



*Employers entrusted to deliver
Sustainability Growth Innovation*

Acquis + Glossary

THE ACQUIS COMMUNAUTAIRE FOR
SERVICES OF GENERAL ECONOMIC INTEREST

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General Remark:

This Glossary is a general and non-exhaustive description of the EU primary and secondary law, case law and soft law impacting the provision of SGIs in the European Union, from a transversal point of view. It does not aim at presenting all the EU legislation impacting each and every sector and service concerned as this would require a specific project.

This transversal work enlightens how complex the issue of services of general interest in the European Union is, as it is always difficult to find the right balance between the European cohesion and the respect of subsidiarity.

Based on this compendium, SGI Europe has therefore formulated proposals in a Manifesto to achieve this equilibrium with the objective of giving the best answer possible to citizen's expectations regarding their public services.

In order to facilitate the comprehension of the concept of SGIs in Europe at national and local level, these two documents are accompanied by a leaflet "Services of General Interest for Everyone".

All this Acquis+ Package is available on SGI Europe website www.SGIeurope.org

For more information, please contact SGI Europe General Secretariat (info@SGIeurope.org - +32 2 219 27 98)

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Foreword

Services of general economic interest need to be granted a solid foundation within a renewed concept of the Single Market, because they are a basic pillar for the success of this market. Against this background, SGI Europe has taken the initiative to describe the current *Acquis Communautaire*¹ on services of general economic interest.

The European model, amongst others, guarantees to European citizens the access to goods and services which are, for most of them, delivered via the market. The EU has set market rules to ensure the well-functioning of those markets in the interest of the users. However, there are goods and services which by nature are so essential for the well-being, health and fundamental rights of European citizens, European economic, social and territorial cohesion and sustainable development that they deserve a special and adapted treatment in face of free market forces, in order to ensure their proper functioning. Therefore, they deserve a special and adapted framework ensuring that each one can enjoy a high level of quality, safety and affordability of services based on equal treatment as well as the promotion of universal access and users' rights. Those goods and services are called services of general interest (SGIs). They may be economic (SGEI) or non-economic (NESGI) services.

With regard to non-economic services of general interest, the rules of competition and the internal market do not apply; they are only subject to the general principles of the EU (transparency, non-discrimination, equal treatment, proportionality) without stipulation of any specific procedures. However, European Union Law is continuously extending its scope in the field of NESGI via State Aid and Public Procurement Law.

With regard to services of general economic interest, a body of *acquis communautaire* has been developed. The White Paper of the European Commission on services of general interest of 2004 states that "(...) in Community practice there is broad agreement that the term refers to services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion".

The way SGEIs are provided is deeply rooted in historical traditions and the constitutional frameworks of the Member States. Any "one-size-fits-all" approach to SGEIs would fail. The national, regional and local authorities, representing their citizens' interest, have "wide discretion" and full freedom of choice concerning the organisation, the financing and the use of different modes of provision of SGEI. The European institutions are restricted to checking manifest errors. In 2009, the Lisbon Treaty implemented a set of new provisions into European Law.

The present compilation can be regarded as an auxiliary reference guide for the interpretation of the SGEI concept in European Law in the light of the Lisbon Treaty and can be of help when analysing legislative proposals by the European Commission. SGI Europe calls on the European Institutions to be the guardians of the full and coherent implementation of the new provisions and to take full account of the fact that SGEIs need to be given special consideration in EU legislation in order to ensure high quality, safety, affordability of services based on equal treatment, universal access and respect of users' rights.

This compilation was first finalised in August 2013 and updated in 2020. Please view updates on the SGI Europe website: www.SGIeurope.org

¹ The *Acquis Communautaire* is the accumulation of legislation, legal acts, and court rulings on services of general interest.

Primary law

Primary law is the fundamental basis of the rules on SGEIs. The provisions of the Treaties cannot be changed by secondary law.

Article 3 TEU – EU objectives

This article refers, among other EU objectives, to “the well-being of its peoples”, “social market economy”, “social progress”, etc. The article gives a comprehensive definition of the objectives of the European Union that must be a reference for all its policies and initiatives.

In particular, it states:

1. “The Union’s aim is to promote peace, its values and the well-being of its peoples.
2. (...)
3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It 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.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.”

The explicit reference to a “social” market economy was introduced in the Treaty of Lisbon and is relevant for services of general interest as they are often a key element of a social market economy. Furthermore, services of general interest contribute to the achievement of many goals mentioned in Article 3 such as combating social exclusion and promoting social and territorial cohesion (see also Article 14 TFEU). Services of general interest are the backbone of the European economy as they provide essential infrastructures such as transport, energy or social services for both people and businesses. The goals of Article 3 TEU such as sustainable development, a high level of protection and the promotion of the environment, the fight against social exclusion and discrimination, as well as economic, social and territorial cohesion, legitimate the setting-up of services of general interest as they are essential in achieving these goals.

Article 4 TEU – Member States sovereignty

Article 4 underlines that the EU respects the “national identities” of its Member States, “inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State function, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

The article refers among others to the respect of regional and local self-government. It recognises the important role of sub-state level authorities and their governing function. In each Member State these authorities have a specific constitutional anchorage and different degrees of responsibilities. However, Article 4 explicitly states that regional and local self-government may constitute a central element of the fundamental and constitutional structures in the Member States. In many Member States, the provision of services of general interest is a key aspect of local self-government. Article 4 therefore establishes the principle of constitutional respect of services of general interest at local level, a principle that the European institutions have to consider/take into account when legislating or judging.

Article 5 TEU – Competences

Article 5 defines the scope of competences of the Union and the principles of subsidiarity and proportionality which are essential for the role of the Member States in defining and implementing rules on SGEIs. It states that “(u)nder the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States” and “(u)nder the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

The principle of subsidiarity requires clear benefits of common provisions over national measures as prerequisite of EU legislation. Hence, any EU measure regulating services of general interest needs to bring some added value which could not have been attained through national measures. In this context, it is important to note that “one-size-fits-all” internal market proposals do not meet the heterogeneity of SGEIs in the national markets.

Article 6 TEU – Fundamental rights

According to Article 6 “the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”. Article 6 TEU adds that “fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.” This establishes a binding character for fundamental rights in the EU. All EU secondary law must therefore be in conformity with the fundamental rights.

Article 36 of the Charter of Fundamental Rights sets out that “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.”

Article 9 TFEU – Horizontal social clause

As a provision of general application, Article 9 contains a horizontal social clause that implies the respect of the Union concerning the promotion of the public missions in the Member States. It establishes that “in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.” As mentioned above, services of general interest are a key instrument to achieve these goals; at the same time these goals legitimate services of general interest.

Article 11 TFEU – Horizontal environmental clause

This article requires the integration of environmental protection into the definition and implementation of the Union's policies and activities. In addition, Article 37 of the Charter of Fundamental Rights of the EU requires that a “high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.” Again, services of general interest are a key instrument to achieve these goals. Nevertheless, the EU secondary law framing the provision of SGIs still needs to better take this into account. A good example could be the modernisation of EU public procurement rules, which among other objectives aimed at enhancing the strategic use of public procurement. The co-legislators agreed to clarify and secure the use of social and environmental criteria in tendering procedures by authorities in order to enable them to pursue environmental policy goals when purchasing goods and services for the community.

Article 14 TFEU – Services of general economic interest

This article, as a provision of general application, defines SGEIs as “shared values of the Union”, emphasizes “their role in promoting social and territorial cohesion”, and declares a shared competence between the EU and the Member States, each within their respective powers, in order to take care that providers of SGEIs “operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions.” The same article provides that “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”.

This article contains an explicit constitutional recognition of the special role of SGEIs. The provision refers to the role of SGEIs in the promotion of social and territorial cohesion, the respect of the national, regional and local authorities in the Member States (in reference to Art. 4), the respect of competences of the Union vis-à-vis the Member States as defined in the treaties (as in Art. 106 where it is stipulated that the provision of SGEIs should not be obstructed by rules on competition), the competence of the Member States to finance SGEIs (within the limits of Article 107 Par. 2 about State aid) and the competences of the European Parliament and the Council to ensure – in line with the Member States – that the provision of SGEIs is not endangered by market rules imposed by the Commission.

Article 106 TFEU – Public/entrusted undertakings

This article is a provision on competition law (thus an exclusive competence of the EU) and states that “(u)ndertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them”. The same article enables the Commission to address “appropriate directives or decisions to Member States” in order to ensure the application of the provisions of this article.

The article reflects the balance between the internal market and free competition on the one hand and Member States and EU regulations intervening in the market in order to safeguard the public interest on the other hand. It establishes that the application of EU law, including competition law, State aid rules and the provisions of the internal market shall be considered the rule, while the non-application of these provisions to services that are provided in the public interest shall be considered as a departure from these provisions. However, there is a clear limit to the application of EU law: The obstruction of the performance of the special tasks of SGEIs. In other words: in case of conflict, the public interest shall prevail.

Paragraph 3 of Article 106 provides that the “Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.” However, this does not mean that the European Commission is restricted to only ensuring competition law (the article rather states that undertakings providing SGEIs “shall be subject to the rules contained in the Treaties, in particular to the rules on competition”). On the contrary it is entitled and obliged to safeguard the provisions of the Treaty in its entirety. Furthermore, the public interest prevails in the case of tension.

Articles 107 to 109 - State aid

State aid is defined as an advantage in any form conferred on a selective basis to undertakings by national public authorities. Therefore, subsidies granted to individuals or general measures open to all enterprises are not covered by this prohibition and do not constitute State aid. To be State aid, a measure needs to have these features:

- there has been an intervention by the State or through State resources.
- the intervention gives the recipient an advantage on a selective basis, for example to specific companies or industry sectors, or to companies located in specific regions.
- competition has been or may be distorted.
- the intervention is likely to affect trade between Member States.

Despite the general prohibition of State aid, in some circumstances, government interventions are necessary for a well-functioning and equitable economy. Therefore, the Treaty leaves room for a number of policy objectives for which State aid can be considered compatible.

Articles 107 to 109 TFEU state that State aid (including tax benefits) is prohibited when affecting trade between Member States. It follows from Article 106, paragraph 2, that undertakings entrusted with SGEIs are exempt from this prohibition in so far as competition rules obstruct the performance of their task. State aid is considered “compatible with the internal market” under the condition that it is proportionate to clearly defined objectives of general interest. Article 93 TFEU considers aids as “compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.”

EU rules and practices regarding State aid have been further developed in secondary law on State aid with, amongst others, specific rules for State aid granted to SGEIs (the so-called Monti-Kroes and Almunia Packages) as well as case law (see below in the glossary).

In particular, the ECJ in its Altmark ruling (see below) has established four conditions for departure from competition law with regards to the provision of SGEIs: There must be an official act of entrustment, this entrustment must relate to the operation of SGEIs, there must be a necessity for exemption in order to perform the SGEI task and this must be proportional to that end and the internal market must not be affected to the extent that it would be contrary to the interest of the European Union.

Protocol 2

Article 2 of Protocol 2 states that “(b)efore proposing legislative acts, the Commission shall consult widely. Such consultation shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal” and the “Commission shall forward its draft legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator.”

Article 5 of the Protocol states that draft legislative acts shall be justified with regard to subsidiarity and proportionality: “Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.”

National parliaments can object legislative acts if they do not comply with the principle of subsidiarity: they can raise doubts about the fulfilment of the principle of proportionality. The Commission may then reconsider the draft. If there are objections from a third of the national parliaments, the draft must be reconsidered. But this last requirement together with the very limited time for reaction restricts the opportunity for national parliaments to act. The consultation and subsidiarity processes as of now do not take into account national concerns in a sufficient manner when drafting EU legislation.

Protocol 26 - Services of General Interest

This Protocol was introduced by the Treaty of Lisbon and is annexed to the TEU and TFEU) and therefore is an “an integral part thereof” (Article 26 TEU).

The objective of the Protocol is to emphasise the importance of services of general interest and to provide interpretative provisions, regarding the notion of the “shared values of the Union” regarding services of general economic interest within the meaning of Article 14 TFEU.

According to Article 1 of the Protocol, these values include “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 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.”²

Protocol 26 concerns not only services of general economic interest, but all SGIs, regardless of their nature, whether economic or non-economic. With regard to SGEI the “wide discretion” of public authorities, the “diversity between services” and the “6 values” must be respected (quality, safety, affordability, equal treatment, universal access and users’ rights).

Article 2 of the Protocol reaffirms that the Treaty does not affect “the competence of Member States to provide, commission and organise non-economic services of general interest”.

Article 36 of the Charter of Fundamental Right

This article refers to the access to SGEIs: “The Union recognizes and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote social and territorial cohesion of the Union.”

With the enforcement of the Lisbon Treaty, the Charter of Fundamental Rights of 2000 acquires full legal status as part of primary law. The fundamental rights of the European citizens constitute general principles of the Union’s law. Art. 36 constitutes that the access to SGEIs “as provided for in national laws and practice, in accordance with the Treaty” is one of the fundamental rights of the EU. For the first time, access to SGEIs is recognised as a fundamental right.

According to existing case law, Article 36 of the Charter of Fundamental Rights is to be regarded as a constitutional right (C-275/06 and C-555/07) and not as mere competition policy.

Other articles of the Charter concern and legitimise SGIs:

- * Article 14 Right to education
- * Article 25 The rights of the elderly
- * Article 26 Integration of persons with disabilities
- * Article 29 Right of access to placement services
- * Article 34 Social security and social assistance
- * Article 35 Health care

² The Protocol refers to the competence of Member States “to provide, commission and organise » services, whereas Article 14 TFEU emphasises Member State’s competence “**in respect of Treaties**, to provide, commission and **finance** these services”.

Secondary law

Secondary law has progressively translated primary law into concrete measures for completing the “internal market” in several sectors as well as into the form of horizontal rules, such as public procurement or State aid rules. Without claiming to be exhaustive, the following features should especially be mentioned:

Universal service

In three sectors, the European Union defines an **universal service** that is “the right of everyone to access certain services considered as essential”, which “imposes obligations on service providers to offer defined services according to specified conditions, including complete territorial coverage and at an affordable price”³:

Directive [2002/22/EC](#) (“Universal service Directive”) amended by Directive 2009/136/EC and Regulation (EU) 2015/2120 refers in Article 3 paragraph 1 to universal service as being “a defined minimum set of services of specified quality to which all end-users have access, at an affordable price”. It imposes upon national regulatory authorities the obligation to notify to the Commission the universal service obligations imposed upon undertakings (Article 36 paragraph 2 Directive 2002/22/EC, as amended by Directive [2009/136/EC](#)).

In the **postal sector**, Directive [2008/6/EC](#) of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (Official Journal of the European Union L 52 of 27 February 2008). The Directive provides in Article 4 paragraph 2 for the obligation for the Member States “to provide different elements of universal service and/or to cover different parts of the national territory. When they do so, they shall determine in accordance with Community law the obligations and rights assigned to them and shall publish these obligations and rights. In particular, Member States shall take measures to ensure that the conditions under which universal services are entrusted are based on the principles of transparency, non-discrimination and proportionality, thereby guaranteeing the continuity of the universal service provision, by taking into account the important role it plays in social and territorial cohesion.”

Regulation (EU) 2018/644 of the European Parliament and the Council of 18 April 2018 on cross-border parcel delivery services also mentions in Article 6 paragraph 1 the universal service obligation: “On the basis of the public lists of tariffs obtained in accordance with Article 5, the national regulatory authority shall identify, for each of the single-piece postal items listed in the Annex, the cross-border tariffs of the parcel delivery service provider that originates in its Member State and that are subject to a universal service obligation that the national regulatory authority objectively considers necessary to assess.”

Public service obligation

Neither the TFEU nor the TEU give any indication as to the usual meaning of the concept of public service obligation under Union law. The Treaties only refer to the term “public service obligation” in the context of services of general economic interest which should be the objective of any public service obligation (see also

³ White Paper on services of general interest ([COM\(2004\) 374 final](#)).

Articles 14 and 93 TFEU, Article 36 of the Charter of Fundamental Rights of the European Union and Protocol (No. 26) on services of general interest).

In recent years, the application of the concept of public service obligation has emerged in addition to the concept of services of general interest. This term was first mentioned in the Decision of 13 May 1965 by the Council which referred to the existence of obligations inherent in the concept of public services imposed on transport undertakings (Council Decision 65/271/CEE on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway (OJ, English Special Edition, 1965, Series I, p. 67)). The Council used the shorter expression Public Service Obligation. In this regulation the term was the first time defined in Article 2(1) of the Regulation (EEC) No 1191/69. According to the Court's case-law, the purpose of Regulation No 1191/69 was to establish a system which the Member States must comply with when they consider imposing a public service obligation on undertakings in the transport sector (see judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraph 53).

In its 2004 White Paper on services of general interest, the European Commission emphasised that the concept of public service obligation refers "to specific requirements that are imposed by public authorities on the provider of the service in order to ensure that certain public interest objectives are met" (COM(2004) 374 final of 12 May 2004, p. 23; see also COM(2011) 900 final of 20 December 2011, p. 3; SWD(2013) 53 final/2 of 29 April 2013, p. 21). It should be noted that the Commission's documents which refer to public service obligations always do so to designate the supply of specific services or goods (see for example, Article 1(18) of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), or Article 16 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3)).

The definition of public service obligation is linked to the liberalisation of utilities. They are partly defined at European level on a sectoral level, framed by the subsidiarity principle. The public service obligation is for example defined in the transport, electricity and gas sector.

- All transport modes have specific rules on public service obligations. In the field of **air transport**, Regulation n° [1008/2008](#) (Article 16) provides that "a Member State, (...), may impose a public service obligation in respect of scheduled air services between an airport in the Community and an airport serving a peripheral or development region in its territory or on a thin route to any airport on its territory any such route being considered vital for the economic and social development of the region which the airport serves." It must satisfy "fixed standards of continuity, regularity, pricing or minimum capacity, which air carriers would not assume if they were solely considering their commercial interest." In the field of urban transport, Regulation [1370/2007](#) states that "it is essential that a public service contract between the competent authority and the chosen public service operator defines the nature of the public service obligations and the agreed reward". The Regulation then defines public service obligation as "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". During the period of implementation of this public service obligation, a public service compensation can be granted to the operator.
- In the sector of **electricity**, the field of public service obligations was subject to progressive changes and complements after the first directive (Directive [96/92/CE](#)), then by the adoption of directives [2003/54/EC](#) and [2009/72/EC](#). After the entry into force of the third directive of 2009, "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* [provision introduced in 2003], *energy from renewable sources* [provision introduced in 2009] and *climate protection* [provision

introduced in 2003].” Moreover, Member States shall report to the Commission some of their actions, an obligation that was not yet imposed in 1996: “Member States shall, upon implementation of this Directive, inform the Commission of all measures adopted to fulfil universal service and public service obligations”; “They shall inform the Commission subsequently every two years of any changes to such measures”. This definition is the largest one in the Community law.

- Similar measures are provided for in **the sector of natural gas** by Article 3 (2) of Directive [2019/692](#) of 17 April 2019 amending Directive [2009/73/EC](#) on common rules for the internal market in natural gas, according to which “Member States may impose on undertakings operating in the gas sector, in the general economic interest, public service obligations which may relate to security of supply, regularity, quality and price of supplies, and environmental protection, including energy efficiency, energy from renewable sources and climate protection.”

Passenger rights

Community measures also concern the adoption of provisions on the protection of the passenger rights, applied to services of general economic interest:

- In the sector of **air transport**, Regulation (EC) No [261/2004](#) establishes common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No [1107/2006](#) concerns the rights of disabled persons with reduced mobility when travelling by air;
- In the sector of **rail transport**, Regulation (EC) No [1371/2007](#) defines rail passengers' rights and obligations and [Regulation \(EC\) No 1370/2007](#) focuses on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70;
- The same applies for the bus and coach transport sectors through Regulation (EC) No [181/2011](#) and **other fields of transport** (waterway transport - [COM\(2008\) 816 final](#)).

Services directive

Some services of general economic interest are subject to the horizontal regulatory framework established by the Directive of 12 December 2006 on **services in the internal market** ([1006/123/EC](#)). For services of general economic interest, the significant value of this horizontal text rests on the provisions concerning **users' rights**, which form, according to the directive's provisions, one of the objectives of general interest. The Services Directive further specifies the freedom of establishment and the free movement of services and service suppliers from other EU countries. However, it should be noted that several SGIs are not included.

Public procurement

Public procurement refers to the process by which public authorities, such as government departments or local authorities, purchase work, goods or services from companies. EU law sets out minimum harmonised public procurement rules. These rules govern the way public authorities and certain public utility operators purchase goods, works and services. They are transposed into national legislation and apply to tenders whose monetary value exceeds a certain amount. For tenders of lower value, national rules apply. Nevertheless, these national rules also have to respect the general principles of EU law.

Several directives define common rules for procedures for the award of public contracts ([Directive 2014/24/EU](#) of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC), including for utilities ([Directive 2014/25/EU](#) of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC) and in the fields of defence and security (Directive 2009/81/EC of 13 July 2009). These directives gather provisions on general principles of public procurement, definitions, publication and transparency, procedures, technical specifications, modifications of contracts, subcontracting etc.

The core principles of these directives are transparency, equal treatment, open competition, and sound procedural management. They are designed to achieve a procurement market that is competitive, open, and well-regulated. To encourage progress towards public policy objectives, the public procurement rules allow for environmental and social considerations, as well as innovation aspects to be considered when awarding public contracts and should function as a policy strategy instrument.

The European Commission's public procurement strategy focuses on six strategic policy priorities that were set out in the 2017 communication '[Making public procurement work in and for Europe](#)'. This Communication defines clear priorities to improve procurement in practice and support investment within the EU.

In December 2011, the European Commission issued proposals to amend Directives 2004/17/EC on procurement in the water, energy, transport and postal services sectors (COM/2011/895 final) and 2004/18/EC on public works, supply and service contracts (COM/2011/0896 final), as well as for the adoption of a Directive on concession contracts. The new Directives were adopted by the European Parliament and the Council of the European Union on 26 February 2014.

Concessions

Concession contracts are used by public authorities to deliver services or construct infrastructure. Concessions involve a contractual arrangement between a public authority and an economic operator (the concession holder). The latter provides services or carries out works and is remunerated by being permitted to exploit the work or service. Concessions are a form of public contract in which the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment. In a concession, the respective concession holder is mostly remunerated by being permitted to run and exploit a work or service. It is also exposed to a potential loss on its investment.

The 2004 Public Procurement Directives only partially covered concessions. In response to this lack of clarification, Directive 2014/23/EU on the award of concession contracts was adopted in 2012 and meanwhile updated (Commission Delegated Regulation (EU) 2019/1827 of 30 October 2019 amending Directive 2014/23/EU of the European Parliament and of the Council in respect of the threshold for concessions).

Article 2 (1) of the [Directive 2014/23/EU](#) of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts “recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services. Those authorities may choose to perform their public interest tasks with their own resources, or in cooperation with other authorities or to confer them upon economic operators.”

The following areas are excluded from the scope of the Concessions Directive:

- Concessions for the provision or operation of fixed networks for drinking water, as well as concessions for the disposal or treatment of sewage and hydraulic engineering projects, irrigation or land drainage.
- Concessions for lottery operating services.

A concession contract must be limited in time. For concessions lasting more than 5 years, the duration must not exceed the time in which a concessionaire could reasonably be expected to recuperate their investment. The maximum duration must be referred to in the concession documents, either as a point subject to negotiation (may be part of the award criteria and fixed through competition) or as a part of the fixed conditions which take into account things like total investment (including copyrights, patents, logistics), the asset's capacity to generate revenue or user tariffs, and the asset's operation and maintenance costs.

In Article 57 (4) (g) of the Directive 2014/24/EU on public procurement, it is defined that contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in the following situations: where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract or where a prior contract with a contracting entity or a prior concession contract led to early termination of that prior contract, damages or other comparable sanctions.

Internal Operator/In-house

Until the publication of the EC proposals for a modernisation of EU public procurement rules in December 2011, there were no transversal definition of public-public cooperation and in-house provision of SGIs in the EU secondary law. Nevertheless, Regulation 1370/2007 on land transport provided a sectoral definition of the internal operator, a concept similar to in-house.

Regulation (EC) No [1370/2007](#) of 23 October 2007 on **public passenger transport services by rail and by road** provides in Article 5 that “any competent local authority (...) may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent local authority (...) exercises control similar to that exercised over its own departments. Where a competent local authority takes such a decision, the following shall apply:

(a) for the purposes of determining whether the competent local authority exercises control, factors such as the degree of representation on administrative, management or supervisory bodies, specifications relating thereto in the articles of association, ownership, effective influence and control over strategic decisions and individual management decisions shall be taken into consideration. In accordance with Community law, 100 % ownership by the competent public authority, in particular in the case of public-private partnerships, is not a mandatory requirement for establishing control within the meaning of this paragraph, provided that there is a dominant public influence and that control can be established on the basis of other criteria;

(b) the condition for applying this paragraph is that the internal operator and any entity over which this operator exerts even a minimal influence perform their public passenger transport activity within the territory of the competent local authority, notwithstanding any outgoing lines or other ancillary elements of that activity which enter the territory of neighbouring competent local authorities, and do not take part in competitive tenders concerning the provision of public passenger transport services organised outside the territory of the competent local authority (...)

This means that it is not necessary that the legally distinct internal operator be not partly owned by a private partner, under the condition that it operates only within the territory of the local authority.

The EC proposals from December 2011 (the so-called Public Procurement Package, including also a proposal on concession contracts) suggested a transversal EU definition of public-public cooperation and in-house, more restrictive than the definition in Regulation 1370/2007. Private participation is very much restricted (the Trilogue opposed a strict ban) and 80% of the activity of the in-house entity should be dedicated to the controlling authority. The directive does not take full account of the heterogeneity of Member States as it followed a “one-size-fits-all” approach which will probably cause changes to the way SGEIs are organised in some Member States, including additional transaction costs. It did not further develop a coherent approach to PPPs nor take into account specific situations for multi-sectoral undertakings (with the exception of water, but only after negotiations and public protest).

State Aid

In 2012, the Commission launched a major reform package, the State Aid Modernisation, resulting in the revision since 2013 of many State aid rules. The Commission started a process aimed at evaluating the rules under the State Aid Modernisation package in line with the Commission’s Better Regulation Guidelines, and consequently prolonging the validity of those State aid rules that would otherwise expire by the end of 2020. The evaluation takes the form of a “fitness check” and will prepare for a revision of the relevant guidelines considering the policy objectives of the European Green Deal.

In its 2003 Altmark judgement (see below), the European Court of Justice held that public service compensation does not constitute State aid when four cumulative conditions are met:

- the recipient undertaking must have public service obligations and the obligations must be clearly defined;
- the parameters for calculating the compensation must be objective, transparent and established in advance;
- the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit;
- where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical well-run company.

Where at least one of the Altmark conditions is not fulfilled, the public service compensation will be examined under State aid rules. To clarify the application of State aid rules, the Commission adopted the “Altmark”-package, where it specifies under which conditions public service compensation can be considered compatible with primary law.

In 2005 the Commission adopted the “Monti-Kroes”-package, which was then modified by the “Almunia”-package. The principles of the Almunia package are *clarification* of the case law, *simplification* in terms of an exemption for social services and *proportionality* (stricter rules for certain sectors and for compensation above 15 million EUR). The package consists of:

- an interpretative communication that clarifies the definition of State Aid and the meaning of the four Altmark conditions (([2012/C 8/02](#))
- A decision exempting Member States from the obligation to notify public service compensation for certain SGEI categories. Social services become exempted from the obligation of notification to the Commission, regardless of the amount of the compensation received. The services concerned must meet "*social needs as regards health and long term care, childcare, access to and reintegration in the labour market, social housing and the care and social inclusion of vulnerable groups*". Other SGEIs are exempted provided the compensation amount is less than €15 million a year. ([2012/21/EU](#))
- A framework with criteria for compensation payments, which will be the tool for assessing large compensation amounts granted to providers which are not exempted. The Commission sets the criteria which allow compensations to be declared compatible with the internal market. ([2012/C 8/03](#))
- A *de minimis* Regulation, stating that under a certain threshold of 500,000 EUR for over 3 years, compensations do not fall under State aid scrutiny. (Regulation No [360/2012](#))

In this context, the Commission repeated its decision practice where it considers that payments for purely local activities such as local swimming pools, hospitals, museums and cultural events do not have the potential to affect trade between Member States, provided that all users/visitors live in the vicinity.

The 2013 revision of the State aid Procedural Regulation (Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union) introduced the possibility of conducting State aid sector inquiries, which was previously only possible as part of Antitrust and Merger control. State aid sector inquiries can be launched in situations where State aid measures may distort competition in several Member States, or where existing aid measures are no longer compatible with the regulatory framework. Aid measures can only be implemented after approval by the Commission. Moreover, the Commission has the power to recover incompatible State aid.

As of 1 July 2016, the new transparency requirements concerning State aid granted by Member States to undertakings entered into force and became mandatory based on Article 9 and annex III of GBER and where provided for in notifications and decisions. For each State aid award above €500,000, Member States are required to publish the identity of the beneficiary, the amount and objective of the aid and the legal basis on a dedicated website. The information must be published within 6 months from the granting of the aid. Full and timely publication is a condition for the validity of the aid. Transparency extends also to fiscal aid, with specific rules ensuring that tax confidentiality is preserved.

SSGIs – Social Services of General Interest

In 2006, for the first time, the European Commission described in a Communication ([COM\(2006\) 177](#)) what constitutes Social Services of General Interest (SSGI). It identified two broad types of services, namely:

- statutory and complementary social security schemes covering the main risks of life; and
- services provided directly to the person, such as social assistance services, employment and training services, childcare, social housing or long-term care for the elderly and for people with disabilities.

Those services enjoy a specific “lighter” regime when it comes to competition and internal market rules, as they are often considered as having a limited cross-border impact.

When it comes to public procurement rules, SSGIs were covered in the Annex B list of services that were subject solely to Article 23 (technical specifications) and to Article 35 paragraph 4 (notices on the results of the public service award) and to fundamental principles of EU primary law.

The Almunia Package on State aid rules also provided for a decision exempting Member States from the obligation to notify public service compensation for services meeting *"social needs as regards health and long term care, childcare, access to and reintegration in the labour market, social housing and the care and social inclusion of vulnerable groups"*.

The European Commission has published several reports and working papers to communicate on the special regime of SSGIs as the 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 ([SWD\(2013\) 53 final/2](#)).

The Jurisprudence of the European Court of Justice

The case law of the European Court of Justice is part of the *acquis communautaire* on services of general economic interest. However, the European legislator should bear in mind that the ECJ's rulings on secondary law can always be revised based on primary law.

This chapter summarises the rulings of the ECJ, **without pretending to be exhaustive** and without describing the details of the cases concerned. Most rulings do not form general principles of EU law but are **case-by-case rulings**. Therefore, case law should not be regarded as a substitute for political debates and legislative acts. The aim of this chapter is to provide any actor that is concerned with services of general economic interest with a rough overview of the relevant case law.

Definition of public service obligation

The concept of public service obligation is addressed in some court decisions, such as the judgment of 7 September 2016, ANODE (C 121/15, EU:C:2016:637, para. 36); accordingly, with regard to Directive 2003/55/EC, judgment of 20 April 2010, Federutility and others (C 265/08, EU:C:2010:205, para. 22), and in relation to Directive 2003/54/EC, ENEL judgment of 21 December 2011 (C 242/10, EU:C:2011:861, para. 42). In accordance with the case law of the Court of Justice on the interpretation of Article 3(2) TEU, in order for a measure to be classified as a public service obligation, it must meet two conditions:

- It must be designed to achieve an objective of general economic interest.
- The measures must oblige the undertakings concerned to adopt a certain conduct which they would not have adopted under competitive conditions (see judgments of 7 September 2016 (ANODE) (C 121/15, EU:C:2016:637, para. 30) and of 21 December 2011 (ENEL) (C-242/10, EU:C:2011:861, para. 42).

Associação Peço a Palavra and Others v Conselho de Ministros (C-563/17)

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as meaning that it is not relevant to the examination of whether certain requirements relating to the activities of an air carrier which are imposed on the purchaser of a qualifying holding in the share capital of that undertaking, in particular the requirement that the purchaser be required to discharge public service obligations and to maintain and develop the national base of operations of that undertaking, are compatible with Union law.

Engie Cartagena SL (C-523/18)

The term public service obligation is defined and specified in Article 3(2) of Directives 2003/54 and 2009/72. In order to be considered a public service obligation, a measure must not only fulfil the conditions set out in the judgment of 7 September 2016, ANODE (C 121/15, EU:C:2016:637, para. 36), but also oblige the undertakings to supply certain services or goods as part of this obligation. A simple obligation to pay money to the State or a public body in the form of taxes, charges or parafiscal measures cannot be considered a public service obligation in this sense.

Definition of service concessions

Service concessions refer to a European legal term which might differ from similar terms at national level. It is therefore crucial to understand how service concessions are defined at European level in order to determine whether national settings are affected by European legislation in this field.

Telaustria (C-324/98)

This case clarified that the awarding of concession contracts is not subject to public procurement rules. However, the awarding procedure for concessions still has to follow the general principles of non-discrimination, transparency and equal treatment.

Contse (C-234/03)

In this case the ECJ ruled that where there is no transfer of risk connected to the provision of the service concerned, the operation constitutes a public service contract.

Parking Brixen (C-458/03)

In this case the ECJ clarified the notion of the transfer of risk, which is a “characteristic of a public service concession”: the “risk of operating the services” is transferred when the payment is made by third parties and not by the public authority concerned.

Commission v. Italy (C-382/05)

In this case the ECJ confirmed that a concession exists where the agreed method of remuneration consists in the right of the service provider to exploit the service. This comprises that the service provider assumes the risk connected with the services in question.

Eurawasser (C-206/08)

In this case the ECJ held that at least some of the consideration for the services must come from third parties, but that sufficient transfer of risk would be assumed even if there was very little risk. Moreover, assuming the risk means that the contracting authority does not guarantee any payment.

Helmut Müller (C-451/08)

Somewhat contrary to the Eurawasser-case the ECJ reconfirmed that the characteristic of a concession is “that it is the concessionaire himself who bears the main, or at least the substantial, operating risk”.

Hörmann Reisen GmbH v. City of Augsburg and Landkreis Augsburg (C-292/15)

In this case the ECJ clarified that Article 4(7) of Regulation No 1370/2007 must be interpreted as not precluding a contracting authority from imposing a self-financing rate of 70% on an operator entrusted with the management and provision of a public passenger transport service by coach, such as that at issue in the main proceedings.

Rhein-Sieg Kreis and Rhenus Veniro GmbH & Co. KG v Verkehrsbetrieb Hüttebräucker GmbH and Others (C-266/17 and C-267/17)

In this case the EJC pointed out that Article 5(2) of Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road is applicable to the direct award of contracts for public passenger

transport services by means of buses. However, only in the case when they do not take the form of service concessions within the meaning of Directive 2004/17/EC or Directive 2004/18/EC .

“In-house”

It is an established principle that contracting authorities have the right to use their own operators for the fulfilment of their public service task. The ECJ has established certain conditions under which the internal award is exempted from procurement rules. Concerning this “**in-house**” management, the conditions imposed by the ECJ in the field of public procurement, which will be summarised in this chapter, are more restrictive than those established in the European secondary law in the field of public passenger transport (Regulation (EC) No [1370/2007](#) of 23 October 2007).

Teckal (C-107/98)

In this case the ECJ held that public procurement rules must always be applied when there is a contract for public supply between two distinct legal persons. However, if the local authority exercises over the other person a control “which is similar to that which it exercises over its own departments” and at the same time that person carries out the essential part of its activities with the controlling local authority, procurement rules do not apply.

Stadt Halle (C-26/03)

In this case the ECJ first recalled the main objective of public procurement, namely the free movement of services and undistorted competition and that any exception must be interpreted strictly. It confirmed that the Teckal criteria constitute such an exception. However, procurement rules always apply when awarding a public contract to an undertaking that has private shareholding, since any private capital investment in an undertaking follows considerations of private interests and not of public interest.

Parking Brixen (C-458/03)

In this case the ECJ ruled that a complete lack of any call for competition when awarding a concession is not in accordance with the fundamental rules of the EC Treaty when awarding concessions. It further established that the “Teckal” criteria also apply to the award of concessions and that these must be interpreted strictly.

Carbotermo (C-340/04)

In this case the Court clarified the second Teckal criterion of the “essential” part of the turnover. The Court ruled that the turnover which must be taken into account is the turnover of “all those activities which that undertaking carries out as part of a contract awarded by the contracting authority, regardless of who the beneficiary is” and regardless of the territory in which the services are provided. Further, the activities which have to be taken into account in the case of an undertaking controlled by more than one authority are the activities of all those authorities together.

Acoset (C-196/08)

In this judgment, which concerned the award of a service concession for water supply, the ECJ held that primary law does “not preclude the direct award of a public service to a semi-public company”, provided that it was formed “specifically for the purpose of providing that service” and that it possessed “a single corporate purpose”. Furthermore, the private participant in the company had to be selected by means of an open procedure under the principles of the Treaty and “after verification of the financial, technical, operational and management requirements specific to the service to be performed”.

Econord SpA (C-182/11 and C-183/11)

In this case the ECJ clarified the conditions for the applicability of an in-house award. Public authorities can establish an entity with responsibility for carrying out their public service mission or they can entrust an entity to operate “in-house”. Those authorities must exercise over that entity control like the control they exercise over their own departments. These requirements are fulfilled where each of those authorities not only holds capital in that entity, but also plays a role in its managing bodies.

Undis Servizi Srl v Comune di Sulmona (C-553/15)

In this case the ECJ ruled that to assess whether the entrusted undertaking carries out the essential part of its activities on behalf of the local authorities which exercise joint control over the undertaking in the same way as they exercise control over their own departments, account must be taken of all the circumstances of the case, which may include any activity which the undertaking carried out on behalf of those local authorities before such joint control became effective.

Porin kaupunki (Case C-328/19)

In this case the ECJ pointed out that a cooperation agreement which confers on a municipality the competence to organise services for another municipality, the commissioning municipality can be regarded as a contracting authority. It is also authorised to commission an in-house facility, without prior competitive tendering, with services which cover not only its own needs but also those of the commissioned municipalities, whereas without this transfer of competence these municipalities would have had to provide for their own needs themselves.

Public-public cooperation

Commission v. Germany (C-480/06) and Coditel Brabant (C-324/07)

In these two decisions the ECJ considered that **cooperation between public authorities for the provision of a public service** does not require applying public procurement procedures if such a contract concerns the implementation of a shared public service task. No particular legal form is required in order to carry out jointly this public service task. Control may be exercised jointly by those authorities. However, this must take place without participation of any private party. Also, the European Parliament regarded cooperation as falling outside the scope of the public procurement directives, provided that the following criteria (also laid down in the so called Rühle-report of the European Parliament) are all met:

- the purpose of the partnership is the provision of a public service task conferred on all the local authorities concerned,
- the task is carried out solely by the public authorities concerned, i.e. without the involvement of private individuals or undertakings, and
- the activity involved is essentially performed on behalf of the public authorities concerned.

Azienda Sanitaria Locale di Lecce (C-159/11)

In this case the ECJ confirmed that the subject of the cooperation between public authorities must be governed solely by considerations to the pursuit of objectives in the public interest.

Econord (C-182/11)

In this case the ECJ held that the joint control of an undertaking by more than one public authority must comprise not only a capital shareholding but each public authority must also “play a role” in the “managing bodies” of the undertaking.

The economic activity of public undertakings

The economic activity of public undertakings is closely linked to Article 106 TFEU. Its requirements refer to the theory of market failure. The European Commission clarifies that the market sometimes fails to achieve the socially desirable results. This leads to a situation where services are not provided to a sufficient extent and in such cases public sector intervention may be necessary (Report to the Laeken European Council - Services of general interest (COM(2001) 598 final, point 3)).

Furthermore, the Court of Justice has stated that this provision is intended to reconcile the interest of the Member States in using certain undertakings as an instrument of economic or social policy with the Community's interest in ensuring compliance with the competition rules and preserving the unity of the common market (cf. Judgments of 21 September 1999, Albany (C 67/96, EU:C:1999:430, para. 103), of 20 April 2010, Federutility and others (C 265/08, EU:C:2010:205, para. 28), and of 21 December 2011, ENEL (C 242/10, EU:C:2011:861, para. 41). Assessing the economic activity of undertakings is essential knowing that this will determine whether or not competition rules apply to a provider of SGIs. As a consequence, it can also be seen as a way to delimit the market. Several cases define in the following what an economic activity is.

Merzi convenzionali Porto di Genova (C 179/90)

In this case the ECJ ruled that the exemption from the rules of the Treaty provided for in Article 106(2) TFEU can only be applied if the undertaking has been entrusted by public authorities with a service of general economic interest. Furthermore, the implementation of the rules of the Treaty must prevent the performance of the particular task assigned to that undertaking and must not harm the interests of the Union.

Höfner and Elser (C-41/90)

In this case the ECJ established that an undertaking is “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”. This clarified that the economic activity of an undertaking is regardless of the legal status of an entity - whether it is private or public. Both private and public undertakings are subject to EU law.

Ambulanz Glöckner (C-475/99)

In this case the ECJ confirmed the Höfner case and ruled that public service obligations cannot prevent the activities of an undertaking to be regarded as economic activities, even if the undertaking is a non-profit-making undertaking.

FENIN (C-205/03)

This case clarified the definition of an economic activity of an undertaking. The ECJ confirmed that any undertaking that is economically active is subject to EU law, regardless of its legal status and its funding. An economic activity is further characterized by offering goods and services on a market. An undertaking is not economically active if it is merely buying goods or services on a market.

Poucet and Pistre (Joined Cases C-159/91 and C-160/91)

These cases clarified that activities that are of a purely social nature (which means that they fulfil an exclusively social function, e.g. the activities are based on the principle of national solidarity and they are entirely non-profit-making) are non-economic activities. However, a social objective is not sufficient to characterize the social nature of an economic activity.

Albany (C-67/96)

In this case the ECJ recognized that disadvantages arising from public service obligations can justify exclusive rights or compensation payments.

Proportionality

The principle of proportionality concerns Art. 106 TFEU and strives for a balance between the performance of the public service task and competition rules by limiting any exemption from the competition rules to what is absolutely necessary in order to guarantee the effective fulfilment of SGEIs. Public authorities must clearly define their “particular task” (the principle of transparency). On that basis, they may define appropriate means for the proper accomplishment of the “particular task” (principle of proportionality), which may include necessary, justified and proportionate aids and subventions, exclusive or special rights. These definitions should clearly establish the objectives of a high level of quality, safety and affordability of services based on equal treatment and the promotion of universal access and of user rights.

Corbeau (C-320/91)

In this case the ECJ confirmed that any restriction of competition might be necessary to enable the undertaking to perform the task under economically acceptable conditions. The Court further held that the possibility to offset less profitable sectors against the profitable sectors justifies a restriction of competition in economically profitable sectors.

State aid and SGEIs

Altmark Trans (C-280/00)

In the Altmark case the ECJ clarified that public service compensations are not to be considered as State aid when certain cumulative criteria are met (grounds 89 ff.):

“First, the recipient undertaking must actually have public service obligations to discharge, and the obligation must be clearly defined. [...]

Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner [...].

Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations [...].

Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of

providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.”

In this context however, inland transport is subject to special rules as Reg. [1370/2007](#). In general, this case shows that the ECJ believes that the assignment of an SGEI following a procurement procedure presumes the least cost for the public authority.

Chronopost (C-83/01)

Somewhat contrary to the Altmark-ruling the Court in this case denies the comparability of a national postal organisation with private operators due to the fact that in practice in this case there is no market for universal networks. Furthermore, the Commission argued that the costs of SGEI may cover: all variable costs, an appropriate contribution to fix costs and a return on the capital assigned.

Enirisorse (C-34/01)

In this case the ECJ established that the Altmark criteria must in principle be applied to all cases of compensation payments with regard to public services.

BUPA (T-289/03)

In this case the ECJ confirmed the wide discretion of Member States to define services of general economic interest and established that the European institutions are restricted to the control of manifest errors. The prerogative of the Member States is justified by the absence of competences and the absence of a clear definition of SGEIs at the European level. Furthermore, the ECJ held that SGEIs must have a universal and compulsory nature, they must assume a general or public interest and they have to be entrusted to an operator by a public authority act. The compulsory nature comprises either special or exclusive rights, or the fact that the operator entrusted with the services has the obligation to provide the service, which means that the service provider is obliged to contract the other party. However, this universal nature is neither hampered by the fact that it is offered only in a restricted area or to a restricted group of people nor by the fact that this service is being reimbursed.

Aanbestedingskalender BV (T-138/15)

In this case the ECJ concluded that the first activity — the economic significance of which and the possibility that private companies could be tasked — was an economic activity, whereas the task of ensuring that such products were properly transformed and disposed of, which was incumbent upon the competent public authorities themselves, was a task forming part of the exercise of public powers. Consequently, the Commission was entitled to find that the activities performed by TenderNed were not economic in nature and that the measure at issue in the present case did not involve State aid within the meaning of Article 107(1) TFEU.

AB „Achema“, AB „Orlen Lietuva“, AB „Lifosa“/Valstybinė kainų ir energetikos kontrolės komisija (VKEKK) (C-706/17)

Where distribution and transmission system operators receive funds to finance services of general interest in the electricity sector in order to compensate for the losses they have incurred as a result of the obligation that this compensation constitutes an advantage within the meaning of Article 107(1) TFEU granted to the electricity producers.

Public Procurement

Remondis GmbH v Abfallzweckverband Rhein-Mosel-Eifel (C-429/19)

In this case the ECJ ruled that Article 12(4)(a) of Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that cooperation between contracting authorities cannot be presumed to exist where a contracting authority fulfilling tasks in the public interest does not fully perform that task itself but entrusts another independent contracting authority.

Zweckverband Tierkörperbeseitigung v Commission (T-309/12)

In this case the ECJ made a distinction between e-procurement and ensuring that such procurement is not only feasible but will also be carried out in compliance with the statutory obligations imposed on contracting authorities.

Soft Law: Communications from the Commission

Introduction

This Chapter shows a summary of the main Communications (Soft Law) from the Commission with regard to services of general interest. By issuing Communications the Commission contributes to the debate on SGIs by delivering definitions of key terms and concepts, thereby displaying the Commission's view on SGIs. When examining this Chapter it can easily be seen that the Commission's perspective on SGIs has shifted from a more citizen-oriented view focusing on quality, accessibility, affordability and diversity across Member states (up until 2004) to a more market-oriented view with the focus on accessibility of public procurement markets for economic operators (2010-2012). Against the background of the new provisions of the Lisbon Treaty this must be seen very critically.

Communication on SGIs (COM(1996) 443)

This Communication is the first main contribution from the Commission to the debate of SGIs in Europe. Services of general interest are viewed to be at the heart of the European society, delivering high quality services at affordable price, but also forming part of the cultural identity in the European Member States. The central idea is the interest of the public. They are "shared values" that however are translated differently across Member States with regard to their organisation (public, semi-public, private) due to geographical or technical constraints, the political-administrational structure as well as historically rooted traditions. This diversity is said to be a "challenge" to European economic integration, but the European Commission also "respects" diversity as a clear example of subsidiarity. The challenge lies in balancing general interest objectives with the requirements of the internal market. According to the principle of proportionality this balance is seen in the "best match between the duty to provide general interest services and the way in which the services are provided, so that the means used are in proportion to the ends sought." Non-economic services are the prerogatives of the Member States. The Commission then promotes a combination of sector-specific approaches (telecommunications, postal services, transport, electricity, and broadcasting) together with European measures like enhancing the interoperability of trans-European networks.

Communication on SGIs (2001/C 17/04)

In this Communication the Commission defines three principles that guide Art. 106 TFEU: the principle of neutrality, the principle of the freedom to define SGEIs and the principle of proportionality. This means the EU is neutral with regard to the public or private ownership of undertakings, Member States have a wide discretion with regard to the definition of SGEI and the EU's competences in this context are restricted to the control of manifest errors. The principle of proportionality strives for a balance between the performance of the public service task and competition rules by limiting any exemption to what is absolutely necessary in order to guarantee the effective fulfilment of SGEI.

Green Paper on SGIs (COM(2003) 270 final)

This Green Paper is the first Green Paper to extensively cover services of general interest with the main focus on three issues:

- The shared responsibilities between the Community and the Member States, including regional and local administrations, in the light of subsidiarity;
- The question of whether the Commission should follow a sector-specific approach or rather draw up a general framework;
- The distinction between economic and non-economic services.

The outcomes were summarized in the White Paper of 2004 (see below).

White Paper on SGIs (COM(2004) 374 final)

The White Paper on services of general economic interest highlights that high quality and affordability of SGIs are an essential component of the European model of society and that they are a *shared responsibility* of the European Union and the Member States. The debate on the Green Paper showed that it was not necessary to give the Commission additional legal powers in the area of SGIs. The Commission therefore decided not to issue a framework directive on SGIs for the time being. The definition of the public service obligation is the relevant public authority's task. It further states that "the Commission is committed to taking full account of the specific role of services of general interest in the policies and activities falling within its sphere of competence", respecting "the diversity of traditions, structures and situations that exists in the Member States". The Commission is therefore guided by the following principles:

- Enabling public authorities to operate close to the citizens
- Achieving public service objectives within competitive open markets (compatibility of high quality, accessibility and affordability with the internal market)
- Ensuring cohesion and universal access
- Maintaining a high level of quality, security and safety (including incentives for long-term investments and the protection of the environment)
- Ensuring consumer and user rights
- Monitoring and evaluating the performance (impact assessment and regular evaluation of policies)
- Respecting diversity of services and situations (the different needs and preferences of users and consumers resulting from different economic, social, geographical or cultural situations)
- Increasing transparency
- Providing legal certainty (in particular in the field of State aid rules)

Communication on PPPs, Public Procurement and Concessions (COM(2005) 569 final)

This Communication draws policy conclusions from the PPP Green Paper consultation. It concludes that concessions and IPPPs require a follow-up EC regulation or interpretative communication at this stage in terms of providing for legal certainty. The Communication, such as later in 2007 (see below), lacks the examination of situations where public authorities had already entered into a public-private partnership in the past. Furthermore, the Communication does not properly take into account the character of IPPPs since it is not a

sub-case of public procurement but instead an instrument in order to use the cooperation of private capital, technology and management with public know-how and responsibility that needs the right incentives. Moreover, the “in-house” approach by the Commission (and the ECJ for that matter) is too strict and complicated resulting in high transaction costs when applying them on the ground.

Communication on Institutionalised Public-Private Partnerships (IPPP) (C(2007)6661)

In this Communication the Commission highlights that insofar as a private partner engages in economic activities which qualify as a public contract or concession, EU rules for these kinds of contracts apply. IPPPs are understood as “cooperation between public and private parties involving the establishment of a mixed capital entity which performs public contracts or concessions”. Mere capital investments are not considered to be IPPPs. The Commission then examines the founding process and decides if it is necessary to apply Community law either in the selection process of the private partner or in the awarding process of a public contract or concession (not both). As already in 2005 (see above), the Communication completely lacks the examination of situations where public authorities had already entered into a public-private partnership in the past without tendering procedures, because at that time these particular rules did not exist. The implications and consequences of future EC regulation in this field, especially in terms of financial burdens on the local authority is not taken into account at all. In this context, for example the importance of transition periods should be discussed.

Communication on SGIs (COM(2007) 725 final)

This Communication named “Services of general interest, including social services of general interest: a new European commitment” accompanies the Communication on the “single market for 21st century Europe” (COM(2007) 724) and highlights the role of Protocol No. 26 as a broad agreement between stakeholders with regard to SGIs. In particular, the “joint responsibility” of the Union and the Member States is put forward. The Commission concludes: “The Protocol and revised provisions in the new Treaty (...) mark a new European commitment. Ten years after the first Communication at EU level, three years after the White Paper, they reflect the broad consensus across the EU about the role and responsibilities of the EU. Now that the EU framework has been consolidated by the Protocol, it is time to focus on implementation.”

The Communication also discusses the particular situation of social services as basically not falling under EU competition rules. However, it is also stated that more and more social services are considered economic in their nature and therefore fall within the scope of EC law.

Communication Towards a Single Market Act (COM(2010) 608 final)

The Commission communication “Towards a Single Market Act” aims at promoting “a highly competitive social market policy in order to restart an unfinished process of integration and realise our potential for growth in the service of human advancement”.

The Communication highlights some major issues with regard to SGEIs like quality, the extension of universal service obligation to new areas, pensions, professional qualification, public procurement, concessions and taxation. Although the Communication aims at establishing a real social market economy, it is only concentrating on competition law and does not take into account that SGEIs need to be granted a solid

foundation within a renewed concept of the single market, because they are a basic pillar for the success of this market.

Green Paper on the Modernisation of Public Procurement (COM(2011) 15)

This Green Paper introduced the modernisation of EU public procurement rules, as presented in the chapter on secondary law. In this Green Paper the Commission announces that it wants to enhance a more accessible procurement market in the EU by modernising public procurement rules in order “to create a truly European procurement market”. It is stated that one of the main objectives of EU public procurement legislation is to enable economic operators to compete effectively for public contracts in other Member States. Some key issues, like in-house and horizontal cooperation are raised, but not solved. The Communication even adds to the confusion since it declares in-house to be a form of cooperation, which it is not. Furthermore, the Commission promotes “intelligent procurement aimed at maximizing competition”, where contracting authorities design their public tender in a way that promotes competition, but without clarifying what this shall mean in practice. It is further suggested that contracts to be awarded without a competitive procedure on the basis of exclusive rights should only be allowed to be exempted from procurement rules if these exclusive rights have also been subject to a competitive procedure. The Communication also stresses that the Europe 2020 objectives should be incorporated in public procurement rules, but without stating how.

For the field of concessions, the Green Paper shows the main approach by the Commission, namely, to use public procurement rules for the sole purpose of enhancing competitors’ access to hitherto protected “concession markets”. By not addressing major issues that arise e.g. effects on self-government, quality or social cohesion, the Commission neglects previous Communications and some main provisions of the Lisbon Treaty with regard to the provision of SGEIs (e.g. Art. 3 and Art. 4 TEU, Protocol No. 26).

Communication on the Reform of EU State Aid Rules on SGEIs (COM(2011) 146 final)

This Communication introduced some of the key concepts of State aid rules with the aim of starting a debate on the reform of the “Altmark” and “Monti-Kroes” packages. It summarises previous definitions of SGIs and SGEIs (see below). The definition of non-economic services not subject to EU competition law is however narrowed down to services linked to state prerogatives or services with an exclusively social objective.

Communication on a Quality Framework for SGIs (COM(2011)900)

This Communication attempts to set a “framework” for SGIs with the aim of legal clarification, ensuring access and promoting quality, thereby announcing the revision of State aid rules, the reform of public procurement and concessions, information actions on how to apply EU rules, suggestions on sectoral legislation like postal services and banking, transport, energy and universal service in e-communications and attempting to define “quality” with regard to social services.

In this Communication the Commission tries to clarify some key terminology. SGEIs are defined as economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety and affordability, equal treatment or universal access) by the market without public intervention. Doing so, the Commission follows the theory of market failure only. This theory is not able to explain the whole reality of services of general interest where for instance environmental,

social or urban development aspects have to be taken into account. Furthermore, it cannot explain the democratic and constitutional-organisational dimension concerning SGEIs within the Member States. Therefore, it is not enough and even counterproductive to only refer to the existence or the further extension of universal service obligations.

The Commission further states rightly that the current economic and financial situation has highlighted more than ever the fundamental role of services of general interest in the European Union in terms of social cohesion. By concentrating only on the aspect of social cohesion the Commission fails to take into account other important aspects like a changing demography and the growing split between wealthy parts of the society on the one hand and impecunious parts of the society on the other. Furthermore, the Commission does not take account of the fact that services of general economic interest provided traditionally by authorities or local public enterprises have had a stabilizing role within the current crisis.

Moreover, the Communication refers only to Article 14 TFEU and Protocol 26 which does not give the full picture. The legislative framework for SGIs is based on several other Treaty provisions that should be part of such a legislative framework. Because of its incomplete scope, the set of actions proposed by the Commission is necessarily not broad enough.

Finally, “in-house” is defined as an exception to the rules of public procurement. However, the provision of services in the public sphere should not be considered as an exception to the rules. In order to comply with Community rules on subsidiarity, Member States, including regional and local authorities, must remain free to decide how to organise the provision of SGIs.

The Almunia Package: Communications on State Aid and SGEIs (2012/C 8/02; 2012/C 8/03)

State aid is usually granted for the compensation of the provision of public services and is therefore closely linked to the provision of SGEI. EU State aid rules generally aim at the prevention of over-compensation and at the prohibition of state funding affecting trade between Member States.

The Almunia Package is a reform of previous decisions, regulations and communications (“Altmark package”, “Monti-Kroes” that will not be covered in this chapter) and consists of: 1) an interpretative communication that clarifies the definition of State aid and the meaning of the four Altmark conditions, 2) a decision exempting certain compensation payments, 3) a communication framework with criteria for notification of compensation payments, and 4) a *de minimis* Regulation, stipulating an exemption for compensation payments up to a threshold of 500,000 EUR for over 3 years (for point 2 and 4 see above: Secondary law on State aid).

The two Communications (point 1 and 3) attempt to clarify key concepts underlying State aid rules. The Commission first summarises some key terms: State aid rules apply where the recipient of the public service compensation is an undertaking. An undertaking is an entity engaged in an economic activity. The economic activity is the only relevant criterion for determining whether an entity is an undertaking. An economic activity is any activity consisting in offering (not just purchasing) goods and services on a market, regardless of whether this is for the purpose of generating profit or non-profit (see Case Law above). The existence of a market is defined by the fact that there possibly could be other undertakings willing or able to provide the service.

In this context, the Commission confirms that SGEIs are “rooted in the shared values of the Union” and “play a central role in promoting social and territorial cohesion.” Furthermore, “in the absence of specific Union rules, Member States are generally free to determine how their SGEIs should be organised and financed.” The

Commission's competence is restricted to checking whether the Member State has made a "manifest error" when defining SGEIs.

Certain public service compensations do not constitute State aid. This is the case when the four cumulative Altmark criteria are met (see above). In particular, this requires the definition of an SGEI task to which certain public service obligations are attached by means of an entrustment act.

The Commission considers that it would not be appropriate to attach public service obligations to an activity which can be provided satisfactorily by other undertakings under "normal market conditions". Therefore (this is the fourth Altmark criterion), the compensation offered must either be the result of a public procurement procedure or the result of a benchmarking exercise with a typical "well run" undertaking. The benchmark for compensation in the absence of public procurement could be "market remuneration" (comparison with the costs on the market) or "analytical ratios representative of productivity". Otherwise, State aid has to be notified to and approved by the Commission.

The procedure must allow for the selection of the undertaking providing the service at the least cost to the community. The least cost means either providing the service at the lowest price or the "most economically advantageous tender"; social and environmental criteria must be "closely related to the subject-matter of the service".

Where activities are said to have a purely local character, they are considered not to be affecting trade between Member States, e.g. swimming pools, local hospitals, local museums or local cultural events. This perception is right and it should be explored how to extend this finding to all situations where authorities have decided to provide services only at local or regional level.

Although the Almunia package was designed to clarify key issues of State aid, it is rather just a summary of the existing rules which themselves are still very confusing. State aid rules sometimes do help to uncover over-compensation. But State aid rules as of now also have the negative effect of public money being spent inefficiently, since in practice there is still a huge lack of understanding, especially at the level of local administrations. Following on from that, aid is either not applied for, expensive attorneys are commissioned in order to have it verified whether aid is granted on a legally sound basis and public procurement procedures are conducted without necessity. Thus, there is still a need for simplification of State aid rules that set the right incentives.

Commission Working Document on State aid, SGEIs and SSGIs (SWD(2013) 53 final)

This Commission Working Document is another summary of State aid rules on SGEIs with a specific focus on social services of general interest (SSGIs). It summarises the existing State aid rules, but also gives a summary of the proposed revised rules on State aid and SGEIs (see above).

According to this Document, SSGIs are not per se exempt from internal market rules. As soon as they constitute an *economic* activity, they are covered by the internal market rules. *Non-economic* services are interpreted in a rather strict way; in particular they concern activities related to the exercise of State prerogatives and activities of a purely social nature. When assessing the economic nature of an activity it is not relevant whether the entity aims at a profit or is non-profit. It is rather stated that "all services provided for remuneration must be classified as economic activities". This is why the concept of an "economic activity" is so important when assessing EU rules on SGIs (further reference is made throughout the glossary, see index).

The document further highlights the wide discretion of Member States to define SGEIs, but also gives examples where the ECJ has held that Member States have conducted “manifest errors” when defining SGEIs. More importantly it states that “the effect on trade does not depend on the local or regional character of the service supplied”. It thereby confirms its view that decisions of the past, where certain local services (e.g. swimming pools, museums) were deemed to have no effect on cross-border trade, are case-by-case decisions. It is further stated that as soon as there is an operator from another Member State only possibly “interested” in providing the SGEI in question, there is a potential effect on trade between Member States which would justify the application of the internal market rules. It is also stated that a “public contract or concession has a cross-border interest if it is of interest to economic operators situated in other Member States of the European Economic Area. It is up to the public authority to evaluate the potential interest of the contract for economic operators located in other Member States on a case by case basis, unless national law provides specific guidance”.

Many other practical and more detailed questions, e.g. with regard to classification of a service as SGEIs, the act of entrustment, the Altmark ruling, the main changes due to the new *de minimis* rules, the Decision exempting certain social services, the new Framework (e.g. compatibility conditions and compensation mechanisms), the relationship between State aid and EU funding or State aid and public procurement as well as the applicability of the Services Directive to SGEI are covered by the Working Document.

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