PES GROUP SEMINAR
Services of general Interest: Who's leading? The European Internal Market or Public Authorities?

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Preliminary draft for a European framework directive for Services of General Interest

Explanatory statement

I. Short history of initiative

For the PES Group in the European Parliament , the provision of efficient, accessible and high quality services of general interest is a priority issue. Following the referenda in France and the Netherlands, and the failure of the June 2005 EU Summit, the PES Group launched an action plan to rebuild confidence in the EU's capacity to respond to the concerns of citizens. The action plan proposed five concrete measures, one of which was the adoption of an EU legal framework on services of general interest, in order to protect and enhance public services. A PES Group position paper on the future of services of general interest, last updated in April 2004, explained in detail the legislative framework that the Group believes is needed.

The draft EU Constitutional Treaty - thanks in large part to a Socialist campaign during its preparation in the European Convention - contains an extremely promising **Article III-122**[1] asserting the specific character of services of general interest in relation to the rules of competition and the internal market. And in two EP reports - the LANGEN report in 2001 and the HERZOG report in 2004 - broad majorities in the European Parliament have supported the demand for a European legal framework for services of general interest.

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

The PES Group has decided that the best way to express our impatience and to underscore our sense of urgency is to take the lead that the European Commission has failed to take - by drafting a legislative text and leading the debate. In October 2005 the PES Group established a working group, with European and national experts and observers, for that purpose**.** After three working meetings a framework was developed. The framework prepared by the Expert Group will be presented to a PES Group seminar on 7 February, to provide guidance for the fine-tuning which should be done before presentation to a full Group Plenary. In this note we present the main issues on which we would like more guidance. A final version of the text, revised in the light of the seminar, will be used to bring pressure on the European Commission and the EU Austrian Presidency to speed up the presentation of a formal legislative initiative before the end of this year.

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

II. Introduction

The European Treaties and the EU Charter of Fundamental Rights emphasize that access to high quality services is a key element in European citizenship. They also underline that competences regarding content and method lie with Member States and sub-national authorities. The key concepts - "Public service", "services of general interest", "Daseinsvorsorge", "services of general economic interest", etc - have different meanings and practical implications in ,different Member States, and show the rich diversity of Europe, which a legal framework must respect.

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

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

III. What is the objective of the directive (article 1)

Article 1 and in Recitals 1 – 7 formulate the objective of the Directive in a way that combines the need to clarify what citizens and companies may expect from services of general interest that function in an internal market, with the guarantee that it is up to the authorities at a more local level to define, provide, commission and fund such services.

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

<u>Key questions here are:</u>

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

IV. What is the scope of the Directive (article 2)

In the alternatives presented for Article 2 we signal the complexity of finding a clear definition of the scope. In the interest of guaranteeing high quality services it would be desirable to have a broad scope, including all services of general interest. From the perspective of the authorities and companies

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

executing or offering to execute services it is important to make clear which services are deemed to be services of general economic interest operating in the internal market (see article 3).

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

Key questions here are:

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

V. Clarification of the concept of services of general interest and general economic interest (article 3):

The options presented here are linked to the alternative approaches set out in Article 2. **One option** offers more precise definitions of services of general economic and general interest, based on the case-law criterion of market participation or the performance of an activity under market conditions. However, the concepts of economic activity and of undertaking, within the meaning of Community case law, do not suffice to account for the specific nature of certain services of general interest or services of general economic interest compared with other operators in the same sector.

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

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

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

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

A second option offers a definition focused on the limitation of services of general economic interest to services which are of a predominantly industrial or commercial character. This means that borderline services of general interest/general economic interest issues would in future face a different test from the current economic/non-economic test - which is gradually sucking all services of a social character into the 'economic' category. The term industrial and commercial is in fact at the heart of the definition of 'services' in Article 50 of the Treaty. Moreover, the term "industrial or commercial

character" is also used in an important way in the Public Procurement Directive of 2004, where a "body governed by public law" (to which the Directive's duties apply) is defined as one "established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character". So it would be a question of fact whether a body was predominantly of an industrial or commercial character. In particular, it would exclude all public services that are purely social in character and include the responsibility of the governmental authority at any level to determine what is a service of general economic interest.

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

All members of the Expert Group agree that the whole subject of services of general interest is subject to technical, economic and social change and therefore has a dynamic character as regards the nature and manner of their provision.

Key questions here are:

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

VI. Relation of a horizontal directive with sectoral directives (article 4):

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

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

Key questions here are:

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

VII. Definitions and principles (Article 5)

The definitions in this Article should create common ground for meeting the expectations of citizens vis-à-vis their authorities,and should establish greater legal certainty as to what the Court of Justice calls "overriding reasons of general interest", which may permit derogations from normal market rules. They seek to apply common principles - such as universality, continuity, quality, efficiency, equal access, proportionality, affordability etc. - to the provision of services of general interest

Key questions here are:

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

VIII. Operational provisions (articles 6, 7 and 8)

These articles describe the relationship with the internal market and competition rules. They mainly follow the case law of the European Court of Justice and its interpretation by the European Commission. All members of the Expert Group pointed out that common elements of daily management of services of general interest would be required for legal certainty.

Article 7 makes one major change from the EJC's well-known "Altmark" decision – it leaves out the 4th Altmark condition, comparing the recipient undertaking with another "typical" undertaking. The expert argues it would be wrong to decide whether something is or is not a state aid by reference to what could be marginal judgements about the reasonableness of specific cost items.

Article 8 describes some common principles of management, in particular regarding public obligations, public procurement and contracts, in-house services and public-private-partnership; and also principles as regarding some financial aspects of management, such as prices, thresholds etc. All experts agreed not to define any absolute threshold values in the interests of excluding some services from certain management obligations.

Key questions here are:

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

IX. Allocation of powers and level of regulation (articles 9, 12 and 15)

Article 9 is the heart of the Directive, where the questions asked under article 1 and 2 about the objective and scope come back in the form of: What will be the division of responsibilities between Member States and European Union regarding the main provisions of the Directive? What will it oblige Member States to do and what powers of regulation would the European Commission have? It is this Article (with Articles 10, 11 and 12) which tries to promote co-ordination and co-operation between Member States via European guidelines, the Open Method of Coordination and report-back. The most radical proposal is in Article 12, creating a European Observatory to assist the European Commission in collecting information, stimulating European standards and evaluating the sector.

Key questions here are:

- How big is the role for the EU and what should be the focus: stimulating, facilitating, monitoring ?
- What can be prescribed in the light of the division of competences ?
- Should the European Commission take the leading role or should there be an Open Method of Coordination between the Member States ?

- How can the involvement of civil society, social partners, EP, CoR and EESC best be guaranteed ?
- Should there be an European Observatory as in article 12 ?

X. Quality of services and evaluation (articles 10 and 11)

Articles 10 and 11 give measures and methods to encourage and promote voluntary high quality standards. Some experts have been very creative in suggesting several measures to be undertaken to give a quality impulse at the executive level - such as certification, quality charters, labels and independent assessments. Member States and the European Commission have to cooperate here. The role for the European Commission is mainly facilitating and supporting. Others want the European Commission to be more prescriptive in standard setting or would prefer to leave these provisions out of this Directive, having in mind different concepts of services of general interest and different controlling procedures/standards within public authorities.

Key questions here are:

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

XI. *Protection of users and participation of the workforce (articles 13 and 14)*

Article 13 outlines how the users of services of general interest should be informed, protected and guaranteed the high standards that these services should meet. It may be desirable to take account of the monopolies, special guarantees and rules which SGI providers often enjoy .

Article 14 is deals with participation of the workforce in the public service and services of general economic interest.

The key question here is:

- What is necessary, beyond existing general provisions of consumer protection and workers information and consultation, in view of the special collective character of services of general interest ?

XII. Missing elements

A last question to be dealt with is whether the Expert Group's draft text has left any important gaps. For the moment it tries to be as comprehensive as possible, in order to stimulate a rich debate.

The PES Group invites all who would like to contribute or comment in the coming weeks, to send their remarks to utmuller@europarl.eu.int by latest 24 February 2006.