member States. The underlying definitions and criteria are not derivable from the legal definitions. They are determined by the competent public authorities in a political process applying different criteria corresponding to specific public needs and demands. This conception seems to be common in all examples.

Austria

At a first glance, there is no legal institution in Austria comparable to the „service public" in the tradition of some Romance countries. The Austrian constitutional law has no notion of public missions or tasks as a synonym for "service public" and therefore developed no corresponding rules. Also, in the legal framework below the constitutional level the term public service does not play explicitly any role, in contrast to the long history and great importance of the public economy and public enterprises in Austria (Wimmer 1998).

In spite of the historically developed large variety of state owned enterprises, nationalised industries, municipal services etc., an overall concept comparable to the "service public" of the Romance countries was not aimed at and therefore not established.

However, the legal framework for the supply of public services and SGI, provided by the public economy, shows similarities to the conditions and obligations of "service public". Public tasks, usually performed by public enterprises, are always associated with specific obligations.

Belgium

Article 23 of the Belgian constitution establishes the right for everyone to lead a life in accordance with human dignity and guarantees economic, social and cultural rights (e.g. right to work, to social security, to health, to a decent housing, to cultural and social blossoming). To implement those rights, numerous public services were created and public service missions assigned to various organisations and institutions. But there is no definition of public or general interest as such.

Concerning health, for example, Belgian federal authorities achieve the assigned objectives through various instruments: programming hospital capacities throughout the territory, agreement of health services (or drugs laboratories) with respect to set requirements, financing and reimbursement schemes, etc. Another example at regional level is the public employment service: even if not offering services as such, it is a "coordinating-designing" structure which governs the activities of various authorised operators and providers of specific services. Those need to integrate their action in order to answer the collectivity needs.

Public service obligations and tasks are defined and described in detail in legal norms or implementing contracts for each specific operator and partner in the provision of the service under consideration.

Denmark

There is no administrative law on public services. The justifications for various state interventions in public services include:

- pursuit of equality
- national interest e.g. gas not oil as a fuel for electricity generation
- overriding social interests e.g. perequation of electricity prices, safety regulations on railways
- protection of the environment
- protection of consumers e.g. guaranteed access, price control
- consideration of the needs of the handicapped
- adaptation of a demand - e.g. regulation of taxis.[7]

Since the Local Government Reform Act (1970), local authorities have acquired increasing importance and autonomy, but also responsibility with respect to the provision of public services. Nearly all social security schemes and numerous social and general interest services are under the responsibility of local authorities, including for example child dental service, leisure-time education, libraries, home nursing, sport centres, district heating, road maintenance, incineration plants, fire-fighting, food control, next to many traditional public utilities and services of general interest encountered elsewhere.

Hungary

The new direction in Hungary was followed by constitutional reform and the recasting of the provision of public services; the "Local Self-Administration Act" was passed in 1990. The central idea of this model was the principle of subsidiarity, whereby any activity that can be performed and controlled by a better informed, more decentralized entity, in fact, should be.

Hungary has a three-tier administrative system; the 3 131 "település" (municipalities) competent for all areas of self-administration not expressly assigned to another level of administration. The next level is that of the 20 "komitate" (administrative districts incl. Budapest) that undertake, e.g., economic policy missions. Over and above this is the topmost level of the Seven Regions.

There is no mention of public services as such in the constitution, nor of human rights to such services. However, the constitutional court has ruled that citizens cannot be cut off from their water supply, even in case of non-payment, thus establishing in effect a right to water.

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[7] Lyon-Caen and Champeil-Desplats, 2002

The "Local Self-Administration Act" includes a list of 27 compulsory competences at local government level. These range from the provision of day nursery facilities, kindergartens and primary schools, from basic health care and social services, through guaranteeing the rights of minorities, to the supply of drinking water, street lighting, maintenance of unadopted streets, management of cemeteries. Compulsory provision of such services ceases to apply once fixed lower population limits are fallen short of. In this case provision of such services is referred to the hierarchically next-up "administrative district level". The said list for Budapest and its outlying districts includes a number of additional compulsory missions.

The list is not exhaustive, however. Any local authority may decide to undertake any mission on behalf of the local population. This explains why - over and above the compulsory missions - most Hungarian local authorities also invite tenders for various additional (voluntary) missions. Most authorities take care of waste management and street cleaning.

The transition from the socialist state-controlled economy to the market economy also raised the question of the split between services more properly to be provided by the public or by the private sector. The State took a back seat, passing ownership of provider entities over to local corporations, this including moderate-rent accommodation, unadopted streets and municipal buildings. General shortage of funds necessitated a reorganisation of public expenditure. The underlying idea of local self-organisation is, therefore, not only the principle of subsidiarity but, also, the idea of cost-efficiency via local financial control and via responsibility.

Local-authority enterprises are run in many and various legal forms: "joint stock company", "public limited liability company", or even the "Non-Profit-Organisation". These companies are often integrated in the public budget; their control is usually subject to a council committee. 66% of the larger conurbations and 33% of townships - municipalities - have such providers. Many such companies have mixed ownership structure, with joint ventures created to attract private investment, if needed. Many local authorities farm out the provision of general-interest services to this or that franchisee; many operators are NGOs.

Italy

Since the start of the 20th century Italian law developed the notion of public functions of the state, based on sovereignty (e.g. police), and public services, consisting of economic and social activities of the state. As these activities developed further, and came to include private concessions, sectoral regulation was also developed. The 1948 constitution has two key articles governing public services. Article 43 enables the state to reserve for itself, including by nationalisation, the operation of "essential public services" (or sources of energy, or monopolies): the concept of 'essential public services' remains undefined. Article 41 enables the legislature to decide what controls are necessary on any economic activity in order to ensure that it is 'oriented and coordinated towards social objectives'. [8]

There are however some activities which the state has a constitutional duty to provide, such as education, social security and health (articles 32, 33, 38). But there is neither constitutional right to transport nor state responsibility to establish a transport service, as for example in the German constitution.

[8] Lyon-Caen and Champeil-Desplats, 2002

In 1991 a new law was introduced restricting the right to strike in essential services, defined as services "whose objective is to guarantee citizens' rights". This was introduced after a rail strike, and so implies a citizen's right to travel. In sectoral laws, elements may be found to define some aspects of general interest. For example, article 1 of the law on social cooperatives (381/91) says that these have the purpose to pursue the general interest of the community for human promotion and social cohesion of citizens through various means including for example health and social services, or activities (agriculture, industrial, services) dedicated to the enhancement of employing handicapped persons. Another illustration is the framework law on social services (328/00) stating that actors of the third sector (associations, non-profit organisations, social cooperatives, foundations, ...) are assigned a mission of contribution to the process of policy-making, notably at local level to define and reconstruct general interest of community with respect to social services (through the drafting of "social zone plans" determining the needs and resources of a territory in this perspective).

In practice, the Italian state involved itself in numerous activities for various reasons - for example, economic development objectives during economic crisis. These have included a wide range of sectors including steel, baking, and banking. These state holdings have been considerably reduced in recent years by a process of privatisation. At all times the activity has relied on the judgment of the state that the service needs public regulation and direction, so the activities remain under private law.

Slovenia

In the Slovenian Constitution Act the general interest or public services are not defined in a firm and positive manner. The Constitution gives the general guidelines to the legislator or it makes certain boundaries that must not be crossed by the legislator, executive or judiciary powers in regulating, implementing, applying policy or law. Public services or services of general interest are:

- social services and
- economic-public services (or material infrastructure).

The latter are regulated in the Act on Economic Public Services from 1993. The Act says that these services and goods are defined by acts of Parliament for the areas of energy, transport and communications, water supply, management of natural resources, preservation of nature (Art. 2, para. 1) and shall be secured in a sustainable manner by the Republic of Slovenia, Municipalities or other communal authorities for the purpose of addressing public needs as long as these services can not be provided in the free market (Art. 1, para. 2). In the provision of public services and goods, accumulation of profit is subordinated to the realisation of public needs. Equal access to those services and goods is a statutory right (Art. 5, para. 19).

The social services are regulated in the general statute from 1991 (Act on Social Institutions), which will eventually be amended in the near future. But this general statute regulates mainly status of organisations that provide social services. It defines areas of social services (education, children care, science, culture, sport, health care, social protection, protection of disabled persons and other areas if the purpose of services is not lucrative (Art. 1)). Areas of services, which have to be realised in a sustainable manner, are defined by acts of Parliament and have to be performed by State, Municipalities or Cities or by other entities on the basis of concessions (Art. 22-23).

Further regulation of these areas and the scope of economic public services and social services are defined in special statutes for each aforementioned area. Therefore, public service missions are

defined and specified in laws (statutes) concerning specific sectors. There are a lot of Constitutional Court cases that illustrate these matters.[9]

Spain[10]

The main legal concept of public service in Spain is of a public domain ('titularité publique'), which means the activity is a legal monopoly of the state, though it can be carried out through concession. In a public service the state has general right to intervene and can unilaterally determine contracts. Electricity and gas, for example, are designated as public services.

The 1978 constitution defines the state as 'social, democratic and legal'. This is used to interpret laws and gives a general mandate to the state for positive action.

United Kingdom

There is no legal definition of public services in the UK, and it is difficult to develop an analysis beyond the assertion that 'public service is whatever the public authorities do'. There are some specific statutory duties e.g. for municipalities to provide public libraries, but no general principles. The scope of public services is politically contested.

The 1994 Deregulation Act allows any service to be delegated except the exercise of judicial powers, regulatory powers, and activities affecting fundamental freedoms.

There is no legislation restricting strikes in essential services.

Justifications for public services and regulation include:

- public health and safety
- public order
- guaranteed access to essential services and basic necessities
- consumer protection against monopolies/oligopolies.

Specific services may be assigned detailed objectives and conditions. For example, the UK Broadcasting Act 2003 states that the objectives of public service television include the provision of programmes 'dealing with a wide range of subject-matters', 'to meet the needs and satisfy the interests of as many different audiences as practicable', 'properly balanced', and with 'high general standards' in relation to contents, quality, and 'professional skill and editorial integrity'. It further specifies criteria for judging if these objectives are met, including 'dissemination of information' and 'the provision of education and entertainment', 'cultural activity in the UK and its diversity are reflected, supported and stimulated by ...drama, comedy and music...feature films ...other visual and performing arts'; a 'comprehensive and authoritative coverage of news and current affairs in...the UK and from around the world'; 'a wide range of different sporting and other leisure interests'; 'programmes of an educational nature and ...educative value'; 'programmes dealing with science, religion and other beliefs, social issues, matters of international significance or interest'; 'high quality and original programmes for young children'; 'programmes that reflect the lives and concerns of different communities and cultural interests and traditions within the UK' (Communications Act 2003, Article 264 -

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[9] Zalar, Boštjan, 2004, Basic Standards and Techniques for Human Rights Protection before Ordinary Courts in Slovenia, in: Zalar, Boštjan, (ed.), Five Challenges for European courts: the Experiences of German and Slovenian Courts, the Supreme Court of the Republic of Slovenia, Slovenian association of Judges, Ljubljana, 379-420 (especially sections: 2.3., 2.5., 2.7., 2.8.).

[10] Lyon-Caen and Champeil-Desplats 2002

http://www.legislation.hmso.gov.uk/acts/acts2003/30021--i.htm#264).

B. Overview of a same service in different countries[11]

Funeral services are mostly dealt with on a local basis, while cultural services may be offered at all level, even though the trend has been to entrust their provision at regional or Community level. As in other service sectors, one has to note the tendency towards liberalisation, considering possible commercial and new business opportunities.

Those two examples were chosen to illustrate the diversity of cultural and social heritage with respect to practice and provision of services of general interest and their evolution in the new socio-economic context. Indeed, it is hardly possible to find a unique definition of public interest in those two selected case studies, but general interest is clearly an issue at stake in those fields.

Cemeteries, crematoriums and funeral services

In the opinion of the European Union, cemeteries should remain under public responsibility (essentially regional or local) - among others to prevent possible excesses resulting from wishes stemming from deceased persons or their families, but also considering public health requirements or aesthetic considerations -, while the property of cemeteries may be either public or private (including those under church administration, but also family cemeteries in private properties). Or there might be no constraint to be buried in a cemetery (e.g. Belgium, England, France, Italy, the Netherlands, Spain).

Crematoriums are still mostly in public hands, but may also be private as in the Netherlands (where they are operated by foundations or insurance companies) or Italy (law proposal in 2002). In this latter country, considering place scarcity, cremation was designed as a public service free of charge (law of 1987).

Whereas funeral services - that were for long considered as a public service mission of the municipalities (possibly operated under concessions to third parties) and in some cases still are - should be, in the EU opinion, liberalised as it is the case, at least partially, for example in France (since 1986) and in the UK. Consequently, the trend is clearly towards privatisation of funeral services, with the expectation of wider choice and lower prices. However, it is noted that in some countries competition does not take place effectively, either because of market failures or because of the appearance of a private monopoly in this field. Moreover, cross border offer of funeral services is not yet common and a EU-wide CEN norm for funerals (including minimum requirements of the service and in terms of qualifications of the enterprise in charge of it, but also ethical considerations with respect to advertising) should be developed by the end of 2005.

The picture of funeral services across Member States ranges from large funeral enterprises (see in France or in the UK) over small companies active on a local basis and/or medium-size companies; while in Sweden funerals (and cemeteries) are a church matter only but under public regulation, whereby the churches are obliged to also provide non-religious funeral ceremonies and places. Some enterprises offer specific funeral services (see e.g. ceremonies of ashes dispersion by plane or in the sea, burials in "woodland" (free nature) in the UK for example, complementary services as for a wedding ceremony, artistic coffins, ...).

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[11] Based *on the results of a set of studies led recently by the Österreichische Gesellschaft für Politikberatung und Politikentwicklung (ÖGPP – http://www.politikberatung.or.at/studien_liberalisierung.htm).*

Cultural services

The spectrum of cultural services ranges from those offered in various theatres, sport and music auditoriums, exposition and conference halls, music and drama academies, museums, monuments, libraries, up to publishers, broadcasting, etc., all of those considered if publicly owned, supervised or subsidised. No EU coordination or harmonisation policy is foreseen for the moment with respect to culture services.

The most important problem nowadays is the financing of those cultural institutions and it can be noted that quantity of visitors or users or the audience is set before the objective of quality.
Public responsibility and financing of cultural services can be found at every level: national, regional and local in nearly each Member State. In some Member States, guaranteeing the access to culture is a public mission embedded in the constitution. Further, diversity and pluralism - which are often found in public service mission specifications - may suffer from, even disappear with the development of integrated private groups producing, selling and commercialising only cultural activities and services from their own production or under their sole control.

Privatisation of cultural facilities and institutions - understood as selling of property shares - are limited[12], but European groups are being set up to commercialise cultural places (notably musical podiums like the Dutch *Stage Holding* or the German *Stella Entertainment*). One can also note public-private-partnerships in building new facilities, as in Athens or Copenhagen. Whereas in Sweden, where providing a cultural environment of high quality and ensuring a large participation is a clearly set mission to public authorities, the privatisation is not discussed. In this country, cultural policy is indeed seen as an instrument for collective/societal education, but also a tool to prevent migration towards urban areas and rural depopulation.

In the UK, several cultural institutions cannot count anymore on public subsidies and need to look for private sponsoring, which again has consequences on the cultural offer. In other countries, financial support is searched for through the constitution of third sector foundations. On the other hand, international groups appear that may monopolise product and service offers, but also prices (as it is the case in Belgium where *Clear Channel Entertainment*, a US corporation, quasi monopolises the organisation of concerts). A last issue that should be noted is the implementation of generalised entrance fees in public national museums that traditionally offered free entrance, at least for several categories of population (students for example).

Considering only the former communist countries, culture had an important value and was quite well developed. Public budget constraints clearly made a halt to this development.

Contrarily to most former communist countries, several cultural institutions were privatised in Estonia from the beginning of the nineties. However, the new owners are missing the necessary funds to develop their acquisitions and numerous movie theatres had to close down. Lithuania also counted negative experiences with the privatisation of cultural organisations: private owners are not able to fulfil their cultural mission without public subsidies. Hungarian municipalities have difficulties to support cultural institutions. Poland has negatively experienced the State retreat from cultural policy.

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[12] For example: City theatre of Antwerpen (BE), Metropol theatre in Berlin (DE), Circustheater in Scheveningen (NL), Poliorama Theatre in Barcelona (ES), not to speak from the inventory and evaluation of Italian museums and art treasures asked for by S. Berlusconi in the perspective of their selling.

2. Liberalisation

2.A. What measures have Member States adopted to guarantee services of general interest's fundamental principles in the context of liberalisation?

The application of the European legal framework and the progressive creation of the internal market are tied to a change of paradigm regarding the provision of general economic interest services and SGIs. Such services were formerly offered almost exclusively by public enterprises and were subject to the internal regulation in the public sector. Competitive markets are now being established, and general interest obligations are being imposed on private and public enterprises. These enterprises are subject to an external regulation.

The change from internal to external (public) regulation of SGIs has brought new challenges for all involved players, especially for the policies of the Member States and the Community.

Experiences and findings from the Member States to date allow the conclusion that in European practice no uniform model exists for the provision of SGIs. There are considerable differences between Member States regarding the applied concepts of organisation and financing according to sectors, national traditions, political preferences and legal regulations. This applies equally to spatially extensive services, e.g. telecommunications and mains power supply, and to regionally and the locally concentrated (municipal) services. However, the importance of services of general economic interest and SGIs is high in all Member States (see in particular CEEP/CIRIEC 2000, Cox 2002 and documents of the European Union).

These results should, in the main, also reflect the situation in the new Member States. Ambitious privatisation and liberalisation programmes have been pursued in many new countries since the early nineties. These measures had, and still have, lasting effects on the range and quality of supply of general interest services in various sectors. Experiences and reports from different areas reveal that further adjustments and some time will be required until complete recognition and application of the EU criteria for guaranteeing SGIs (Höferl 2005).

The measures taken by the Member States for the implementation of the SGI principles cannot be represented individually.

2.B. In which areas do private operators act?

The role of private operators in SGI varies considerably between Member States. In most sectors and most countries public sector companies and public authorities remain the dominant providers.

Private operators are most prevalent in the utilities - electricity, gas and water -, telecommunications, and local public transport, with some operators in the sectors of rail and post. The groups operating in these sectors are overwhelmingly international groups, except for local bus transport, where there is a mixed pattern of local operators and international groups.

In municipal services, waste management is often outsourced to private companies, which are a mixture of national operators and international groups. In some countries, there are private and not-for-profit operators in the hospital sector of healthcare, and in residential care for the elderly. Other SGI functions are sometimes outsourced by central or local governments to private operators, including prison management. In all sectors the international groups are nearly all Europe-based, of

which the most important are Suez (water, electricity, gas, waste management), Veolia (water, heating, waste management, public transport) and RWE (water, electricity, gas, waste management). During the 1980s and 1990s a number of USA-based groups acquired companies or developed operations in EU countries, notably in electricity and waste management, but nearly all have now sold their interests.

2.C. What are the consequences on the application of services of general interest fundamental principles?

The measures taken by the Member States in the wake of the liberalisation of public service missions and sectors must fit within the legal framework of the fundamental criteria for the supply of SGIs imposed by the EU. The specific institutional arrangements selected by the Member States for individual areas of general interest services (e.g. creation of regulatory bodies, contract award procedures and practice), can be examined and judged against this backdrop for their probable short and long term consequences. This can happen once the interaction of key factors determining provision of SGIs - and characterising the institutional arrangement - are analysed in detail for individual service areas.

Empirical experience and theoretical contributions show that a well working model for the guarantee of SGIs and the effectiveness of the provision of public services must take account of specific conditions. These conditions concern the following success-related factors in particular:

- organisation of the production of services,
- relations between contracting authority and contractor (e.g. principal-agent problems),
- market structure,
- contractual regulations (e.g. transaction costs, imperfection of contracts, consequences of contract duration),
- design and structure of contract award procedures,
- financing schemes and pricing of services, and
- guarantee of quality and availability of the provided SGIs.

Economic and legal studies have yielded important explanations with regard to the properties of and relationships between these elements for the production of a specific desired range of SGIs, either advantageous or compatible or disadvantageous or unsuitable (Cox 2003, Heritier 2002, Wegener 2002, Miller/Samuels 2002, Snethlage 2001).

On this basis it should also be pointed out that even when complying with the fundamental criteria - formerly imposed or now set as a target - in the legal framework of the EU for the production of SGIs, the existence or the quality of certain SGI cannot in all cases be guaranteed over the longer term by a public institution (authority) limited to the guarantee function. It may even be a case of services and sectors of significance in economic terms that are negatively affected or even appear to be threatened in the long term by the SGI concept of EU law.

There are numerous pieces of theoretical and empirical evidence for this conclusion. Among others, concrete examples may be found in the publications of the CIRIEC network. Selected problems and consequences of the application of the fundamental principles of the EU on the production and provision of SGIs have been explored in depth in recent years for various service missions, sectors and Member States. The works concern, for instance (i) research on the regulation, financing, evaluation and best practices in the guaranteeing of services of general interest (CEEP/CIRIEC 2000), (ii) analyses of the issue of scope and limits of awards of contracts through competitive tendering (Cox 2003), and (iii) studies on the contribution of services of general interest to

economic and social cohesion (CIRIEC 2004 - http://www.psiru.org/publicationsindex.asp, November 2004).

Such research often deliver conclusions relevant to practice and policy, under which conditions and for which services certain institutional organisational forms and arrangements in the sense of lasting guarantee of SGIs appear adequate and efficient (e.g., consideration of the number of potential suppliers, existence of imperfect and incomplete contracts, dynamic development of SGIs, the transaction costs for the national economy). The results of numerous economic studies also suggest the conclusion that the suitability of a specific institutional arrangement and its consequences for the guaranteeing of SGIs where possible should always be studied for the individual case; but always with full respect to the principles which guide the provision of public services. A comprehensive judgment must in any case be made before any decision regarding a radical organisational reform.

Finally, such considerations bring questions about comparative efficiency and costs (for the economy as a whole) of a suitable alternative system of performing public service missions and the guaranteeing of SGIs to the centre of decision-making (Cox 1999, Thatcher 2002, Heritier 2002, Bance 2003).

The consistent implementation of market and competition models intended by EU policy and the obligation for the authorities of transparent contract award practices in SGI contracts has obviously had various economic and social effects and repercussions; especially regarding

- the development and enforcement of reasonable operational quality standards for SGIs,
- the establishment of monitoring systems for safeguarding quality over time,
- alternative concepts of service contracts which allow for dynamic adaptation requirements,
- contract award regulations in sensitive areas (e.g. in-house problems, smart buyer problems),
- analysis and comparison of transaction costs of alternative provision arrangements,
- problems of financing (e.g. prohibition of cross-subsidies, dependency between financing methods and service standards),
- the change in the role of public enterprises (e.g., paradigm change in public enterprises, consequences for public budgets as owners of public enterprises, change of behaviour of management of public enterprises) (Cox 2004).

In practice the introduction and application of the fundamental principles of the EU regarding the provision of SGIs gives rise to lasting consequences - discernible by some delay for the players involved; the latter are in many regards therefore faced with new challenges.

3. Financing

3.A. Are revenues of profitable services used to cross-finance SGI?

SGI may be financed through tax revenues or user charges (see 3.D). The proportion may vary across time, country and services. Public education is normally financed almost entirely from taxation, but user fees may be charged by private schools or universities, which may nevertheless receive state funding from taxation; health services are normally financed mainly from taxation or insurance, but may also be supplemented by user charges; domestic waste collection is normally financed through local taxation or charges; public transport charges passengers, but may also receive significant subsidy from taxation; tenants of public housing are charged rent, but part of the costs may be carried by a municipality's tax revenues; water and energy supplies are normally financed by charges, but taxation may remain as a method of collecting revenue or as a way of financing investment.

The notion of profit normally applies only to services that use charges for a significant part of their revenues, and should apply to a surplus of income from user charges over expenditure. (For the operating company however the profit is reckoned after taking into account all income, including from government grants: public transport operators may therefore make profits, although they may be heavily subsidised by governments.) Cross-subsidy then becomes possible if the profits from one such service are used to finance another SGI that does not generate a surplus. The SGI that run at a loss include many local services such as public swimming pools or public lavatories. These may be financed from taxes, and/or from the profits from the other sectors.

This is done through two forms of mechanisms:

- One is where the profit of the service is remitted to the public authority, which then uses it as part of its general income to finance any other service - or to permit a reduction in taxation. Arguably, this is the only possible use of the non-retained profit of an operator wholly owned by central or local government, and so all profitable public sector enterprises that do not reinvest all their profit are contributing to the cross-subsidy of other SGI. This may be restricted by practices such as restricting or prohibiting the distribution of a dividend, as is done by some Netherlands water companies.
- The other is where an arms-length public company is created which provides a number of services within an integrated structure (see "Querverbund"), the main examples of which are the Stadtwerke or municipal companies of Germany, Austria or Italy. Such Stadtwerke may have responsibility for profitable services - typically water and electricity - whose surpluses may then be used internally to finance non-profitable services such as public transport, district heating or waste collection. Such a transverse integrated structure at local (or even regional) level benefits from economies of scale and scope in terms of management and fiscal efficiency. Explicit attention, however, should be devoted to possible wanted or unwanted distributional effects of such policies. The liberalisation of electricity and gas sectors, and the moves towards ring-fencing water revenues in the Water Framework Directive, make such forms of redistribution less feasible.

Private contracts

For services operated under concession or contract by a private operator the profit made on any part of the company's activities can be used for any purpose. Thus profits may be reinvested in the same operation; or invested in another venture, whether SGI or commercial, within the same country or another country; or may be remitted and distributed as dividends to shareholders; or saved as cash reserves. There are various mechanisms by which revenues may be transferred within a group,

including management fees to parent companies, or re-allocation of group debt amongst subsidiary companies.

The same may apply in reverse: profits from other parts of the group may be invested in any particular service concession or contract. Such cross-financing will be expected to earn a return in the same way as any investment by the group, but the actual terms may vary over time, and may sometimes involve a cross-subsidy. For example, to obtain or retain a contract which is valued for its long-term or 'demonstration' potential, a company may engage in 'loss leaders' so that the contract itself makes a loss, carried by the company, for a limited period. This may happen, less intentionally, when a company overestimates the potential profitability of a contract.

An illusory form of apparent cross-subsidy may occur when a principal contract or concession is run at a loss but sub-contracts derived from the main contract are secured which generate adequate profitability for the whole set of contracts.

3.B. What kind of compensations do services of general interest receive (other than those mentioned in cases *Ferring*[13] and *Altmark*[14])?

The question of compensation of providers of SGI is defined in the context of EU legal provisions relating to the limitations of state aid in the internal market. The actual provision of SGI however is determined by considerations of the objectives of SGI themselves, and this may result in a pattern of rules on financing and provision that are related to non-market considerations. The single most relevant principle here is that of solidarity in the provision of SGI, which leads to the adoption of non-market rules in terms of payment for services and organisation of provision. Various forms of monopoly for example serve the function of restricting market choice by consumers so that all are required to pay a single provider, in order that cross-subsidies can be generated from the widest range of contributors: without this restriction large consumers can negotiate favourably lower rates which escape any contribution by way of cross-subsidy to the generality of service users. Financing wholly or partially through compulsory taxation or public insurance mechanisms also enables the delivery of solidarity objectives, whereas consumer payment through market mechanisms allows consumers with greater income to obtain services for themselves without financing services for poorer users. The use of these mechanisms may necessarily take the form of compensations that are beyond the *Ferring* and *Altmark* principles.

To compensate for the costs of public service obligations (PSO), there are in principle various means and solutions:

- the state (or public authorities at other levels) can grant special or exclusive rights (territorial monopolies, concessions) to the providers of the service;
- public authorities can propose advantages to the undertaking in charge of PSO: e.g. total or partial exemption of corporate tax or reduced VAT rates on various goods and services used in the provision of the PSO, tax abatement on investments favouring the development of PSO (see infrastructure development, sustainable provision, environmental investments, ...), various other tax advantages, free loans, state guarantee for loans or other purposes (see German public banks), favourable conditions to buy or use complementary services necessary for the provision of the PSO, ...;
- in specific cases linked to other public policy goals, the public authorities can couple together other public measures with the PSO obligations in one sector: social aid to favour specific user

[13] Case C-53/00 *Ferring* [2001] ECR I-9067.
[14] Case C-280/00 *Altmark Trans GmbH* [2003] ECR I-7747.

groups and categories allowing for special tariff reductions, cohesion funds to develop the access to remote regions, ...;
- public authorities can guarantee a certain revenue to an undertaking subject to a PSO linked to environmental considerations: having invested in green production processes in the energy sector for example, the undertaking might receive compensations if the players on the market do not sufficiently buy their services that are more costly than others available on the market;
- the state and other levels of public authorities can also make funds available as compensation for PSO and general welfare costs: such a fund can be financed by all enterprises active on the given market or only by those not supporting the PSO, or by general state budget resources.[15]

The provision of services of general interest, especially the non-economic ones in the social and welfare area (including education, local development, sport and leisure, insertion through work in economic services, etc.), is especially subject to number of indirect help and advantages. Indeed, an important part of this provision, if not the majority, is the doing of non-profit and other social economy organisations. Next to the state and public authorities and to the private sector, a third sector (social economy, voluntary sector) has emerged to take over several activities not offered to conditions or in sufficient quantity/quality to some categories of the population. Such organisations benefit from various tax exemptions or advantages, but also subsidies to hire staff to ensure those social services. Further an important part of voluntary work is done in those services through the activities of associations. Some such associations practice differentiated prices and also offer their service to persons that are solvent. The revenues obtained from the latter serve to finance the services rendered to the non-solvent. This could be considered as competition distortions or unfair competition by private operators that would wish to enter the profitable part of the market. But this would end up in eliminating the solidarity base of the system with cross-subsidisation mechanisms between socio-economic categories of population.

3.C. What kind of costs are to be included when compensating the discharge of public service obligations?

"The costs allocated to the SGEI may cover all the variable costs incurred in providing the SGEI, an appropriate contribution to fixed costs and an adequate return on the capital assigned to the SGEI" (See the judgement by the Court of 3 July 2003 in Joined Cases C-83/01P, C-93/01P and C-94/01P *Chronopost SA*.). It seems indeed necessary that the enterprise in charge of public service obligations (PSO) should be able to provide the service in good economic conditions (including a "reasonable profit" or a "normal" margin, but also sufficient cash-flow) and thus stay on the market to pursue its activities. It is also important to differentiate between short-term and long-term elements to take into consideration to create the conditions for sustainable economic, social and environmental development.

Beyond the direct private costs of the provision of a service more economic and social categories should be considered and - at least partly - compensated.

Costs can be very varied depending on the service and the sector considered and there are several types of costs to be considered since several elements are needed to render a service:
- the necessary infrastructure and the connection from the producer to the user or from one user to another user (with the aim of total coverage); the price and cost of this network architecture

[15] This might also happen case by case, when a special/urgent problem arises and an ad-hoc solution is set up to meet the needs in question.

will greatly vary from one region to another (see geographical characteristics, population density, socio-economic realities and living standards, etc.);
- the additional equipment to use the service (transportation means, computers with sufficient capacities and speed, mailboxes, metering systems, etc.);
- ongoing investment in R&D, infrastructure and equipment to keep up with technological evolution, but also sustainable development in the long-run; technology might indeed allow for the overcoming of resources or place scarcity;
- the personnel needed to ensure the service - and this might be the most costly item in several non economic and social services of general interest;
- special requirements and/or constraints laid upon the undertaking: environmental specifications, "social clauses" (e.g. the obligation to train workers within the contract scheme) in public procurement procedures,
- the **social dimension** of SGI and public service obligations, especially those that do include a relational dimension or connotation - but how evaluate time and "lost productivity" and thus compensate it?;
- the capacity/capability[16] to use the system and master the resources and services offered (necessary training, as well as sufficient education and confidence with respect to new technologies[17], in order to be able to use self-ticketing machines, computers, and so on);
- but also additional costs (such as transaction costs) appearing following the passage of a public monopoly, where all is integrated, to a diversification of operators, and of functions and missions (effective procedures and means of control, effective system of sanctions with payment of indemnities planned in advance, access to verifiable data and information, ...) - and the appearance of new functions and missions such as, for example, that of ombudsman.

Thus next to the private costs to be identified and notably the part of the cost devoted to PSO, the main difficulty lies in assessing the non-private costs (external and social ones) linked to the large and complex role of SGI.

Another difficulty will be comparison of costs calculation resulting from different models used in different Member States (or regions). But one could not rely on one single calculation model EU-wide (even sectorally differentiated), considering the necessary subsidiarity, but also the variable economic conditions and context (affecting trade between Member States or not), not to speak from the difficulty to determine the market size to take into account.

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[16] see this concept of "capability" developed by Amartya SEN.

[17] Indeed considering the more and more technological development stage of western societies, the digital divide becomes a real public interest issue (see older persons, low income, persons with disabilities, etc.) and one can see the emergence of a new class of illiteracy.

3.D. How can the financial burden of services of general interest and of discharging public service obligations be evaluated?

All SGI is financed through a mixture of taxation, in its various forms, or user charges. Taxation may be categorised as direct, indirect and social security contributions. User charges may incorporate elements of cross-subsidy. Taxation and user charges also finance the cost of borrowing to finance capital or current costs of SGI, and remain the ultimate sources of financing even under the various forms of PPP or private finance. The effect of these arrangements is to change the mechanism for borrowing to finance capital expenditure and to re-direct the payment of capital costs through user (or public sector) payments to the private operator. These payments remain based on taxation or income but spread over a different timescale.

There are three apparent bases for evaluating the financing of SGI.

- Firstly, the objectives of the public services themselves. For example the public policy objectives of health services normally include universal provision of healthcare, which is not dependent on income. Systems may evaluated against their effectiveness in implementing the solidarity principle, for example the extent to which insurance schemes deliver the sharing of risk, or the effect on demand, for example of user charges for drugs, or the relative cost-efficiency of collection. The same approach can be applied to other services including SGEI: for example a public policy of achieving a uniform national rate for letter post, or for a unit of electricity, leads to different evaluation of tariff structures from simple cost recovery from users.
- Secondly, taxation policies may be evaluated against principles of equity and efficiency. Equity may be evaluated against two different criteria: the 'benefit' principle that people should pay according to the extent to which they benefit from a service; or the 'ability-to-pay' principle, that people should pay for public services according to their income and wealth. Charging policies may be evaluated in similar ways.
- Thirdly, the level and structure of taxation (and charges) may be used to achieve other objectives, apart from financing SGI, for example monetary policy, demand management, market development, discouraging certain forms of consumption, encouraging certain forms of consumption, e.g. public transport, redistribution of income.

The choice between these different principles of evaluation clearly leads to different results, and forms part of core political debates and differences. The selection of criteria reflects political judgments and priorities, and implicitly forms a significant part of political debate in Member States. For any given set of criteria, a horizontal evaluation of practice in EU Member States would be technically possible.

A separate issue is whether any particular criteria are of relevance to EU policies. At present, EU-level interest in this issue centres on the issue of state aid. This is based on one subset of the 'other objectives', the concern to avoid distortion of competition in the internal market. Some sector directives, including those referring to SGEI, incorporate principles referring to internal market policies or environmental policies, which also impact on the evaluation of different possible systems of charging: for example, the water framework directive restricts the possibility of cross-subsidy between broad economic groups (households, business and agriculture). Again, this is effectively using a specific subset of the 'other objectives'.

EU level interest in evaluation against the first set of objectives - the public policy objectives of the services themselves (or the second set concerning equity and efficiency of taxation systems) - has so far been based on the EU objective of social and territorial cohesion. A report commissioned by DG Regio on SGEI considered the impact of different charging structures on social and territorial cohesion and concluded, inter alia, that "moves towards full cost recovery and reduction of subsidies leads to a worsening of territorial and social cohesion". The Green Paper on SGI raised

the possibility of EU-wide evaluation of financing systems against objectives such as effective solidarity in healthcare systems, but this was no longer included in the White paper.

The issue of evaluation at EU level is thus so far constrained by the limited set of policy concerns of the EU itself. Evaluation against other objectives, in particular the policy objectives of the services themselves, may nevertheless be regarded within Member States as more important.

The European Commission collects annual data on the distribution of the burden of taxation in different countries. This shows variations between Member States in the level of taxation as a percentage of GDP, ranging from 29% in Ireland and Lithuania to 51% in Sweden: the average for the EU25 is 40.4%, and for NMS10 is lower, at 37.3%; in the distribution of taxation between different types (direct, indirect, and social security: new Member States have a significantly lower level of direct taxation than the EU-15); by the level of government receiving the revenue (10% of tax revenues go to local governments); and by the economic category (labour, capital, consumption). There has been a "long-run increase in the overall tax burden ... closely related to the growing share of the public sector in the economy", but a more recent trend in the last decade to reduce the rate of company taxation. This may reflect international tax competition to attract business, which may be stimulated by the more stringent limits imposed on state aid for private and public enterprises.

3.E. What elements should be taken into consideration?

The answer to this question will largely depend on the perspective taken: that of the state and public authorities, the operators' one, that of taxpayers and/or of the citizens and users. Nonetheless, most arguments are of a macro-economic or social nature and include:

- lack of financial means, tax pressure and budgetary constraints;
- variable economic situation from one region to another: affordable prices and tariffs are not of the same level within the enlarged European Union;
- globalisation and internationalisation of service provision in relation to the foreseeable restriction of subsidiarity left to Member States (regions and local collectivities) with respect to definition, provision and financing modes of SGI;
- reallocation of tasks, responsibilities and risks between operators, regulators and public authorities with increasing responsibility placed on the latter at all levels;
- exercise of effective control and evaluation;
- importance of correctly drafting the contracts related to SGI and PSO considering the new requirements related to transparency and prior (ex ante) definition of the public service mission and their compensation; that means foreseeing a maximum of elements (quality, ongoing investment, ...) and making provision for possible revisions of the contracts even during their application period;
- long-term view and sustainability perspective;
- R&D efforts with their consequences on provision modes;
- externalities (see e.g. the social benefits of a public transportation system (in terms of congestion and pollution relief) that are not deducted from its cost estimation) and the issue of internalising social costs that are not integrated in private business calculations;
- size of the solidarity perimeter: the larger the basis to organise solidarity in a mutualised system, the less costly the system, since the risk is spread throughout more individuals or firms;
- increasing needs and new demands considering the appearance of new products and services;
- analysis and assessment of the consequences of new provision modes of SGI on the public service principles and missions, as well as in terms of costs (e.g. transaction costs) and new modes of governance (see regulation, evaluation, and so on);

- weighing up the tendency to invoice each user at real cost (i.e. per individual service, quality-wise, as regards utilisation/service, periods/times/places of use, etc.) with respect to the simplicity and user-friendliness of a single-tariff schedule, but also with respect to economic, social and territorial cohesion issues.

It is remarkable to note, by the way, that the Green Paper on Services of General Interest (COM(2003) 270 final - http://europa.eu.int/eur-lex/en/com/gpr/2003/com2003_0270en01.pdf) acknowledges that "other relevant criteria for selecting a financing mechanism, such as its efficiency or its redistributive effects, are currently not taken into account in Community legislation. Neither have the effects of the selected mechanism on the long-term investment of providers of services and infrastructure and on security of supply been specifically considered" (par. 91 under section 4.2). This should though be the case.

3.F. When does overcompensation occur?

"Pursuant to the Court's case law, compensation may cover all the additional costs incurred in performing the public service task. The undertaking in question must be able to perform its public service obligations (PSOs) under conditions of economic equilibrium and must therefore be able to earn a normal return." (§ 83 of the Non Paper, Services of general economic interest and state aid, 12 November 2002, European Commission - DG Competition - http://europa.eu.int/comm/competition/state_aid/others/).

In case no PSO is imposed and thus no compensation provided for, the undertaking may either not offer the service at all, or offer it only partly or in a limited way (reduced quality or offer) and most probably at a higher charge for users. Imposing a PSO and organising compensation therefore might thus be necessary to even provide the service. However, this compensation is inherently linked to the market conditions and the economic context in which the service is delivered and this again varies over time and space.

In the absence of a tendering procedure, the main difficulty lies in the parameters (costs and factors) to take into account with respect to those considered by an undertaking, operating under normal market conditions, when setting the price or the remuneration of the service - comparable to the one specified by the PSO - to be provided. Several problems appear:

- there is not always an existing comparable operator in the sector and region/municipality under consideration;
- how to define and select a "typical undertaking, well run and adequately provided with means... so as to be able to meet the necessary public requirements" (see 4th condition of the *Altmark* ruling)?;
- how to know about the costs and factors a competitor takes into account to determine the price, since these are mostly confidential elements?; to our knowledge, there is no obligation for an undertaking not entrusted with a PSO to deliver such information elements to the Court of Justice or to another European public body;
- in the absence of a public compensation scheme, what would have happened: who would have delivered what service under which conditions? Would there even be an operator for some services? According to several authors, it seems inherent to the public service that an enterprise in charge of providing such services will be in a situation different from other kinds of enterprises.

Overcompensation would be the case when the economic advantages or the total revenues (including the compensation) resulting from the PSO exceed the total cost of performing the PSO.

But aside from this definition there are complex and difficult theoretical and practical problems with regard to the appropriate cost calculation and allocation approach (marginal costs versus total costs).

Overcompensation clearly occurs for example in case of dumping of competitive activities of an operator, also entrusted with PSOs, which is active on a market in competition with other undertakings. This would mean that the undertaking uses the possible overcompensation received by public authorities to discharge a PSO as an advantage that puts it in a more favourable competitive position than competitors; this may result in competition distortion.

Cross-subsidisation of non-profitable activities by profitable ones should be further possible in the same undertaking or holding (see Stadtwerke). Indeed, additional surplus can also be used to improve or increase the qualitative offer of a service. Of course, such transfers should be shown in the undertaking's accounts. But setting up and maintaining separate accounts where undertakings, receiving such compensation, also carry on activities outside the scope of the service of general economic interest is not necessarily an easy task. Some specific costs imputable to the service of general economic interest cannot be identified or allocated and thus the amount of compensation to be calculated could be incomplete or incorrect. There are number of serious theoretical and practical issues to be managed.

Another difficulty lies in the interpretation of the Treaty and EU legislation, especially when analysing the vocabulary and terminology used in judgements rendered. For example, the Court says that the economically most profitable offer is not necessarily the lowest one, since qualitative criteria may be introduced in the apprehension of the offer. And thus following Alain Alexis (DG Competition), the future examination of financing SGEI will need to determine if the offer "at least cost for the community" (as stated in the *Altmark* case) is equivalent to the most economic offer in the sense of the public procurement regulations.[18] The same fine meaning-interpretation of words and concepts will be found when dealing with compensation issues. Since there are no common criteria for cost evaluation, overcompensation will necessitate a case-by-case examination.

3.G. What is the role of PPPs?

There are two definitions of PPPs. The first type - the joint venture PPP - is a company that is partly owned by private capital and partly owned by one or more public authorities. The second type - the concession PPP - involves two elements: (a) financing a public sector capital investment project through a private company; (b) a contract for services to the same company, usually operating the capital assets financed under (a).

Both types of PPPs have existed in some countries for many years, notably in France: for example, the sociétés d'économie mixte (SEM) are a form of joint venture PPPs, while the concessions widely used in water supply services in the same country are examples of the concession PPP.

There has been growth in the use of both types of PPP throughout the EU in the last 15 years. More joint venture PPPs have been created as a result of decisions to partly privatise existing public enterprises - in order to raise money for the public authority selling the shares, or in order to introduce private sector management. Examples of this process include the sale of shares in many Stadtwerke in Germany, similar sales of shares in municipal enterprises in Italy, and the creation of

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[18] "L'arrêt Altmark Trans du 24 juillet 2003 : La Cour de justice précise les conditions de financement des services d'intérêt économique général", *Competition Policy Newsletter*, Number 3, Autumn 2003.

jointly owned companies in new Member States, including Hungary and the Czech Republic and Slovakia, notably in the sectors of water, electricity and gas.

Forms of concession PPPs have also grown, including the private finance initiative (PFI) model developed in the UK, under which investments have been made in new hospitals and schools, with the private operator raising the finance for the capital investment and then being compensated through the operation of part of the service over a period of years, including payment for the capital invested. This form of concession PPP has become attractive to governments under conditions of policy constraints on government borrowing and debt, including the EU stability pact.

PFI-style PPPs are, unsurprisingly, most common in the UK, which pioneered them - but even in the UK PFI will provide only 11% of total investment in public services in 2003-2004[19]. PFIs are used in a number of sectors in countries across Europe, including the construction/maintenance of roads, hospitals and schools. The European Commission itself is encouraging PPP schemes as a way of financing the large-scale capital investment needed for the planned trans-European networks (Developing the trans-European transport network: Innovative funding solutions; Interoperability of electronic toll collection systems: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the widespread introduction and interoperability of electronic road toll systems in the Community. COMMUNICATION FROM THE COMMISSION Brussels, 23.4.2003. COM(2003) 132 final 2003/0081 (COD) - http://europa.eu.int/comm/transport/themes/network/doc/com_2003_0132_en.pdf).

The effects and effectiveness of PFI are complex and the subject of considerable debate. A fundamental question emphasised by the IMF in a recent paper on PPPs, concerns the comparative evaluation of a PFI project against the alternatives of using conventional public financing and procurement for construction and conventional public sector delivery of service. Since the cost of capital to the public sector is invariably lower, the IMF observes that the comparative advantage of a PFI project must be derived from demonstrably greater efficiencies in performance, and notes that this advantage should not be taken for granted. Other questions in implementing PFIs concern the impact of transaction costs and the risks of incomplete contracts, which can lead to unanticipated revisions in the quantity and quality of assets and level of service delivered; another related issue is the question of monitoring the development of the contract against original expectations, for example to establish whether risk has been successfully transferred or not.

There is uncertainty about the relationship between PPPs and various aspects of EU law, including the application of the procurement rules and their eligibility for cohesion funds and ISPA funds. Their use to circumvent the fiscal constraints has also led to concerns that they may lead to concession PPPs being chosen, regardless of whether they represent a better option than a more traditional combination of public sector investment and operation. A Eurostat ruling has made it easier to classify the assets of a concession PPP as "off-balance sheet", and so encourage the use of such PPPs to escape fiscal discipline. The European Commission has been concerned about these developments, as has the IMF, which warned that the Eurostat ruling "could provide an incentive for EU governments to resort to PPPs mainly to circumvent the Stability and Growth Pact (SGP) fiscal constraints."[20]

3.H. Does the choice of financing belong to Member States or to the European Communities?

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[19] UK Treasury (2003), PFI: Meeting the investment challenge, July 2003, p. 13 www.hm-treasury.gov.uk/media/648B2/PFI_604.pdf

[20] International Monetary Fund, Public Investment and Fiscal Policy, March 12, 2004 para 36 http://www.imf.org/external/np/fad/2004/pifp/eng/PIFP.pdf

This is a highly political question that will need more debate, but subsidiarity should be the key notion.

The answer will depend on possible future SGI or SGEI at European level; those should of course be decided upon and in principle financed at European level and implemented by European bodies and institutions. Such services do already exist and could be further developed: agencies and foundations to follow matters depending on European policy (drug evaluation agency, environment, living and working conditions, training, drug addiction, etc.); European Investment Bank and European Central Bank; but one could also consider the development of a European public bank to support a coordinated structural regional policy of the EU; the creation of a same single or multiple-ride card (or pass) allowing the use of various means of public transport public in different countries, regions, towns and cities in Europe; a complete European public broadcasting service to favour European "consciousness"; free internet access for everyone in public buildings or places (e.g. schools, hospitals, public libraries, public administrations, etc.) as a European universal service; ...
While at the other end of the scale, local services should be decided upon and financed at local level by local authorities and bodies.

But one important aspect is to avoid limiting the possible field of action of Member States, and also regions, territorial collectivities and local authorities. We see the evolution towards more restrictions with possible negative consequences on efficiency and effectiveness. The main risk would be limiting subsidiarity to only one model or one single mould imposed by external framework conditions and a narrow concept of public action (see also section 6).

Thus the limit between Member States' subsidiarity, to define and finance what they consider as important public service obligations, and EU-level responsibility should be established more clearly. But this implies of course adequate financing sources and means at European level as well as a democratic procedure to define socially and economically acceptable public service obligations at European level.

3.I. Can services of general interest be financed otherwise, e.g. by taxes levied at European level?

Yes, it is of course possible, why not? But particularly distributional consequences should be scrutinised with care beforehand.

The essential question is to know if services should be financed by the users/customers only, by some categories only, or by all taxpayers (or only some of them: workers, enterprises, incumbent or all operators of the sector).

If a service is considered as beneficial for the society as a whole (see, for example, a telecommunication system with public phone booths and European-wide emergency numbers), it seems legitimate to finance its provision from tax revenue. It should be noted though that non-users (for example, owners of a mobile phone or persons who do not use telecommunication services at all) also pay for this service and that such a policy is not necessarily equitable for all. Thus the imposition could be limited to the industry benefiting from earnings in the telecommunication activity under consideration.

Another case are merit goods and an example thereof could be the "inter-rail" card existing in one way or another in several countries to favour rail travel for young people around Europe (promotion of cohesion and cultural exchange, favouring a environment friendly transportation mode, etc.).

Such tariff reductions could be harmonised in all countries and regions of the EU and be subsidised as a European public service directly by European funds.

Another evolution could be the emergence of mutualisation of services at local community level, and new areas of activities for mutual funds. In the possible absence of public service provision, more and more persons turn to voluntary and self-help solutions, but also to social economy. But this is only possible when there is no need for a heavy or costly network and when the persons forming this community do possess means and devices to organise themselves the service under consideration.

Since many years there are academic and political discussions on the issue of establishing a genuine EU-tax. Considering the complexity and far reaching economic and institutional consequences of such a decision it appears not as a real alternative for financing SGI in the near future.

4. Employment

4.A. What kind of employment is generated by services of general interest in the Member States?

The sectors that most closely coincide with SGI are public administration, defence and compulsory social security; education; health and social work; other community social and personal service activities, together with electricity, gas, water. Some SGI are also included in transport, storage and communication but non-SGI activity is a significant part of this sector. Using this definition, in 2003 SGI provides 29.6% of all employment in the EU, 30% in the EU-15, and 26% in the new Member States (European Commission 2004b).

In recent years public administration etc. has represented a stable source of annual growth of employment in the EU.

The variation in employment rates across the Member States is particularly large in health and social services - with an employment gap of more than 10 percentage points between the Member States with the highest employment rates in this sector (the Nordic Member States) and those with the lowest employment rates (Cyprus and Greece and the new Member States). Overall, the proportion of the EU workforce employed in education, health and social services, is around 2 percentage points below the USA level; employment rates in public administration are similar in the EU and the US. The level of demand is the key determinant of employment levels in these sectors.

The development of employment in the core SGI sectors is seen by the European Commission as central to the closing of the employment gap with the USA economy: "the key to increasing employment in services is in the creation of jobs in the comparatively high-paying, high-productive services such as business services, education and health and social services. .... In this context, reorienting public spending towards areas such as education and health and social services is crucial. This will contribute to accelerate further increases in the labour market participation of women and older workers." (European Commission 2004b, p. 14 - http://europa.eu.int/comm/employment_social/employment_analysis/employ_2004_en.htm).

A significant level of employment is sustained by European Commission directives concerning air, water and waste. A study in 2000 (DG- ENVIRONMENT. STUDY ON INVESTMENT AND EMPLOYMENT RELATED TO EU POLICY ON AIR, WATER AND WASTE. FINAL REPORT. September 2000 - http://europa.eu.int/comm/environment/enveco/industry_employment/inv_and_empl_main_report.pdf) found that investments of 260 Billion Euro between 1990 and 2010 are associated with these directives - expenditure larger than the economies of all but the six largest of the EU-15 Member States - accompanied by additional operating costs of 15 Billion Euro per year. These expenditures create a demand for labour totalling half a million jobs - equivalent to 3% of Europe's unemployed.

75% of employees in health and education are women, a much higher percentage than any other sector (except private households) (Equal opportunities for women and men in services of general interest Foundation paper NO. 6 November 2004 - www.eurofound.eu.int/publications/files/EF04128EN.pdf). The public services are often leaders in good gender equality practices in the workplace with, for example, equal pay for women and men (Deakin, 1995; Pillinger, 2000; 2004). Thus in many countries the gender wage gap has been narrower than in the private sector as government policies and legislation have contributed to a reduced wage gap. The gender pay gap remains on average

16% in the EU: 12% in the public sector, compared to 21% in the private sector (European Commission, 2004b).

Percentage of total employment by SGI sector: EU25, EU15 and new Member States, 2003

From Employment in Europe 2004: Recent Trends and Prospects. DG Employment/social affairs. August 2004 *Table 10, p.42*

	EU 25	EU 15	NMS10
Electricity gas, water	0.9	0.7	1.7
Public administration, defence, compulsory social security	7.5	7.7	6.6
Education	7.1	6.9	7.7
Health, social work	9.5	10.0	6.2
Other community social and personal service activities	4.6	4.7	3.8
Total SGI	29.6	30	26
Memorandum items:			
Transport. storage, communication	*6.3*	*6.2*	*6.8*
Total Agriculture. fishing, forestry	*5.3*	*4.0*	*12.4*
Total Industry	*28.3*	*27.6*	*31.9*
Total Services	*66.4*	*68.3*	*55.6*

4.B. Is there a link between quality of employment and quality of services provided?

Working conditions of those employed in SGI, as in other sectors, directly affect the quality of work and output: recruitment, retention, and productivity are all linked to levels of pay and conditions.

Working conditions in SGI are affected by service restructuring as more services are contracted out. This process creates conditions of insecurity, and the pressures of competitive tendering can lead to poor working conditions, and differential terms and conditions of employment - the "two-tier workforce". Research indicates that this insecurity and worsening of conditions has a negative impact on the quality of services to users.

Recent research is ambivalent on the developments in productivity in sectors subject to liberalisation and deregulation. There have been clear gains in labour productivity in electricity/gas/water, and in telecommunication, but these appear to have been 'one-off' gains from labour-shedding as a result of restructuring, and there is no evidence of continuing 'dynamic' efficiency gains expected from the creation of markets in these sectors. The evidence is also unclear in relation to investment in research and development, which is a key aspect of developing the 'knowledge economy': some recent research suggests that deregulation may lead to less investment in R&D, other that it is neutral.

Training has a direct impact on the quality of labour. There is evidence of the development of problems in the electricity sector across Europe, where serious skill shortages across Europe have been identified, linked to the mechanisms of liberalisation and competition through outsourcing, which creates incentives to reduce indirect costs such as training. Such problems have also been identified in other privatised and liberalised sectors in the UK.

5. Impact assessment

5.A. What kind of qualitative assessment should be carried out in order to ensure the quality of services?

Defining the quality of services is the first issue and determining the objectives and goals (see the problem of conflicting public policy objectives) with respect to which the impact assessment needs to be realised is the second important issue.

Both are complex and specific to the sector and service under consideration, but also dependent on the location (quality needs to be connected to the territory where the service is provided) and the actors involved in the provision of services and in the assessment process. Finally, as already said earlier, needs and demands evolve with time and consequently, quality indicators will need to evolve, but also vary according to the horizon of the evaluation: indicators with respect to short-term objectives and to long-term objectives.

Assessment has several functions, but should among others enable dysfunction, differences in quality and/or type of service to be comprehended. Therefore, several sets of information and data are needed at local, regional, national and European level. This is complex and costly. The solution seems to rest in a mix of exhaustive **comparable** (over time and space) quantitative data and qualitative surveys. Moreover, the assessment criteria must themselves obey a number of quality criteria, such as relevance, efficiency (cost effectiveness), reliability, comprehensibility and integrity (not conducive to distortion by unwarranted behaviour).

Further, it is necessary to consider the assessment criteria one by one to allow for a time series as well as a spatial analysis, but also to consider each criterion with respect to one another to ensure an overall coherence of the evaluation. Only this cross-reference of criteria will enable a true qualitative assessment: for example, the price criterion needs to be related to the nature and quality of the service (technical quality and comfort, access, frequency, safety and reliability, continuity of provision and security of supply, equality of treatment, etc.), to the sustainable provision of the service, to the possible social and environmental clauses embedded in the provision contract, but also to the network density, to the tariff transparency and its user-friendliness, to the equivalent service in other types of areas (rural versus urban environment), to the clientele service (treatment of complaints, invoicing, etc.), not to speak from the contribution of the service to public policy objectives (see externalities). This example - which is incomplete - shows the quantity of data needed service by service, for each location (and at regional and national levels to evaluate connection and transfer possibilities), at different time periods, for different categories of consumers and users, etc., to try to assess the various dimensions of quality.

In the CIRIEC-CEEP study on "Services of General Economic Interest in Europe – Regulation, Financing, Evaluation and Good Practices" (November 2000) carried out with the support of the European Commission (http://www.ulg.ac.be/ciriec/intl_fr/research/publications/executsum.htm), a reference schedule has been proposed to conduct a performance assessment of SGEI. Quality was one of the issues, but quality of the service can be related to the production process, to the provision conditions and the service output, to the relation with users/consumers, to external factors. Thus as said, quality needs to be defined before constructing the indicators to measure it.

In the frame of a project realised by CIRIEC for the European Commission (DG Regio) entitled "Contribution of Services of General Interest to Economic, Social and Territorial Cohesion" (http://www.psiru.org/publicationsindex.asp, November 2004), an attempt was made to evaluate the

accessibility (general, universal, social and territorial - see notably remote and outermost regions) and affordability (economic accessibility) of services in the sectors of transport, energy, postal services and telecommunications. One of the conclusions was the difficulty of collecting useful and comparable data - especially at regional level (not to speak from the local level) and distinguishing urban, rural and remote areas - to realise such an assessment.

Elaborating the qualitative criteria to be measured and assessed service by service would be worth a study in itself.

5.B. Is the methodology chosen by the Commission adequate?

This can be considered in two parts: whether the methodology is adequate for the intended purpose of the evaluation; and whether the methodology is adequate for the issues addressed by the Commission in the evaluation.

The methodology used by the European Commission in the 2004 report (Horizontal Evaluation of the Performance of Network Industries Providing Services of General Economic Interest 2004 report SEC(2004) 866 - http://europa.eu.int/comm/internal_market/en/update/economicreform/docs/sec-2004-866_en.pdf) concerns the evaluation of the market performance of network industries; the contribution made by liberalisation directives to achieving those public service obligations which are defined at EU level; and the description of consumer opinions on various aspects of SGI.

This is significantly more restricted than the original objectives of the horizontal evaluation, which derived from a series of requests from the Council and the Parliament. These concerned the evaluation of SGI in general, not only network industries, and the evaluation of the impact of liberalisation, not only its contribution to EU-level public service obligations. The earliest request from the Nice Council covered all SGI, and asked that the evaluation should cover their performance "particularly in terms of quality of service, accessibility, safety and fair and transparent pricing....". The Laeken Council also expected that the evaluation would cover the performance of SGI, and include "citizens' and consumers' opinions on the performance of services of general interest and the impact of liberalisation on them". The European Parliament in October 2001 called for an "evaluation of the real impact of the policy of liberalisation of services of general interest before embarking upon further liberalisation as well as the use of the Cardiff process for regular evaluation of the functioning of SGEI.

The request from the European Parliament also specified that public debate should form part of the process. The European Parliament requested greater public participation and proposed to "organise the debate within the various existing forums (Economic and Social Committee, Committee of the Regions, consultative bodies, associations involved in services of general interest initiatives and consumer associations)". The European Commission's paper on methodology in 2002 endorsed this view and said that "public participation could be greatly expanded ... The results of this debate should be taken into account and provide guidance for the annual horizontal evaluation, and the evaluation should itself be the subject of debate", but failed to make any methodological proposals for creating and using the results of such a debate. The methodology of the 2004 report relies on consumer surveys for evidence of public opinion and makes no reference to public debate before or after the report.

The second aspect concerns the adequacy of the methodology for the report's own objectives. The report collates data from a number of sources on the competitive framework, and performance of

network industries including productivity, prices, employment, accessibility and affordability, and from a survey of consumer views on SGI, as well as the more limited Eurobarometer surveys. Much of this data is of interest and relevance to the issues addressed by the report, and to a wider evaluation of SGI.

The issues identified, the sources selected and the conclusions drawn from them are however vulnerable to the charges of arbitrariness and selectivity. Discussion of market entry to network services addresses the issue of the number of new entrants to each national markets, but does not address the question of concentration of ownership across the EU; data on productivity indicates that there is no dynamic gain in performance in liberalised network industries, but no conclusions are drawn for modifying the expected impact of liberalisation; the presentation of the results of consumer opinion relegates to a single sentence a number of reports that consumers of SGEI do not perceive their usage as a contractual relationship. These limitations may arise from the lack of a more wide-ranging debate and independent evaluation.

5.C. Should other elements be taken into consideration or should a new methodology be chosen instead?

Evaluation of the impact of the deregulation and liberalisation in SGI resulting from the directives should be reinstated as a central aspect of the evaluation (as originally proposed by the Parliament). This evaluation should include at least four tasks:

- evaluate the general impact of EU-led liberalisation on SGI, not only through the specific directives covering network SGEI, but also the extension of internal market rules into SGEI and SGI in general;
- evaluate not only the 'positive' contribution of liberalisation, but address the questions of the expected impact on efficiency, productivity, price levels, and assess these against evidence of the actual developments under liberalisation;
- assess the impact not only on public service objectives as set at EU-level, which are necessarily restricted to those elements in SGEI specifically identified in the directives, but also the impact on the achievement of social objectives of SGI in Member States, and the SGI contribution to numerous public policy objectives;
- assess the impact on the ability of Member States to organise SGI according policies and structures determined locally and reflecting national and local conditions and histories.

The evaluation should also form part of a public and participatory process whereby the objectives and criteria reflect the dynamics of the concerns of all parties. This step would of itself address some of the problems identified in the current process, including the problems of selectivity of data and interpretation.

5.D. Who should carry out such evaluation - the Commission, and independent observator, Member States?

The issues of establishing a valid and social and politically accepted assessment system are of a highly normative nature.

Before answering this question, four essential - and often demanded - features to the nature and characteristics of the "Evaluator" should be mentioned:

- The bodies entrusted with assessment - Offices or Observatories or ... - should be accessible to the plurality of parties involved, in their expectations, aspirations and interests; any hindrance to

the active participation of one of the parties will impoverish assessment and harm its legitimacy. Those parties are: public authorities, operators, consumers/users/citizens, trade union organisations, professional groupings, civil society, research centres, etc. No single party must assume - de jure or de facto - the monopoly of assessment. The best guarantee of involving all parties is that representatives of each party should belong to the structure defining the assessment guidelines and their follow-up.

- The bodies entrusted with assessments should be specialised in their definition and conduct, because assessment has an essential role in speaking and revealing before comprehending and improving the quality of service. Bodies entrusted with assessment must possess real means of expertise and investigation, but also be transparent in their action. Further, they should be in charge of a specific sector even though it would be useful to prescribe exchanges between sectoral bodies.
- These bodies need to be independent - guaranteed as far as possible by law - and must have margins of autonomy in their relations with the various parties concerned. There is the risk of some of the parties appropriating assessment if the assessment function is entirely and solely dependent on them. This could, for example, occur if assessment is entrusted solely to bodies in charge of regulation or to politico-administrative bodies that define regulation or, on a European scale, to the Commission alone. Assessment must take into account the plurality of sources of information and expertise; schemes giving "recourse" must enable the way in which assessment is conducted to be contested and generate counter-expertise.
- It is clear that the bodies entrusted with assessment should be appointed at each Member State level[21] (on a scale which can be local); at the same time at Community level, it is necessary to devise methods for exchanges, encounters, comparison, co-ordination and even harmonisation; the latter could also be a support for national efforts. The European dimension is increasingly important owing to the markets concerned becoming less and less national; the parties are becoming more transnational to the point where one can speak of "Euro-operators".

At the present stage and to start the assessment process, an Observatory could be founded. It could be attached to the European Parliament and thereby, in communication with national bodies, possess real legitimacy. Of course, this Observatory should be entrusted with the task of collecting all existing evaluation and assessments procedures and attempts, in order to realise an overall and global analysis of their respective results. Such an exercise could already lead to several usable conclusions and recommendations.

As for now, it seems reasonable to set up at least the premises of such an assessment body. Developing progressive assessment dynamics and sharing existing experiences, notably to enable users, consumers and citizens to make their voices effectively heard, appear as a feasible way.

[21] In federal states, those assessment bodies could be even organised on a regional base.

6. *Conclusions – policy options and recommendations*

This chapter deals with some issues that appear to be crucial for the development of the policy of the EU in the future. At first, important conclusions from the answer to the raised questions in this study were drawn with respect to the definition and scope of services of general interest (SGI), to liberalisation and regulation measures of SGI, to the financing of missions with public sector obligations (PSO), to employment effects and to the evaluation of SGI. On this basis attempts are made to develop some crucial guidelines and policy recommendations.

With regard to the development of the policy of the EU the following arguments appear important:

- Subsidiarity is appropriate and needed at national, regional and local level to define the missions and to implement well-performing institutional arrangements for the provisions of SGI, which meet the prevailing demands and specific circumstances.
- There is urgent necessity of legal certainty in order to reduce the permanent stress with which public authorities and operators of SG(E)I cope at present. Public authorities should be free to decide on what services to treat as public services/SGI, and on the appropriate structures for financing and providing them, be exempt from the application of competition and internal market rules, and also consequently from the GATS at world level (but not from procurement rules, apart from the so-called "in-house" operations, which should however not be defined as strictly as in the very recent *Halle* case).
- SGI have a clear role to play to support a number of common policies of the EU, including employment and economic policies. The EU needs to be able to develop policies and strategies that would encourage and support cooperation between Member States to improve their public services/SGI and assist in delivering EU policy objectives.
- Debate is needed at European level to raise the question and allow the emergence of true European public services of SGI, which could also be financed at that level (see existing matters dealt by DG Regio under the cohesion policies).

6.A. Definition and scope of SGI

Many persons and institutions rightly regard the uncertainty surrounding a legally correct definition and classification of specific public tasks and SGIs as unsatisfactory. A meaningful answer to this question depends on the preferred definition of SGI. The search for a definition of SGI at EU level has to deal with two different approaches. On the one hand is the project to define SGI by inference from EU legislation and jurisprudence; on the other hand is the diverse reality of public services/SGI provided by Member States. The search for a definition becomes in practice an attempt to define the limits of SGI for EU purposes, which can simultaneously act as an acceptable definition of actual public services/SGI.

One type of approach is to construct at EU level a list of services which are regarded as SGI for EU purposes, and which could then be accorded special status in EU policy and law. A central problem with such an approach is that there is a wide range and a great diversity in the services and missions regarded as public services/SGIs, as the term is understood and in the tradition of most Member States. The range runs from traditional infrastructure services to the offers of social, cultural and charitable institutions. The areas so treated also change over time, with economic development and political changes. Missions and national particularities are considered and regulated in various - and partially inconsistent - ways within the legal framework of the EU. This approach also lays too much weight at the EU level. The provisions of the constitution and directives concerning SGEI

and state aid were drafted to address specific objectives in relation to competition and the internal market, which are different and more limited objectives than the definition of SGI in general. An attempt to define SGI by reference to these EU issues would risk being constrained by criteria that are adequate for dealing with competition issues but inadequate for dealing with public service/SGI issues. Moreover, any move towards central definition could entail the creation of homogeneous EU-standards with correspondingly high costs, whereas in the now 25 Member States considerable differences exists with regard to the economic conditions and possibilities, and also to the expectations of the citizens to the provision of particular SGIs (see section 1.B.6).

A possible and reasonable policy alternative for the future development of the SGI framework would be to accept that the principle of subsidiarity is of central importance, so that the EU definition of SGI/public services becomes simply: whatever Member States decide should be a public service/SGI. Thus Member States would be recognised as entitled to decide what services to provide as public services/SGI, how specific services with PSO should be provided, and accept full responsibility for financing and safeguarding the necessary supply of SGIs. This definition can then be used at EU level as the basis for exempting public services/SGI from the obligations of the competition and internal market regime in the EU. This would simply restore to public authorities, at appropriate level, the freedom to decide how to organise services without the increasingly problematic obligation to make them cohere with competition law developed for quite different purposes.

The range of the possible forms of provision remains wide open, from public production, through publicly owned enterprises and Stadtwerke, to the use of PPPs and of competitive outsourcing. The procurement directives would remain fully applicable - whenever a public authority **wishes** - but should not be obliged to do so in case of "in-house" operations - to tender work or services, then it would have to do so by inviting tenders from suppliers throughout the EU.

6.B. Liberalisation and regulation

The change from internal to external (public) regulation of SGIs has brought new challenges for all involved players, especially for the policies of the Member States and the Community.

The policy of the European Union has consistently followed through on the decisive impetus for remodelling the public enterprise sector in the Member States since the early nineties with the realisation of the concept of the internal market.

The state is now more frequently inclined to produce services of general interest (SGI) no longer on its own account, preferring instead to farm them out to private and public enterprises that have to act in compliance with the rules of competition. Political guidance of enterprises and execution of missions is now (increasingly) effected through external regulation. The relations between local government or authorities and the production of SGIs are thus characterised by the crossover from the traditional responsibility for production to the state responsibility of guarantee. The relationships between the authorities and the suppliers of SGIs in the Member States differ according to sectors and levels.

The changes of distribution of responsibility or, rather, the divided perceptions of responsibility for production, financing and guaranteeing are generally also accompanied by a redistribution of the economic risks. The change of function of the state and the reform of the public enterprise sector therefore also involve distribution policy consequences, which should be addressed explicitly and considered carefully.

On the whole, the observed process of reconfiguration of relations between the authorities and the service-suppliers has numerous economic, legal and socio-political consequences the long-term repercussions of which on the range of SGIs are today only partially in evidence.

Theoretical and empirical studies have been conducted to analyse the effects of the services of general interest's fundamental principles in the context of liberalisation. It is important to point out that even when complying with the fundamental criteria - formerly imposed or now set as a target - in the legal framework of the EU for the production of SGIs, the existence or the quality of certain SGI by a public institution (authority) limited to the guarantee function cannot in all cases be guaranteed over the longer term. It may even be a case of services and sectors of significance in economic terms that are negatively affected or even appear to be threatened in the long term by the SGI concept of EU law.

In this regard the recent judgement in the *Halle* case is an example of a particularly restrictive decision. The ECJ ruled that the city could not choose its own Stadtwerke to provide a service because the city had made the Stadtwerke a joint venture PPP, in which a private company held a 24.9% minority interest. That private interest could gain unfair advantage under competition law, and so - regardless of any other consequences for the city's provision of services - the Stadtwerke could not receive work without it being opened for public tendering. This judgement has potentially widespread ramifications, undermining the central basis of the French sociétés d'économie mixte, for example, as well as numerous PPPs .

Another issue concerns the regulator's new role and mission. Attention should be devoted to the establishment and role of powerful and independent regulators, especially considering the internationalisation of providers in the field of SGI and the respective market power and political influence of these sometimes multinational providers compared to local or regional public authorities. Further those operators do not necessarily feel invested of a public service mission defined in the broad sense. Therefore, additional responsibility is placed on the public authority.

Global governance and regulation issues become much more important and strategic, since this is the only place where macroeconomic objectives may still be pursued.

Such considerations bring questions about comparative efficiency and costs (for the economy as a whole) of a suitable alternative system of performing public service missions and the guaranteeing of SGIs to the centre of decision-making.

On the one hand it is the declared desire of many Member States, institutions, and interest groups to take such missions with PSO out of competition and liberalised markets. The European Parliament too seems to follow a precautious policy and advocates against a (too) restrictive policy for SGI. On the other hand, there are a number of important economic arguments in favour of such an approach.

In sectors and areas with well performing SGIs would be no obligation to undergo institutional reforms of the provision of public services.

In other fields, in which the provision and supply of SGI is felt as insufficient or inefficient, it is the responsibility of the Member States to choose better measures or to reform institutional arrangements, which are more suitable and fit the preferences of citizens and consumers. If local authorities or Member States prefer organisational reforms with elements of competition they can of course implement proper models.

From an economic point of view, especially with regard to transaction costs, there are strong arguments to choose as simple as possible models of provision, regulation and monitoring of specific tasks. According to the principle of subsidiarity - and also to the theory of fiscal federalism - local and regional preferences can be best considered when decisions on the organisation and the model of the regulation of public missions are taken at the lowest institutional (or federal) level.

6.C. Financing

There are numerous issues to be tackled with in relation to financing SG(E)I. Just to recall a few of them:

- the risk of underestimating (new) costs appearing from new provision modes: transaction and negotiation costs appear but due to the required separation of services segments, scope and range economies as well as the pooling of central (e.g. administrative) services tend to disappear;
- the insufficient analysis of possible effects and consequences of new provision and financing modes on the prevalence of SGI and their financial sustainability (see the neglected risk of failure of a private operator in charge of a SG(E)I – is the return to an in-house provision even possible?);
- the question of internalising externalities (i.e. costs or advantages that are not integrated in private calculations), for example, the social costs, in order to improve a "level playing field" between all operators and between substitute provision modes of a same final service;
- the difficulty of determining everything in advance with respect to contracts and the importance of correctly and completely drafting the contracts.

A democratic and public interest reflection is needed to discuss solidarity perimeters and new manners of mutualising services. Considering the evolution over time of the financing modes, moving from a national or territorial solidarity towards prices oriented according to costs - i.e. the real price for each user -, more cost transparency occurs; and the visibility of the real cost for some types of consumers may reduce solidarity. In any case, one should pay attention that the financing of services of general interest for all does not in the end resort to charity, since this evolution would mean a social setback.

Consequently should be left open the possibility of solidarity-based financing in its various forms (including solidarity between territories, socio-economic categories of population and/or economic actors/users, or even generations), this meaning tariff perequation or charge equalisation and cross-subsidisation as allowed in the pure commercial sector.

"In the EESC's view, the possible options for financing obligations should not be restricted, or preference given only to direct public funding from the budget; this would contradict the principles of subsidiarity and proportionality." (Opinion of the European Economic and Social Committee on the Green Paper on Services of General interest, 11 December 2003, see section 4.7.2).

Financing SGI using EU funds may be a reasonable and desirable solution in very particular areas. Primarily, such a model could be arguable if EU-wide homogeneous services are wanted and/or distributional aims should be addressed at the European level. In this regard, the organisation and provision of such EU-level SGI should be fully decided at that level, as well as their necessary financing modes. This would thus constitute an exception to the subsidiarity principle advocated for SGI at other levels.

Indeed, services which are determined by local, regional or national preferences and demands or needs, however, should be with the responsibility of the Member States (even Regions). Consequently, they have to care for provision and funding of the services, unless that they do not have sufficient own means in order to provide such a SGI. The aim would be then the promotion of the regional and social cohesion over the whole European Union territory with corresponding funds.

In case the SG(E)I would not fulfil anymore their more general public mission role (see their social dimension and the positive externalities they generate), one should be aware of the inevitable shift of responsibility and thus financing on the public authorities. SGI contribute to the general well-being of society and if their services and missions are reduced or limited to their sole "core business", either because of budgetary restrictions (search for more cost-effectiveness due to benchmarking and comparisons with strictly private service providers), or following limitations of the scope of their missions (see restrictive definition of universal service), the additional or complementary services rendered in the past by those SG(E)I will eventually have to be provided for by other means and this will entail (maybe more) costs for the society, but indeed at another level than that of the initial service provider.

Finally, the possibility of intertwining public, private and third-sector/non-profit sectors might be a solution with regard to provision and funding of SGI. Nevertheless, the social economy/third sector solution will never replace a SGI with universality, equality, continuity, etc. as basing principles; whereas public-private-partnerships imply a careful and appropriate partaking of risks and responsibilities, but also the capacity of the public authorities to manage such PPPs and the contracts' supervision.

6.D. Employment

Employment in SGI should be treated as a central issue in EU policy-making, for reasons connected with employment policy, economic policy, and cohesion policy. The objective of full employment remains a key EU objective, and recent evaluation of employment trends in the EU, especially when compared with the USA, indicates that the core SGI sectors of public administration, education and health are crucial to achieving the employment growth necessary, and that increasing public (and private) demand for these services is the key factor generating growth. Evidence on productivity growth also suggests that these sectors are central to the creation of a successful knowledge-based economy. These sectors are also relevant for cohesion policies, since these sectors generate higher levels of employment for women; and also because the new Member States have relatively lower levels of employment in these sectors.

It thus appears necessary for the level of employment in these sectors to be evaluated for its contribution to EU employment policies, and that EU policy on SGI should therefore concern itself with ensuring that there is growth in public demand and expenditure on these services. This may require attention to the impact of the stability pact framework on Member States' propensity to spend on these services, on the actual and potential impact of extending liberalisation and market forces in these services, and on the possible use of cohesion funds to sustain SGI in new Member States.

The quality of employment should also become a focus of EU policy in these sectors, both for cohesion reasons and for economic performance. The protection of training in an environment of outsourcing is a EU-wide issue, as is the creation of two-tier workforces resulting from the same processes in both SGI and SGEI. These issues could be addressed through regulation either through EU-wide mechanisms or through the development of guidelines for national regulators.

In the SGEI subject to liberalisation directives the issues rather demand further evaluation. These sectors have undergone major restructuring with far reaching consequences in many dimensions. Such - advantageous or disadvantageous - consequences of liberalisation should not be assumed from an a priori basis, but rather adduced from empirical evidence following evaluation.

6.E. Assessment

In principle it appears desirable if the EU keeps on pursuing the objective of a comparative and transparent assessment of SGI and supports corresponding initiatives in the Member States. The evaluation should be comprehensive and consider political, social, economic and environmental criteria.

The evaluation of missions with PSO is often a complex task. Multiple criteria need to be adopted and analysed in interrelation with one another (e.g., quality cross-reference between price, universality and continuity, access for all, cohesion in its various forms) and with respect to all assigned objectives and tasks. Further there is a need of detailed (regional, sectoral, urban versus rural areas, etc.) data and qualitative information established on the basis of comparable situations, and the evolutionary features of SGI should not be forgotten.

But one needs first to determine the objectives and goals - which can be multiple - with respect to which the impact assessment should be realised. With respect to the set purpose, it is then necessary to carefully select the assessment criteria and their respective explanatory power and scope. Analysis and interpretation should be done within a wide-ranging perspective encompassing the plurality of stakeholders.

Evaluations need also to be cost-efficient. Some evaluations may be too costly compared to the possible benefit of their results and the eventual implementation of corrective measures.

Considering all this, there is a need of pluralist and autonomous assessment bodies that possess sufficient expertise and investigation power. The important participatory process of all parties could be supported by involving representatives of each party in defining the assessment guidelines and their follow-up.

A possible strategy for the near future could be to promote assessments of SGI organised within the responsibility of the Member States. The evaluation should be carried on by the Member States, however, according to own criteria and procedures. The methods and results of the assessments should be published and compared across Europe. This task could be assigned to an observatory established on EU-level, which would have a coordination role.

For purposes of sectoral and nation-wide comparisons, cooperation and learning of best practices, the results need to be accessible to all. However, more and more information and data is seen as confidential and assessments are thus difficult, eventually impossible to conduct.

To date, no advanced and mature concept of a European-wide assessment of SGI in different sectors exists. An operational model of reference, which could be prescribed obligatorily, is still unavailable. Against this backdrop the assignment of responsibility for the conduct of specific evaluations based on the principle of subsidiarity appears appropriate. It would allow the Member States to develop and test country and task-specific evaluation criteria for SGIs. But the debate

around evaluation processes should also be organised within the existing forums (Economic and Social Committee, Committee of the Regions, etc.).

At present there is obviously a need of specific assessments for different areas of public missions at different levels. Of equal importance appears an evaluation in a transsectoral manner and at Community level as such (to evaluate with respect to European common policies and public interests goals); an Observatory (placed under the auspices of the European Parliament) could be in charge of it.

It appears reasonable to establish a legitimated "Evaluator and Observer" acting in communication and cooperation with sectoral bodies, national agencies and regulators in order to promote and develop appropriate evaluation methods and standards according to the evolution of public missions.

One most important finding is the observation that there exists only an incomplete and unsatisfying knowledge of the results of the SGI-policy in the past. There are sound arguments in favour of a policy that provides more and comprehensive knowledge of the supply of SGI and the function of different institutional arrangements for their provision. This underlines the importance of assessing the existing and present consequences of sectoral directives set up till now **before** going on with new legislative initiatives in other areas of public service missions.

6.F. Draft Directive on Services and issues with respect to services of general interest

The question with regard to the expected consequences of the Commission draft proposal on services for services of general interest in each Member State (e.g. health care, education and waste) and the relationship between this legal act and other directives (such as sector-specific directives on postal services, energy, telecommunications, railways) has to consider a wide perspective taking economic, social, legal, and political issues into account. It is not possible to give a comprehensive and detailed answer in the context of this study.

However, the preceding chapters have addressed the most important issues and provided some guidelines, which should be considered in forming and developing the future legal framework with relevance to missions with PSO and SGI in particular.

Presently the Parliament is intensively concerned with the proposal for a directive on services. The most recent two working documents by the Committee on Employment and Social Affairs (PE 353.297v01-00) and the Committee on the Internal Market and Consumer Protection (PE 353.364v01-00), respectively, are dealing in detail with the draft services directive. They express the present position and opinion of the involved Members of the Parliament. It appears useful to give a short comment on these documents.

In principle, the arguments put forward in both documents could be strongly supported.

The conclusions in the document by Evelyne Gebhardt (Committee on the Internal Market and Consumer Protection) are understandable and could be supplemented with a further argument. Considering the absence of evaluation results and the danger of not mastering negative consequences in terms of quality standards (including environmental, social and working conditions standards) and consumer protection, it should be clearly stated that SG(E)I are neither concerned nor covered by the directive proposal, since a framework directive or another legislative initiative should cover those separately following the sayings in the White Paper.

Especially the opinion in the working document prepared by Ann Van Lancker (Committee on Employment and Social Affairs) seems to be in line with important arguments presented in this study.

There is agreement with the clear statements on "the fact that there is no distinction between what is purely commercial and what serves the public interest" and the demand, that "the proposal should not pre-empt a future framework directive on services of general interest; on the contrary, such a framework directive should precede a services directive."

"In any event it should be seriously considered to exclude services of general (economic) interest (SG(E)I) entirely from the scope of the Draft. Even though this notion is not clearly defined at EU level, there is consensus that it covers activities such as network industry services, health services and social services such as welfare, employment services and social housing. The Draft includes all of those services of general interest. The discussion about the role of the EU in defining these services and the way they are organised and financed is however the object of a separate process launched by a Green Paper and followed by a White Paper on Services of General Interest. In order not to affect this process and not to anticipate a framework directive on SGI, the Draft should not apply to services that are guaranteed or financed by the State to fulfil its duties in the social, educational, cultural, judicial fields as well as its duties in the areas of health care and welfare. This is particularly the case for educational, cultural, audiovisual services, health care and social services (including placement of workers, vocational/professional training), water distribution and purification services, electricity distribution services, management of waste services, services of protection of the environment. The fact that several of those activities feature among the derogations from the COOP (Art 17) is not enough: they should be totally excluded from the scope. Furthermore, some of the activities the Commission already proposed to exclude (Art 2 (2)) need to be better defined" (Working document PE 353.364v01-00).

6.G. Proposed definition of SGI in the services directive or SGI framework directive

A review of the economic arguments and a consideration of the history, experience and diversity of the Member States lead to the conclusion, that the quality of a specific public service or SGI is in fact determined not only by the activity performing a service but also - and equally important - by the specific objectives and conditions related to the service provision that are politically demanded and imposed by legal obligations. For practical purposes, a proper definition of SGI or public services should therefore explicitly cover these two dimensions of a public task.

This point of view is especially relevant for attempts to distinguish between economic and non-economic (commercial and non-commercial) activities in the context of public services and SGI. This criterion refers primarily to potential market (supply) features of a given service activity. First, most public service activities, even within the public sector - even in services such as health and education - are increasingly carried out through institutions under private law, and through relations which are, or closely mimic, commercial relations. The activities can move quite freely between public and private operators and with fluid mixtures such as PPPs. Thus any definition of non-commercial activities will either include too little - only those parts of public services carried on directly by public authority departments - or too much - those activities that are privately operated, with the possible consequence to be subject to open market and procurement rules.

Second, defining public services and SGI must reflect the practice of Member States, since there is no EU definition or general mission. But the concept of 'commercial/non-commercial' does not reflect the actual legal or conceptual definitions of public services apparent in Member States.

If the policy of the EU is prepared to secure and strengthen the provision of SGI in the future development of the internal market and looks for a proper concept treating SGI vis-à-vis the competition rules the following ideas and policy guidelines could be useful and should be considered and developed further.

The criterion for excluding SGI from the scope of the services directive should not be based on an attempt to distinguish economic from non-economic activities. Any given activity may be carried out either as a private service or as a public service e.g. teaching, surgery; and public services may be delivered through a range of different modalities, including both commercial and non-commercial operations; so neither the activity nor the modality is capable of being used alone to define the scope of SGI in the EU

The starting point should be the concept of the general interest as defined collectively (politically) through democratic processes by public authorities in the Member States. A SGI is always defined by reference to a public interest objective or objectives, not by reference to a particular activity, nor type of provider, nor the mode of market organisation or provision. Such public interest objectives are always explicable by reference to the benefits for the community under consideration. These benefits may accrue to the community as a whole or to special groups or territories. The public authority defines, at appropriate level, the conditions under which such objectives are to be realised in each specific service. Those conditions may include for example universality, perequation of charges, and reliability, but in all cases will be intimately linked to the objectives of the service, not to the activity per se. These conditions may include specification of the forms and modalities of provision and finance, either public and/or private under various contractual arrangements. The objectives, the beneficiaries and the conditions are legitimated and made transparent through democratic processes. It follows that the right to define SGI should be assigned to the public authorities at every level in Member States, according to the principle of subsidiarity. Consequently SGI should be simply defined as all those services designated by public authorities within the EU by reference to public interest objectives. This conception of SGI can then be used as the criterion for the exemption of SGI from the services directive, and could also form the core of a framework directive on SGI.

This solution avoids the need for a long and inevitably incomplete list of services, which is in any case subject to variation over time and between countries, and would restrict the freedom of democratic decision-making and subsidiarity at the level of the Member States.

This system is regulated by democratic political activity, and allows for challenges to ensure against abuse of the process, because public authorities can be required to specify the public benefits accruing from any service designated by them as SGI. This approach to excluding SGI from the services directive is coherent with all the principles of the EU constitution.

6.H. Concluding remarks to the future of EU policy and services of general interest

The political decision to be taken by the European institutions about the future development of the legal framework with regard to SGI issues concerns ultimately the trade-off between the unaffected functioning of the internal market and a satisfactory supply of SGI according to local and regional preferences in the Member States. The missions that are presently in discussion are primarily guided and provided at local and regional level. Considering this fact and the elaborated arguments it would be reasonable for the future policies to decide in case of conflicts in favour of SGI and to accept restrictions with regard to the application of the competition rules.

In comparison with the large European network industries the discussed missions and services concern sectors that are indeed of great importance for the functioning of an economy and that, however, in many cases have lesser significance to the internal market. This means that possible distortions and negative effects to the internal trade are correspondingly smaller.

In the case of a prevalence of the competition rules, however, numerous exception arrangements and stipulations for entitled deviations from the competition principle would be necessary. For this

purpose extensive and costly administrative and legal provisions are necessary. Important decisions and ruling would have to be taken centrally and far away from the affected citizens in the Member States and would be associated with corresponding transaction costs.

A specific SG(E)I directive (still in project) or another legislative initiative specifically devoted to SGI should precede or be concomitant with a more general framework for services. The draft directive on services under discussion at present appears to create more legal uncertainty and to bear the risk of possible unexpected - and thus not assessed - harmful consequences for the safeguarding and provision of SGI.

If the EU is prepared to adopt a rule of blanket exemption of SGI under the principle of subsidiarity, a proper way to incorporate this into the legal framework has to be found. Maybe Art. 256 of the old Treaty could serve as an example or basis for a feasible solution for an operational exemption rule.

In any case, clear statements and rules should frame the considerable appreciation and interpretation power of the Court of Justice on individual cases, since the Treaty in its actual version does not define precisely what it understands under general economic interest. This results in reality in an unintended shift of power to the Court of Justice.

There obviously exists the danger of implementing new framework conditions without having sufficiently studied the possible effects and consequences on the prevalence and well-performing of SGI and their financial sustainability at present in different areas and sectors in many Member States.

Once a service and its provision structure have changed or even disappeared, it is much more difficult to implement them anew - especially considering the social and informal networks that form part of SGI, especially the social SGI in many Member States. Further, the risk of failure of the operator in charge demands explicit consideration. Resuming the charge and responsibility of an insufficient service provision (and maybe also further contractual obligations towards third partners and subcontractors) might be more complex and costly than adapting the service provision inside a public entity.

Thus the public authorities bear much more responsibility, in terms of supervision and control, when contracting out a service, since new institutional arrangements are often irreversible in reasonable time. Negative or disadvantageous effects could be a long lasting consequence of a poor or insufficient decision taken by a public authority, by Member States or by European institutions.

In conclusion, the European Union should ensure positive support to SGI, enabling them really to fulfil their wide-ranging missions. Rather than organising or supervising competition in this field, the EU should encourage and even initiate Member States cooperation to achieve greater efficiency and effectiveness of SGI at all levels.

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