

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

7 February 2006

Summary

Opening Session

PES Group Vice President, MEP Harlem DÉSIK (Chair):

Public services are at the heart of communities, even though the rules governing them are different in each state. The lack of EU legislation, to regulate and protect public services is a problem. Europe has to have common rules, providing equal access to public services for all European citizens, and leaving the means on how to do so to the Member States. When compared with the US, having a market economy and developing (lasting) public services is a characteristic of Europe. Europe should strive to assure equality of access to public services, making long-term investments and guaranteeing regional and territorial continuity. Based on the role played by the Services of General Interest (SGI), and the interface between the Internal Market and the SGI, community rules are necessary. Consequently, we should work on a framework directive for the SGI, for which we do have a basis in the current EC Treaty, even though the Commission is using the rejection of the Constitutional Treaty as an excuse to avoid the establishment of such a framework directive. The PES Group believes in lasting and developing Services of General Interest that will make people trust Europe again. To prove this, we are not just making a declaration, but working towards drafting the framework directive itself. After the discussions of the day, we will submit our proposal for a Directive on the SIG to European Commission President Barroso.

Session 1: Presentation of a Preliminary Draft for a European Framework Directive for Services of General Interest

Introduction:

PES Group Coordinator in the EP ECON Committee and Chair of the PES Group Expert Group on SGI, MEP Ieke VAN DEN BURG:

We generally consider Services of General Interest to be an indispensable characteristic of the European Social Model, but the traditions as to what exactly is provided, under which conditions and by whom, differ considerably from country to country. This has led to misunderstandings and confusion about the concept of SGI, and especially about Services of General Economic Interest (SGEI). The only way to solve the problems and confusion is to create more legal certainty. Legal certainty is imperative for authorities, for companies and for citizens. The EP, the social partners and local and regional authorities have already asked for more legal certainty several times. So far, the European Commission has not used its right to initiative to come up with a draft proposal for secondary legislation dealing with how the existing internal market and competition rules relate to the guarantee in the Treaty of the right for decentralised authorities to define, condition

and guarantee SGI for citizens. This is why we, the PES Group, decided to undertake such an initiative ourselves. Proper secondary legislation at the European level is the only possible way to give clarity and security throughout Europe. 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 making or non-profit making) 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,
- and last but not least those of citizens and users of those services to be sure that they are offered under reasonable conditions of accessibility, quality, affordability, etc.

The PES Group working group on SGI/SGEI considered it opportune to open up this embryonic draft for broader consideration in this seminar to get guidance and input for the direction in which it may be developed further and prepared into a document for debate and adoption in our political group and for wider distribution. Whatever the assessment of this draft might be, by providing a concrete text, we hope that the debate will focus more on a real target, rather than going in circles around prejudices and assumptions of more or less noble intentions and ambitions. We appreciate your comments and contributions, leading to further improvements of the draft text.

Panel

Stéphane RODRIGUES, Professor at University of Paris I/ Lawyer at Lallemand & Legros:

The most polemical part of this discussion is the legal basis for having a framework directive on the SGI. The current draft for a framework directive does not finally define the legal basis. So, there is still a decision to be taken regarding the legal basis. At some point it will be necessary to go back to Article 95 of the Treaty! Recitals of the draft text: In justifying the need for having a framework directive we need to give political and legal reasoning (recitals 1-7), for which Article 16 of the Treaty (introduced at Amsterdam) provides a compromise and imposes the principle of shared responsibility. The conclusions of the Barcelona and Nice European Councils show that this article is a political mandate. Recitals 8 and 9 provide food for thought on the question of the scope of the framework directive: Will the scope be extended to all the SGI or will it just cover SGEI ? Recitals 10 and 11 look at the relation of this directive with the other aspects of community legislation. Recitals 12 and 13 introduce the subject matter of the actual text. Articles proposed by the working group in the draft text: Article I is the basis of the text, highlighting the need for general and shared compassion for having better legal certainty for the SGI and SGEI. Article II touches on the scope of the text; there is obviously a debate on this issue and the working group presents several alternatives. Article III attempts the clarification of concepts of SGI and SGEI, where the working group presents several alternatives again. Article IV refers to the relationship with other provisions of Community Law.

Jean-François AUBY, Legal Adviser for Local Public Services:

Article V is on definitions and basic principles, regulating the supply and delivery of providing SGI, which give rights to the users. It lays out basic principles such as universality, continuity, equality, quality, affordability, efficiency...etc. It touches on the issue of European Standards for SGI, as well as presenting several alternatives on the regulation of how SGI are supplied. The main principles on the supply of SGI are:

- SIG must be provided by the national/regional authorities.
- the regional and local bodies responsible for the supply of SGI will be able to choose their means for it.
- if the public service is to be provided by a private company, no matter what the means are, the competition rules will have to be respected.
- the need for defining what the principle of in-house supply means and if in-house supply is subject to competition rules.

Jens LATTMANN, CEO & Legal Adviser for German Local Governments' Organisation:

Most local governments in Germany would support the establishment of a framework directive.

Main points:

- It is a question of emphasizing other aspects than competition and internal market in providing public services and to give more importance to the principles of continuity, universality...etc.
- Secondly, legal safety of the providers is a crucial issue. German local governments attach great value to the differentiation between SGI and SGEI. They wish to have more liberty in deciding who will provide public services ("in-house" or other, such as for example the "best-value regime"). Particularly the inter-communal co-operation could profit greatly from increased legal safety.

German local governments currently do not have a legal basis for the payment of suppliers of public services and regarding the establishment of minimum standards for the supply of SGI, this is a difficult issue! The question of evaluation should not be left up to a European agency.

Per KLOK, Legal Adviser for Danish Confederation of Trade Unions:

The issue of SGI is a complicated subject, both politically and legally important. The framework directive should be as simple as possible and it should mainly focus on:

- Subsidiarity
- Promotion of the respect of SGEI
- Focusing on SGEI (It is important that the public authorities decide on the supply of SGI in accordance with the treaty)
- Containing some clear principles and conditions
- Clarification of the existing market rules
- Clarification of in-house rules
- Clarification of protection of users
- Involvement of relevant stakeholders.

In developing a European policy for setting standards for the supply of SGI, all relevant stakeholders should be taken into account in their fields! For the evaluation of the quality of the SGI provided, the draft directive includes:

Article XI: Evaluation reports to be presented by each Member State to the Commission, in the light of which the Commission shall provide a summary report to the EP and the Council.

Article XII: The establishment of an Independent European Observatory for SGI/SGEI, which will evaluate the quality and performance of SGI/SGEI.

Questions and Debate

There are lines of defence set up for SGI/SGEI by the actors involved:

- Our products/ services are different and specific.
- In discussions at European level, only the SGEI should be taken into consideration.
- Subsidiarity.

However, in the process of European integration these lines of defence are being blurred one after another; it is thus necessary to clarify this issue legislatively (so to have a legal certainty). However, it is a very important issue, with a lot of disagreements, often due to misunderstandings. Europe stumbled for a long time on a Franco-German misunderstanding, each one having the objective of protecting its own public services. The Germans wanted to protect freedom of Länder and the French wanted to protect their public monopolies. Basically, the objective of protection is the same, but we have radically different approaches. There is thus a true problem here - and the text proposed in order to solve this problem is a good one; it fixes common sectoral principles, contrary to the directives which sometimes fix mixed, even contradictory, principles. The issue of "in-house" should be better defined and the question of the scale of "in-house" should be clarified. Furthermore, better definition of public service obligations is needed, as well as a clarification on how to finance it.

The scope of SGI and SGEI should be discussed and defined; otherwise the lines of defence will be breached. We should also clarify if it is the Member States or the European Union that defines SGI and SGEI, or if there should be a list. Certainly against the idea of trying to come up with an exclusive list of SGEI and SGI! We should not target the commercial character of an activity too much, since it is very difficult to define what is commercial and what is non-commercial. A case-by-case analysis can make it possible to determine some subcategories such as SGEI, social SGI, medical or transport SGI...etc. When the Commission makes proposals at a sectoral level, for example for the mail service directive, it uses Article 95 of the Treaty, which does not prohibit an interference with competition rules. Articles 81 and 82 authorize measures of execution. Then, we are trying to define the relation (by imposing principles) between SGI and the competition rules.

Finally, everybody agreed that, obviously, here we have an initiative that is at the heart of what the PES is aiming at and to present it in April will be very timely. We should try to define the standards and obtain a neutral definition – which is very difficult taking account of the existing differences in Europe. The question really is how much you want to invest in this sector. The reason for us to discuss this now is the proposal on the services directive, and the unclear situation on whether we will be able to draw the line between the Services Directive and the Internal Market principles.

Session 2: Other/ additional solutions for the future of Services of General Interest

Introduction

PES Group Coordinator in the EP IMCO Committee, MEP Evelyne GEBHARDT:

Since the health and social systems of the Member States are extremely different, there is a need for regulation at the European level. It is known that each Member State imposes different limits inherent in its own system and those sometimes are contradictory from one Member States to another. If we want openness for patients/consumers though, we have to address it in a difficult way; the creation of a special set of provisions is needed for this type of sector. In a lot of areas, there are many different conditions in different Member States. So in opening up the borders between Member States, the special needs of the SGI/SGEI need to be safeguarded. The first question to put to the experts is then: How will we be able to solve this problem? Second question: Which services could be included? At the moment, we leave it to the Member States to define this and at the European level it is only the constitution that would make it possible to define this. Therefore, after the rejection of the constitutional treaty, we need to find an interim arrangement. The Commission approach is that, because there are different types of services, we cannot have a horizontal approach to this issue. Third question: How do we organize the participation of civil society? By a forum, an observatory or within the parliamentary framework? These are important issues to be discussed. And there are many more questions to be raised and answered!

Panel

Marcel HAAG, European Commission, Head of Unit SG D2.

The discussion about the framework directive is only one aspect of a much wider discussion. The Commission has established a number of principles in its White Paper of 2004 on the future of SGEI which should be followed in all European policies related to SGI/SGEI. These principles go far beyond the issue of the framework directive. In addition to the work going on, there are a number of horizontal initiatives since the White Paper. For example:

- The package on state aid rules, with which the Commission aims at clarifying and simplifying the rules for public financial support for SGI.
- The public land transport proposal, in which the right of public authorities to provide services is clearly laid-out.
- The evaluation reports that the Commission has submitted on the performance of network industries.
- The planned Communication on social and health services, which will allow us to look at what needs to be done.

Once the EP adopts the ECON draft report of MEP Rapkay on the follow-up of this White Paper, the Commission will elaborate on this issue. The question of the framework directive on SGI is an important one, but this debate should not overshadow some very important and specific initiatives (cited above) that are going on in this area.

Bernard SOULAGE, 1st Vice President of the Rhône Alpes Region (CoR)

Do we need a framework directive? The answer now is obviously, yes, but that was not always the case. The general problem is to articulate a European definition with the national situation and the application at the national level. The framework directive should cover all SGI, in order to have a general framework, with complete respect of the subsidiarity principle. Definition of in-house: Today, the position of the Commission is the 100% control of shareholding. In my opinion, it is necessary to go towards 67%. Definition of whether it should be the delegating authority of the operator that will define and provide the in-house service.

Raymond HENCKS, European Economic and Social Committee (EESC).

The EESC entirely agrees with the content of the draft framework directive, except the scope. For the EESC, the question of SGI includes economic and non-economic services. The EESC believes that SGI are indispensable tools in reaching a social goal in Europe. Each Member State should be free to define the difference between SGI and SGEI and the framework directive should spell out the rules of competition.

Carola FISCHBACH-PYTTEL, General Secretary of European Federation of Public Service Unions (EPSU).

The link between the Services Directive and SGI is very important. This subject has been under discussion for ten years now, and there has not been much progress on it. The Commission's argument for not presenting a legal basis, because of the diversity of services, is not a good argument. The diversity of services had not stopped the Commission from presenting the proposal on the Services Directive. We wish for the constitutional treaty to come back, but meanwhile, we need to have an interim arrangement as was said before. Problem of definition: SGI/SGEI: SGI was initially meant to be the bigger title whereas SGEI could be subsumed under it. Now, in the Services Directive, SGI becomes a very limited domain. What is proposed in the draft text today is very valuable and worthy of reflection. A European Observatory is necessary for the process of self-evaluation. On quality control and benchmarking, there needs to be a set of principles. Observatory should be open to civil society participants.

Jeremy SMITH, Secretary General of the Council of European Municipalities and Regions.

The concept of SGI covers the largest network from industries down to the smallest local authority. We need to be sensitive to this diversity and not only concentrate on the question of subsidiarity. There is a need for general guiding principles to be taken into account at the right level of government. We need to see by whom they are evaluated. We believe in evaluation by *peer review*, not regional, national or European control. There is a need for a difference between SGI and SGEI. Given the way the jurisprudence is going, there would be a danger of going in the direction of subjecting all public services to competition rules. There needs to be a definition of SGI – as not being commercial or industrial, but neither a long shopping list of services. The problem of defining in-house should be solved. For the compensation of public service obligations, it is a question of scale and we need more definitions.

Rainer PLASSMANN, General Secretary of CEEP.

We need a codification of the various sectoral legal instruments (principles) in order to guarantee legal safety. In the White Paper for SGI, there are many principles but they are not necessarily

linked. We need an overarching provision to deal with the grey zones. In the absence of a constitution, it is important to reconcile the rules of the single market with the existence of public authorities at a regional level of governance. We need more legitimacy for the European institutions to act in this field. There is a need for rules. If not, funds could simply repurchase the transport companies and manage them with the sole objective of making profit. A right of self-determination is necessary for regional public authorities so that they can do more than simply carry out European law. The Commission currently has a "monotheist" approach on the internal market. We need a pluralistic approach, answering to political, social...etc. needs. The legal bases are not always optimal, but if wanted, a reasonable basis could be found.

Jean Claude BOUAL, CELSIG.

The debate shows a progression on the subsequent texts. The Commission is beating around the bush, when it comes to the debate on a framework directive. SGI are a pillar of the European Union, so it is a contradiction not to legislate in this field and let the market forces decide on this! With the results of the referenda on the constitutional treaty, we can see that the people are scared. Consequently, we cannot let this issue drift. The problem of subsidiarity: how to implement this principle in the domain of the internal market, the logic of which is relatively contradictory with this concept. We should not lose the privileges of local communities because of the rules of the internal market. As for the evaluation, it is necessary to organize the participation of all the actors, in particular users/ consumers, civil society, public authorities...etc. It is necessary to keep account of it by creating an independent observatory.

Barbara SAK, Assistant Director of CIRIEC

Definition and Goal of SGI/SGEI: It is the Member States which traditionally define the rules and operation. The principal question in the definition is the 'finality' of the service, not the nature of the service. The goal is to be non-profit and not always commercial (the repairing surgery after an accident is a public utility; the plastic surgery practised by the same doctors in the same hospital is undoubtedly not). It is necessary to avoid a single model and to respect a certain balance to avoid forcing the abandonment of what functions well in certain circumstances. Everybody in their own way should be allowed to be a part of Europe, and there are various models in doing so. We take the existence of SGI/SGEI for granted, but we need them for the functioning of our society. We need to organise and regulate the SGI/SGEI.

Questions and Debate

We need a European way of ensuring the high quality of services. The question here is the quality criteria: it's not about the number of nurses per patient, but principles like equality, access to services, etc. Principles of equality, universality, accessibility...etc. should not be put away.

The authority which will make the choice of what a nation regards as public services must have a very strong legitimacy since it is one of the fundamental choices of any company. Europe does not have this legitimacy today. Europe must impose horizontal rules, but respect the subsidiarity principle and the role of the local communities in this sector.

The majority underlined that it will be not possible to have lists of SGI and SGEI. Making lists is not a suitable way to react to the developments of the market in a flexible manner. The more we succeed in finding other instruments to determine competences and to limit the legal consequences of difficulties of definition of the SGI/SGEI, the less we will have problems. Some

grey zone needs to be left behind the definition of economic activity, semi-economic activity, non-profit activity; all can be defined only by general criteria. But, it would be better to agree on the objectives of such services.

It was considered as regrettable that the Commission has limited itself to issuing communications and has avoided the legislative way since one can pose questions about the legal authenticity of the Communications. However, finally in this context, the Commission showed itself to be willing to have a very inclusive approach towards this subject.

Closing Session

PES Group Vice-President, MEP Robert GOEBBELS

I support the Commission's sole right to legislative initiative. Some people say that the EP should have the right to initiative too, but it would be a big mess if the EP had that power and all the local governments and others started bombarding the EP with suggestions for initiatives. It would not be useful. However, in this case, the Commission is playing with fire! Because both the governments and the EP asked the Commission to take an initiative on this subject. The Nice and Laeken European Councils asked for an initiative! But the Commission seems to be engaged in eternal procrastination on this subject. Even if the Commission has not been given the legal basis with the constitutional treaty, it can still carry on and do what it has to do. If the Commission does not act on this, the European Court of Justice will take the chance to fill the gap, which is not at all the best way of going about this. The PSE Group will continue working on this subject and finalise the draft text presented here.