



**Comité européen de liaison
sur les Services d'intérêt général**

**European Liaison Committee
on Services of General Interest**

**Europäisches Verbindungskomitee
"Dienstleistungen von allgemeinem Interesse"**

Secrétariat / Secretariat / Sekretariat : RESEAUX SERVICES PUBLICS

E-mail : celsig@celsig.org

Web Site: www.celsig.org

16, avenue Boileau
B-1040 BRUXELLES
BELGIQUE

Tél : + 32 2 739 15 30
Fax : + 32 2 739 15 39

European Seminar

Services of General Interest(SGI) Challenges of the European elections of June 2009

Thursday 13th November 2008

At the Committee of the Regions

Brussels

CONTENTS	Page
Seminar programme	3
Summaries :	
Statement by Jean-Louis DESTANS, Committee of the Regions	4
Statement by Stéphane RODRIGUES, University of Paris I	4
Statement by Francis DONNAT, Maître des requêtes at the French State Council, Referendary Counsellor at the EC Court of Justice	4
1 st debate	5
Statement by Inge REICHERT, CEEP	5
Statement by Claire ROUMET, Platform of European Social NGOs	6
2 nd debate	6
Introductory report by, Jean-Claude BOUAL, Secretariat of the CELSIG	6
Questions to Members of Parliament	7
Answers from representatives of parliamentary groups	7
Conclusions, Pierre BAUBY, Secretariat of the CELSIG	7
ANNEXES	
I. Statement by Jean-Louis DESTANS	8
II. Statement by Francis DONNAT	10
III. Statement by Jean-Claude BOUAL	17
IV. Statement by Pierre BAUBY	19

PROGRAMME

Morning : 9:30 to 12:30 am

Opening : Jean-Louis DESTANS, Committee of the Regions

1st session : From Rome to Lisbon : the evolution of Community law on SGI

Presidency : Raymond HENCKS, European Economic and Social Committee

A/ SGI – SGEI – SSGI - NESGI : State of Community law

Rome and Amsterdam Treaties, Charter of Fundamental Rights, Potentialities of the Treaty of Lisbon (Article 14 TFEU, Protocol annexed to the two treaties)

Clarifications : - Stéphane RODRIGUES, University of Paris I
 - Francis DONNAT, Maître des requêtes at the French State Council,
 Referendary Counsellor at the Court of Justice of the European Communities

B/ Constraints and opportunities of the Community law for actors of SGI

Round table :

- Inge REICHERT, CEEP
- Carola FISCHBACH, EPSU (apologised)
- Claire ROUMET, Platform of European Social NGOs

Afternoon : 2 to 5 pm

2nd session : SGI : European Parliament election in June 2009 : What political will ?

Answers from European political groups to questions from citizens, at the eve of the elections to the European Parliament, of the designation of the President of the European Council and of the new European Commission.

Presidency : Barbara SAK, CIRIEC

Introductory report : Jean-Claude BOUAL, Secretariat of the CELSIG

Questions from representatives of the civil society and stakeholders (EAPN, EPSU, ESC, Platform of European Social NGOs, European Public Health Alliance (EPHA), European Disability Forum, Public Service Group of the Belgian Social Forum OMC/AGCS, etc.)

Around three areas of interest : access for all to quality SGI, the democratisation of regulation and evaluation involving all actors, SGI/internal market/subsidiarity/competences of public authorities

Answers from representatives of parliamentary groups in the European Parliament

Dimitrios PAPANIMOU (GUE/NGL group), Joël HASSE-FERREIRA (ESP group), Pierre JONKHEER (the Greens) Bernard LEHIDEUX (ALDE group), Edit BAUER (EPP group)

Floor debate

Conclusions : Pierre BAUBY, Secretariat of the CELSIG

(Working languages EN, FR, DE)

Statement by **Jean-Louis DESTANS**, summary, Committee of the Regions.

After acknowledging the merits and the perseverance of CELSIG in upholding the issue of public services for the past fifteen years, Mr. DESTANS stressed that as far as the Committee of the Regions is concerned, the poor record of the current Commission since 2004, should be taken into account when installing the next Commission in 2009.

He believes that the current economic and financial crisis should be utilised to promote the call for a European legal framework with regard to SGI.

“In concrete terms, we think that the legal framework that we are calling for could be based on the future Article 14 of the Lisbon Treaty on the Functioning of the European Union, and could take the form of a proposal for a Regulation on SGEI which, without presuming to regulate everything, would aim to pave the way for what could be a genuine "package" of consistent and innovative legislation on such matters as users' rights, the quality and evaluation of SGEI; the awarding of public service contracts; SGEI funding; the relationship between SGEI regulatory authorities; and the status of social services of general interest”.

According to him, acknowledging the transversal nature of the problematics of SGI is likely to lead to the political opening of the debate and to a wide grouping of opinions. For the Committee of the Regions, the transversal approach covers issues of State Aid, social economy, political cohesion, which, in the Lisbon Treaty (Article 14 TFEU), includes territorial cohesion as well.

SGI - SGEI - SSGI - NESGI: The state of Community law.

Statement by **Stéphane RODRIGUES**, summary, University of Paris I.

The debate on SGI dates back to the 80s with the development of the Internal Market.

The first difficulty was conceptual and emerged right from the preparatory work of the Treaty of Rome since, the term ‘public service’ covers different aspects according to the country. The Treaty of Rome deals with public services by way of derogation as regards aid for transport or with "services of general economic interest" regarding competition rules.

The debates that preceded the Treaty of Amsterdam (1997) led to the adoption of a new Article 16, which provides for the concept of SGEI, with an additional element: the sharing of responsibilities between the EU and Member States to ensure that SGEI are able to accomplish their missions. A Declaration annexed to the Treaty refers the undertaking of defining principles for the proper functioning of SGEI to the EC Court of Justice. Despite its legal shortcoming, the new article has made it possible to Europeanise debates on SGI.

The Treaty of Lisbon brings about further advances: an Article 14 (TFEU) that complements the aforementioned Article 16 by adding a statement that provides for secondary legislation, a protocol on SGI annexed to the Treaty, the binding value of the Charter of Fundamental Rights.

Meanwhile, secondary law has evolved.

The liberalisation and the opening to competition of network services have been accompanied by measures to consolidate a core of public services. This core may seem small, but it is part of an evolution common to 27 Member States, and in some cases may go beyond what exists in some countries (e.g. the term "affordable" goes beyond the legal content in France).

Over time, new concepts have emerged and have further complicated the debate: public service obligations (in transport), universal service, service of general interest, non economic service of general interest. Today, this debate, which focuses on social services of general interest and their economic or non-economic specificity, has become more complex, particularly on the “Services” directive

A twofold conclusion:

- Presently, the debate on SGI has become public, this is a good thing
- It is not yet over, neither politically nor at the level of the Community Judge

Statement by **Francis DONNAT**, summary, Maître des requêtes at the French State Council, Referendary Counsellor at the EC Court of Justice, speaking on his own behalf.

The case law reflects the texts it is intended to interpret, complex and evolving but not binary. In the absence of specific texts for SGI / SGEI, the ECCJ is obliged to subject public authorities and local communities to competition law, especially if the public service activities in question are jointly carried out with other partners. This is dubious, but only the Community legislature can set it right.

The Court has progressively defined the framework for SGI:

- Three categories of undertakings i / those that are considered normal and fully subject to competition and internal market rules ii / those carrying out SGEI and subject to the rules of competition iii / those which are exempted from such rules because they perform activities that are purely public or social. The Court rules on a case-by-case basis and not adopting a general approach.

- Qualification criteria for SGEI i / they are provided by an undertaking (however, a basic social security system, a health insurance company and the managing of a health system that is purely social were not considered by the Court as being undertakings) ii / such an undertaking has a business, industrial or commercial activity, consisting in providing goods or services on a market, regardless of the type of market, and, its activity is likely to be performed by any private operator iii / it should be invested by a public authority to which it must be linked closely enough. All these criteria are allowed by way of derogation from competition rules and any exception provided for in the treaty is fully applicable.

In recent years, the Court has gone a long way in improving the taking into account of the specificities of SGEI, allocation of exclusive rights or granting of a right to an incumbent operator whenever it is deemed necessary in the implementation of their mission in acceptable economic conditions; the obligation to provide an SGEI mission presupposes a possible compensation between profitable and less profitable sectors; the conditions governing State Aid; whereas exclusive rights could sometimes lead to the abuse of dominant position, it is not necessarily the case.

The case of *in house*. The two conditions are that the authority should exert control similar to that it exerts over its own services and the company should perform most of its activities within the community or communities owning it. Recent developments in case law show greater flexibility in the Court's approach and, in a judgment passed on the very day the Seminar is being held (C-324/07), it says that similar control may be jointly exerted by several public authorities. An ongoing case (C-480/06) on the legality of awarding a contract without calling for tender in case of vertical cooperation between local authorities for the activity of waste disposal, will be followed with interest.

1st Debate.

The general opinion is that the two speakers have illustrated the existence of a serious legal uncertainty with regard to SGI and that a firmer law is urgently needed, Court judgements are not sufficient.

From the answers provided to the questions raised, we shall mention here the following:

F. DONNAT * rejects the idea that Court rulings uphold the Commission's positions and, stresses that, on the contrary, the Court has always asserted that Member States have a margin for action * states that the Court is very cautious as regards exemption, it can rely only on Community legislation, even though case law may change it * the Charter of Fundamental Rights is an essential text for SGI * insists that the Court cannot refer to itself and specifies that it is the number of preliminary ruling being referred to the Court that has risen rather than the number of cases.

S. RODRIGUES * stresses that the Corbeau case marks a change in the interpretation of Article 86.2: before that, the accent was on the fact that companies could be exempted from competition rules, now the stress is more on how to ensure that they do abide by the treaty, in as far as doing so does not prevent them from performing their mission * calls attention on the interest of reading the opinion of the Advocates General who have often made very detailed analysis and have shown possible areas for research.*

Constraints and opportunities of Community law for the actors of SGI.

Statement by **Inge REICHERT**, summary, CEEP.

The current context is that of a number of challenges and difficulties whereas, at the same time, the Treaty of Lisbon is pending.

How could one avoid interrupting the ongoing process of the modernisation of SGI while upholding their role? For companies in the liberalised sector, this implies stronger rules to ensure an equitable sharing of markets. For new sectors in the process of liberalisation, CEEP intends to remain watchful as regards the principle of subsidiarity. In all cases, policies that are being run affect companies as well as social and economic environments, which is a factor of insecurity. In covering an ever increasing number of areas, the Internal Market raises the question of the legitimacy of public authorities and that of companies concerned who, in most cases, are not invited in the preparation of the legislation.

However, is there need for a transversal legislative framework for SGI? CEEP has distanced itself from this idea. It considers that the question should be approached in the light of the new Article 14 (TFEU) and of the protocol on SGI which recognises SGI and their role in social and territorial cohesion. It is important to

explore their potential opportunities, assess the impact of any new Community legislative draft on SGI, and create an environment of confidence.

Statement by **Claire ROUMET**, summary, Platform of Social NGOs.

The quality of SSGI can be improved by using other tools that are lighter than the law, users' networks are demanding an approach through rights.

Among the constraints that the Community legislation imposes on SSGI, one may note that: in order to be considered as a social service, the service in question must be provided over a long period, however, Community law is not adapted to handling contracts extending over long periods, it therefore leads to shorter contracts and fragmentation; social cohesion is not an impediment to competition, as illustrated by the social housing in the Netherlands; some social services do not fall within the existing legislative frameworks. However, there are cases where the Community legislation brings about beneficial changes.

The European Platform of Social NGOs identified 9 principles for quality social and health services (at www.socialplatform.org). Their quality is essentially based upon the quality of employment, however, there is a gap between the need for the recognition of social workers and the necessity to implement flexicurity.

The current crisis (financial, economic, energy) renders necessary the reflection to bring forth new universal needs that are not addressed at the EU level, such as counselling services to reduce the energy costs or the energy divide, which pose a serious challenge for all citizens and are a source of employment and, regulation of access to mortgage credits and bank accounts.

2nd Debate

This debate was run on the key issues of legal uncertainty, the democratic evaluation of liberalisation over a 20 year period in terms of quality, employment, cohesion and the need to reflect on common and collective holdings.

SGI: European Parliament elections in June 2009: What political will?

Introductory report of the CELSIG, summary, by J-C. Boual, Secretariat of the CELSIG

On the basis of a twofold observation:

1. Contrary to what Mr Barroso argued in November 2007, the debate on SGI is not over, as can be illustrated by the recent European news: Second Forum on SSGI (Social Services of General Interest) organised by the French Presidency, on the 28th and 29th October 2008, from which emerged a proposal for a roadmap institutionalising the Forum on SSGI every two years, the drafting, by Member States, of a report concerning the Monti-Kroes package on the financing of the SGEI: the Commission's proposals to review conditions on the regulation of telecommunications and energy; court proceedings launched by the Commission against Germany and France on the use, by one local community, of services of another local community; consultation on the funding of public broadcasting by Member States, etc.

2. There are certainly many gaps in the European legislation on SGI that need to be filled, it is up to the legislature to do so (the Council and the Parliament) and it should not delay until the EC Court of Justice fills these "legislative gaps" through the case law. This implies that the Commission should make proposals on the shortfalls in matters regarding: the financing of SGEI, regulation, means for action and obligations for local communities and public authorities, as well as relations between them, conditions of the application of Article 86 paragraph 2 of the EC Treaty and the position of SGI regarding competition, the "in house" method of management, concession contracts and public-private partnerships;

CELSIG puts forward five proposals intended to structure the debate, allow for the necessary legislative improvements and overturn the Commission's refusal to propose transversal texts:

As regards the European Council: that the December Council include on its agenda the question of SGI in the context of the current economic and financial crisis and calls on the Commission to prepare proposals for transversal texts. This is the move made recently by CELSIG before President Sarkozy, the President of the European Council (letter available at www.celsig.org).

In view of the 2009 European elections: that SGI become a subject of debates and that, to this end, the contesting parties place them at the centre of their programs and campaigns.

In view of the appointment of the next European Commission by the next European Parliament: i / that the Parliament poses as a *sine qua non* condition for its vote, the commitment of candidates to the Presidency of the Commission to put SGI in the axis of priority work of the Commission ii / a commissioner of the future

Commission is made specifically responsible for SGI and given a proper administration structure iii / that a permanent intergroup on SGI be set up at the Parliament.

Main topics of questions addressed to members of Parliament, summary;

Poverty, exclusion and the guarantee of rights for everyone, access to energy for all, public banks, universal access to quality and affordable health care for all and not for only 1% concerned by the crossborder issue, the promotion of civil rights and equal opportunities for persons with disabilities (employment, transport, information) and the Roma, rebalance the Lisbon strategy on its social dimension, avoid the devastating effects of the mechanical application of Community law on SSGI (mandate, control of State Aid), a mandatory, pluralistic and counter-checked assessment, the participation of the civil society in debates on policies, the rebalancing of fundamental rights and competition law.

Answers from Members of Parliament, summary;

The EPP, which considers that on the issue of SSGI there should be no or very few obstacles in bringing together positions held by different groups, is in favour of a permanent parliamentary intergroup on SGI, however, the issue of a commissioner in charge of SGI seems not very realistic. No answer on the future President of the Commission.

Since ALDE is composed of different groups, B. LEHIDEUX spoke on his own behalf. The SGI will be at the centre of the campaign for the June 2009 elections and the proposals made by CELSIG will be examined. A permanent parliamentary intergroup on SGI is a good idea and perfectly feasible, however, a commissioner specifically responsible for SGI seems less effective than having SGI under the responsibilities of a commissioner who will have a wider portfolio and therefore weigh more.

CELSIG proposals will be submitted to the PES group which is preparing its electoral platform and is considering the possibility of presenting a candidate for the Presidency of the Commission. Creating a permanent intergroup in the EP is a perfectly viable idea, the feasibility and utility of a commissioner in charge of SGI appears less obvious.

The Greens voted against the Barroso Commission in 2004, but the election of the next president will depend on the political balance of power in the EP. Establishing a permanent SGI intergroup will provide means to ensure continuity and transversality among the EP committees and act as an interface with the civil society. The issue of a commissioner for SGI was not discussed by the Greens but, does not, *a priori*, seem convincing.

The GUE / NGL group is in favour of a transversal legislative framework on SGI and the setting up of intergroup for SGI in the EP. On the issue of the President of the Commission, it is ready to make clear agreements on the basis of specific commitments, however, rather than a "SGI Commissioner" the group considers that it is more appropriate to strengthen the Commissioner for social affairs and employment. It would like to see a specific protocol on "fundamental rights/market."

Conclusions, summary, by P. BAUBY, Secretariat of the CELSIG

In the field of SGI, the EU, which was first conceived as a common market, then as a single market, suffers from a congenital imbalance which, despite real progress, is yet to be resolved. It is therefore necessary to continue to fecundate the domestic market with quality SGI for all.

There is need for Community legislative initiatives to implement, without delay, Article 14 of the Treaty of Lisbon, by conducting a pragmatic approach aimed to resolve the problems that emerge from the grassroots; the sharing of powers and responsibilities between the EU and Member States to define, organise and finance the SGI, in order to clarify the principle of subsidiarity, interests of regulation, conditions for the setting up of community SGI; conditions for the implementation of Article 86; ensure secure funding for SGI based on the fact that compensation for PSOs are not State Aid; firmly establish the rights of users: accessibility, quality, universal service and, bring up new requirements at all territorial levels.

The proposals of CELSIG have started being discussed and it will be necessary to clarify them so that the year 2009, marked by European Parliament elections and the appointment of the new Commission, becomes that of political accountability for all actors, in order to resolve the current blockage.

This implies developing convergence between: political, legal and social battles, all stakeholders, Member States, sectors and local, national and community levels.

ANNEXE I

Statement by **Jean-Louis DESTANS**

Ladies and Gentlemen, friends

Thank you for this opportunity to speak to you, which continues a tradition of cooperation between the Committee of the Regions and CELSIG that began some years ago now, and which is not only bilateral but also takes place in other forums, such as the European Parliament, and includes other partners such as the European Economic and Social Committee, the European Trade Union Confederation, the European Centre of Employers and Enterprises providing Public services (CEEP) or even the European Federation of Public Service Unions (EPSU).

It is entirely to your credit that you are holding this conference.

First of all, I believe you can be credited with choosing such an opportune moment, albeit unintentionally, since when you set the conference date in April, you could hardly have anticipated that that we would be in the grips not only of a full-blown financial crisis but also a crisis of the real economy. However, the time is also opportune because it follows immediately upon the publication of the European Commission's 2009 work programme and therefore allows us to take stock of action taken by the Barroso Commission on public services during the last five years. And finally, it is also opportune because European political parties are currently arming themselves for an "ideological" battle at the European elections. The Liberals adopted their "manifesto" in Stockholm on 31 October, the Socialists will do so on 1 December in Madrid and, of course, other political movements will do so within similar timeframes.

But you must also be given credit for your perseverance in "forcing" the public services issue. Your efforts are all the more remarkable because you are not really battling the winds and tides but, rather, you are working under far more difficult circumstances; you find yourselves upon a sea of glassy stillness, where not a single ripple breaks the surface, not one. I use this metaphor to illustrate the Commission's inertia on this issue.

Indeed, in autumn 2008, we will be able to take initial stock of the Commission's achievements in the area of public services since 2004. And they are very poor. The documents which have had the greatest impact on public services during the last five years date back to the Prodi Commission: The Services Directive - the White Paper on services of general interest - the "Monti Package" following the Altmark judgement on the notification rules for State aid. The last Commission communication on services of general interest in November 2007 was even downgraded to the status of an appendix to another communication on the internal market, with such a low added value that the European Parliament did not even consider it worthwhile to issue a report on it!

That is why we hope that the "ostrich policy" towards public services will come to an end after the European elections of 2009.

However, a reading the European Commission's 2009 work programme¹ does not encourage this hope. In fact not one reference is made to public services in any variant (SGI, SGEI, SSGI ...).

With regard to the European political parties' electoral platforms, I have two things to say about two of the five major groupings:

The first is that the Manifesto of the European Liberal Party (ALDE) adopted in Stockholm on 30-31 October 2008 does not make any reference to the issue of public services.

The second is that, mainly as a result of amendments proposed by the Socialist Group at the Committee of the Regions, the latest version of the PES Manifesto for the European elections, due to be adopted at the PES Council on 1 December 2008 in Madrid, includes the following statement:

Chapter 2 – *"New social Europe - giving people a fairer deal*

12. We propose to establish a European legal framework for public services, guaranteeing universal and equal access for citizens, quality, local autonomy and transparency in public services, so that European competition and business rules do not run counter to citizens' rights. (...)²."

The current context, where the need for regulation of the market economy is once again gaining credibility, is certainly a favourable to this objective since it has become clear that market forces alone cannot guarantee an adequate level and quality of public services. Let us make the most of it!

I am not going to embark on a lengthy discussion of the need for a European legal framework for public

¹ COM(2008) 712, published on 5 November 2008, only available in English at this stage.

² 3rd version of the draft PES manifesto, internal document dated 7 November 2008.

services.

I shall just say a few words.

As the new Protocol on services of general interest appended to the Lisbon Treaty confirms, it is not up to the EU to interfere in the provision of these services. However, in order to consolidate the public authorities' perimeter for action at national, regional and local level and ensure the legal consistency of powers and definitions within this perimeter when, over the years, the liberalisation of various public service networks has been based on different rules, we are maintaining our call for the adoption of a European legal framework for public services.

In concrete terms, we think that the legal framework that we are calling for could be based on the future Article 14 of the Lisbon Treaty on the Functioning of the European Union, and could take the form of a proposal for a Regulation on SGEI which, without presuming to regulate everything, would aim to pave the way for what could be a genuine "package" of consistent and innovative legislation on such matters as users' rights, the quality and evaluation of SGEI; the awarding of public service contracts; SGEI funding; the relationship between SGEI regulatory authorities; and the status of social services of general interest³.

We are delighted that the final version of the PES Manifesto will probably contain a call for framework legislation on public services. Nevertheless, it seems clear to me that we cannot allow ourselves to be satisfied with this.

Not only do we need to mainstream the debate in the sense that we need to go beyond the call for framework legislation and raise awareness of other aspects in order to flesh out the claim, but we also need to rally a political majority behind an ambitious public services agenda.

Although socialists rightly see themselves as the frontline defenders of public services, the price to be paid for obtaining a political majority at EU level includes taking ideology out of the debate in order to avoid the impression that public services are a leftwing monopoly.

The political mainstreaming of the debate will be achieved through greater recognition of the cross-sectoral nature of public services in Community policies.

The cross-sectoral nature of public services covers State aid. A majority of members of the Committee of the Regions therefore back the call for a review of the Commission's approach to State aid for public services⁴. We reject a quantitative reduction in the volume of State aid as an objective because it is not appropriate to place emphasis on the global cost of State aid without distinguishing between the different types of aid and their respective benefits in terms of general interest. We also call for the "Monti-Kroes package" on the exemption from the notification rules for State aid to be reviewed in such a way as to ensure that it takes into account the specificities of public services.

Greater attention has to be paid to the social economy, which is a very significant sector of activity (accounting for 10% of all European businesses and 10% of all jobs) because it provides many services of genuine general interest. We feel that associations, mutuals and foundations need a recognised European legal framework in order to guarantee them equal treatment alongside other business models that already benefit from, or are moving towards, recognition of their status (the European cooperative society, the European company and the proposed European private company).

Finally, we call for greater recognition of the cross-sector nature of public services in cohesion policy.

With the exception of the protocol on services of general interest, the future Lisbon Treaty only refers to public services, or - to be precise - services of general economic interest, in Articles 14 and 106 of the Treaty on the Functioning of the European Union. But Article 14 refers to a new objective inserted in the Treaty: that of territorial cohesion. To give concrete form to this objective of territorial cohesion, the European Commission last week brought out a Green Paper.

So for us, the Socialist Group at the Committee of the Regions, it is essential that in the consultations on this Green Paper on territorial cohesion, a maximum number of contributions should take a look at the indissoluble link between the new objective of territorial cohesion and the concomitant requirements of quality and access to services of general interest.

Thank you for your attention.

³ See CoR opinion presented by Jean-Louis Destans (PES/FR) on 6 December 2006 (CdR 181/2006).

⁴ See CoR opinion presented by Gabor Bihary (PES/HU) on 16 November 2005 (CdR225/2005).

ANNEXE II

Statement by **Francis DONNAT**.

Maître des requêtes at the French State Council, Referendary Counsellor at the EC Court of Justice.

I would, first of all, like to thank the organizers of this seminar, the CELSIG, and the Committee of the Regions, for welcoming us here.

Secondly, I would like to clarify that although I am a Referendary at the Court of Justice of the European Communities, I am attending this Seminar on my own behalf.

Stéphane Rodrigues brilliantly depicted the evolution of the texts as well as their complexity. Obviously, the case law of the Court of Justice reflects the texts it interprets and applies. That is to say, it is equally complex and evolving. When considering the case law of the Court of Justice one should not bear a binary approach to issues, see issues in black or white, i.e. that there should be, on the one hand, services of general economic interest and, on the other hand, all the rest, since, in reality, real situations are more complicated than that.

Firstly, it is because there are three categories of undertakings: there are undertakings considered as ordinary, those which do not fall under services of general economic interest and are fully subject to competition rules and to the main freedoms; then there are companies that are given responsibility to provide a service of general economic interest, which companies are subject to competition rules in as far as it is practically possible; finally, and above all, though I am hesitant in affirming this, but I am sure you will understand what I mean by it, there are those that simply fall out of the definition of service of general economic interest because they carry out a purely public or purely social activity, in which case rules of competition and of the main freedoms do not apply at all.

Secondly, because the Court's case law is quite subtle on these issues. Stéphane Rodrigues has just explained that the normative law was often based on consensus and negotiations. Well, it might surprise you some how, but the Court's case law is also, sometimes, a case law of consensus. It is not always easy to standardise. In this instance also, it is not a matter of white or black but rather considering that there are some gray shades in between. The Court has consistently refused to provide an abstract definition of what a service of general economic interest ought to be, but has sought to rule on a case by case basis.

Finally, it is because the SGEI approach is not the only way by which the Court of Justice addresses what we shall call here the problematics of public service, in general. This is why, quite rightly, the organisers of this meeting asked me to also talk about different ways in which public authorities intervene, including local authorities since we are gathered here at the Committee of the Regions and discuss their relationship with the strict case law of the Court on the application of public procurement directives.

These will, essentially, be the two parts of my presentation.

I am of the opinion that, whereas the Court has progressively defined the concept and the framework for services of general economic interest, nevertheless, public authorities and, in particular, local communities are rarely exempted from competition rules when they are brought to jointly organise, with other entities, public service activities.

First part, the Court has progressively defined the notion as well as the regulatory framework for services of general economic interest.

The Court's case law has evolved along these two axes as regards both, the classification of such services as well as the scope of exemption to competition rules that this classification implies.

Let us first consider the classification of the service of general economic interest. Concerning this classification, the criteria are known. I shall recall them here: in order to be considered a service of general economic interest, 1) the service must be provided by a company 2) the company in question must pursue an economic activity 3) it must be assigned this mission by the State. These are the three criteria for companies providing a service of general economic interest. I shall review them one by one.

First criterion, there must be an undertaking

The Court of Justice, has consistently considered that the classification of companies is independent, it is a Community's classification and beyond national laws. The Court says that such company classification concerns any undertaking running an economic activity. The company status has thus been denied to organisations which manage basic social security cover (the so-called Poucet-Pistre judgment of 1993⁵), health insurance in Germany (the famous AOK judgment of 2004⁶) or, still, operators of a health system

5 Judgment dated 17 February 1993, cases C-159/91 and C-160/91.

6 Judgment dated 16 March 1994, cases C-264/01, C-306/01 and C-355/01

running a purely social activity, this concerns the Spanish health system, in the Fenin ruling of 2006⁷. In all these three cases, an operator running a basic social security activity, health insurance in Germany, an operator of a health system running a purely social activity in Spain, we are in structures that are completely outside the competition law, these are not companies, and therefore do not provide services of general economic interest, which would have been partially subject to this law. From this point of view, the Court has, contrary to what is believed, a rather pragmatic view of things. For instance, it refuses to make such a distinction between the management activity of a health service and an activity, by the same operator, involving the buying of medical equipment. It was argued before the Court that such an operator of health services should be considered as a company when buying medical equipment. The Court of Justice pointed out that, indeed, it was necessary to judge things on the activity per activity basis, but that when these activities were, in practice, inseparable, a global consideration has to be made and that, in such a case, the operator of health services would not fall under the classification of a company, for all its activities including the buying medical equipment. In this regard, the Fenin ruling of 2006, is very important.

Second criterion: the activity must be economic

From this point of view the case law, in a way, joins that on the company status. It must be, in essence, an industrial or a commercial activity providing goods or services on a market, a classic definition of economic activity. The Court therefore considers as an economic activity, activities involving production, marketing or provision, especially that of services, in a market, irrespective of the purpose of the activity in question. The Court, for example, judged that the fact that in Germany the activities of the placement of executives to various employers was being provided free of charge by a public operator, does not change the economic nature of these provisions, this is in the Höfner case of 1991⁸. In essence, it suffices to determine that the activity in question is likely to be performed by a private operator for profit. This is what has been decided in connection with a French non-profit organisation operating a system of pension insurance. But, in this case again, even when referring to this criterion of economic activity, the Court acknowledges that there are activities that are essentially public in nature or that fall within the prerogatives of public authority. This applies, for example, to the anti-pollution monitoring activity in a port, in which case the activity does not fall under the economic activity classification and hence not concerned by any application of competition law and the main freedoms of movement.

Third and final criterion, which is often left out, despite being important, there must be sufficiently strong links between the public authority and the company providing services.

This is important because -and here the French public service legal practitioners will certainly feel quite at home- these links, as is the case for public service rights in France, characterize the empowerment, the endowing of the company providing services by the public authority. What are these links? The Court of Justice said they could be either in a form of a unilateral act (referring to an old judgement of 1974, BRT⁹), or as a public service concession contract, this was decided in 2000 on the case involving the municipality of Copenhagen¹⁰. A mere State control over the company is not enough, there must be a sufficiently strong link or unilateral concession contract which characterizes the endowing by the public authority of the company in question. There must be a sufficiently strong link between the public authority and the company awarded the contract for the service.

If these three criteria are met, then the company can be considered as providing a service of general economic interest. This classification implies a number of exemptions to competition rules and the main freedoms.

Regarding to these exemptions the Court has remained cautious. With respect to what the Treaty itself deems as an exception to competition rules, any exception should be thoroughly interpreted. Having said that, the evolution of the case law, especially in recent years, reflects the Court of Justice's concern to further take into account the specificities of services of general economic interest. This recognition of what in France are called the constraints of public service, can be illustrated by the following four examples.

First example: the Court rules in favour of maintaining exclusive rights to ensure the smooth operation of the service.

More specifically, the Court recognises that exclusive rights can be granted or maintained in favour of a company if it is deemed necessary for carrying out its mission of general interest. These are the famous judgments Corbeau of 1993¹¹ and the municipality of Almelo of 1994¹². In the latter case the issue involved an exclusive-buying clause which prohibited a local distributor in the Netherlands to import electricity destined for distribution. The Court held that the application of this exclusive-buying clause is possible to the

7 Judgment dated 11 July 2006, case C-205/03

8 judgment dated 23 April 1991, case C-4190

9 Judgment dated 27 March 1974, case 127-73

10 Judgment dated 27 May 2000, case C-209/98

11 Judgment dated 19 May 1993, case C-320/91

12 Judgment dated 27 April 1994, case C-393/92

extent that the restriction to competition which it entails, is necessary to enable the company fulfil its mission of general interest. To this end, the Court specified that, the economic conditions in which the company finds itself should be taken into account, due to public service constraints which it has to confront, in particular the costs it has to bear and regulations to which it is subjected. This is the case for which exclusive rights are reserved for a company. If there are no exclusive rights, the Court also agrees that companies wishing to engage in those activities should be required to pay the incumbent operator certain rights, provided that the revenues obtained from such rights are necessary to enable the operator provide the service in economically acceptable conditions. This was the TNT Traco judgment of 2001¹³. In the case where exclusive rights already exist, they can be maintained if deemed necessary; if there are no exclusive rights, it may be necessary to pay rights to the incumbent company provided that the revenues thereof are also needed to enable the provision of the service in economically acceptable conditions. The Court has recently shown that it did not have a restrictive view of what constitutes these "economically acceptable conditions" in which the public service must operate: it held that a mere sake of financial stability can validly be considered, this is the 2007 judgment of International Mail Spain¹⁴.

Second example: the Court accepts compensation between non-profitable and profitable activities, in order to, in this case too, ensure the proper functioning of the public service.

This, again, refers to the Corbeau ruling on postal services in Belgium. The Court noted that the Belgian postal service had, I quote, "the obligation to collect, carry and distribute mail on behalf of all users throughout the territory of the Member State concerned, at uniform tariffs and on similar quality conditions" and that this obligation to ensure such a mission of general interest "in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition". The terms of the Corbeau case are important because they depict all the criteria of the public service: the Court said that there was an obligation to ensure the service to the benefit of all users throughout the territory at uniform rates and similar conditions of quality.

The third example takes much the same logic, namely that specific costs related to the provision of a public service mission can be compensated for.

This is the case law on State Aid which, specifically states that financial compensation for public service obligations does not constitute State Aid (cases Ferring of 2001¹⁵ and, especially, Altmark of 2003¹⁶). Thus, as you know, for such compensation not to be qualified as State Aid, a number of conditions must be met. I shall mention them briefly and only depict their substance:

1 / the beneficiary must actually be in charge of implementing a public service;

2 / the parameters on the basis of which financial compensation shall be calculated should be established beforehand in an objective and transparent manner, it is, in a way, a procedural condition;

3 / the third, is the underlying condition, the compensation should not exceed what is necessary to cover all or part of the costs related to public service obligations and, the Court specified, taking into account reasonable revenues as well as some profit. Therefore, the Court does not go as far as strangling the provider of public service, it acknowledges the ability the provider has to generate reasonable profit;

4 / the fourth is some how an extension – but which is important in practice - where the choice of a company is not carried out in accordance to the framework of the public procurement procedure, the level of necessary compensation must be determined on the basis of an analysis of the costs that a well-run medium company would have incurred, in this case, again, taking into account the revenue and a reasonable profit. If there has been no awarding of contract, comparison must then be made with a typical well-managed medium company.

The fourth and final example: even in matters concerning the abuse of dominant position, where the Court is, in general, very strict the law is more subtle than it is normally thought.

It is true that, in general, an operator that performs a service of general economic interest is the holder of exclusive rights, that such rights would place it in a dominant position and that they can quite easily lead to the abuse of its dominance. These are the three stages of the Court's reasoning: exclusive rights, dominant position, prohibition of abuse. This was the case in a recent judgment where a Greek company that organises motorcycle competitions for commercial purposes but which is also, under the Greek legislation, a holder of the right to licence competitions which other competitors would want to organise. The Court of Justice said that this was not possible because the company in question was automatically led into abusing its dominant position. This was in the Court's MOTOE case of 1st July 2008¹⁷. However, it is necessary to properly distinguish the three stages of the reasoning process: it is noted that there are exclusive rights, there is the

13 Judgment dated 17 May 2001, case C-340/99

14 Judgment dated 15 November 2007, case C-162/06

15 Judgment dated 22 November 2001, case C-53/00

16 Judgment dated 24 July 2003, case C-280/00

17 Judgment dated 1 July 2008, case C-49/07

recognition of a dominant position and, lastly, the question whether there has been an abuse of that dominance is raised. The Court regularly recalls that the awarding of exclusive rights is not necessarily synonymous with the abuse of the dominant position, it is quite possible to stop at second stage of reasoning, which is compatible with the Community law. It is possible to grant special or exclusive rights even if this would mean creating or strengthening a dominant position, without going as far as the abuse of that position. This refers to an important judgement made in 1998, the Corsica Ferries¹⁸ case. Further, in that same direction, in a very significant case, the Court, for example, has validated the fact that a Municipality could set up a waste treatment centre and, in order to ensure the profitability of the centre, grant it the exclusivity of waste treatment; the Court gave the ruling that such exclusivity may be considered necessary to the accomplishment of a service of general economic interest and therefore not prohibited by the Community law; this refers to the judgment passed in 2000 concerning the Municipality of Copenhagen¹⁹. It is therefore clear, especially with this last example, that the Court's case law is more subtle than is generally said.

Nevertheless, and this will be **the second part of my presentation, public authorities, in particular local authorities, are rarely exempted from competition rules when organizing public service activities, jointly with other undertakings.**

I will elaborate on two points.

The first one is based on the fact that, due to lack of specific text, the Court is obliged to subject to competition rules operations that have a strong connotation of public service.

Second point: recent developments in the case law of the Court on the so-called "in house" market seem to show that the Court is inclined to provide more flexibility to communities when they organise, between them, a public service mission.

1. In the absence of a specific text, the Court is bound to subject to competition rules operations that have a strong connotation of public service.

I shall present two illustrations.

The first concerns public services concession contracts. As you know, these contracts do not fall within the scope of the directive on public services. However, the Court held that they should be subject to the rules of transparency arising directly from the Treaty and, therefore, that public service concession contracts should be preceded by adequate publicity in order to ensure transparency in the awarding of these contracts.

The second, more important illustration, is the recent case law on public works contract which concerns territorial planning agreements. These are the *Ordre des Architectes*²⁰ and *Auroux*²¹ cases. In the first one, known in the jargon as the *La Scala* case, the Court gave the ruling that an agreement to develop an entire district including the construction of a public facility (the issue here was the setting up of a provisional theatre during the renovation of the *La Scala* theatre) was a public works contract, judgment passed in 2001. In line with this judgement, the Court declared that, on referral from a French administrative court, a territorial development agreement between a municipality and a mixed economy company to develop an entire district and create a recreation centre was also a public works contract, the *Auroux* case of 2007. This decision has been criticised by the doctrine, particularly by practitioners, because it disregards the specific nature of territorial development agreements, which do not concern works and services only, but fit into a much wider urban planning policy. The *Auroux* ruling, in this regard, might have considered as belittling what planning agreements are. It is still fully justified by law, in the absence of a Community legislation covering, more specifically, these types of territorial planning. In the absence of a text, therefore, the Court is bound to fit such operations into pre-established public procurement systems, simply because they fulfil the criteria for these contracts. This solution is justified under the law, even if it is not necessarily appropriate in practice. However, in such a situation, only the Community legislature can do something and it would be quite substantive to do so. The Court itself can only change that which depends exclusively on its case law.

This is the case of public procurement system known as "in house" which will be the last part of my presentation.

2. Recent developments in the case law regarding "in house" contracts seem to show –with precaution– that the Court is willing to give more flexibility to communities when they organize, between them, a public service mission.

We know the scope of this purely case law set-up contracts known as "in house". Just as we are aware that the call for competition, in accordance with the guidelines on public procurement, is not compulsory, even if the co-contractor is a legal entity legally separate from the contracting authority, when the following two conditions are met:

18 Judgment dated 18 June 1998, case C-266/96

19 op. cit.

20 Judgment dated 12 July 2001, case C-399/98

21 Judgment dated 18 January 2007, case C-220/05

First condition: the public authority must exert control over the separate undertaking, similar to that exerted over its own services: it is the condition known as similar control. The municipality, for example, must exercise control, on the undertaking to which it entrusts a service, similar to that it exercises over its own municipal services. This first condition is, in practice, the most difficult to meet.

Second condition: that the entity, the company, must carry out the bulk of its business with the public authority or authorities under which it operates. This second condition relates to the activity. All this has been stated in the Teckal judgment of 1999²².

It is rather sparingly that the Court of Justice has hitherto applied its case law on "in house" contracts. However, recent judgments and cases suggest some sort of simmering of the case law. First of all, since the Teckal ruling, dating back to 1999, the Court had recognised the "in house" character of a contract only twice and it did so only indirectly, when a question was referred to it for preliminary ruling. One could cite, in particular, a case in 2006, which concerned a stock company²³ whose capital was totally being owned by the municipality of Bari, and whose sole activity was to provide this municipality with public transport service throughout its territory. The Court held that the criteria for an "in house" contract could be verified, however, it was up to the Italian judge to check whether this was indeed the case here. If it indeed proves to be an "in house" contract, then there would be no need to go through the rules of transparency and competition before granting the company the mission to provide public transport service in its territory. I am talking of simmering starting from 2006-2007: we can, in this regard, cite the Asemfo case of 2007²⁴ which recognised, in a little more explicit way, the "in house" nature of contracts between the Spanish Government or the Spanish Autonomous Communities and a state company Tragsa, 99% of whose capital is owned by the Spanish State and 1% by the four autonomous communities. An even more recent judgment, that of 17th July 2008 goes even further and dismisses an action for infringement brought by the Commission against Italy in respect of a contract for the management of municipal computer services²⁵, which was awarded without any call for competition between the municipality of Mantua and another company. The Court held that it was an "in house" contract, the company could be linked to the services of the municipality of Mantua. Much more interesting for the topic under discussion here is the judgment made this very morning at 9:30, the Coditel-Brabant judgment (C-324/07) concerning the awarding by a Belgian municipality of a contract for the management of its communal broadcasting network, to an inter-municipal cooperative company. The Court holds the "in house" nature of this relationship on the ground that the inter-municipal company is pursuing a service of general interest which cannot be distinguished from that pursued by the local authorities who own it and who are behind its creation. In a more technical way, what is interesting in this case is that the Court changed the status of similar control, which I mentioned earlier on, one of the two conditions of the Tekal case law, by acknowledging that the condition of similar control can be fulfilled jointly by several public authorities which, together, own a provider to which they have entrusted the implementation of a public service mission.

Since we are in a topical preliminary ruling, whose outcome is still fresh, I shall conclude by referring to a case which is not yet judged by the Court. This is the Commission-Germany (C-480/06) case, pending before the Court and whose hearing was held in Luxembourg before yesterday, Tuesday 11th November 2008. In this case, four local authorities in Lower Saxony signed a contract, in 1995, with the road maintenance and cleaning services of the City of Hamburg, for waste disposal. The contract provides for the treatment of such waste in an incineration plant in return for payment based on a price adjustment mechanism depending on the amount of waste delivered. The contract was directly concluded between the four local authorities and the road maintenance and cleaning services of the City of Hamburg, without them, the four communities, following the bidding process provided for under the directive on public procurement of services, for which reason the Commission took Germany to Court.

What is interesting in this case, are the two main arguments presented by Germany for defence.

In the first argument, Germany argues that the contract is an "in house", whereas the only link between the four communities and the City of Hamburg is the contract itself. The Court will be obliged, in response to this argument by Germany, to work out a balance between, on the one hand, the need to implement EU laws on public contracts and, on the other hand, the need to take into account the requirements of public policy that are subject to Community guidelines, namely, environmental protection, which, as elected local authorities are well aware of, necessitates some planning.

In the second argument, which is even more radical, Germany simply maintains that the application of the directive on public services must be excluded, under Article EC 86 paragraph 2, wherever, as in this present case, it is likely to obstruct the performance of government agencies in performing the mission of general interest entrusted to them, that of waste disposal here. The German Government, in its argument, considers

22 Judgment dated 18 November 1999, case C-107/98

23 Judgment dated 6 April 2006, case C-410/04

24 Judgment dated 19 April 2007, case C-295/05

25 Judgment dated 17 July 2008, case C-371/05

that the interpretation by the Commission of the directive would mean that local authorities cannot entrust the City of Hamburg with the mission of the disposal of waste, which is a general interest mission, controlled by the Community law and, are thus obliged to entrust this task to an operator offering the most economically advantageous tender, wherever the operator may be found, without any guarantee that the public service will be provided in a satisfactory and sustainable manner.

In the last part of its defence, the German government is also concerned that the application of the directive will lead to a situation whereby the resources of the new waste treatment centre are not harnessed in a cost effective manner. You have undoubtedly understood that this case is very interesting. It is obviously much too early to guess what the Court will decide, however whichever direction the Court goes the ruling will certainly be enlightening.

Thank you for your attention.

Floor debate

Concerning the apparent error on the classification of a SGEI: ex. social services of general interest and their scope. On the fact that there is no direct and exclusive link with disadvantaged people when, for example, providing a social service for housing: are there any judgments in this direction? (contribution from Laurent Ghekière)

The answer is no: there is no case law that could go exactly in the direction of the Commission or in your direction. Such being the case, the Court regularly recalls that, there is the preamble that corresponds quite well and that could be applied, in the Corbeau and the Municipality of Almelo cases: Member States have possibility for flexibility and a degree of discretion in what they may consider to be a service of general economic interest. Else, it depends on the case in question and the matter has not yet been presented before the Court.

On the possible exemption to competition rules and the fact that the Treaty does not talk of exception, does not use this term (contribution from Pierre Bauby).

It was Stéphane Rodrigues who spoke about Article 86 § 2 and explained that the very wording of this article is such that SGEI appear as an exception to the general rule.

That is what I said, the Court is very cautious with regard to what it sees as exceptions because, once again, this is how the Treaty was drafted. The evolution of mentalities, which was highlighted by Stéphane Rodrigues, since the Corbeau case, is definite but it is mainly found expressed in the opinions of the Advocates General, not in the judgments as such. That said, I tried to show you that the evolution of the Court's case law since 1993 and 1994 was more comprehensible, if I may say so, vis-à-vis public service constraints. But, once again, and I fully agree with what President Jean-Louis Destans has said, the Court does what it can, if I may say so, at constant Community legislation. That is why I wanted to talk about the case law on *in house* contracts: in the case of a purely preliminary ruling set up, of which it has overall control, the Court tries to make it evolve. In order to solve the problems of inter-municipal cooperation the judgment and the case I mentioned, Coditel-Brabant and the Commission-Germany, will probably be very important in France; in any case it is necessary to follow them up. But, once again, this is at constant Community legislation and the Auroux case perfectly reflects the need for legislation, which is felt even at the Court of Justice itself, which feels obliged to take these territorial agreements into the predetermined slots of public procurement, for lack of texts taking into account the specificity of this kind of territorial planning operations.

A quantitative question: Is there an increase in litigations concerning SGI? Another question on the missing slots and necessary texts on, for example, SSGI, to enable the Court of Justice make the right decisions? The Charter of Fundamental Rights? (contribution from Claire Roumet)

The first question: no, there has been no substantial increase in litigation. What has been observed is that some supreme courts refer to us more preliminary rulings than before, which is quite good because it allows the Court to clarify its case law. It may also be noted that the legal service of the Commission prosecute Member States more often on matters of public procurement or on tendering (the Commission-Germany case that I mentioned is a good example of this) and it also allows the Court of Justice to refine its case law.

Regarding the missing slots, I have reported on those regarding territorial agreements because, most probably due my personal legal culture, it seems to me to be the most conspicuous, but there are certainly others.

Finally, on the Charter of Fundamental Rights, yes, certainly, it is an essential text. We already have it in watermark in our rulings, and when the Lisbon Treaty comes into force, Article 36 will obviously be a significant standard.

Regarding SSGI and on the Commission, which claims that the texts are perfect and that State Aid is not covered by the Community legislation. On considerable evidence that local authorities must provide to the

report by Member States to the Commission on the Altmark package (contribution from Jean-Claude Boual).

Your two questions are in fact just one, it comes back again to the need for legislation. The Court in so far as it is, as an institution - I am not speaking on its behalf - can certainly not decide on this issue. It publishes an annual report in which it reports on its activities, where it presents its statistics, its case law and cases it has ruled upon. That is all. The Court of Justice does not have the same kind of legitimacy as the Parliament, the Council, the Commission, etc. It is a court that decides upon the litigations and to which preliminary judgments are referred by national courts. It answers questions that he raised and settles disputes submitted to it. It does not have any policy as such. This applies to all courts, it is true in France for the Supreme Court of Appeal and the Council of State. The Court of Justice is not a political institution, it is a jurisdiction.

Areas where one may find more personal and sometimes more subjective analysis, are in the opinions of Advocates General, who are therefore an important tool for the Court because the Advocates general are both within the system while remaining sufficiently outside it. They speak in a personal capacity whilst having all the authority that a member of the Court of Justice may have. It is worth reading, to have an idea of this, the conclusions of the Slovenian Advocate General, Ms. Trstenjak in the Coditel-Brabant case, which presents a very good overview of case law and legislative shortfalls in this regard. But, apart from that, it is not for the Court of Justice to report any such legislative shortfalls. Once again, it is the role of the doctrine to point out that the judgment is what it is, due perhaps to the lack of a text.

The opinions of the Advocates General are always very useful. See conclusions of the Coditel-Brabant case and the on-the-ground analysis of what local authorities experience. The Court of Justice keeps aware of the great debates and draws on them (contribution from Stéphane Rodrigues).

Also members of the Court of Justice have each their own personal history. They, obviously, are not lawyers who were born on the Plateau du Kirchberg (*Luxembourg City*) and who have lived their entire lives surrounded by collections of the judgments of the Court of Justice! They are, almost all of them or a very large majority of them, people who before becoming Judges or Advocates General in Luxembourg, had taken up administrative and public responsibilities in their respective Member States or in Community institutions. I shall cite only one example, that of a French judge at the Court of Justice who is a former local politician, State Councillor, who has dealt with litigations concerning territorial planning for 20 years and who knows this kind of issues perfectly well. He would therefore judge with his personal sensitivity.

On the inter-municipal cooperation and, in particular, the example of German local authorities, which cooperate on the management of waste disposal. In Germany, the various levels of territorial authorities are very complex. Is it normal that cooperation between these levels be considered as cooperation with a third party? Do you think that the Court of Justice would agree to recognize an additional level of local authority (contribution by the representative of the German Kreisse).

I shall not make a perspective of the preliminary ruling here because it is a very difficult exercise. I can speak even less about the Commission-Germany case, which is currently pending before the Court. Therefore, I will just say that the problematics is really present, that the Court of Justice has not yet responded fully, but that it has started to do so, especially with the Coditel-Brabant case on which I insisted and, lastly, that the question arises in France on a daily basis: in France there are 36,500 municipalities, a number inter-municipal cooperation structures - fortunately they are there-, under such circumstances, the ruling of Court of Justice in the Commission-Germany case will probably be eagerly awaited.

The only advantage in terms of litigation, would be to remove the infringement actions for failing to transpose. But, for everything else, there would be exactly the same kind of litigation, in interpretation, for Member States that would have gone beyond, but that will no longer be a question of transposition, but that of incompatibility between their legislation and the regulation, nevertheless, it would amount to the same thing. I would add that, in practice, the situation is not the same in all Member States: in France, when transposing, they try to do the work of craftsmanship, which is why it sometimes takes so long to transpose, they try to codify, to fit everything in the texts that exist already, they ask themselves whether they do not already have elements that would enable them to show that transposition has already been implemented; in short, there is a tendency to carry out a very clever job and, perhaps, even too smart. Other Member States do not take so much precaution and in order to transpose, they simply copy and paste the directive and introduce it as it is in the national legislation and, of course, by so doing, they are never late in transposing. Thus, in such a case, the difference with the Directive is clearly inexistent because they simply copy it. That is why, just like Stéphane Rodrigues, I shall remain rather cautious about this kind of ideas.

ANNEXE III

Introductory report of CELSIG

by **Jean-Claude BOUAL**, Secretariat of the CELSIG

Contrary to what Mr Barroso said on 20th November 2007, while presenting the European Commission's communication on the internal market of the 21st century, and its annexes, including the communication entitled "*A single market for the 21st century Europe. Services of General Interest, including Social Services of General Interest: A new European commitment*", the debate on services of general interest is not closed. Even far from being closed, is the discussion on the need for transversal texts governing SGI, even though the publication of the working program of the Commission for 2009 confirms its lack of interest in this issue.

One can judge from the following:

The French Presidency has just held the 2nd Forum on social services on the 28th and 29th October and presented a road map institutionalising, in particular, the holding of this Forum every two years.

Member States are currently working on the drafting of the report, which they are to submit to the Commission by 19th December, on the implementation of the Monty-Kroes package (or Altmark package) on State Aid. The drafting of this report is much more complex than what a cursory reading of the decision of the Commission had suggested. This decision renders compensations that "small" public services receive compatible with the treaty and, exempts Member States from notifying the Commission about such compensations. However, Member States must submit a report, to the Commission, every three years. Yet, these "small" services of general interest are in tens of thousands, even hundreds of thousands in each Member State. The absurdity of such a situation is blatant, the States, even less the Commission, will not be able to deal with so many documents, if at all they were able to collect the information. Clearly, there is disparity between the objective of avoiding competition distortions that would possibly be brought by these small local public services and measures taken to verify the situation.

In addition, Member States are in the process of transposing the "services" directive and are all working on the mandate concept which allows the exemption of SSGI from the scope of the directive.

The Commission itself has taken several decisions that revive certain debates, on regulation for example, and which illustrate that major issues remain open:

It has just revised its proposal on the telecom package (presented on 31.01.2008) and tries again to obtain a veto right with the establishment of a new Office of European Telecommunications Regulations (OETR) that would be placed under its exclusive control. A European regulator, in short, under its authority, thus further reviving the debate with Member States and the European Parliament.

For his part, Commissioner Piebalgs declared in the Spanish daily *ABC*, on 2nd November 2008 that he wished to see a European regulator in the field of energy. At the Parliament, the Industry Committee (ITRE committee) voted in this direction, on 28th May 2008.

Furthermore, the drafting of a directive on service concessions is still on the agenda.

Further, after having initiated proceedings against France because a group of municipalities entrusted the implementation of certain public service functions to another member of the same group without competition procedures, the Commission has just initiated a formal questioning to Germany on the signing of public service contracts for the maintenance of local roads by administrative districts (*Landkreisse*) in eight Länder. In both cases, the procedures do not involve trade issues and the award of public contracts only, but certainly the internal organisation of the State as well, for which the Commission has no jurisdiction because it is the organisation and the role of different territorial levels

Lastly, on 4th November the Commission launched a consultation on State funding of public broadcasting, as well as consultation on territorial cohesion on the basis of a Green Paper.

The Court of Justice of the European Communities, meanwhile, continues its work and rules on cases brought before it. Services of general interest are still topical as attested again by the TV2/Danemark/AS case judged on 22nd October 2008, concerning public service broadcasting.

Moreover, we know that case law changes. For example: With the ADBHU ruling, in 1985, compensation for PSO are not State Aid, they become so with the Banco Fomento e Exterior in 1997, FFSA in 1998 or SIC in 2000, they cease to be so again with the Ferring ruling in 2001, they are not, under certain conditions, with the Altmark ruling in 2003.

Without taking sides on all these issues, it is clear that a lot remains to be done to clarify the operation, organisation and financing of SGI in Europe.

Therefore, the tension or even the contradiction between, on the one hand, the internal market, whose rules are determined at the Community level (either in the treaty, by secondary legislation or by the Court's case law) and within which any award of a contract or a service is questionable and, on the other hand, the principle of subsidiarity, also set out in the Treaty and on which grounds is there is provision for " 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" as stipulated in protocol n° 26 annexed to the consolidated version of the treaty (Lisbon), is still not overcome.

To make matters better or worse, this tension or contradiction is not even addressed by the Community authorities and, in some cases it is denied.

The financial crisis that we are currently experiencing will have strong repercussions on the economic activity and on the real economy; unemployment, the number of the working poor and poverty will increase. Social and territorial cohesion will become weaker. SGI (SGEI, SSGI etc..) will therefore have to play an even greater role in the months and years to come under these conditions. New SGI are, undoubtedly, necessary in banking sector, notably, to avoid the failings that have been observed and allow for a universal access for all to banking services of general interest.

An opinion poll shows that the French, for example, rely on their public services (and thus on the redistribution by the public authorities) to cope with the crisis. Similarly a study by the institute of statistics shows that in France services of general interest, education, health, housing, contribute the most to curb social inequality.

Finally, the evaluation of the SGEI liberalisation policy in its economic, social and territorial cohesion, remains to be done. Similarly, the need to implement a cross-checked assessment, with all stakeholders involved, is still valid.

In short, all this to say and show that the debate on SGI is not over in Europe. That, this debate is global and transversal, that the cross-sectoral approach, whilst necessary and indispensable, is not the whole thing and that there is need for a transversal approach and transversal texts, as provided for in the Treaty of Lisbon.

In this context, CELSIG is making four proposals to sustain the debate, which it is submitting to the political parties represented at the seminar.

1st proposal

Make SGI an issue of the campaign for the elections to the Parliament on 9th June 2009.

What is the place of SGI in your election platforms?

2nd proposal

That the commitment to serious work, on a sectoral basis and transversally, on SGI becomes part of the working axes of the next President of the Commission.

In other words: are political groups willing to make this commitment a *sine qua non* condition for the election of the President of the Commission? The EP has the means to exert pressure and to set requirements if it wants because it is the one that invests the Commission and its president (even under the Treaty of Nice).

3rd proposal

That the Commission include a Commissioner responsible for SGI, exclusive of all other responsibilities and that an administrative structure (DG, or otherwise) be set aside for the task, to avoid divergences, delays, inconsistencies that we see today within the Commission itself.

4th proposal

A permanent Inter-group (or a committee, but it will be more difficult given the EP's regulations) be created within the EP, so that work on SGI at the EP is carried on continuously.

ANNEXE IV

Conclusions

Pierre Bauby, Secretariat of CELSIG

From discussions conducted during the seminar, it would be presumptuous to try to draw sweeping conclusions. I will limit my conclusions to trying to identify some elements of synthesis of our discussions.

The first hours of the morning were devoted to the evolution of the Community law on SGI and it was essential to clarify some points, since the legal ground is very important: over a period of 60 years, Europe has been built on the basis of law. At the same time, the construction strategy was based on economic integration with a common market and then a single market, the gradual establishment of an internal market. The convergence of these two features is reflected in the crucial role of the Community law on competition and on internal market rules.

It is, therefore, not surprising that the EU suffers from a congenital imbalance as regards SGI. Whereas a lot of patient work for rebalancing has been going on for fifteen years now (article 16 in 1997, article 36 of the Charter of Fundamental Rights, the Treaty of Lisbon), it must be acknowledged that this work is not yet complete. Consequently, it is necessary to continue to fecundate the internal market with quality SGI for all.

It is important, at this juncture, to elucidate any possible misunderstandings: SGI are neither against nor external to the internal market, but a necessary condition that enables to meet the needs of consumers, citizens and the society.

There is need for Community legislative initiatives to, without delay, implement article 14 of the Treaty of Lisbon, by conducting a pragmatic approach aimed to resolve problems that emerge from the ground, in particular:

- the sharing of powers and responsibilities between the EU and Member States to define, organise and finance SGI in order to clarify the principle of subsidiarity, legitimise Community interventions when such interventions bring in added value in terms of regulation or the setting up of Community SGI;
- conditions for implementing article 86, i.e. conditions - including the challenges of "investing" – allowing SGEI not to fall under or not to completely fall under the rules of the Treaty as regards free movement or competition;
- methods of financing SGI and ensuring their security based on the fact that compensation for PSOs are not considered as State Aid;
- the need to firmly establish the rights of users: accessibility for all - territorial, social, as regards people with disabilities -, quality, universal service, the arising of new services to meet the changing needs at all territorial levels.

Proposals set forth by CELSIG are starting to be discussed and, they should be clarified so that the year 2009, marked by the European Parliament elections and the appointment of the new Commission, turns out be the occasion for political accountability of all actors rendering it possible to break from the current blockage.

This implies developing convergence in 5 areas:

- regarding conflicts between political, legal and social issues, which are complementary and thus not mutually exclusive;
- among all stakeholders, public authorities, operators, users, staff and trade unions, ...
- between Member States, taking into account their histories, traditions and institutions;
- across sectors, those that have been undergoing liberalisation process over the past fifteen years, as well as those which are becoming increasingly insecure;
- between local, national and community levels.