



Services of General Interest and Social Services of General Interest after the Lisbon Treaty and the Commission Communication "Services of general interest, including social services of general interest: a new European commitment"

Analysis paper

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KEY FINDINGS

- Although it is recognised that Services of General Interest are mainly a competence of the EU Member States, Art. 14 of the new Lisbon Treaty requires that the European Union **takes regulatory actions in this field**.
- A Protocol which is linked to new Treaty **defines key values** for Services of General Interest such as quality, user rights, safety and affordability, equal treatment and universal access
- Social services are currently dealt with at EU level in the framework of the **Internal Market Review**, which shows that the 'market-related' aspects of service provision prevail on the fundamental rights and social policy objectives.
- The European Commission **recognises the added value of non-for-profit service providers** in terms of citizenship, social inclusion, social cohesion and intergenerational solidarity. Moreover, the European Commission recognises that need for a certain degree of autonomy for service providers to fulfill their role. These statements could be used for lobby activities at both national and European level.
- The European Commission expresses for the first time its explicit support to the **development of a (voluntary) EU quality framework for social services**.

1. Background

The *Treaty of Lisbon* (also known as the *Reform Treaty*) is a treaty signed on December 13, 2007 at a Summit in Lisbon, Portugal. It amends the existing treaties of the European Union. It is due to come into force in 2009, if successfully ratified by all EU Member States, and would carry out some of the reforms previously proposed in the European Constitution, which was rejected by referenda in 2005.

The Treaty of Lisbon makes some important statements with regard to public services or Services of General Interest (SGI) as they are known in EU jargon. SGI are widely known as essential services such as water supply, gas, electricity, postal services, transport as well as social and health services. They all pursue two main objectives: implement fundamental social and economic rights of people and achieve economic, social and territorial cohesion. After the first horizontal Communications on SGI in 1996 and 2000, the European Commission has published in 2003 a Green Paper on Services of General Interest followed in May 2004 by a White Paper on Services of General Interest.

In November 2006, after much discussion and great controversy, the final version of the 'Services Directive (also known as the Bolkestein Directive) was adopted, as part of the general liberalisation of the European internal market. Health services and some social services have been excluded from the scope of this Directive. In parallel the European Commission has adopted two Communications, one on Social Services of General Interest (April 2006), the other on health services (September 2006).

Adding to the debate on SSGI, the Commission adopted in November 2007 a Communication on "Services of General Interest, including social services of general interest: a new European commitment" supported by three staff working papers¹. This Communication reviews progress made since the 2004 White Paper, also in the light of the provisions of the Treaty of Lisbon. It draws on the public consultation on social services initiated in 2006.

2. The legal situation of services of general interest according to the Treaty of Lisbon

Following the adoption of the Lisbon Treaty two major changes as compared with the present situation can be identified:

- ***A legal basis for future European legislation on services of general interest***

The first important change already been agreed on in the draft Constitutional Treaty. It consists in *adding words* to the present Article 16 (future Article 14 of the "Treaty on the functioning of the European Union") so as to provide for a legal basis for a future European legislation on services of general interest.

An additional change included to the ones already foreseen by the draft Constitutional Treaty is the common competence of the Parliament and the Council to adopt a Community instrument, which is a shared competence of the European Union and its Member States. It is significant to note that the instrument chosen has been a *Regulation* rather than a *Directive*, which leaves less room for flexibility and interpretation at national level. This decreases the probability of a fast adoption of such a legal instrument.

Future Article 14 will then read (changes in italics):

"Without prejudice to *Article 3a* of the Treaty on European Union or to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions, *particularly economic and financial conditions*, which enable them to fulfil their missions.

"The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services."

This forthcoming Article 14 not only provides a legal basis for legislative initiative, but also mandates the Council and the Parliament to adopt such legislation. Thus, by the wording

¹ http://ec.europa.eu/services_general_interest/index_en.htm

“shall establish” used in Article 14 it should be understood that there is no other option but delivering on this provision. Thereafter, adopting “principles and conditions” for services of general interest is not just an option, but a requirement. The Commission therefore must take responsibility and not only act in this direction “if necessary”.

- ***Defining cross-national values for services of general interest***

The second important change is the annexing of a politically significant Protocol on Services of General Interest to the Reform Treaty. This Protocol has the same legal value as the Treaty, but has to be understood as a legally binding “interpretative provision”. It reads as follows:

<p>PROTOCOL ON SERVICES OF GENERAL INTEREST</p> <p>Article 1</p> <p>The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:</p> <ul style="list-style-type: none">– 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. <p>Article 2</p> <p>The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic.</p>

The Protocol agreed alongside the Treaty of Lisbon sets out the EU principles applicable to services of general interest and establishes a new, transparent and reliable framework at the level of the Treaty. This draws the lessons of a decade of debate about the role of the EU and it highlights the convergence of views, notably since the 2004 Commission's White Paper. A document on services of general interest, including social services of general interest, is presented alongside this review to take stock of this new situation.

3. SGI: is there a need for further legal action?

The Commission believes that “the Protocol annexed to the Treaty of Lisbon provides a coherent framework that will guide EU action and serves as a reference for all levels of governance. By clarifying the principles and setting out the common values underpinning EU policies, it gives visibility, transparency and clarity to the EU approach applicable to services of general interest.”

However, other than its unquestionable contribution to the Community primary law (treaties), as regards the principles, it cannot be considered that the Protocol provides all the legal security necessary in all areas concerned. Further, in addition to the fact that there is no evidence to assure that these principles are respected by the various sectoral policies or network services, one can neither regard that they are being observed in all social services.

Moreover, the Commission seems to accord little importance to the provisions of the new Article 14 (the amended Article 16) of the Treaty, on the functioning of the EU, thus neglecting the major innovations that it contains: legal basis for a secondary law (i. e. a regulation); the Council-Parliament codecision; reference to the powers and rights of Member States and their communities. In addition, all EU policies, including internal market and

competition, will have to take account of these provisions because Article 14 is included under the "general provisions for the implementation" section of the treaty. The Commission, therefore, seems to refuse to see and, hence, to apply the complementarity between the Protocol and Article 14.

The debate on the need for a transversal legislative framework for SGI is thus not terminated by the Protocol, annexed to the modified treaties, contrary to what the Commission would want to make known. A serious assessment of measures adopted on SGEI, over the last 15 years has, hitherto, never been carried out. Moreover, by seeking to quickly put an end to the debate and impose an inadequate solution, the Commission disregards the legal security needs expressed by a large number of actors, Member States, the civil society and signatories of the ETUC petition.

As provided for in Article 14, the secondary substantive Community law must "lay down principles and set conditions, especially economic and financial, that enable SGEI to fulfill their missions" by, in particular, clarifying the rights and responsibilities public authorities are endowed with to define what SGI are, determine conditions for their implementation, decide on the most appropriate system for their management, guarantee long-term forms of public service obligations compensation and long-term investments funding, guarantee users' rights, set up a regulatory process involving all stakeholders and implement a dynamic assessment of the effectiveness of the services.²

4. The particular situation of social services

The Communication "Services of general interest, including social services of general interest: a new European commitment" is actually issued as an accompanying document to the Communication on "A single market for 21st century Europe." This fact displeases social NGOs who do not find the Internal market review an adequate framework to tackle social services. Social NGOs regard SSGI as a core element of social protection schemes, supporting the realisation of fundamental rights and social policy objectives. Therefore, they wish to see a clear separation between the two exercises. Nevertheless, the adjoining of the two Communications is yet another demonstration on the part of the Commission that its approach to social services review is very much "Internal market-oriented."

The section on social services in the Communication seeks to build on the broad consultation with the Member States, service providers and users to better understand the nature of these services across the EU and assess stakeholders' experience with the application of Community guidelines initiated in April 2006.

However, in reality, the section does not add substantially to the conclusions of the Communication issued in April 2006. Helpfully, the November 2007 Communication describes the *objectives* and *principles* of organisation of social services. It outlines rather objectively the specific *aims* of social services and the *ways* in which these services are organised, delivered and financed.

Very positive for non-profit service providers is the acknowledgment that they 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." Equally positive is the appreciation that "service providers often need a large autonomy to address the variety and the evolving nature of social needs." "Modernisation" is again identified as an important process the social

² A Communiqué from the CELSIG

sector is engaged in. However, the Commission stops short of defining what exactly “modernisation” means.

5. FAQs concerning the application of public procurement rules to SSGI

Accompanying the Communication on “Services of general interest, including social services of general interest: a new European commitment”, the Commission has issued a staff working document on “Frequently Asked Questions concerning the application of public procurement rules to SSGI.”

This document provides only technical guidance notably on the basis of a concise and sometimes simplified summary of public procurement legislation and case law related to SSGI. However, even though the FAQ document is not legally binding on the Commission as an Institution, it is nevertheless a useful paper giving answers to a number of questions concerning the application of public procurement rules to SSGI. The document can be also definitely used by service providers to put pressure on relevant actors in cases where their interpretation of rules and regulations differs from the Commission’s.

6. Moving forward

- ***Providing legal guidance on cross-cutting issues***

The Commission commits to consolidate the EU framework applicable to services of general interest, including for social and health services, providing concrete solutions for concrete problems where they exist. One way it proposes to do this is by providing legal guidance on cross-cutting issues. The Commission is aware that the application of Community law to services of general economic interest may raise questions and that a number of legal clarifications or explanations about EU rules are regularly sought in the various areas. In this context, the Commission will assist users and practitioners to obtain quickly answers to practical questions, explanations and interpretations. Answers to questions raised will be published and appropriate update reflecting the position of the Commission will be provided on a regular basis through a dedicated website. Service providers should make use of this website by publishing questions and accessing information.

Apart from developing the actions related to the launching of this interactive information service, the Communication does not refer to developing any other sector-specific policies in the field of social services. This sole measure will probably leave those pushing for further legal certainty disappointed.

- ***A strategy supporting the quality of social services across the EU***

The Commission undertakes to support the development, within the Social Protection Committee, of a voluntary EU quality framework providing guidelines on the methodology to set, monitor and evaluate quality standard. Moreover, via the PROGRESS programme, the Commission will support cross-European bottom-up initiatives aimed at developing voluntary quality standards and exchange of experience and will promote training of public authorities in the field of public procurement. In this respect, a Call for Proposals funding several projects in the area of quality is expected to be launched in January 2008. This will be the first time DG Employment, Social Affairs and Equal Opportunities provides such type of funding and this opportunity should be exploited.

Links

COMMISSION COMMUNICATION Accompanying the Communication on "A single market for 21st century Europe - Services of general interest, including social services of general interest: a new European commitment"

http://ec.europa.eu/services_general_interest/docs/com_2007_0725_en.pdf

COMMISSION STAFF WORKING DOCUMENT: Frequently asked questions concerning the application of public procurement rules to social services of general interest. Accompanying document to the Communication on "Services of general interest, including social services of general interest: a new European commitment"

http://ec.europa.eu/services_general_interest/docs/sec_2007_1514_en.pdf

A Citizens' Agenda – Review of the Single Market

http://ec.europa.eu/internal_market/strategy/index_en.htm