« The words of the 'public services' »

Multi lingual Glossary

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Services of general interest (SGIs)
"Services of general interest" is a particular concept of the European Union, a recent and specific term in the Community language, having no "official" completed definition, and that was gradually implemented in the Community practice. The term has its origins in the Community legislation's term of "services of general economic interest" (SGEIs) that it comes to include. The first official use of the concept of "service of general interest" was in the title of a communication of the European commission in 1996 – "Services of general interest in Europe"[1], and then reiterated in its Communication[2] and a report of 2001[3], the Green paper of 2003[4], the White paper of 2004[5]. The Communication of the European Commission on the SGI and SSGI of 2007[6] states the actual definition of the SGI: "*they can be defined as the services, both economic and non-economic, which the public authorities classify as being of general interest and subject to specific public service obligations*." In sectors that are not specifically regulated by the Community law, the Member States have a general competence to define the services of general interest and the way they are provided; if they have to respect the general principles of the treaties (transparency, non-discrimination, equality of treatment, proportionality), they can be subject to Community control only in the case of "obvious error" issue from a too large interpretation of the concept of general interest; this control is exercise by the European Commission who can contest the proper qualification of an activity of general interest by a public authority (it was the case in 2007 when the EC opposed Holland on the qualification as service of general interest of its system of social housing; see also BUPA jurisprudence[7]). Since the Treaty of Lisbon[1], signed on December 13, 2007, we formally distinguish within the framework of the SGI between the services of general economic interest (SGEI) and the non-economic services of general interest (SGNEI). To the difference of the current treaties, the Protocol on services of general interest annexed to the Treaty of Lisbon does not concern only services of general economic interest, but all SGIs, economic or non-economic. If a service is called "non-economic", Article 2 of the Protocol clearly states that "*the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest*". If a service is called "economic", Article 1 requires the Community institutions to comply with both "*the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organizing*" the service, with respect for "*diversity of services and the disparities that may exist (...) because of geographical, social or cultural situations, and the principles" of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights*."[2] The Community law relating to competition and the internal market potentially applies to SGEIs, but not to the NESGIs, which are subject only to the general principles of the treaty (transparency, non-discrimination, equal treatment, proportionality). So, there is no specific European legislation for the NESGIs.

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[1] COM(1996) 443 final Communication Services of general interest in Europe, JO C 281 of 26.09.1996

[2] Communication "Services of general interest in Europe" (2001/C 17/04), JO C 17 of 19.01.2001, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/c_017/c_01720010119en00040023.pdf

[3] COM(2001) 598 final, Report to the Laeken European Council "Services of general interest", 17.10.2001 - http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0598en01.pdf

[4] COM(2003) 270 final of 21.5.2003 Green Paper on services of general interest http://eur-lex.europa.eu/LexUriServ/site/fr/com/2003/com2003_0270fr01.pdf

[5] COM(2004) 374 final, 12.5.2004, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, White Paper on services of general interest http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0374en01.pdf

[6] COM(2007) 725 final, 20.11.2007, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, 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://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0725:FIN:EN:PDF

[7] "*Member States have a wide discretion to define what they regard as services of general economic interest. That prerogative is confirmed by the absence of any competence specially attributed to the Community and by the absence of a precise and complete definition of the concept of service of general economic interest in Community law. The determination of the nature and scope of a mission involving the provision of a service of general economic interest in specific spheres of action which either do not fall within the powers of the Community, within the meaning of the first paragraph of Article 5 EC, or are based on only limited or shared Community competence, within the meaning of the second paragraph of that article, remains, in principle, within the competence of the Member States... the Member State has a wide discretion not only when defining a mission involving the provision of a service of general economic interest but also when determining the compensation for the costs, which calls for an assessment of complex economic facts.*"

Challenges and prospects

The concept of SGI (but also of SGEI, NESGI, and SSGI) aims to define a common language within the EU member states, taking into account the national diversities. But this could often create conflict between national traditions.
The concept of SGI focuses on the objectives, purposes and missions of these services: the "general interest"; it is therefore the functional conception of these services.
The concept of "service of general interest" is flexible and adaptable in its definition according to the complexity and evolution of the European reality of SGI, which covers a wide range of activities, a large diversity with regard to the level at which these services are provided, the traditions and the national organisation and delivery, their economic or non-economic nature. The fact that "economic and non-economic services can co-exist within the same sector and sometimes even be provided by the same organisation" (Green Paper on SGIs, 2003) make clear the importance of defining the criteria for distinction of these categories, perhaps not only in terms of "economic" and "non-economic" nature of the activity. The Commission stressed in its report to the Laeken European Council that it is neither possible nor desirable to establish *a priori* a definitive list of all services of general interest that should be considered "non-economic". "*It is probably neither desirable nor possible to develop a single comprehensive European definition of the content of services of general interest*" (Green Paper on SGIs, 2003). More recently, in the Communication on SGIs and SSGIs of 2007 the Commission notes that the answer to the question of how to distinguish between economic and non-economic, that "*cannot be given a priori and requires a case-by-case analysis: the reality of these services is often specific and differs widely from one Member State to another, and indeed from one local authority to another*".

SGIs – Services of general interest – *To go further*

Legal consecration

Since 1 December 2009, when the Treaty of Lisbon gone into effect, the expression ("service of general interest") is enshrined in the primary EU law.
The Protocol n° 26 on services of general interest, annexed to the Lisbon Treaty (consolidated version 2008), introduces, by its title, the concept of services of general interest in the primary law of the European Union.[3].

Jurisprudential definition

"Official" definition

The European Commission has published the first definition of SGI in its initial Communication of September 26, 1996 on "Services of General Interest in Europe", completed by the Communication on SGI of 2001: "*This term covers market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations*." (Annex II COM 2001).
The White Paper of 2004 defines the SGIs as: "*services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion*" (see also, in the same terms, the Green Paper on SGIs of 2003).
See above the new definition of Communication of the European Commission on SGIs and SSIGs 2007.

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[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ n° C 306 of 17 December 2007, http://eur-lex.europa.eu/en/treaties/dat/12007L/htm/12007L.html

[2]

[3] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0201:0328:EN:PDF

"Public service"
In the Green Paper of 2003 on the services of general interest[11] and under the same terms in the White Paper on the SGIs[12], the European Commission stressed that "*the term 'service of general economic interest' must not be confused with the term 'public service'. This term is less precise. It can have different meanings and can therefore lead to confusion. The term sometimes refers to the fact that a service is offered to the general public, it sometimes highlights that a service has been assigned a specific role in the public interest, and it sometimes refers to the ownership or status of the entity providing the service. Therefore, this term will not be used in this Green Paper*." On that occasion the Commission states clearly the reasons for which the concept of "public service" cannot be used at Community level and also explains the necessity of adopting a new and distinct vocabulary. Behind the expression "public service" co-exist in fact two approaches: a functional conception, for the objectives and the finalities of the public services, and an organic conception (especially for the French "service public"), covering the statute of the entity that provides the service. As well, it is in this dissociation between the organic and the functional conception of public service that we must also seek the origins of the concept of "public service mission". In some European countries one speaks about "services **of** the public" or "services **to** the public". (P.B.)
Challenges and prospects
Such a change of vocabulary and concepts call into question the national traditions in some Member States, especially those who had constructed a legal doctrine or policy of the "public service".
"Public service" – *To go further*
Legal consecration
The term "public service" is used in the primary law of the European Union in the Treaty on the functioning of the European Union – Protocol n° 29 on the system of public broadcasting in the Member States: "*The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account*". It is also used in the Article 93 of the TFEU (ex Article 73 TEC) "*Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service*".
Jurisprudential definition
"Official" definition
As defined by the European Commission (Communication on SGIs of 2001[13]), the term "public service" "*may refer either to the actual body providing the service or to the general interest role assigned to the body concerned. It is with a view to promoting or facilitating the performance of the general interest role that specific public service obligations may be imposed by the public authorities on the body rendering the service, for instance in the matter of inland, air or rail transport and energy. These obligations can be applied at national or regional level. There is often confusion between the term public service, which relates to the vocation to render a service to the public in terms of what service is to be provided, and the term public sector (including the civil service), which relates to the legal status of those providing the service in terms of who owns the services*". The term is also used in the Community texts on "public services" of broadcasting[14].

[11] COM(2003) 270 final of 21.5.2003 Green Paper on services of general interest http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0270en01.pdf

[12] COM(2004) 374 final, 12.5.2004, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, White Paper on services of general interest http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0374en01.pdf

[13] http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/c_017/c_01720010119en00040023.pdf

[14] Communications of the Commission of 2001 and 2008 on the application of State aid rules to public service broadcasting http://ec.europa.eu/competition/state_aid/reform/broadcasting_communication_en.pdf

Services of general economic interest (SGEIs)
The expression "services of general economic interest" (SGEIs) was formally consecrated in 1957 in Article 90 (the actual Article 86) paragraph 2 of the Treaty of Rome[15]. Its establishment is then integrated in the Community effort to create a common specific vocabulary within the Community taking into account the differences of terminology, language and traditions of the Member States in the area of services of general interest, and to facilitate the understanding, comparison and, to some extent, the Europeanisation of SGEI development at national, regional, and Community level. With the Treaty of Amsterdam of 1997[16], SGEIs are placed among the common values of the European Union (Article 16)[17]. The EU Charter of Fundamental Rights, proclaimed in 2000, includes SGEIs between the "fundamental rights" whose access is recognised and respected (Article 36)[18]. At the present, SGEIs are the solely "category" of SGIs developed in the EU law and the only SGIs been subject to the EU rules of competition and internal market[19], but without being defined in the EU primary or secondary law. The "official" definition of SGEIs was developed in the Community practice, the documents of the European Commission and the EU Court of Justice. The European Commission noted that "*in Community practice there is broad agreement that the term refers to services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion. The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications. However, the term also extends to any other economic activity subject to public service obligations*."[20]

[15] "2. *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in 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. …*" http://eur-lex.europa.eu/en/treaties/index.htm#founding

[16] See Article 7d http://eur-lex.europa.eu/fr/treaties/dat/11997M/htm/11997M.html#0001010001

[17] "*… given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions*."

[18] "*The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union*", Charter of Fundamental Rights of the European Union, 2007/C 303/01, OJ n° C 303 of 14.12.2007, http://eur-lex.europa.eu/en/treaties/dat/32007X1214/htm/C2007303EN.01000101.htm

[19] Article 86 paragraph 2: "*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in 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*."
The Treaty of Amsterdam also confers to the Community and the Member States, "*each within their respective powers and within the scope of application of this Treaty*", the responsibility of take care of good operation of these services. In the Communication on SGIs of 2001 the European Commission notes that the "*Member States' freedom to define services of general interest, is subject to control for manifest error*".

[20] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – White Paper on services of general interest COM (2004) 374 final, 12.05.2004 - ANNEX 1 Definition of Terms

Challenges and prospects
"The range of services that can be provided on a given market is subject to technological, economic and societal change and has evolved over time. As a consequence, the distinction between economic and non-economic activities has been dynamic and evolving, and in recent decades more and more activities have become of economic relevance." (Green Paper on SGI, 2003[21]) In 2002, the European Council of Barcelona – March, 15, 16 - asked the Commission to "continue his examination in order to consolidate and to specify, in a proposal for a Framework Directive, the principles relating to the services of general economic interest, which underlies the article 16 of the treaty, in the respect of specificities of the various sectors concerned and taking into account the provisions of the article 86 off the treaty." The Community policy on SGEIs consists of two parts: the first, dominant, is the progressive liberalisation of SGEIs since 20 years, which continues, and the second, to accompany the liberalisation of certain guarantees (universal service, Charter of fundamental rights, principles of the Lisbon Protocol on SGIs, etc.). Despite some progress towards a Community conception these components are not in balance. (P.B.) The draft Constitutional Treaty in 2004 and now the Lisbon Treaty propose a certain progress in the field of SGEIs, including a legal basis for secondary law (co-decision Council - Parliament) and the consolidation of shared competence between the Union and the Member States (see Article 14[22] of the Lisbon Treaty (amending Article 16 TEC).
Services of general economic interest – SGEIs - *To go further*
Legal consecration
See the Articles 14 and 106 of TFEU.
Jurisprudential definition
In the jurisprudence of the Court of Justice SGEIs are defined through the obligations imposed by the public authorities to the companies responsible for managing the service.[23] According to the jurisprudence of the ECJ: "*Any activity consisting in offering goods and services on a given market is an economic activity*".[24]
"Official" definition
According to the first Communication on services of general interest (1996[25]), SGEIs refer to "*market services which the Member States subject to specific public service obligations by virtue of a general interest criterion. This would tend to cover such things as transport networks, energy and communications*". In the terms of the Commission Communication on SGIs of 2001, "*Services of general economic interest are different from ordinary services in that public authorities consider that they need to be provided even where the market may not have sufficient incentives to do so. This is not to deny that in many cases the market will be the best mechanism for providing such services*." It is appreciated by the Commission that "*For a given service to qualify as an economic activity under the internal market rules (free movement of services and freedom of establishment), the essential characteristic of a service is that it must be provided for remuneration. The service does not, however, necessarily have to be paid by those benefiting from it*." (Communication on SIGs and SSIGs 2007[26])

[21] http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0270en01.pdf

[22] "*Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the 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*."

[23] ECJ, Judgment of 19 May 1993, *Corbeau*, C-320/91, Rec. p. I-2533

[24] Judgements of 16 June 1987, Commission/Italie, 118/85, Rec. p. 2599, point 7, and of 18 June 1998, Commission/Italie, C-35/96, Rec. p. I-3851, point 36

[25] COM(1996) 443 Communication Services of general interest in Europe, JO C 281 of 26.09.1996

[26] COM(2007) 725 final of 20.11.2007, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions 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://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0725:FIN:EN:PDF

Social services of general interest - SSGIs

Social services have not been the subject of the Treaty of Rome in 1957[27] because at that time it raised of activities considered as of "non-economic" nature.
SSGIs are an emerging category of SGIs with social purposes, devoted for the first time at Community level by the European Commission, in its Green Paper on the SGI (2003)[28].
Still, the SSGIs remain restrained in a "grey" area as for the conditions of application of the Community law, on the border between non-economic activities, which fall outside the application of the competition and internal market rules of the Treaty, and the economic activities governed by EU law. The specific framework of SGEIs applies to SSGIs when they meet the specificities of such a service.
In its Communication of 2006, the European Commission has identified two main types of SSGIs:

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. Certain services can obviously include all of these four dimensions

The additional Protocol (n° 26) to the Treaty of Lisbon[29] unlike the current treaties, concerns not only the services of general economic interest, but all the SGIs, weather they are classified as economic or non-economic. If a service is called "non-economic", Article 2 clearly states that treaties "*do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest*". If a service is defined as "economic", Article 1 requires the institutions to comply with both "*the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest*", and respect for "*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*"[30].
The distinction between SGEIs - NESGIs led to distinguish between the social services of general economic interest (SSGEIs: "*social services serving a mission of general interest concerning an economic activity and delivered against payment, including as a third-party payer, whatever the nature of the company which is in charge and its way of financing*") and non-economic social services of general interest (NESSGIs).

Challenges and prospects

The "protective force of the social services arising from the Treaty falls within the competence of the public authorities at national, regional, departmental, municipal level. The protection of the social services by the Treaty… becomes effective in the Community law only if it is expressly activated by a competent public authority of a Member State, including on a sub-national basis through the explicit qualification of the social service of general interest by the public authority."[31] In some cases, the Commission tends to associate the social character of the service of general interest to its "direct connection with the socially disadvantaged households", while the Court, the Council and the European Parliament privilege the promotion of the universal access to social services, thus confirming the protocol of the Treaty of Lisbon. The European court cases concerning the SSGIs are also considerable.
One of the questions within the framework of the SSGIs concerns the plurality of concepts around the expression of SSIGs at the European level and the identification of its beneficiaries: Should SSGIs be reserved only for the most vulnerable? What is the role of the prevention?

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[27] Treaty establishing the European Economic Community, http://eur-lex.europa.eu/en/treaties/index.htm#founding
[28] COM(2003) 270 final of 21.5.2003 Green Paper on services of general interest http://eur-lex.europa.eu/LexUriServ/site/fr/com/2003/com2003_0270fr01.pdf
[29] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ n° C 306 of 17 December 2007, http://eur-lex.europa.eu/en/treaties/dat/12007L/htm/12007L.html
[30] Pierre Bauby, *Les SIG et le traité de Lisbonne du 13 décembre 2007*, http://www.rap.asso.fr/idee_detail.php?id_idee=6
[31] **** Le courrier des maires et des élus locaux. Guide pratique. Les services sociaux d'intérêt général (SSIG)*, novembre 2008, p. 9

In the more recent debates it is also accused the insecurity of the legal framework of the SSGI and it is therefore proposed the adoption of a sectoral directive adapted to specificities of the social services, the current framework being the result of a jurisprudence based on the network services.

Social services of general interest – SSGIs – *To go further*

Legal consecration

Since there is no general EU legislative framework applicable to SSGIs, they are subject to the legal regime concerning SGIs.
However, because of their specificity, several Community texts impose to some social services of general interest a different legal regime, such as exclusion from the area of application of Services Directive of NESGIs, health services, social services relating to social housing, to child welfare and assistance to families and persons permanently or temporarily in need.

Jurisprudential definition

The BUPA judgment of the Court of First Instance[32] applied for the first time the legal framework of SGEIs to a social service. Relying on Article 5, paragraph 2, EC (principle of subsidiarity) the Court confirms the Member States' competence to determine the nature and scope of a SGEI mission, more so in areas of specific action that is not within the competence of the Community, or which are based on a shared competence. "The national authorities were entitled to take the view that certain services were in the general interest and must be provided by means of SGEI obligations when market forces were not sufficient to ensure that they would be provided."
The Court remembers that "the health sector falls almost exclusively within the competence of the Member States. In that sector, the Community can engage, under Article 152(1) and (5) EC, only in action which is not legally binding, while fully respecting the responsibilities of the Member States for the organisation and provision of health services and medical care. It follows that the determination of SGEI obligations in this context also falls primarily within the competence of the Member States. That division of powers is also reflected, generally, in Article 16 EC, which provides that, given the place occupied by SGEIs 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 the Treaty, are to take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions. … Consequently, the control which the Community institutions are authorised to exercise over the use of the discretion of the Member State in determining SGEIs is limited to ascertaining whether there is a manifest error of assessment."

Official definition

According to White Paper on SGIs[33], the field of social services covers particularly: health services, the long term care, social security, the employment services, social housing.
In the Communication of 2007[34], the European Commission notes that "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."
"Due account should be taken of the diversity that characterises such services, the situations in which they are provided, the characteristics of service providers and the need for flexibility to adapt services to various needs: this is particularly relevant in the case of social services."

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[32] Case T-289/03, judgement of 12.02.2008, *BUPA e.a./Commission*, http://curia.europa.eu/jcms/jcms/Jo1_6308/
[33] COM(2004) 374 final of 12.5.2004, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, White Paper on services of general interest http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0374en01.pdf
[34] COM(2007) 725 final of 20.11.2007, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions 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://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0725:FIN:EN:PDF

Non-economic services of general interest – NESGIs
The concept of “non-economic services of general interest” (NESGIs) is the newest in the Community law on services of general interest. The Protocol no. 26 annexed to the Treaty of Lisbon[1] acknowledges it in the European primary law, but without defining it. Its importance rises from its statute within SIGs area, as their second component. In its sphere and his contents it can be found an under part of SGIs, which falls within the Community competence only for the general principles of the treaties (transparency, non-discrimination, equal treatment, proportionality)[2], and thus they are not subject to the Community law of competition and internal market[3]. According to Article 2 of the Protocol n° 26 of the Lisbon Treaty, “*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*.”
Challenges and prospects
The recognition of NESGIs and their guarantees represent an important step in building the European conception on SGI. However, it remains to clarify its content, criteria, etc.
Non-economic services of general interest (NESGIs) – *To go further*
Legal consecration
The legal term “non economic services of general interest” was introduced in the Community law by Article 2 of the Directive of 12 December 2006 on services in the internal market[4], which has provided their exclusion from its area. Still, there is no legal definition of NESGIs.
Jurisprudential definition
Official definition
In its first Communication on SGIs (1996[1]), the European Commission did not use the expression NESGIs; however, the document distinguishes the category of service activities of non economic nature, as for example the compulsory systems of education or of social protection. In the Communication on SGIs of 2001, the Commission also refers to national education and to basic schemes of compulsory social security [cf. Community jurisprudence]. The term NESGIs will be consecrated progressively, starting with Green Paper on SGEIs of 2003[2]. After that time, several expressions were used: “non economic services” (in the Communication on SGIs and SSGIs of 2007[3]), services of general interest having a non economic nature (see also the White Paper on SGIs of 2004), services of non economic general interest, and non economic services of general interest. In the documents of the European Commission we can also note several categories of activities of service of non economic nature: non economic activities that “concern in particular matters which are intrinsically prerogatives of the State, services such as national education and compulsory basic social security schemes, and a number of activities conducted by organisations performing largely social functions, which are not meant to engage in industrial or commercial activity.” [basically, social functions] (cf. Green Paper on SGIs of 2003). The Communication on SGIs of 20 November 2007[4] defines: “*Non-economic services*: these services, for instance traditional state prerogatives such as police,

[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ n° C 306 of 17 December 2007, http://eur-lex.europa.eu/en/treaties/dat/12007L/htm/12007L.html

[2] Article 2 of the Protocol n°26 of the Treaty of Lisbon on the services of general interest: “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.”
In the White Paper of 2004, the European Commission noted that “…there is broad agreement that the Community should not be given additional powers in the area of non-economic services.”

[3] The Communication of November 20, 2007 of the European Commission defines the non-economic services: “these services, for instance traditional state prerogatives such as police, justice and statutory social security schemes are not subject to specific EU legislation, nor are they covered by the internal market and competition rules of the Treaty. Some aspects of the organisation of these services may be subject to other rules of the Treaty, such as the principle of non-discrimination.” COM (2007) 725, 20.11.2007

[4] Directive 2006/123/CE of the European Parliament and of the Council of 12 December 2006 on services in the internal market, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0123:EN:HTML

justice and statutory social security schemes are not subject to specific EU legislation, nor are they covered by the internal market and competition rules of the Treaty. Some aspects of the organisation of these services may be subject to other rules of the Treaty, such as the principle of non-discrimination."
According to the European Commission, "Whether a service which a Member State considers to be of general interest is of an economic or a non-economic nature has to be determined in the light of the case law of the ECJ ... In any case, it will not be possible for Member States to consider all services in a specific field, for example all education services, as non-economic services of general interest."[5]

[1] COM(1996) 443 Communication on Services of general interest in Europe, JO C 281 of 26.09.1996
[2] COM(2003) 270 final of 21.5.2003 Green Paper on services of general interest http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0270en01.pdf
[3] COM(2007) 725 final of 20.11.2007, Communication from the Commission to the Council, the European Parliament, the Committee of the Regions and the European Economic and Social Committee, 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://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0725:FIN:EN:PDF
[4] Idem
[5] European Commission, *Handbook on implementation of the Services Directive*, Luxembourg, Office for Official Publications of the European Communities, 2007, http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf, p. 11

Fundamental rights
Services of general interest meet several objectives, including ensuring the right of each inhabitant to access essential goods and services (health, safety, education, water, energy, transport, communications, housing, etc…), and guaranteeing the fundamental human rights. Since 1997[44], they are recognised between the values of the European Union. The Treaty of Maastricht[45] refers to "*fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law*" (Article 6 EU Treaty). However, the primary law does not establish a catalogue of guaranteed human rights and the European citizenship protected in the Treaty of Maastricht contains no special rights in relation to SGIs. It is with the European Charter of Fundamental Rights[46], proclaimed in 2000 at the Nice European Council that the European Union will go further, by sanctioning the right to good administration, workers' social rights, etc... Also, the Charter states (in Article 36) that EU recognises and respects the access to the services of general economic interest "as provided for in national laws and practices." But the Charter does not add any new fundamental rights. According to the mandate of the Convention, it is only codifying the existing rights. As for the right of access to SGEIs, the Charter does not create a right of access to services of general economic interest, exclusively covered by this text. This right is not within the competence of the European Union but of the Member States. The national, regional and local authorities of the Member States are in principle free to define the services of general interest, including users' rights, but they are also held, as for SGEIs in particular, to ensure the compatibility with Community law. According to Article 6 TFEU "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties." The Declaration concerning the Charter of Fundamental Rights of the European Union annexed to the treaty of Lisbon states that "1. The Charter of Fundamental Rights of the European Union, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States." To provide to EU and Member States assistance and expertise as regard the fundamental rights when implementing Community law, and help them to take measures and to define adapted actions, the Fundamental Rights Agency of the European Union was founded in 2007 (Regulation (EC) No 168/2007 of 15 February 2007[47]).
Challenges and prospects
The freedom of movement within the European Union, one of the pillars of the European construction, put citizens face to a wide variety of legal situations concerning services of general interest. It produces tensions between national and Community law generating transformations and, in the long term, the Europeanisation of users' rights in relation to SGIs. Article 36 of the Charter of Fundamental Rights can be interpreted in two contradictory ways: either, by referring to national legislation and practice, it does bring nothing new; or EU have to respect the national laws and practices regarding access to the SGEI, which would dramatically limit its capacities of calling into question of the national modes of organisation and regulation.

[44] Treaty of Amsterdam amending the Treaty on European Union, the Treaty establishing the European Communities and related acts, OJ n° C 340, 10.11.1997, http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html

[45] Treaty on European Union, signed at Maastricht, 7.02.1992, JO n° C191 of 29 July 1992, http://eur-lex.europa.eu/en/treaties/index.htm#founding

[46] Charter of Fundamental Rights of European Union (2007/C 303/01), OJ n° C 303 of 14.12.2007, http://eur-lex.europa.eu/en/treaties/dat/32007X1214/htm/C2007303EN.01000101.htm

[47] http://europa.eu/scadplus/leg/fr/lvb/l14169.htm (the successor agency to the European Observatory on Racism and Xenophobia (EUMC), established by Regulation (EC) No 1035/97 of 2 June 1997)

Economic, social and territorial cohesion
The term "cohesion" is more often used in political debates in relation to risks of divisions and fractures in society. In its original etymological sense, cohesion is defined as the property of an assembly [unit] in which all parts are closely united [linked]. The origins of the concept of "social cohesion" are in the thinking of the sociologist Emile Durkheim in 1893 (*De la division du travail social*) representing the good functioning of the society where it expresses solidarity between individuals and the collective consciousness ("mechanical solidarity" and "organic solidarity"). Different approaches of social cohesion were consecrated, according to periods, cultures, political ideas and especially according to the role of actors involved, areas of life or interested groups, or methods they use to develop this cohesion. "Social cohesion" is not a "scientific" or technical concept. It rather results from interpretative exercises that the institutional actors and the autonomous individuals release in the exercise of their collective responsibilities face to the resolution of the conflicts"[1]. The various objectives of the cohesion entered progressively in the politics and the Community law. Initially, one of the objectives expressed by the EEC Treaty of 1957[2] was the promotion of "*a harmonious development of economic activities*" (Article 2). Also, one of the fundamental aims of the CEE was to strengthen the unity of the Member States economies and to ensure their harmonious development by reducing the differences existing between various regions and the less favoured regions (see paragraph 5 of the EEC preamble[3]). On the bases of Article 235 of the EEC Treaty (now article 308), the Council adopted in December 1974 the first instrument, of budgetary nature, of the Community regional policy (of "cohesion"), the European *regional development found*. In 1986, the Single European Act[4] adopts the objective of the Single European Market and the policies for promoting the harmonious development in the Community to consolidate its economic and social cohesion (article 130A, Title V Economic and social cohesion). The action seeking to reinforce the economic and social cohesion of the Community "aims at reducing disparities between the various regions and the backwardness of the least-favoured regions" (article 130a§2). The Treaty of European Union of 1992[5] stated economic and social cohesion and solidarity between the missions of the European Community (Article 2). A full title of the consolidated Treaty is devoted to economic and social cohesion (Title XIV; see also the Protocol on the economic and social cohesion). In 1997, at the time of amendment of the European Treaty by the Treaty of Amsterdam[6] the concept of territorial cohesion is included in the primary law in relation to SGEIs. A new article (Article 7d) acknowledges the place of services of general economic interest among the common values of the Union as well as the "role they play in the social and territorial cohesion of the Union". The constitutional Treaty and then the Treaty of Lisbon[7] step further by enshrining the three fold aim of "economic, social and territorial cohesion" among the objectives of the European Union (see Article 2 and 3, Title XVIII of TFUE and the Protocol n° 28).
Challenges and prospects
Far from being something that exists naturally, the cohesion of a society depends on the elements that come into play and the specific types of process that establish themselves between those elements and with society as a whole."[1] The triple aspect of community cohesion objectives requires thinking about the tensions between economic, social and territorial goals (cohesion and

[1] Conseil de l'Europe, *Elaboration concertée des indicateurs de la cohésion sociale. Guide …*, p. 21, 26
[2] Treaty establishing the European Economic Community, http://eur-lex.europa.eu/en/treaties/index.htm#founding
[3] http://eur-lex.europa.eu/fr/treaties/dat/11957E/tif/TRAITES_1957_CEE_1_XM_0014_x111x.pdf
[4] http://eur-lex.europa.eu/en/treaties/index.htm#founding
[5] http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html
[6] Treaty amending the Treaty of European Union, the Treaties establishing the European Communities and related acts, OF n° C340, 10 November 1997, http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html
[7] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ n° C 306 of 17 December 2007, http://eur-lex.europa.eu/en/treaties/dat/12007L/htm/12007L.html

competitiveness, cohesion and diversity, cohesion and freedom).
An operational issue concerns the indicators which are to be established for determining the presence and degree of cohesion in the relevant services of general interest. Difficulties exist more particularly in relation to the social dimension of cohesion.
"Cohesion is not a fact, but a movement. The economic and social developments are leading to spontaneous polarisation of economic, social and territorial disparities and to growing inequality between regions/territories, as well as within each region/territory. The cohesion is an issue for voluntary policies working to redress these spontaneous developments, to build solidarity between and within each region." (P.B.)

Economic, social and territorial cohesion – *To go further*

Legal consecration

Jurisprudential definition

"Official" definition [2]

According to the European Commission, the territorial cohesion is to ensure the harmonious development of European territories and to allow their people to maximize their own characteristics. The concept of territorial cohesion can build bridges between economic efficiency, social cohesion and ecological balance, placing sustainable development at the heart of policies.[3]

[1] ***, *Concerted development of social cohesion indicators – Methodological guide*, Editions of Council of Europe, 2005, p. 24
[2] See also http://europa.eu/scadplus/glossary/economic_social_cohesion_fr.htm
[3] COM(2008) 616 final of 6.10.2008, Communication from the Commission to the Council, the European Parliament, the Committee of the Regions and the European Economic and Social Committee, Green Paper on Territorial Cohesion. Turning territorial diversity into strength, http://ec.europa.eu/regional_policy/consultation/terco/paper_terco_en.pdf

Universal service
The concept of “universal service” appeared in the United States at the beginning of the XXth century at the initiative of AT& T, the America’s dominant private operator of telecommunications, with the aim to consolidate its monopoly. At European level, it is the European Commission that had recourse to the concept of universal service as from the end of years 1980 (following the European Single Act), in the context of harmonisation of European telecommunications market, then for postal services and more recently for electricity. The concept has been implemented sector by sector within the Community secondary law. The definition of the concept of universal service has significantly evolved since its official European consecration: - In the Communication on SGI of 11 September 1996[1], the European Commission noted that universal service is the Community concept called to be generalised in order to promote the coordination of services of general economic interest with the aim of economic integration of Europe on the basis of an enlarged market, which would allow to establish basic common rules on services of general economic interest in Europe. “This evolutionary concept, developed by the Community institutions, refers to a set of general interest requirements which should be satisfied by operators of telecommunications and postal services, for example, through the Community. The object of the resulting obligations is to make sure that everyone has access to certain essential services of high quality at prices they can afford”. - According to the Communication of September 20, 2000[2]: “The definition and guarantee of universal service ensures that the continuous accessibility and quality of established services is maintained for all users and consumers during the process of passing from monopoly provision to openly competitive markets.” - The Green Paper of 21.05.2003[3] on the services of general interest noted that: “Universal service is a dynamic concept. It ensures that general interest requirements can take account of political, social, economic and technological developments and it allows these requirements, where necessary, to be regularly adjusted to the citizens’ evolving needs.” - According to White Paper of 2004 on SGI[4] “universal service is a key concept the Community has developed in order to ensure effective accessibility of essential services. It establishes the right of everyone to access certain services considered as essential and imposes obligations on service providers to offer defined services according to specified conditions, including complete territorial coverage and at an affordable price. Universal service is a dynamic and flexible concept and has proven to be an effective safety net provision for those who could otherwise not buy essential services for themselves. It can be redefined periodically in order to be adapted to the social, economic and technological environment. The concept allows common principles to be defined at Community level and the implementation of these principles to be left to the Member States, thus making it possible to take account of specific situations in each country, in line with the principle of subsidiarity.” - In the above mentioned Communication of 2007[1], the Commission exposes the general contents of the concept of universal service: “Where an EU sectors specific rule is based on the concept of universal service, it should establish the right of everyone to access certain services considered as essential and impose obligations on service providers to offer defined services according to specified conditions, including complete territorial coverage and at an affordable price. Universal service provides for a minimum set of rights and obligations, which as a general rule can be further developed at national level. It is a dynamic concept, which needs to be updated regularly sector by sector.” “The concept establishes the right for every citizen to access certain services considered as essential and imposes obligations on industries to provide a defined service at specified conditions, including complete territorial coverage. In a liberalised market environment, a universal service obligation guarantees that everybody has access to the service at an affordable price and that the service quality is maintained and, where necessary, improved.” The concept of universal service is not synonymous with the notion of “public service”. Also, the concept of universal service should not be confused with that of services of general interest which has a broader sense (COM September, 1996).

[1] COM(1996) 443 final, Communication Services of general interest in Europe, JO C 281 of 26.09.1996

[2] COM(2001) 598 final, Report to the Laeken European Council « Services of general interest », 17.10.2001 - http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0598en01.pdf

[3] COM(2003) 270 final of 21.5.2003 Green Paper on services of general interest http://eur-lex.europa.eu/LexUriServ/site/fr/com/2003/com2003_0270fr01.pdf

[4] COM(2004) 374 final, 12.5.2004, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, White Paper on services of general interest http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0374en01.pdf

Challenges and prospects

There are two ways to define this concept: on the one hand, it can only lead to a minimum service (only voice telephony in telecommunications), accompanied by social measures for the poor, as is the case of its current general definition (but not as regards the postal sector); it is here only one component of the concept of SGI, which does not cover neither the dimensions of solidarity and economic, social and territorial cohesion, or the preparation of the future and sustainable development. On the other hand, the concept can be regarded as the "rediscovery" of certain principles of SGIs such as accessibility and equality: it would be enough to progressively enrich its contents, in order that the new European common language gives content to the "service of general economic interest" issue of the European treaties.

Universal service – *To go further*

Legal consecration

We note, at the sectoral level, the limited view of the Commission in the definition of universal service for telecommunications, and a much more ambitious in the definition of universal postal service.
The Telecommunications Directive of 2002[2] refers to the universal service as being "*a defined minimum set of services to all end-users at an affordable price*".
The Directive on postal services[3] states that the universal service guarantees "*not less than five days a week, save in circumstances or geographical conditions deemed exceptional by the national regulatory authorities, as a minimum: one clearance, one delivery to the home or premises of every natural or legal person or, by way of derogation, under conditions at the discretion of the national regulatory authority, one delivery to appropriate installations.*""*The universal service guarantees, in principle, one clearance and one delivery to the home or premises of every natural or legal person every working day, even in remote or sparsely populated areas*"

Jurisprudential definition

The concept of universal service has been recognised in the jurisprudence of the Court of Justice of European Communities by the judgement "Corbeau"[4].

Official definition

The Communication on SGIs of **1996**: "This evolutionary concept, developed by the Community institutions, refers to a set of general interest requirements which should be satisfied by operators of telecommunications and postal services, for example, throughout the Community. The object of the resulting obligations is to make sure that everyone has access to certain essential services of high quality at prices they can afford. Services of general interest are … to serve the whole society and therefore all citizens. The same applies, in the Community, for universal service. "28. The basic concept of universal service is to ensure the provision of high-quality service to all at prices everyone can afford. Universal service is defined in terms of principles: equality, universality, continuity and adaptability; and in terms of sound practices: openness in management, price-setting and funding and scrutiny by bodies independent of those operating the services. These criteria are not always all met at national level, but they have been introduced using the concept of European universal service, there have been positive effects for the development of general interest services. 29. Universal service is, none the less, a flexible concept, which evolves gradually in line with specific structural and technical features and sector-specific requirements. It is also evolutionary in the way it has to adapt to technological change, new general interest requirements and users' needs. 30. There is nothing to prevent the Member States from defining additional general interest duties over and above universal service obligations, provided that the means used comply with Community law."

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[1] COM(2007) 725 final, 20.11.2007, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, 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://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0725:FIN:EN:PDF

[2] Directive 2002/22/CE of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=32002L0022

[3] Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0067:EN:HTML, as modified by Directive 2002/39/EC of 10 June 2002 and Directive 2008/6/EC of 20 February 2008
Universal postal service which would provide collection and delivery facilities throughout the Community, at prices affordable to all and with a satisfactory quality of service – Green Paper on the development of the single market for postal services COM(91) 476, of 11 June 1992, http://aei.pitt.edu/1173/01/postal_gp_COM_91_476.pdf

[4] ECJ, Judgement of 19 May 1993, *Corbeau*, C-320/91, Rec. p. I-2533

According to the Communication of **2001** on SGIs "Universal service, in particular the definition of specific universal service obligations is a key accompaniment to market liberalisation of service sectors such as telecommunications in the European Union. The definition and guarantee of universal service ensures that the continuous accessibility and quality of established services is maintained for all users and consumers during the process of passing from monopoly provision to openly competitive markets. Universal service, within an environment of open and competitive telecommunications markets, is defined as the minimum set of services of specified quality to which all users and consumers have access in the light of specific national conditions, at an affordable price."

In the terms of Green Paper on SGIs of **2003** "51. Universal service is a dynamic concept. It ensures that general interest requirements can take account of political, social, economic and technological developments and it allows these requirements, where necessary, to be regularly adjusted to the citizens' evolving needs. 52. It is also a flexible concept that is fully compatible with the principle of subsidiarity. Where the basic principles of universal service are defined at Community level, the implementation of these principles can be left to the Member States, thus allowing different traditions and specific national or regional circumstances to be taken into account. Furthermore, the concept of universal service can apply to different market structures and can therefore be used to regulate services in different stages of liberalisation and market opening. 53. During the last two decades, the concept of universal service has developed into a major and indispensable pillar of the Community's policy on services of general economic interest. It has allowed public interest requirements to be addressed in various domains, such as economic efficiency, technological progress, environmental protection, transparency and accountability, consumer rights and specific measures regarding disability, age or education. The concept has also contributed to reducing the levels of disparity in living conditions and opportunities in the Member States. 54. Implementation of the principle of universal service is a complex and demanding task for national regulators which in many cases have only been recently created and whose experience is therefore necessarily still limited. At Community level, rights of access to services are defined in different directives, but the Community institutions alone cannot ensure that these rights are fully granted in practice. There is a risk that these rights as set out in Community legislation remain theoretical, even where they are formally transposed in national legislation."

Users rights
In the Community law, the concern of the rights of users in relation to services of general economic interest has emerged in the consumer protection policy ("Every citizen is a consumer") and within the law concerning some SGI sectors. The European harmonisation of national actions of consumers' protection has been undertaken from the middle of 1970s to protect their health, safety and economic welfare, to improve the quality of life, to ensure the right to information and education and to encourage consumers' associations. The scope of consumer protection policy has grown considerably and it is now applicable to certain aspects of services. In the frame of SGEIs, the Community actions generally followed the establishment and control of certain standards of protection and quality, in particular as regards the rights of air passengers (rules for operators, with appeal to the European Commission), then of other travellers[66], as well as of the users of electronic communication services, etc.[67] Some services of general economic interest are subject to the transverse regulation framework (Directive 2006/123/CE of the European Parliament and Council of December 12, 2006 on services in internal market[68]). The significant value of this horizontal text on SGEIs also lay in the provisions concerning users' rights, that constitutes in accordance with the directive, one of the objectives of general interest. Its provisions does not affect the exercise of the fundamental rights as recognised in the Member States and by the Community law (article 1§7). However, this act does not apply to non-economic services of general interest, electronic communications services and networks, services in the field of transport (see further the specific standards of consumer protection), healthcare services, it does not apply to audiovisual services, to activities related to the exercise of public authority in accordance with Article 45 of the Treaty; social services relating to social housing, childcare and support of families and persons permanently or temporarily in need, which are provided by the State, by providers mandated by the State or by charities recognized by the State. In terms of the services directive, every customer has at least the following rights: equality and non-discrimination, right to information[69] (the information should be expressed in clear and intelligible, easy accessible by electronic way, with updates on the essentials conditions of supply, management, financing, and pricing), right of access to information concerning them, held or collected by the service provider and by the competent authority, right of complaint and right to effective remedy. According to the first Article of the Protocol n° 26 on services of general interest annexed to the Treaty of Lisbon, "*The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular: — the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest*

[66] http://europa.eu/scadplus/leg/fr/s13007.htm, http://ec.europa.eu/transport/air_portal/passenger_rights/information_en.htm
[67] http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-DY-07-001/EN/KS-DY-07-001-EN.PDF
[68] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:EN:PDF
[69] Article 7 : (a) requirements applicable to providers established in their territory, in particular those requirements concerning the procedures and formalities to be completed in order to access and to exercise service activities; (b) the contact details of the competent authorities enabling the latter to be contacted directly, including the details of those authorities responsible for matters concerning the exercise of service activities; (c) the means of, and conditions for, accessing public registers and databases on providers and services; (d) the means of redress which are generally available in the event of dispute between the competent authorities and the provider or the recipient, or between a provider and a recipient or between providers; (e) the contact details of the associations or organisations, other than the competent authorities, from which providers or recipients may obtain practical assistance.
Article 21 : (a) general information on the requirements applicable in other Member States relating to access to, and exercise of, service activities, in particular those relating to consumer protection; (b) general information on the means of redress available in the case of a dispute between a provider and a recipient; (c) the contact details of associations or organisations, including the centres of the European Consumer Centres Network, from which providers or recipients may obtain practical assistance. Where appropriate, advice from the competent authorities shall include a simple step-by-step guide. Information and assistance shall be provided in a clear and unambiguous manner, shall be easily accessible at a distance, including by electronic means, and shall be kept up to date.
Article 22 information on providers and their services, the price of the service where a price is pre-determined by the provider or, where the price is not pre-determined by the provider, if an exact price cannot be given, the method for calculating the price so that it can be checked by the recipient, or a sufficiently detailed estimate.

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.”
Challenges and prospects
If the community law imposes a European system of protection of user rights in relation with service of general economic interest, the organisation of non-economic services and their protection is essentially a national, regional or local competence.
Users rights – *To go further*
The Universal Service Directive on **Electronic Communications**[70] requires Member States to extend the rights of users. Users of telecommunications services have a number of rights that include particularly: the right to have a contract where consumers subscribe to services providing connection to a public telephone network and/or access to such a network. The contract between users and providers of connections to a telephone network must contain at least a set of information (name and address of the supplier, types of services provided, contract duration and renewal terms, rules of procedures for resolving disputes, etc.); the provision, by the operators, of transparent and appropriate information on prices and tariffs; the publication by the companies providing electronic communications services accessible to the public, of comparable, adequate and timely information on the quality of their services; ensuring that in case of catastrophic network breakdown or “*force majeure*”, the access to public telephone network remains accessible to users; the provision of assistance services and of telephone information services. Alternative dispute resolution procedures, simple, transparent and inexpensive should be made available to users to solve disputes not resolved within the universal service obligations. Where appropriate, Member States may adopt a system of reimbursement and/or compensation. (See in particular Articles 6, 9, 7.2). Directive 2003/54/CE of 26 June 2003 concerning common rules for the internal market of **electricity**[71] states in Article 3 the obligations of consumers protection “§5. Member States shall take appropriate measures to protect final customers, and shall in particular insure that there are adequate safeguards to protect vulnerable customers, including measures to help them avoiding disconnection. In this context, Member States may take measures to protect final customers in remote areas. They shall ensure high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms. Member States shall ensure that the eligible customer is in fact able to switch to a new supplier. As regard at least household customers, these measures shall include those set out in Annex A.” Directive 2003/55/CE of 26 June 2003 concerning common rules for the internal market of **natural gas**[72] (repealing directive 98/30/CE that used the term « client ») provided for minimum common rules to ensure a high level of protection of consumers, too (right to change the provider, transparency of the contractual conditions, general information, mechanisms of disputes resolution, etc.) and seeks in particular to guarantee an appropriate protection of vulnerable consumers (for example, by taking appropriate measures to avoid the interruption of gas provision). Article 3 of the directive poses a set of obligations in order to protect the consumers “§3. Member States shall take appropriate measures to protect final customers and to ensure high levels of consumer protection, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers, including appropriate measures to help them avoid disconnection. In this context, they may take appropriate measures to protect customers in remote areas who are connected to the gas system. Member States may appoint a supplier of last resort for customer connected to the gas network. They shall ensure high levels of consumers’ protection, particularly with respect to transparency regarding general contractual terms and conditions, general information and dispute settlement mechanisms. Member States shall ensure that the eligible customer is effectively able to switch to a new supplier. As regard at least household customers these measures shall include those set out in Annex A” (« Measures on consumer protection”. [73]

[70] Directive 2002/22/CE of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0051:0077:EN:PDF

[71] Directive 2003/54/CE of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0054:EN:HTML

[72] Directive 2003/55/CE of European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0055:EN:HTML

[73] See also Council Directive 90/377/EEC of 4 December 1990 laying down amendments for the purpose of implementing in Germany certain Community Directives relating to statistics on the carriage of goods and statistics on gas and electricity prices

Directive 97/67/EC of 15 December 1997 on common rules for the development of internal market of Community **postal services** and the improvement of quality of service[74] as modified by Directive 2002/39/EC precise that "28) It might be appropriate for national regulatory authorities to link the introduction of licences to requirements that consumers of the licensees' services are to have transparent, simple and inexpensive procedures available to them for dealing with their complaints, regardless of whether they relate to the services of the universal service provider(s) or to those of operators holding authorisations, including individual licence-holders. It might be further appropriate for these procedures to be available to users of all postal services, whether or not they are universal services. Such procedures should include procedures for determining responsibility in case of loss of, or damage to, mail items."

According to article 19 of the directive, "Member States shall ensure that transparent, simple and inexpensive procedures are drawn up for dealing with users' complaints, particularly in cases involving loss, theft, damage or non-compliance with service quality standards (including procedures for determining where responsibility lies in cases where more than one operator is involved). Member States may provide that this principle is also applied to beneficiaries of services which are: - outside the scope of the universal service as defined in Article 3, and - within the scope of the universal service as defined in Article 3, but which are not provided by the universal service provider. Member States shall adopt measures to ensure that the procedures referred to in the first subparagraph enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation… Without prejudice to other possibilities of appeal under national and Community legislation, Member States shall ensure that users, acting individually or, where permitted by national law, jointly with organisations representing the interests of users and/or consumers, may bring before the competent national authority cases where users' complaints to the universal service provider have not been satisfactory resolved… In accordance with Article 16, Member States shall ensure that the universal service providers publish, together with the annual report on the monitoring of their performance, information on the number of complaints and the manner in which they have been dealt with."

For railway transport services, see Regulation (EC) no 1371/2007 of 23 October 2007 on rail passengers' rights and obligations[75].

Legal consecration

European Commission noted that for *Upholding user rights* "Citizens, consumer and user rights should be specified, promoted and upheld. The capacity of consumers and users, including vulnerable or disabled persons; to take up their rights, especially their right of access, often requires the existence of independent regulators with appropriate staff and clearly defined powers and duties. These include powers of sanction, in particular the ability to monitor the transposition and enforcement of universal service provisions. These also require provisions for the representation and active participation of consumers and users in the definition and evaluation of services, the availability of appropriate redress and compensation mechanisms, and the existence of a review clause allowing requirements to be adapted over time to reflect new social, technological and economic developments. Regulators should also monitor market developments and provide data for evaluation purposes."[76]

Jurisprudential definition

«Official» definition

[74] Directive 97/67/CE of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0067:EN:NOT, as modified by Directive 2002/39/CE of 10 June 2002 and Directive 2008/6/CE of 20 February 2008

[75] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:315:0014:0041:EN:PDF

[76] COM(2007) 725 final of 20.11.2007, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 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://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0725:FIN:EN:PDF

Liberalisation

The liberalisation claims itself of liberalism (economic) that declares and establishes as a fundamental principle, civil liberties and the free market.[77]

The liberalisation is a gradual process meant to introduce competition in sectors marked by the existence of monopoly situations, exclusive or special rights granted to operators today qualified as “historical”. It is distinct from privatisation processes: they can be lead one without the other (liberalisation while maintaining public ownership of the historical operator or privatisation without liberalisation, so by maintaining the monopoly). It is also possible to lead the two processes in a successive manner (in many cases, the opening to competition was followed by ~~a~~ changes in the status of the historical operator, up to privatisation) or in a direct manner.[78]

In many European States, the public service liberalisation was introduced by the Community law. ~~In~~ At the same time, in the Community primary law the concept of “liberalisation” of services was for the first time introduced only by the Treaty establishing a Constitution for Europe (Article III-147 and Article III-148). These provisions are not included in the Treaty of Lisbon; however it modifies the provision “declare their readiness to undertake the liberalization of services ...” by “… shall endeavour to undertake the liberalisation of services...” (Part IV on “The free movement of persons, services and capital”, Article 53 TFEU). Consequently, Article 60 (ex Article 53 TEC) of TFEU (consolidated version) provides that “*The Member States shall endeavour to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 59(1), if their general economic situation and the situation of the economic sector concerned so permit. To this end, the Commission shall make recommendations to the member States concerned.*”

The Treaty of Lisbon also modifies Article 188 C, which replaces Article 133 (Article 207 of the Consolidated TFEU devoted to the “Common commercial policy”): “*1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.*”

It is in particular in secondary Community law that the framework of liberalisation of public services is developed.

Since 1990, liberalisation is provided in the European law mainly as a policy of introducing competition in fields or sectors marked by the existence of monopoly situations (see French sheet “*consecration légale*” which incorporates the main sectoral provisions).

Challenges and prospects

In the network sectors, the logic of liberalization is carrying on economic polarization because of fast concentrations, leading quickly to an oligopolistic competition between some great groups, which structure, even share, the “market”.

Liberalization, indeed, is not synonymous with absence of the rules, but requires their evolution.[79]

Certain uncertainties are due to the evolution of the market prices and to the deficiencies of the evaluation level and the democratic regulation of the «service public» missions.

Liberalisation – *To go further*

Legal consecration

The policy of liberalisation in service sectors has been gradually initiated in the 1980s and it was accentuated in the next decade in aviation sector through the adoption of Regulation (ECC) n° 2343/90 of 24 July **1990**, on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States[80]. It is noted in its preamble that: “… Whereas Decision 87/602/EEC (4) made a first step towards the liberalization in respect of sharing of passenger capacity and access to the market, necessary to achieve the internal market in air transport; whereas the Council agreed to take further measures of liberalization at the end of a three-year initial period; Whereas increased market access will

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[77] Gérard Cornu, Vocabulaire juridique, 8e ed., 2007, PUF, p. 546

[78] Sarah Valin, *Services publics : un défi pour l’Europe*, Editions Charles Léopold Mayer, Paris, 2007, pp. 206, 207

[79] Lysiane Cartelier, « Production et régulation des services en réseau : l’évolution de l’analyse économique », dans Cahiers Français, n° 339/2007, Juillet-août, p. 56

[80] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990R2343:EN:HTML

stimulate the development of the Community air transport sector and give rise to improved services for users; whereas as a consequence it is necessary to introduce more liberal provisions concerning multiple designation, third-, fourth- and fifth-freedom traffic rights;…".
Council Resolution of 19 December **1991**, on the development of the common market for satellite **communications** services and equipment[81] mentioned between the major goals in satellite telecommunications policy: "1. harmonization and liberalization for appropriate satellite earth stations, including where applicable the abolition of exclusive or special rights in this area, subject in particular to conditions necessary for compliance with essential requirements; 2. harmonization and liberalization as far as required to facilitate the provision and use of Europe-wide satellite telecommunications services subject, where applicable, to conditions necessary for compliance with essential requirements and special or exclusive rights; 3. separation in all Member States of regulatory and operational functions in the field of satellite communications; …".
Council Resolution of 22 July 1993 on the review of the situation in the telecommunications sector and the need for further development in that market [82] considered between the major goals of the Community's telecommunications policy in longer term, the liberalization of all public voice telephony services, whilst maintaining universal service. Council resolutions 93/C 213/01 and 94/C 379/03 determined for January 1st, 1998, with transition periods for certain Member States, the liberalisation of infrastructures of telecommunications and of voice telephony service, and et parallel goal of maintaining and advancing universal service. In its Resolution of 18 September 1995, on the implementation of the future regulatory framework for telecommunications[83] the Council "2. recognizes the considerable social and societal impact of the whole liberalization of the telecommunications sector and notes that the Commission has established a forum to study the related issues, in particular the trend towards growing employment in this sector; … 4. agrees that the implementation of these principles at Union level requires the adoption, according to the procedures laid down in the Treaty, of legislative measures centring on: - liberalization of all telecommunications services and infrastructures, in accordance with the procedures and transitional periods provided for in resolutions 93/C 213/01 and 94/C 379/03, …6. calls on the Commission, in accordance with the timetable set out in resolutions 93/C 213/01 and 94/C 379/03, to present to the European Parliament and the Council before 1 January 1996 all legislative provisions intended to establish the European regulatory framework for telecommunications accompanying the full liberalization of this sector …". As a consequence of this policy, Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunication markets is adopted[84].
The Commission noted in its Communication of 1996 on the application of the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles[85], "In the telecommunications sector, liberalization and harmonization legislation permit and simplify the task of Community firms in embarking on new activities in new markets and consequently allow users to benefit from increased competition. These advantages must not be jeopardized by restrictive or abusive practices of undertakings: the Community's competition rules are therefore essential to ensure the completion of this development. New entrants must in the initial stages be ensured the right to have access to the networks of incumbent telecommunications operators (TOs). Several authorities, at regional, national and Community levels, have a role in regulating this sector. If the competition process is to work well in the internal market, effective coordination between these institutions must be ensured". On 25 January 1995, the Commission also published the Communication intituled "Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks - Part II - A Common Approach to the Provision of Infrastructure for Telecommunications in the European Union".[86]

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[81] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992Y0114(01):EN:HTML
[82] http://eur-lex.europa.eu/Result.do?aaaa=1993&mm=08&jj=06&type=c&nnn=213&pppp=&RechType=RECH_reference_pub&Submit=Search
[83] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995Y1003(01):EN:HTML
[84] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0019:EN:HTML
[85] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y0311(02):EN:HTML
[86] http://europa.eu/bulletin/fr/9501/p103101.htm
87 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994Y0216(02):EN:HTML

[88] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0067:FR:HTML
[89] See the preamble of Directive 2002/39/EC of European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services
[90] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0092:EN:HTML
[91] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0030:EN:HTML

Council Resolution of 7 February **1994** on the development of Community **postal services**[87] declares as one of the main objectives in the development of postal services in the Community: "… [3] - reconciling, …, the rules of the Treaty and users' interests, the furtherance of the gradual, controlled liberalization of the postal market and that of a durable guarantee of the provision of the universal service...".
Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service[88] noted in its preamble "(8) Whereas measures seeking to ensure the gradual and controlled liberalisation of the market and to secure a proper balance in the application thereof are necessary in order to guarantee, throughout the Community, and subject to the obligations and rights of the universal service providers, the free provision of services in the postal sector itself;" et "(16) Whereas the maintenance of a range of those services that may be reserved, in compliance with the rules of the Treaty and without prejudice to the application of the rules on competition, appears justified on the grounds of ensuring the operation of the universal service under financially balanced conditions; whereas the process of liberalisation should not curtail the continuing supply of certain free services for blind and partially sighted persons introduced by the Member States…"
European Council meeting in Lisbon on 23 and 24 March 2000 set ~~ed~~ out in the Presidency conclusions two decisions relating to postal services that require the intervention of the Commission, Council and Member States, given their competence. The requested actions are: first, to set out by the end of 2000 a strategy for the removal of barriers to postal services, and secondly, to speed up liberalisation in areas such as postal services, the stated aim being to achieve a fully operational market in such services. [89].
Directive 96/92/EC of the European Parliament and of the Council of 19 December **1996** concerning common rules for the internal market in **electricity**[90], "39) Whereas this Directive constitutes a further phase of liberalization; whereas, once it has been put into effect, some obstacles to trade in electricity between Member States will nevertheless remain in place; whereas, therefore, proposals for improving the operation of the internal market in electricity may be made in the light of experience; whereas the Commission should therefore report to the Council and the European Parliament on the application of this Directive…".
Directive 98/30/EC of the European Parliament and of the Council of 22 June **1998** concerning common rules for the internal market in **natural gas**[91] notes that "the purpose of this Directive to liberalise the internal market in natural gas" (see paragraph 30 of the preamble).
At Lisbon summit of 23 and 24 March 2000, the European Council called for rapid work to be undertaken to complete the internal market in both electricity and gas sectors and to speed up liberalisation in these sectors with a view to achieve a fully operational internal market. The European Parliament, in its Resolution of 6 July 2000 on the Commission's second report on the state of liberalisation of energy markets, requested the Commission to adopt a detailed timetable for the achievement of accurately defined objectives with a view to gradually but completely liberalising the energy market (see preamble Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC).

Jurisprudential definition

«Official» definition

“In house”

The expression “in house” arises from the Community debates and law. The management “in house” concerns the services whose operation is ensured by a structure directly depending on the public authority (“interorganic delegation between the concessionaire and the grantor which do not fall outside the administrative sphere of the contracting authority”[1]).

In accordance with the directives on public procurement, the call for tender is not obligatory when some of the “in house” conditions are met. According to Community jurisprudence, even in these cases, it is to comply with all the fundamental rules of the Treaty: not discrimination, equal treatment, transparency, publicity[2].

The markets so-called “in house” are primarily a Community judicial construction, its basic criteria being set in the Teckal case law of November 18, 1999. Since 2005, several European cases had come to refine the concept, not yet stabilised.

1st condition/“similar control”: the public authority (-ies) exert on the operator an effective control, similar to that use over its own departments. For determining such a control, it is taken into account factors such as: the level of representation in the administrative, management or monitoring structures, rules related to its position included in statutes, the property as well as the effective influence and control over strategic and individual decisions of management. Consequently, if a private associate takes part in the capital of a company whose shareholder is the community, the latter cannot exert a control similar to that which she exerts on her own services and the relation could not be described as “in house” / “internal management” (the Stadt Market case law of January 11, 2005; for precise details, see also Coname case, July 21, 2005; Brixen case of October 13, 2005). The communication of the Commission on the institutionalised private public partnerships (*“companies of mixed economy” SEM*) is based on this jurisprudence. The SEM do not profit from the exception “in house” (see hereafter the judicial evolution).

2nd condition/the activity: the operator carries out the majority/most of his activity with (for/to) the public authority (-ies) /collectivities which hold it (case Teckal, November 18, 1999, aff. C-107/98).

According to a constant Community jurisprudence, the criteria of “in house” should continue for the duration of the contract in question (CJCE, 6/06/2006, ANAV c/commune of Bari).
In the Case *Coditel Brabant*, 13 November 2008[1] on the award by a Belgian municipality of the management of its municipal cable system to a cooperative intermunicipal society, the European Court recognises the “in house” of this relationship if the company is pursuing a mission of general interest that cannot be distinguished from that pursued by the local authorities that hold it and which are behind its creation.

So far, it is only in the field of transport services that a legal definition is adopted in the secondary law. The new European regulation on public service obligations for transport of passenger by rail and road (EC n° 1371/2007 of October 23, 2007[2]) sets a legal framework for “in house” services and define at EU level the first legal definition of “in house” management: “*Unless prohibited by national law, any competent local authority, whether or not it is an individual authority or a group of authorities providing integrated public passenger transport services, may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments*.” (art. 5§2)
According to the same regulation, the ‘internal operator’ is “*a legally distinct entity over which a competent local authority, or in the case of a group of authorities at least one competent local authority*[3], *exercises control similar to that exercised over its own departments*.” (article 2§j)
These provisions, so far limited to ~~the~~ transport sector, are less restrictive than the cases cited above.

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[1] Communication 2000/C121/02 §2.4, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:121:0002:0013:EN:PDF
[2] CJCE, arrêt du 6/06/2006, ANAV c/Comune de Bari, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:143:0012:0012:EN:PDF

Challenges and prospects

The recent developments of jurisprudence on "in house" suggest that the Court is willing to give more flexibility to the communities when they organize between them a public service mission.
It is so necessary to adopt particular rules for framing and secure the contracts "in house".

"In house" - *To go further*

Legal consecration

Jurisprudential definition

Jurisprudence 1st condition (similar control): Judgement « ANAV » of 6 April 2006, confirms the jurisprudential restrictive definition of *in house* which limits its definition to companies owned 100% by a local authority. Judgement « Acemfo » of 19 April 2007 recognises the procurement *in house* to those concluded between the Spanish State or the Spanish autonomous communities and a public company Tragsa, whose capital is owned 99% by the Spanish State and 1% by the four autonomous communities. According to the Judgements Asemfo and Carbotermo (11 May 2006), when several collectivities own a company, the condition of similar control can be satisfied if the company performs the essential part of its activity with those authorities in their entirety.
In a judgement of 17 July 2008, Commission – Italie[4], the Court dismissed the appeal noting that it is not a failure of a Member State the fact that a local community attributes directly and without publishing the contract notice in the OJEC, the management, maintenance and the development of its IT services to a private company even though the public contracting authority exercises over the entity in charge of market a similar control to that exercised over its own services and that the entity in question achieves most of its activity to the local authority or authorities which control it. In this case, the town of Mantua had the power to influence decisively both strategic objectives that the important decisions of ASI, the company receiving the contract. On the other hand, the Court finds that ASI carries out its activities not only for the town of Mantua, but for all communities who hold it. Consequently, these activities can be regarded as essentially devoted to the mentioned communities.

«Official» definition

[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:006:0006:0006:EN:PDF
[2] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:315:0001:0013:EN:PDF
[3] According to the jurisprudence, the authority and not « at least … »
[4] http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=fr&num=79919282C19050371&doc=T&ouvert=T&seance=ARRET

Mandate
In the European law, the mandate appeared within the competition rules concerning SGEIs, relating to derogations established by the Article 86, paragraph 2 of the EC Treaty, and then in the texts of the Directive 2006/123/CE on services in the internal market[98]. In applying these derogations, the existence of mandate (the act of mandate) is a common condition. Moreover, these derogations are different in terms of their objectives and the conditions to accomplish in order to make them practicable. Thus, the definition of mandate has not yet been formulated in the Community law (scope, modalities, etc.). The BUPA[99] jurisprudence of the Court of First Instance provides some clarifications and flexibility. 1. According to the **article 106 paragraph 2 of the TFEU** (ex Article 86 TEC), "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union." In its White Paper of 2004[100] (non compulsory), the European Commission stated that "under the EC Treaty and subject to the conditions set out in Article 86(2), the effective performance of a general interest task prevails, in case of tension, over the application of Treaty rules." In the terms of another text of the Commission - COM 2005 267 of November 28, 2005[101], the article 86 establishes for SGEI an "exception" from the rules of the treaty, if some conditions are meet: "firstly, there must be an act of entrustment, whereby the State confers responsibility for the execution of a certain task to an undertaking [**mandate**]. Secondly, the entrustment must relate to a **service of general economic interest**. Thirdly, the exception has to be necessary for the performance of the tasks assigned and proportional to that end (the necessity requirement). Finally, the development of trade must not be affected to such an extent as would be contrary to the interests of the Community. […] According to the case-law on the interpretation of article 86(2) of the Treaty, such **act or acts of entrustment** [mandate] must specify, at least, the precise nature, scope and the identity of the undertakings concerned. […] The form of the instrument may vary from one Member State to another but it should specify at least the precise nature, scope and duration of the public service obligations imposed and the identity of undertakings concerned, and the costs to borne by the undertaking concerned." Consequently, if the mission of general interest is not directly provided, by the public authority but by undertaking, entrustment is compulsory in order that enterprise may take benefits from the derogations of the article 86§2 of the Treaty. In this case, the entrustment appeared when a public authority assign a mission of general economic interest to an enterprise provider of the service of general economic interest and the compensation it confers as counterpart is considered as an authorised State aide "compatible with the internal market" (on the condition that the other requirements defined in the "Monti-Kroes" legislation are also meet). The BUPA judgement [102] of the Court of First Instance of the European Communities gives a more flexible interpretation to the concept of mandate/entrustment also recognising the "collective" mandate and not only the individual one: "The recognition of a mission involving the provision of a service of general economic interest does not necessarily presume that the operator entrusted with that mission will be given an exclusive or special right to carry it out. […] the provision of a service of general economic interest may also consist in an obligation imposed on a large number of, or indeed on all, the operators active on the same market, is not vitiated by an error. In that case, there can be no requirement that each of the operators subject to that obligation be separately entrusted with that mission by an individual act or mandate." (point 3 of the decision; accordingly, the point 183: "there can be no requirement that each of the operators subject to the PMI obligations be separately entrusted with that mission by an individual act or mandate"). The decision of the Court also precise that « the compulsory nature of the

[98] Directive 2006/123/CE of the European Parliament and of the Council of 12 December 2006 on services in the internal market,
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0123:EN:HTML

[99] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0289:EN:HTML

[100] http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0374en01.pdf

[101] Decision on the application of article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:312:0067:0073:EN:PDF

[102] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0289:EN:HTML

service and, accordingly, the existence of a mission involving the provision of a service of general economic interest are established if the service-provider is obliged to contract, on consistent conditions, without being able to reject the other contracting party. That element makes it possible to distinguish a service forming part of a mission involving the provision of a service of general economic interest from any other service provided on the market and, accordingly, from any other activity carried out in complete freedom."

2. According to, Article 2 paragraph 2 of the Directive 2006/123/EC of 12 December 2006 on services in the internal market, "This Directive shall not apply to the following activities: […] j) social services relating to social housing, child care, and support of families and persons permanently or temporarily in need which are provided by the State, by providers **mandates** by the State or by charities recognised as such by the State."
In the sense of the Directive, the mandate is useful to determine if the directive on services applies: by delivering to an undertaking an entrustment, we exclude the application of this directive to the service concerned of the sectors strictly mentioned.
Two concepts are used: act of entrustment and undertaking entrusted. An act allowing operators meeting certain requirements to develop an economic activity is not a mandate; the mandate is not the authorisation of an activity of service or the simply confirmation of the provision of a service (see Article 4, 6 of the Directive on services for the definition of "authorisation scheme"); the entrustment imposes an obligation. The directive on services does not suppose an obligation to eliminate all authorisation schemes; according to the directive, the authorisation scheme does not produce the effect of an entrustment. There is also a difference between the spheres of undertakings entrusted: on the one hand, they are mentioned in the directive on services (social services relating to social housing, child welfare and assistance to families and individuals who are either permanently or temporarily in need which are provided by the State), on the other hand, according to the Altmark legislation, the mandate concerns all SGEIs.

So far, we can conclude by saying that mandate is a general and flexible concept.
EU Member States are free to establish the statutory forms they want to use taking into account national specificities, but the act of mandate should have a compulsory nature in the domestic law, imposing an obligation to provide the service (judgement BUPA). The Community law does not impose a "standard" mandate but criteria for analysing its content. The obligation to provide a certain service is a common element of the act of entrustment within the Altmark scheme – where it is a condition of financing – and within the directive on services, where it justifies the non application of the scheme that it imposes.
In the sense of the directive on services a formal entrustment is enough to recognise the assignment; thus, one of the first requirements for the public authorities is to assign by a formal entrustment one or more undertakings to provide the service. Four elements define a service of general interest: the necessity, the particular character of the mission, the obligation to provide the service to any users who demands it and the formal entrustment of the undertaking assigned with the mission.
In the sense of Altmark case, the conditions are stricter. Any mandate act should meet more conditions, in order to make compatible the aid they decide to give to the enterprises providing SGEIs in the common market: it should be formal and compulsory, define the nature and the duration of the mission of general interest or the obligation of public service confined to the undertaking concerned and the general conditions to accomplish this mission. It must determine parameters of measurement; control and revision of the compensation assigned in counterpart of this obligation. The precise amount of the compensation is not necessary to be mentioned, but it is imperative to determine the safeguards allowing avoiding the overcompensation and if necessary to establish the measures for reimbursing. For verifying this element, the structures in charge with a mission of public service should have a separate accountability. The State can define the nature and the duration of the obligations of public service, the conditions of accomplishment of the mission of SGEI, choose different modes of financing, and, if necessary, the parameter for calculate, control and revision ~~of~~ the compensation and ~~of~~ the costs relating to the operation of the SGEI.

Challenges and prospects

Article 86 (2) of the EC treaty (Article 106 TFEU) is the object of multiple contradictory interpretations: either we consider that it regards SGEIs as "exceptions" of the rules of the treaty and in particular of the rules of competition (COM 2005 267 of 28 November 2005[103]), or we consider that it is about "derogations", which does not have the same meaning, or even that it justifies that the effective accomplishment of a mission of general interest prevails, in case of tensions, on the application of the rules of the treaty (White Paper).

[103] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:312:0067:0073:EN:PDF

The act of mandate poses several problems and questions: should we define the mandate for the transposition of the directive on services (perimeter of exclusion) in the same sense as in the regulation on the financing of services of general interest? Is the obligation to provide the service a compulsory condition in order to exclude an operator from the directive on services area? Is the mandate the solely act allowing the definition of public service mission? Finally, what interpretations would offer the Commission and the Court of Justice on the limitative list of services on the field of exclusion: will it be a control of what should be qualified as being, for example, "social housing"? If so, how this control will be articulated with the enforcement of the subsidiarity as established by the future application within the field of services of general economic interest? It would be necessary to have a definition of the concept of mandate at the Community level in a sense less compulsory by adapting the Article 86(2) (Article 106 TFEU) in particular to SSGIs. It should be recognized that the obligation of providing is implicit when the public authorities finance a certain mission recognised as being of general interest by the entrustment act, also by clarifying the objectives and the counterparts of such a financing and by conferring to each operator entrusted flexibility as regards modalities of their action[104]. It should be also noted that for the majority of the social services of general interest, the mandate can be only very general, the service being the result of the relationship between the provider and the beneficiary. Moreover, in many cases the undertaking is forced to take initiatives that cannot always be defined in amount.

Mandate - *To go further*

Legal consecration

Jurisprudential definition

Extract of BUPA judgement of ECJ: "the compulsory nature of the service in question is an essential condition of the existence of an SGEI mission within the meaning of Community law. That compulsory nature must be understood as meaning that the operators entrusted with the SGEI mission by an act of a public authority are, in principle, required to offer the service in question on the market in compliance with the SGEI obligations which govern the supply of that service. From the point of view of the operator entrusted with an SGEI mission, that compulsory nature – which in itself is contrary to business freedom and the principle of free competition – may consist, inter alia, particularly in the case of the grant of an exclusive or special right, in an obligation to exercise a certain commercial activity independently of the costs associated with that activity (see also, to that effect, paragraph 14 of the communication on SGEIs). In such a case, that obligation constitutes the counterpart of the protection of the SGEI mission and of the associated market position by the act which entrusted the mission. In the absence of an exclusive or special right, the compulsory nature of an SGEI mission may lie in the obligation borne by the operator in question, and provided for by an act of a public authority, to offer certain services to every citizen requesting them. Contrary to the applicants' opinion, however, the binding nature of the SGEI mission does not presuppose that the public authorities impose on the operator concerned an obligation to provide a service having a clearly predetermined content... In effect, the compulsory nature of the SGEI mission does not preclude a certain latitude being left to the operator on the market, including in relation to the content and pricing of the services which it proposes to provide. In those circumstances, a minimum of freedom of action on the part of operators and, accordingly, of competition on the quality and content of the services in question is ensured, which is apt to limit, in the community interest, the scope of the restriction of competition which generally results from the attribution of an SGEI mission, without any effect on the objectives of that mission. It follows that, in the absence of an exclusive or special right, it is sufficient, in order to conclude that a service is compulsory, that the operator entrusted with a particular mission is under an obligation to provide that service to any user requesting it. In other words, the compulsory nature of the service and, accordingly, the existence of an SGEI mission are established if the service-provider is obliged to contract, on consistent conditions, without being able to reject the other contracting party. That element makes it possible to distinguish a service forming part of an SGEI mission from any other service provided on the market and, accordingly, from any other activity carried out in complete freedom." (point 188-190 of the judgment preamble) (See also interpretation of the Commission in its *Handbook on implementation of the Services Directive*[105] binding the mandate to an "obligation to provision").

"Even though the Member State has a wide discretion when determining what it regards as an SGEI, that does not mean that it is not required, when it relies on the existence of and the need to protect an SGEI mission, to ensure that that mission satisfies certain minimum criteria common to every SGEI mission within the meaning of the EC Treaty, as explained in the case-law, and to demonstrate that those criteria are indeed satisfied in the particular case. These are, notably, the

[104] Frédéric Pascal, *Quel cadre juridique européen pour les services sociaux d'intérêt général ?*, Avis du Conseil économique et social, 2008, p. 33, 38

[105] Handbook on implementation of the Services Directive, Luxembourg, Office for Official Publications of the European Communities, 2007, p. 13, http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf

presence of an act of the public authority entrusting the operators in question with an SGEI mission and the universal and compulsory nature of that mission. Conversely, the lack of proof by the Member State that those criteria are satisfied, or failure on its part to observe them, may constitute a manifest error of assessment, in which case the Commission is required to make a finding to that effect, failing which the Commission itself makes a manifest error." (Point 172 of the judgment preamble).

"Official" definition

The Commission noted that "the application of Article 86(2) requires from Member States the respect of certain basic conditions … 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". According to Commission, a mandate act ensures the certainty of SGEIs' missions.[106]

As for the application of the Services Directive, the European Commission considered that the social services in Article 2(2)(j) are excluded to the extent that they are provided by the State itself, by the providers which are mandated by the State *and are thus under an obligation to provide such services …* »[107].

[106] COM(2007) 725 final of 20.11.2007, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 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://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0725:FIN:EN:PDF

[107] Handbook on implementation of the Services Directive, Luxembourg, Office for Official Publications of the European Communities, 2007, p. 13, http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf

Concession

In the Community law, “concession” is subject of the secondary legislation (concession of public works) and of the general principles of the treaties (as concerning the concession of services). Public contracts[108]/”marches publics” are subject to detailed provisions of the EU directives (now, the directive 2004/18/CE[109]). As for the public contracts of services, the Directive defines the “concession of services” as a contract having the same characteristics as a public contract of services, except that the counterpart of the service furnished consists either only in the right to exploit the service, or in this right with payment (Article 1 paragraph 2 subparagraphs 3 and 4). But there are no detailed rules of the directive that provide for them.

So far, the contours of the concept of concession in the Community law and the obligations to be meet by public authorities in the selection of the economic operators to whom the concessions are granted have been specified by the European Commission in its interpretative Communication on the concession under Community law of 29 April 2000[110]. “The acts attributable to the State whereby a public authority entrusts to a third party - by means of a contractual act or a unilateral act with the prior consent of the third party - the total or partial management of services for which that authority would normally be responsible and for which the third party assumes the risk. (...) These acts of State will henceforth be referred to as ‘concessions’, regardless of their legal name under national law.”

Therefore, from a legal point of view, it should be distinguished between the concession of works (granting the right to exploit a work as counterpart for the construction of this one, accompanied by the right to charge fees on the user, and by the transfer to the concessionary of the responsibility for the exploitation as well as the corresponding risk[111]) and the concession of services, having the same characteristics but generally concerning “activities whose nature and purpose, as well as the rules to which they are subject, are likely to be the State's responsibility and may be subject to exclusive or special rights” (interpretative Communication, 2000). Moreover, in the concession of service, the work or the construction of works is only additional compared to the main object of the contract that relates to the service provision.

The applicable statutory regime at the time of the award of the concessions of services is fixed only by reference to the principles raising from articles 28-30 and 43-55 of the EC Treaty and also from the Community jurisprudence, in particular the principles of transparency, proportionality, equal treatment and mutual recognition. In the opinion of the European Commission, the regime which rises from the relevant provisions of the Treaty can be summarised in the following obligations: fixing ~~of~~ the rules for the selection of the private partner, adequate publicity on the intention to grant a concession and rules for the selection in order to allow the control of impartiality throughout the procedure, ensuring a real competition of the potentially interested operators and/or capable to ensure the achievement of the tasks in question, respect of the principle of equal treatment of all the participants throughout the procedure, adjudication on the basis of objective and non-discriminatory criteria.

Challenges and prospects

So far, the EU law applicable to concessions derives primarily from general obligations which imply any coordination of the legislations of the Member States. Moreover, the diversity of national situations of “concessions” is confronted with the need to identify the Community regime applicable to concrete cases: the law on the public contracts or the concessions (in the sense of the Community law). These two Community procedures are distinguished only according to the criterion of transfer of the responsibility of exploitation that are engaged by concessions (the operator supports the risks associated to the establishment and the exploitation of the service; this one is remunerated by the user, in particular by the perception of a fee). The European Commission is working on a draft Directive on the issue of the concessions of services, which might try to assimilate them to the rules of the public contracts.

Concession – *To go further*

[108108] “Any contract for pecuniary interest concluded in writing between a contracting body and an operator, which have as their object the execution of works, the execution of a work or provision of a service, is designated as a "public works or public services contract”.

[109] Directive on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:EN:PDF

[110] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000Y0429(01):EN:NOT

[111] Directive 93/37/CEE of the Council, of June 14, 1993, concerning the coordination of procedures for the award of public works contracts
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1993L0037:19950101:EN:PDF

Legal consecration

Jurisprudential definition

The assessment elements of the definition of concession and public procurement should, according to the ECJ, be made to ensure that the effectiveness of the Directive in question is not compromised (Judgement of 12 July 2001, *Scala*, in particular points 53 to 55). For example, the formalism attached to the concept of contract under national law can be advanced so the Directives lose their effectiveness. Similarly, the onerous nature of the contract in question does not necessarily imply the direct payment of a price by the public partner, but may derive from any other form of economic provision received by the private partner.

"Official" definition

Public-private partnership (PPP)
According to EU law, public authorities are free to exercise their own economic activity or to entrust it to other operators. Generally, the cooperation between public authorities and private companies is called "public-private partnership". The concept is consecrated at the Community level as referring in general to the "phenomenon" of "forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service."[112] So far, in the Community law there is no definition or a specific regime for all the PPP. The legal framework governing the choice of the private partner has therefore been the subject of the Community coordination at several levels and degrees of intensity, leaving, at the national level, a wide divergence of approaches, even if any operation involving the award of a task to a third party is governed by a minimum set of principles deriving from articles 49 and 56 of the TFEU. Taking into consideration the diversity of practices of PPP in the Member States of the EU, the Green Paper on public-private partnership and Community law on public contracts and concessions proposes a distinction between "purely **contractual PPP**" that refers to a partnership based solely on contractual links between the different players", and **PPPs** of an **institutional** nature, involving cooperation between the public and the private sector within a distinct entity. - In the framework of **contractual PPPs**, the Green Paper distinguishes several national models: the "concessive model", the "Public Finance Initiative". Still, the conventions of public-private partnership are not precisely defined, even if the European Commission is working to a draft of directive on this field. - The **PPP of institutional nature** is qualified by the Commission as a cooperation between the public and private partnership establishing an entity with mixed capital (in particular cases through several authorities and/or several private partners) which aim is to ensure the delivery of a work or a service for the benefit of the public (the grant of a contract or a concession to the mixed-capital entity newly created). The establishment of a PPP of institutionalised nature can also take the form of a takeover of an existing public company by the private sector following the change of the shareholding of the private entity. In the Member States, different terminology and schemes are used in this context (for example, *Kooperationsmodell*, *joint ventures*, mixed companies). IPPP allows the public partner to maintain, by its presence in the shareholding and decision-making bodies of the common entity, to control, influence and expertise in the activities accomplished in the partnership. The private contribution to the work of the PPPI is the contribution to capital or other assets, in active participation in the execution of tasks assigned to the mixed-capital entity and / or management of the mixed-capital entity. However, a simple contribution with funds by a private donor to a public company is not an IPPP. The characteristic of this cooperation, mostly on a long term, is the role of the private partner who participates in various phases of the project in question (design, implementation and operation) bear the risks traditionally in charge of the public sector and which often contributes to financing the project[113]. There isn't, at the community level, specific regulations governing the setting up of IPPP. The Interpretative Communication proposes do not constraint the actors to the existence of two tendering procedures, one for selecting the private partner of IPPP, the other to grant to the new entity the public contract or the concession. However, regardless of how an IPPP was established in the field of public contracts and concessions, the principles of Articles 49 and 56 of TFEU treaty (non-discrimination and equal treatment, transparency, mutual recognition and proportionality) apply in the cases in which a public authority assign the provision of economic activities to a third party. For cases falling within the scope of the Directives on the coordination of procedures for public contracts (the Directives on public contracts), specific provisions apply.

[112] Green Paper on public-private partnership and Community law on public contracts and concessions http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0327:EN:HTML

[113] Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP))- 2008/C 91/02 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:091:0004:0009:EN:PDF

When the creation of an IPPP involves awarding a public contract fully covered by the Directive 2004/18/EC to a mixed-capital entity, it is always possible, given the financial and legal complexities of such projects, "in cases where the contracting body is objectively unable to define the technical means that would best satisfy its needs and objectives, or in cases where it is objectively unable to define the legal and/or financial form of a project" (PPP Green Paper item 25) using an innovative procedure created by this directive - the **competitive dialogue**[114]. It is a more flexible procedure whose purpose is both to preserve the competition between economic operators and to take into account the authorities needs. It allows authorities to discuss with ~~the~~ candidate companies for identifying solutions to meet their needs and discuss to each candidate all aspects of the contract.

Challenges and prospects

The PPP is not, at Community level, the expression of a particular legal form but induces a variety of mechanisms and tools that are not exposed in the Green Paper on PPPs. Even if the legal modalities of PPP may vary from a country to another they are obliged to respect the rules applicable to the choice of the company called to cooperate with a public authority under a PPP. The lack of homogeneity among the different Member States is confronted with a certain Community legal insecurity, and as regards the clarity of their impact on the contractual relationships governing the execution of the partnership. However, we must distinguish between the PPP of public contracts, which are not covered by the same distribution of risk.

Elements of uncertainty are also the structures of public-private cooperation developed in the national practices that were not taken into account in the Green Paper on PPPs.

[114] See also the European Commission, Explanatory note – competitive dialogue – classic directive http://ec.europa.eu/internal_market/publicprocurement/docs/explan-notes/classic-dir-dialogue_en.pdf

State aid – Public service compensations
The public aid to public or private companies are defined and are subject of the EU competition law (Articles 107-109 TFEU, regulations, decisions, communications, and a rich European jurisprudence). The provisions of the Treaty lay down the principle of the prohibition of public aids that distorts or threatens to distort competition (Article 107 § 1 TFEU). Aid is considered public if it is financed by public resources from state, local government or European funds[1]. Some derogations of the principle of prohibition of the State aid are established by the TFEU. Certain are considered as "compatible with the common market": a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; b) aid to make good the damage caused by natural disasters or exceptional occurrences; c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point. (Article 107§2/2 of the Treaty). Others can be considered as compatible with the common market, under the condition of the European Commission authorisation a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment and of the regions referred to in Article 349, in view of their structural, economic and social situation; b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest; e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission (article 107§2/3of the treaty). In the Altmark judgment of the CJCE of 24 July 2003[2], the Court established four cumulative conditions in order that a public service compensation should not be considered a State aid : • the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined; • the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner; • the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; • where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. After this judgement, and considering that most of the compensation of public service obligations do not meet these four conditions, the European Commission adopted several regulations exempting certain categories of aid[3] and in 2005 three texts (called package Monti-Kroes) concerning state aid in the form of public service compensation (a decision[4] and a framework[5]) and a Directive on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (obligation of keeping separate accounts), replaced on 16 November 2006 by the Directive 2006/111/EC[6]. These texts exempt from notification and judge a priori compatible compensation not exceeding 30 € million a year granted to companies whose annual turnover is less than €100 million, hospitals, social housing, certain public service obligations in transport and airport and shipping infrastructure, while clarifying the conditions to be met: to be granted on the basis of a mandate from the public authorities including the nature and duration of PSOs and their

[1] The "state aids" are all *benefits*, *direct or indirect*, that the **public communities** can allocate to a company or group of companies, particularly in the form of *grants, tax benefits, whatever their forms, debt forgiveness, granting of loans, investments in capital, interest subsidies, loans and advances*, to zero-rate or on terms more favourable than the average rate of bonds, *loans or made available property, buildings or staff, discount on the selling price, rentals or lease-purchase of bare or improved land or of new or renovated buildings*. (Circulaire du Premier Ministre Français du 26 janvier 2006 relative à l'application au plan local des règles communautaires de concurrence relatives aux aides publiques aux entreprises)

[2] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:226:0001:0002:EN:PDF

[3] http://europa.eu/scadplus/leg/en/s12002.htm

[4] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:312:0067:0073:EN:PDF

[5] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:297:0004:0007:EN:PDF

[6] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:318:0017:0025:EN:PDF

PSOs and their duration, the enterprises and territories concerned, the nature of any exclusive or special rights granted to the company, the calculation, monitoring and reviewing parameters of the compensation, the modalities for the refund of any over compensation and ways to avoid them and the excessive character: the amount of compensation may not exceed what is necessary to cover the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.
As regards the procedure for granting of aid, the Community law establishes the principle of previous authorization by the European Commission, following notification or exemption. The European Commission is the sole authority to assess the compatibility of state aid with the provisions of Article 87 of the EC treaty and it is particularly concerned in the matter exercising strict control.

Challenges and prospects

In a draft Communication of 4 November 2008[1] on the application to public service broadcasting the rules on state aid, the Commission considers that "the provisions granting exemption from the prohibition of State aid have to be applied strictly." The current state of law and jurisprudence is not always easy to evaluate in practice (for example, in the case of monitoring the conditions posed by Altmark judgement relative to the "reasonable profit" or the analysis of costs by reference to a medium-sized firm, well run and adequately equipped).

State aid – Public service compensations – *To go further*

Legal consecration

Other dispositions of the EC treaty applicable in the field o State aids (extract):
[SECTION 2 Aids granted by States]
Article 108 of TFEU
1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.
2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.
If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.
On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.
If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.
3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.
4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

Article 109 of TFEU

The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108 (3) shall apply and the categories of aid exempted from this procedure.

Article 16 of EC Treaty

[1] http://ec.europa.eu/competition/state_aid/reform/broadcasting_communication_en.pdf

Without prejudice 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 which enable them to fulfil their missions.

Article 93 of TFEU

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

Article 106 of TFEU

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

See also Vademecum Comunity law on State aid: http://ec.europa.eu/competition/state_aid/studies_reports/vademecum_on_rules_09_2008_en.pdf

Application of State aid rules to public service compensation for SGEIs http://ec.europa.eu/competition/state_aid/legislation/sgei.html

Jurisprudential definition

The European jurisprudence is rich and evolving in the field of State aids (see in particular judgement Philip Morris[1] of 18 September 1980, Altmark of 24 July 2003).

According to case law, aid can occur not only when granted by the State and other public authorities to companies they control directly, but also by these companies to their subsidiaries. They are subject to the same rules, beginning with that of the prohibition in principle, in the both cases. (ECJ, 11 July 1996, Syndicat français de l'express international[2]).

It should be noted that the enforcement of Community rules on state aid is a shared responsibility between the Commission under the supervision of the Court of Justice and national courts. The Commission has the sole right to determine the compatibility of state aid with the provisions of Article 107 TFEU. National courts are not the directly judge of the compatibility of ~~the~~ aids notified in respect of the Community law. They are competent to decide on possible violation of the terms of Article 108 § 3 of the Treaty, relating to prior notification and suspension clause. They also decide on the recovery of unlawfully granted aid, especially in the absence of notification (see judgment Centre d'exportation du livre français (CELF) of 12 February 2008[3]).

See also the Commission notice on the enforcement of State aid law by national courts[4]

«Official» definition

See also http://europa.eu/scadplus/glossary/state_aid_en.htm

[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61979J0730:EN:HTML
[2] http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61994J0039&lg=en
[3] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:079:0003:0004:EN:PDF
[4] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0409(01):EN:HTML