

## **SGI and the Treaty of Lisbon signed on 13<sup>th</sup> December, 2007**

The Treaty of Lisbon, signed on 13<sup>th</sup> December 2007 by the Heads of State and Government of the 27 Member States of the European Union and which will come into force after ratification by each State, amends the two treaties, that of the European Union (EUT) and that of the European Community, which becomes the Treaty on the Functioning of the EU (TFEU).

In many areas this “reform” Treaty retains a number of proposals from the Convention on the future of Europe and from the “Treaty establishing a Constitution for Europe” of 2004. However, in some other areas it lags behind reflecting, in particular, the redefinition of the role and powers of Member States and an impediment to any further Europeanisation.

With regard to services of general interest, the Treaty includes more significant innovations as compared to the current situation with, the article 14 of the TFEU, the legal status of the Charter of Fundamental Rights and a Protocol annexed to both treaties, provisions that complement each other.

These provisions represent additional stronghold bases to secure services of general interest, their objectives and their varied forms of organisation.

### **1 / Article 14 of the Treaty on the functioning of the European Union embraces progress achieved with Article III-122 of the Draft of the Constitutional Treaty of 2004:**

- it is, explicitly, a legal base for a secondary law,
- this secondary law concerns Parliament-Council co-decision, and not that of the Commission alone (as is the case under the current Article 86),
- it explicitly makes reference, twice, to the powers and rights of Member States and their communities (reference to Article 4),
- it should apply in all EU policies, including those on the internal market and competition “provisions of general application”),
- it specifies the legal legislative tool and regulations, which are immediately and directly applicable throughout the EU without any form of national "transposition".

**Article 14** : Without prejudice to Article 4 of the Treaty on European Union and to Articles 73,86 and 87 of the Treaty on the functioning of the European Union and, given the weight of services of general economic interest in the shared values of the Union as well as their role in promoting the union’s social and territorial cohesion, the Union and its Member States, each within their respective powers and within the scope of application of this Treaty, shall ensure that such services operate on the basis of principles and under such conditions, particularly economic and financial, which enable them to fulfil their missions. The European Parliament and the Council, acting through regulations that are in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions, without prejudice to the competence of Member States and in compliance with the Treaties, in order to provide, commission and fund such services.

### **2 / The legal value of the Charter of Fundamental Rights:**

The new Article 6, paragraph 1 of the EU Treaty states that “*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 adapted at Strasbourg<sup>1</sup>, on 12 December 2007, which shall have the same legal value as the Treaties*”.<sup>2</sup>

**Article 36 of the Charter of Fundamental rights**: “The Union recognises and respects access to SGEI 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”.

<sup>1</sup> OJEU C 303 of 14.12.2007.

<sup>2</sup> Except for Poland and The United Kingdom.

### 3 / The Protocol on SGI annexed to the two treaties:

The Protocol on Services of General Interest (no. 9), will be annexed to the treaties on the European Union and on the functioning of the EU, with the same legal value as both treaties since it will be an “integral part”<sup>3</sup> of them.

The Protocol is the outcome of the demand by the Dutch Prime Minister made at the European Council of June 2007, which adopted the contents of the reform Treaty, in reaction to a letter of formal notice from the European Commission regarding the organisation of social housing in the Netherlands.

In 2005, the European Commission had considered that classifying under SGEI the housing system then prevalent in the Netherlands, was an obvious mistake because it operated well beyond the social dimension expected of a “public service”: “renting out houses to households other than those that are socially disadvantaged cannot be regarded as a public service.” Given that structural overcapacity is not necessary in carrying out a public service, it constitutes an obstacle to competition in the real estate market and, therefore, the Netherlands had to sell the housing units in question.

In doing so, the European Commission adopted a narrower view of missions of general interest and public service obligations, questioning decision making powers of Member States and giving primacy to the application of competition rules over missions of general interest.

It is in order to avoid such digressions, which could in future affect a wide range of sectors or activities, that the Dutch Government introduced the Protocol and made it a condition of acceptance of the reform Treaty of Lisbon and its ratification in the Netherlands.

In contrast to the current treaties, it is not confined to services of general economic interest only, but includes all SGI, whether they are classified as economic or as non-economic.

Where a service is defined as “non-economic”, Article 2 clearly specifies that the treaties “do not affect in any way the competence of Member States to provide, commission and organise” such a service.

Where a service is defined as “economic”, which is the case in a growing number of areas, Article 1 requires institutions to respect, all at the same time, “the essential role and the broad discretionary powers of the national authorities, regional and local authorities to provide, organize and enforce such a service”, the respect for “the diversity of services and the differences that may exist (...) because of geographical, different social or cultural situations”, as well as the principles of “quality and safety and concerning affordability, equal treatment and the promotion of universal access and of user rights”.

#### **Protocol on services of general interest (annexed to the treaties)**

*“The high contracting parties, wishing to emphasise the importance of services of general interest Have agreed upon the following interpretative provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the Union:*

**Article 1:** *The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the functioning of the EU include, in particular:*

- *the essential role and the wide discretionary powers of national, regional and local authorities in providing, commissioning and organizing services of general economic interest in a way which responds, as closely as possible, to the needs of the users;*
- *the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;*
- *a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights;*

**Article 2:** *The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.*

Thus, the Treaty of Lisbon reflects a significant step forward compared to the existing treaties in that it creates new opportunities to ensure and secure the services of general interest. However, it will take strong political pressure to ensure that these potentials result into concrete actions.

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<sup>3</sup> Article 49 B of EUT.