

**Opinion of the European Economic and Social Committee on ‘Services of general economic interest: how should responsibilities be divided up between the EU and the Member States?’**

**(own-initiative opinion)**

(2010/C 128/11)

Rapporteur: **Mr HENCKS**

On 26 February 2009, the European Economic and Social Committee, acting under Rule 29(2) of its Rules of Procedure, decided to draw up an own-initiative opinion on:

*Services of general economic interest: how should responsibilities be divided up between the EU and the Member States?*

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 8 September 2009.

At its 457<sup>th</sup> plenary session, held on 4-5 November 2009 (meeting of 4 November), the European Economic and Social Committee adopted the following opinion by 155 votes to one, with nine abstentions.

## 1. Subject of the own-initiative opinion

1.1. In its action plan A Programme for Europe: the proposals of civil society (CESE 593/2009), the EESC stressed the importance of services of general interest (SGIs), enshrined in the Charter of Fundamental Rights of the European Union and as defined in the protocol appended to the Lisbon Treaty.

1.2. The protocol on SGIs is a major innovation of the Lisbon Treaty, as it covers all SGIs and for the first time in a treaty introduces the concept of ‘non-economic services of general interest’ in contrast to ‘services of general economic interest’.

1.3. The protocol is not just an interpretative declaration on the Union’s treaties and common values regarding SGIs; rather, it is a set of operating instructions aimed at the Union and its Member States. It consistently places the user, the satisfaction of his needs, his preferences and rights at the heart of the proposals and enshrines the common principles of a high level of quality, safety and accessibility, equal treatment and promotion of universal access.

1.4. In the EESC’s Programme for Europe, the Committee proposes that a Community initiative be prepared to launch a real debate on establishing guidelines on services of general interest in view of their importance for the Union’s social and territorial cohesion in the context of globalisation and in line with the aim of promoting universal access and user rights provided for by the Lisbon Treaty.

1.5. With Article 14 of the Treaty on the functioning of the European Union (TFEU) the Lisbon Treaty for the first time

introduces a generally applicable legal basis for SGIs for the Community legislative authorities; this is legally distinct from that relating to the internal market, which is the basis for the sectoral directives liberalising network SGIs (electronic communications, electricity, gas, public transport, postal services).

1.6. Article 14 focuses on the economic and financial conditions necessary to enable SGIs to carry out successfully the function assigned to them, calling on the Council and the European Parliament to legislate by means of regulations.

1.7. Following on from its Programme for Europe, in this own-initiative opinion the EESC concentrates on the implementation of Article 14 of the Lisbon Treaty and proposes that the added value and possible content of legislative initiatives by the European institutions should be studied in order to clarify the following questions:

- who defines services of general interest, their objectives, tasks and responsibilities?
- what forms can this definition take?
- in what areas could Community SGIs be needed to implement the Union’s objectives?

## 2. Definition, objectives, tasks and responsibilities of SGIs

2.1. The protocol appended to the Lisbon Treaty for the first time introduces the concept of ‘non-economic services of general interest’, whereas the Treaties have previously referred only to ‘services of general economic interest’.

2.2. The protocol on SGIs appended to the Lisbon Treaty confirms, on the one hand, the exclusive competence of the Member States for non-economic services of general interest (subject to compliance with the general principles of Community law), and on the other hand 'the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users'. The protocol does not, however, clarify the distinction between an economic and a non-economic service.

2.3. Since the Treaty of Amsterdam (1997) the EC Treaty (Article 16) has made it clear that the Union and the Member States share powers and responsibility for SGEIs to the extent that, according to the EC Treaty, *'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'*.

2.4. This sharing of responsibilities is, however, still far from being clarified, and this is a source of uncertainties for all stakeholders concerned (public authorities, service providers, regulatory agencies, users, civil society), leading to a large increase in references for preliminary rulings and disputes before the Court of Justice of the European Communities. Given that the Court rules on individual cases, on the basis of existing law, which is not well developed in relation to SGIs/SGEIs, and previous case law, government and the local authorities are increasingly subject to Community competition law, for example if public service activities are carried out with other partners.

2.5. The reference to the needs of the users, both private individuals and professionals, can be interpreted as a key element which has to be complied with as the establishment of SGEIs can only be justified if it enables the performance of missions of general interest, in the service of the principal beneficiaries of these services.

2.6. The determination of the nature and scope of an SGEI mission in specific spheres of action which either do not fall within the powers of the Community or are based on only limited or shared Community competence remains, in principle, within the competence of the Member States.

2.7. The Community institutions and in particular the European Commission are invited by the protocol to take account of the 'diversity' of SGEIs and the 'differences in the needs and preferences of users that may result from different geographical, social or cultural situations'.

2.8. When monitoring compliance with Treaty rules regarding the definition of SGEIs by the Member States, the Commission will therefore have to take greater account of the public logic and democratic choices of each Member State. The scope, content and method of the Commission's assessment of 'manifest error' should be correspondingly adapted in order, as far as possible, to prevent conflicts and disputes.

2.9. All SGIs and SGEIs are faced with a twofold uncertainty detrimental to the achievement of their objectives, as regards:

— the respective powers and responsibilities of the Union and the Member States and the local authorities;

— the economic or non-economic character of services, which determines the body of law by which they are governed.

2.10. It is therefore important that, as required by Article 14 of the Lisbon Treaty, one or more legislative initiatives should be adopted providing the necessary clarity and guarantees, while taking account of the nature and specific features of various kinds of SGEIs (social services, employment measures, aid for the disadvantaged and people with disabilities, social housing etc.). The aim is not to standardise SGEIs throughout the EU, but to combine unity and diversity – unity in the form of a set of common rules in essential areas, and sectoral and national diversity.

### 3. Types of definition

3.1. The fact that a Member State has a wide discretion when determining what it regards as an SGEI 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 respected in the particular case.

3.2. These are, notably, the presence of an official national act entrusting the operators in question with an SGEI mission and scope and nature of that mission. This official act by the public authority must have binding force as a law, regulation, contract or agreement in the Member State.

3.3. The Member State must indicate, on the basis of Community rules, the specific general interest tasks, on the basis of which it considers that the service in question, because of its specific nature, deserves to be characterised as an SGEI and to be distinguished from other economic activities in the free market.

3.4. 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.

3.5. A Member State may choose to have a SGEI mission carried out by several operators in a given sector without any requirement that each of the operators be separately entrusted with that mission by an individual act or mandate.

3.6. All these provisions derive from the case law of the ECJ but they are not clearly established and consolidated by derived law, giving rise to legal uncertainties for the various parties involved – or at least to the perception of uncertainty by some of them.

3.7. In the Directive on services in the internal market a distinction is made, with regard to social services, between 'providers mandated by the State' and 'charities recognised as such by the State' on the one hand, and providers without a mandate or official recognition on the other.

3.8. In its working document SEC(2007) 1516 the Commission states that the act of entrustment<sup>(1)</sup> is the official act which entrusts the company to carry out the SGEI and spells out the mission of general interest of the undertaking concerned, as well as the scope and the general conditions of the functioning of the SGEI.

3.9. According to a Commission interpretation, the act of entrustment entails the *overriding* obligation to provide or make available the service without distinction and without taking account of the specific nature of the service. The Commission says that this obligation does not apply to state-recognised charities, but the terms and the system for gaining this charitable status are not stipulated.

3.10. The Commission also states that an 'approval' given by a public authority to a service provider, authorising him to provide some services does not correspond to the notion of act of entrustment and does not create an obligation for the operator to provide the services concerned. But the concept of an approval is not defined either in primary or derived law.

3.11. The only solution therefore is case-by-case clarification as disputes and settlements arise; a legislative initiative, in consultation with the parties concerned, could create legal clarity and security.

3.12. Clarification of this kind, requested by the parties concerned, should take into account existing situations in the Member States, including history, traditions and modes of social organisation, and guarantee their continuity where they are justified by the general interest and service quality considerations.

#### 4. Community services of general interest

4.1. In two recent opinions (opinions of the European Economic and Social Committee on The social implications of transport and energy developments, CESE 1293/2008 and the Green Paper - Towards a secure, sustainable and competitive European energy network, CESE 1029/2009 (rapporteur for both opinions: Ms Batut), the EESC expressed the view that studies should be carried on the feasibility of a European energy SGI which could be harnessed for the common energy policy.

4.2. In its Green Paper entitled *Towards a secure, sustainable and competitive European energy network*, the Commission argues for the establishment of a European Transmission System Operator by building progressively an independent company to manage a unified gas transport network throughout the EU.

4.3. Caught between national disparities and the common need to build a European single market, the European institutions and the national governments or the Member States are, however, struggling to get to grips with the idea of Community services of

general interest (whether economic or otherwise). The idea of establishing European energy services has, for example, not found favour with political decision-makers.

4.4. Nonetheless, Community SGIs are necessary for the continued process of European integration. Services of this kind will be an expression of European solidarity and a response to the challenges which will face the Union in essential, multinational or transnational areas such as security of energy supply, security of water resources, preservation of biodiversity, maintenance of air quality, internal and external security etc. These are services which cannot be reduced to organisations at national or local level, as they are not local services, such as social services for example, or exclusively local, regional or national services of general interest.

4.5. The EESC therefore declares its support for public (Union and Member States) — private partnerships to increase the security of energy supply, and ensure that interconnected energy networks (gas, electricity, oil) are managed in an integrated way. The Committee also supports the development of wind energy networks at sea and the connection of these wind parks to the terrestrial network — which could significantly reduce operating and investment costs and provide greater incentives to invest in new network projects.

4.6. In terms of the powers of each Member State as regards energy-mix for example, the social and societal questions posed by the management and use of natural resources, nuclear energy, climate change, sustainable management and security cut across traditional national borders and can be satisfactorily addressed only through a European concept of the general interest and appropriate services.

4.7. The fact that the States in principle have the power to define SGEIs does not in any way detract from the EU's power to define SG(E)Is at its level, when necessary to achieve the objectives of the Union and when the act is proportionate to the objectives. Primary, derived and case law leave it open to the Union, as a public authority in areas where it has explicit competence or even limited or shared competence, to provide, commission, organise and finance these services under the same conditions and subject to the same rules as the Member States.

4.8. Article 16 of the EC Treaty clearly establishes powers and responsibilities shared between the EU and the Member States, stating that the Community and the Member States, each within their respective powers, shall take care that SGEIs operate on the basis of principles and conditions which enable them to fulfil their missions.

<sup>(1)</sup> Translator's note: this is the term used in the working document.

4.9. SGEIs in effect fall within the scope of a number of EU objectives (respect of fundamental rights, promotion of the well-being of citizens, social justice, social cohesion etc.) which are essential to society. The Union, which is responsible for promoting living standards and quality of life in Europe, also has responsibility for the instruments used for putting fundamental rights and social cohesion into effect.

4.10. The Treaties clearly define the competences of the EU, some of which, in accordance with the subsidiarity principle, may involve the establishment of services, bodies, agencies, etc. at Community level (transport policy, trans-European networks, protection of the environment, consumer protection, the economic, social and territorial cohesion of the Union, internal and

external security, the fight against climate change, security of energy supply etc.).

4.11. Even though no legal reference to SGIs and SGEIs has been made for some EU agencies — e.g. the agencies for maritime, food and rail safety, the agency for managing operational cooperation at the EU's external borders, and the 'single sky' and 'Galileo' agencies — these services are operating in the general European interest.

4.12. Rather than adopting a defensive approach, the Community institutions, without prejudging the status of operators, should recognise the existence of, and the need for, Community services of general interest in those areas where objectives can be more effectively achieved by EU action than by each of the Member States acting separately.

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*The president  
of the European Economic and Social Committee*  
Mario SEPI

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