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STUDY
COMPLETE VERSION

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Providing high-quality public services in Europe based on the values of Protocol n° 26 of the Lisbon Treaty on Services of General Interest

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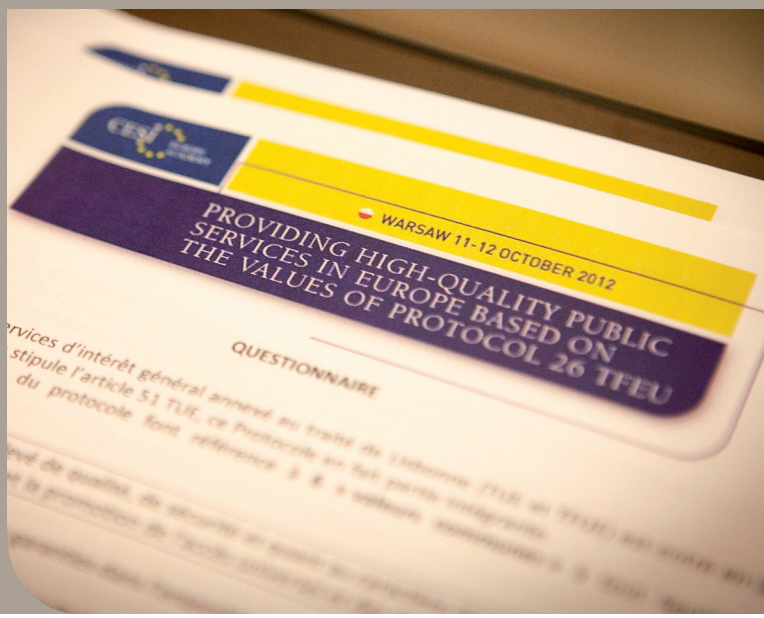

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Introduction

In this paper, we present the core results of a study carried out for CESI (European Confederation of Independent Trade Unions), with the support of the European Commission, by Pierre Bauby and Mihaela M. Similie from the association RAP (Reconstruire l'action publique) on "Providing high-quality public services based on the values of Protocol 26 TFEU".

In European parlance, Services of General Interest (SIG) cover economic services (SGEI) and non-economic services (NESGI) – which the public authorities consider to be of general interest and subject to specific public-service related obligations.

Gradually, these services have begun to be recognised by European Union primary legislation (treaty of Amsterdam in 1997, Charter of Fundamental Rights promulgated in 2000, Lisbon treaty in force since 1 December 2009) and the way these services are recognised is subject to frequent change.

The Lisbon Treaty creates a new legal basis for services of general economic interest (SGEI) with article 14 TFEU and for all SGI with Protocol 26, which is annexed to TEU and TFEU.

The European conception of SGEI is based on shared competence between the EU and the Member States according to the subsidiarity principle.

At the same time, primary European legislation, with Protocol 26, makes specific the shared values of the Union and in particular 6 values which must be applied to all SGEI across the European Union: a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

The lack of legal security when it comes to these values is what led CESI, with the support of the European Commission, to task RAP with conducting a study on their origin, content and implementation, in order to better comprehend their meaning and usefulness for citizens and social movements.

Protocol n°26 on Services of General Interest

THE HIGH CONTRACTING PARTIES,

WISHING to emphasise the importance of services of general interest,

HAVE AGREED UPON the following interpretative provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

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 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.

Article 2

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.

This research was conducted on the basis of the literature on services of general interest and European integration, in particular the study "Mapping of the Public Services in the EU and its 27 Member States"[1]; interviews with key actors; by using contributions of the conference organized by CESI in Warsaw, on 11 and 12 October 2012[2] and by carrying out a survey among several legal professionals from a variety of Member States having different legal traditions.

Protocol 26 did not come about from one day to the next. It is the fruit of both a progressive process of Europeanisation on the part of committed public services in the middle of the 1980's and the demands of the Dutch government after the rejection of the treaty setting up a constitution for Europe in the referendum of 1 June 2005.

Allow us therefore to remind our readers first of all of the conditions under which the Protocol came into being, which will help to shed light on its content and meaning. We shall go on systematically to analyse each of the 6 values. Finally, we shall attempt to identify the usefulness that these 6 values might have for each of the citizens and inhabitants of the European Union as well as for trade union organisations and civil society movements, creating a sort of 'user's manual' for the Protocol).

[1] *Study carried out in 2010 for the European Centre of Employers and Enterprises providing Public services (CEEP), www.ceep.eu. Available also on www.actionpublique.eu*

[2] *Symposium «Providing high-quality public services in Europe based on the values of Protocol 26 TEU/TFEU», Warsaw, 11-12 October 2012. Presentations and speeches available on http://www.cesi.org/seminares/seminares.html*

THE SHARED VALUES OF EUROPEAN UNION

The first reference to "common values" in the EU primary law dates back to the Maastricht Treaty, which established a common foreign and security policy "to safeguard the common values, fundamental interests and independence of the Union" [Article J.1(2)]. The introduction of the concept of "values" – "common values" is significant but it seemed rather a vague notion as not defined. It was argued that the idea of common values had emerged as constitutive for the European Union – the representation of Union's collective identity, but also as "the key to achieving specific Union objectives"[3].

In 1997, the Amsterdam Treaty recognized services of general economic interest as components of the "common values" of the Union; the Treaty also emphasized their role in the promotion of "social and territorial cohesion"; the Union and its Member States must ensure that they can "fulfil their mission"; the principles of "equal treatment", "quality" and "continuity" are specifically enumerated.

Amsterdam Treaty (1997)

"Without prejudice to Articles 77, 90 and 92, 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 7d of the Amsterdam Treaty, Article 16 of the Treaty establishing the European Community)[4].

Moreover, the following declaration (n° 13 on Article 7d of the Treaty establishing the European Community annexed to the Final Act of the Treaty of Amsterdam) is introduced: the provisions of Article 7d (Article 16) on « public services » (SGEI) "shall be implemented with full respect for the jurisprudence of the Court of Justice, inter alia as regards the principles of equality of treatment, quality and continuity [this principle doesn't appear explicitly in the Protocol n° 26 of the Lisbon Treaty] of services".[5]

According to the European Commission, this article "recognises the fundamental character of the values underpinning such services and the need for the Community to take into account their function in devising and implementing all its policies, placing it among the Principles of the Treaty" and the "recognition of the link between access to services of general interest and European citizenship". [COM(2000)580]

In fact, since its first Communication on SGI [COM(96)443], the European Commission made reference to SGEI as shared values of the Union which "translate into different ways of organizing SGI, varying from one country or region to another and from one sector to another", according to their geographical, technical, political and administrative specificities, their different history and traditions; their content also dependent of other – moral or democratic – values. According to the Commission, "The provision of public interest services is central to these values [on which the European model of society is based] (…) on which the European societies are founded [COM(96)443, point 70 and 72]. Under the title "Shared values", the Communication specifies: "European societies are committed to the general interest services they have created which meet basic needs. These services play an important role as social cement over and above simple practical considerations. They also have a symbolic value, reflecting a sense of a community that people can identify with. They form part of the cultural identity of everyday life in all European countries".[6]

[3] *Marise Cremona, "Values in the EU Constitution : the External Dimension", CDDRL Working Paper N° 26, 2 November 2004, http://iis-db.stanford.edu/pubs/20739/Cremona-Values_in_the_EU_Constitution-External__Relations.pdf.*

[4] *See also COM(96)90 of 28 February 1996 - Reinforcing political union and preparing for enlargment. According to the Commission, « Europe is built on a set of values shared by all its societies (...) These values include the access for all members of society to universal services or to services of general benefit, thus contributing to solidarity and equal treatment ».*

[5] *According to the doctrine, "It is certainly not a question of an exhaustive or restrictive enumeration, as these principles pertain to Community secondary legislation and the case law of the ECJ relating to services of general interest." Michel Mangenot (dir.), Public Administrations and Services of General Interest : What Kind of Europeanisation ?, EIPA, 2005, p. 94.*

[6] *See also COM(2005) 525 European values in the globalised world. Contribution of the Commission to the October Meeting of Heads of State and Government, 3 November 2005. "Common European values underpin each of our social models. They are the foundations of our specific European approach to economic and social policies. The EU's Member States have developed its own approach reflecting its history and collective choices. Each has blended together common elements such as public pensions, health and long-term care, social protection, education, labour market regulation and redistribution through tax policies. Member States are responsible for shaping and delivering these different services. (...) In addition, all Member States have played a strong role in the delivery of high quality services of general interest which have been a key feature of economic and social development. (...) The challenge today is (...) to continue to improve our strong tradition of affordable and high quality services of general interest".*
According to COM(2009)262 "The Union is an area of shared values. (...)These values provide the basis for European citizenship and respect for them is an essential criterion for membership of the Union". "Freedom, security and justice are key values that form an integral part of the European model of society (...). The area of freedom, security and justice must above all be a single area in which fundamental rights are protected, and in which respect for the human person and human dignity, and for the other rights enshrined in the Charter of Fundamental Rights, is a core value".

Introduction

The Preamble of the Charter of Fundamental Rights contains two references to the "common values" of the "peoples of Europe"[7] and a reference to "universal values" on which the Union is founded ("human dignity, freedom, equality and solidarity"). The distinctive use of the concepts "rights" and "principles"[8] is also noticeable: "The Union therefore recognises the rights, freedoms and principles set out hereafter » (Preamble, the value clause or Article 2).[9]

In the Lisbon Treaty, references to values have raised[10]:

- "universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law" (Preamble, TFEU),
- values [which are] common to the Member States on which the Union is founded " respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities", Article 2 TFEU), whose serious and persistent breach by a Member State can lead to sanctions against it (suspension of certain rights, Article 7 TFEU) and whose respect and commitment to promote them allow any European State to apply to become a Member of the Union (Article 49 TEU).
- There are also more general references to the "values of the Union" (Article 8, 13, 21, 32, 42 TFEU). Their promotion is one of the Union's aims and, in relations with the wider world, the Union shall also uphold its values (Article 3 (1) and (5) TEU).

In the TFEU, the concept "shared values of the Union" is taken up in relation to SGEI (Article 14 TFEU, the former Article 16 TEC – here below, completed), and the Protocol n° 26 on SGI lists these values but without defining them: "a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights". These are the subject of this study. Their "shared" character engages not only the action of the Union but of its Member States, too. They are fundamental for SGEI and for both Community policies and actions and those of Member States implementing EU law.

Nevertheless, the Protocol contains a non-exhaustive list of shared values: "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…"[11] Moreover, different texts or statements of European institutions or bodies have already asserted some of them as principles or exigencies (obligations) which characterise SG(E)I; many have derived from the Community secondary law and/or different legal systems of the Member States. The expression "shared values" is used on rare occasions in these texts, but many more values/principles are listed as compared to the Protocol 26.

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[7] *"The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values. ... The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment. ».*

[8] *This distinction was introduced at the request of the Unite Kingdom ; it was inspired by the case law of the French Constitutional Court (Décision no 94-359 DC du 19 janvier 1995). Cf. Assemblée Nationale de la République Française, la Commission des affaires européennes, "Rapport d'information sur la protection des droits fondamentaux en Europe sur les relations entre l'Union européenne et le Conseil de l'Europe", 11 janvier 2011, p. 27.*

[9] *See also the Explanations to the Charter stating that some articles may contain elements of rights and principles or only rights or principles. Draft Charter of Fundamental Rights of the European Union, Convent 49, Charter 4473/00 (2000) http://www.europarl.europa.eu/charter/pdf/04473_en.pdf. The renforceable and justiciable character of the principles (particularly economic and social rights) were questionned. – see Lord Goldsmith QC, A Charter of Rights, Freedoms and Principles, 38 (2000) Common Market Law Review ; Jean-Paul Costa, « La Convention européenne des droits de l'homme, la Charte des droits fondamentaux de l'Union européenne et la problématique de l'adhésion de l'Union européenne à la Convention », Florence, Institut universitaire européen, 16 janvier 2004. According to a recent report of the National Assembly of France the 'positive' social and economic rights, such as the right to education or the right to work are not immediately applicable and they cannot be directly invoked before the courts except for interpretation or review of the legality of implementing acts. However, these traditional reserves do not preclude them from any legal effect because the judiciary can refer to and interpret their scope when they will be asked to review European texts that tend to put them into practice. Assemblée Nationale de la République Française, "Rapport d'information sur la protection des droits fondamentaux …", loc.cit., 11 janvier 2011, p. 27, 28.*

[10] *However, fewer than in the Constitutional Treaty, which was considered "a shift from the language of principles … to values". Marise Cremona, loc. cit.*

[11] *Keon Lanaertz, José A. Guiérrez-Fons, « Le rôle du juge de l'Union dans l'interprétation des articles 14 et 106, paragraphe 2, TFUE », in Concurrences N° 4-2011, p. 5, 6. The authors underlines that according to EU soft law, sectorial legislation and ECJ case, the continuity may be regarded as one of the common elements that characterises all SGEI.*

The European Parliament considered that SGI "are founded on the principles of continuity[12], solidarity, and equal access and treatment for all users (…] and/or adaptation"[13], "universality (…), affordability and quality"[14], as well as "efficiency, economic management of resources, (…), proximity to service users and transparency" . According to this institution, SGEI should also ensure lasting security of supply, a high quality level, democratic accountability and respect of social balance.[16]
For the European Parliament, "the guaranteeing of certain basic principles in their operation (…) is a fundamental element in the shaping of European general interest"[17]. It also considers "it is neither possible nor relevant to draw up common definitions of services of general interest"[18] and public service obligations resulting from them. Nevertheless, "the European Union must lay down common principles, including the following: universality and equality of access, continuity, security and adaptability; quality, efficiency and affordability, transparency, protection of less well-off social groups, protection of users, consumers and the environment, and citizen participation, taking into account circumstances which are specific to each sector".[19]

For its part, the EESC has identified a series of "certain principles which the Committee believes should underpin services of general interest": equality (not uniformity), universality, reliability (continuous, regular and uninterrupted provision), participation, transparency, simplification of procedures, profitability and efficiency, quality, adequate provision (adapted to changes in the needs of the community and to technical and economic progress), evaluation of results, cooperation between service-providers, affordable price, environmental protection[20].
According to the Committee[21], "One option would be the legal definition of services of general interest, including a non-exhaustive list of the social values that underpin these services, for whose promotion and protection the public authorities and supranational powers must be equally responsible. At the same time, the link between access, to such services and European citizenship must be acknowledged."
For the EESC, services of general interest are also based on the principle and objective of consultation. Therefore, it emphasizes that "The access to information, consultation and participation of workers and their representatives is essential to a negotiated modernisation of the way in which these services are organised. (…) For the Committee, the concept of general interest must go hand in hand with a system of exemplary industrial relations, as it is characteristic of the EUsocial model".

In its Opinion[22] on the Green Paper of 2003 on SGI, the Committee of Regions has found that "a number of provisions, which are common to all sectors, can be incorporated into the Treaty as an overarching legal framework" such as: "equal access to services, insofar as this is economically viable"; "a high degree of security of supply, if it is economically viable"; "services shall be of high standard".

The European Commission has recently stated that "in the coming years the regulatory environment at EU level should take better account of the specific nature of these services, and to meet the challenge of delivering them in a way which incorporates the values of quality, safety and affordability, equal treatment, universal access and users' rights recognised in the Protocol" [COM(2011)900].

The question of the European system of values and of what distinguishes them from other patterns of society or civilisation are studied rather too little[23]. Maria de Lourdes Pintasilgo, in her Foreword to the Comité des Sages Report, which she chaired for the European Commission[24],

[12]This exigency appears repeatedly in the resolutions of the European Parliament.
[13]European Parliament, Resolution on the Communication from the Commission on Services of general interest in Europe (COM(96)443 C4-0507/96, O.J. C 014, 19/01/1998, p. 0074
[14]European Parliament, Resolution on the Green Paper on Services of general interest [COM(2003)270 – 2003/2152(INI)]
[15]European Parliament, Resolution on social services of general interest in the European Union, 14 March 2007, [2006/2134(INI)]
[16]According to its resolution on the Commission Green Paper on services of general interest, "democratic accountability" [European Parliament Resolution COM(2003) 270 – 2003/2152(INI)]] ; "ensuring democratic accountability for the application of rules to SGIs and SGEIs to the Member States, regional, and local authorities" [European Parliament Resolution on the Commission White Paper on services of general interest (2006/2101(INI))]
[17]European Parliament Resolution on the Commission Green Paper on services of general interest [COM(2003)270 – 2003/2152(INI)),point O.
[18]"in a social and economic environment as diverse as that of the EU" [European Parliament Resolution on the Commission White Paper on services of general interest (2006/2101(INI)), point G].
[19]European Parliament Resolution on the Commission Green Paper on services of general interest [COM(2003)270 – 2003/2152(INI)),point 20.
[20]Opinion of the Economic and Social Committee on « Services of general Interest (1999/C 368/17), O.J. n° C 368 of 20/12/1999 p. 0051 – 0057.
[21]Opinion of the Economic and Social Committee on 'Services of general interest' (2002/C 241/23), O.J. n° C 241 of 7/10/2002 p. 0119 – 0127.
[22]Opinion of the Committee of Regions on the « Green Paper on services of general interest in Europe » (2004/C 73/02), J.O. n° C 73 du 23.3.2004 p. 7-14.
[23]See Pierre Bauby, « La culture de service public en Europe », XVIII Congrès mondial de Science politique, AISP-IPSA, Québec, 1-5 août 2000.
[24]For a Europe of civic and social rights, Brussels, Report for European Commission – Directorate General for Employment, Industrial Relations and Social Affairs, Office for Official Publications of the European Communities, 1996, pp. 5, 25.

underlines that "Europe is a social entity. One of the things each of the Member States introduces into the European integration process is a sense of responsibility for the needs of its citizens. Historically, each country has found different ways of exercising this responsibility, but the end result is that in all the Member States, social rights are, to different degrees, expected, defended and nurtured. Europe, then, already has a social dimension". She also adds that social and civic rights are becoming interdependent in European tradition. The report specifies that "all individuals are entitled to the same dignity and equal rights to participate in the political scene".

The setting (or the confirmation) of "values" in the European Community law has given rise to many questions as regards their legal nature and effects. Is it their affirmation as common values only a contribution to bridging differences/discrepancies between EU Member States and a reference in the external relations of the Union. What are the mechanisms for their promotion? What is their scope? What is the distinction between values and principles, if any[25]? On which basis the six values of the Protocol 26 have been set up? What is their legal scope? What is the legal force given to them by the national law? The breach by Member States of values mentioned by the Protocol 26 cannot be subject of the sanction procedure of Article 7 TEU[26] and their respect is not a condition of accession to the EU. But are they enforceable through an infringement procedure? How could SGEI users benefit from this enforceable value?

The present study seeks to address these questions. ◄

[25] *"Principles, as we have seen from the Court's case law on general principles of law, are at least potentially justiciable, as well as offering a degree of flexibility and a recognition that different competing principles may need to be reconciled when engaging in concrete actions". Marise Cremona, loc. cit.*

[26] *In case of a serious and persistent breach by a Member State of the values referred to in Article 2 TEU, the Council may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question.*

First part - The origins of the Protocol 26 on Services of General Interest

In Europe, each country has defined and built in its long history, its public services or equivalent, in the framework of the construction of each nation-State, in relation with its traditions, organisation, institutions, culture. Therefore, it is no wonder that the definitions, the forms of organisation and regulation, and even the concepts used in each language are different. During the 30 years of European integration that followed the Rome Treaty of 1957, a consensus existed at European level: each State continued to be in charge of the definition, organisation, financing of its public services.

EUROPEANISATION OF SERVICES OF GENERAL INTEREST

However, since the mid-1980s, The goal of the single market, defined by the Single European Act of 1986, led the European Institutions to set in motion a gradual process of Europeanisation with regard to 'services of general economic interest' (SGEI)[27] first mentioned in the treaty of Rome, and at the time, limited to the sectors of communication, transport and energy, that is the infrastructure networks considered as the elements facilitating the free movement of persons, goods, services and capital. This process has relied upon the shared competences between, on the one hand, European institutions and, on the other hand, Member States, including their regional and local authorities. Neither the sharing of competences nor the aims of services of general interest were clearly set up in the beginning, though.

This Europeanisation aimed simultaneously to wipe out national borders in order to organise the free movement of people, goods, services and capital by building internal markets, as well as introduce a greater level of effectiveness in those fields which had often been sheltered from competition due to exclusive, local, regional and/or national rights. The European Union thus developed gradual liberalisation strategies for the sectors of services of general economic interest, based on the introduction of competition and market logic, but without defining in parallel the Community objectives and standards, which could have led to a common conception of the issue and European solidarity.

Diversity and unity of services of general interest in Europe

Each European state has built up and defined its 'public services' over its long history, guided by the traditions, institutions, culture, social movements and power balances which have helped to shape it.

This has given rise to a whole host of diversities in Europe when it comes to the terms and concepts used in each language, the competent national levels (national, regional, municipal), the marketable character or otherwise of each service, the modes of organisation (monopolies or competition), and the types of actors involved (public, mixed, private or associative).

However, at the very heart of these diversities, there is a deep-rooted unity: throughout Europe. The local, regional or national authorities have arrived at the conclusion that some activities cannot only be subject to market rules and the common law of competition, but rather should also adhere to specific forms of definition, organisation, funding and regulation, in order to

- guarantee the right of each inhabitant to access fundamental goods or services,
- build solidarity, vouchsafe the economic, social and territorial cohesion of each community,
- prepare for the future and take the long-term into account.

These general interest purposes and objectives are at the heart of the European social model and the social market economy which characterises it.

A PROGRESSIVE PROCESS

Since that time, European debates and initiatives have sought to restore the balance between liberalisation and objectives of general interest and to clarify the share of competences between the European Union and the national, regional and local authorities.

This gave rise to the concept of 'universal service' in the telecommunications and postal services, followed by electricity, guaranteeing some essential services to all citizens and residents; with the public service's obligations being set out in the fields of energy (electricity and gas) and transport and the case law of the Court of Justice of the European Union recognising that services of general economic interest can encompass other objectives, missions and forms of organisation and funding than solely the general laws of competition.

The treaty of Amsterdam of June 1997 included a new article 16 which recognised SGEI as the components of 'common values', underscoring their role in promoting 'social and territorial cohesion', and asked the Union and the Member States to make sure they could 'accomplish their tasks'.

The European Council of Nice held in December 2000 proclaimed the Charter of Fundamental Rights of the European Union, in which article 36 asks the European Union to recognise and respect access to services of general economic interest, as foreseen in national legislations and

[27] *Cf. Pierre Bauby, L'européanisation des services publics, Presses de SciencesPo, Paris, 2011.*

practices, in line with the treaties, and place them amongst fundamental rights.

Starting in 1996, the European Commission began a process of cross-cutting reflection on all services of general interest, with two communications (1996 and 2000), a report (2001), a green paper (2003), a white paper (2004) and new communications (2007 and 2011), putting forward principles founding a Community conception.

The Lisbon treaty, in force since 1 December 2009, included major innovations with regard to the previous situation, with article 14 of the TFEU, the legal status of the Charter of Fundamental Rights and a Protocol 26.

Article 14 of the Treaty on the Functioning of the European Union is explicitly the legal basis of secondary legislation. Coming within the competence of co-decision between the Council and the Parliament; it twice refers to the powers and rights of the Member States and their communities (article 4 of the EU treaty) ; in its capacity as a 'general implementing provision', it must be applied to all EU policies, including those dealing with the internal market and competition.

Article 14 TFEU

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.

The Lisbon treaty gives legal status to the Charter of Fundamental Rights.

The Protocol on services of general interest (n°26), is annexed to the Treaties on European Union and the Functioning of the European Union, with the same legal status as the latter treaties, since it is an 'integral part' of them.

Unlike the previous Treaties, the Protocol 26 of the Lisbon Treaty does not only regard services of general economic interest but all SGI, be they economic or non-economic.

If a service is considered as "non-economic", Article 2 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 qualified as economic, which is the case in a growing number of fields, Article 1 requires EU institutions to respect both "the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising" such services and "the diversity between various services of general economic interest and the differences (...) that may result from different geographical, social or cultural situations", as well as "a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights".

Therefore, even if the Protocol is presented as « interpretative provisions », its content goes beyond being a simple « reminder »: it asserts for the first time in EU primary law both the concept of « non-economic services of general interest » which are not subject to the rules of competition and internal market, and the « large discretionary power » of national, regional and local public authorities, the respect of the « diversity of services », as well as the six values that must be observed by all SGEI.

Thus, the Treaty of Lisbon represents a clear advantage on the previous treaties, as it creates potential to clarify the Community framework regarding the definition, organisation, operation of services of general interest, it guarantees them and it gives more security for all actors concerned.

From these developments of the Treaties, which define the "primary law" on which all European integration is based on, the fruits of the interventions of social actors in every Member State, as well as vis-a-vis the European institutions, alongside initiatives such as that of the government of the Netherlands (Cf below) a set of acquis and principles, part of a European conception of services of general interest, came into being.

SGI: The European acquis with the Lisbon treaty

1. The Member States (national, regional and local authorities) have the general competence to define, 'provide, commission and organise' SGI, as well as funding SGEI.
2. The European institutions have the same competence for European services which prove necessary in order to achieve the EU's objectives.
3. For non-economic services, the rules of the internal market and the rules of competition do not apply; they merely come under the sole general principles of the EU (transparency, non-discrimination, equal treatment, proportionality).
4. For services of general economic interest, the public authorities must clearly define their 'special task' (principle of transparency).
5. On this basis, they can define the means best adapted to effectively achieving the 'special task' (proportional-

ity principle), including, should it prove necessary and proportionate, aid and subsidies, exclusive or special rights.
6. The Member States are free to choose the styles of management: internal, 'in house', delegated, etc.
7. These definitions must clearly establish the standards of 'quality, security and affordability, equal treatment and the promotion of universal access and of user rights'.
8. The rules of competition and the rules of the internal market only apply if they do not stand in the way, legally or factually, formally or in effect, of their specific mission being achieved.
9. The Member States are free to choose the type of company property (principle of neutrality).
10. In all cases, misuse can occur due to 'manifest error', that the Commission can raise, under the control of the CJEU.

However, unlike most other provisions of the Lisbon Treaty, it was not part of the project of the "Treaty establishing a Constitution for Europe". From the project of the "Treaty establishing a Constitution for Europe" of 2004, to the Lisbon Treaty signed on 13 December 2007 and entered into force on 1st December 2009, the referendums of France and the Netherlands have taken place, with as a consequence the refusal of ratifying the draft Constitution.

THE NETHERLANDS'S DEMANDS

Jean-Claude Piris, General Director of the Legal Service the Council at the time of the preparation of the Lisbon Treaty, highlights[28] that the issue of services of general interest "was raised with some passion during the referendum campaign on the Constitutional Treaty, both in the Netherlands and in France. The situation was exacerbated in the Netherlands, following decisions taken by the Commission on the Dutch system of financial help to social housing. Therefore, one of the prerequisites of the Dutch government, when negotiating the June 2007 IGC mandate, was to obtain Treaty provisions on this issue". He also adds that "the Lisbon IGC adopted, on the initiative of the Dutch government, a new Protocol on services of general interest".

On that basis and in order to clarify the reasons and content of the Protocol n° 26, we met the Representative of the Netherlands to the Intergovernmental Conference of 2007 - Mr Tom de Bruijin, Mr Jean-Claude Piris, at that time General Director of the Legal Service of the Council, and Mr Michel Petite, former General Director of European Commission's Legal Service.

Protocol 26 responds to one of the conditions imposed by the government of the Netherlands during negotiations on the Lisbon treaty following the rejection of the 'draft treaty establishing a constitution for Europe' in the referenda held in the Netherlands and in France. Several factors were highlighted by the Dutch government in order to assert the subsidiarity principle and the powers of the Member States, in particular in order to reinforce the control of the national parliaments. At the same time, the pressures that the European Commission was bringing to bear in order to ask the Netherlands to reform its social housing system so that it be reserved for the most destitute had led to the negative vote from the Dutch and the Dutch government wanted to put the brakes on things.

Whilst the treaty was being negotiated, an Interpretative Declaration on all services of general interest was proposed. According to the European Commission, whose Legal Service produced the draft of this Interpretative Declaration, this one only reminded the existing EU rules and represented 'interpretative provisions'. Finally, under the pressure of the Dutch government to obtain a European legal tool, the Protocol 26 has been annexed to both treaties (TEU and TFEU). It has therefore the same legal status as the treaties themselves and is thus a full component of European Union primary law. ◄

[28] *The Lisbon Treaty, a Legal and Political Analysis, Cambridge University Press, 2010.*

Second part - The six common values

This study conducted as part of a CESI project, even if it does not purport to cover the six values of the Protocol n°26 of the Lisbon Treaty, wishes nonetheless to analyse their essential characteristics and in particular relevant future initiatives in this field.

A preliminary general framework of these characteristics can be found here below, established in particular by EU primary and secondary law, the Charter of Fundamental Rights[29], ECJ case law, the communications of the European Commission.

We apply on the basis that the role, the content, the meaning(s), the definitions and the nature of the six values currently referred to in the Protocol n°26 annexed to the TEU and TFEU have emerged as part of the process of Europeanization of services of general interest. Beyond the enumerative listing in the EU primary law, the identification of aspects concerning the definition of these values is based upon the European legislation and interpretations given by different bodies of the Union and in the legislation and practices of the Member States. Among the elements that differentiate the six values we may particularly underline the complexity of their content and the level of guarantee to be achieved.

Definitions may be stable or not, guarantees may appear enriched or deficient, the entering into force of the Lisbon Treaty has affected or not their content and legislative and concrete implementation. While taking into account that their legislative or regulatory definition is not stable in time, we will try to point out the strengths and weaknesses of the current legislation, to examine how precise and complete is the current legal framework, to compare different sectorial approaches and to search for their valuation in concrete individual or collective actions, including through legal proceedings.

(Some of) the six values, or principles, are constant references in the documents of EU institutions, often with respect to all services of general interest. Thus, the Commission communication on the Lisbon Midterm Review[30] states that within the single market "providing high quality services of general interest to all citizens at affordable prices is also necessary".

The provisions of the Protocol n° 26 on the six values only concern services of general economic interest (SGEI), which are subject of the shared competence between the Union and its Member States; as regards non economic services of general interest, the EU has much more limited competences.

The listing of the six values of services of general economic interest made by the Protocol 26 places the first third values (quality, security, affordability) behind the goal of a "high level". These are thus no absolute values, which could be clearly distinguished or measured, defining clear quantifiable indicators and making possible to range SGEI on a linear scale.

The expression "high level" makes rather reference to qualitative and evolutionary objectives. But it clearly states a purpose.

2.1. A HIGH LEVEL OF QUALITY

Quality is the first of the six values mentioned by the Protocol 26. It is not surprising. Since the beginning of the process of Europeanisation of SGEI, the improvement of their quality had been placed at the heart of this process and in conjunction with the completion of the internal market.

Regarding quality, this requirement appears today as one of the most complex[31]- "'quality' has become a vehicle to which almost everything that anyone wants to do to or with public services can be attaché"[32] - whose importance has become very common[33], to be considered as « the most important characteristic of the service"[34]. The complex character of its definition is further stressed by the "a high level" objective that must be met.

In time, the very nature of the quality manifested itself in all its diversity[35], in particular in the Communications of the European Commission on SGI: as an objective of some policies or an objective of the European Union, a fac-

[29] *According to Article 51 (Field of application) of the Charter, its provisions "are addressed to the institutions, bodies, offices and agencies of the Union (...) only when they are implementing Union law". "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defines in the Treaties".*

[30] *COM(2005)24 final, Working together for growth and jobs A new start for the Lisbon Strategy.*

[31] *See also the presentation of Matthias Redlich at CESI Symposium «Providing high-quality public services in Europe based on the values of Protocol 26 TFEU», Warsaw, 11-12 October 2012, http://www.cesi.org/pdf/seminars/121024_04_redlich_matthias.pdf.*

[32] *Christopher Pollitt, "Editorial: public service quality – between everything and nothing?", International Review of Administrative Sciences, 2009, vol. 75, n° 3, p. 379.*

[33] *The concept of 'quality' was transferred from the manufacturing sector to the world of government in the early 1990s ; still, according to Max Travers (The New Bureaucracy, 2007), it is hard to trace all the origins and pathways of this movement. See Tony Bovaird and Elke Löffler, "More quality through competitive quality awards ? An impact assessment framework", in International Review of Administrative Sciences, 2009, vol. 75, n° 3, p. 384.*

[34] *See, for example, COM(91)476 Green Paper on the development of the single market for postal services.*

[35] *European Commission, Directorate-General III. Industry, Working document on "A European quality promotion policy", 17.2.95*

tor for competitiveness and market performance, for cohesion and facilitating European integration of candidate countries, as well as a guarantee for the improvement the well-being of citizens and help them to make use of their fundamental rights, and a principle facilitating the definition of users' needs.

References to quality of SG(E)I are often general and diverse, sometimes even in the same text[36]: "better quality" or "better services", "appropriate quality", "good quality", "very good quality" versus "lower quality" or "satisfactory (recognised) quality of service" or "sufficient", "high level of quality/(sufficiently) high quality" or simply "quality services". However, in some sectors that we outline below, EU legislation specifies some elements of its content, thus giving them constraining force. After the enter into force of the Lisbon Treaty and its Protocol 26, a "high level" of quality became one of the fundamental standards of SGEI and Member States and the European Union have the shared responsibility of the definition of its content, according to the principles of subsidiarity and proportionality.

Its accomplishment is linked to all values and principles on SG(E)I. Thus, the security for users, and « the concept of safe and continuous provision of services[37]» were mentioned as a definitional element of the quality of services or « intertwined » with the concept of quality[38] and, conversely, many exigencies, including quality standards, imposed to services for security reasons. Other opinions feel that the quality of core services "is achieved by guarantees of quality, affordability, continuity"[39]. Therefore, quality aspects appear as exceeding other values or principles of SGI although they are/can be important components of quality of SGI.

2.1.1. Current definition(s) in the European texts

The quality appears as a multifaceted value and, as shown by the Green Paper on SGI of 2003 [COM(2003)270], there is no general definition of quality. However, different EU law sources allow to distinguish the complexity of this exigency by making reference to (without wishing to make a hierarchy within this listing) the reliability and continuity of services, the existence of mechanisms if compensation in case of insufficiency, the protection and the safety of users and consumers, the protection of environment and sustainable development, etc.

In the EU legislation, quality objectives vary and sometimes are specified according to the characteristics of each sector: time taken for an item from collection to delivery (in postal services), punctuality (in transport services – delays for passengers and their bags, delivery of delayed baggage), how long and easy does it take to access services (ex. proximity, virtual access, access to information, facility to find out services best fitting users' needs and operator's responsiveness etc.); reliability; regularity; being adaptable to the needs of users; the ability to provide an increasing variety of choices and/or "tailor-made" and/or innovative services; how readily/quickly and efficiently are enquiries or complaints[40] or disputes answered; staff training and its access to information on best quality services[41]. If in some sectors some criteria may be dominant, it is increasingly recognised that using only one measurement of quality does not give a complete picture of service reliability.

Normative and/or contractual statements – contracts between public authorities and operators, contracts between operators and users and contracts between employees and operator – provides the picture of existent quality guarantees, of their level and means of protection and enforcement of this exigency, as well as mechanisms of adaptation.

A question raised in the European debates concerns the appropriate and/or pertinent competent authority to define standards of service quality, including cross-border services. European Commission underlined on several occasions in its Communications on SGIs the necessity of "guaranteeing" or "meet" democratic choices as regards, inter alia, the level of quality of services.

Quality has become a driving force of the Community action in a number of SG(E)I sectors, "a Community (fundamental) objective to be achieved throughout the

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[36] *COM(91)476, loc. cit.*
[37] *COM(93)274 Guidelines for the Development of Community Postal Services.*
[38] *Opinion of the Committee of the Regions on the "Green paper on services of general interest in Europe", (2004/C 73/02), O.J. n° C 73 of 23.3.2004, p. 7-14.*
[39] *Erika Szyszczak, "Why Do Public Services Challenge the European Union?", in Erika Szyszczak et al, Developments in Services of General Interest, T.M.C. Asser Press, The Hague, 2011, p. 11. As for continuity as a guarantee for quality exigencies see Bertrand Carsin, Elena-Loredana Puiu, « Services sociaux d'intérêt économique général (SSIEG) et marchés publics. Convergence ou divergence ? », in Concurrences N° 4-2011, p. 10. As regards SSGI see, Proinsias de Rossa, "The Future of SSGI : An Agenda for Change", in Concurrences N° 4-2011, p. 20 ; the author notes continuity as one of the gaps in the European Voluntary Quality (VQF) for SSGI.*
[40] *For example, according to an European Survey, 11% of respondents (EU-25) declared having personally made a complaint about fixed telephone services in the previous two years ; water supply services generated the least complaints (3% of respondents). Eurobarometer 65.3 - Consumers' opinions of services of general interest, European Commission, 2006.*
[41] *Council Conclusions on Common values and principles in European Union Health Systems (2006/C 146/01), JO C146/1, 22.06.2006.*

Community"[42], as well as one of the reasons of the definition of universal service obligations at Community level, assigning "in particular", quality criteria while leaving « greatest possible flexibility for the provision of whatever specialised services the market may demand"[43]. In other sectors (water and waste), quality exigencies are at the core of EU policies et legislations.

In sectors where a universal service policy was developed at EU level, as postal services, it was considered that « universal service becomes shadow phrase if its provision does not imply some threshold quality of service standards to be applied throughout the Community"[44]. Moreover, in the postal sector, it was the "variability", the "inadequate", "unsatisfactory" quality of (universal) service, such as defined by Member States before any legislative involvement at Community level, that was considered at the beginning of the 1990 as one of the problems justifying action at EC level because considerably affecting other sectors particularly dependent on the postal services and thus limiting the freedom of choice of individual consumers and also hampering the internal cohesion of the Community. "Resolution of such quality related problems is paramount", "this quality gap effectively creates a 'frontier effect'"[45], "emphasize borders and thus disrupts the single market"[46]. Moreover, "few if any, regulatory bodies impose quality of service obligations on their reserved service providers"[47].

The quality has become an element of definition of universal service in all the sectors where a Community definition has been given. Thus, for example, Directive 97/67/EC established for the first times common rules concerning "the setting of quality standards for universal service provision and the setting-up of a system to ensure compliance with those standards" (Article 1). In this sector, "the most important harmonisation actions for quality of service are the setting of Community standards and the implementation of a single Community measuring system"[48]. Community action intervenes as complement to national policy, which retains its important role. « Hence, norms for quality of service in each Member State established by national postal authorities will permit higher standards from the providers of the universal service"[49]. In fact, at EU level "a specified quality" of universal postal service which was established by Directive 97/67/EC has not been considered as encompassing all the dimensions of "a high quality".

The quality in the postal sector

Since the first directive on the internal market of postal services, the quality appears as an essential aim and it is mentioned even in its title[50].

Chapter 6 of the Directive ("Quality of services") provides a series of obligations as regards the quality standards of postal universal service which "shall focus, in particular, on routing times and on the regularity and reliability of services", their publication and access to dispute resolution procedures (Article 16).

Setting up quality standards for intra-Community cross-border services fall within the competence of the EU and are laid down in Annex II of the Directive but exceptional situations relating to infrastructure or geography entitle exemptions from these standards that are to be determined by the national regulatory authorities, reported to and published by the European Commission.

Member States are competent in the case of national services and shall ensure they are compatible with those laid down for intra-Community cross-border services (Article 16, 17). They shall be notified to the European Commission and published in the same manner as the standards for intra-Community cross-border services.

Independent performance monitoring shall be carried out at least once a year by external independent bodies under standardised conditions and shall be the subject of reports published at least once a year.

ANNEX II Quality standards for intra-Community cross-border mail

The quality standards for intra-Community cross-border mail are to be established in relation to the time limit for routing measured from end to end (End-to-end routing is measured from the access point to the network to the point of delivery to the addressee) for postal items of the

[42]COM(91)476 Green Paper on the development of the single market for postal services. The objective of "high quality" was clearly required in this sector since 1994, "including both national services and cross border service" (COM(93)274 Guidelines for the Development of Community Postal Service).
[43]COM(91)476, loc. cit. See also Council resolution of 7 February 1994 on the development of Community postal services (94/C 48/02).
[44]COM(91)476, loc. cit.
[45]Idem.
[46]COM(93)274, loc. cit.
[47]COM(91)476, loc. cit.
[48]Idem.
[49]COM(93)274, loc. cit.
[50]Directive 97/67/EC 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, as amended.
[51]The date of deposit to be taken into account shall be the same day as that on which the item is deposited, provided that deposit occurs before the last collection time notified from the access point to the network in question. When deposit takes place after this time limit, the date of deposit to be taken into consideration will be that of the following day of collection.

fastest standard category according to the formula D + n, where D represents the date of deposit[52] and n the number of working days which elapse between that date and that delivery to the addressee.

Quality standards for intra-Community cross-border mail

Time limit	Objective
D + 3	85 % of items
D + 5	97 % of items

The standards must be achieved not only for the entirety of intra-Community traffic but also for each of the bilateral flows between two Member States.

Technical standards are also developed in the field of quality of service by the European Committee of Standardization (Article 20 of the Directive). A Report is published by the European Commission on the application of the Postal Directive 97/67/EC[52]. In 2011, European Regulators Group for Postal Services (ERGP) published a Report on the quality of service and the end-user satisfaction, which analyses the quality of postal service and end-user satisfaction in the following 6 dimensions considered as core quality of service indicators[53]: measurement of the quality of service concerning transit time and loss; measurement of complaints; consumer issues; obligations imposed on postal service providers; collection and delivery; access point.

The quality in the field of electronic communication

Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) sets out in its Annex III Quality of service parameters, definitions and measurement methods for :

- undertakings providing access to a public communications network: supply time for initial connection; fault rate per access line; fault repair time, and
- undertakings providing a publicly available telephone service: call set up times, response times for directory enquiry services; proportion of coin and card operated public pay-telephones in working order; bill correctness complaints; unsuccessful call ratio.

Water sector can be distinguished from other fields by the specific Europeanisation around quality goals.

European directives on water

Since the 1970s the European Community has issued several water directives, chiefly with an eye to the protection of public health and the environment. More particularly it has enacted ambitious pro-quality and anti-pollution standards.[54]

A distinction can be made among three phases of European directives:

- a first generation, during the period 1973 to 1988, concerns the protection of the quality of water used for human activities (1980 directive relating to the quality of water intended for human consumption, amended in 1998);
- a second generation of directives, from 1988 to 1995, centring on the prevention of pollution (in particular a directive of 1991 concerning urban waste-water treatment that sets an agenda for the construction of waste-water treatment plants in all urban areas);
- the third wave from 1995 led in particular to the Framework Water Directive of 2000, which laid down the general principles of production and management of water and updated the provisions concerning the quality of water and protection against pollution.

These European directives have set higher quality standards for water that represented challenges for the authorities in charge of the distribution and purification of water in the various countries of Europe.

Community water policy was thus founded not on the creation of an "internal market", but rather on the respect of common ambitious quality standards based on public health and environmental protection standards.

Community actions aim to promote the quality of SGEI not only through regulatory measures but also through non regulatory initiatives: such as financial instruments, European voluntary quality standards and exchange of good practices. Social services of general interest (SSGI) have been subject of a specific approach at EU level with the development of a « quality framework ».

A quality framework for social services of general interest (SSGI)

After the publication of the Communication of social services of general interest [COM(2007) 725], the Commission has launched several initiatives aiming to develop an European strategy for the promotion of SSGI, including the one of the Committee of Social Protection on the development of an European voluntary quality framework (hereafter, CVEQ), including the integrated guidelines concerning the methodology to be used to define, evaluate and monitor SSGI (2009 working program of CPS). Other

[52] *COM(2002)632, COM(2005)102, COM(2006)595, COM(2008)884.*

[53] *The report also regognises that other indicators could also be used to monitor quality of service.*

[54] *Pierre Bauby et Sylvie Lupton, « Quelles évolutions pour le service public français face aux directives européennes ? », in L'eau mondialisée, la gouvernance en question, sous la direction de Graciela Schneier-Madanes, La Découverte, 2010.*

actions aimed at setting up projects for the definition of quality norms and training for local authorities. The VEQF is proposed as results of the CEN workshop Agreement (CWA) and has a legally non-binding status, while implementation is voluntary and which serve as a reference for « defining, assuring, evaluating and improving the quality of these services ». It is a set of areas, preliminary conditions and a number of key criteria which influence the quality of social services and whose flexibility aims at facilitating its application to all SSGI, regardless the level of their organisation and responsible organisations (public authorities, providers, other concerned parties). Moreover, it reinforces transnational aspects of mutual learning, exchange of good practices and a comparison of the performance of the provision of social services in the European Member States (= benchmarking).

Quality Principles for Social Services[55]

- Overarching quality principles for social service provision : accessible, affordable, person-centred, comprehensive, continuous, outcome-oriented;
- Quality principles for the relationships between service providers and users: respect for users' rights, participation and empowerment;
- Quality principles for the relationships between service providers, public authorities, social partners an other stakeholders: partnership, good governance;
- Quality principles for human and physical capital: good working conditions and working environment/investment in human capital, adequate physical infrastructure.

Furthermore, the European Commission considers that the necessity of a legislative intervention would be significantly reduced in case of effective competition (even needless in truly competitive markets). Member States continue to have large competence in this field to adapt the level of quality to national/regional/local realities and capabilities: "It is also in public authorities' discretion and best interest to specify further the requirements linked to the performance of SGEI tasks" and to make full use of all possibilities to draft specifications suitable for awarding a service contract[56].

2.1.2. What challenges? Promotion and guarantee, scope and content

The quality is defined by the interrelation with users' needs and opinions, but their satisfaction is essential, too, which also requires to ensure a strong capacity of SG(E)I to adapt to new needs: « Quality of service can be defined as giving the customer what he wants. (...) The level of satisfaction will depend on how customers define quality of service and how effective … operator(s), in the public and/or the private sector is/are in achieving the desired level of quality"[57]. What the customer wants can vary widely depending on the location of the customer, the efforts the operator(s) makes to provide guidance on the use of its services; also, customer expectations arise from a somewhat "circular chain": if a good quality service is provided then it comes to be expected. If conversely, the services as experienced by the customers are (and were) poor, customers are likely to become less and less demanding in terms of what they require of the service[58]. Therefore, (high) universal service standards definition is a progressive process at EU level, to take account of the situation in some Member States, too, while allowing Member States from adopting more stringent measures. At the same time, EU "standards should not have the effect of reducing national standards where they were already higher" or "serve as an excuse for reducing domestic standards where they are already high"[59]. However, such effects could be observed in some sectors and Member States. For example, in postal sector, after imposing in the five days mail delivery, some Member States renounced to impose the obligation of delivery of the universal service in the sixth day of the week[60].

The Committee of Regions had considered "that services must be of a high standard. In fact, to warrant its remit, the public sector must be in a position to provide a high standard of public services. In that connection, it must be stressed that the idea of quality also covers general social considerations, including, for instance, environmental performance, occupational health and safety and consumer protection. Narrow microeconomic considerations will not always be able to ensure that these issues are adequately addressed. Within an overall framework, the authorities

[55] *The Social Protection Committee, SPC/2010/10/8 final, A Voluntary Framework for Social Services.*
[56] *Commission Staff Working Document, "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest", SEC(2010)1545 final.*
[57] *COM(91)476, loc. cit.*
[58] *Idem.*
[59] *COM(93)274, loc. cit.*
[60] *For other issues in the context of the Finnish postal market, see Pertti Jokivuori, "Practical case study: Industrial relations in the postal sector in Finland – 'Play or pay' mechanism", at CESI Symposium «Providing high-quality public services in Europe based on the values of Protocol 26 TFEU», Warsaw, 11-12 October 2012, http://www.cesi.org/pdf/seminars/121024_13_jokivuori_perrti.pdf.*

responsible for service delivery must be able to take action in the field of service quality. Everyday service providers generate the ideas for improving the way in which the various functions are discharged. Under the quality approach, each public service needs to adopt a charter, code or regulation defining users' entitlements in terms of the services to be provided, the amount and quality of service, quality controls, complaints, information etc. Users must be actively involved in defining optimum service quality; using instruments for measuring customer satisfaction can contribute to this"[61].

As regards the legal safeguards of quality available to users, we could remind in particular the obligation to provide users with adequate information on the range of services offered and the publication of quality of service standards (see European Directives in relation to the universal service, including the type of information).

The question of whether a "high level of quality" does necessary mean "equal quality" may also be raised. In the postal field it was noted that "while it is operationally inevitable that the quality of service in rural areas will be less than in urban areas, it is important to ensure that the rural areas - or even whole regions - do not suffer unduly poor quality. If they did, this could have the effect of marginalising them"[62]. For instance, a recent CIRIEC study[63] found that "for most sectors, the provision and quality of SG(E)I services in Europe present the largest gap in the EU-12 and in rural and peripheral regions". Under all circumstances, the evaluation of the quality is a mechanism indispensable to improve services' performance and the European Commission has conduct between 2001 and 2007 several evaluations of SGEI performance[64].

A "high level of quality" is not an absolute value but it depends on the technical and economic conditions as well as of users' needs and their evolution. Moreover, it is interlinked with the other values, such as affordability; therefore, choices and arbitrations have to be made, in particular among quality and costs. To this end, the systematic organisation of ways giving opportunity to all users to express their expectations and needs and, on that basis, of public debates to clarify issues, precise choices and arbitrations is a prerequisite.

One of the challenges of the definition of the content of the high level of quality of services concerns the distinction between the "normal", "low", and "high" quality level. According to a ECJ case law, in a judgment relating to environment protection, the Court considered that the "high level" does not necessary mean the highest tier that is technically feasible, Member States can adopt more forceful measures. Case-law in the field of consumer's protection seems to be particularly important, too.

The need for specific quality standards for specific categories of users is also at stake. In telecommunications, 'Universal Service Directive' 2002/22/EC allow Member States regulatory authorities to develop performance standards and relevant parameters for disabled users (Article 11).

Under the Regulation n° 1371/2007, railway operators who are subject to it must publish an annual report on the quality of services provided and in particular on the punctuality of passenger transport services. In its 3rd railway market follow-up report [COM(2012) 459] the European Commission noticed that "the quality of rail freight services in the European Union remains difficult to measure as a result of a general lack of indicators". At the same time, the quality of rail passengers services is not covered – Are there such analysis? What are the indicators used? Would there be other exigencies than punctuality? The European Commission ordered an Eurobarometer survey[65] concerning on-train safety, planned journey time and comfort level, hygiene and cleanliness, punctuality, the quality of information provided, in particular in case of delay, quality of facilities, cleanliness and maintenance of parking lots, easy ticket purchase, information and safety.

The drawing up of quality indicators, adapted to each sector concerned[66], is a tool for ensuring the monitoring of

[61] *Opinion of the Committee of Regions on the "Green Paper on services on services of general interest" (2004/C 73/02), O.J. n° C 73 du 23.3.2004, p. 7-14.*
[62] *COM(91)476, loc. cit.*
[63] *CIRIEC International, The Inter-Relationship between the Structural Funds and the Provision of Services of General (Economic) Interest, study for the European Parliament, October 2010, p. 59.*
[64] *After the publication in 2001 of the first report of horizontal evaluation of SGEI, the European Commission has been realized in 2002 a methodology of horizontal evaluation of SGEI [COM (2002) 331], then it order a new report on this topic in 2007 (Van Dijk Management Consultants, "Evaluation of the Methodology Used to Assess the Performance of Network Industries Providing Services of General Economic Interests (SGEI). Final Report", Brussels, 31 October 2007). The third first evaluations were published between 2004 and 2007 (Horizontal Evaluation of the Performance of Network Industries Providing Services of General Economic Interest, SEC(2004) 866 of 23 June 2004, SEC (2005) 1781 of 20 December 2005, and SEC(2007)1024 of 12 July 2007). No new report was published after 2007.*
[65] *Flash Eurobarometer 326, Survey on passengers' satisfaction with rail services, June 2011.*
[66] *For a healthcare study see Susan Burnett, "Managing Quality in healthcare: The challenges for hospitals in Europe", CESI Symposium «Providing high-quality public services in Europe based on the values of Protocol 26 TFEU», Warsaw, 11-12 October 2012 http://www.cesi.org/pdf/seminars/121024_05_burnett_susan.pdf.*

evolutions and the promotion of high level services. However, their aim should not be to establish comparisons or rankings between operators and countries, as the quality depends of needs and the diversity of situations. At the same time, the setting up of such indicators could have adverse effects, by creating incentives to get good results for these indicators, while ignoring other aspects not covered by them.

2.2. A HIGH LEVEL OF SAFETY

In general, the concept of security/safety involves the protection against dangers and risks; its content is thus very large, which raise the question of defining the security of SGEI, their "high level" of security.

The actual provisions of the treaties distinguish between "security" and "safety". It is at least the case in the English version of the treaties while some other linguistic versions (French, for example) a single word translates both security and safety.

According to the **Oxford dictionary of English**, "safety" refers to the condition of being protected from or unlikely to cause danger, risk, or injury, while the "security" refers to the state being free from danger or threat.

Despite the coexistence of the two concepts – "safety" and "security" - in the successive European Treaties, their different characteristics are not clearly defined. It was argued that the differences between these concepts are not so evident, and that it would be even complicated to distinguish them or that "it might be unnecessary to distinguish them"[67]. Others consider that they overlap[68], or that "in many cases, the division between security and safety is blurry to non-existent (i.e. in power plants and in the maritime environment) and they note that "many stakeholders do not distinguish these in operationally meaningful ways"[69]. By reference to the threats relevant to the maritime environment, analysts recently considered that they are "primarily of two types: risks and threats related to safety (which may have dramatic environmental and socio-economic consequences), and risks and threats related to security (unlawful activities: trafficking in human beings and narcotics, illegal migration, terrorism, piracy, etc.")[70].

Several provisions of the Treaty of Rome of 1957 referred to "security" issues: "public security" (as rationale for import, export or transit restrictions, restrictions on the free movement of workers, special regimes for foreign investment), Member States' security and international security. The concept of « safety » appeared only in the EURATOM Treaty representing the basis of many EU actions related to nuclear safety, radiation protection and the safe management of radioactive waste and spent fuel. According to the Treaty, the conditions of safety to be created are necessary "to eliminate hazards to the life and health of the public" (Preamble). We found here the only provision in primary law that links the concept of "safety" to "hazards".

In the EEC Treaty, the concept of "safety" appeared in 1986, when the Single European Act supplemented this Treaty by the provisions of Article 100a as regards a high level of protection of health[71], safety, environmental protection and consumer protection of measures for the approximation of the provisions laid down in Member States which have as their object the establishment and functioning of the internal market, at the attention of the Commission, and Article 118a (safety of workers or employees) for the Member States.

According to the European case law[72] "The measures which the Council is empowered to take under Article 100a(1) of the Treaty are aimed at "the establishment and functioning of the internal market". Since in certain fields, and particularly in that of product safety, the approximation of general laws alone may not be sufficient to ensure the unity of the market, the concept of "measures for the approximation" of legislation must be interpreted as encompassing the Council's power to lay down measures relating to a specific product or class of products and, if necessary, individual measures concerning those products."

[67] *Eirik Albrechtsen, « Security vs safety », August 2003, available on http://www.iot.ntnu.no/users/albrecht/rapporter/notat%20safety%20v%20security.pdf However, the author shows that "Safety is protection against hazards, while security is protection against threats » and also notes that "the uncertainty dimension of the threats are much more present within the field of security than in safety" and that "the security field is more regulated as well as affected by the society, than what is the case of safety" as « security is relevant for a wide range, if not all, ...". As for the concept of "security", a recent working paper of the Commission's staff shows that it "is not a stable concept. It varies with changes in the perception of new threats". SWD(2012) 233 on Security Industrial Policy, p. 8. This document relative to the first action plan by the Commission specifically targeting the security industry also provides, in Annex III, a classification of this sector in the EU.*

[68] *ESRIF (European Security Research & Innovation Forum) Final Report, December 2009, p. 82, available on http://ec.europa.eu/enterprise/policies/security/files/esrif_final_report_en.pdf.*

[69] *Idem, p. 84.*

[70] *Idem, p. 9.*

[71] *See also the condition laid down in Article 129§1 according to which environmental protection requirements to become a component of the Community's other policies.*

[72] *Judgment of 9 August 1994, C-359/92, Germany/Council.*

The Maastricht Treaty reaffirms « the objective to facilitate the free movement of persons, while ensuring the safety ["sûreté" in the French version of the Treaty – where in the Protocol n° 26 of the Lisbon Treaty "safety" is translated as "sécurité"] and security [in French "sécurité"; in fact, in the preamble of TFEU as amended by the Lisbon Treaty, this distinction is maintained and it remains the only mention made of "safety" in this Treaty] of their peoples, by including provisions on justice and home affairs in this Treaty". In the transport field, article 75 is modified and becomes the legal basis for the Council to lay down "measures to improve transport safety" [paragraph 1 (c)]. The Maastricht Treaty also introduced a specific Title (XI) on consumer protection which, for the purpose to contribute to the attainment of a high level of consumer protection, conferred the Council the legal basis for "specific action which supports and supplements the policy pursued by the Member States to protect health, safety and economic interest of consumers and to provide adequate information to consumers" [Article 129a §1 (b)]. These actions "shall not prevent any Member State from maintaining or introducing more stringent protective measures", compatible with the Treaty and notified to the Commission [Article 129a §3].

The Amsterdam Treaty recognizes, within the framework of the provisions on police and judicial cooperation in criminal matters (Title VI), the Union's objective "to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial co-operation in criminal matters and by preventing and combating racism and xenophobia".

The Lisbon Treaty, beyond some amendments of the previous texts, brings two new provisions. On the one hand, "common safety concerns in public health matters, for the aspects defined by this Treaty" are recognized as subject of the shared competence between EU and its Member States [Article 4§2 (k)]. On the other hand, Protocol 26 recognizes in the primary law "a high level of safety" as one of the values of SGEIs. According to Article 4(2) k) TFEU, « common safety concerns in public health matters, for the aspects defined in this Treaty » the Union shares competence with the Member States. Also, the Lisbon Treaty introduces the energy policy in the EU primary law and provides that the security of supply is one of the aims of the Union policy on energy (Article 194 (1) b)). Nevertheless, security or safety obligations and guarantees were already provided in the secondary law[73].

The Green Paper on SGI [COM(2003)270] mentions separately "safety" and "security", which are "one of the basics of the European model of society", and refers to "a common set of objectives that exist in almost all Member States", which typically have pursued in Europe by means of services of general interest and traditionally "carried out under the umbrella of the State and without always pursuing commercial objectives" [COM(2003)270].

Article 6 of the Charter of fundamental rights provides for the right to security "Everyone has the right to liberty and security of person" but the meaning and the scope of the right to personal security hasn't been yet defined in the jurisprudence of the EU while the European Court of Human Rights "has never attributed any independent significance beyond personal liberty to the right to personal security in Article 5 ECHR"[74].

2.2.1. Current definition(s) in the European texts

The security covers different divers aspects in the field of SGI: physical security (for users and persons who intervene in the production and provision of these services), including the security and the reliability of networks and materials, of the system, the security of the provision and security of supply. It is also considered that safe products "should not present any more than the minimum risk consistent with their use under normal or foreseeable conditions"[75].

European texts make reference, for example, to "safe and reliable service", to "continuous and reliable services, including protection against disconnection" [COM(2003)270], to the "regularity" of the service as one aspect of the security (see Article 3 paragraph 2 of the Electricity Market Directive).

The **Committee of the Regions** considers that "the concept of security should include the key consideration of risk prevention, and in particular of reducing the risk of high-impact". According to the Committee, to guarantee a high degree of security in the field of services supply means that service suppliers must ensure "continued and uninterrupted service provision"[76].

There is here a potential conflict with another fundamental right, the right to strike (Article 28 of the Charter of fundamental rights), which breaks in service continuity. One

[73] *Directive 2005/89 concerning measures to safeguard security of electricity supply and infrastructure investment.*
[74] *EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union, June 2006, p. 68. http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf*
[75] *Eurostat, Consumers in Europe, Office for Official Publications of the European Communities, Luxembourg, 2009, p. 113.*
[76] *Opinion of the Committee of Regions on the "Green Paper on services of general interest in Europe" (2004/C 73/02), J.O. n° C 73 du 23.3.2004 p. 7-14.*

principle should not prevail on the other, which involves policies of reconciliation and arbitration, which are subject today of Member States legislation.

The service safety can be assessed not only in relation with its different (potential) users[77], but also as regards the producers and suppliers. Thus, for EESC, "transparency, quality and worker protection are interlinked"[78].

The competences of definition of the safety of SGEI are shared between the Union and its Member States. The Union intervenes when global issues appear, as for example the security of nuclear power stations after Fukushima, while Member States exercise the essential part of responsibilities[79]. As regards security policy, it is "still very much a national prerogative, where Member States delegate a limited amount of authority to supra-national entities".[80]

In the field of transport, Article 91 TFEU (ex Article 71 TEC) clearly confers (since the Maastricht Treaty) to the European legislator (now to the European Parliament and the Council) the competence to laid down "measures to improve transport safety" as well as "any other appropriate provisions"[81].

On that basis, an important European legal framework was adopted in all transport areas, in particular the "Civil Aviation Safety Regulation" (Regulation 300/2008/EC), but also for road, maritime and rail safety.

Railway Safety – A common approach

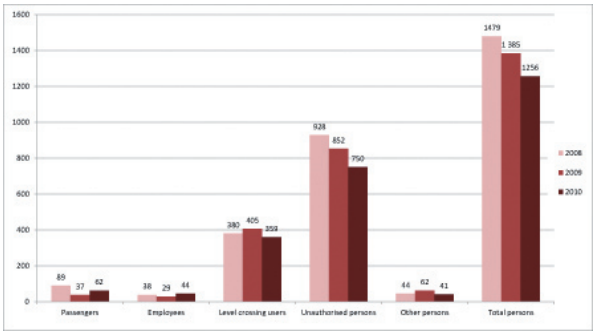
In this field, requirements on safety were laid down since the 1990 and "Railway Safety Directive" (2004/49/EC) introduced the first common safety targets (CSTs), common safety methods (CSMs), common safety indicators (CSIs) and common requirements for safety certificates, and provided for the gradually replacement of national safety rules. An independent safety authority must be established in each Member State, which reports annually to the Commission. The European Railway Agency, set up in 2004, publishes annual reports on the railway safety performance in the European Union[82].

At the same time, the Directive allows Member States, in accordance with the principle of subsidiarity, to exclude from its scope rail systems local rail systems (metros, trams, other light rail systems) and networks that are functionally separated from the rest of the railway system and intended only for the operation of local, urban or suburban passenger services, as well as railway undertakings operating solely on these networks.

As stated by Article 7 of the Directive, the Common Safety Targets define minimum safety levels to be reached in each Member State, expressed in risk acceptance criteria for "individual risks" (passengers, staff including the staff of contractors, level crossing users, unauthorised persons on railway premises) and "societal risks".

The Common Safety Indicators are established in Annex I of the Directive relating to accidents and their economic impacts, to dangerous goods, suicides, precursors of accidents, to technical safety of infrastructure and its implementation, to the management of safety.

Reported number of fatalities per victim type 2008, 2009 and 2010



[77] *For a European Survey on consumers' perception on safety of SGI in the EU-25, see European Commission, Special Eurobarometer 219 – "Consumers' opinions on services of general interest", November 2004.*

[78] *European Economic and Social Committee, (own-initiative) Opinion on "Services general interest" (CES/99/91) of 18 November 1999.*

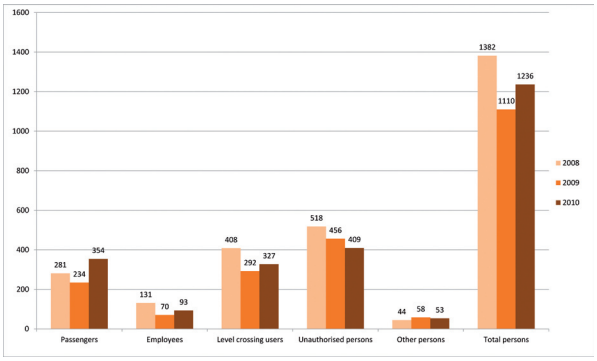
[79] *See the recent stress tests developed on the European Commission initiative, reports, etc.*

[80] *SWD(2012) 233, p. 2*

[81] *"According to the original wording of Article 75 of the EEC Treaty, before the entry into force of the Single European Act, the Treaty on European Union and the Treaty of Amsterdam (pursuant to which it has become Article 71 EC), the Council was entitled to adopt – on a proposal from the Commission and after consulting the Economic and Social Committee and the European Parliament – measures concerning 'common rules applicable to international transport' and 'the conditions under which non-resident carriers may operate transport services within a Member State', and, under paragraph 1(c) of that article, 'any other appropriate provisions'. That wording allowed the Council to bring into being provisions of a social nature or in any event relating to public safety in the transport sector, in order to pursue the objectives of the EEC Treaty – set out in the same Article 75 – in accordance with principles of a general character which can be inferred, inter alia, from what was then Article 118 of the EEC Treaty (which became, after the entry into force of the Treaty on European Union, Article 118 of the EC Treaty and then, after the entry into force of the Treaty of Amsterdam, was moved to the section comprising Articles 136 EC to 143 EC). That possibility, already inherent in the system, was expressly recognised in the wording given to Article 75(1)(c) of the EC Treaty by the Treaty on European Union, which provided that the Council could adopt 'measures to improve transport safety'. Opinion of advocate general of 21 September 2000 in case C-297/99, Skills Motor Coaches and others.*

[82] *http://www.era.europa.eu/Document-Register/Documents/SafetyReport2012.pdf.*

Reported number of serious accidents per victim category 2008, 2009 and 2010



Source: SWD(2012) 246, p. 62, 63 ; European Railway Agency, The railway safety performance in the European Union.

However, EU action in the field of safety goes beyond the sectors where specific competences are recognized in the treaties (transport, energy and health).

Safety in secondary law

Directive 2002/22/EC (Universal Service Directive – **electronic communications**) introduced the free of charge single European emergency call number "112", even from public pay telephones, and an obligation for Member States to reserve harmonised "116" numbers for services with a social purpose, including the emergency number for "Missing children" (116000) and to ensure the availability on their territory as well as to provide adequate information to the public on the existence and use of such services provided by the hotline numbers.

In the area of **Information Society and Media**, Directive 2010/13/EU (Audiovisual Media Services Directive) bans the inclusion of harmful content in any programme, which could seriously impair minors' well-being and safety.

In **postal sector**, "security of the network as regards the transport of dangerous goods" was considered an "essential requirement", that is a "general non-economic reason which can induce a Member State to impose conditions on the supply of postal services" (Article 2 Directive 97/67/EC).

In **energy** sectors, in the framework of public service obligations, ensuring energy security/safety supposes availability and uninterrupted/regular energy supply at reasonable prices ; other security tasks concern investments and cooperation among Member States to address energy needs. As regards the security of supply[83], with the entry into force of the Lisbon Treaty ensuring security of energy supply in the Union becomes one of the Union policy on energy aims [Article 194(1)b)]. In this sector, security/safety also concerns users (their security/safety), infrastructures (e.g. nuclear power plants security), and staff[84].

In **water** sector, 'Water Framework Directive' (Directive 2000/60/EC, as amended) sets out environmental quality standards and a series of safety factors to be set out by Member States. Directive 98/83/EC (which repeals Directive 80/778/EC) on the quality of water intended for human consumption establish minimum level of 41 parametric values (microbiological, chemical and relating to radioactivity parameters - Annex I) for micro-organisms, parasites or any other substance "to ensure that water intended for human consumption can be consumed safely on a life-long basis, and thus represent a high level of health protection" (13). In the case of water supplied from a distribution network, the parametric values shall be complied with "at the point, within premises or an establishment, at which it emerges from the taps that are normally used for human consumption" [Article 6, paragraph 1 (a)]. Where there is a risk that water would not comply with the parametric values, Member States shall nevertheless ensure measures to reduce or eliminate such risk (advise, treatment techniques, and consumer information and advice of possible additional remedial action). Exceptions from the parametric values up to a maximum value may be provided by Member States on a limited period of time and if it does not constitute a human health hazard and no other reasonable means of maintaining the distribution of drinking water in the area concerned exist. The population affected shall be informed and also the Commission, which shall public regular reports.

Sometimes, security reasons may justify derogations from a normal regime of a SGEI provision. For example, in the postal sector, national regulatory authorities grants exceptions to the guaranteed frequency of collection for safety concerns[85].

In some sectors, cross-border security challenges are more evident and they justified the creation of European agencies for security: in some fields of transport (European Maritime Safety Agency; European Aviation Safety Agency - EASA; European Railway Agency - ERA) as well as the

[83] *See Christian Cleutinx, "The case of energy security", CESI Symposium «Providing high-quality public services in Europe based on the values of Protocol 26 TFEU», Warsaw, 11-12 October 2012, http://www.cesi.org/pdf/seminars/121024_06_cleutinx_christian.pdf.*

[84] *See also Directive 2011/70/EC establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste.*

[85] *See ERGP Report on the Quality of service and the end-user satisfaction, 24 November 2011, pp. 43, 44.*

European Food Safety Authority, European Agency for Safety and Health at Work, Executive Agency for Health and Consumers).

2.2.2. What challenges? Promotion and guarantee, scope and content

In its Green Paper on SGI [COM(2003)270], the European Commission has remind its "new approach", " a "major impetus" to increase "the level of security as well as adopting a more European approach in certain fields, for instance in transport and energy", to ensure that various objectives are pursued "by Europe as a whole", when, for example, problems go beyond national frontiers.

Regarding the need of a legislative intervention on security of SGEI, the European Commission considers that "in general, the development of the internal market has generated a considerable increase in the level of security of supply of products and services, to the extent that the markets concerned are functioning competitively. However, in some cases of services of general interest public intervention may be necessary to improve the security of supply, in particular in order to address the risk of long-term underinvestment in infrastructure and to guarantee the availability of sufficient capacity." [COM(2003)270].

Ensuring proper safety guarantees of SGEI also requires appropriate knowledge and evaluation. Most often, measuring safety is based on data relating to accidents, fatalities. In postal sector, the respect of such a standard would be measured in terms of the number of instances where mail is lost, stolen or damaged[86].

A "high level of safety" is not an absolute value, but it depends on the technical and economic conditions as well as of users' needs and their evolution. Moreover, it is interlinked with the other values, such as affordability; therefore, choices and arbitrations have to be made, in particular among quality and costs. To this end, the systematic organisation of ways of giving opportunity to all users to express their expectations and needs and, on that basis, of public debates to clarify issues, precise choices and arbitrations is a prerequisite.

A "high level of safety" does not cover the same issues according to sectors or activities. In some fields, safety is essential, vital, such as for water[87], rail or air transport, energy and nuclear power plants, health care[88], etc. The situation is different for postal service or telecommunications.

In some sectors which have been already subjected to European regulation, such as water (e.g. Directive 98/83/EC on the quality of water intended for human consumption), the Commission is currently preparing some revisions.

The European Commission also looked at whether it would not be useful "to consider whether there are other sectors in which the issue of supply security should be raised specifically", as in the field of energy [COM(2003)270]. Moreover, security/safety issues depend of the specificities of each sector (e.g. protection of privacy in the postal sector).

Compared to other values, a « total and absolute » security was sometimes required. This could justify to consider to what extent a "high level of security" should be defined as "total and absolute" safety/security.

2.3. A HIGH LEVEL OF AFFORDABILITY

"Financial accessibility" or "affordability" is a complex topic and the use of the term may be misleading. It refers to financial affordability. From this perspective "the essence of affordability lies in the resources that are available for a purchase" and it "only has meaning when speaking of a certain group getting particular products or services"[89]. However, non-access to SGEI is not always due to non-affordability which can also depend on other aspects. In Europe, political approaches and texts reveal two conceptions about affordability: on the one hand a universal approach, on the other hand a limited one conception, on people with low income, vulnerable or disadvantaged.

The requirement for SGEI to be affordable has been continuously underlined by EU liberalisation policies initiated by the EC/EU after the adoption of the European Single Act, as being closely aligned with the objective of cohesion promoted by the Union to support access of all to SGEI irrespective of the beneficiaries income and their place of residence, to prevent and fight against exclusion. In this context, the "lowest cost" and the "less expensive services" were intended to be major objectives in the framework of the construction of the single market[90]. Affordability appears in particular as a defining element of the "universal service". Therefore, the exigencies of affordability of SGEI emerged first in the secondary law of the European Communities, in the framework of the legislation adopted to

[86] *COM(93)274, loc. cit.*

[87] *For some issues in the local context of Bucharest municipality, see the presentation of Epsic Chiru at CESI Symposium «Providing high-quality public services in Europe based on the values of Protocol 26 TFEU», Warsaw, 11-12 October 2012, http://www.cesi.org/pdf/seminars/121024_07_chiru_episca.pdf.*

[88] *see Susan Burnett, loc. cit.*

[89] *Claire Milne, Towards defining and measuring affordability of utilities – a discussion paper, report for the Public Utilities Access Forum, 2004, http://www.antelope.org.uk/publications/PUAF_affordability_discussion_paper.pdf*

[90] *Guidelines on the application if EEC competition rules in the telecommunications sector (1991/C 233/02).*

accomplish the internal market of telecommunications, postal services and electricity which includes affordability in the Community definitions of universal service. In the primary law of the EU, the first references to "affordability" are made in the Protocol 26 of the Lisbon Treaty[91].

The affordability of a service is also, according to the Commission, one of decisive elements of markets performance and, in view of the sectorial legislation of the European Union, one of the elements which "can be drawn on to define a useful Community concept of services of general economic interest", an element which identifies community values and goals". Affordable prices are also considered as one of the "key elements of a consumer policy in the area of services of general economic interest" [COM(2003)270].

2.3.1. Current definition(s) in the European texts

In the European legislation, affordability appears as a facet of accessibility, of financial nature. The terms and references may be different ("affordable" access, services, prices, etc.). For example, in the postal sector, it was considered that affordability means "that each citizen or organisation of the Community should have access to a postal service at prices which he can readily afford for his main postal communication needs"[92].

In the **Open Network and Universal Service Directive (Directive** 98/10/EC) universal service coverage at an affordable price was accompanied by a particular geographic and social obligation to maintain affordability 'for users in rural or high cost areas and for vulnerable groups of users such as the elderly, those with disabilities or those with special social needs'. To that end, Member States were to be able to provide for special or targeted tariff schemes with, inter alia, price capping or geographical averaging until competition was able to provide effective price control (Article 3(1)).

Directive 2002/22/EC provides that "The affordability of telephone service is related to the information which users receive regarding telephone usage expenses as well as the relative cost of telephone usage compared to other services, and is also related to their ability to control expenditure. Affordability therefore means giving power to consumers through obligations imposed on undertakings designated as having universal service obligations. These obligations include a specified level of itemised billing, the possibility for consumers selectively to block certain calls (such as high-priced calls to premium services), the possibility for consumers to control expenditure via pre-payment means and the possibility for consumers to offset up-front connection fees" (Recital 15).

In the field of SSGI, affordable would mean that "Social services should be provided to all the persons who need them (universal access) either free of charge or at a price which is affordable to the individual".[93]

Temporary non-financial protection measures have been also drown up to ensure access to SG(E)I for all users. For example, EU law provides for temporary measures of not disconnection from electricity provision in case of difficulties of payment of bills by vulnerable consumers.

There are also more nuanced approached on affordability. The intergovernmental conference which prepared Lisbon Treaty in 2007, has adopted a project of the Protocol on SGI[94] which – in the French version – used the term "accessibility" (accessibilité) as synonymous with the word "affordability" of the English version of the Protocol. In the French final version of the Protocol, this term was replaced with "affordable character" but we could question the meaning of the terms used in other linguistic versions of the Treaties.

While the EU law has left the precise meaning of this term to be defined at national level, several initiatives appeared at EU level to assess SGEI affordability.

Thus, the European Commission's affordability indicators for services of general economic interest (telecommunications, electricity and gas) measured percentages of per capita income needed to acquire a given basket of services[95]. The methodological note for the horizontal evaluation of SGEI [COM(2002)331] affordability is defined as "Price of services relative to the income of low/average income consumers reported for consumers with different income levels". According to the horizontal evaluation of the performance of network industries providing SGEI realized by the Commission in 2004 [COM(2004)866] "affordability indicators track what share of their budget households[96]

[91] *However, since the Treaty of Rome (1957) the rules on competition and state aid already stated that "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" shall be compatible with the internal market (Article 107(2) a TFUE).*

[92] *COM(91)476, loc. cit.*

[93] *See A Voluntary European Quality Framework for Social Services, 2010, op. cit.*

[94] *See the French version of the COM(2007)725 which reproduce this project.*

[95] *European Commission, DG Economic and Financial Affairs, Working document, Annex to the report on the functioning of product and capital markets – "Market performance of network industries providing services of general interest : a first horizontal assessment", 7 December 2001.*

[96] *For data on consumption expenditure of private households see http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Household_consumption_expenditure#Household_budget_survey*

have to pay for a bundle of services of general interest; (...) [they] show the importance of special tariffs for low income or special user groups".

Calculation of affordability indices[97]

Affordability is estimated using an index which gives the percentage of annual income a consumer has to pay to enjoy a year's fixed provision of a certain service.

For income data, the risk-of-poverty thresholds for one-person households were used. The risk-of-poverty rate is defined as the share of persons with an equivalent disposable income below the risk-of-poverty threshold, which is set at 60% of the national median equivalent disposable income (after social transfers). Therefore, the indices correspond to the 'low income consumer'.

As the availability of reliable data is very poor, the index is a rough estimation of a trend rather than a reflection of reality, and does not take into account changes in consumption.

The necessity of a regulatory intervention is at stake in this field, too. In fact, according to the Commission, "the market should in principle determine the price"; "where there is effective competition, market mechanisms may ensure the provision of affordable services of an adequate quality thus greatly reducing the need for regulatory intervention" [COM(2003)270]. Then, it noticed that "the creation of an internal market has significantly[98] contributed to an improvement in efficiency, making a number of services of general interest more affordable" [COM(2004)374] (the example of telecommunications is the most frequently cited). Nevertheless, the Green Paper recognised that "the best market could offer is a price oriented towards cost" which could not ensure the access of all to an affordable service. Thus, "where necessary to achieve this objective, price regulation measures are applied by regulators" (in general, maximum prices, or minimum prices, "to prevent predatory behaviour by dominant players" [COM(2003)270]. A CIRIEC report of 2004[99] pointed out that "the market preferences for cost-recovery pricing also mitigates against the use of cross subsidy in solidarity pricing" and that "moves towards full cost recovery and reduction of subsidies leads to a worsening of territorial and social cohesion. This is reinforced by the finding in local public transport that accessibility for disadvantaged groups is most importantly achieved by general affordability, with targeted schemes less effective". Evaluations conducted showed that, among the liberalised SGEI sectors, important reductions were registered only in telecommunications but in this field, the Commission and the European legislator had to intervene firmly to lower mobile electronic communication prices in the EU (roaming).

On a more general note, price decrease does not necessary mean an affordable access. Thus, regulatory measures concerning prices exist in all member States and for most SGEI: price caps, maximum prices, regulated tariffs, special tariffs, which are different according to countries and sectors.

2.3.2. What challenges? Promotion and guarantee, scope and content

In Europe, two conceptions about affordability coexist: a universal approach along and a limited conception regarding only people with low income, vulnerable or disadvantaged.

Affordability is not an absolute value. It depends on the technical and economic conditions in each territory. 20 years after the adoption of the objective of the "internal market", despite all the initiatives of the cohesion policy, deep disparity continues to exist. It also depends on the needs and their evolution. For example, if the per unit price of electronic communications has significantly decreased in the last 20 years, households' "communication budget" is not going down.

Therefore, it is necessary to better define « affordability », to precise what it means in time and space, to determine tools for measuring it, to precise the implementation of this « common value » in the secondary EU law and in the national law of Member States, to identify what kind of initiatives would or should take the EU to ensure that it is respected and protected.

The respect of affordability requires a control of access, price, interventions, including of vulnerable persons or people in a particular situation. In fact, to ensure univer-

[97] *European Commission, Annex to SEC(2005)1781, p. 29, Annex to SEC(2007) 1024, p. 66.*

[98] *Three years later, in its Communication of 2007, the Commission noted that « « experience (…) shows that markets which are open to competition contribute to improving (...) affordability (...) ». [COM(2007)725]*

[99] *CIRIEC International, « La contribution des services d'intérêt général à la cohésion économique, sociale et territoriales de l'Union européenne », Rapport pour la Commission européenne, 2004, p. 63, 75.*

sal affordability may require designing special regimes for people having low revenues or specific needs.

Electricity: the protection of "vulnerable consumers"[100] (Directive 2009/72/EC on common rules for the internal market of electricity[101])

Article 3. Public service obligations and customer protection

7. Member States shall take appropriate measures to protect final customers, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers. In this context, each Member State shall define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of electricity to such customers in critical times. Member States shall ensure that rights and obligations linked to vulnerable customers are applied. In particular, they shall 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 easily to switch to a new supplier. As regards at least household customers, those measures shall include those set out in Annex I. (Measures on consumer protection)[102]

The European concept is limited: "energy poverty" only concerns the fields of electricity and gas while the notion of "fuel poverty" is larger and embraces all energy sources (electricity, natural gas, liquid petroleum gas, oil, coal, urban heating, other fossil fuels).

Fuel/energy poverty exists in all Member States but the realities and approaches of this phenomenon vary widely. At national level, definitions seem to exist only in the United Kingdom and Ireland (+10% of household's revenues spent for heating fuel poor households) and in many countries where there is no official definition or estimates about poverty, the topic remains confuse and/or not discussed.

According to the European Commission, a national definition of vulnerable consumers may make reference to the concept of energy poverty provided that this is clearly identified. Also, any mechanism adopted to protect vulnerable consumers must take into account other social policy measures in the Member States. The Commission does not consider it appropriate at this stage to propose a European definition of energy poverty or of vulnerable customers. However, the Commission encourages other kind of measures to be adopted by Member States, such as long-term solutions to replace direct subsidies with a support for improving the energy quality of dwellings, the integration of energy efficiency measures in welfare policies, and the reconsideration of regulated prices, because of their negative impact on the access to the market, investments and to motivate consumers to reduce their energy consumption. [SEC(2010)1407 An energy policy for consumers].

The **European Economic and Social** Committee, in its (exploratory) Opinion on 'Energy poverty in the context of the liberalisation and the economic crisis' of 14 July 2012, considers that "Combating energy poverty is a new social priority that needs to be tackled at all tiers of government and the EU should provide common guidelines to ensure that all Member States adopt the same approach eradicating this phenomenon. The work done by the EU in recent years on protecting vulnerable customers deserves to be highlighted. Many Member States, however, are still not fulfilling their obligations, and as a result, the EU should take action in line with the principle of subsidiarity, as defined in Article 5 TEC, when Member States do not comply with the measures that have been put in place". "1.4. The EESC suggests that the EU adopts a common general definition of general poverty that can then be adapted by each Member State". According to the Committee, "one option would be to define energy poverty as the difficulty or inability to ensure adequate heating in the dwelling and to have access to other essential energy services at a reasonable price".

For its part, the **European Parliament** observes that in general, liberalisation "has not resulted in a general lower-

[100] *The first reference to the vulnerability of consumers the European legislation dates back to 2005 (Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market). Directive 2011/83/EU on consumer rights does contains one reference on vulnerable consumers (Recital 34: "In providing that information, the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee. However, taking into account such specific needs should not lead to different levels of consumer protection"). The proposal for a Regulation on a consumer programme 2014-2020 of 9 November 2011 [COM(2011)707] provides for the taking into account of the specific situation of vulnerable consumers; moreover, the European Parliament proposed the introduction several amendments regarding this category of users [see EP Report COM(2011)0707 – C7-0397/2011 – 2011/0340(COD)].*

[101] *In the field of the natural gas, see Article 3 of the Directive 2009/73/EC.*

[102] *For Greek and Italian case studies, see Yannis Eustathopoulos, « Programme d'ajustement structurel & SIEG. Le cas de l'électricité en Grèce », http://www.cesi.org/pdf/seminars/121024_08_eustathopoulos_yannis.pdf and Mauro Brolis, « Lotta alla precarietà energetica. Misure e strumenti per garantire l'accessibilità ai servizi energetici », http://www.cesi.org/pdf/seminars/121024_09_brolis_mauro.pdf, CESI Symposium «Providing high-quality public services in Europe based on the values of Protocol 26 TFEU», Warsaw, 11-12 October 2012.*

ing of prices, and has in fact resulted in added difficulty for the majority of citizens in knowing the price the best meets consumers' needs, in changing providers and in understanding the items billed". According to the European co-legislator, "European legislation must address the problem of vulnerability among consumers as a horizontal task, taking into account consumers' various needs, abilities and circumstances". The Report of 8 May 2012 on a Strategy for strengthening the rights of vulnerable consumers also proposes an European approach of the concept of "vulnerable consumers":

- all consumers, at some point in their life, can become vulnerable because of external factors and their interactions with the market ;
- vulnerability can result from endogenous and/or exogenous causes: endogenous causes – temporal or permanent inherent to the consumer or his or her physical or mental situation (mental, physical or psychological infirmity, age, credulity, sex, etc.) and exogenous causes – external: lack of comprehension of received information or of proposed choices (for example, for excluded persons or without education, the lack of knowledge of the language), the lack of information (general or specific to a sector of the market), the need to use new technologies with which consumer is not familiar, poor knowledge about existing complaints and compensation systems, vulnerable social and financial situation, lack of access to Internet, etc.

In the sector of energy, a Communication of the European Commission [COM(2012)663 Making the internal energy market work] of 15 November 2012 specifies that "Final energy prices for consumers may continue rising in the coming years [sic], having a negative impact particularly on consumers in an economically weak situation. They should therefore be adequately protected. However, subsidies or regulation aimed at lowering the overall energy prices tend to reduce the incentives for energy-efficient behaviour, do not specifically target the most in need, and can distort competition. While assistance to vulnerable consumers by financial measures may be part of social policy, assistance with energy efficiency improvements represents a cost-effective form of assistance". The Commission reveals here a limited approach on public service obligations regarding affordability to cover "week" or "vulnerable" consumers alone, while the Protocol n°26 develop a universal approach of the values and aims at the "promotion of universal access".

The European law hasn't established criteria to determine if prices are affordable; the EU leaves Member States this competence and responsibility. The European Commission emphasized that Member States must define criteria for determining affordability and they "should ensure that this level is effectively offered, by putting in place a price control mechanism ("price cap", geographical averaging) and/or en by distributing subsidies to the consumers and users concerned" [COM(2003)270]. According to the Commission, "these criteria could be linked, for example, to the penetration rate or to the price of a basket of basic services related to the disposable income of specific categories of consumers"; "affordability is a criterion that takes account mainly of the customer perspective". The Commission also pointed out that "affordability should not be confused within and does not necessarily equate to, cost orientation", and noted that "in some cases, affordability can imply that a service is offered free to everyone or to specific groups of persons"[103]. Thus, "a higher level of solidarity is achieved where the service in question is available free of charge, as there is then no connection between the cost of providing the service and the price paid by the user" (point 31, Opinion of Advocate general Poiares Maduro of 10 November 2005, C-205/03 P, FENIN/Commission). Indeed, sometimes, free access regimes are implemented, such as in the field of public urban transport (free access for all, or for some categories of age or certain social categories), as well as in non-economic areas (compulsory education, some health services).

The free of charge access in public urban transport

In France, of about 290 urban transport organizing authorities, 23 networks – most of them of a small size, representing 2,5% of urban inhabitants – have chosen the total free access for their inhabitants, so the complete subvention of transport services from the administrations, enterprises and local authorities[104].

In Estonia, a local referendum on free public transit was conducted in March 2012 among the residents of the capital city Tallin; 75.5% of participants expressed in favour of the proposal; Tallin City Government intends to start pro-

[103] *"The concept of affordability appears to be narrower than the concept of "reasonable prices" ... While affordability is a criterion that takes account mainly of the customer perspective, the principle of "reasonable pricing" suggests to take account also of other elements". [COM(2003)270].*
See also the concept of « concept » reiterated by the COM (2011) 900.

[104] *See Stéphanie Lopes d'Azevedo, Florence Dujard, Union des Transports Publics et ferroviaires (UTP) et Groupement des Autorités Responsables de Transport (GART), « Une décennie de tarification dans les réseaux de transport urbain », 1 juin 2012, http://www.utp.fr/images/stories/utp/publications/GART_UTP2012_Une_d_cennie_de_tarification_Rapport.pdf.*

viding free public bus and tram transport to its residents from January 1, 2013[105]. In Belgium, the city of Hasselt made its bus system free in January 2012. In Germany, the city of Leipzig, was the first German city offering a four-days free public transportation to drivers, in April 2012 ("Down with the Petrol Price Insanity -- Time to Switch"). Similar free days of transport were recently proposed in Riga during 23-24 June 2012, official days off in Latvia[106]. Different other local communities in Europe offer free transport to some categories of individual users, such as children and elderly.

Price regulation in the railway passengers transport

Currently, in this field, tariff obligations represent one of the main public service obligations and cover tariff reductions for certain categories of users. A recent study[107] shows that "in general, the margin of manoeuvre is limited in the sense that railway companies [subject to public service obligations] cannot increase prices beyond a level set by the authorities".

In some sectors, affordability is usually represented as a single tariff covering the whole of the territory concerned. At the same time, an affordable service does not necessary presuppose a uniform tariff/price on the whole territory of a country/regions and/or of their cross-border territories. For example, the EU law on telecommunication in 1990 expressly provided that "the fixing of the actual tariff level will continue to be the province of national legislation[108]; when EU legislation has intervened to regulate the tariffs for roaming telecommunication it established a maximum level[109].

In general, it is up to the national, regional and local authorities to finance of services of general economic interest (Article 14 TFEU). This involves the possibility to grant public subsidies to ensure the fulfilment of particular missions of general interest and the access to SGEI, while at the same time respecting the principle of proportionality of subsidies to objectives set and EU rules regarding public service compensations and state aid. More generally, the principle of transparency of public funds should be observed, as well as the legal outsourcing procedures and the monitoring of their management.

The **Committee of Regions** expressed its conviction that "universal access to high-quality services of general interest at reasonable prices calculated on the basis of production costs is a fundamental aspect of economic, social and territorial cohesion throughout the EU"[110]. According to the Committee, "the authorities must be in a position to set the price, based on a uniform principle of solidarity under which no-one, or the fewest people possible, are deprived of such services for economic reasons. Likewise, the authorities should be able to even out costs within the individual sectors, thereby making for enhanced regional and social cohesion"[111].

The EU funds, in particular the structural funds and TEN programs, can also support sectors of general interest but their aim is not "to ensure the financial stability of services of general interest" [COM(2001)598]. Nevertheless, their impact on the affordability of services may be important[112].

Towards European prices/tariffs? The financial conditions for accessing SGEI differ widely across EU Member States. For example, in 2011, while GDP per capita ranged from 45% to 274% of the EU average[113], energy price levels ranged from 152% in Denmark to 54% in Romania of the EU average (energy costs represented in EU, on average, 5% of household final consumption) and for transport services from 134% in Sweden and Finland to 46% in Bulgaria and Romania (transport services represented, on average, 3% of households final consumption expenditure)[114]. Thus, convergence rate of prices remains weak and the crisis seems even to accentuate existing disparities. In this context, European policies and legislation on SGEI focused particularly on establishing harmonised principles or rules of price setting based on objective cri-

[105] *http://news.err.ee/society/e065014d-9d67-43a2-8f3a-f6cacb54cdae.*
[106] *http://www.liveriga.com/en/public-transportation-free-of-ch/what-s-on/stay.*
[107] *Community of European Railway and Infrastructure Companies (CER), Public Service Rail Transport in the European Union: An Overview , November 2011, available on http://www.cer.be/media/2265_CER_Brochure_Public_Service_2011.pdf*
[108] *Annex II of Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision.*
[109] *Regulation (EU) No 531/2012 of 13 June 2012 on roaming on public mobile communications networks within the Union which repeal Regulation (EC) No 717/2007 and Regulation (EC) No 544/2009.*
[110] *Opinion of the Committee of the Regions on the White Paper of services of general interest, (2005/C 164/06), O.J. n° 164 of 5.7.2005, p. 53-58.*
[111] *Opinion of the Committee of Regions on the Green Paper on services of general interest in Europe (2004/C 73/02), J.O. n° C 73 of 23.3.2004 p. 7-14.*
[112] *See in particular CIRIEC International reports for the European Commission and the European Parliament.*
[113] *http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/2-20062012-AP/EN/2-20062012-AP-EN.PDF*
[114] *Eurostat, Barbara Kurkowiak, "Statistics in focus. 26/2012. Major dispersion in consumer prices across Europe", http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-12-026/EN/KS-SF-12-026-EN.PDF*

teria, being, as a rule, cost-oriented[115], "more in line with costs" (see, for universal postal service, Article 12 of Directive 97/67/CE, "full cost-recovery" principle in water sector - Article 9 of Directive-cadre de 2000), while promoting the need to ensure the access of all to SG(E)I. Thus, if a competence is conferred to the EU, it is not to establish European (uniform) prices; affordable price are to be set out "by taking account of specific national circumstances" [COM(2011)900].

EU legislation also provides among public service obligations the right to a transparent description of tariffs, an appropriate publication, the independent pricing (e.g. added services), access and affordability provisions for vulnerable and disabled consumers. By complying with non-discrimination exigencies, tariffs appear also as a guarantee for the equal treatment of users[116].

The "high level" of affordability of SGEI has also not been defined. Could it take into account only (or in particular) the effective access or non-access to SGEI?

Individual users' perception of the affordability of SGEI is reflected in several Eurobarometer Surveys. Thus, according to 2006 data[117], on average, 16% of respondents who use services in question in EU (25 MS) considered electricity supply services as being not affordable (16% for gas services, 13% for fixed telephone services, 13% for rails services between towns/cities, 12% for water services, 10% for transport services within towns/cities, 6% for postal services). On the other hand, the satisfaction as regards affordability (they considered themselves able to afford the services they need) ranged from 87% for postal services to 74% for rail services between towns/cities. Finally, the percentage of respondents who didn't use particular SGEI but considered them not affordable was much more important (on average, from 27% for electricity services and 26% for fixed telephone services to 15% for postal services).

The same price has a different value for households according to their income level. The use of a service (frequency of use, quantity, etc.) is also important in terms of expenditures and affordability. Measuring affordability also depends of the evolution of living standards, the natural conditions of living[118], evolution of the price of raw materials, etc. In some cases, arrears on services bills may also indicate affordability problems[119]. And all these aspects must be approached in the context of differences between countries, services[120] and users.

It is difficult to know how far affordability objective is being achieved and it is not clear if this is an important issue in all EU Member States and for which SGEI sectors, if it is a subjective judgment rather than an objective one and which are the indicators used. As concluded by the European Commission as regards the objective of price affordability in postal sector[121] putting this principle into practice "will require further attention from Member States"; a similar conclusion may be deducted from its horizontal evaluation of SGEI.

Among EU 27 MS, the UK often appears as having the most developed system of public policies concerning services affordability for vulnerable persons, in particular in energy (fuel poverty issues). In this sector, since the 1990s it was considered that those who need to spend more than 10% of their income to achieve certain levels of warmth in the home are in situation of "fuel poverty". This approach was also used by European Commission for EU assessments. In the UK, the same approach was put forward in the 2000s to determine the level of « water poverty » as needing to spend more than 3% of income on water and sewerage charges[122]. As for telecommunications, some authors used the following criteria to define a tariff package as affordable: if it allows a household in the lowest income decile to make socially necessary use (up to 60 minutes of charged out-

[115] *"...must also take into account the principle of fair sharing in the global cost of the resources used and the need for a reasonable level of return on investment". Annex II of Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision.*

[116] *"... tariffs must be non-discriminatory and guarantee equality of treatment". Annex II of Directive 90/387/EEC. In electricity field, the EU law establish the right to a universal supply of electricity at a reasonable, easy and clearly comparable, transparent and non-discriminatory price.*

[117] *Eurobarometer 65.3 - Consumers' opinions of services of general interest, European Commission, 2006.*

[118] *For example, particularly in some Southern European territories, the cooling may also need to be taken into account when defining basic energy needs or "fuel poverty".*

[119] *For a EU Survey conducted in 2005 see Eurostat, Consumers in Europe. Facts and Figures on services of general interest, 2007 Edition, Office for Official Publications of the European Commission, Luxembourg, 2007, p. 6, 7.*

[120] *In some sectors it mays seems easier to measure affordability than in others (transport, energy, depending on the evolution of fuel price).*

[121] *COM(2008)884 4rd Report on the application of the Postal Directive 97/67/EC as amended by Directive 2002/39/EC and accompanying document SEC 2008/3076.*

[122] *Martin Fitch and Howard Price, Water Poverty in England and Wales, CUCL/CIEH, July 2002, http://www.cieh.org/library/Knowledge/Environmental_protection/waterpoverty.pdf*

bound calls and 1GB of data downloads per month) through sustainable expenditure (up to 4% of household income for telephony alone or 6% for telephony plus broadband) and if the package helps such a household readily control its expenditure on telecommunications[123].

If due to the diversity of national situations a positive definition of affordability is still not possible at EU level, would it be necessary to reinforce the scope of some obligations, for example to forbid exorbitant fees?

Could this value be interpreted as requiring the provision of SGEI at an affordable level for the community? In such a case, how it would apply to the financing of these services?

Furthermore, for the **ECJ** "a desire to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources » was considered by the Court as an overriding reason relating to the public interest likely to justify a barrier to the principle of freedom to provide services or on the free movement of goods.

"61. It must be possible to plan the number of hospitals, their geographical distribution, their organisation and the facilities with which they are provided, and even the nature of the medical services which they are able to offer, in a way which, first, meets, as a general rule, the objective of guaranteeing in the territory of the Member State concerned sufficient and permanent access to a balanced range of high-quality hospital treatment and, secondly, assists in ensuring the desired control of costs and prevention, as far as possible, of any wastage of financial, technical and human resources (see Case C 157/99 Smits and Peerbooms [2001] ECR I 5473, paragraphs 76 to 80; Case C 385/99 Müller-Fauré and van Riet [2003] ECR I 4509, paragraphs 77 to 80; and Watts, paragraphs 108 and 109).

62. From those two points of view, it is equally clear that the requirement that one local pharmacist should be given responsibility for all the tasks involved in the supply of medicinal products to German hospitals is not a measure which goes beyond what is necessary to achieve the objective pursued by the Federal Republic of Germany, namely to achieve a high level of public health protection"[124].

"107. As regards hospital medical services, the Court has already made the following observations in paragraphs 76 to 80 of Smits and Peerbooms.

108. It is well known that the number of hospitals, their geographical distribution, the way in which they are organised and the facilities with which they are provided, and even the nature of the medical services which they are able to offer, are all matters for which planning, generally designed to satisfy various needs, must be possible.

109. For one thing, such planning seeks to ensure that there is sufficient and permanent access to a balanced range of high-quality hospital treatment in the State concerned. For another thing, it assists in meeting a desire to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources. Such wastage would be all the more damaging because it is generally recognised that the hospital care sector generates considerable costs and must satisfy increasing needs, while the financial resources which may be made available for healthcare are not unlimited, whatever the mode of funding applied.

110. From those two points of view, the requirement that the assumption of costs by the national system of hospital treatment provided in another Member State be subject to prior authorisation appears to be a measure which is both necessary and reasonable"[125].

2.4. EQUAL TREATMENT

As the first three values aim at meeting a "high level" of …, and have therefore a relative nature, the fourth one, "equal treatment", is an absolute value, for which there can be no barriers, relativism, exceptions.

The equality is one of the constitutional principles of most European countries. While in some States it was initially conceived to provide users "equality of access and in the provision of service" and to forbid "theoretically any discrimination", in the Member States which have opted for universality of service (Germany, Northern European countries), the universal provision obligation of some services can imply the implementation of positive discrimination[126]. This approach progressively spread in the legal order of other Member States, including through the transposition of Community law.

In its first Communication on SGI [COM(1996)443], the Commission emphasized that SGI, in general, and universal services, contribute to achieving equal treatment, fundamental aim of the European Community. Therefore, the set of rights for users and consumers as regards serv-

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[123] *David Lewin and Claire Milne, Plum Consulting, "Are telecommunications services universally affordable across the EU ?. An independent assessment for Vodafone", October 2010, http://www.vodafone.com/content/dam/vodafone/about/public_policy/affordability_plum.pdf*

[124] *Judgment of the Court of 11 September 2008 in Case C-141/07, Commission/Germany.*

[125] *Judgment of the Court of 16 May 2006 in Case C-372/04, Watts.*

[126] *Michel Mangenot, Public Administrations and Services of General Interest: What Kind of Europeanisation?, European Institute of Public Administration, 2005.*

ices of general interest "could be based on the following principles (…) equal access and treatment for users and consumers when using cross-border services within Member States" [COM(2003)270].

The Treaty establishing the European Economic Community of 1957 has conferred to the Community the objective of improving the standard of living and of eliminating discrimination on grounds of the nationality among the citizens of Member States. It established new rights, such as the equality between men and women and as regards migrants[127]. One can observe that in the French version of the Treaties (including the Protocol n°26 of the Lisbon Treaty) a right/principle of "equality" (noun) of treatment is proclaimed, while in the English version the focus is very much on "treatment" ("equal treatment" - with equal as adjective).

"Equality", as fundamental right "recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter", was introduced in the EU primary law in the Preamble of the Single Act. Then, the Amsterdam Treaty enshrined the promotion of "equality between men and women" among the Community's tasks (Article 2 TEC), and Article 3 provides that "In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women (paragraph 2). According to the Declaration N° 13 of Amsterdam Treaty on Article 7d of TCE on public services, its provisions « shall be implemented with full respect for the jurisprudence of the Court of Justice[128], inter alia as regards the principles of equality of treatment…".

The EU Charter of Fundamental Rights adopted in 2000, legally binding since the entry into force of the Lisbon Treaty on 1st December 2009, contains a specific title (Title III) on equality, which provides equality before the law and prohibition of any form of discrimination (Articles 20 and 21), and also specific rules concerning the rights of the child and the elderly, integration of persons with disabilities, equality between women and men, linguistic diversity (Articles 22-26).

In the Lisbon Treaty, equality appears as "universal value" (TEU, Preamble[129]), on which the Union is founded[130] (see also the preamble of the Charter of Fundamental Rights). According to Article 3(2) "[The Union] shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child". Article 9 TEU imposes on the Union to observe in all its activities "the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies". In all its activities, the Union shall also "aim to eliminate inequalities and to promote equality, between men and women" [Article 8(1) TFEU]. The provisions of the treaty also protect EU citizens from discrimination on grounds of nationality in host States (Articles 18[132] and 21 TFEU – these protections are principally available for EU citizens residing in other Member States).

2.4.1. Current definition(s) in the European texts

EU secondary law imposed judicially enforceable rights for individuals and ex ante obligations to achieve equality by establishing a general framework for equal treatment in employment and occupation (Directive 2000/78/EC – Framework employment Directive) and regulating frameworks for the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin (Directive 2000/43/EC – Race and ethnic origin Directive), of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Directive 2006/54/EC – Gender recast Directive), of the principle of equal treatment between men and women in the access to and supply of goods and services (Direc-

[127] *Treaty of Rome (1957): "Article 119. Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job".*

[128] *See in particular C-149/77 Defrenne (the elimination of discrimination based on sex is part of fundamental rights); C-442/00 Caballero (fundamental rights include the general principle of equality and non-discrimination) ; C-236/09 Test Achat (equality between me and women is a fundamental principle of the EU).*

[129] *« DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law »*

[130] *"Article 2 TEU. The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".*

[131] *"Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law".*

[132] *Article 18 TFEU should be subject to "limitations and conditions" imposed under the Treaty according to the principle of proportionality.*

tive 2004/113/EC). A Proposal for a Directive against discrimination based on age, disability, sexual orientation and religion or belief beyond the workplace [COM(2008)426] is being discussed by the EU legislature[133].

The EU Equality Directives require Member States to support social dialogue and dialogue with NGOs on equality issues, to create bodies for the promotion of equal treatment on grounds both of race and sex in order to provide independent assistance to victims of discrimination in pursuing their complaints, conduct independent surveys concerning discrimination, and publish independent reports and recommendations.

The equal treatment principle applies also as regards operators who compete for grants of exclusive or special rights and compensations for public service missions performed by a third party. For this purpose, EU law enshrined a series of obligations:

Public service contracts as defined in Directives 2004/17/EC or 2004/18/EC shall be awarded in accordance with the procedures provided under those Directives to ensure the respect of the principles of transparency, non-discrimination and equal treatment[134] (e.g. right of information concerning procurement intentions, the criteria and modalities of evaluation and selection of tenders, the conditions of public contract implementation, or Article 3 Directive 2004/18/EC). Furthermore, Directive 2004/17/EC provides that "the principle of non-discrimination is no more than a specific expression" of the principle of equal treatment" (recital 9);

The principle of non-discrimination between the public and private sectors, also implies the free choice by each Member State of the ownership of operators and reciprocal that Member States must ensure the equal treatment all operators (public or private). According to Article 345 TFEU, "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership". However, as noticed, "Member States' constitutions generally do not reserve the provision of certain economic goods or services to the public sector (...) which seems to have been a facilitating factor for the implementation of the free movement provisions »[135]. Moreover, the case law of the ECJ held that "... those concerns cannon entitle Member States to plead their own systems of property ownership, referred to in Article 222 [345 TFEU] of the Treaty, by way of justification for obstacles resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. As is apparent from the Court's case law (...), that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty"[136].

The definition of the nature of public service obligations and of agreed awards in a public service contract (recital 9 of the regulation 1370/2007/EC – public passengers transport services by rail and by road; see also Article 3§6 - Directive 2009/72/EC concerning common rules for the internal market in electricity);

Non-discriminatory network access, non-discriminatory public service obligations and equality of access for electricity undertakings of the Community to national consumers (Directive 2009/72/EC concerning common rules for the internal market in electricity).

To ensure equal treatment of services' users, the Community law sets up, on the one hand, the requirement of "an identical service to users under comparable conditions" (e.g. Article 5 – Directive 97/67/EC), and, on the other hand, it imposes a series of non-discrimination obligations and positive measures as regards some categories of users.[137] Thus, the equality of access does not mean identical conditions for all users, but rather ensuring the access of all to services.[138]

Rights for disabled persons and persons with reduced mobility - Regulation 1371/2007 on rail passengers' rights and obligations

For the purpose of this Regulation, 'public passenger transport' is defined as "passenger transport services of general economic interest provided to the public on a non-discriminatory and continuous basis".

[133]For a summary of European and international legal framework see EQUINET (European Network of Equality Bodies) http://www.equineteurope.org/-Legislative-framework,82-

[134]Directive 2004/17 – "Article 10 Principes of awarding contracts. Contracting entities shall treat economic operators equally and non-discriminatory and shall act in a transparent way".

[135]Piet Jan Slot, Anna Biganzoli, "Public Capital and Private Capital in the internal market. Securing a level playing field for public and private enterprises – General Report", in G.C. Rodriguez Iglesias, L. Ortiz Blanco (eds.), Public Capital and Private Capital in the Internal market, Proceedings of the FIDE XXIV Congress Madrid, Servicio de publicaciones de la Faculdad de Derecho Universidad Complutense, 2010, vol. 3, p. 39.

[136]Case C-367/98 Commission v Portugal.

[137]For a practical case study in education sector, see Harald Weber - European Agency for Development in Special Needs Education, "Vocational Education and Training (VET) for learners with Special Educational Needs (SEN)" at CESI Symposium «Providing high-quality public services in Europe based on the values of Protocol 26 TFEU», Warsaw, 11-12 October 2012, http://www.cesi.org/pdf/seminars/121024_11_weber_harald.pdf.

[138]For a general presentation of this value and a Finnish case study see Kristian Siikavirta, "Equality of treatment – public services", CESI Symposium «Providing high-quality public services in Europe based on the values of Protocol 26 TFEU», Warsaw, 11-12 October 2012, http://www.cesi.org/pdf/seminars/121024_10_siikavirta_kristian.pdf

"Rail passengers' services should benefit citizens in general. Consequently, disabled persons and persons with reduced mobility, whether caused by disability, age or any other factor, should have opportunities for rail travel comparable to those of other citizens" (recital 10). As the case might be, the Regulation impose several obligations to railway undertakings, station managers, ticket vendors and/or tour operators to benefit disabled persons and persons with reduced mobility. They concern non-discriminatory access rules for the transport (including reservation and access cost - Article 19. Right to transport), the provision with information on the accessibility of rail services and on the access conditions of rolling stock and about facilities on board (Article 20), accessible facilities for transport (station, platforms, rolling stocks etc. – Article 21), free of charge assistance for boarding o disembarking and on board (Articles 22-23), compensation in respect of mobility equipment or other specific equipment loss or damage due to the railway undertaking (Article 25).

More specifically, the non-discrimination appears as one of the exigencies of the universal services (e.g. Article 5 of Directive 97/67/EC, which forbids all forms of discrimination whatsoever, "especially that arising from political, religious or ideological considerations") or with reference to prices/tariffs and a wide choice of payment methods, which do not unduly discriminate between customers[139].

2.4.2. What challenges? Promotion and guarantee, scope and content

Since the end of the 1960s, the case law of the European Court of Justice has been incorporating references to fundamental rights, including the general principle of equality. Today, the non-discrimination and equal treatment are recognized as general principles of the EU. The ruling in Grzelczyk Case (C-184/99) "suggests that the scope of Union citizens' right to equal treatment in other Member Stes is, in principle, unlimited..."[140]. In education, equal treatment was applied with regard to fees charged for access to education. It also allows EU citizens living in another Member State to claim admission in education under the same conditions as the nationals of the host state. Thus, Article 7(2) of Regulation 1612/68 confers various rights to equal treatment as regards access to and maintenance assistance with education[141].

Equal treatment does not require an identical treatment. According to ECJ[142], the general principle of equality requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way unless such treatment is objectively justified. The promotion of "positive measures" has its foundations in the EU primary law: Article 23, paragraph 2, of the Charter of Fundamental Rights provides that "The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex", thus taking over, in a shorter form, specific provisions on the positive action of the secondary law which, more extensively, concerns the maintenance or adoption of specific measures aiming to prevent or compensate disadvantages linked to race, ethnic origin, religion or convictions, disability, age or sexual orientation.

European jurisprudence has also provided for and better defined some exigencies supporting compliance of these criteria as regards SGEI. Thus, equal treatment implies an appropriate publicity in the public procurement or concession procedures. The act by which a Public authority entrusts a third party with the provision of a service of general interest must also respect this general principle. However, this principle can be interpreted so that no public undertaking be left in a more favourable situation than its private competitors.

The impact on other values is underlined in the legal doctrine which shows how "non-discrimination, a fundamental EU law principle, is used in the form of access and affordability provisions and through geographic and social universality obligations"[143].

2.5. PROMOTION OF UNIVERSAL ACCESS

Access (sometimes universal), appears as one of the core elements of the Universal Service Obligation/Public Service

[139] *e.g. Article 3 and Annex I - Directive 2009/72/EC concerning common rules for the internal market in electricity ; see also Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service.*

[140] *As it was observed, the removal of all obstacles to equal access to education for foreigners and the equal right to maintenance assistance has been achieved not through use of the free movement of services provisions, but applying Article 18 TFEU (ex Article 12 EC) (equal treatment) and Article 21 TFEU (ex Article 18 EC) (citizenship). See Laura Nistor, Public services and the European Union. Healthcare, Health Insurance and Education Services, TMC Asser Press - Springer, 2011.*

[141] *See for example Case C-9/74 Casagrande, Case 39/86 Lair and Bown ; Case 235/87 Matteucci, Case 3-90/ Bernini, Case C6337/97 Meeusen. In the Lair and Bown Case the Court decided that the principle of non-discrimination does not apply with regard to maintenance grants. However, the Court ruled that maintenance grants fall outside the scope of the Treaty « at the present stage of development of Community law ».*

[142] *ECJ, 17 April 1997, Earl de Kerlast, case C-15/95. In the same direction, for example, ECJ, 13 November 1984, Racke, case 283/83; ECJ, 20 September 1988, Espagne/Conseil, case 203/86.*

[143] *Erika Szyszczak, Jim Davis, Mads Andenaes, Tarjei Bekkedal (eds.), Developments in Services of General Interest, T.M.C. Asser Press, The Hague, 2011, p. 259.*

Obligation (USO/PSO). In its first Communication on SGI [COM(96)443], the European Commission emphasized that the interest of the citizen "involves guaranteed access to essential services". However, it was particularly its Communication of 2000 that "gives perspectives on how, building upon Article 16 [Amsterdam Treaty]: the Community in partnership with local, regional and national authorities can develop a proactive policy at European level to ensure that all the citizens of Europe have access to the best services". The Report submitted by the Commission to the Laeken European Council [COM(2001)598] underlines that "access to services of general interest by all their members is one of the common values shared by all European societies" and recognizes "the society's aspiration to ensure that all citizens, including the poorest, can have access to certain services of an adequate quality". "The importance the Union attaches to everyone's access to services of general interest" has been confirmed by the Green Paper on SGI of 2003. According to the Commission, "a guarantee of universal access, continuity, high quality and affordability constitute key elements of a consumer policy in the area of services of general interest" [COM(2003)270].

Community action aiming at achieving universal access to SG(E)I has been initiated mainly within the framework of the liberalisation of some SGEI sectors (particularly through the universal service), the cohesion policy and the trans-European network programmes (transport, energy, telecommunications), given that "universal access or full geographical coverage may not be offered by the market itself" [COM(2003)270].

The requirement for universal access is linked with the more general provision of Article 36 of the Charter of Fundamental Rights of the EU which enshrined the fundamental right of access to services of general economic interest. The right of access to specific SG(E)I is also recognized by other provisions of the Charter.

Charter of fundamental rights and SGI

Article 14 Right to education – 1. Everyone has the right to education and to have access to vocational and continuing training. 2. This right includes the possibility to receive free compulsory education. 3. The freedom to found educational establishments (…) shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 24 The rights of the child – 1. Children shall have the right to such protection and care as is necessary for their well-being. (…)

Article 25 The rights of the elderly – The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26 Integration of persons with disabilities - The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

Article 29 Right of access to placement services - Everyone has the right of access to a free placement service.

Article 34 Social security and social assistance – 1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices. (...) 3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

Article 35 Health care - Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.

Article 36 Access to services of general economic interest - 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.

2.5.1. Current definition(s) in the European texts

The EU rules on universal service emerged in the context of the process of liberalisation of telecommunications, postal and electricity services in the 1990s. Since then, the definition(s) of this dynamic[144] concept evolved.

Currently it is considered that the rationale of universal service obligation ('USO') is to act as a "social safety net" – that is to achieve "availability, affordability and accessibility" - where market forces alone do not deliver affordable access to basic services for consumers, particularly those living in remote areas or having low incomes or disabilities. To this end, one or more specifically designated undertakings can be obliged to deliver such basic services.[145]

[144] *The evolutionary nature of the concept was recognized since its establishment. See for example Council resolution of 7 February 1994 on the development of Community postal services (94/C 48/02).*

[145] *COM(2011)795 final, Universal service in e-communications: report on the outcome of the public consultation and the third periodic review of the scope in accordance with Article 15 of Directive 2002/22/EC, p. 2.*

Universal service in secondary law

The **Telecommunications** Directive of 2002[146] refers to the universal service as "a defined minimum set of services to all end-users at an affordable price". It set up a common level of universal service, the minimum set of telecommunications services of specified quality to which all EU end-users have access, at an affordable price in the light of specific national conditions. Thus, it provides harmonising conditions providing users on request with a connection to the public telephone networks at a fixed location and related publicly available telephone services (directory information and a directory enquiry service) (see Chapter II Universal service obligations including social obligations). Member States may, in the context of universal service obligations and in the light of national conditions, take specific measures for consumers in rural or geographically isolated areas to ensure their access to the universal service and the affordability of those services, as well as ensure under the same conditions this access, in particular for the elderly, the disabled and for people with special social needs. Individual Member States remain free to impose special measures (outside the scope of universal service obligations) and finance them in conformity with Community law but not by means of contributions from market players.

The Directive on **postal services**[147] 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"[148].

In **electricity** field, Directive 2009/72/EC provides that "Member States shall ensure that all household customers, and, where Member States deem it appropriate, small enterprises (namely enterprises with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding EUR 10 million), enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non-discriminatory prices".

In the BUPA judgment (issued in the field of medical insurance, a sector where no "universal service obligations" are defined at EU level), the universality appears as one of SGEI identifiers. The Community court has provide clearer definition of this principle: "the concept of universal service, within the meaning of Community law, does not mean that the service in question must respond to a need common to the whole population or be supplied throughout a territory (…) Accordingly, the fact that the SGEI obligations in question have only a limited territorial or material application or that the services concerned are enjoyed by only a relatively limited group of users does not necessarily call in question the universal nature of an SGEI mission within the meaning of Community law."

2.5.2. What challenges? Promotion and guarantee, scope and content

The "promotion of universal access" implies an evolutionary and progressive movement. It covers far more than sectors and definitions which are subject today of the "universal service" such as regulated by the EU secondary law.

On the one hand, universality requires proper access throughout the territory (territorial accessibility)[149]. On the other hand, it is about the universality regarding the conditions of access to services[150]. Access conditions can vary significantly among and within Member States. Accessibility depends also on factors such as customer waiting times (postal services, health, etc.), treatment in relation with the service and its staff and/or infrastructure, regularity of service access points (number of offices and per km2, average users per office, etc.). In postal sector, for instance, it was considered that "access should be interpreted widely.

[146] *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).*

[147] *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, 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.

[148] *It seems that in some Member States some postal universal service obligations, such as the frequency of the service, are no longer applied for some time.*

[149] *« Articles 3 and 4 of Directive 97/67 provide that Member States are to designate one or more providers of a universal service, that is to say, a service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users." Judgment CJEU, C-148/10*

[150] *Keon Lanaertz, José A. Guiérrez-Fons, « Le rôle du juge de l'Union dans l'interprétation des articles 14 et 106, paragraphe 2, TFUE », in Concurrences N° 4-2011, p. 6.*

It therefore refers to the ease with which potential customers can find out about postal services. More particularly, it refers to the ability to buy the means of posting items (for most people, this meaning stamps) and then actually to post those items. (…) Accessibility, however, does not refer only to the universal service. It also refers to the need to have as wide a variety of services as necessary"[151].

Moreover, "equal treatment and promoting universal access (…) includes (…) combating all forms of discrimination in accessing services of general economic interest" [COM(2007)725]. Therefore, the concept of universal service involves, in particular, the adoption of specific measures taking also into account disability, age or education conditions.

As for the "universal service", it has been conceived as "a minimum set of rights and obligations" which in general, may be more developed at national level [COM(2007)725]. At the same time, even if "at Community level, rights of access to services are defined in different directives (…), there is a risk that these rights as set out in Community legislation remain theoretical, even where they are formally transposed in national legislation" [COM(2003)270].

Is there a need to define/maintain/extend/reduce universal access? Universal access is a constant issue. At the same time, social evolutions, in particular in time of crisis, tend to create new exclusions which involve new pro-active inclusion initiatives based on the principle of universal access to SGEI. While the universal service has been defined at Community level only in three sectors until now (telecommunications, postal services, electricity), debates appeared on the issue of the extension of universal service to other telecommunication fields or other SGEI sectors, such as banking[152] and broadband[153]). Thus, in the field of telecommunications, because of technological developments, the traditional scope of universal service (universal access to landline telephony) should be continuously updated to meet the new communication needs (mobile phone, broadband Internet access, etc.). In the field of water, the issues of accessibility and affordability of this essential indispensable good and service could raise the question of a European concept of "universal service". But what could be its content in the context of the 'territorialisation' of water services on each of specific territorial situations?

What field(s) for "universal service"?

The **European Parliament** has stressed "the need for public banks which contribute to the provision of services of general interest by making accounts available to all, providing a comprehensive range of financial services to the community, facilitating loans for small businesses and promoting a wide range of their public-spirited activities"[154].
On the other hand, the **EESC** notes that "broadband is a service of general interest that improves living conditions by reducing distances and facilitating access to health care, education and public services both for geographically isolates citizens and for the worst-off. It therefore follows that unless universal telecommunications service at an affordable price is extended to broadband and mobile telephony, the European Union's delay in setting up and using the new information and communication technologies and the technologies of a knowledge society will grow, while the digital divide will become more pronounced, particularly in the new Member States"[155].
It also considers that "the universal service could include access to: a bank account and methods of payment; affordable loans; housing; home-care facilities; mobility; social services, etc.[156].

[151] *COM(91) 476, Green Paper – postal services, loc. cit.*

[152] *While the Report of the European Commission to the Council of Ministers "Services of general interest in the banking sector" of 17 June 1998 recalls Commission's confirmation that the existing rules of the Treaty are sufficient to take into account the possible existence within the banking sector of undertakings entrusted with the operation of services of general economic interest". In its Single Market Act of 13 April 2011 [COM(2011)206], the European Commission intended to propose a universal service to ensure access to basic banking services. Still, in July 2011, the European Commission issued a Recommendation to Member States [C(2011)4977] on access to a basic payment account with the aim of guaranteeing access to a basic bank account to all citizens within the Union, emphasizing that it will initiate a legislative proposal only if this recommendation will not produce the expected impact. Through its Single Market Act II of 3 October 2012 (COM(2012)573) Commission announced that it will make legislative proposals to address the issues of access to a basic payment account, ensure bank account fees are transparent and comparable, and make switching bank accounts easier.*
Currently, the legal framework governing the access to basic banking services varies greatly across the EU: in 12 Member States there is a legal requirement (in Belgium, Denmark, France, Finland, Netherlands and Sweden) or a voluntary code of conduct obligation (in Germany, Ireland, Italy, Luxembourg, Slovenia and United Kingdom) to provide access to some type of basic bank account while such provisions do not exist in the other 15 Member States. See Patrice Muller (Dir.), Basic banking services, Report for the European Parliament's Committee on the Internal Market and Consumer Protection, November 2011.
See BEREC Broadband Promotion Report
http://berec.europa.eu/doc/berec/bor/bor11_70_broadbandpromo.pdf

[154] *European Parliament Resolution on the Commission communication Services of General Interest in Europe (COM(2000)580*

[155] *Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the White Paper on services of general interest (COM(2004) 374 final), 9 February 2005.*

[156] *European and Social Committee, Own-initiative Opinion on "What new services of general interest do we need to combat the crisis?", 15 September 2010.*

The European Commission has also adopted a proposal of regulation regarding the European Social Fund for the period 2014-2020 which defines access to social services of general interest as one of the priority actions within the framework of the objectives of the EU 2020 Strategy[157].

Another issue concerns the relationship between the six values recognized by the Protocol 26 and the scope of universal service obligations which, until now, does not concern all of them. Does the Protocol require an enlargement of the content of these minimum obligations or, as in the sectors of electricity and natural gas, public authorities are free to impose, beyond the scope of current USO, public service obligations concerning the other values, in particular security and users rights?[158]

During the two "Postal Users Forum" organised by the European Commission on 12 December 2011 and 16 November 2012, certain stakeholders, in particular some postal operators that develop specific value-added services, called into question the demanding content of the postal universal service, considered as an obstacle to a genuine liberalisation of the sector. But what is the purpose of the European rules? Meeting the needs of users or facilitating a liberalised market?

2.6. PROMOTION OF USER RIGHTS

Services of general interest exist because the internal market and competition rules generally lead to a series of polarisations: economic (concentrations and oligopolies), social (solvent clients are favoured), territorial (to benefit densely populated areas), generational (focus on the short term while ignoring long term). All these prevent access of all to essential services, the setting up of social, territorial and generational solidarity/cohesion relationships, the implementation of sustainable development conditions in each community. The SGI's purpose is meeting users', citizens' and community's needs. Therefore, users' rights should be recognized and guaranteed, mechanisms allowing them to express their needs as well as ways of expressing their complaints and their equal treatment should be ensured, compensations in case of non-respect of obligations should be set up, etc.

Various concepts were/are used to nominate persons in their relations with a service and to distinguish different approaches as regards their statute in such relations: on the one hand, "administré" (view as a passive subject), citizen, beneficiary, which in some countries used to be/are protected by public law; on the other hand, from the point of view of the market, customer or client, concepts derived from the idea of individualised or personalised relations with the service, supposing the possibility of choice among various operators and protected by private law. The liberalisation of SGEI sectors and the changes occurred in the statute of the historical providers and, in some cases, the freedom of choice of SGEI providers, lead to the transformation of the relationships between the providers and their users which become subject of consumer law.

In the Community law, the issue of the rights of users of services of general economic interest has emerged in the consumer protection policy ("Every citizen is a consumer")[159] and in the services sectors legislation.[160]

The European harmonization of national measures for the protection of consumers was undertaken from the middle of 1970s[161] to protect their health, safety and economic welfare, improve the quality of life, to ensure defence of rights to information and education, and to encourage consumer associations. The scope of the policy of consumer protection has grown consistently and is applicable to certain aspects of services.

At EU level, the consumer is considered as "a well-advised citizen who wishes to make full use of internal market"[162]. Indeed, some consumers wish to "be offered a choice", to see competition and to have the possibility to change provider, and to spend time to "have a look at the market", to get the most of the opportunities it offers.

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[157]See COM(2011)607 Proposal for a Regulation on the European Social Fund and repealing Regulation (EC) No 1081/2006, Article 3 – Scope of support: "Under the thematic objectives listed below, and in accordance with Article 9 of Regulation (EU) No […], the ESF shall support the following investment priorities: (...) (c) Promoting social inclusion and combating poverty through: (...) (iv) Enhancing access to affordable, sustainable and high-quality services, including health care and social services of general interest".

[158]For a critical study of the promotion of universal access to public services in Europe see José M. Ruano, « La promotion de l'accès universel aux sevices publics en Europe », CESI Symposium «Providing high-quality public services in Europe based on the values of Protocol 26 TFEU», Warsaw, 11-12 October 2012,
http://www.cesi.org/pdf/seminars/121024_12_ruano_jose_manuel.pdf

[159]However, SGI are considered « relative new comers in the field of consumer law ». Cf. Peter Rott, "Consumers and Services of General Interest".

[160]For general analysis, see Jim Davis, "Protocol 26 and the Promotion of Users Rights", CESI Symposium «Providing high-quality public services in Europe based on the values of Protocol 26 TFEU», Warsaw, 11-12 October 2012, http://www.cesi.org/pdf/seminars/121024_14_davies_jim.pdf.

[161]Council of the EEC preliminary program for a consumer protection and information policy set out five basic consumer rights: to protection of health and safety ; protection of economic interest ; the right to redress ; the right to information and education and the right of representation (the right to be heard).

[162]Cf. Peter Rott, loc. cit.

If some consumers may be subject to this approach, it is clear that SGEI users do not spent much of their time to follow market evolutions and to change providers, in particular when the quality of the service and appropriate participatory relations with users are ensured.

In its Communication "Energy 2020" of 10 November 2010 [COM(2010)639], the European Commission proposed as priority action to "empower consumers" by "measures to help consumers better participate in the energy market in line with the third energy package. These measures will include the development of guidance based on best practice in the area of switching suppliers, the further implementation and monitoring of the billing and complaint-handling recommendations and the identification of best practices in alternative dispute resolution schemes. A price comparison tool based on a methodology to be developed by energy regulators and other competent bodies should be available to all consumers (...)".

SGEI's quality at best price can also be ensured by other kinds of relationships, other than the economic ones of supply and demand. This applies to all forms of organisation allowing users to express their needs and to take into account their evolution, to participate to the definition of services, to their co-production. The participation of users should be a principle for all SGEI, a right for all users.

The protection of consumers has become a Community policy by the Maastricht Treaty of 1992 (Title XI[163]) and it is subject now of a shared competence between the Union and its Member States (TFEU, Title XV, Article 169).

Article 3 … the activities of the Community shall include … (o) a contribution to the strengthening of consumer protection"
Art. 169 (1) In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

This innovation was based on the recognition of the completion of the internal market and the implementation of the competition policy which didn't allow, alone, to ensure the development and the well-being and they need to be supplemented by specific initiatives to ensure a balance between market forces and the rights of users (which are also "consumers"). As regards this search for balance, it is also important to see that the European Parliament has a commission (IMCO) to deal both with internal market and consumers protection issues.

Art. 169 (2). The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through: (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States.
Art. 169 (4). Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

The Charter of Fundamental Rights of the EU provides for a high level of protection of consumers in its Article 38. This was interpreted as being rather a "social and economic 'principle'" that the expression of a subjective right which would be addressed to 'any person'; however, when a Community act, or a national act adopted in the field of Community law is inconsistent with Article 38, once the Charter legal scope has been defined the judge cannot ignore this provision[164]. More generally, the provisions of the Charter as a whole are important for the analysis of the rights of the users of SG(E)I.

Beyond this new legal basis in EU primary law, procedural and substantive rights for consumers were set up and evolved since the 1970s. As pointed out by the Commission, "horizontal consumer protection legislation also applies to all services of general interest" [COM(2000)580, point 66][165]. The EU law recognises a series of rights, to ensure, sometimes even improving, the level of quality and protection, stemming from the need to specify, promote and upheld users rights [COM(2007)725].

[163] *Article 129 a. « 1. The Community shall contribute to the attainment of a high level of consumer protection through: (a) measures adopted pursuant to Article 100a in the context of the completion of the internal market; (b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers. 2. The Council, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee, shall adopt the specific action referred to in paragraph 1(b). 3. Action adopted pursuant to paragraph 2 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them. »*

[164] *EU Network of Independent Experts on Fundamental Rights (CRIDHO), Commentary of the Charter of Fundamental Rights of the European Union, June 2006, p. 318.*

[165] *See also the Commissions' strategies on consumer policy which identifies services of general interest as one of the fields where a Community action is needed to ensure a common high level of protection of consumers (in particular the strategy for the period 2000-2006).*

The Green Paper on SGI specifies that "these services are a pillar of European citizenship, forming some of the rights enjoyed by European citizens and providing an opportunity for dialogue with public authorities within the context of good governance". According to this document, "the protection of the rights of individuals" is part of "the principles that derive directly from the EC Treaty". At the same time, the legal formula consecrated by Protocol 26 is less binding (it provides for the "promotion" of rights) while more comprehensive from the point of view of its recipients (ensuring that protection for all users)[166]. For the application of these provisions, we should also remind the distinction made by the EU law as regards the distinction between, the concept of "user" and the narrower concept of "consumer".

Thus, according to Directive 2002/21/EC (electronic communications « Framework Directive »), "'user' means a legal entity or natural person using or requesting a publicly available electronic communications service" while "'consumer" means any natural person who uses or requests a publicly available electronic communications service for purposes which are outside his or her trade, business or profession" (Article 2, Definitions).

2.6.1. Current definition(s) in the European texts

The spectrum of rights which are (or should be) promoted is large. For instance, in relation to universal service, the European Commission spoke in its Green Paper on SGI of 2003 the right of physical access regardless disability or age, the transparency and complete information about tariffs, contractual relations, quality indicators on the performance of services and indices of satisfaction of users, complaint handling and disputes settlement mechanisms, rights for users and consumers.

More generally, the Green Paper and some of the latter Communications also indicates that based on the principles of protection of users and consumers, the rights available for them in the field of services of general interest could embrace the following:

- clear definition of basic obligations to ensure good quality service provision, high levels of public health and physical safety of services [COM(2000)560], as well as the respect of values of the Protocol 26;
- access (complete geographical coverage including cross-border access, access for persons with reduced mobility and disabled; equal access and equal treatment of users and consumers as regards cross-border services);
- equity (effective and fair competition);
- affordable prices (special arrangements for persons with low revenues);
- security (safe and reliable service, high level of public health);
- security and reliability (continuous and reliable services, including protection against service interruption);
- quality (including reliability and continuity of services as well as mechanisms of compensation in case of failure);
- choice (choice among a range of services as widely as possible and, where necessary, choice of provider and effective competition among providers, right to change the provider);
- presence of an evolutionary clause or of a revision clause to adapt exigencies throughout time (users/consumers rights might evolve according to the evolution of their interests and to economic, legal, technological environment) [COM(2007)725];
- total transparency and information from operators (e.g. on tariffs, bills, contractual clauses, choice and financing of providers [COM(2000)580]);
- right of access to information gathered by regulatory authorities (information on the quality of service, choice and financing of providers, customer complaint mechanisms);
- independent regulatory authorities (with appropriate powers of sanction and clear objectives);
- active representation and participation of consumers and users (for the definition of services and choice of form of payment – [COM(2000)580] – and, according to [COM(2007)725], evaluation of services);
- redress (availability of legal remedies and of fast and inexpensive complaint resolution systems and dispute settlement mechanisms and compensation schemes) and capability of users to uphold their rights [COM(1996)443 and COM(2007)725];

This non-exhaustive "grid" help to investigate the range and level of protection of users rights which have been specified (or not) in the secondary EU law, some aspects of which are exemplified here below.

As regards SGEI, it was particularly in the field of transport that the European consumers policy saw its sectorial manifestations, through regulations directly applicable in EU Member States.

Passengers' rights at EU level

In air transport sector, EU has taken action since 1991 when Regulation 295/91/EEC establishing common rules

[166] *The provisions of the Protocol 26 do not make reference to "citizens".*

for a denied-boarding compensation system in scheduled air transport came into force. It dealt with the problem of denied boarding in spite of a confirmed ticket and installed a system of compensation payment by the air transport operator, together with the offering of alternative travel arrangements and, if necessary, the provision of meals and accommodations. Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights extended these rights and the types of events from scheduled flights departing from an airport within an EU MS to charter and domestic flights, to flights from an airport outside the EU to a destination inside the EU if the flight is operated by an airline based in an EU MS and to low-cost airlines, too[167]. This regulation aims at **guaranteeing** assistance, reimbursement and compensation in case of flights disruptions. It establishes rights of compensation and assistance of passengers in case of cancelled or delayed flight, denied boarding due to overbooking, or in case of downgrading imposed by the flight operator. Passengers' rights also include reimbursement of their tickets, a free return flight to the point of departure, if appropriate or a later flight to their destinations. The regulation provides that airlines must inform passengers of their rights through specific information upon check in. If boarding is denied, fly cancelled or delayed for at least two hours[168], airlines must submit passengers a note informing them about compensation (staggered up to 600 EUR for flights of over 3.500 km) and assistance rules. Additionally, meals, refreshments, means of telecommunication and hotel accommodation if necessary must be made available even if the incidents happen outside the control of the airline (force majeure). Moreover, EU law also provides for the promotion of transparency and support disabled rights and the rights of persons with reduced mobility when travelling by air (Regulation n° 1107/2006/EC). All measures also apply to passengers flying with a ticket issued under a fidelity program of an airline. In 2011, a Communication for a review of Regulation 261/2004 [COM(2011) 174] addresses in particular liability in extraordinary circumstances, compensation thresholds and proportionality aspects.

Regulation 1370/2007 on **public passenger transport services by rail and by road** recognizes public authorities the possibility of establishing, according to subsidiarity principle, qualitative criteria to maintain and uphold quality norms for public service obligations, for example as regards passengers rights, the need of persons with reduced mobility or the protection of environment, the security of passengers and workers (recital 17 of the regulation). At the same time, in case of direct award of public service contracts for transport by rail, the Regulation imposes competent public authority an obligation of publicity by making public a series of elements within one year of granting the award, of which the description of the passenger transport services to be performed and quality targets, such as punctuality and reliability and rewards and penalties applicable [Article 7 (3)].

In **rail transport**, Chapter IV of Regulation Regulation 1371/2007 on rail passengers' rights and obligations deals with delays, cancellations and missed connections. It provides for the reimbursement of the full cost of the ticket or re-routing of the passenger in the event of a delay of at least 60 minutes. If the ticket has not been reimbursed, the passenger has the right to request compensation without losing his right of transport. The compensation amounts to 25% of the price of the ticket (or half of the price if it is a return) in the event of a delay of 60 to 119 minutes and 50% of the price of the ticket (or half the price if it is a return) when the delay exceeds 119 minutes. The passengers have a right for assistance as soon as a train is subject to 60 minutes of delay. These provisions apply whatever causes the delay or the cancellation.

Additional passengers rights imposed on the Railway Undertaking in Belgium

"The public service contract between the Belgian Federal State and SNCB/NMBS provides for an additional compensation for passengers having sustained regular or systematic delays. The compensation amounts to 25% of the ticket price per delay for a minimum of 20 occurrences of more than 15 minutes over a period of six months and to 50% of the ticket price per delay for a minimum of 10 occurrences of more than 30 minutes over a period of six months. It is however to be noted that punctuality remains unsatisfactory according to consumers in Belgium".[169]

In the field of **electricity**, European legislation obliges States Member States to guarantee universal service to all household customers and small enterprises. On that basis, they have the right to be supplied with electricity of a specified quality at reasonable, easily and clearly comparable, transparent and non-discriminatory prices. EU law

[167] *A first report regarding the implementation of the regulation was published in 2006 and a second one in February 2010 - Steer Davies Gleave for the European Commission (2010), Evaluation of Regulation 261/2004/EC – Final Report.*

[168] *For records of airlines' delay rates see the Association of European Airlines (AEA) http://www.aea.be/*

[169] *See DLA Piper – Carole Maczkovics, Geert Van Calster, Bob Martens, "Study on the implementation of Regulation (EC) N° 1370/2007 on public passenger transport by rail and by road", Final Report, 31 October 2010.*

also requires from them to ensure a high level of consumer protection, transparency of contracts, general provision information and a dispute settlement mechanism. The third package requires consumers to have access to data concerning energy consumption[170] and the composition of the energy mix, the right to switch suppliers with three weeks' notice and to receive a final account closure at the latest six weeks after the change of supplier. Furthermore, they are entitled to compensation if service quality levels are not met. Member States are obliged to create an independent mechanism, i.e., an energy ombudsman or consumer body that will deal with complaints and will facilitate out-of-court dispute settlements. The customers Member States should design National Energy Action Plans or benefits in social security systems to guarantee a necessary level of energy supply to vulnerable customers.[171]

In the field of **cross-border health care**, Directive 2011/24/EC on the application of patient's rights in cross-border health care sets out rules relative to healthcare access and guarantees for the mobility of patients "to achieve a more general, and also effective, application of principles developed by the Court f Justice on a case-by-case basis (recital 8). Member States retain responsibility for organising and providing safe, high quality, efficient and quantitatively adequate health care, and to decide about the basket of healthcare to which citizens are entitled and the mechanisms used to finance and deliver that healthcare (Article 168, paragraph 7, TFEU; recitals (4) and (5) of the Directive). Furthermore, the rules applicable to cross-border healthcare should be those set out in the legislation of the Member State of treatment (recital 19). The Directive establishes the responsibilities of Member States (of treatment and of affiliation) to guarantee healthcare provision by "taking into account the principles of universality, access to good quality care, equity and solidarity" and 'non-discrimination with regard to nationality" (Article 4§1 and 3). They must safeguard the patients' rights: to relevant information (norms, orientations, healthcare providers, accessibility of hospital care centres for disabled persons, treatment options, availability, quality and security of healthcare services, bills and prices, insurance coverage, conditions for the reimbursement of costs and access to these rights), right of access to medical records, reimbursement of cross-border healthcare services[172]. Member States must also make available transparent complaints procedures and mechanisms for patients, in order for them to seek remedies if they suffer harm arising from the health care they receive, and systems of professional liability insurance or a guarantee or similar arrangement. It is for the Member States to determine the nature and the modalities of such mechanisms. Each Member State designate one or more national contact points for cross-border healthcare whose name and contact details will be make publicly available.

In postal sector - Article 19 of Directive 67/97/EC

1. Member States shall ensure that transparent, simple and inexpensive procedures are made available by all postal service providers for dealing with postal 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), without prejudice to relevant international and national provisions on compensation schemes.

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.

Member States shall also encourage the development of independent out-of-court schemes for the resolution of disputes between postal service providers and users.

2. Without prejudice to other possibilities of appeal or means of redress 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 undertakings providing postal services within the scope of the universal service have not been satisfactorily resolved. In accordance with Article 16, Member States shall ensure that the universal service providers and, wherever appropriate, undertakings providing services within the scope of the universal service, 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.

The Universal Service Directive of **Electronic Communications**[173] requires Member States to extend the rights

[170] *See Case C-394/11, Valeri Hariev Belov - principle of equal treatment between persons irrespective of racial or ethnic origin – Installing of electricity meters attached to electricity poles in the streets at a height which is not accessible to users.*

[171] *EU Energy Markets in Gas and Electricity - State of Play of Implementation and Transposition, Report for the European Parliament, 2010*

[172] *Several ECJ rulings have recognised patients' rights as insured persons to the reimbursement, by the statutory social security system, of health care costs provided in another Member State.*

[173] *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)*

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).

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 the services in the interior market[174]). The significant value of this horizontal text on the SIEG also lays in the relative provisions at the rights of the users, who constitutes in accordance with the directive, one of the objectives of general interest. According to these texts, it does not affect the exercise of the fundamental rights as recognized 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 subject to specific legislation, 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[175] (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.

2.6.2. What challenges? Promotion and guarantee, scope and content

In the field of SGI, the European Commission emphasized in its first Communication on SGI of 1996 [COM(96)443] that "consumers are becoming increasingly assertive in exercising their rights and desires as users of general interest services, including at European level".

The "promotion" of users' rights does not necessarily mean the guarantee of their protection. In this field, competences are shared with Member States and, in the absence of specific Community regulations, it is in principle up to the Member States to define rights of users and consumers; they can also act in complementing Community actions.

The role of the European and national judiciary is also particularly important in this area. It ensures the enforcement of user's rights and, sometimes, it also addresses the legislative void.

[174] *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:EN:PDF*

[175] *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.

For example, in the field of rail transport, the Court has delivered several a number of rulings regarding the application of the Regulation n° 261/2004/EC, which introduces new principles of interpretation of its provisions.

- Case C-549/07 (Friederike Wallentin-Hermann v Alitalia - Linee Aeree Italiane SpA): it provides an interpretation of the concept of "extraordinary circumstances" and established a set of criteria to that effect.
- Joint cases C-402/07 (Sturgeon v Condor Flugdienst GmbH) and C-432/07 (Böck et autres v Air France SA): precise the obligations of air carriers as regards the right to compensation to passengers for external costs / delay of flights.
- Case C-294/10 (Andrejs Eglitis et Edvards Ratnieks v Latvijas Republikas Ekonomikas ministrija): held that "air carrier, since it is obliged to implement all reasonable measures to avoid extraordinary circumstances, must reasonably, at the stage of organising the flight, take account of the risk of delay connected to the possible occurrence of such circumstances. It must, consequently, provide for a certain reserve time to allow it, if possible, to operate the flight in its entirety once the extraordinary circumstances have come to an end."
- Case C-83/10 (Aurora Sousa Rodríguez and Others v Air France SA): it interprets the concept of "cancellation" (which "also covers the case in which that aeroplane took off but, for whatever reason, was subsequently forced to return to the airport of departure where the passengers of the said aeroplane were transferred to other flights") and of "further compensation"[176].

However, we should remind that this Regulation only apply in the event of denied boarding and of cancellation or long delay of flights. Moreover, in case of cancellation, the passengers shall have no right to compensation by the operating air carrier if they are informed of the cancellation at least two weeks before the scheduled time of departure; in such a case, they have a right to reimbursement of the full cost of the ticket but at the price at which it was bought, which will not always allow them to buy another ticket (for example in case they bought a second flight with another air carrier).

The formal existence of users' rights through Charters, contracts or other texts is not sufficient. Users must be aware of their rights and they must be given means to secure them, including through redress procedures.

A Eurobarometer survey on passengers rights conducted in 2009, shows that even if about 25% of all Europeans have travelled by plane that year, a significant part of respondents to this survey were unaware of the rights and obligations associated with their plane ticket purchase. Therefore, one of the fields of the Community action regards a better information of users. Thus, early July 2012, the European Commission launched a smartphone application available in 22 EU languages for rail and air passengers allowing them to access right information about their passenger rights. It works on four mobile platforms (Apple iPhone and iPad, Google Android, RIM Blackberry and Microsoft Windows Phone 7). The application will be extended to bus or coach and marine travel in 2013 when these rights come into force[177]. A network of European consumers centres, established in the 27 Member States as well as in Iceland and Norway and financed by the European Commission and the national authorities for the protection of consumers, provides free of charge information, directly or on line, on consumers cross-border rights and may help them to solve contentious cross-border situations linked to their cross-border purchase.

According to recent studies "public infrastructure service reforms implemented in the EU based on neoclassical economics and their subsequent regulation, by not considering citizens' heterogeneity as consumers, have increased the vulnerability of those subject to higher potential vulnerability. These have, in general, as well as less social and cultural resources, less economic resources. Consequently, these transformations, in the absence of compensatory regulatory policies, have had a negative impact on those public service obligations to which the provision of Services of General Interest is addressed, such as their universality and affordability and their role in strengthening equity, solidarity and social cohesion[178]. … It is crucial for public infrastructure services regulation and, by extension, regulation of Services of General Interest to incorporate the heterogeneity of citizens as consumers in its design, implementation and evaluation. It should be noted, in this sense, that the same reforms and the same regulation can have different effects on different citizens"[179].

In the field of transport, the European Commission recently presented [COM(2011)898] the state of passengers

[176] *See also Hans De Coninck, «"Promotion of user rights. Case study: Air Passenger Rights", CESI Conference, Warsaw, 10-12 October 2012, www.cesi.org/seminares/seminares.html.*
[177] *European Commission, Press release, Brussels, 4 July 2012, IP/12/738.*
[178] *COM(2004)374, BAUBY P., 2008, "L'européanisation des services publics", Télescope, 14 (1), 11-22*
[179] *Judith Clifton, Daniel Díaz-Fuentes, Marcos Fernández-Gutiérrez and Julio Revuelta, Does neoclassical economics work for European citizens? New evidence on public infrastructure services, Paper to 2012 AHE CONFERENCE.*

rights in all transport modes (air, rail, waterborne and road). It determines three key principles – non-discrimination, accurate, timely and accessible information, as well as immediate and proportionate assistance, from which stem the following ten specific rights which apply to all transport modes, within the spirit of a more intermodal vision: right to non-discrimination in access to transport; right to mobility: accessibility and assistance at no additional cost for disabled passengers and passengers with reduced mobility (PRM); Right to information before purchase and at the various stages of travel, notably in case of disruption; Right to renounce travelling (reimbursement of the full cost of the ticket) when the trip is not carried out as planned; Right to the fulfilment of the transport contract in case of disruption (rerouting and rebooking); Right to get assistance in case of long delay at departure or at connecting points; Right to compensation under certain circumstances; Right to carrier liability towards passengers and their baggage; Right to a quick and accessible system of complaint handling; Right to full application and effective enforcement of EU law. Under the terms of the Protocol n°26, these rights should be completed (see the draft Opinion of EESC on this Communication[180] who "feels that three additional rights should be added to the ten specific rights listed in the communication: the right to safety and security, including both the technical safety of the transport equipment and the physical safety of passengers; and the right to minimum standards of service quality, comfort, environmental protection and accessibility"). On that basis, the actual EU legal provisions are re-examined.

In some sectors, essential aspects of the six values provided for by the Protocol 26 on SGI have been transposed in universal service obligations at EU level. In other fields, the public service obligations are defined at the level of Member States, by the competent public authorities. However, until the entry into force of the Lisbon Treaty, public/universal service obligations defined in the EU secondary law did not constitute an effective constraint and guarantee of all the six values introduced by this Treaty.

Public passenger transport services - Public service obligations as defined in Regulation 1370/2007 of 23 October 2007[181] let Member States free to decide on the content of PSO for local, regional, national or even transnational[182] transports by rail and road.

"'Public service obligation' means a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward"[183]

A recent study shows the general similarity existing in the scope of public service requirements throughout EU countries, with tariff obligations and service frequency being the two public service requirements that are most commonly applied[184]. In the scope of the main public service obligations currently requested from operators in the EU the study also mentions: quality requirements, marketing possibilities with specific tariff levels often imposed by the allocating authority, service reliability[185].

- "Tariff obligations covering tariff reductions for certain categories of passengers. In certain cases the legislation leaves a certain margin of manoeuvre to the operator to increase tariffs. In general, the margin of manoeuvre is limited in the sense that railway companies cannot increase prices beyond a level set by the authorities[186].
- Service frequency including services between large cities, during peak hours and stopping patterns.
- Quality requirements are generally included – whether explicitly in the section relating to public service obligations – or indirectly through 'bonus-penalty' systems. This constitutes an increasingly important aspect of the economic implications of the contract as quality has a price, and this price needs to be fairly negotiated between the parties. Quality requirements typically include: • punctuality performance; • seat reservation; • services to passengers with reduced mobility; • client

[180] *Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament and the Council — A European vision for passengers: communication on passenger rights in all transport modes', 23 May 2012.*
[181] *According to a recent study, in the EU-25, 90% of the domestic passengers rail transport is covered by public service obligations, a number of states limiting public service transport to local and regional services while "in smaller countries, such as Belgium, Czech Republic, Denmark, Estonia, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Slovakia, Slovenia and Switzerland, almost the entirety of internal passenger transport falls within the category of public service transport". (Public service rail transport in the European Union: an overview (November 2011) http://www.cer.be/media/2265_CER_Brochure_Public_Service_2011.pdf)*
[182] *According to the study, "These contracts can either be exclusively managed by the competent authority in one member state or be shared between the related member states (e.g.: contracts along the French and Luxembourgish borders)", Idem, p. 22.*
[183] *According to the authors, "in other words, public service operations are per definition not commercially viable", Idem, p. 20.*
[184] *Idem, p. 20*
[185] *Which according to the study, also includes "data on the effective circulation of foreseen trains and obligations to ensure a substitute mean of transport in case of a rolling stock breakdown".*
[186] *Idem.*

information, including the level of information to be provided in the stations, on board or as general communication; • requirements relating to ticket sales in train stations and on trains themselves; • cleanliness of rolling stock; • number of seats available during peak and off-peak hours; • presence of staff on the trains; • characteristics of rolling stock.

- Marketing of public service transport possibilities/availability at specific tariff levels is often imposed by the allocating authority.
- Service reliability - including data on the effective circulation of foreseen trains and obligations to ensure a substitute mean of transport in case of a rolling stock breakdown".

Electricity - Public service obligations as defined in Directive 2009/72/EC concerning common rules for the internal market in electricity[187]

Article 3 Public service obligations and customer protection

"Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for electricity undertakings of the Community to national consumers. In relation to security of supply, energy efficiency/demand side management and for the fulfilment of environmental goals and goals for energy from renewable sources, as referred to in this paragraph, Member States may introduce the implementation of long-term planning, taking into account the possibility of third parties seeking access to the system".

Given the place occupied by services of general economic interest in the shared values of the Union and the fact that there is no hierarchy among these values, the provisions of the Lisbon Treaty should conduct policy-makers to concentrate their attention not only on competition rules but on the whole conditions required for a proper level of provision of SGEI particular tasks, not only economic and financial conditions, but also those required by the six values of Protocol 26 on SGI. The EESC consider that "it is essential to translate the new primary law provisions on SGIs into derived sectorial and, where appropriate, cross-sectorial law".[188] But that implies a real internalisation of these values. Or, as EESC has noticed about the recent Communication of the Commission 'A quality framework for services of general interest in Europe' [COM(2011)900], the quality, even if mentioned in the title, it is confusing: "the term "quality framework" is apparently to be understood differently from the common value entitled "quality", as recognised in Article 14 TFEU and in Protocol 26; "quality" in the latter sense is not dealt with at all in the communication, either per se or from a sectorial point of view".

The introduction of references to the six values of the Protocol 26 is currently discussed during the European legislative procedure concerning the adoption of a Directive on concessions (see below).

2.7. INTERACTIONS BETWEEN THE SIX VALUES

As meeting the needs of users – of each inhabitant or of a local, regional, national, European community, which is the raison d'être of SG(E)I, implies having access to a range of services (what would profit a user to have guaranteed access to electricity if he/she has no home at all), there is a need to link the six values whose origins, content and issues are examined here above, to take into account their interactions.

The listing of the six values in the Protocol n°26 is not a "à la carte menu" from which we could choose one or another aspect but an overall approach of what services of general interest are and whose access must be guaranteed for a decent life, integration into society and for the development of social and economic activities.

The values also involve contradictory aspects. Improving the quality or the security of services implies costs, risks to call into question their affordability...; trade-off may be needed, progressive priorities and adaptations could be determined.

There is no prevalence of a value over others and, as we saw, the listing of the six values in the Protocol n°26 is not meant to be exhaustive[189].

[187] *For natural gas, see the similar provisions of Article 3 , paragraph 2 of Directive 2009/73/EC.*

[188] *Opinion of the European Economic and Social Committee on the Communication from the Commission: A Quality Framework for Services of General Interest in Europe COM(2011)900, 2012/C 229/18, of 23 May 2012, point 1.3.*

[189] *In the White Paper on SGI of 2004 [COM(2004)374], the European Commission identified nine "guiding principles", which go further than those listed in the Protocol 26: enable public authorities to operate close to the citizens; achieving public service objectives within competitive open markets; ensuring cohesion and universal access; maintaining a high level of quality, security and safety; ensuring consumer and user rights; monitoring and evaluating the performance; respecting diversity of services and situations; increasing transparency; providing legal certainty.*

Therefore, at this stage, we can raise reciprocal tension between:

- possible pressure on price to the detriment of quality of services;
- the exigency of a high quality and security (their maintenance and evolution), the needed economic, material, financial and staff costs and affordability of services (full cost recovery, incentive prices, etc.);
- the link between investment and quality of service improvement ("not proven by past experience"[190]);
- the adequate mix of economic, social and environmental considerations;
- the universal coverage (sometimes « free » access, that is financed through public budget), the quality and the financial sustainability;
- affordability is a condition for meeting other principles (such as universal access, equal treatment), and some fundamental rights (access to SGEI, provided for by Article 36 of the Charter of Fundamental Rights of the EU or by national law);
- the equal treatment, general and absolute principle of the European integration, could take precedence over the implementation of other values: under which conditions (scope and time) can we accept quality and security differences, for example when new technologies are implemented. On the contrary, is it legitimate – and under which conditions – to implement "positive discriminations"? In such cases, if special tariffs for individual categories of users are set up to ensure the affordability of a service, they must equally applied and opened to users who use services under similar conditions;
- balancing all these ambitious values and objectives and increasing and/or stringent/exigent PSO with the economic and social potential;
- the impact of European policies of liberalisation and/or cohesion in meeting the six values and on their interactions;
- the effects of public service obligations (PSO) and of universal service obligations (USO) which have been defined until now.

We cannot have identical or even harmonised answers to these tensions and interactions for all sectors of SGEI and for all Member States of the European Union. In addition, the Protocol n° 26 clearly points out "the differences in the needs and preferences of users that may result from different geographical, social or cultural situations" and "the wide discretion of national, regional and local authorities in providing, commissioning and organising" these services.

On the contrary, the Protocol n° 26 – as part of the primary law - explicitly calls on European institutions, as well as Member States, to ensure the implementation of these six values and the interactions among them.

This could – or should – be given concrete expression through the adoption and implementation of pro-active and progressive strategies of implementation of Protocol n°26, in each sector, pertinent territory, by associating all actors concerned. We could – we should – also implement knowledge-based, evaluation and benchmarking tools and exchange of practices.

Therefore, the European Commission could launch a public consultation on the meaning and implementation of the six values, on what level, in what sectors, etc. ◄

[190] *COM(91)476, loc. cit.*

Third part - Perspectives of implementation

Investigating the perspectives of implementation of Protocol 26 and in particular of the six values entails taking into account a series of aspects and dimensions.

Since its introduction, the Protocol has pretended containing "interpretative provisions". So, implicitly, – that has been developed on the occasion of the interviews on the origins of the Protocol -, it would only interpret existing provisions, without mentioning new ones. However, as part of the primary law of the EU, it introduces provisions that do not exist in other articles or in the previous treaties. This is the case, in particular, for the six values, as well as of the "diversity" and the "differences", "the wide discretion of national, regional and local authorities"; it also introduces in the primary law the overarching concept of "services of general interest" and the concept of "non-economic services of general interest", where it was only SGEI. These provisions seem to go beyond the « interpretation » of the existing provisions.

Therefore, another question arises: how could the Protocol be implemented and how could users, citizens, civil society organisations, workforce representatives, local public authorities, etc., make use of its provisions?

To provide elements of clarification and to give meaning to the six values for all actors, RAP requested the opinion of several legal professionals from a variety of Member States having different legal traditions. Apart from interviews with Mr Jean-Claude Piris and Mr Michel Petite, as referred to already in the First Part, that gave RAP the opportunity to discuss these questions, too, four legal experts accepted to make a personal contribution: Markus Krajevski (Germany), Ulla Neegard (Denmark), Laurent Pech (Ireland), Stéphane Rodrigues (France).

Broad convergence of points of view appeared, even if some aspects remain controversial.

Obviously, the Protocol n°26 cannot be, in itself, the legal base of a secondary law. On the contrary, the explicit reference as regards SGEI to Article 14 TFEU, which became with the Lisbon Treaty the legal base of EU regulations[191], seems to offer references that could – or would- be translated in the content of such regulations.

REGULATIONS ARTICLE 14 AND PROTOCOL 26

The first article of the Protocol makes a direct reference to article 14 TFEU: '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…'.

An inseparable link is thus established between article 14 and Protocol 26. This involves any rules and regulations– sectorial or cross-cutting – taken in order to apply article 14 will have to make explicit reference to the content of the Protocol and in particular to state in secondary legislation each of the 6 values that it includes.

Articles 14 and 106 TFEU must be read and interpreted in connection with Protocol 26.

More generally, the six values of the Protocol 26 can provide a basis and legitimate the content of the "particular tasks" that public authorities assign to SGEI, under Article 106 TFEU.

STATING (THE SIX VALUES) IN CROSS-CUTTING AND SECTORIAL LEGISLATION

In more general terms, every time the secondary legislation regarding any sector related to services of general economic interest (communications, postal services, electricity, gas, different modes of transport, etc.) is re-examined or added to as well as cross-cutting provisions (public markets concessions, state aid, etc.), the Protocol must be inserted in the basis clauses of the Union's primary legislation which is being 'transformed into secondary legislation'.

The rules currently in force were adopted before the Lisbon treaty and could not therefore refer to the content of Protocol 26. They are all subject to regular revision depending on the impact their implementation has in terms of economic, social, environmental, cultural impact, and so on. This ought to serve as an opportunity to enrich them with the 6 values of Protocol 26.

Even if at the time of the publication of this report the European Commission had failed to refer to Protocol 26 in its legislative proposals regarding SGI, such as those on public procurement [COM(2011) 895, COM(2011) 896] or on concessions [COM(2011) 897], the European Parliament starts introducing it.

Thus, the draft project of Philippe Juvin on the proposal for a Directive on the award of concessions contracts proposed an amendment of the Recital 21: "... Member States should ensure that the grantor may take into account the need to ensure innovation and, in accordance with Protocol 26 to the Treaty on the Functioning of the European Union, a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of users' rights". Therefore, this draft Report reaffirms the right of public authorities to establish a certain level of quality or public service obligations in accordance with Protocol 26 of the Lisbon Treaty.

[191] *"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".*

THE ROLE OF THE CJEU

The Court of Justice of the European Union has the responsibility to guarantee that 'in the interpretation and application of the Treaties the law is observed'. It rules on the 'appeal formed by a Member State, an institution or natural or legal persons' as well as 'in preliminary rulings, at the request of national jurisdictions, on the interpretation of Union law or on the validity of acts adopted by the institutions'. In case of a conflict between the Protocol 26 and another provision of primary EU law, the EU Court would then have to rely on standard rules of interpretation to reconcile norms located at the same level in the EU's hierarchy of norms.

The Court practice is to look at the purposes of the Treaty-lawmakers, their aims, the determination to make or not precise and unconditional legal obligations... Thus, for example, in its judgment TF1, M6 and Canal+ v European Commission (T-520/09), the Court dealt with the Protocol of Amsterdam Treaty on audiovisual; it has not given its judgment on the direct effect of its provisions but it use it as a standard reference for its own interpretation to clarify the legal scope of Article 86(2) TEC.

The Court began to invoke Protocol 26 in a legal dispute which was submitted to it with regard to the 'wide discretion'….[192]. Clearly, it will have to integrate all of the Protocol's content into its interpretations and applications of European Union primary legislation, in particular if the claimants refer to a specific aspect. Protocol 26 is an integral part of primary legislation and the CJEU will integrate it into all of the references on which it forms its case law.

THE PROTOCOL AS A LEGAL MEANS

The direct use by a claimant of a given provision in Protocol 26 in a legal dispute appears more controversial amongst the jurists we consulted.

First, it reflects the general problems of the Court which are based on the 'direct effect' of the primary legislation provision cited by the claimant. The three requirements identified by the ECJ as regards the direct effect of EU primary law: (i) the provision must be sufficiently clear and precisely stated; (ii) it must be unconditional and not dependent on any other legal provision; (iii) it must confer a specific right upon which a citizen can base a claim. It seems appropriate to show that the principles cited are sufficiently clear, precise and unconditional, that they set down an obligation to do or not to do something, which, as we saw in our analysis of each of the 6 values, is subject to debate. Provisions of EU protocols can also be relied upon by litigants either in order to convince the relevant court to adopt a particular interpretation of a provision of EU law or to annul a provision of EU secondary law that is not compatible with a particular provision of the protocol.

The fact remains that since primary legislation takes precedence over an act of secondary legislation, the provisions of Protocol 26 could be used as a legal means to obtain a Court ruling. This use of Protocol 26 as a legal means seems equally possible in each of the Member States, as long as it is a full component of the European Union's primary legislation, which is applicable everywhere. EU courts could repeal any provision of "EU secondary law" which contravenes to any of these "shared values".

THE RESPONSIBILITY OF THE MEMBER STATES

We must not restrict the 'user's manual' for Protocol 26 to a uniquely European dimension. Protocol 26 develops the content of article 14 TFEU, in which we have seen that it defines shared competence between the European Union and its Member States in the field of services of general economic interest.

The values made explicit by Protocol 26 need to be implemented not just at European level, but also in each of the Member States (the national, regional and local authorities). Is this always the case? For all sectors concerned? In every field? In order to allow SGEI to 'fulfil their missions'! The Member States and each of the regional and local public authorities are responsible for implementing the values of Protocol 26, including when they delegate their management to other actors.

National Parliaments could also, for example, make use of the content of the Protocol on the occasion of a subsidiarity control of a text presented by the European Commission.

This scope should not be limited to economic services. Even if non-economic services are not covered by article 1 of the Protocol and the values it lays out, they should not, in any way, be excluded from the implementation of the values of the Protocol by national authorities. On the contrary, given that we are dealing with services which are intrinsically linked to social links and citizenship, they ought to exemplify quality, safety, affordability, equal treatment, universal access and user rights.

[192] *As of the date of drafting this report, one reference was made to Protocol 26 by the General Court: in the Order of the President of the General Court of 17 February 2011 (T-490/10), the President follows up the provisions of the Protocol which « mentions the importance of SGEI and the large discretionary power of national authorities to provide, commission and organise them ». Moreover, an application introduced in 2012 to the General Court is based on the Protocol 26 (Article 2, Case T-15/12, Provincie Groningen and Others v Commission), which is now pending before the General Court: the applicants argues inter alia that nature conservation in the Netherlands is a service of general interest within the meaning of Article 2 of Protocol n°26 on services of general interest. European Union competition law should therefore be deemed inapplicable.*

This is how in every Member State, in every local community, with the involvement of all social actors concerned, the application of values now recognised by European law are being played out.

IMPLEMENTING THIS NEW TOOL

It has been two years since the Lisbon Treaty has entered into force and the Protocol 26 can now produce its effects.

The first issue to address is to explore the potential of the new elements it adds to European rules and norms of services of general interest. As we saw, it provides a sort of cornerstone of the European conception of services of general interest which is progressively built for more than half of century now and which require further concrete expression, implementation...

However, the Lisbon Treaty, with, in particular, Article 14 TFUE, the Charter of fundamental rights and the values provided for in the Protocol 26, represents a crucial step on the long road towards a renewed, efficient vision, based on the way they respond to needs...

European integration takes time. It involves making histories, traditions and different interests converge towards a certain number of common principles, without claiming neither uniformity nor even a complete harmonization, but rather by combining unity and diversity.

It is to this challenge this report hopes to provide a modest contribution. It will be effective only if all stakeholders start to address this issue... ◄

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