Services of General Interest (SGI) and Public Owned Enterprises

EU acquis after Lisbon Treaty

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This report is on the *EU acquis* with respect to two notions which partially overlap themselves: 'Undertaking entrusted with the operation of services of general economic interest' and 'Public undertaking' (State-Owned Enterprise):

- A Public undertaking can be entrusted with the operation of services of general economic interest and can have particular missions and tasks to this end, or not.
- An Undertaking entrusted with the operation of services of general economic interest (SGEI) can be public, mixed, private, social or cooperative, for profit or not for profit.

Both cases are treated separately here below, as well as in their interrelationships. Since the Treaty of Rome of 1957 they are subject to the same Article of the Treaties, which have not been amended in the last 60 years.[1] At the same time, since the Treaty of Rome of 1957, the European framework on SGEIs has evolved in the framework of a progressive Europeanisation process.

We introduce this report with some preliminary legal considerations concerning public authorities, followed by a short presentation of the process of Europeanisation of SGI and the current situation on the basis of the Lisbon Treaty, secondary law and ECJ case law. Then we explore the way the EU approaches SOEs, depending on whether they are entrusted with the operation of SGEIs or not. In the Annex we will present the 6 common values of SGEIs, a less known common legal framework.

1. Introduction: General considerations concerning Public Authorities

In general, the written Constitution or fundamental laws of the EU Member States determine the objectives of the State.

Most of the time, the intervention of public authorities is based on the competence they have to intervene in different fields to meet collective needs. And it is mainly for the States through their national regional and local public authorities to define what they consider to be of public interest (some general interest goals have been progressively harmonised by the EU *acquis*).

Historically, when European States have decided to engage in economic activities they normally used public means and set up specific legal regimes, distinctive from the common law, to ensure the meeting of public good or general interest.

Today, when it comes to decide the ways of meeting public interest needs, there are still (national, regional and local) public authorities that decide:

- on the one hand, the ownership model of enterprises, the setting up of SOEs or the evolution of their capital, of their objectives, etc.,
- on the other hand, to entrust them with the operation of services of general economic interest and to define their particular missions and tasks they are in charge of.

Whether it is about SOEs or other undertakings entrusted with the operation of SGEI, fundamental European principles shall apply: transparency, proportionality, non-discrimination, equal treatment, accountability.

[1] When we make reference to the provisions of the EU Treaties we use the current numbering of Articles of the TEU and TFEU.

The transparency principle requires public authorities to clearly provide in a legal act (legislative or other unilateral act of public authorities, such as an act of creation of the public entity) public interest reasons, objectives, and aims, which determine the public ownership of an enterprise and/or the definition of particular tasks it is in charge of.

The proportionality principle suggests that the means that are used should be proportionate to objectives in order not to favour or sanction SOEs or enterprises in charge of SGEIs compared to others.

Non discrimination and equal treatment are founding principles of the EU since its origins.

The rule of law principle requires public authorities and persons who act in their name to be responsible for their actions.

> "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*" Art.2 TEU.

2. The Europeanisation of Services of General Interest

In Europe, each country has defined and built its public services or equivalent, in the framework of the construction of each nation-State, guided by the traditions, institutions, culture, social movements and power balances which have helped to shape it over its long history.

Therefore, it is no wonder that the definitions, the forms of organisation and regulation, and even the concepts used in each language are different.

2.1. Diversity and Unity of Services of General Interest

This has given rise to a diversity picture in Europe when it comes to the terms and concepts used in each language, the competent national levels (national, regional, municipal), the marketable character or not of each service, the modes of organisation (monopolies or competition) and the types of actors involved (public, mixed, private or associative).

In particular, two approaches of SGIs exist everywhere in Europe: an organic approach, which assimilates public services or services of general interest to the public character of the operators (administrations, public departments, SOEs); a functional approach, which focuses on the tasks and missions of SGIs regardless of the statute of the operator.

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

- guarantee the right of each inhabitant to access fundamental goods or services,

- build solidarity, secure the economic, social and territorial cohesion of each community,

- prepare for the future and take the long-term into account.

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

2.2. A progressive process of Europeanisation

The concept of 'Europeanisation' refers to the transition from traditional national frameworks for defining and organising basic public services to shared responsibilities between the EU and its Member States. The Europeanisation of basic public services is both a *bottom-up* and a *top-down*, gradual, multi-actor, contradictory process. Europeanisation involves a difficult and evolving balance between the common EU interest and the interrelated national interests of each Member State. Europeanisation is not a linear process, but a charged and difficult one in which the interests and strategies of all actors play a role.

During the 30 years of European integration that followed the Rome Treaty of 1957, a consensus existed at the European level: each Member State continued to be in charge of the definition, organisation, financing of its public services. Between 1958 and 1996, only eight Directives (among others, on telecommunication terminals and telecommunication services) and seven Decisions have been adopted by the European Commission on the basis of Article 106 of the Treaty on the Functioning of the European Union (TFEU).

However, since the mid-1980s, the goal of the Single Market, based on the four fundamental freedoms of movement (of persons, goods, services and capital), has led European institutions to engage the Europeanisation process of "services of general economic interest" (SGEI). At that time, it has been limited to communications, transport and energy fields that are major infrastructure networks needed to ensure freedoms of movement. The Europeanisation of these sectors has been based on strategies of liberalisation, progressive introduction of competition, and market logic. However it did not define clear European objectives or norms to ensure the European "economic, social, and territorial cohesion". Since then, European debates and initiatives tried to balance liberalisation and the general interest and to define universal and/or public service obligations for some sectors at EU level. At the same time basic services created under the competence of local authorities have not been directly subject to the Europeanisation process.
This process has relied upon the shared competences between, on the one hand, European institutions and, on the other hand, Member States, including their regional and local authorities. Although nor the precise sharing of competences nor the aims of services of general interest have been set up.

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

2.3. The development of a common language

Taking into account the different terms and notions shaped during the long history of each Member State, which have no single nor the same meaning in all languages, the European construction has been brought to progressively define a common language. Thus, since 1957 the Treaty of Rome has employed the expression SGEI, which then inspired the creation of derived expressions (SGI, SSGI, NESGI).

Definitions are not yet stabilised. There are some soft law definitions but they evolve in time and fields, according to social, economic and political context. The White Paper of 2004 and the Communication of 2011 are the most important transversal documents and show the evolution of the conception as regards SGIs, in particular SGEIs.

COM(2004) 374 final White Paper on services of general interest http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2004:0374:FIN	**COM(2011) 900 A Quality Framework for Services of General Interest in Europe** http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2011:0900:FIN
Services of general interest	**Service of general interest (SGI)**
The term "services of general interest" cannot be found in the Treaty itself. It is derived in Community practice from the term "services of general economic interest", which is used in the Treaty. It is broader than the term "services of general economic interest" and covers both market and nonmarket services which the public authorities class as being of general interest and subject to specific public service obligations.	SGI are services that public authorities of the Member States classify as being of general interest and, therefore, subject to specific public service obligations (PSO). The term covers both economic activities (see the definition of SGEI below) and non-economic services. The latter are not subject to specific EU legislation and are not covered by the internal market and competition rules of the Treaty. Some aspects of how these services are organised may be subject to other general Treaty rules, such as the principle of non-discrimination.
Services of general economic interest	**Service of general economic interest (SGEI)**
The term "services of general economic interest" is used in Articles 14 and 106(2) of the Treaty. It is not defined in the Treaty or in secondary legislation. However, 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 concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications. However, the term also extends to any other economic activity subject to public service obligations. Like the Green Paper, the White Paper focuses mainly, but not exclusively, on issues related to "services of general economic interest", as the Treaty itself focuses mainly on economic activities. The term "services of general interest" is used in the White Paper only where the text also refers to non-economic services or where it is not necessary to specify the economic or non-economic nature of the services concerned.	SGEI are 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, affordability, equal treatment or universal access) by the market without public intervention. The PSO is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission.
	Social services of General Interest (SSGI)
	These include social security schemes covering the main risks of life and a range of other essential services provided directly to the person that play a preventive and socially cohesive/inclusive role. While some social services (such as statutory social security schemes) are not considered by the European Court as being economic activities, the jurisprudence of the Court makes clear that the social nature of a service is not sufficient in itself to classify it as non-economic. The term social

	service of general interest consequently covers both economic and non-economic activities.
Public service	**Public Service**
The terms “service of general interest” and “service of general economic interest” must not be confused with the term “public service”. This term is less precise. It can have different meanings and can therefore lead to confusion. The term sometimes refers to the fact that a service is offered to the general public, it sometimes highlights that a service has been assigned a specific role in the public interest, and it sometimes refers to the ownership or status of the entity providing the service.	Public service is used in article 93 TFEU in the field of transport. However, outside this area, the term is sometimes used in an ambiguous way: it can relate to the fact that a service is offered to the general public and/or in the public interest, or it can be used for the activity of entities in public ownership. To avoid ambiguity, this Communication does not use the term but follows the terminology "service of general interest" and "service of general economic interest".
Public service obligations	
The term “public service obligations” is used in the White Paper. It 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, for instance, in the matter of air, rail and road transport and energy. These obligations can be applied at Community, national or regional level.	
	Universal service obligation (USO)
	USO are a type of PSO which sets the requirements designed to ensure that certain services are made available to all consumers and users in a Member State, regardless of their geographical location, at a specified quality and, taking account of specific national circumstances, at an affordable price. The definition of specific USO are set at European level as an essential component of market liberalization of service sectors, such as electronic communications, post and transport.
Public undertaking	
The term “public undertaking” is normally also used to define the ownership of the service provider. The Treaty provides for strict neutrality vis-à-vis ownership. It is irrelevant under Community law whether providers of services of general interest are public or private; they are subject to the same rights and obligations.	

SGEIs’ definition of 2011 is more restrictive that that one of 2004 as it emphasis ‘market failures’ as condition of existence of an SGEI, while Protocol No 26 focus, among others, on “preferences of users”, that is on the democratic choice of citizens.

2.4. Liberalisations and polarisations

During the 1980s and 1990s, it has been restated that a total liberalisation of network industries, which would follow only internal market objectives, would not be satisfactory. Liberalisation led to a series of polarisations potentially challenging some public service objectives:

- Economic polarisation because of the rapid concentrations, often creating an oligopolistic competition between some big groups on the market;
- Social polarisation, as big consumers and solvable clients are in a more favourable position than individual and small consumers, which questions universal access, equal treatment, equalisation of tariffs and solidarity;
- Territorial polarisation in favour of dense areas to the detriment of isolated areas or marked by the characteristics of particular physical or human geography;
- Temporal polarisation, which tends to over-value the short term, for which the market gives precious indications, to the detriment of the long term, for which the market is myopic; which favours the lower cost capital to the detriment of a long-term policy at lower cost for users;
- Generational polarisation, to the detriment of future generations;
- Financial polarisation, bringing the development of commodification phenomena and/or environmental and social dumping.

In these circumstances, aside some interest groups proposing a complete deregulation of public services, to make them exclusively subject to the common competition law, European rules, which have resulted from contradictory debates, initiatives of actors, social movements, have started to implement a controlled, organised and regulated liberalisation.

2.5. From Rome to Lisbon

Since the 1980s, European debates and initiatives have sought to restore the balance between liberalisation and objectives of general interest and to clarify competence sharing between the European Union and the national, regional and local authorities.

That gave rise to the European concept of 'universal service' in the telecommunications and postal services, then in the electricity field, guaranteeing some essential services to all citizens and residents. Also, public service obligations have been set out in the fields of energy (electricity and gas) and transport. The ECJ case law has recognised that services of general economic interest can encompass other objectives, missions and forms of organisation and funding than solely the general laws of competition.

The Treaty of Amsterdam of June 1997 has included a new Article 16 in the TEC, which recognises SGEI as components of the EU shared values, underscoring their role in promoting 'social and territorial cohesion', and which asks the Union and its Member States to make sure they could 'accomplish their tasks' (see Annex 2).

The European Council of Nice held in December 2000 proclaimed the Charter of Fundamental Rights of the European Union of which Article 36 requires the European Union to recognise and respect access to services of general economic interest, as foreseen in national legislations and practices, in line with the Treaties, and place them amongst fundamental rights

Starting with 1996, the European Commission has initiated a process of transversal reflection on all services of general interest, with two Communications (1996 and 2000), a Report (2001), a Green Paper (2003), a White Paper (2004) and new Communications (2007 and 2011), putting forward principles founding a Community conception on SGI.

2.6. EU *Acquis*

The Lisbon Treaty, in force since 1st December 2009, has brought major innovations with regard to the previous situation, in particular through Article 14 TFEU, the legal status conferred to the Charter of Fundamental Rights and the Protocol No 26 on services of general interest. More generally, the Lisbon Treaty reinforces the role and prerogatives of Member States and their sub-national public authorities.

Article 14 TFEU is explicitly a provision of general application, which applies in all EU policies. It is a possible legal basis for secondary legislation under the co-decision procedure between the Council and the European Parliament. It refers twice to the powers and rights of the Member States and their communities (Article 4 TEU). As 'general implementing provision', it must be applied to all EU policies, including those dealing with internal market and competition fields.

Article 14 TFEU

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

The Lisbon Treaty gives legal status to the Charter of Fundamental Rights, which places access to SGEI among fundamental rights.

Charter of Fundamental Rights of the European Union

Article 36: 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 106 TFEU contains unchanged provisions since the Treaty of Rome.

Article 106 TFEU

1. In the case of and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings 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 development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate Directives or decisions to Member States.

The Protocol on services of general interest (No 26), which is annexed to the Treaty on the European Union and the Treaty on the Functioning of the European Union, has the same legal value as the Treaties, as 'integral part' of them. It is the first primary law text specifically regarding SGI.

Protocol No 26 annexed to TEU and TFEU

THE HIGH CONTRACTING PARTIES,
WISHING to emphasise the importance of services of general interest,

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

Article 1

The shared values of the Union with respect to services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

— the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;

— the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;

— a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

Article 2

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

Unlike the previous Treaties, the Protocol No 26 of the Lisbon Treaty does not only regard services of general economic interest but all SGI, be they economic or non-economic.
If a service is considered as "non-economic", Article 2 clearly states that the Treaties *"do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest"*.

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

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

Thus, the Treaty of Lisbon represents a clear step further compared to the previous Treaties, as it creates potential to clarify the EU framework regarding the definition, organisation, operation of services of general interest, it guarantees them and it gives more security to all actors concerned.

From these developments of the Treaties, a set of principles framing the European conception on services of general interest has emerged.

These provisions of the Lisbon Treaty (TEU and TFEE) have integrated the EU *acquis*, which defines the framework for services of general interest and gives new guarantees to national, regional and local public authorities in the exercise of their powers with respect to these services. The EU *acquis* can be summed up as follows:

SGI: The European *Acquis* with the Lisbon Treaty

1. The Member States (national, regional and local authorities) have the general competence to define, 'provide, commission and organise' SGI, as well as financing SGEIs.
2. The European institutions have the same competence for European services which prove necessary in order to achieve the EU's objectives.
3. As concerns non-economic services of general interest (NESGI), the rules of competition and internal market do not apply; NESGI are only subject to fundamental principles of the EU (transparency, non-discrimination, equal treatment, proportionality.
4. As for services of general economic interest, public authorities must clearly define their "missions" and "particular task" (principle of transparency).
5. On that basis, they may define appropriate means for the proper accomplishment of the "particular task" (principle of proportionality), including, if it is necessary and proportionate, aids and subsidies, exclusive or special rights.
6. The Member States have free choice on the management mode: internal, in-house, delegated, etc.
7. These definitions should clearly establish the objectives of "a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights".
8. The rules of competition and the rules of the internal market apply only if they do not obstruct the performance, in law or in fact, of their particular tasks.
9. The Member States have free choice on the ownership of enterprises (principle of "neutrality").
10. In all cases, misuse can occur due to "manifest error", which the Commission can raise, under the control of the CJEU.

3. Transversal and sectoral rules

We focus here below on the EU secondary law, soft law and ECJ case law in fields that are the most relevant to the Greek SOEs entrusted with SGEIs missions and which are in the jurisdiction of HCAP-EDIS.

3.1. Transversal rules

3.1.1. Definition of SGEI and subsidiarity

European Treaties do not provide a clear division of competences between the EU and its Member States when it comes to defining, organising and financing of SGEIs.

Article 14 TFEU provides for the shared competence between the EU and its Member States with regard to SGEIs (*"each within their respective powers"*). It refers to Article 4§2 TEU according to which *"The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, 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 »*. Article 1 of the Protocol No 26 emphasises the essential role and the wide discretion of national,

regional and local authorities.

On these bases, the ECJ case law, as well as Communications from the European Commission, reiterates the general competence of the Member States (and of their infra-national authorities) with respect to the definition of SGEIs. This definition can only be subject to control for *"manifest error"*, which can be raised by the Commission under the control of the ECJ.

In fact, the division of competences between the EU and its Member States derives from the application of the subsidiarity principle, which has been enshrined in the primary law by the Maastricht Treaty and which is reinforced by the Lisbon Treaty.

Article 5 TEU provides that "*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in 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 institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol*".

The European Court of Justice has jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act brought by a Member State or the Committee of the Regions.

3.1.2. Competition law and SGEI

Article 106 TFEU refers for undertakings entrusted with SGEIs to possible derogation from the Treaties, in particular of the rules of competition, in case these rules obstruct the performance, in law or in fact, of the particular tasks assigned to them, provided that the development of trade will not be affected to such an extent as it would be contrary to the interests of the Union. Under these two conditions, Article 106§2 TFEU exempts the undertakings under consideration from the application of the Treaty rules. Therefore, it gives primacy to SGEIs, as specified in the White Paper of 2004 on SGIs: « *This means that, under the EC Treaty and subject to the conditions set out in Article 106(2), the effective performance of a general interest task prevails, in case of tension, over the application of Treaty rules* ». But this unchanged legal text had not the same meaning in 1957 and today, to the extent that "the interests of the Union", which serves as the basis for analysing the effects on trade, are different: in 1957, it focused on the progressive elimination of obstacles to trade; today, it is part of the whole EU objectives as mentioned in Article 3 TEU.

For SGEIs to be exempted from the application of competition rules and internal market rules, the 'particular tasks' assigned to them must be clearly defined by competent public authorities. The corresponding act of the public authority elaborates the reasons and objectives (transparency principle) which make an activity subject to SGEIs and therefore also to particular norms. It ensures that exemptions are proportionate to the objectives (proportionality principle) and that the development of trade will not be affected to such an extent as it would be contrary to the interests of the Union.

On these bases, public authorities decide about the mode of organisation of services, which could include, in a manner that is proportional to their particular tasks, special or exclusive rights or territorial and/or temporal monopoly situations. Public authorities define services to be provided, public service obligations – PSO, universal service obligations – USO, as well as the financing modes foreseen (public service compensations, for instance).

3.1.3. SGEI management models

Public authorities decide about the management model of SGIs that can range from direct management and *in house* to different forms of externalisation (e.g. concession).

For the ECJ, *"public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments"* (C-26/03, case *Stadt Halle*, 11 January 2005). The Court has also stated that *"a public authority has the possibility of performing the public interest tasks conferred on it by using its own administrative, technical and other resources"* and that they may *"perform the public interest tasks conferred on them may be exercised in cooperation with other public authorities"* (C-324/07, case *Coditel Brabant SA*, 13 November 2008).

At EU level, *in house* management has been recognised by the ECJ case law. The Court refers to *"the case where the local authority exercises over the person concerned 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 or authorities"* (Teckal case C-107/98, 18 November 1999). Starting from 2005, several decisions of the ECJ have clarified the notion. Thus, in 2005, in a case regarding a mixed company, the Court has stated that if a private associate participates in the capital of a company whose capital is in part owned by a public authority, such a relationship should not be considered in house (Stadt Halle case, 11 January 2005; Anav case, C-410/04, 6 April 2006). The Court's decisions in the cases Carbotermo and Asemfo (C-340/04, 11 May 2006 and C-295/05, 19 April 2007) have recognised the in house character when several public authorities own the capital of a company. In the case Coditel Brabant (C-324/07, 13 November 2008), the Court has recognised the in house character of a relationship with an inter-municipal cooperative society (Commission/Germany, C-480/06, 9 June 2009).

EU secondary law has defined the *in house* notion only in the field of transport (Regulation No 1370/2007). Unlike the European case law, this Regulation provides that *"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*" (Art. 5 § 2a).

Public authority confers the management of a SGEI, according to the management model it has chosen, by a mandate. The mandate is required by the EU secondary law since the Monti-Kroes package of November 2005 (replaced by Almunia package of 2011) and the Services Directive 2006/123/EC of 2006.

According to the 'Almunia' package, a mandate is an act, the form of which can be determined by each Member State. It should particularly mention: 1) the content and the duration of public service obligations; 2) the undertaking and, where applicable, the territory concerned; 3) the nature of any exclusive or special rights assigned to the undertaking by the granting authority; 4) a description of the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation; 5) the arrangements for avoiding and recovering any overcompensation; 6) a reference to the decision of the Commission C(2011) 9380 for aids subject to it. The duration of the mandate have to be justified by objective criteria, such as the need to amortise non transferable capital. In principle, it should not exceed the period needed for the accounting depreciation of the main vital assets for the provision of the SGEI [SEC(2010) 1545 of 7 December 2010; SWD(2013) 53 of 29 April 2013].

The BUPA case law *(British United Provident Association Ltd)* (T-289/03, 12 February 2008) has further clarified the in house notion and has given a more flexible interpretation to the concept of mandate by recognising a collective mandate: *"the recognition of an SGEI mission does not necessarily presume that the operator entrusted with that mission will be given an exclusive or special right to carry it out (…) the attribution of an SGEI mission may also consist in an obligation imposed on a large number of, or indeed on all, the operators active on the same market"*. The decision also stated that *"the compulsory nature of the service and, accordingly, the existence of an SGEI mission are established if the service-provider is obliged to contract, on consistent conditions, without being able to reject the other contracting party. That element makes it possible to distinguish a service forming part of an SGEI mission from any other service provided on the market and, accordingly, from any other activity carried out in complete freedom"*.

3.1.4. SOEs in charge of SGEI

In Europe, in particular after the Second World War, public enterprises have been either the single or the main tool for the commercial provision of services of general economic interest (SGEI) in most countries and activity sectors (transports, energy, communications, water, etc.). Their pre-eminence in the provision of public services has sometimes led to consider them as equivalent to public services. Yet, in practice, public enterprises can be in charge of public tasks other than tasks of public service. As established by the European Parliament, "*In Europe, public undertakings are by nature intended to guarantee that the necessary steps are taken towards the harmonious development of the economy and society, in so far as they contribute towards achieving the objectives pursued by the government in the general interest. (…) whereas it is necessary to distinguish, from both the legal and economic points of view, between public manufacturing undertakings and public undertakings which run public services at local or national level, since the former meet rather the demands of economic development and the latter meet needs for public services, but bearing in mind that both contribute to the pursuit of general interests"* (Resolution of 6 May 1994[2]).

Since 1957, the Treaty of Rome has defined the neutrality of the European construction with respect to the ownership regime of undertakings.

Article 345 TFEU

The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

The ownership of undertakings falls within the sole competence of Member States. They are also free to decide to undertake, directly or indirectly, economic activities on the same terms as private companies (T-319/12 and T-321/12, 3 July 2014, point n° 79). However, they should ensure that the action of public undertakings acting on the European market is conducted according to the rules of the Treaty.

In fact, the EU Treaty states that Member States *"shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109"* (Art. 106-1 TFEU). SOEs should not enjoy particular advantages compared to their competitors. But, they should not be penalised compared to their competitors because of the particular tasks conferred to them. If they have "particular tasks" in SGEI field, these should be compensated.

To a certain extent, the Treaty has recognised the specificities of the various industries, in

[2] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_1994_205_R_0453_01&from=EN

particular in the transport sector. On the other hand, it has provided for exceptions, limitations, derogations, in particular with respect to competition rules.
The European Commission has adopted on 25 July 1979, on the basis of Article 106§3 TFEU, the general guidelines for the preparation of a Directive on the transparency of financial relations between Member States and public undertakings (80/723/CEE, completed in 1985 – 85/413/CEE). This Directive was repealed and replaced in 2006 (Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings of 16 November 2006).

The Directive takes up the definition of the concept of public enterprise of 1980: *"For the purpose of this Directive: (…) (b) 'public undertakings' means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking: (i) hold the major part of the undertaking's subscribed capital; or (ii) control the majority of the votes attaching to shares issued by the undertakings; or (iii) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body".*

The Directive requires a systematic communication of certain information, the storage of some data and annual reports. It also imposes particular obligations to public and private undertakings, which are entrusted with exclusive or special rights under Article 106§1 TFEU or entrusted with the management of an SGEI under Article 106§2 TFEU. Besides, the Directive requires the separation of accounts for the activities linked to SGEIs missions and other economic activities.

The European Court of Justice has promoted a functional approach of the notion of public undertaking. It has considered that when an entity that is part of the public administration undertakes economic activities it is to be considered as being a public enterprise (Decoster, C-69/91, 27 October 1993, point 15; Collino and Chiappero, C-343/98, 14 September 2000, point 33). Besides, it has considered that *"the concept of public undertaking has always been different from that of body governed by public law, since bodies governed by public law are created specifically to meet needs in the general interest not having any industrial or commercial character, whereas public undertakings work to meet industrial or commercial needs*" (Case C-214/00, 15 May 2003).

For their part, the *OECD Guidelines on Corporate Governance of SOEs* note that "the rationales for establishing or maintaining state enterprise ownership typically include one or more of the following:

(1) the delivery of public goods or services where state ownership is deemed more efficient or reliable than contracting out to private operators;

(2) the operation of natural monopolies where market regulation is deemed infeasible or inefficient; and

(3) support for broader economic and strategic goals in the national interest, such as maintaining certain sectors under national ownership, or shoring up failing companies of systemic importance".

OECD Guidelines show that, in case of "natural monopoly" situations, the State may choose to manage them through SOEs: "Natural monopolies are sectors where it is most effective for production to be undertaken by a single firm. In such cases, the State may deem it more cost efficient to own such enterprises directly rather than to regulate privately-owned monopolies. To clarify the respective policy rationales underpinning their maintenance in state ownership, it can sometimes be useful to classify those SOEs into separate categories and define their rationales

accordingly. All elements in the chain of agents involved in the governance of SOEs should be made aware of the government's commitment to the present Guidelines."

3.1.5. Public procurement

Since the 1990s, the European policies of liberalisation of public procurements have had a particular influence on the management of SGEIs.

Several Directives define common rules for procurement procedures today: Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Directive 2014/25/EU 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 Directive 2009/81/CE of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

For the purpose of Directive 2014/25/EU, public undertakings which pursue one of the activities referred to in Articles 8 to 14 are considered contracting entities. Article 4§2 of the Directive define 'public undertakings' as *"any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the contracting authorities shall be presumed in any of the following cases in which those authorities, directly or indirectly: (a) hold the majority of the undertaking's subscribed capital; (b) control the majority of the votes attaching to shares issued by the undertaking, (c) can appoint more than half of the undertaking's administrative, management or supervisory body."*

3.1.6. The compensation of pubic service obligations

Until the 2000s, there were no transversal European rules regarding public service obligations compensation.

European Treaties forbid state aids that are more likely to favour some enterprises at the expense of their competitors in the internal market. At the same time, a series of derogations have been provided, in particular for SGEIs when the application of such prohibition prevents them to accomplish their particular tasks (Art. 107 to 109 TFEU).

These provisions have been subject to appeals before the ECJ, which has issued two important decisions in the *Ferring* case (judgment of 22 November 2001) and the *Altmark* case (judgment of 24 July 2003, C-53/00 and C-280/00). In the Altmark case law, the ECJ defines four cumulative conditions to be met for a compensation not to be considered state aid:

> *"- first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;*
>
> *- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;*
>
> *- third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;*
>
> *- fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been 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."

The European Commission has then taken the initiative to define a more general legal framework ('Monti-Kroes' package, also called 'Altmark' package, adopted in November 2005, then 'Almunia' package of 2011-2012).

The current EU transversal framework contains four acts: a Communication (2012/C 8/02), aiming at clarifying basic concepts; the *de minimis* Regulation concerning SGEI (360/2012), which provides that state aid for SGEIs not exceeding EUR 500.000 within three years period is not to be considered state aid; a Decision (20 December 2011) and a Framework (2012/C 8/03), which provide for the conditions to be met for a compensation of public service that are considered state aid to be compatible with the provisions of the TFEU.

3.1.7. Regulation and evaluation

Regulation aims to ensure a dynamic balance of complex and instable systems, which cannot be left at their self-regulation. For SGEIs there are in particular tensions between, on the one hand market and competitions rules and, on the other hand, general interest objectives assigned to them. Regulation also searches to handle asymmetries of information and different capacities of actors.

The aims and objectives of regulation can also be very different, leading to various forms of regulation. It could have the purpose of introducing competition in a sector characterised by monopoly situations. In this case, it is asymmetric as its aim is to force the incumbent to open its markets. For that purpose, regulation would be often temporal (yet, this character hasn't been confirmed). Regulation could also aim to control competition and in this case it is often a task of competition authorities. Regulation could also aim to monitor that the introduction of competition does not provoke perverse effects (lack of incentives to invest, multiplication of negative externalities, territorial concentrations, etc.). It can be in charge of organising equal access of operators in competition to a single network that constitutes a natural monopoly. It follows complex objectives, which requires continuous decisions and the intervention of specialised entities. Likewise, regulation could aim at ensuring the evolving balance between competition and general interest, the control of public service obligations and universal service, etc.

We could emphasise eight functions of regulation, to be clearly defined in each specific situation:

- general or sectoral regulation (decision-making),
- public policy objectives,
- respect of the EU and national competition law,
- equal access to certain infrastructure organised as natural monopoly,
- tensions between competition rules and public service missions,
- the financing of PSO and/or USO and long term investments that are needed to ensure the quality, continuity and universality of the service,
- the control of the whole of these functions, dispute arbitration and eventual sanctions,
- multi-criteria evaluation of the economic and social efficiency of the system, to contribute to the evolution of the service in time and space, to meet users', citizens' and community's needs.

Sectoral EU rules elaborated in the field of SGEIs (telecommunications, postal services, electricity, gas, transports) leave most regulation functions to Member States and have provided for the creation of national authorities for regulation and their cooperation. At the same time, market development and the integration of operators lead to growing difficulties for the exercise of national regulation functions and to disparities detrimental to the internal market.

3.2. Sectoral rules

3.2.1. Postal services

Unlike the European rules in other fields, EU postal secondary law has provided an ambitious definition of postal 'universal service' to be guaranteed to each European citizen. Directive 1997/67/EC (as amended by Directive 2008/6/EC requires Member States to take measures in order that *"users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users"*. They *"shall take steps to ensure that the universal service provider(s) guarantee(s) every working day and not less than five days a week, save in circumstances or geographical conditions deemed exceptional by the national regulatory authorities, as a miminum: one clearance, one delivery to the home or premises of every natural or legal person or, by way of derogation, under conditions at the discretion of the national regulatory authority, one delivery to appropriate installations"*. *"Each Member State shall adopt the measures necessary to ensure that the universal service includes the following minimum facilities: the clearance, sorting, transport and distribution of postal items up to two kilograms, the clearance, sorting, transport and distribution of postal packages up to 10 kilograms [that can be extended up to 20 kg], services for registered items and insured items"*.

This Directive allows to: define quality norms for postal services; to guarantee remedies and compensation of users; to mandate a single operator for the provision of the universal service; to guarantee essential exigencies, including the respect of working conditions and social security regimes, the respect of collective conventions, environment protection, territorial planning; to guarantee all equal access to the postal service and the possibility to adapt the service according to the evolution of the technical, environmental and social context, as well as to take into account users' preferences; to implement an affordable single tariff applicable to all the country for each service that compose universal service.

The last amendments of the Directive have repealed the possibility of financing the net cost of the universal service by the existence of a reserved sector, for a part of the service, but it offers margins of manoeuvre with respect to financing. This involves the precise calculation of such net costs and the definition of the recovery or financing mode (possibly through compensation). Thus, the Directive allows either public subventions, a financing by users or the implementation of a "play or pay" system, according to which the new entrant or a potential competitor engage itself either to respect or to take in charge universal service obligations or to pay in to a compensation fund proportional to its turnover and engagements it assumes, in order to make the conditions of competition fair for all.

The Decision 2010/C 217/07 of the European Commission of 10 August 2010 created a European Regulators' Group for postal services.

3.2.2. EU Railway packages

From the beginning of the 1990s, a series of legislative packages have been progressively adopted, which developed European railway policy. Initially, the Directive 91/440/EEC provided for the

separation between exploitation of services and the management of the infrastructure, rights of access to networks and transit rights.

The first railway package of 2011 has reinforced the separation between the infrastructure and transport operations, has recognised rights of access to the railway trans-European network, has created the legal framework for the recognition of the validity of licences issued in one Member State in the territory of the whole Union and has established a framework for the infrastructure capacity allocation and infrastructure charging, requiring the setting up of national independent regulatory authorities.

The second railway package of 2004 aimed at reinforcing safety rules, interoperability and the liberalisation of railway transportation of goods and to create the European Railway Agency.

The third railway package contains the Regulation No 1370/2007 on public passenger transport services by rail and by road, Regulation No 1371/2007 on rail passengers' rights and obligations, Directive 2007/58/EC amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and Directive 2007/59/EC on the certification of train drivers operating locomotives and trains on the railway system in the Community.

Regulation No 1370/2007 provides for a general definition of the term 'public service obligation' – *"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"* - leaving the precise definition of its content to the discretion of EU Member States.

In 2013, the European Commission has proposed a fourth railway package [COM(2013)25], which contains six legislative proposals concerning in particular the opening to competition of national railway passengers transport markets, the improvement of the management of the infrastructure and of the quality of the railway employment. In April 2016, the legislative procedure has led to a political compromise between the Council and the European Parliament in favour of the opening to competition of commercial passengers transport, in December 2020, and liberalisation of routes subject to public service obligations in December 2023.

3.2.3. Urban transportation

Regulation No 1370/2007 of 23 October 2007 provides in its Article 5 that *"Unless prohibited by national law, 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, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments." "Any competent authority which has recourse to a third party other than an internal operator, shall award public service contracts on the basis of a competitive tendering procedure, except in the cases specified in paragraphs 4* [for small value contracts or contracts concerning small distance routes]*, 5* [in urgent cases] *and 6* [railway transport, excepting metro and tramway]*."*

The Regulation also rules the way public service contracts are awarded in the EU and the circumstances requiring the opening to competition.

3.2.4. Electricity

European rules in this field aim at developing the internal market of electricity and providing for a safe and sustainable environment. One of the basic principles is the free choice of providers by each user.

Article 3§3 of the Directive 2009/72/EC of 13 July 2009 defines the universal service *"that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non-discriminatory prices"*. With respect to public service obligations, Article 3 of the Directive provides that for residential clients, and eventually for small enterprises, *"Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection"*. National consumers shall have equal access to electricity enterprises; the protection of vulnerable clients is integrated; clients must have access to information regarding the nature of electricity they can use; Member States shall impose measures to promote social and economic cohesion, environment protection and the fight against climate change, and shall inform the Commission about the measures they implement to transpose the Directive. Regulation No 713/2009 of 13 July 2009 sets up the European Agency for the Cooperation of Energy Regulators.

3.2.5. Water and wastewater

Since the 1970s, the European Community has adopted a series of Directives containing ambitious norms of quality and against pollution. These norms have been adopted in the framework of environment and public health policies and not with the aim to realise an internal market in the field of water and wastewater services. There is no European legal obligation to liberalise these industries. Directive 2000/60/CE has introduced the full cost recovery principle from 2010.

4. Synthesis

In Europe, services of general economic interest, are at the heart of multiple and complex tensions between:

- balancing the realisation of an idealised common internal market with the fact that basic public services are anchored in specific local areas that have their own needs and objectives;
- public service obligations, in general and for each precise sector, to carry out "particular tasks" defined by public authorities to meet the general interest objectives they pursue;
- fulfilling public service obligations, in general and for each precise sector, to carry out "particular tasks" defined by public authorities to meet general interest objectives;
- implementing the subsidiarity principle in the context of shared authority between European, national, regional and local levels in order to offer optimal public services;
- working towards the objective of economic, social and territorial cohesion of the EU, particularly in relation to Article 174 TFEU[3].

[3] **Article 174 TFEU** - In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion. ... the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least

Responsibilities, rights and duties of public authorities

The EU *acquis* regarding SGEIs and SOEs emphasises the essential role of national, regional and local public authorities, their rights and duties.

Public authorities decide:

- to classify a service as being a service of general interest, that is a service meeting the common interest of all inhabitants, communities and social and economic activities;
- the definition of "their missions" (Art. 14 TFEU) and "particular tasks" (Art. 106 TFEU), involving obligations to provide the service and public service obligations (PSO) or universal service obligations (USO);
- the mode of organisation of these missions and tasks with respect to European rules;
- to confer these missions and tasks to an operator– in particular in case of a natural monopoly – or to several operators in competition;
- their management model, either the direct provision of services or through in house entities or through externalisation;
- to define the mode of financing of these services: by the public budget or by users or with the participation of other private or public funds or combining these forms, for instance to implement social, geographical, generational equalisation schemes or equalisation schemes between activities, etc.;
- to define the modes of compensation of the net costs generated by PSO and USO;
- to set up, when needed, regulators, with the definition of their objectives, decision-making powers and process and appeals against their decisions;
- to organise evaluations of both relevance of decisions here before (to allow their adaptation to technological, economic, social developments) and of the performance of services and operators;
- to accompany this process by forms of stakeholder participation.

They also decide on the ownership of operators, their status, the existence of SOEs and their specific objectives.

Public authorities have also duties aiming at ensuring transparency, proportionality, non-discrimination and accountability:

- transparency: clear definition of missions, tasks, PSO, USO, equalisations, objectives assigned to SOEs;
- proportionality of decisions taken for the organisation, financing, compensation of PSO and USO with respect to missions and tasks;
- equal treatment and non discrimination on grounds of nationality;

organisation of the accountability for the decisions and for their effects, as long as the rule of law principle requires that public authorities, SGEIs and SOEs do not operate for themselves but to meet evolving needs of citizens, users and of each community and society.

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favoured regions ... Among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross- border and mountain regions.

5. Annex 1: The six common values of SGEIs

The six values set out in Protocol No 26 for services of general economic interest place the three first values (quality, safety, affordability) behind the objective of 'high level'. We are thus not referring here to absolutes, which are clearly definable and measurable, identifying quantifiable indicators and allowing us to rank SGEI on a linear scale. Rather, the expression 'high level' evokes qualitative and progressive objectives. However, it does clearly define a goal.

5.1. A high level of quality

The first of the six values mentioned is that of quality. Here, there are no surprises. From the beginning of the process of Europeanisation of SGEI, improving quality has been at the heart of the approach, in parallel with achieving the 'internal market'.

Even if there is no general definition of quality, the various sources of Union law allow us to pick out the reliability and continuity of services, the existence of mechanisms of compensation in the event of the standard of services being poor, user and consumer protection and security, environmental protection, sustainable development, etc. Quality is thus often tied in with other values.

In European legislation, quality objectives vary and are provided for each sector, depending on the characteristics of that sector. Therefore, as far as the water sector is concerned, the series of European Directives adopted since the 1970s aim for the implementation of quality standards. In the same vein, 2010 saw the adoption of a 'quality framework for social services of general interest' (SPC/2010/10/8).

Details regarding standards and/or contracts, such as contracts between the public authorities and the operators, contracts between the operators and the users, the statutes and the employees' contracts with the operator – set out the existing quality guarantees, their level and the means whereby they can be protected and respected, as well as mechanisms to adapt them.

According to a ruling by the Court of Justice of the European Union regarding environmental protection, the Court ruled that when it came to 'high quality' the goal was not necessarily to aim at the highest possible technical level, as the States could adopt more restrictive measures (C-284/95).

One should with no doubt define, for each of the sectors of SGEI covered by European Regulations, specific quality indicators which are easily measurable and verifiable, which could be subject to progressive satisfaction related objectives which could be periodically evaluated and adapted.

5.2. A high level of safety

In general, the concept of safety involves protecting oneself against dangers and risks; its content is thus very broad, which begs the question as to how one can define the safety of SGEI, their 'high level' of safety.

In the field of SGEI, safety covers various aspects: physical safety (for users and people playing a role in producing and providing these services), including the safety and reliability of the networks and materials, of the system, the safety of provision and supply.
If the bulk of competences when it comes to defining the safety of SGEI remains with the Member States, the Union does intervene when global and crucial problems arise, such as, for example, the safety of nuclear power plants after Fukushima.

In certain sectors, cross-border safety issues are more obvious and explain the setting up of European safety agencies: in transport sub-sectors (the European Maritime Safety Agency, the European Aviation Safety Agency, the European Railway Agency) but also the European Food Safety Authority, the European Agency for Safety and Health at Work, the Executive Agency for Health and Consumers.

In the framework of the Green Paper on SGI [COM(2003)270], the Commission reminded us of its 'new approach', 'a major impetus' aiming to 'increase the level of safety and adopt a more European approach in certain domains, in particular in the transport and energy sectors', so that several objectives can be pursued 'by Europe as a whole', when, for example, problems extend beyond national borders.

As for the need for regulatory intervention regarding the security of SGEI, the Commission takes the view that 'in some cases of services of general interest, public intervention may be necessary to improve the security of supply, in particular in order to address the risk of long-term underinvestment in infrastructure and to guarantee the availability of sufficient capacity' [COM(2003)270].

5.3. A high level of affordability

Two approaches to the 'affordability' coexist in the European political approaches texts: one has a universal dimension, whilst the other is restricted to those populations who are on a low income, who are vulnerable or disadvantaged.

The demand for SGEI to be affordable was permanently underscored in the liberalisation policies for SGEI carried out after the Single European Act (1986) by the European Union, as being closely linked to the goal of cohesion pursued by the Union in order to allow access to SGEI, irrespective of how much the beneficiaries earn or their place of residence, in order to prevent and fight against exclusion.

The affordability factor features in particular as a way of defining the concept of 'universal service' in telecommunications, the postal services, electricity, and, more generally, the public service's obligations.

Affordability is not an absolute, it is relative to the economic and social conditions of each territory, which, as we all know, continue to vary wildly, even 20 years after the goal of the 'single market' and in spite of the initiatives underpinning cohesion policy. It is also relative to needs and technologies, and thus related to how they evolve over time. This is why, even if the unit cost of electronic communications has dropped sharply over the last 20 years, the population's 'communication budget' is not going down.
It therefore would appear necessary to better define what 'affordability' means in time and space, to define the tools with which this concept and goal can be measured, to clarify how this

'common value' can be implemented in secondary legislation or national legislation and to determine what initiative(s) the EU might take in order to make sure this value is respected.

In more general terms, it is up to the competent authorities at national, regional and local level to finance services of general economic interest (Article 14 TFEU); this involves the possibility of compensating the costs incurred in order to achieve the special tasks of general interest, whose 'affordability' and accessibility are the key components, whilst respecting the proportionality principle with regard to compensations compared to the objectives, but without this being considered as state aid.

Whilst the first three values target a 'high level' of..., and are thus relative, the fourth is an absolute, which could not countenance violations or exceptions, ('equal treatment') and the last two can be classed as objectives ('the promotion of...').

5.4. Equal treatment

Equality is one of the constitutional principles of many Member States of the European Union. If, in some Member States, it was originally conceived as a guarantor to users of equality in access and in the supply of the service, banning, in principle, any form of discrimination, in the States which gave priority to the universality of service, the obligation regarding the universal supply of certain services can translate into the setting up of positive discrimination. This approach appears in the legal system of the other Member States, including via the transposition of Community law.

Equal treatment has been at the heart of the very process of European integration since it began. The Community, followed by the European Union, was founded based on the absence of any kind of discrimination amongst the Member States, and against any person, even forming a condition for States to work together towards achieving shared goals.

The Charter of Fundamental Rights of the EU was adopted in 2000, and has been binding since the entry into force of the Lisbon Treaty on 1 December 2009. It contains a specific title (Title III) on equality, which establishes equality in the eyes of the law and bans any form of discrimination (Articles 20 and 21). It also contains specific rules regarding the rights of children and the elderly, the integration of people with disabilities, equality between men and women and linguistic diversity (Articles 22-26).
Since the end of the 1960's, the case law of the Court of Justice has integrated the reference to fundamental rights, including the general principle of equality. Today, non-discrimination and equality of treatment are recognised as general principles of the EU. However, equal treatment does not require identical treatment.

Therefore, promoting 'positive measures' ('positive discrimination') can be considered justified, as it allows for maintaining or adopting specific measures which aim at preventing or compensating disadvantages linked to race, gender, ethnic origin, religion or convictions, a disability, age or sexual orientation.

5.5. Promoting universal access

Community action aiming at guaranteeing universal access to SGI was set in motion in particular within the framework of the policy of liberalisation of certain sectors of SGEI, via the notion of the

universal service, by the cohesion policy and in the field of trans-European networks (for transport, energy and telecommunications), given the fact that 'the market alone cannot, for example, provide universal access or total geographical coverage.' [COM(2003)270].

The demand for universal access is part of a more general reference to the fundamental right to access to services of general economic interest recognised by Article 36 of the EU's Charter of Fundamental Rights.

The view is frequently put forward that the *raison d'être* behind the Universal Service Obligations (USO) is to be a kind of 'social security net', guaranteeing 'the availability, affordability and accessibility' where market forces alone do not provide users with affordable access to basic services, in particular those living in remote regions, with modest incomes or in vulnerable situations [COM(2011)795].

Although a universal service has only, so far, been defined at European level in three sectors (telecom, post, electricity), debates have been held on extending universal service to other fields of telecommunication or other SGEI, such as banking services, for which the Commission has announced a legislative proposal (Single Market Act II) or high-speed internet access, which at the moment is left to the discretion of the Member States.

Yet promoting universal access is not restricted to defining what a 'universal service' is. This is why, by way of example, in the transport sector, it would not be possible to define a universal service for every mode of transport, but it is possible to guarantee, for each inhabitant and throughout European territory, access to one or several mode(s) of transport which guarantee a person's right to mobility.

In the BUPA ruling (T-289/03), universality features as one of the elements which serve to identify SGEI. The Community judge also adds certain defining features to this value and penalties in the event of its violation (access being refused): 'the concept of universal service, within the meaning of Community law, does not mean that the service in question must respond to a need common to the whole population or be supplied throughout a territory (...). Accordingly, the fact that the obligations associated with the service of general economic interest in question have only a limited territorial or material application or that the services concerned are enjoyed by only a relatively limited group of users does not necessarily call in question the universal nature of a mission involving the provision of a service of general economic interest within the meaning of Community law.

5.6. Promoting users rights

Consumer protection became a Community policy with the Treaty of Maastricht in 1992 (Title XI) and is now a shared competence between the Union and the Member States (TFEU, Title XV, Art. 169).

This innovation was based on the recognition that achieving the internal market and implementing competition policy would not suffice to allow for the development and well-being to be achieved. It thus needed to be completed by specific initiatives guaranteeing a balance between market forces and citizens' rights in that they are also 'users' and 'consumers'.

'Promoting' users' rights does not necessarily mean that those rights will be protected. In this field, competences are shared with the Member States and, in the absence of a specific Community

regulation, it is, in principle, the Member States which define users and consumers' rights, just as they will be able to act alongside Community actions.

SGEI must incorporate all of the six values. Listing them in Protocol No 26 does not amount to an 'à la carte menu' in which one might opt to emphasise one aspect over another, but rather gives an overall conception of what SGI are.

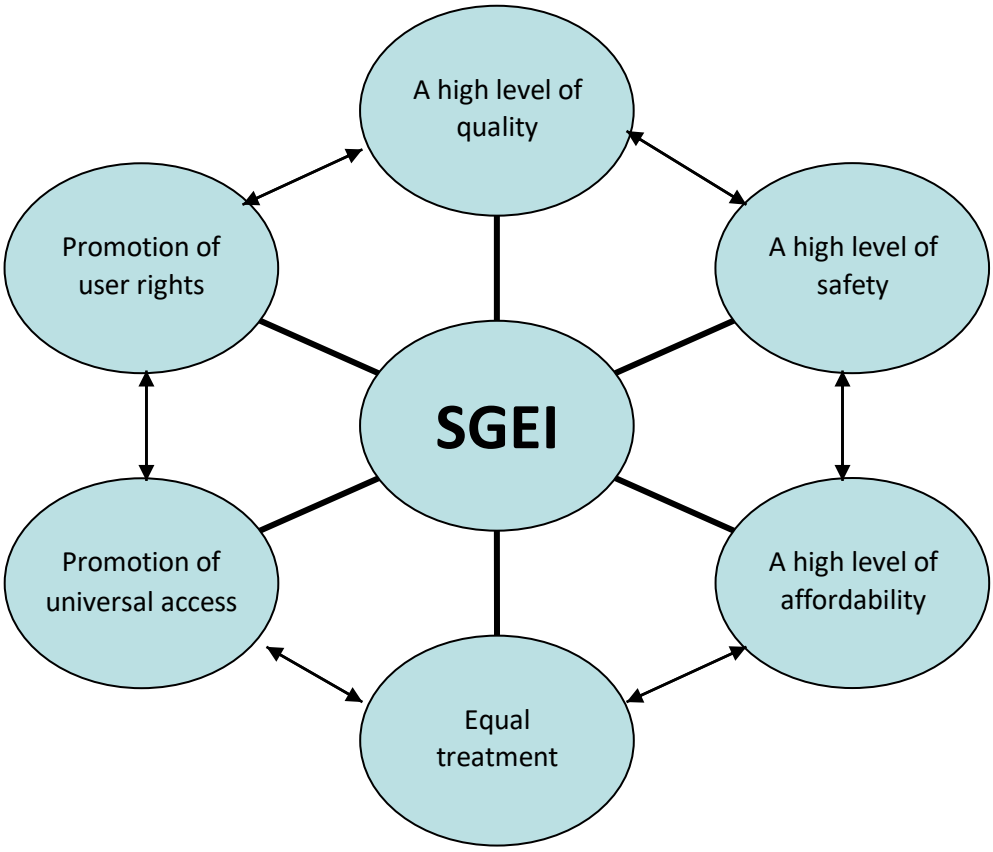
The essence of services of general interest is to provide answers to the needs of each inhabitant, as well as local, regional, national and European community.

Even if we have so far presented each of the values separately, meeting people's needs involves implementing all of these values and their interconnectedness. Considering at once 'quality, safety, affordability, equal treatment, universal access and user rights', what would be the point of having a very high-quality service if the bulk of its users could not access it for financial or territorial reasons?

Those values contain contradictory aspects – improving quality or security comes at a price -, which presupposes making choices and weighing things up, setting priorities and adapting things.

Interactions between values

SGEIs should incorporate all values. At European level, these are not on a sort of "à la carte" menu, but they form an overall approach. At the same time, it is not an exhaustive list. The response to needs involves the implementation of all these values and of their interactions.



6. Annex 2: Chronology of primary law provisions on public enterprises and SGEIs

Treaties	Public enterprises - SGEIs	SGEIs
Treaty establishing the European Economic Community (TEEC - 1957)	**ARTICLE 90** 1. In the case of **public undertakings** and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94. 2. Undertakings 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 this Treaty, 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 development of trade must not be affected to such an extent as would be contrary to the interests of the Community. 3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.	
Treaty establishing the European Community (TEC – 1997; as amended by the Amsterdam Treaty)	**ARTICLE 86 (ex Article 90)** *[unchanged, except the number of articles]*	**ARTICLE 16** Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which

		enable them to fulfil their missions.
Treaty on the functioning of the European Union (TFEU – 2007; Lisbon Treaty)	**ARTICLE 106 (ex Article 86 TEC)** *[almost unchanged, except the number of articles and words in italics]* 1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the *Treaties*, in particular to those rules provided for in Article 18 and Articles 101 to 109. 2. Undertakings 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 development of trade must not be affected to such an extent as would be contrary to the interests of the *Union*. 3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.	**ARTICLE 14 (ex Article 16 TEC)** Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.