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on services of general interest

Committee on Economic and Monetary Affairs

Rapporteur: Bernhard Rapkay

I. INITIAL SITUATION:

There has been hardly any issue in European politics so widely debated in regions and communities across Europe in recent years as the services of general economic interest. With the step-by-step implementation of the so-called 'Lisbon Strategy' which consists of a package of measures involving economic, employment, environmental and social reforms to modernise the European model of society, including structural reforms (the opening and co-ordination of markets in the European internal market) together with investment in increased growth and employment by the year 2010, providers of services of general interest are quite often faced with legal issues and uncertainties.

Furthermore services of general interest are not only a necessary element of the quality of life of the individual citizen; they play as well a role in regard to

- overcome economic stagnation, social exclusion and isolation
- improve the economic, social and territorial cohesion
- define social and economic rights that flank the European citizenship
- secure the smooth functioning of the European internal market and its external competitiveness
- take care that international negotiations concerning trade with services are lead within a secure European legal framework.

High-duty services of general interest – open and transparent, with the same access for everyone – are consequently a fundamental part of the European community model. Market forces themselves can not secure the services of general interest that we need: it should be up to the competence of the European Union to guaranty appropriate standards throughout the European Union and to understand the high-quality public service as a concrete concept of European citizenship.

Against this background 'Services of General Interest', their future provision and form are more than ever in the limelight both in political debate and also as regards the concerns of European citizens about access for all to public services of high quality. They are an essential element in the European model of society and represent goals which are common to every society in Europe. They play a decisive role and are commonly regarded as essential in all Member States in improving the quality of life for every citizen and overcoming economic stagnation, social exclusion and isolation as well as improving economic, social and territorial cohesion. Since these services reflect rights which can be exercised by the citizens of Europe and which offer them an opportunity to participate democratically in responsible government in Europe, services of general interest therefore also represent a pillar of EU citizenship.

The draft EU Constitutional Treaty contains an extremely promising **Article III-122**¹ asserting the specific character of services of general interest in relation to the rules of competition and the internal market. Moreover, the Charter of Fundamental Rights, integrated into the Constitution, stipulates that the Union recognizes a right of access to services of general interest as provided for in national laws and practices, in accordance with the

¹ This should moreover be read in conjunction with the proposed **Article I-3** making economic, social and territorial cohesion an objective of the Union and **Article I-5** calling for the Union to respect local and regional autonomy.

Constitution, in order to promote the social and territorial cohesion of the Union. This right needs to be respected in all policy areas of the Union

In reply both to the request by the European Parliament in November 2001 (EP Report LANGEN, A5-361/2001) and in January 2004 (EP Report HERZOG, A5-484/2004)¹, as well as for a proposal for a European legal framework and to the conclusions drawn up by the Barcelona European Council (March 2002)² and in view of the Commission's task of examining the future of services of general interest in Europe, the Commission only published a 'Green Paper on Services of Public Interest'³ on 21 May 2003 and on 12 May 2004 a 'White Paper on Services of General Interest'.

The rapporteur insists that the currently revised draft for the **Services Directive** must not call into question the competence of each Member State to organize and promote services of general interest and that, to avoid that risk, adoption of the Services Directive makes necessary a legislative framework for services of general interest.

To the regret of the rapporteur, the Green Paper and the White Paper on the Services of General Interest deal only briefly and in general terms with the central question of a European legal framework on services of general interest, without examining the possible substance of regulation of this kind in a convincing way. Still missing, however, an authoritative distinction between services of general "economic" and "non-economic" interest, a pivotal precondition under which the application of especially new European legislation remains unclear for providers of services of general interest.

With a view to the debates already advanced on the future of the public and private services on the European single market, the rapporteur wants to - based on its response to the Green Paper on the Services of General Interest⁴ - welcome the opportunity to assert a strong position in favour of the promotion and defence of services of general interest, as a fundamental aspect of our shared values and our model of society.

¹ See EP Report LANGEN (A5-361/2001): http://www2.europarl.eu.int/omk/sipade2?PROG=REPORT&SORT_ORDER=D&REF_A=A5-2001-0361&L=EN, and EP Report HERZOG (A5-484/2003): http://www2.europarl.eu.int/omk/sipade2?PROG=REPORT&SORT_ORDER=D&REF_A=A5-2003-0484&L=EN, which were adopted by a large majority in the European Parliament.

² See Conclusions of the European Barcelona Council (March 2002), section 42: *'The integration of European networks and the integration of utility markets should take full account of the quality of public services. In this regard, the European Council underlines the importance for citizens, and for territorial and social cohesion, of access to services of general economic interest. In this context the European Council asks the Commission (...) to continue its examination with a view to consolidating and specifying the principles on services of general economic interest, which underlie Article 16 of the Treaty, in a proposal for a framework objective while respecting the specificities of the different sectors involved and taking into account the provisions of Article 86 of the Treaty. The Commission will present a report by the end of the year.'*

³ COM (2003) 270 final: http://europa.eu.int/eur-lex/en/com/gpr/2003/com2003_0270en01.pdf and COM (2004) 374 final.: http://europa.eu.int/eur-lex/en/com/gpr/2004/com2004_0374en01.pdf

⁴ Cf the PES Group position paper "Future of Services of General Interest in Europe: Responses to the Green Paper of the European Commission on the Services of General Interest, dated 11 December 2003: http://www.socialistgroup.org/gpes/servlet/Main/Position~2? wcs=true&id_position=92&lg=en

II. LEADING IDEAS CONCERNING THE DISCUSSION ON THE FUTURE OF SERVICES OF GENERAL INTEREST

1. The current initiatives of the European Commission on the future of the services sector as well as the initiatives of the Commission on the future of public services, and delegated public services should take into consideration the fact that services of general interest in the internal market are currently subject to very different de facto and de jure conditions and practices at both a European and a national and/or local level. The key concepts - "Public service", "services of general interest", "Daseinsvorsorge", "services of general economic interest", etc. - have different meanings and practical implications in different Member States, and show the rich diversity of Europe, which a legal framework must respect.

2. Performance and execution of services of general interest however take place within a European single market and are subject to European rules regarding the internal market, state aid, public procurement and competition. The application of such rules must currently be struck on a case-by-case basis by the European Court of Justice or by interpretations from the European Commission. In the interests of clarity and legal certainty, so that authorities at national and local and regional level can full fill their responsibilities, we need a coherent European legal framework¹. This should suit the interests of all involved:

- those of local, regional and national authorities to offer and guarantee the services they deem appropriate for their citizens within a clearly demarcated playing field of competition and internal market rules,
- those of companies (whether public, profit or not-non-profit) providing or offering to provide such services to know what rules and obligations can be legitimately put upon them by authorities on the grounds of general interest,
- those of citizens and users of those services to be sure that they are offered under reasonable conditions of accessibility, quality, affordability, etc.

3. In the opinion of the Rapporteur a supplementary general Community legal framework – in accordance with existing sector-specific and national provisions – should be enacted on the basis of Community law. This should permit a meaningful delimitation of the responsibilities of Community and Member States in all branches of services of general interest activities as well as the most far-reaching Parliamentary legislative process (joint decision-making with the European Parliament).

4. The principle of free administration of local authorities must be respected. Local authorities must remain sovereign in the management of the public services for which they are responsible. In future citizens should have a local input – allowing for the principle of

¹ In the event that a horizontal act of general application was accepted, the Directive is best suited to allowing flexibility. It is binding only as to result(s), and it is for the states to choose the most appropriate methods for achieving them. It would appear that Article 95(1) is the most appropriate legal basis and, indeed, is unquestionably so in the strictly limited context of the establishment and development of the internal market. It is also the article which holds the powers of the European Parliament in highest esteem. The framework directive offers the double advantage of consistency (it is the instrument most used in the harmonisation of the internal market) and legal certainty (establishment of stable common principles for users, operators and regulators) in line with the co-responsibility entrusted to states and the Union to ensure that such services operate properly.

subsidiarity – ensuring that their needs, claims and problems can be examined promptly and directly and that the interests of consumers and civil rights are pursued efficiently and effectively protected. As a consequence the rapporteur is in no doubt that the actual definition, formulation, organization and funding of services of general interest remains a task for the Member States and their regional and local authorities. In any case, the European Union must ensure that community regulation does not hinder national, regional or local authorities in their responsibilities and tasks.

5. Together with an urgent request to start work on a European legal framework without delay, the rapporteur raises the following questions which are from his point of view indispensable to discuss in regard to more legal certainty for the services of general interest. These questions should represent a base which will give impetus to an actively created European policy on the future of services of general interest, in a European society which is modernizing.

6. In conclusion it should be stressed in this context that the debate on the future of services of general interest would be fruitless if we only highlighted objectives without presenting our proposals for the instruments which are needed for the purpose. We do not have the right to ignore the legitimate expectations of millions of European citizens who are concerned about the future of public services. Subject to the express proviso that a high level of employment, its quality and legal security in the context of a modern European model of society will be guaranteed, we can envisage the widest variety of solutions for the effective provision of services of general interest at a local level. We must guarantee universality and territorial and social equality of access to essential public services for all the peoples of Europe.

III. TOPICS TO BE DISCUSSED

It is clear that citizens as well as enterprises want to have clarified what they can expect from the internal market. Furthermore, it is established that the obligation to determine and to offer this kind of services as well as the award of contracts for their provision and their financing falls within the competence of the downstream level.

1. Possible objectives in the interest of more legal certainty

Consequently, without hindering sector-specific application and having regard to the specific features of each activity involved, the task is to provide a framework directive for the application of internal market and competition law by way of common rules for protection of the general interest and consumer satisfaction.

Key questions here are:

- How prescriptive should the directive be regarding the public service obligations of Member States and regional and local authorities?
- How does this relate to its purpose to fend off interference on the basis of internal market rules in the autonomy of public authorities to set and govern these obligations?

2. Possible framework in the interest of more legal certainty

From the perspective of the authorities and companies executing or offering to execute services it is important to make clear which services are deemed to be services of general economic interest operating in the internal market.

Under the terms of the Treaty, the actual definition, formulation, organization and funding of services of general interest is a task for Member States and their regions, which must be responsible for the development of new needs and technologies. At the same time, the Community's tasks have to be recognized - including ensuring universal and affordable access to quality services of general interest; ensuring the operation of the internal market; and promoting co-ordination between Member States.

Key questions here are:

- What are the services we should deal with?
- What are the criteria for defining them as economic/market or public/non market?

3. Clarification of the concept of services of general interest and general economic interest

One option would be in this context to create more precise definitions of services of general economic and general interest, based on the case-law criterion of market participation or the performance of an activity under market conditions. However, the concepts of economic activity and of undertaking, within the meaning of Community case law, do not suffice to account for the specific nature of certain services of general interest or services of general economic interest compared with other operators in the same sector.

To date only the concept of SGEI has been identified by primary Community law, firstly since 1957, under Article 86(2) of the EC Treaty, and secondly since 1997, under Article 16 EC introduced by the Treaty of Amsterdam. By contrast, the concept of SGI was introduced by the Commission in its first 1996 communication on 'services of general interest in Europe'.

According to the doctrine developed by the Commission, SGEI would be merely a sub-category of SGI, i.e. 'market' SGI. Given, however, that the distinction between market and non-market services does not exist in secondary legislation or case law, it would seem more prudent to start with the distinction deriving from the Treaty itself, i.e. the distinction between economic and non-economic services, and then to proceed by exclusion.

The "*exclusively social function criterion*", which appeared in 1993 with the 'Poucet and Pistre' EJC decision, did not totally clarify the issue of relations between the economic sphere and the field of social activities. According to that case law, two conditions must be met for an activity to fall outside the economic sphere: the absence of profit-making and respect for what is known as the principle of solidarity. The second criterion poses a genuine problem of identification in case law, given that the latter relates to a random range of indices. Given that it is a source of legal uncertainty, the question of extending the "*exclusively social function criterion*" to sectors other than social protection (e.g. healthcare and employment services) remains open. Today, the scope of "*typically public authority powers criterion*" seems to have

been interpreted in a restrictive manner and limited to state-regulated activities, such as activities relating to the police, justice, defence, diplomacy or even taxes.

It is in no way inconsistent to classify an activity as of economic interest and also of general interest. On the contrary, it is the combined or cumulative effect of these two qualifications that allows us to identify a service of general economic interest and to apply the system set out in Article 86(2) EC. Here, the part played by the State is crucial: it is up to the State to define the service of general interest that it will entrust to an undertaking.

A second option would be to bring about clarification where the limitation of services of general economic interest to services which are of a predominantly industrial or commercial character is in the focus. This means that borderline services of general interest/general economic interest issues would in future face a different test from the current economic/non-economic test - which is gradually sucking all services of a social character into the 'economic' category. The term industrial and commercial is in fact at the heart of the definition of 'services' in Article 50 of the Treaty. Moreover, the term "industrial or commercial character" is also used in an important way in the Public Procurement Directive of 2004, where a "body governed by public law" (to which the Directive's duties apply) is defined as one "established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character". So it would be a question of fact whether a body was predominantly of an industrial or commercial character. In particular, it would exclude all public services that are purely social in character and include the responsibility of the governmental authority at any level to determine what a service of general economic interest is.

This definition would introduce a different name, that of "*Non-Market Services*" (NMS) to describe non-commercial services of general interest, whilst avoiding the ambiguity of the term services of general interest which means all public services (services of general economic interest plus non-economic). It would make clear that in general this framework directive does not apply to NMS. This definition follows the logic of the "Monti/Kroes package" on compensation for public service obligations, by deeming NMS to comply with the Treaty rules, unless the contrary is clearly proved in an individual case. Consequently, NMS do not adversely affect trade (a requirement of article 86 EC Treaty).

The daily practice shows that the whole subject of services of general interest is subject to technical, economic and social change and therefore has a dynamic character as regards the nature and manner of their provision.

Key questions here are:

- Is it sufficient and desirable to leave it to Member States to define which services they consider to be of general interest and subject to general interest obligations?
- Or should we make a European definition, which defines more precisely (and thus restricts) the room for manoeuvre for Member States and local authorities to be able to fence off internal market and competition rules?
- Do we deal only with services that are provided under economic conditions?
- What are the criteria for defining them as economic/market or public/non market?

4. Relation of a horizontal directive with sectoral provisions

In the sphere of utilities and transport several European sectoral directives exist. The draft directive intends to provide an overall horizontal approach, but should give room for more specific sectoral directives. Existing sector-specific provisions of Community law must not be called into question and the need for sector-specific provisions must be respected.

In individual cases the need for and form of additional sector-specific provisions of Community Law must be discussed with reference to the special nature of each sector and a Community competence. It therefore seems necessary to define a kind of “common” set of specifications for services of general interest, of such a nature as to be able to take on a different form in each sector-specific directive. Thus the framework directive should usefully clarify a number of major principles where we have no legal certainty.

Key questions here are:

- Has the case been made clearly enough for a horizontal directive besides several specific sector directives?
- Are other sectoral initiatives necessary (such as health and social services – presently under consideration by the European Commission) and compatible with the horizontal approach?

5. Preferable principles in the interest of legal clarification

Preferable principles should be discussed in regard to what the Court of Justice calls “overriding reasons of general interest”, which may permit derogations from normal market rules. They seek to apply common principles - such as universality, continuity, quality, efficiency, equal access, proportionality, affordability etc. - to the provision of services of general interest

Key questions here are:

- Do we provide such principles that characterise the public interest obligations only as general guidelines for the Member States to voluntarily comply to or not, or should the Directive set binding standards for the guarantees linked to these principles?
- How would the courts interpret obligations such as universality, continuity etc as applied to highly diverse services operating in divergent circumstances - e.g. what does an obligation of continuity mean for a provider of public libraries, or universality for a railway operator?
- Do these obligations, as drafted, adequately balance common European principles with subsidiarity and with diversity of local circumstances?

6. Operational provisions

It is important to describe the relationship with the internal market and competition rules. They mainly follow the case law of the European Court of Justice and its interpretation by the European Commission. In the interest of legal certainty it could be helpful to point common elements of daily management of services of general interest.

Common principles of management could be seen in particular regarding public obligations, public procurement and contracts, in-house services and public-private-partnership. Further on principles should be discussed such as absolute threshold values in the interests of excluding some services from certain management obligations, such as prices, thresholds etc.

Key questions here are:

- Is it sufficient to remain with the present acquis for definitions of “state aid”, “public procurement”, “public private partnerships” and “in house” definitions, or do we want to challenge and change this acquis via this directive ?
- Should there be some general provisions requiring benchmark against comparators in terms of costs, quality, threshold values etc.?
- How far do we extend and enlarge the case law to provide a consistent and clear legal security?
- To which level of detail we want to prescribe and set standards for the management and financing of services of general economic interest?

7. Allocation of powers and level of regulation

Here the crucial question is raised: What will be the division of responsibilities between Member States and European Union regarding the main provisions of the Directive? What will it oblige Member States to do and what powers of regulation would the European Commission have? Would be preferable to promote with the help of European guidelines the coordination and cooperation among member states and the application of the method of open coordination and confirmation?

Key questions here are:

- How big is the role for the EU and what should be the focus: stimulating, facilitating, monitoring?
- What can be prescribed in the light of the division of competences?
- Should the European Commission take the leading role or should there be an Open Method of Coordination between the Member States?
- How can the involvement of civil society, social partners, EP, CoR and EESC best be guaranteed?
- What is beyond the general provisions regarding consumer protection and regarding the information and hearing of employees necessary in the light of the particular collective character of services of general interest?

8. Protection of quality of services of general interest

In this connection measures and methods to encourage and promote voluntary high quality standards should be discussed; Propositions such as certification, quality charters, labels and independent assessments. Member States and the European Commission could cooperate here in the interest of the protection of the quality of services of general interest.

Key questions here are:

- Do we see positive effects in voluntary cooperation and coordination on European quality standards?
- Which processes and methods would be most effective in stimulating high standards?