CECOP – CICOPA EUROPE

THEMATIC DOSSIER:

The services of general interest

October 2008

With the support of the European Commission

Acknowkedgements:

We would like to express our special thanks to Laurent Ghekiere and Marie-Laure Onnée for their precious participation in this collective work

This publication has been elaborated for the CECOP Conference "Worker ownership: the synthesis between entrepreneurial development and social inclusion" (1st and 2nd of October 2008 – Brussels).

CECOP – CICOPA Europe
C/0 European House of Cooperatives
rue Milcamps 105
1030 Bruxelles
+32 2 543 10 33
cecop@cecop.coop – www.cecop.coop

With the support of the European Commission

TABLE OF CONTENTS

INTRODUCTION

This preparatory dossier divides itself into three parts.

In the first part, we will examine the relations between SGI and cooperatives. We will first of all clarify the concept of SGI and related concepts (section 1.1.) and the basic principles of the EU internal market in which SGI operate (1.2.). We will then discuss the notion of the primacy of the general interest (1.3.). Finally, we will examine the relationship between cooperatives and SGI (1.4).

The second part is dedicated to the present EU legal framework in the field of SGI, which cooperatives and other social economy enterprises must take into account in their provision of SGI. After some general considerations (2.1), we will review the issue of the transposition of the service directive, which addresses the issue of SGI (2.2.). In 2.3., we will examine successively the communications by the Commission from 2004 to 2007 on this issue, the two successive European resolutions, and the problem of community law vs case law, where we will delve into the issue of entrustment and state aid, and the notion of compensation. In 2.4., we will discuss the relation between social services of general interest (SSGI) and public procurement, by reviewing successively the issue of public private partnerships (PPP), concessions, public procurement per se, direct provision, and the 'in house" issue. In 2.5., we will briefly discuss the relationship between SGI and human rights.

The third part envisions the necessity for a new EU legal framework for SGI: why is such a legal framework necessary (3.1), and what kind of strategy could be envisaged in the short-medium term (3.2.).

1. SGI AND COOPERATIVES– AN APPROACH

1.1. CLARIFICATION OF BASIC CONCEPTS

1.1.1. GENERAL INTEREST

The term 'general interest' can be understood in two different ways:

- In a wider and more societal understanding, the general interest means "*the satisfaction of the common and fundamental needs of all citizens – or their vast majority - in a given territory or community (European, national, regional or local), as distinct from private interests*"[1]. Since society evolves, the definition of the needs of general interest and their response in terms of services is also evolutive.
- In a more narrow and technical sense, the term 'general interest' refers to activities that are under the entrustment of public authorities. This is the generally accepted meaning in the expression 'social services of general interest".

The foundation of the two understandings is the same. On the one hand, the state is the entrusted representative and defender of the general interest. On the other, the state, on the basis of the citizens' entrustment, in turn entrusts private actors to implement social services. Indeed, the notion of entrustment is the logical consequence of the fact that only the public authorities have the legitimate right to define general interest.

1.1.2. SERVICES OF GENERAL INTEREST (SGI), SOCIAL SERVICES OF GENERAL INTEREST (SSGI), SERVICES OF GENERAL ECONOMIC INTEREST)

The debate on the social and health services of general interest today is at the heart of the community agenda, after having emerged initially at the time of the White paper of the European Commission on the services of general interest in 2004, but also at the time of the discussions on the European Constitution and of the parliamentary proceedings on the proposal for a directive on the services in the internal market. What is it about exactly? In fact, many concepts are used with different meanings given to them. This section thus aims to examine the different terms in use, explaining what the concepts cover in a precise chronology and in the continuity of the evolution of community law applicable to the notion of services of general interest .

I – From public service to services of general (economic) interest : reminder of several key notions in Community legislation

The services of general interest (SGI) are at the heart of the European political debate. They touch on the central question of the role played by the public authorities in a market economy, namely how to ensure the proper functioning of the market and the respect of the rules of the game by all actors while guaranteeing the general interest, and in particular the satisfaction of the essential needs of citizens and the preservation of the public good when the market cannot do it.

Public service and services of general interest

The notion of public service is not the object of a common approach in the EU. It can mean either services offered to the general public, or services provided by public sector organisations, or services submitted to an "obligation of public service" in the general interest.

It is only to this latter notion that the European Union refers to. It has thus coined the concepts of "service of general interest " (SGI) and "service of general economic interest " (SGEI). Those two

1 Cooperatives Europe, Common position on services of general interest, 14 June 2007

concepts are broad-based and able to include the diversity of conceptions and national expressions, from the state public service theorized by Léon Duguit in France to the *daseinsvorsorge* developed on the initiative of the local communities in Germany, or to the *public utilities* in the UK.

The organisation of the public service can be under the responsibility of the state, like in France, or of the local communities, like in Germany. However, the Community legislation has mainly focused its attention on the enterprises entrusted of a public service because of the potential conflict between the public service and the principle of freedom of competition enshrined in the Treaty. Furthermore, the differences in conception on the principles of the public service from one country to another can lead to conflicts that can only be managed at the European level. It is the case of the electricity public service, which in Germany is ensured by many actors limited to their local zone whereas the sole French operator extends its activities beyond the French borders.

The evolution of the debate on the public service in Europe has thus made it possible to classify the services of general economic interest among the "common values" of the EU, as per article 16 of the EC treaty completed by the treaty of Amsterdam.

The Commission has elaborated several distinct concepts:

- Services of general interest (SGI), which are not mentioned in the EC treaty, and are for profit or not for profit services that the public authorities consider to be of general interest and submit to specific public service obligations.
- Services of general economic interest (SGEI), mentioned in articles 16 and 86 of the EC treaty: these are "*services of an economic nature that the Community members States submit to specific obligations of public service according to a criterion of general interest*." An economic activity can be any activity consisting in offering goods or services on a given market. More specifically, the notion of SGEI covers some services provided by the big network industries such as transportation, postal services, energy and communications. It also extends to all other economic activities submitted to obligations of public service whatever their purpose may be.

The services of general economic interest are different from ordinary services insofar as the public authorities consider their provision as being a necessity, even when the market is not sufficiently profitable. Indeed, the notion of SGI is based on the concern to ensure everywhere a high-quality service at an affordable price for all citizens. The SGI thus contribute to the objectives of solidarity and equality of treatment that are at the basis of the European social model.

SGEI are mentioned in three provisions :

1. Article 16 of the treaty, which entrusts to the Community and members States the task to ensure that their policies allow the SGEI to fulfill their missions based on common values. It expresses a principle but does not provide to the Community any means of specific action or any legal basis to legislate transversally.
2. Article 86§2 of the treaty, which implicitly recognizes the right of members States to impose specific obligations of public service to the operators when entrusting them with the management of a SGEI. It establishes a fundamental principle that guarantees the supply and development of the SGEI in the internal market. The enterprises that have been entrusted the management of SGEI, such as organisations of social housing, are exempted from the application of the rules of the treaty only when this exemption is strictly necessary to allow them to fulfill their mission of general interest. Therefore, in case of conflict, the implementation of a public service mission prevails upon the enforcement of Community law, including the rules relative to the internal market and competition. It is up to member-states to prove it ;
3. Article 36 of the Charter of fundamental rights of the European union, according to which the EU recognizes and respects the access to SGEI to promote the social and territorial cohesion of the EU.

Article 16 of the EC treaty also recognizes the role that SGEI play in promoting social and territorial cohesion. The missions that are assigned to the SGEI and the special rights that may result from them derive from considerations of general interest such as, supply security, the protection of the environment, economic and social solidarity, regional development, the promotion of the interests of

the consumers, among others.

The principles inspiring SGEI are continuity, equality of access, universality, and transparency of the services. The SGEI thus contribute to a large extent to the competitiveness of the European industry and to economic, social and territorial cohesion. Their notion is by definition flexible and evolutionary, insofar as its content adapts to the features of the sector and the technological and societal transformations.

Whereas article 86§2, of the EC treaty affirms that the SGEI are submitted "*to competition rules, within the limits in which the application of those rules does not hinder the implementation de jure or de facto of the specific mission that has been entrusted to them*", when the competition rules apply, compatibility with these rules is based on three principles:

- neutrality towards the public or private property of the enterprises;
- the freedom of the member States to define the services of general interest;
- the proportionality of the restrictions to competition in relation to the efficient implementation of their missions.

Even though members States are free to choose the manner in which the services should be ensured and can decide to directly or indirectly offer public services themselves, they must follow the principles of transparency, equality of treatment and non discrimination when they decide to entrust the supply of those services to enterprises. But the reality of the SGI in the EU remains complex and in constant evolution. It covers today:

- a vast range of activities, from the big network industries (energy, postal services, transportation and telecommunications) to health, education and social services;
- a wide array of services in terms of geographical scope, from services at European level to the purely local and neighbourhood level;
- services provided on different bases: some are economic, some are non-economic, others are in between;
- organisations with various historical, geographical and cultural traditions and with different types of activity, ranging from big state enterprises, or even of big European and world groups to local non-profit organisations.

Confronted with this complexity, the Commission launched a debate on the role of the EU in the definition of the general interest objectives pursued by those services and on their organisation, financing and evaluation by means of a green paper on SGI. At the same time, it reaffirms the meaningful contribution of the internal market and competition rules to the improvement of many public services in terms of quality and efficiency, benefitting both the citizens and enterprises. The green paper and the White paper that followed also take into account internationalization and liberalization, and raise the question as to whether it is appropriate to establish a general legal framework at the Communityl level for SGEI.

II – <u>What is a social service of general interest ?</u>

As can be easily imagined, the activities covered by SGI comprise a large variety of actors with various missions and interests. The concept has thus been refined, with a distinction between "social services of general interest " (SSGI) and "network SGI ." The latter comprise network services in the fields of transportation, energy, communication submitted to specific obligations of public services (state electrity company, The Post office, state telephone company, etc.). The latter are submitted to the rules of the internal market via sectoral directives.

The question of social services of general interest is more complex. SSGI are SGI whose missions aim to guarantee social cohesion and the effectiveness of the fundamental social rights. These are services that the authorities submit to specific obligations of public services within the framework of social and/or health policies. They comprise services such as health, social-health services, long term care, employment and social housing services, social security and complementary social protection. They cover a wide-ranging field of activities which can be found in a questionnaire of the Social

protection Committee[2]. One of the fundamental features of SSGI is the implementation of collective solidarity to answer all situations of social weakening that are likely to undermine the integrity of individuals.

Another expression in use is "social and health services of general interest". The addition of 'and health " or not is a useful specification. Some indeed consider that health services are naturally part of social services; others in turn consider that they constitute a distinctive category, in particular in relation to the mobility of patients and professionals. This leads to a confused situation where the mention of SSGI can include health services or not.

From our viewpoint, we will consider below that the SSIG are "social and health services of general interest" and thus also cover health services.

- ***Who delivers SSGI ?***

In their majority, SSGI are delivered by solidarity organisations (associations, mutuals, cooperatives, private organisations entrusted with a public service mission, foundations etc.) of very diverse origin (national, private, public, charity-based, religious, etc.). They encompass a very vast field: organisations of social housing, protection of youth, social and educational action groups, homes for the elderly, undertakings for people with disabilities, nonprofit private care undertakings, services of assistance to persons and home assitance, accommodation centres for people in danger, for mistreated children, for social rehabilitation, creches, health centres, social centres, services for people in situation of social exclusion or homelessness, nursing services, domestic assistance, life assistants, social tourism, etc.

- ***Founding principles***

Transcending the exclusively economic logic, the SSGI address several specific objectives, such as solidarity, territorial cohesion, prevention (against exclusion, etc.), struggle against social vulnerability, effective implementation of fundamental rights (right to health, social insertion, etc.). Founded on a solidarity-based logic, the actions in the field of SSGI transcends the simple caritative framework: they act in favour of social cohesion and do not merely accompany the excluded. In line with the SGEI concept, their inspiring principles are continuity, equality of access, universality, and transparency of services. The SSGI thus also contribute to a large extent to the competitiveness of the European industry and to the economic, social and territorial cohesion.

- ***Which applicable legislation and which specificity ?***

The general principles of the Treaty, as well as derived legislation on the topic, also apply to the SSGI. The rules relative to the internal market (including competition law, all being sustained by the case law of the ECCJ) apply to a large part of them, from the moment in which they are of an economic nature (we can thus cal them SSGEI).

On the other hand, excluded from the rules of the internal market are non economic SSGI, such as the basic régimes of social protection. According to the case law of the ECCJ, the social security regimes are not within the scope of competition nor internal market rules.

We can thus summarize the different concepts examined above in a double-entry table.

Double grid	*According to the economic or non economic character of the SGI*	
	Non economic SGI	SGEI

[2] http://ec.europa.eu/employment_social/social_protection/docs/questionnaire_fr.pdf

According to the nature of the SGI activity	Network SGI	They do not exist	« Network SGEI » Eg : national electricity company, the Post Office, the national railway company *The rules of the internal market* apply
	SSGI	« Non economic SSGI » Eg : the national welfare system *The rules of the internal market only apply for the coordination of the systems between member states (regulation 1408-71 and following)*	« SSIEG » Eg : health services, social services, services to persons… *Grey zone as far as the concrete application of the rules of the internal market is concerned*

The debate on SSGI is thus twofold :

- Clarify the situation of SSGEI in relation with the internal market rules and provide security to the operators in terms of applicable legislation.
- Define the border between SSGEI and 'non economic SSGI'

Since the acronym 'SSGEI' is not very common, and except where otherwise mentioned, we will call below SSGI of an economic nature under the term 'SSGI'.

The need to clarify SSGI is unanimously recognised. However there are different political options:

- If we consider SSGI as being services like any other, let us apply to them the rules of the internal market as such ;
- Since SSGI are services that are strictly under the national level of competence, let us limit ourselves to the jurisprudence of the ECCJ;
- If SSGI are not the proper level to solve the problem, let us solve it through a Community regulatory of legislative framework common to all SGEI;
- If SSGI are to be considered as differing from other services and not to have the same characteristics as the network SGI, let us solve the problem through a specific sectoral tool (without prejudice of another common framework for SGEI).

1.2. THE INTERNAL MARKET: THE FOUR FREEDOMS AND THE THREE PRINCIPLES[3]

1.2.1. THE FOUR FREEDOMS

a) The free movement of goods

Freedom of movement applies to products originating in the Member States and products from third countries which are in free circulation in the Member States [Article 23(9), second subparagraph ECT].

[3] Text initially adapted from "notes" drafted by the French Permanent Representation to the European Union and by the French Senate

To start with, free movement of goods was seen as part of a customs union of the Member States, involving the abolition of customs duties, quantitative restrictions on trade and equivalent measures, and the establishment of a common external tariff for the Community.

Later, the emphasis was laid on eliminating all remaining obstacles to free movement with a view to creating the internal market – an area without internal frontiers, in which goods (among other things), could move as freely as on national markets.

b) The free movement of persons

The freedom of movement of persons is defined in article 14(2) ECT. At the outset, the Treaty of Rome considered the free movement of persons as part of a project designed to bring about economic integration through the market. Therefore, the first group of people to benefit from this freedom of movement were migrant workers.

The freedom of movement of workers is separate from the posting of workers in the context of the provision of services. In the latter case, a worker does not go to another country in order to seek employment, rather he does so within the framework of his employment in order to carry out a contract of employment that binds him to his employer.

c) The free movement of services

Services shall be considered to be 'services' within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. Services shall, in particular, include activities of an industrial character, activities of a commercial character, activities of craftsmen, activities of the professions (art. 50 ECT). The free movement of services within the EU covers two types of rights:

- **The freedom of establishment**

The freedom of establishment (art. 43 ECT) provides a service provider with the possibility of setting up activities on a long-term basis in a Member State other than his Member State of origin.

- **The freedom to provide services**

All restrictions on freedom to provide services within the Community shall be prohibited (art. 49 ECT). The freedom to provide services is defined as the temporary provision of a service by a service provider in a Member State other than the State in which he is established. It is this element that governs the Services Directive (see 2.2 below).

d) The free movement of capital

The principle of the free movement of capital, which has been enshrined within the treaties since 1957 (art. 56 ECT), is designed to prohibit all restrictions on the movement of capital (direct investments, including in real estate, investments in shares or securities, loans, etc.) and the prohibition of all restrictions on payments (for the purchase of goods or services) between the Member States and also between the Member States and third countries.

1.2.2. THE THREE MAIN PRINCIPLES

a) The principle of conferral

The principle of the conferral of competences states that the Union may only act within the limits of the competences conferred upon it: "competences not conferred upon the Union in the Treaties remain with the Member States".

b) The principle of subsidiarity

"The Community acts within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out by the present Treaty. In areas which do not fall within its exclusive competence, the Union shall act only if, and insofar as, the objectives of the proposed action

cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Community level. Union action shall not exceed what is necessary to achieve the objectives of the Treaties."

The principle of subsidiarity therefore corresponds to two elements:

1. The insufficiency of State intervention
2. The added value of Community action

c) The principle of proportionality

Following the example set by the principle of subsidiarity, the principle of proportionality governs the execution of the competences carried out by the European Union. It is designed to limit and to set a framework for actions carried out by the Union's institutions. Under the terms of this principle, the actions of the institutions must be limited to what is necessary in order to achieve the objectives of the Treaties. In other words, the level at which the action is undertaken must be in keeping with the objectives that are pursued through the action.

This means that in cases in which the Union has several modes of intervention available and these modes offer a similar degree of efficiency, then it must select the mode that offers the greatest freedom to the Member States and to individuals.

1.2.3. THE FOUR FREEDOMS, THE THREE PRINCIPLES AND SGI

The three principles establish a balance between the 4 freedoms and the autonomous policy-making process of each EU Member State, based on their different legal traditions and concrete situations. For example, there can be restrictions to the sale of a given product in a given Member State due to health reasons, because of the principle of subsidiarity (by which the health criteria are decided at the national level) and the principle of proportionality (by which, among other things, the EU-level normative framework should be proportionate to its objectives and should not, for example, be so disproportionate as to endanger people's health).

The definition and enhancement of the general interest, and the legal provisions on SGI, are also the competence of each EU Member State, according to the principle of subsidiarity. The principle of proportionality is also used to make sure that the four freedoms of the internal market do not directly endanger the general interests of the citizens by being, in some of their applications, disproportionate.

Thus, the Member States can put in place certain normative provisions in favour of SGI that somehow condition the 4 freedoms to the national environment and make the four freedoms proportional.

1.3: THE PRINCIPLE OF THE PRIMACY OF THE MISSIONS OF GENERAL INTEREST

Europe is highly protective of services of a general interest as well as the mission that has been entrusted to them, which is to respond to the essential and daily needs of the citizens of Europe in the areas of Health, Employment, Housing, Education, Training, Social Protection and Social Insertion. In accordance with the provisions of the Treaty, Europe ensures that these services operate on the basis of principles and in conditions that enable them to accomplish their missions.

Europe is anchored in the recognition of fundamental rights, the respect for human dignity and integrity and aims, in particular, to strengthen its social and territorial cohesion and to promote a high level of employment and social protection.

However, the activation of this protective approach to social services, which derives directly from the Treaty, is the exclusive responsibility of the Member States and their national, regional, departmental and municipal authorities. Europe's protection of social services only exists at a potential and conditional level and it only becomes effective under Community law if it is expressly activated by a competent public authority in a Member State. The **only way to** activate this protective force to cover these services and their providers and the only basis on which they may be afforded effective

protection against market forces, is if a public authority declares them to be services of a general interest.

In fact, by declaring that the services are of general interest and by officially entrusting operators with their effective implementation, it is possible to:

1. ensure that the fulfilment of the general interest mission of social services takes precedence over the rules set out in the Treaty, especially those regarding competition and the internal market,
2. finance these general interest missions through subsidies or any other public resources to the tune of 100% of the net costs without having to give prior notice to the Commission,
3. exclude general interest services from controls carried out by the authorisation bodies and to derogate from the freedom to provide services under the services directive,
4. directly entrust operators, including those that are not-for-profit, by granting them exclusive or special rights in the form of an approval, authorisation or concession where this is necessary in order for them to be able to carry out the mission of special interest,
5. to entrust social operators through the issuing of service agreements where these social partners assume a part of the business risks associated with the services provided.

Europe can only protect general interest services through market forces alone if the competent public authorities use the instruments made available to them by the Treaty and derived rights.

It is the exclusive responsibility of the public authorities in the Member States to explicitly position services of a general interest, to make it clear that they are required to meet with certain needs, that they have a specific general interest mission, the specific obligations related to this mission, the compensation that is necessary for its fulfilment and finally, they must officially entrust the operators with responsibility for the management of these services.

The notion of universal services, in the sense of services accessible to all across the whole of the territory of the Community, is the first example of the way in which concrete expression has been give to the requirement for the sanctuarisation of the European territory. Furthermore, this has been constantly confirmed and reinforced by the Member States in the context of the successive revisions of the Treaties, notably by the Treaty of Amsterdam that came into force in 1999 and the addition of a new specific article that defines services of a general economic interest (SGEI) as a **shared value** of the European Union and as a specific modality for **the promotion of its social and territorial cohesion.**

In keeping with the proposed constitutional Treaty, the proposal for the Lisbon Treaty further reinforced this notion of sanctuarisation through the introduction of a new legal basis as a result of a co-decision making procedure between the Council and the European Parliament. The latter calls upon the Council and the Parliament to legislate through the introduction of regulations so as to establish principles and conditions, notably of an economic and financial nature, that are necessary to ensure the fulfilment of these missions of a general interest.

The governance of services of general interest (SGI) is also stipulated in a new, additional protocol that interprets its notion of a Union shared value. This protocol adopts an innovative approach by addressing the question of SGIs in their entirety. A clear distinction is drawn between services of general economic interest (SGEI) and services of general non-economic interest (SGNEI) within the Union's primary law. The role of the local authorities is explicitly recognised within this protocol.

The Charter of the fundamental rights of the European Union both recognises and respects the right of **access to SGEI** with a view to promoting the social and territorial cohesion of the European Union.

In this way, in less than 10 years a real architecture for SGIs has been constituted in the Treaty on the basis of the principle established in 1957 by the founding fathers of the sanctuarisation of missions of general interest. Not only have they been defined as representing a shared value, but the right of access to SGEI has also been recognised and the main lines of the governance of SGIs have been defined, explicitly based on their diversity and the satisfaction of needs defined locally. In addition, they have now been granted their own legal basis as a result of a co-decision making procedure

between the Council and the Parliament, which is designed to define, in law, the principles and the conditions for the implementation of the requirement to ensure the fulfilment of missions of a general interest.

1957-2008 The progressive construction of a SGI architecture within the Treaties

1957: Article 90.2 of the Treaty of Rome, amended to article 86.2 by the Treaty of Amsterdam in 1999

"***Undertakings entrusted with the operation of services of general economic interest*** *or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition,* ***in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them****. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.*"

1999 – 2004, 2008…: Article 16 introduced by the Treaty of Amsterdam (**1999**) and completed by the proposal for the Constitutional Treaty (**2004**) and the proposal for the Treaty of Lisbon (**2007**); establishment of a legal basis enabling the Parliament and the Council to introduce legislation so as to guarantee the fulfilment of the missions of general interest.

"*Without prejudice to Article 4 of the Treaty on European Union or to Articles 73, 86 and 88 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services*."

2000 - 2007: Article 36 of the EU's Charter of fundamental rights: access to services of general economic interest (**2000**) and the proposal for the Treaty of Lisbon (**2007**) that gives it legal value.

"*The Union recognises and respects the access to services of a general economic interest as provided for under national legislation and practices, in accordance with the Treaty establishing the European Community, so as to promote the social and territorial cohesion of the Union*."

2007…: Protocol on services of a general interest, introduced by the proposal for the Treaty of Lisbon.

"***Wishing to emphasise the importance of services of general interest****, the high contracting parties have agreed upon the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:*
Article 1*: The shared values of the Union in respect of services of general economic interest within the meaning of Article 16 of the Treaty on the Functioning of the European Union include in particular:*
- the essential role and the wide discretion of ***national, regional and local authorities*** *in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;*
- the ***diversity*** *between various services of general economic interest and the* ***differences*** *in the needs and preferences of users that may result from different geographical, social or cultural situations;*
- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.
Article 2*: The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.*"

1.4. COOPERATIVES AND GENERAL INTEREST

1.4.1. THE NATURE AND FUNCTIONING OF COOPERATIVES

In order to understand the relationship that exists between cooperatives on the one hand, and the general interest and SGI/SSGI on the other, it is necessary to first of all examine why cooperatives are established and how they function.

First of all, cooperatives are fully fledged enterprises, in the sense that they are of a specific nature in terms of their objectives and pattern of surplus distribution.

Secondly, however, cooperatives are established and function for specific purposes that are generally linked to the general interest. First of all, according to the internationally approved definition[4], a cooperative aims to associate persons having similar needs and aspirations, which differ according to the typology of cooperatives: creation and maintenance of jobs, including for socially disadvantaged persons (worker cooperatives, B type social cooperatives, generally involved in industry or services), provision of social services (A type social cooperatives), education (educational cooperatives), promotion of production by small producers (agricultural cooperatives, artisans' cooperatives), consumption of daily goods (consumers' cooperatives), housing (housing cooperatives), thrift and credit (credit cooperatives, cooperative banks) coverage of risks (insurance cooperatives). Unlike conventional private enterprises involved in the same sectors of activity, the cooperatives have as their prime objective to focus on the above mentioned needs and aspirations of their members, which are generally geared towards the general interest (even though cooperatives are not the representatives of the general interest, since this is the exclusive role of the elected public authorities).

Nevertheless, cooperatives would not be geared towards the general interest if they limited themselves to satisfying the needs and aspirations of a closed group of citizens. According to the first cooperative principle[5] 'voluntary and open membership', cooperatives must be open to all the persons who can use their services, namely all the persons who share the same needs and aspirations as those served by the cooperative (and not only the people in need). Of course, this openness towards the outside community is restrained by concrete limitations, such as the geographical area served by the cooperative, the pace of its entrepreneurial development, or the necessary skills required for a new job in a cooperative among workers, for example. In fact, even though cooperatives are 'not-for-profit', economic development is crucial for them because it is the driving force through which they can carry out their general interest mission on a wider scale, namely to include more people with similar needs as members.

Being a not-for-profit, open and need-oriented enterprise, the cooperative is inherently linked to the development of the community which surrounds it. This is confirmed by the 7th cooperative principle called 'concern for the community', which stipulates that '*Cooperatives work for the sustainable development of their communities through policies approved by their members'*. It is also confirmed by the 5th cooperative principle, 'Education, training and information,' which stipulates that '*Cooperatives provide education and training for their members, elected representatives, managers, and employees so they can contribute effectively to the development of their cooperatives. They inform the general public - particularly young people and opinion leaders - about the nature and benefits of cooperation'*.

A corollary of the community nature of cooperatives is the fact that they have the same type of democratic governance principle as that enjoyed by citizens in a democratic political system, unlike what happens in a conventional enterprise: members only have one vote each, even if they have different levels of financial participation in the enterprise (as enshrined by the 2nd cooperative principle 'Democratic member control').

[4] As agreed upon by the general assembly of the International Cooperative Alliance (the only world-level cooperative representative organisation) in Manchester in 1995 in the Statement on the Cooperative Identity and approved in a quasi-unanimous vote in Geneva in 2002 grouping governments, trade unions and employment organisations of the majority of the countries of the world, including the governments of all present EU member states and candidate countries, in ILO Recommendation 193 on the Promotion of Cooperatives.

[5] The seven cooperative operational principles are part of the above mentioned Statement on the Cooperative Identity and of the ILO Recommendation 193 on the Promotion of Cooperatives.

With this democratic control principle, the cooperative emerges as a citizen-based enterprise, as part of the politeia. Indeed, just like other citizen-based institutions:

- It is democratic and strictly based on the 'one person one vote' system;
- It is not-for-profit and community-based;
- It is open to all citizens who can qualify to be its members;
- It is owned and controlled by those citizens;
- It addresses people's basic needs (employment, housing, consumption, credit, social services etc).

These characteristics make them more likely to adapt to a series of criteria ("faisceau d'indices" in French) for SGI entrustment, which we propose under section 1.4.5. below.

The democratic member control also makes it impossible for an external person or entity to control the cooperative (through acquisition or other means) unless and until it has been 'de-cooperativised', or, in other words, once the members have legally renounced their democratic control over the cooperative in a general assembly. This citizens' collective democratic control over the enterprise aims to make sure that cooperatives are, indeed, community-rooted enterprises and that they are therefore geared towards the general interest, rather than towards individual private interests.

In turn, as mentioned above, the cooperative differs from the public sphere because, even though it is geared towards the general interest, it does not represent it. In fact, in spite of their collective characteristics, cooperatives are private enterprises enjoying complete autonomy and independence, as enshrined by the 4th cooperative principle.

Thus, cooperatives are at the same time private enterprises which, as such, cannot claim to represent or to define what the general interest is, but which, as a result of their citizen-based nature, are naturally inclined towards contributing to missions of general interest and, in many cases, even to identify and launch them, even before they are eventually recognised as such by the public authorities.

1.4.2 THE ECONOMIC FUNCTIONING OF COOPERATIVES AS SURPLUS-BASED (AND NOT PROFIT-BASED) SOCIO-ECONOMIC ENTITIES, AND THE DESTINATION OF THE SURPLUS

The modalities of redistribution of the surpluses of the cooperative also confirm their 'not-for-profit' nature and their being geared towards the interest of their open membership and of the general interest.

1.4.2.1. The remuneration of the capital subscribed by members in the cooperative

Members subscribe certain amounts of capital in their cooperative. Depending on the different cooperative sectors or regimes, the amount subscribed can be symbolic or substantial, equal among all members or different (in which case, as mentioned above, the 'one person one vote' principle will be maintained).

According to the first part of the 3d cooperative principle 'Member economic participation'; "members usually receive limited compensation, if any, on capital subscribed as a condition of membership' (this provision is aimed at preventing a devaluation of the capital subscribed, rather than to enable members to obtain an income from it. Generally speaking, the rate of interest provided is similar to the rate paid on an ordinary deposit account in a bank).

1.4.2.2. Cooperatives' 'dividends' or 'returns'

Beyond this marginal interest on the capital subscribed in the cooperative, part of the surpluses are normally redistributed to members under the form of 'dividends' or, as they are called in Latin languages, as 'returns'. These 'returns', however, have nothing to do with the usual 'returns on investment' or shareholders' dividends, since, as we have seen above, only marginal bank interest is provided for the members' capital invested in the enterprise. Rather, the cooperative 'returns' are related to the price policy: they are in fact a year-end adjustment to the price of the transactions (unlike ordinary transactions carried out between buyers and sellers or between job-providers and workers) carried out between the cooperative and its members during the year. Therefore they are known as cooperative return, rather than as returns on investment.

In order to understand the reason for this price adjustment, one needs to understand that, generally speaking, the price of any given transaction between the cooperative and its members is only an advance payment on the definitive price. Indeed, since the cooperative is a not-for-profit entity and not a for-profit intermediary, and being its members also its owners, the 'correct price' of the transaction with its members does not depend only upon the fluctuation of market prices or upon the establishment of administrative prices, but can only be known once the annual balance sheet is established and when the annual surplus is calculated. This price adjustment can be on the purchasing price (as in the case of a cooperative among individual producers), on the selling price (as in the case of a consumers' cooperative), or on the price of labour compensation (as in the case of a worker or a social cooperative). Indeed, before this price adjustment, the transactions with the producers, consumers or workers are only advance payments on the final price.

1.4.2.3. Indivisible reserves

Another part of the cooperative surplus is earmarked for indivisible reserves, namely reserves that are not divisible during the lifetime of the cooperative. In some EU countries, such reserves cannot be divided even in the case of dissolution of the enterprises: in this case, the assets of the enterprise will be transferred to a federation, a humanitarian organisation, or to development funds of the cooperative movement (see section 1.4.2.4 below). Even in the countries where this is not the case, the fact that a cooperative cannot be controlled by an external entity before being 'de-cooperativised' (because of the members' democratic control, see above) makes the liquidation of a 'healthy' cooperative a particularly rare event as long as the cooperative continues to perform its community-based mission geared towards the general interest. In such conditions, the division of the cooperative assets by members also remains a very rare event.

Indivisible reserves are another manifestation of the community and general interest orientation of cooperatives, which should be seen in a time perspective: they are tangible proof of the fact that the cooperative is not only open to all present members of the community that can use their services, but also to future members as well. Indeed, the cooperative belongs to all of its members, past, present and future.

1.4.2.4. Funds for the development of the cooperative movement

Furthermore, in a number of EU countries, part of the surplus is earmarked for funds which are not for the cooperative itself, but for the development of the cooperative system at the national level. For example, in Spain, different percentages of the surplus (depending on the regions of the country) are earmarked by law for an education and promotion fund. In Italy, a national law obliges all cooperatives with a surplus to transfer 3% of the latter to cooperative solidarity funds aimed at promoting cooperative entrepreneurial projects (start-ups, transformation, development etc), thus generating thousands of jobs and hundreds of economic activities, including in the field of social services. In Malta, 5% of the cooperative surpluses go to a similar fund. This is one way in which each cooperative contributes to the general interest mission of the cooperative movement.

Beyond the redistribution of surpluses *per se*, cooperatives normally dedicate part of their turnover to finance institutions dedicated to the reinforcement of the cooperative movement in its general interest mission, such as membership fees of federations, participation in the financing of financial instruments and other business support institutions, participation in horizontal groups or consortia of cooperatives.

1.4.3. THE SPECIFIC CASE OF SOCIAL COOPERATIVES AND PART OF WORKER COOPERATIVES

Among the various typologies of cooperatives, social cooperatives and part of the worker cooperatives are specifically dedicated to the provision of social services or to the labour integration of disadvantaged persons (which can be considered as a social service in its own right). In social cooperatives, the community-related aspect clearly takes precedence over the defence of the cooperative members' own needs.

Generally speaking, such cooperatives have been able to develop only thanks to the common dynamics of the cooperative movement. The above mentioned solidarity funds, federations, consortia, support institutions etc, have proved to be fundamental instruments in the creation and development of a strong social cooperative system geared towards social services, including social services under public entrustment (generally called 'social services of general interest'). This should be taken into account in EU and national policies on SGI.

Indeed, in all the European countries where social cooperatives have developed (in particular Italy, Spain, Sweden, Central-eastern European countries such as the Czech Republic, Slovakia, Romania and Bulgaria for the labour integration of disadvantaged people and, more recently, in France with the SCIC), they could not have done so without the above mentioned instruments of the wider cooperative movement.

In addition, social cooperatives generally appear within the matrix of worker cooperatives, namely cooperatives where the workers are members, thus characterised by *worker ownership*. This feature of social cooperatives is particularly important to the quality of the social services which they provide. Indeed:

- In the field of social services in general, since the social service operators (e.g., doctors, nurses, social workers, educators etc), are co-owners of their own jobs in a community-oriented enterprise, they tend to develop a particularly acute sense of both entrepreneurial and social responsibility, towards the services provided.
- In addition, in cooperatives specialised in the labour integration of disadvantaged persons, the disadvantaged workers find a particularly efficient social integration environment, especially considering that most of them become members/co-owners of the enterprise.

1.4.4. COOPERATIVES AND SGI

We saw in section 1.1. that the term 'general interest' could be used both in a wider, societal meaning, and also in a more technical meaning referring to activities being the object of state entrustment:

The above mentioned discussion about cooperatives shows to what extent cooperatives in general, and social cooperatives in particular, are geared towards the notion of general interest (even though, as said above, they do not represent it, since this is the role of the state). Being community-oriented, need-oriented, citizen-based and intrinsically geared towards the general interest, social cooperatives can present specific guarantees.

- They can more easily identify new needs in society in terms of social services, and launch them from scratch, in some cases even without public entrustment whatsoever[6], until their utility as social services has been recognised by the public authorities.
- They are more likely than conventional private actors to provide quality services accessible to all at an accessible price
- They are more likely to provide services to the more remote areas, where social services become rare and where conventional private actors may not find a commercial interest
- They aim to last and stay active in the local community where they operate, thus providing a strong long-term sustainability factor to the social services they provide.

Within their structure, they embody the general principles of SGEI and have also been specifically created to satisfy the requirements of these SGEI. This may be used to justify the fact that, in Community law, they benefit from special or exclusive rights. However, there is a need to demonstrate their character of necessity and proportionality in accordance with the principles of the Treaty and the provisions of article 86§2

1.4.5. SGI, MARKET AND COOPERATIVES – ESTABLISHING A SET OF CRITERIA ('FAISCEAU D'INDICE') FOR SERVICE QUALITY

Being private actors, cooperatives intrinsically base their entrepreneurial expansion upon the four freedoms of the internal market (see above section 1.2).

At the same time, as we have seen above, they are also geared towards the general interest, and a number of them are directly involved in SGEI/SSGEI, and can thus be the object of SGEI entrustment contracts within the framework of public tenders or through the direct allocation of special or exclusive rights.

In this respect, it is essential that the EU public procurement provisions be properly interpreted by the national authorities at the national and local level. In particular, the search for the *best* offer (and not necessarily the cheapest one) should lead to the definition, in public tenders, of a set of criteria (quality, time-sustainability, geographical and social accessibility etc) that implicitly or explicitly promote cooperatives, within the framework of very strict rules, including rules on auditing.

The definition of this set of criteria should also be the object of cross-border exchanges and the gradual convergence of national policies, within the framework of the OMC, with the final aim to define a legally binding set of broad criteria at the EU level. Otherwise, the danger is that we shall continue to see a series of on-going legal cases regarding the conflicts between the general interest and the market.

In this way, specific provisions for the regulation of SGEI at the EU level, within the internal market, should eventually be established. Such provisions should consider the specific case of citizen-based

[6] This is what happened, for example, in the early 1990s, when the main national consortium of Italian social cooperatives began launching services to persons suffering from AIDS, at a time when this activity was not yet recognized as a social service by the Italian authorities. In fact, it was the community-based, member-based and citizen-based character of the cooperative movement that enablesd it to be the first to perceive first the need for AIDS services and to launch such services.

enterprises that include, in their membership, the very stakeholders involved in SGEI, such as cooperatives and mutuals, and in particular social cooperatives, housing cooperatives and health mutuals for the specific case of SSGEI.

Over the last few years, the families of the social economy have been contributing to the debate in progress at the European level on the services of general interest, in particular by advocating the utilisation of a method called of 'set of criteria' (" faisceau d' indices" in French) from three perspectives :

- definition of a service delivery as "service " in the European sense of the term;
- definition of the 'general interest' character of such a service, and
- definition of their "social " character.

In its communication on the social services of general interest, the European Commission recognizes for the first time :

- the relevance of the concept of "social service of general interest " and
- the relevance of this type of approach, through a list of criteria permitting to qualify a " social service of general interest ".

The enterprises of the social economy are, as important suppliers of social services, particularly concerned by this issue, notably insofar as it is necessary for them to obtain recognition of several of their fundamental principles of organisation and functioning :

- their legal statute and their limitations inherent to their not-for-profit character, in particular their more or less binding constraints of "non-distribution » ;
- their citizen dimension and their contribution to social cohesion
- their high requirement level in terms of corporate social responsibility and promotion of fundamental social rights while competing for more legal security in a domain which is too extensively let to the self-appraisal of its actors.

Without questioning the principle of neutrality, the "set of criteria' method consists in establishing a certain balance between operators of the social economy and other operators while correcting what presently appears to be an arbitrary allocation of the evidence of non- guilt: indeed, it belongs to the operators of the social economy to demonstrate that the particular conditions in which they operate do not constitute any unjustified privilege in relation to their commercial counterparts.

The method of the "set of criteria" (which showed its usefulness in French administrative law, notably in fiscal law) consists in establishing an indicative list of criterias and in verifying whether they are fulfilled by the operation or by the organisation concerned in a meaningful way, without there being an obligation to follow them all (alternative and non cumulative criteria).

The method allows to clarify the situation existing in numerous "grey zones" resulting from the important diversity of the assessments that prevail in this field.

This method can be used from three perspectives :

A Is it a service in the European sense of the term ?
Various criterias can be used in this respect :

- remuneration fixed as a counterpart of the service provided, or not
- costly character of the service provided, or not
- profitability or not
- existence of a market (in a given zone, in given conditions), on which there is competition, or not
- existence of volunteering or grants
- implementation of the solidarity principle.

B. Is it a service of general interest?

The Commission defines those services as the "service activities (!), economic or not, considered of general interest by the public authorities and thus subject to specific obligations of public service"
Other criterias can widen the field thus defined:

- response to a fundamental right or need with the user's complete satisfaction (adequacy between the service provided and the expected service)
- subsidy granted by the public authorities
- reference to social cohesion
- universality: the SGI apply to people in a situation (both short term or not) in which they are entitled to benefit from a SGI. The category of disadvantaged persons is not restrictive but must respond to the criteria of universality.
- accessibility
- legal nature of the operator

Furthermore, according to their " general interest" character, various obligations are imposed upon the mechanisms foreseen for the implementation of these services :
- proportionality
- transparency
- equality of treatment.

C Is it a social service?
It is important to specify that a service can be social without being of general interest: this is the case, eg, of mutual aid services or social services which are internal to a given organisation.
From a more "macroscopic" perspective, one generally agrees to distinguish two main groups of social services:
- Protection, insurance and social security services, which consist mainly of financial services;
- the so-called " personal and social" services consisting mainly in service delivery 'from person to person"

The above distinction, however, should not lead to an arbitrary separation: indeed, many services linked to social insurances consist in "personal" service delivery. likewise, the predominance of those groups should not lead us to underestimate the importance of other less clearly identifiable groups such as social restaurants and cloakrooms.
Again, criteria which could be used here are:
- Response to a fundamental need or right of the human person
- reference to social cohesion

2. THE PRESENT EU SGI LEGAL FRAMEWORK UNDER WHICH COOPERATIVES AND THE SOCIAL ECONOMY MUST WORK

2.1. GENERAL CONSIDERATIONS

The development of SGEI by cooperatives and more generally by social economy actors does not fall, primarily, within the scope of competence of the EU. Rather, it is the responsibility of the Member States, at the territorial level of competence, to clarify the position and role of certain activities or services within the social economy in the specific field of SGEI and to set out the consequences within domestic law and the very organisation of these services.

In this case, there is a requirement to establish the fact that these services are necessary in order to cover certain needs, to define the missions of general interest and the related obligations and to specifically entrust certain enterprises with the operation of these SGEI within the framework of an obligation to provide these services. This entrustment may be granted through a call for tenders or directly without a call for tenders, through the granting of concessions for services or the granting of special rights or exclusive rights, if necessary, to social economy actors.

It falls to the cooperatives within the Member States to assess their legal framework and to propose, where necessary, clarification in domestic law regarding their position as SGEI that benefit from derogations provided for in the Treaty (articles 86§2, article 14, article 36 of the Charter of Fundamental Rights). These clarifications should be mainly focussed upon the explicit SGEI character of the services provided, on the nature of the mission of general interest, the particular obligations that derive from this, the effective modalities of entrustment and on the respect for the principle of fair compensation of any subsidies. This is of fundamental importance.

In any case, it will be necessary to undertake these efforts to clarify the overall situation in 2009, since the Member States will be required to transpose the Services Directive into national legislation (there will be a requirement to draw up a list of services of general non-economic interest (SGNEI) that will be excluded and the list of SGNEI that will benefit from a derogation from the controls carried out by the authorisation bodies and the freedom to provide services). The exclusion of certain social services, on the condition that the service providers have been entrusted by the Member States, will also be the focus of particular attention in terms of the modalities used to transpose this element into national law in the Member States. Furthermore, the evaluation, in 2009, of the Monti-Kroes package on state aids to SGEI will require the Member States to draw up a report at the end of 2008 on the implementation of this Community decision and to carry out a survey of the enterprises responsible for the operation of SGEI on their territory and on the specific modalities of their entrustment.

In the first instance, it is also incumbent upon social economy actors to become familiar with the existing SGEI framework and to ensure that their national, regional or local regulatory framework conforms with this Community notion of SGEI.

In the next stage, it would be appropriate to identify the areas of tension that exist between the existing Community framework and the development of the social economy and of the cooperative sector in particular. These areas of tension fall principally into three categories:

1. is the obligation to provide services, which is a direct consequence of the necessity to cover the SGEI need, compatible with the cooperatives that, for the most part, or even exclusively, provide services for their members?
2. does the intrinsic quality of the way in which cooperatives function, of their values and specificities, justify the granting of a special right that enables cooperatives to be exempt from the entrustment of SGEI through a call for tender, thereby allowing them to benefit from direct entrustment through the granting of special rights to a group of cooperatives or of exclusive rights to a single cooperative in a given territory?
3. the financing of the SGEI developed by cooperatives must take into account all of the costs generated by the cooperative mode of operation of the enterprise. Can these specific costs

be integrated within the monitoring of fair compensation and not be considered as elements that constitute a form of unfair competition with other enterprises that are not cooperatives?

All of these issues, for which the Community level is exclusively competent, must be addressed during the next term of office, 2009-2014, in accordance with a thematic and pragmatic approach. The main aspects of Community law concerned are:

1. the conditions of direct entrustment by the granting of special or exclusive rights based on the social economy character of the enterprises and the internalisation, within their mode of operation and governance, of principles that are common to SGEI or certain public service requirements,
2. the conditions for the involvement of social economy actors in the open systems of entrustment through calls for tender for public contracts or through service concessions and public-private partnerships (PPP) and equal treatment taking into account their specific mode of operation and governance and the additional costs that this entails,
3. the conditions for the monitoring of the SGEI compensations that are received and the taking into account of the additional costs related to the specific mode of operation and of governance, as well as the specific obligations in terms of contributions to stabilization or specific development funds,
4. more generally and independently of the monitoring of fair compensation, the question of state aid that is specific to social economy actors and particularly to cooperatives, should also be considered at a political level, given the development of litigation in this area. This leads to the more long term issue of the way in which different modes of doing business are taken into account by the Community rules and regulations on competition.

2.2. SERVICES DIRECTIVE

The Services directive is a new European act that aims to free up the European market of services: as a result, enterprises, especially SMEs, will be able to easily provide their services abroad, either by setting up their business in other Member States (MS) with extremely simplified procedures, or by controlling them remotely. Voted in 2006 by the European Parliament, the directive must be implemented in every Member State before 28 December 2008; like any other directive, the text is written in general terms: it limits itself to setting objectives which members states (MS) should reach, by whatever means they choose to use for this purpose. In addition, since EU law has primacy over MS laws, national governments must change their legislations if they are in contradiction with the provisions of the European directive.

2.2.1. RELEVANCE OF THE SERVICES DIRECTIVE FOR SGI/SSGI

The debates between the Commission, the European Parliament and the Council along the process of adoption of the directive on services in the internal market, which led to the exclusion of some social and health services from its scope after the proposal of the European Parliament (Gebhardt report-ESP D), already reflected, two years before, the inability of the European Commission to take into account the need for the public authorities of the members States to implement specific modes of regulation for the suppliers of social services through "authorization régimes" and other “special rights" in Community jargon. The question here is not to erect unjustified barriers to intra-community exchanges through the provision by local suppliers of local and neighbourhood services, but simply to take into account the very nature of the existing relations between a provider and a user of social services, which cannot be reduced to conventional commercial relation of the supplier/consumer type. On the contrary, it is characterized by an asymmetry of information between the two parts. Such assymetry justifies such regulation of the offer and a correction of this asymmetry in the beneficiary’s interest, for purposes of social protection and solidarity. Those specificities led the Parliament and the Council to exclude some social and health services from the services directive.

Beyond the requirement to regulate the structures of offer of social services, the services directive as amended through the codecision procedure by the Council and the European Parliament, also recalled that *'it should not affect the universal service principle as is implemented in the social services of the member States*." This mention was proposed by the Finnish presidency of the EU and approved

jointly by the Council and the European Parliament in response to the restrictive vision of the social services of general interest by the European Commission, centred exclusively on the most disadvantaged households. This reflects the political arbitrations to try to bridge the divergences of approach between the European Commission on the one hand, the members States and the European Parliament on the other.

2.2.2. TRANSPOSITION OF THE DIRECTIVE BY MEMBER STATES

Cooperative and social economy organisations will need to monitor closely the ongoing transposition of the service directive, as this will provide an indication as to how member states handle the issue of of SSGI.

Several EU governments are according special importance to the Services directive. In the United Kingdom or in the Netherlands, for example, an *ad hoc* working group has been set up to oversee its implementation with 12 people specifically attached to it. The French working group in charge of the implementation consists of 3 people attached to the Ministry of Economy and Finance, even though there are already a certain number of French experts who advise the government on transposition issues in each and every ministry. Indeed, civil servants have also been specifically assigned to work on the transposition of this directive as well.

Some governments have involved enterprises in the implementation process. Other governments have made only timid efforts in this sense. For example, in France, no public consultations have been launched whereas, during the same period, the British government has twice consulted with the public. In Germany, the association of professionals "Bundesverband Der Freien Berufe" is active in the process.

The monitoring of the implementation process is also very important. In Portugal, for example, the Agency for the Administrative Modernisation (AMA – a public structure with a certain degree of autonomy) recently set up a special cell to oversee the process.

In federal countries, the implementation process needs to take into account the regions. In Spain, the implementation of the directive was entrusted by the Permanent Committee for Economic Affairs (CDGAE) to an interdepartmental group leaded by the Ministry of Finance, with one delegate assigned to each autonomous region. Locally, the Spanish Federation of Municipalities and Provinces will start its study and training programme in September 2008. In Germany, the Ministry of Economy and Technology is at the helm of the implementation process. A special coordination body has been set up not only between federal authorities and Länders (as well as between Länders), but also with with cities and unions of private sector services.

2.3. SGI AND SSGI: THE PRESENT LEGAL SITUATION

2.3.1. THE COMMISSION'S COMMUNICATIONS

The aims of the process that began in 2004, encouraged by Romano Prodi and based on wide-ranging consultations with the Member States via the Social Protection Committee and with all the major players, were as follows:

- to pinpoint the particularities of social services of general interest;
- to determine, step by step, the areas of tension with Community law;
- to design, on that basis, appropriate legislation reflecting a strategic approach.

This comprehensive and gradual process concluded with the Communication relating to the internal market review.

In deciding not to publish a new strategic communication on social services of general interest, but simply to tack the subject on to the internal market review as part of a wider-ranging text on services of general interest, the Commission signalled that it did not wish to pursue the process further and now sought to close the debate under the pretext that the Reform Treaty's Protocol on services of general interest constituted a new commitment on the part of the Community.

The abrupt halt was necessitated by internal negotiations in the Commission which reflect the sensitivity of the subject, the relevance of the questions raised and the proposals made for clarification, and – above all – the precedent for political compromise that might have been created, following on from the European Parliament's move to address the question of social services in the Directive on services in the internal market.

Four years of work had been done on studying the sector, extending knowledge of it and identifying areas of tension between the provisions of Community law and the fulfilment by social services of their general-interest remit, and it is useful to trace the reflection of that work in the Communications of April 2004 and April 2006 as well as the most recent Communication, of 20 November 2007, on services of general interest in the context of the single-market review, the document which brought to process to a halt.

Foundation laid by the White Paper on services of general interest (April 2004)

The 2004 White Paper on services of general interest marked the first formal reference in a European Commission communication to the concept of social services of general interest – embracing health services, long-term care, social security, employment services and the provision of social housing.

These services were recognised not as a specific legal category of services of general interest, but on the basis of certain particularities.

The White Paper made clear that these particularities lay in the specific missions that the services fulfilled in the Member States and also reflected the Community's concern that they should develop and should play their full part in achieving the aims of the Lisbon strategy.

The White Paper states: *'Social services of general interest have a specific role to play as an integral part of the European model of society. Based on the principle of solidarity, social and health services of general interest are person-centred and ensure that citizens can effectively enjoy their fundamental rights and a high level of social protection, and they strengthen social and territorial cohesion. Their provision, development and modernisation is fully in line with the achievement of the objectives set at the Lisbon European Council of March 2000, and in particular with the goal of achieving a positive link between economic, social and employment policies.'*

The public consultation initiated by the 2003 Green Paper on services of general interest had indicated that providers of social services wanted a clearer and more predictable framework in which to operate in order to be able to modernise social services of general interest.

While it fell within the responsibility of the Member States to determine the missions and aims of social and health services, that fact did not lessen the impact of competition and internal market rules on arrangements for delivering and financing the services in question if they could be classified as "*services"* or "*activities of an economic nature"* within the scope of the Treaties.

The Commission stated its view in the White Paper that it would be *'useful to develop a systematic approach in order to identify and recognise the specific characteristics of social and health services of general interest and to clarify the framework in which they operate and can be modernised'*.

It went on to propose the publication in 2005 of a specific Communication on social services of general interest and to make arrangements for facilitating cooperation among the Member States in the field of health and medical care.

The Communication on social services of general interest (April 2006)

It was not until April 2006 that the Commission adopted a specific Communication, which referred explicitly to implementation of the Community Lisbon programme.

The Communication was published in a very particular context – following the European Parliament's vote on the first reading of the draft Directive on services in the internal market. That vote had seen the MEPs exclude social and health care services from the new Directive's field of application, in opposition to the Commission's initial proposal.

Justified by the fact of the Member States and the European Union sharing responsibility for the fulfilment of specific missions of general interest, in line with Article 16 of the EC Treaty, the

Communication constituted "*a further step in taking the specific nature of social services into account at European level and clarifying, to the extent that they are covered, the Community rules applicable to them*".

According to the European Commission, the social services covered by the Communication could be divided into two main categories, namely:

– *"statutory and complementary social security schemes, organised in various ways (mutual or occupational organisations), covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability";*

– *"other essential services provided directly to the person. These services that play a preventive and social cohesion role consist of customised assistance to facilitate social inclusion and safeguard fundamental rights. They comprise, first of all, assistance for persons faced by personal challenges or crises (such as debt, unemployment, drug addition or family breakdown). Secondly, they include activities to ensure that the persons concerned are able to completely reintegrate into society (rehabilitation, language training for immigrants) and, in particular, the labour market (occupational training and reintegration). These services complement and support the role of families in caring for the youngest and oldest members of society in particular. Thirdly, these services include activities to integrate persons with long-term health or disability problems. Fourthly, they also include social housing, providing housing for disadvantaged citizens or socially less advantaged groups."*

Without going so far as to recognise them as a legally distinct category of service within services of general interest, this definition of social services of general interest gives them special status as cornerstones of European society and acknowledges their contribution to a number of essential Community aims and values, including:

- a high level of employment and social protection;
- a high level of human health protection;
- equality between men and women;
- economic, social and territorial cohesion.

The Commission noted that their value was also a function of the vital nature of the needs which they were intended to cover: in effect, they guaranteed application of fundamental rights such as the dignity and integrity of the person.

It also stipulated a number of characteristics shared by social services – which are listed in the box below – and referred to the processes of modernisation under way in the Member States, notably in the areas of decentralisation, outsourcing, funding and quality control.

Application of Community rules to social services of general interest

The general problem of determining which Community laws to apply to social services of general interest was addressed as follows:

- on the one hand, it was recognised that, under the principle of subsidiarity, the Member States were free to define missions of general interest and to establish the organisational principles of the services intended to perform them, with the proviso that this freedom had to be exercised transparently and without abusing the notion of general interest. It is worth noting here that this stipulation – and the associated concept of "manifest error" – is the focus of the difference between the European Commission and the Government of the Netherlands concerning the scope of social housing provision as a social service of general interest.
- on the other hand, Member States had to take account of Community law when fixing the arrangements for implementing the objectives and principles they had laid down. For example,

they had to respect the principle of non-discrimination and the Community legislation on public contracts and concessions, taxation, freedom to provide services and freedom of establishment when organising a public service capable of definition under European law as an "conomic activity" and/or a "service".

The practical arrangements for implementing social services of general interest concerned in particular:

- deciding whether to delegate a social mission in whole or in part;
- management of a social service of general interest as a public-private partnership or a concession;
- management of a social service of general interest by an in-house provider;
- recourse to financial compensation and the requirement of entrustment;
- recourse to market regulation, and particularly the structuring of provision in relation to the principles of freedom of establishment and freedom to provide services.

Special organisational characteristics of social services of general interest

- They operate on the basis of the solidarity principle, reflected in particular by the non-selection of risks and the absence, on an individual basis, of equivalence between contributions and benefits.
- They are comprehensive and personalised, integrating the response to differing needs in order to guarantee fundamental human rights and protect the most vulnerable.
- They are not for profit[7], in particular to address the most difficult situations and are often part of a historical legacy.
- They include the participation of voluntary workers – an expression of citizenship capacity.
- They are strongly rooted in (local) cultural traditions. This often finds its expression in the proximity between the provider of the service and the beneficiary, enabling the latter's specific needs to be taken into account.
- An asymmetrical relationship between providers and beneficiaries cannot be assimilated within a "normal" supplier/consumer relationship and requires the participation of a financing third party.

Monitoring and supporting social services of general interest

On the basis of its initial analysis, the Communication proposed to begin a thorough consultation process, looking at the specific characteristics of social services of general interest.

In addition to the traditional criteria of the general interest (universality, transparency, continuity, accessibility, etc.) recognised for social service missions, the characteristics to be explored included their organisational conditions and arrangements.

In particular the consultation was to cover:

[7] In the Sodemare judgment, the Court took the view that a not-for-profit condition could be compatible with the principle of freedom of establishment.

- *"the elements constituting these characteristics as well as their pertinence to gauge the specific features of social services of general interest;*
- *how they could be considered by the Member States when defining the general-interest missions of social services and the arrangements for their organisation, so as to ensure a good institutionalised link with the Community framework;*
- *the experiences with the application of Community law in the field of social services of general interest and possible problems that are faced in this context;*
- *how the same (or other) characteristics could be considered by the Commission where it has to check, subsequently and individually, the compatibility of the organisational modalities of social services with the applicable Community rules".*

Biennial reports on the situation of social services of general interest

The Communication also proposed that social services of general interest in the Member States should be monitored on the basis of biennial reports, the first of which would appear at the end of 2007 and would focus on the functioning of the sector, its socio-economic importance and the implications of the application of Community law.

The reports were envisaged as part of a framework of other Community initiatives supporting the modernisation of social services, in particular the open method of coordination in the area of social protection and inclusion.

The Communication stated that the aim was to take better account of the diversity of social services and to consider how the specific characteristics of social services of general interest could be used by both the Commission and the Member States in order to reduce the legal uncertainty inherent to situations where a case-by-case approach was needed.

It concluded with the following undertaking:

"In the light of this experience, the Commission will decide how to follow up this process and identify the best approach to take, including giving consideration to the need and legal possibility for a legislative proposal."

SSGIs in the Communication on services of general interest in relation to the review of the internal market (November 2007)

This Communication marked a break with the work that had been under way since 2004. It was the result of a compromise within the European Commission, which amounted to termination of the process of recognising specific characteristics and formalising a systematic approach involving adaptation of the applicable Community law and definition of a proper European strategy for social services of general interest.

Instead of a new Communication on a European strategy for social services of general interest, a different Communication was published on 20 November 2007, in the context of the internal market review, dealing with both services of general interest and social services of general interest.

Direct consequences of the internal compromise reached in the European Commission on how to treat services of general interest

The logic of the compromise was clear: a declaration – unanimously supported by all the members of the Commission, as its President José Manuel Barroso told the press – that the Community debate on services of general interest launched in 2003 by Romano Prodi was now closed could not be accompanied by a parallel announcement of continuation of a process leading "sooner or later" (in the words of Commissioner Spidla at the Lisbon Forum on SSGIs a month previously) to transverse legislation on social services of general interest.

From that point on, the process aimed at recognising the specificities of the social services sector, with a view to designing the right European framework for them, was replaced by attempts to assert that

there was no clash whatever between the requirements of Community law, including in particular competition and internal market rules, and the need for public regulation of social services.

The section of the Communication devoted to social services – less than two pages of it – merely recalled the process of exchange begun in 2006 and noted the scope of SSGIs as defined by the 2006 Communication and the fact that certain social services had been excluded from the Services Directive (*on a proposal by the European Parliament and despite the view of the European Commission!*).

The text referred to the consultation process launched under the auspices of the Social Protection Committee and included a boxed list (reproduced below) of specific characteristics that had been highlighted in the 2006 Communication.

Objectives and principles of organisation of social services

Social services are often meant to achieve a number of specific aims:

- they are person-oriented services, designed to respond to vital human needs, in particular the needs of users in vulnerable position; they provide protection from general as well as specific risks of life and assist in personal challenges or crises; they are also provided to families in a context of changing family patterns, support their role in caring for both young and old family members, as well as for people with disabilities, and compensate possible failings within the families; they are key instruments for the safeguard of fundamental human rights and human dignity;

- they play a preventive and socially cohesive role, which is addressed to the whole population, independently of wealth or income;

- they contribute to non-discrimination, to gender equality, to human health protection, to improving living standards and quality of life and to ensuring the creation of equal opportunities for all, therefore enhancing the capacity of individuals to fully participate in the society.

These aims are reflected in the ways in which these services are organised, delivered and financed:

- in order to address the multiple needs of people as individuals, social services must be comprehensive and personalised, conceived and delivered in an integrated manner; they often involve a personal relationship between the recipient and the service provider;

- the definition and delivery of a service must take into account the diversity of users;

- when responding to the needs of vulnerable users, social services are often characterised by an asymmetric relationship between providers and beneficiaries which is different from a commercial supplier / consumer relationship;

- as these services are often rooted in (local) cultural traditions, tailor-made solutions taking into account the particularities of the local situation are chosen, guaranteeing proximity between the service provider and the user while ensuring equal access to services across the territory;

- service providers often need a large measure of autonomy to address the variety and the evolving nature of social needs;

- these services are generally driven by the principle of solidarity and are highly dependent on public financing, so as to ensure equality of access, independent of wealth or income;

- non-profit providers as well as voluntary workers often play an important role in the delivery of social services,, thereby expressing citizenship capacity and contributing to social inclusion, the social cohesion of local communities and to intergenerational solidarity.

The Communication also mentioned the concept of an imbalance of information in the relationship between providers and beneficiaries of social services, without concluding from this that there was any

specific need for public regulation of their provision, or any latent conflict with the fundamental freedoms of the internal market – as reflected in the European Parliament's exclusion of social services from the Services Directive.

It went on to refer to the process of modernisation under way in the Member States, with a view to addressing new challenges and new social needs, to the increased outsourcing of social services and to their gradual inclusion within the scope of European law. This meant there was a need to clarify the rules applicable to providers and to public authorities in the Member States, particularly at local level …

"…an increasing number of activities performed daily by social services are now falling under the scope of EC law to the extent they are considered as economic in nature. This new situation has raised a number of practical questions, with the consultation showing that a number of stakeholders from the sector have difficulty in understanding and applying the rules, in particular State aid and public procurement rules. Local authorities and small providers in particular may lack awareness and information about EU rules, which can lead to misunderstandings and misapplication of rules on the ground. In particular, public authorities and service providers in the social field are sometimes less aware than in other sectors of the specific provisions of Article 86(2) presented above. The application of Article 86(2) requires from Member States the respect of certain basic conditions which have been developed in the case law of the Court and described by the Commission, notably in the texts on State aid adopted following the Altmark ruling which in practice exempt the vast majority of services performed at the local level from notification. Among these conditions, a clear mandate must be assigned by the competent public authority to the service provider regarding the operation of the service at stake. It is therefore important that Member States ensure that such adoption of acts of entrustment is effectively made for all services of general economic interest, including the provision of social services, in order to provide adequate legal certainty and transparency towards citizens."

The Communication does, however, acknowledge the need to strike a balance between application of the Treaty provisions and fulfilment of the general-interest remit of social services. In particular it states that:

"…specific provisions can be maintained to ensure that a balance is struck. For instance, the Court accepts the grant of exclusive or special rights for some services, as well as measures intended to regulate markets, such as authorisation systems, to the extent they are justified by public interest objectives and proportionate to the objectives pursued. In secondary law, the pursuit of public interest objectives by services of general economic interest is also taken into account in the Services Directive."

Among points that the Communication fails to mention, however, is the fact that the European Parliament – opposing the Commission's position – was responsible for the inclusion in the Services Directive of specific provisions on services of general interest (i.e. their exclusion from the overall rule of freedom to provide services, their coverage by Article 15 of the Treaty subject to the requirement that general-interest missions should be fulfilled, and the exclusion of social and health services). Similarly it fails to explain that, because there is no secondary legislation laying down assessment criteria, the justification of specific regulatory measures such as authorisation systems or special rights, granted in the name of public-interest aims and in accordance with the principles of necessity and proportionality, is ultimately the task of the Court of Justice.

The Communication concludes by asserting that the Commission will continue to consolidate the EU framework applicable to services of general interest, providing concrete solutions for concrete problems through application of Community law – an approach quite different from the systematic one advocated in the earlier Communication. The Commission also undertakes to answer questions via an interactive information service, with a website carrying questions and answers – examples of which are offered in two (very useful) documents appended to the Communication – on the subject of State-aid and public-contract rules applicable to social services of general interest.

2.3.2. THE TWO SUCCESSIVE RESOLUTIONS OF THE EP

SGIs and SGEIs still lack a clear legal framework in the EU. The only legally binding texts concerning SGIs (art.86 and art.87 TCE) are vague. Indeed, article 86 in particular stipulates that competition rules do not prevent companies running an SGEI from achieving their general interest mission. The text can be interpreted in several different ways, especially since there is no precise definition of an "SGI" or an "SGEI" in the treaty.

Parliamentarian reports have been trying to highlight these specific aspects of EU law in terms of services of general interest, also by proposing resolutions. Two notable resolutions, voted by the EU Parliament, were voted after two reports were published concerning SGIs.

The **Hasse-Ferreira report** highligthed the clear lack of a legal framework and, therefore, a growing legal insecurity about social SGI and SGEI. This issue is particularly relevant to social SGEIs: for example, the social housing sector, in which the cooperative movement is deeply involved, should not be subject to EU competition law. This is the reason why the report and the following resolution asked for a fixed outline, in order to define in which conditions a social SGEI should be excluded from the application of article 86.

However, in 2006, the EU Parliament voted on a resolution following the publication of the **Rapkay report**, in which the MEPs buried the idea of a framework directive. They followed the Commission's lead in saying that side and partial legislation on SGIs was beneficial to MS, and, as a global framework, protocol 9 of the Lisbon Treaty was sufficient.

However, such partial legislation leaves too much power to the Commission and to the ECJ, which are able to create new case law, without any general normative framework to frame their initiatives.

2.3.3. COMMUNITY LAW AND CASE LAW

2.3.3.1. Entrustment and state aid

I- A SGEI only exists if the territorial collectivity expressly entrusts the "enterprise"

Utilising the jurisprudence of the ECCJ in the BRT/SABAM case (C-12/73), the Commission does not recognize the existence of a SGEI if the enterprise has been officially entrusted with a particular mission by the public authority. This principle is similar to the recent national jurisprudence by which the French State Council determines if a private organisation is entrusted with a public service basing itself mainly on the intention of the entrusting public authority[8].

1- The " entrustment "[9], an essential criteria of compensation of SGEI

The official act by which the public authority designates the enterprise entrusted of the management of a SGEI and makes the compensation and the modes of control of this commitment possible are called "entrustment" by the Commission.

The decision of November 28, 2005 impose on the territorial collectivities "*to fix the framework of criterias and conditions applicable to the supply of services, regardless of the statute of the beneficiary and the question to know whether the service is provided on the basis of free competition.*"

Clearly defined obligations of public service

8 CE, sect., 22 February 2007 n°264541, Staff association in undertakings for disabled ; case in which the EC, enlighted by the work done in preparation to the law, recognised that the legislator considered that the mission ensured by the private organisations managing the social and professional insertion of disabled persons had been excluded

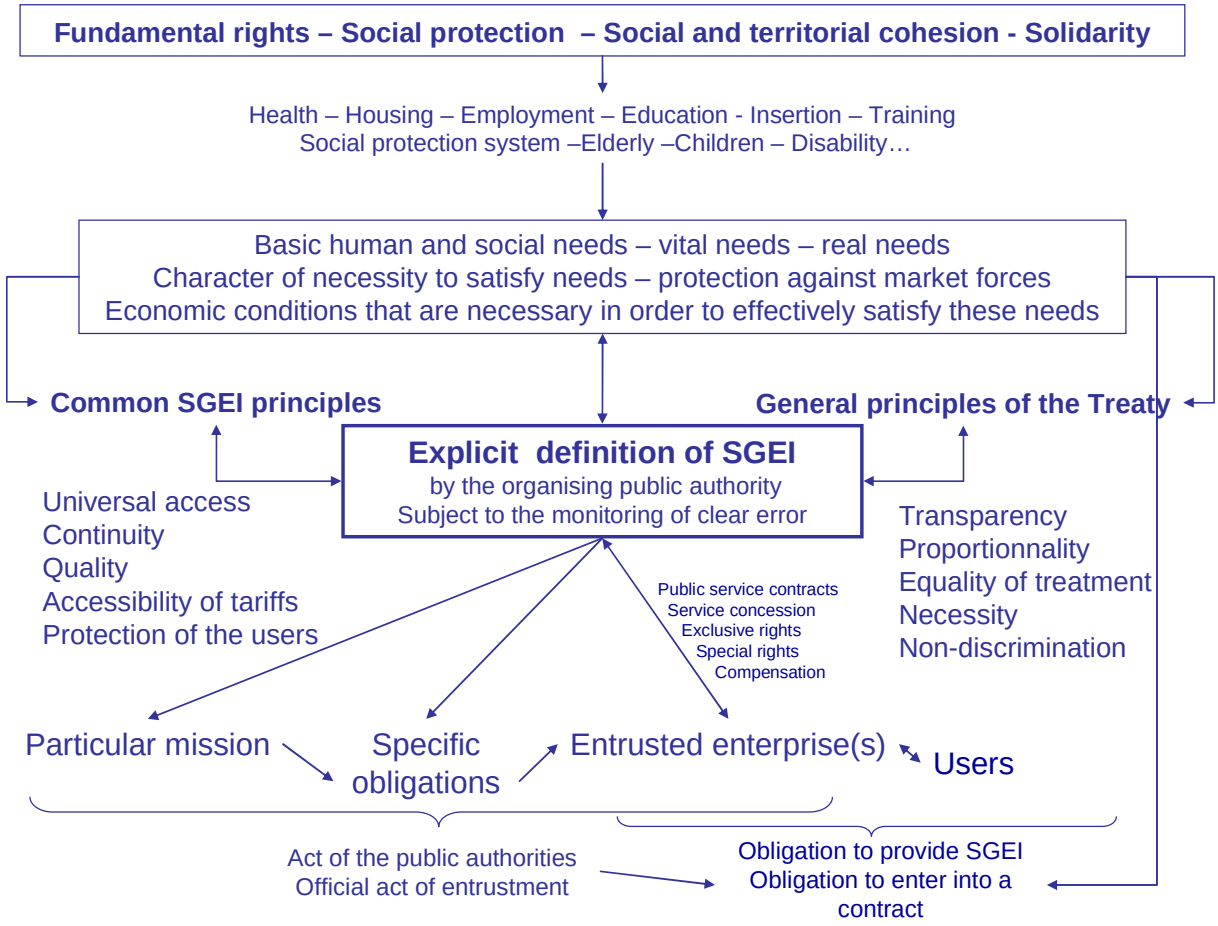
9 The term of « entrustment» is the one used in the Community decision 2005/C 297/04 to State aid in the form of public service compensation of 28 November 2005

If no particular mission has been entrusted to the enterprise by the territorial collectivity, there is by definition no general interest and thus no SGEI. The entrustment is therefore the essential condition of the SIEG.

As the French Council of state reiterated in its decree of April 6, 2007[10], Commune of Aix-en-Provence, when the delivery of services are entrusted to third parties, the principle is to resort to a contract stipulating the obligations of public services (OPS) entrusted to the enterprise.
The state Council mentions a series of cases that do not dispense the public authorities from issuing a contract : no matter whether the collectivity created or contributed to create the operator to which it considers entrusting the service or whether it is a member of its board or not, associated to or a simple shareholder of the enterprise. In every case, it is necessary to abide by the obligations of publicity and competition.

The " Altmark " case and the Monti Kroes package

The Member States are exclusively competent for SGEI and their missions. It is for this reason that the Treaty is somewhat vague in this regard since it is not responsible for their definition. On the other hand, today the potential field of SGEI and of SSGEI in particular, is clearly defined by the Commission's communications, although, once again, it is the responsibility of the relevant public authorities in the Member States to establish their field and the specific definition of SGEI (cf. chart below)



The "Monti Kroes package" confirms by law the conditions relative to the existence and compensation of a SGEI already defined strictly by the Court in its " Altmark " ruling[11]. This ruling is about public

[10] State council, Litigation department, 4 April 2007, *commune of Aix-en-Provence,* 284736, Lebon

[11] ECCJ, 24 July 2003, *Altmark Trans GmbH*, C-280/00, case law described in details in fiche n 2 about compensations.

funding limited to compensating the costs caused by the implementation of obligations of public services and that are " clearly defined"

The **Altmark case,** named after the ruling made on 24th July 2003, can be considered to be the most significant decision on which the whole legal architecture of SGEI lies. The facts are simple: a German local administration had its public transportation service handled by a bus company; it provided financial help to this company because of the obligations imposed. The contract was renewed without any public tender, and a competitor attacked the contract.

Even though land transport has its own special legislation, the Court took the opportunity to clarify and to specify the rules about state aids and SGEI

Regarding community law,

1 – How is it possible to know if a company runs a SGEI?

2 – Is the administration allowed to financially help the company?

3 – Would the contract remain legal if there was no public tender?

The Altmark verdict basically says: If the company does run a SGEI, then, according to article 86, §2 of the ECT (Treaty establishing the European Community) there could be a way in which it could even avoid the application of European competition rules, and therefore, be elegible for funding from the administration. Before the Altmark ruling, this situation was clearly hypothetical. The Altmark decision accordingly set out the basis on which public funding could no longer be considered to be "state aid" but rather "public service compensation"

Those elements are:

- SGI obligations must be clearly defined,
- the compensation must be previously calculated fairly and transparently, in order to ensure that it has an economic advantage that may encourage the recipient company compared to competitors,
- the compensation cannot exceed what is necessary to cover all or part of the costs incurred by the execution of the public service obligations, taking into account receipts and a reasonable profit on the implementation of those obligations,
- finally, where the contract is not made within the framework of a public procurement procedure for selecting the candidate capable of providing those services at a lower cost, the level of compensation has to be determined on the basis of an analysis of costs that an average company, well managed and adequately equipped with means of transport, would have incurred in fulfilling these obligations.

Even though the Altmark decision constituted an important step in the process of clarification of the SGEI concepts, several vague areas remained, particularly with regard to the application of the last criteria: for example, what is a "well managed company"?

The Commission eventually attempted to complete the ECJ's work about SGEI by specifying, to some extent, the status of compensations of public services in releasing a series of measures called the "**Monti/Kroes package**" the most important provisions of which are the following:

- The SGI compensations that meet the four conditions of Altmark do not constitute state aids. However, a company must maintain separate accounts for its activities carried out under a mission of public service and its other activities, still placed under normal competition rules. This will facilitate the control over the financing of these activities.
- Those which constitute state aid but are presumably compatible with the common market, within the framework of Article 86, paragraph 2 of the Treaty. This is the most innovative point of the Monti/Kroes package. This applies in particular to compensations under 30 million Euro granted to a company whose turnover does not exceed 100 million Euro. Some sectors, such

as hospitals, businesses and social housing or transportation to islands, are also excluded from the scope of state aids subject to prior notification.

Those which constitute state aid and remain subject to prior notification. This corresponds to a significant amount of aid attributed to large enterprises. The aid must be notified to the Commission, which may decide to accept or reject them.

2. Form and content of the "entrustment"

The form of these contracts is freely defined by the public authority. The essential is that the entrustment clearly appears.

In practice, the territorial collectivities will be able to decree deliberations of general scope, conventions of public service delegation.

According to the fourth criteria of the Altmark jurisprudence, the designation of the enterprise in the framework of a public tender is an official document (of "entrustment", in the sense of the decision of November 28, 2005) by which the exact nature, scope and duration of the OPS is specified, as well as the precise designation of the enterprise.

Thence, this primordial condition is not always fulfilled for a number of SIEG entrusted to enterprises without previous competition.

Compulsory mentions

Several clauses must be explicitly mentioned in the entrustment contracts. They are listed under article 4 of the decision of November 28, 2005 :

a. the nature and length of the obligations of public service;
b. the enterprises and territories concerned ;
c. the nature of possible exclusive or special rights delegated to the entreprise ;
d. the criteria of calculation, control and audit of the compensation (this mention is related to condition n°2 put by the Court in its Altmark rulin g according to which " *the criteria on the basis of which the compensation are calculated must be previously established objectively and transparently, in order to avoid its constituting an economic advantage favouring the beneficiary enterprise as compared to competing enterprises*") ;
e. the modes of repayment of the possible overcompensations and the means to avoid those overcompensations.

Today, many official documents of the territorial collectivities entrusting a SGEI to an enterprise do not contain all those mentions. An effort in this sense will have to be requested to them because their absence creates the conditions for litigation.

Precariousness of the entrustment

This list of obligations highlights the temporary character of the mandate, which must be limited in time and regularly updated[12].

II The official act is tantamount to controllable commitment by the Commission

The territorial collectivities must ensure the conformity of the SGEI compensations being qualified as state aid to the provisions of the Monti-Kroes package and make sure that the compensation is previously defined, strictly equivalent to the expenditures that the OSP incur while taking into account a reasonable profit for the beneficiary enterprise.

[12] Eg contracts such as the agreements of delegation of public service, which 'should be limited in their duration « (L. 1411-2 du CGCT)

The territorial collectivities must submit themselves to an *a priori* control if necessary and *a posteriori* in any case. The package of November 28, 2005 imposes a certain number of controls that add up to the competition controls already existing.

1. The obligation of notification of state aid

For the large enterprises entrusted with the implementation of a SGEI whose compensation exceeds the thresholds defined by the decision, the aid must be notified previously to the Commission, which must allow it before it is implemented.

In case of doubt on the compatibility of a state aid project, the territorial collectivities always have the faculty to notify it to the Commission prior to its entrustment :

- Possibility to request an opinion uphill; the aid régime considered is then transmitted to the general direction of the local collectivities.
- Possibility of notification always available ; the examination in common with the general secretariat to European affairs and the relevant ministry should permit to define if the régime is in conformity with the principles of the community framework for state aid as compensation of public service.

2. Triennial report on the implementation of state aids exempt of notification

The Commission demands the submission of a report on the implementation of the decision containing a detailed description of the conditions of implementation of the decision on all sectors (article 8 of decision C2005 / 2673).

The 1st report must be communicated on December 19, 2008. It must allow the Commission to achieve at the latest by December 19, 2009 an impact assessment "*based on factual information and the results of wide consultations conducted by the Commission on the basis, notably, of data provided*", as the decision of November 29, 2005 specifies.

3. Control of the abidance of the Community prescriptions by the territorial collectivities

Article 6 of this same decision foresees that the member states proceed to or entrust regular controls in order to make sure that the enterprises do not benefit from overcompensations.

The implementation of those regular controls is presently the object of no particular provision but is being done through the classical procedure of legality control. Within this framework, the repayment by the enterprises entrusted with a SIEG of any overcompensations will be required.

Prudence is called for, because any competing enterprise can file a complaint to the Commission in application of article 20 paragraph 2 of EC regulation n° 659/1999 that stipulates that all interested parties can inform the Commission of any illegal aid.

Furthermore, it is necessary to observe that article 7 of the decision imposes on member states to make available to the Commission, for ten years at least, all necessary elements to establish if the defined compensations are compatible with the common market.

In the end, the compensations established by the Commission decision see their legal security reinforced because they cannot be put in question for absence of previous notification to the Commission, ie for non abidance of the formal conditions. In turn, they remain subject to the basic conditions of community law.

2.3.3.2. Notion of compensation

Under Community law, the public aids accorded to SGEI are analysed in terms of compensation. The aim is to ensure the financing of the mission of general interest and the costs inherent in the provision of the SGEI under the conditions fixed by the public authorities in terms of public service obligations.

To the extent that the compensation is granted to enterprises entrusted with the provision of the SGEI and in cases in which the amount of the compensation does not exceed the costs of the SGEI, the Commission considers that development of trade is not affected in a way that would be contrary to the Community's interests, notably for small SGEI (there are ceilings in terms of turnover and the amount of compensation). In such cases, the Commission considers that the compensation may be deemed to constitute a state aid that is compatible with article 86§2 ECT.

The amount of the compensation should not exceed what is necessary to cover the costs incurred in carrying out the public service obligation, taking into account receipts and a reasonable profit on the implementation of these obligations.

The compensation must actually be used to ensure the functioning of the SGEI concerned, without prejudice to the enterprise's capacity to benefit from a reasonable profit. The amount of the compensation should include all of the advantages accorded by the state or through the state's resources, regardless of the forms this may take.

The reasonable profit should take into account all or part of the productivity gains achieved by the enterprises in question over the course of an agreed and limited period, without reducing the quality of the services entrusted to the company by the state.

The costs to be taken into account include all of the costs incurred by the operation of the SGEI. They are calculated as follows, on the basis of principles of analytical accounting that are generally accepted:

- where the enterprise's activities are limited to SGEI, then all of the costs may be considered;

- where the enterprise also undertakes activities outside SGEI, only the SGEI related costs may be considered;

- where the costs attributed to the SGEI may cover the variable costs incurred by the provision of the said service, a contribution that is proportional to the fixed costs that are common to the service in question and to other activities, as well as a reasonable profit;

- the costs related to investments, notably in infrastructures, may be taken into account in cases in which they are necessary to ensure the provision of the SGEI.

The receipts to be taken into account include at least all of the receipts earned through the provision of the SGEI. If the enterprise in question benefits from special or exclusive rights related to another SGEI that generates profits in excess of the reasonable profit, or benefits from other advantages granted by the state, then these are included in the receipts, irrespective of their definition under article 87 ECT.

The Member States concerned may decide that the profits generated by other activities outside of the SGEI must be allocated, either in part or totally, to the financing of the SGEI.

It would be appropriate to take the notion of "reasonable profit" to mean a rate of return on an enterprise's own capital that takes into account the risk, or absence of risk, faced by the enterprise as a result of the intervention of the Member State, particularly if the latter grants special or exclusive rights. Under normal circumstances, this rate should not exceed the average rate recorded in the sector over recent years.

In sectors in which there are no enterprises that may be compared to the enterprise that has been entrusted with the running of the SGEI, a comparison may be drawn with enterprises established in

other Member States or, where necessary, that operate in other sectors. In order to determine what constitutes a reasonable profit, the Member States may introduce incentive based criteria that are related, in particular, to the quality of the service provided and to productivity gains.

In the case of enterprises that carry out activities that fall both within and outside the context of SGEI, then its internal accounts should provide a separate indication of the costs and receipts related to these services and to other services, as well as the parameters used to allocate the costs and the revenue.

The costs related to any activities outside the SGEI must cover all of the variable costs, an adequate contribution to the fixed costs as well as an appropriate return on capital. No compensation may be granted for these costs.

2.4. SSGI AND PUBLIC PROCUREMENT – PUBLIC PRIVATE PARTNERSHIPS AND CONCESSIONS

2.4.1. PUBLIC PRIVATE PARTNERSHIPS

Public private partnerships (PPP) represent a method of financing through which a public authority makes use of a private service provider to partially finance and to manage services that ensure or contribute to the provision of services of general interest (or "public services" as they are called in certain Member States). In return, the private partners receives a payment from the public partner and/or the users of the service that it manages.

"The partnership contract enables a public authority to entrust an enterprise with a global mission to finance, design (either in part or its totality), construct, maintain and to manage public facilities, works or services that correspond to the public service mission of the administration, within the framework of a long-term arrangement and against payment made by the public purse over the course of time. The aim of this type of partnership is to optimise the respective performances of the public and private sectors so as to be able to carry out, within the best timeframe and conditions, the projects that are of a complex and urgent nature for the community: hospitals, schools, IT systems, infrastructures. The advantages of this new type of contract are multiple: the shortening, through pre-financing, of the time it takes to complete projects; an innovatory approach that is to the benefit of the whole of the community through the dynamism and creativity of the private sector; an overall cost approach; performance guarantees over the course of time; a sharing of the optimal risk between the public and private sector, with each party bearing the risk over which it has the best degree of control."[13]

2.4.2. CONCESSIONS

Directive 2004/18/EC [14] defines service concessions as contracts that have the same characteristics as public service contracts, the only exception being that the consideration granted in return for the provision of these services consists solely in the right to provide these services and this right is often accompanied with an indication of the price.

Nevertheless, concession services are submitted to the rules and principles set out in the EC Treaty. A service concession exists when the operator bears the risks related to the establishment and operation of the service. These services are paid for by the users, usually through the collection of a fee. As is the case for work concessions, service concessions are characterised by a transfer of responsibility for their operation. [15]

[13] Definition given by the French Ministry for the Economy, Industry and Employment: http://www.ppp.minefi.gouv.fr/

[14] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, modified by Directive 2005/51/EC of the Commission of 7 September 2005 modifying annex XX of the Directive 2004/17/EC and annex VIII of the Directive 2004/18 of the European Parliament and of the Council on public procurement

[15] European definition given in SCADPlus : http://europa.eu/scadplus/leg/en/lvb/l22011.htm

2.4.3. PUBLIC PROCUREMENT AND SSGI

The Commission has published a working document called "Frequently asked questions concerning the application of public procurement rules to social services of general interest"[16] and point 2.6 of this document would appear to run counter to the interests of cooperatives and is in contradiction with their principles.

"**2.6.** Is it allowed to introduce as a criterion for the selection of a service provider its familiarity with the local context, this aspect being often essential for the successful provision of an SSGI?

EC public procurement rules aim at ensuring fair competition among operators across Europe to provide better value for money to the public authority. A requirement of familiarity with the local context might lead to an unlawful discrimination of service providers from abroad. At the same time, it risks reducing the public authority's choice to a small number of local operators and consequently diminishing the beneficial effect of European wide competition. Nevertheless, certain requirements related to the local context may be acceptable if they can be justified by the particularities of the service to be provided (type of service and/or categories of users) and are strictly related to the performance of the contract.

Examples:

• A public authority may, for instance, require that the successful tenderer establishes a local infrastructure such as an office or a workshop or deploys specific equipment at the place of performance if this is necessary for the provision of the service.

• A municipal authority intending to put in place a shelter for women in difficulty, mainly addressed to women from a specific cultural minority, may specify in the call for tenders that the service provider should already have the experience of this kind of services in an environment presenting similar social and economic characteristics and that the employees who will be in contact with and/or address the needs of the women in difficulty should be sufficiently familiar with the relevant cultural and linguistic context.

A public authority that intends to put in place a job placement service focused in particular on young adults from disadvantaged areas and addressing in an integrated way the specific difficulties encountered by the users (e.g. mental health problems, alcohol or drug addictions, social housing and indebtedness) might specify that the service provider should have experience with this kind of services for similar target groups. It may also indicate that the service provider should ensure that as of the beginning of service provision the employees dealing with the users have a knowledge of the already existing networks of social actors with whom they will need to liaise in order to address in an integrated way the needs of the young unemployed adults.

In any event, a restriction of that kind must not go beyond what is strictly necessary to ensure an adequate service provision. The ECJ decided, for example, that in tendering a public contract for health services of home respiratory treatments a public authority cannot require a potential tenderer to have, at the time when the tender is submitted, an office open to the public in the capital of the province where the service is to be provided.

It is the responsibility of the public authority to make sure that such conditions are objectively justified and do not result in a discriminatory treatment by unduly favouring certain groups of bidders, in particular local undertakings or incumbent service providers." [17]

[16] Sec(2007)1514/3

[17] idem

2.4.4. DIRECT PROVISION

It is quite clear that in cases in which services are supplied directly by the national, regional or local authorities, then they are exempt from the application of the provisions of Community law, whereas in the case of entrustment, commissioning, public private partnerships, then these provisions either are applied or may be applied.

2.4.5. THE "IN-HOUSE" ISSUE

The "in-house" provision of services is a fundamental notion for the awarding authorities. In principle, these actors are subject to the obligations of transparency and equal treatment as set out in the European treaties, as well as the public procurement rules that derive from the treaties.

The "in-house" notion allows them to be exempt from these obligations in the sense that the Community authorities believe that the link between the provider and the awarding authority is such that they are one and the same and, as a result, that the legislation on public procurement and the general principles of transparency are not applicable.

The difficulties encountered in using this notion are to be found in the fact that its definition has only been established through case law. Furthermore, the rulings of the European Court of Justice actually make it possible to define the areas that are not covered by this notion, rather than those that are covered.

The "in-house" notion in the case law of the Court of Justice:

1/ Teckal ruling, 18 November 1999: this is a fundamental ruling for the definition of the "in-house" notion since it sets out the contours around which the judge may consider the notion to be applicable. The ruling sets out the principles of various definitions that will then be further clarified through future rulings. In this case, the Community judge was called upon to rule on the conditions surrounding the awarding, without the application of the public procurement rules, of a services contract for the heating of municipal building between a municipal authority and a group of authorities. On this particular occasion, the Court recognised the possibility of using the "in-house" notion so as to be exempt from these rules, subject to two conditions: that the contract be concluded, on the one hand, between a public authority, and on the other, an entity that is legally distinct from the authority. The only other way in which the notion may be applied is in the hypothetical case in which the authority exercises a similar control over the entity in question as it does over its own departments or that the entity carries out the essential part of its activities with the authority or authorities that exercise this control over it.
The conditions for the application of the "in-house" notion are therefore as follows:

- an entity that is distinct from the awarding authority
- a similar control exercised over the service provider by the authority, or in other words a control that is equal to that which it exercises over its own services
- the essential part of the providers' activities are carried out with the awarding authority.

These conditions are cumulative.

2/ Spain v European Commission ruling, 8 May 2003: This ruling refers in general to a decision taken by the Kingdom of Spain to undertake the clearance of accounts under EAGGF (agriculture) expenditure and, in particular, the awarding of a works contract for the establishment of an oil register to a state owned company, Tragsa, in which the local authorities are entitled to hold part of the share capital.
As an instrumental arm and technical service of the Spanish administration, Tragsa is required to undertake, on an exclusive basis, the work entrusted to it by the Spanish autonomous communities and the related public bodies.
The Court considered that the members of this company, in which the capital is public and which carries out activities deemed to be exclusive and obligatory under Spanish law, as well as benefiting from a special regime, despite the fact that it has been established as a joint stock company, exercise **a joint similar control** over the company. Furthermore, the essential part of its activities is carried out

on behalf of the awarding authorities and therefore the “in-house” criteria may be considered to be fulfilled.

3/ Stadt Halle ruling, 11 January 2005: this is the first ruling to define the application of the notion of **similar control** so as to establish whether or not the “in-house” notion is applicable, and will be further clarified in the ensuing rulings. This case refers to the awarding of a waste processing contract between an authority and a semi-state (mixed economy) company. In the Court’s view, the fact that private capital, albeit on a minority basis, is held within the entity that is legally distinct from the authority, means that the condition of “similar control” is not applicable. The presence of private capital in the share capital of the service provider excludes the possibility of applying the "in-house" notion.

4/ Coname ruling, 21 July 2005: This ruling refers to the awarding of a service concession for the management and maintenance of gas installations between an authority and a public company in which the authority holds part of the share capital. The fact that the authority holds only a small amount of the public company’s share capital, 0.97%, may not be used as an argument in favour of claiming that the condition of “similar control” has been fulfilled in this case. However, it is the responsibility of the national judge in this case to establish whether there are “objective circumstances” that may justify the absence of publicity when this concession was awarded.
> Since service concessions are not subject to public procurement rules, then it is at the national level that a decision must be taken to establish the appropriateness of the means to be used to guarantee the principle of transparency and the possibility of being exempt from this principle on the grounds of the existence of “objective reasons”.

5/ Parking Brixen ruling, 13 October 2005: this case refers to the awarding of a concession for the management of parking services between an authority and a private company whose share capital had initially been entirely public before becoming mixed. The conversion of the public company into a joint stock company, with the related expansion of its capital, which was then required to open up its capital in the short term to other capital, together with the extension of its territorial competence and a Board that has considerable powers, means that the "in-house" notion may no longer be applied since the condition of “similar control” is not fulfilled under these circumstances.

6/ Mödling ruling, 10 November 2005: the ruling refers to the awarding of a waste management contract between an authority and a company whose capital was entirely public at the time and which had an exclusive right to carry out these activities. The company then opened its capital to private capital (49%) and this led to the application of the case law established in the Stadt Halle case, since the presence of private capital in the share capital of the service provider removes the condition of “similar control”. The fact that the company’s capital was entirely public at the time when the contract was awarded is not sufficient, since the European judge considered that the company had opened up its capital very soon after it had been created and that this element had an adverse effect on the application of the public procurement rules.

7/ ANAV ruling 2006: the ruling concerns the awarding of a transport service concession between an authority and a company in which it holds the entirety of the share capital. The authority then considered the possibility of selling 80% of the share capital to private investors by organising a call for bids to select the investors. However, the authority did not go through with these plans and no longer has any intention of disposing of part of its capital. The Community judge therefore applied the case law regarding the "in-house" notion, referring to the Teckel criteria, and consequently ruled that the company that has been awarded the concession is held entirely by the authority that therefore exercises over it a similar control to that which it exercises over its own departments.

8/ Cabotermo ruling, 11 May 2006: this ruling concerns the awarding of a contract to supply fuel and to maintain and to update heating installations in a series of buildings between an authority and a company that is held to the tune of 99.98% by the same authority, with the remaining 0.02% being held by other neighbouring authorities. However, the company in question has broad managerial powers that it is able to exercise independently. Furthermore, the authority does not hold 99.98% of the share capital of this company directly, but rather does so through a holding company.

The ruling was made on the basis of the application of the case law on the "in-house" notion and provides further clarification regarding the second criteria of the Teckal ruling:
- the notion of similar control is not applicable where the entity that is distinct from the awarding authority benefits from broad managerial powers, despite the way in which its capital has been constituted
- the same rule applies in cases in which the awarding authority holds the share capital of the distinct entity indirectly, e.g. through a holding company
- the condition of the entity carrying out the essential part of its activities with the awarding authority must be understood as taking into account all of the activities undertaken by this entity on the basis of a contract awarded by the authority, regardless of knowing who pays for these activities and which territories are covered by them.

9/ TRAGSA ruling, 19 April 2007: this ruling is a follow-up to the previous ruling: Spain v the European Commission, 2003.
Tragsa is a State company that provides essential services for rural development and environmental conservation, held by the Spanish autonomous Communities. The complaint challenges the fact that the Spanish autonomous Communities "award" contracts to this company without opening up this procedure to competition.
In Spanish law, Tragsa is defined as an instrumental arm and technical service of the administration. The tariffs in the contracts in question are set by the competent public authority.
In this case, on the basis of the specific situation in which Tragsa finds itself, the Community judge confirmed the Court's case law and recognised the existence of the "in-house" notion. Indeed, several awarding authorities may exercise a similar control over a distinct entity.

An interpretative communication on the "in-house" notion, drawing together the case law of the ECJ, has been announced for some time now by the European Commission, although it has yet to see the light of day. Nevertheless, the "in-house" notion has undergone a series of positive developments in the specific sector of passenger transport, since, in a recent regulation, the executive powers decided to move away from case law in this area in order to propose a more open regulatory definition: the notion of similar control does not mean that **the public authorities must hold 100% of the share capital of the distinct entity*, as long as the public sector exercises a dominant influence and that control may be established on the basis of other criteria.***

2.5. SSGI AND HUMAN RIGHTS

It is important to underline that, differently from other so-called "network" services of general interest, which are currently being deregulated – services essential to economic life such as power supply, transport and electronic communications, that have developed at Community level – the services in question here, including not only health, housing and employment provision but also education and training, services for people with disabilities and the elderly and social inclusion services, are of basic importance to the lives and livelihoods of European citizens. All of them come under the heading of social protection and contribute to the everyday quality of life and the wellbeing of the Europe's citizens; they are provided locally, close to the people who use them, and are tailored to their needs; and universal access to them is guaranteed at Member State level and internationally through the fundamental rights proclaimed by the Council of Europe and the United Nations.

Together these services, historically linked as they are to the families of the social economy, are an integral part of the European social model today and in the future. Foreseeable developments in social need, combined with the social reality of the European Union, will require the Member States to legislate in order to meet the demands of modernisation and to adapt social services to people's requirements. In the light of the European Union's Charter of Fundamental Rights, this makes legal clarification with regard to the provision of services more than necessary.

3. MID TERM VISION – TOWARDS A NEW LEGAL FRAMEWORK

3.1. THE UTILITY OF A HORIZONTAL LEGAL FRAMEWORK: FRAMEWORK DIRECTIVE, REGULATION, NEW TREATY?

The question of the appropriateness of a framework directive for SGEI has long been the subject of a debate that was launched by the European Commission's White paper in 2004 and closed by the Commission's most recent communication in 2007.

Neither the Commission, nor the Council, nor the European Parliament supported such an initiative in the absence of a consensus within these institutions. For many different reasons, ranging from subsidiarity to the absence of a clear legal basis on which to launch such a directive, these institutions consider that the current provisions of the Treaty, namely articles 86§2 and 14, as well as the new SGI protocol in the Lisbon Treaty, are sufficient to act as a framework for SGEI, at the same time taking into account the broad area of competence of the Member States in terms of definition, organisation and financing.

On the other hand, the Committee of the Regions and the European Economic and Social Committee continue to be very much in favour of a framework directive on SGEI.

In the past, this debate had been particularly animated within the European parliament at the time of its adoption of the services directive, but it proved impossible to reach a consensus that may have led to the establishment of a majority vote in favour of framework directive of this type on SGEI, in parallel with the framework directive on services within the internal market.

Nevertheless, the European Socialist Grouping within the European Parliament, together with the CEEP, ETUC and CELSIG, had drawn up a draft framework directive so as to specify its contents and to demonstrate its feasibility. The ETUC also launched a petition calling for the establishment of a framework directive for SIEG.

By revising article 14 and introducing a new protocol on SGI, the Lisbon Treaty would change the legal basis if it were to be applied. The revision of article 14 introduces the notion of a regulation on SGEI that would be designed to establish the principles and to define the modalities for the requirement of the fulfilment of missions of general interest. Unlike a directive, a regulation of this type would be directly applicable without having to be transposed into national law in the Member States, whilst the Protocol would specify the lead role that should be taken by the Member States to define, organise and finance SGEI.

The Socialist Group in the European Parliament has adjusted its strategy in light of this new legal framework and has turned its framework directive on SGEI into a regulation on SGEI.

3.2. WHAT SORT OF STRATEGY SHOULD BE ENVISAGED FOR THE SHORT AND MEDIUM TERM?

A strategy to be envisaged could be set out over three stages:

1. Immediately encourage the Member States to make the fullest possible use of the current Treaty provisions regarding SGEI by bringing about, within their national law, the clear definition of activities that fall within the scope of SGEI and the entrustment of the actors. The evaluation of the Monti-Kroes package on state aid should lead the Members States to clarify and to clearly state the SGEI nature of activities of general interest, particularly through the surveying of companies entrusted with the operation of SGEI and their clear entrustment. The transposition of the services directive into national law will also represent a move in this direction since it will lead the Member States to define the non-economic SGI to be excluded from its fields of application, as well as the SGEI excluded from the fields of application of the

freedom to provide services. The cooperative sector and the social economy in general must make sure that they take part in the national debates on this question.

2. Further analyse the areas of tension between Community law and the fulfilment of missions of general interest in the Member States so as to propose specific solutions within the framework of the next term of office for the period 2009-2014. Financing, modalities for the awarding of SGEI missions, public procurement, concessions, "in-house" notion …are all areas of tension that that may be the subject of thematic regulations that are specific to SGEI and that are more likely than a horizontal instrument to form the basis of a consensus within the Parliament and the Council. The evaluation, in 2009, of the Monti-Kroes package on the financing of SGEI will represent a first of its kind, bearing in mind the new co-decision legal basis introduced by the Lisbon Treaty.

3. Integrate the revision of the Lisbon Treaty and immediately begin to explore further avenues for work on SGEI and entrustment of companies entrusted with the operation of SGEI. At this stage of the analysis, only working hypotheses may be formulated with a view to them being developed and further analysed, notably in the areas of:
    a. a more precise definition of the SGI that are not covered by the provisions of the Treaty, due to their non-economic nature,
    b. the development of the principle of neutrality regarding the different modes of holding and operating companies that are charged with the running of SGEI, so as to be able to take into account the different modes of conducting business (associative, cooperative, mutualist, capitalist) and to guarantee that equal treatment is given to these different modes, rather than allowing the capitalist method of conducting business to be the only point of reference,
    c. clearly stating the principle of continuity of SGEI and of its connection with the companies created specifically to guarantee this continuity at the local level, notably on the basis of specific modes of conducting business.
    d. Defining a scale of SGEI that does not result in an impact upon intra-community trade and is not subject to state aid controls.

CONCLUSIONS

The gradual, strategic approach is in keeping with the planned review of the Lisbon process in 2010, with the adaptation of SSGIs to the changing social reality of the European Union, with contributing to the movement for active inclusion that is already under way, and with responding to the changing needs and the developing social-interest remit of social economy organisations, particularly in terms of promoting social integration and complementing the European social partners' efforts in the area of flexicurity.

The question is, however, how the ongoing processes of modernising SSGIs at Member State level are to be dovetailed with these Community developments if there is no guarantee of legal security for service providers and the public in relation to the conditions under which social services are supplied, financed and regulated.

How can intensification of the internal market as it affects ordinary people – and in the interests of ordinary people – be legitimised if the question of services of basic importance to life and livelihood is airbrushed out of the picture because it is too awkward and illustrates too starkly that uniform application of internal market rules can only go so far?

How can people believe in the image of a Europe that protects them if national arrangements for ensuring solidarity and for financing and regulating social provision are challenged in the Court of Justice of the European Communities in the name of a mechanical implementation of internal market rules which the Communities' founding fathers never intended for application to the social sphere?