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Conflicts about general-interest public services

Liberalisation of public services under the Treaty of Lisbon

Neither economic nor social issues were the focus of the debate about the reform of the European treaties. It was mainly concerned with the European democracy deficit and the urgently necessary institutional reforms. Following the eastward enlargement, the EU had aimed to increase its capacity to act, make structures more efficient and more transparent, clarify the competences of Member States and European institutions, strengthen the involvement of citizens and embody their democratic rights against European authorities. However, fundamental reforms related to economic or socio-political matters were not really intended (the price is being paid now in the economic and financial crisis). But the public debate nevertheless reflects in the reform process, above all the shock about the failed referenda in France and the Netherlands, which led to the first application ever of the term **social market economy** in Article 3, paragraph 3 of the EU Treaty. Although this did not mean that the competitive orientation of the EU treaties and their four fundamental freedoms was waived, it did establish a social orientation alongside these.

The topic of **public services**, as a core element of Europe's social constitutions, played a rather notable role in the reform debate, above all in the referenda in France and the Netherlands. The entanglement of this debate in institutional issues related to the reform process also shows in the Lisbon Reform Treaty. As a result, EU legislation only changed in very few places with regard to services of public interest, but these changes will lead to significant shifts of emphasis - or rather shifts of power.

The most important changes in the area of services, which can be derived from the Treaty of Lisbon for services of general interest, are:

- *besides the binding validity of the Charter of European Fundamental Rights, which includes the access to services of general interest in Article 36,*

- *the insertion of an express legal foundation for services of general economic interest in Article 14*

- *and Protocol No. 26 on services of general interest.*

This protocol, by the way, was not included in the original draft for the constitution. It is assumed that pressure from the Dutch government following the failure of the referenda in France and the Netherlands led to the inclusion of this section in the Treaty of Lisbon.

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Background

The dispute about public services in Europe has always taken place along two divides:

- Firstly, who is responsible for the regulation of these services, the EU or the Member States? And which role do the decentralised subdivisions play in this allocation of rights and duties, since the EU simply left out regional/communal self-government up to the Treaty of Lisbon?
- And secondly, which model is to be applied for the financing and organisation of public services? The principle of free competition in the internal market? Or should the delivery of services of general interest also pursue welfare-oriented goals which require limiting market principles?

This is due to the diverse traditions in the European Member States. As early as in the founding phase of the community, states which traditionally had a strongly public system of services of general interest were confronted with countries with a system which was more geared towards the private economy. They agreed on a compromise which was to satisfy all parties: the community takes a neutral stance with regard to the organisation and ownership models used by Member States to fulfil their tasks (Article 295 EC Treaty). However, public companies are treated in precisely the same manner as privately run organisations and are subject to the rules of European competition and subsidy legislation (Article 86, paragraph 2 EC Treaty).

Exceptions are only permitted in cases where the application of competition regulations would cause an unreasonable impairment to the fulfilment of welfare tasks (Article 86, paragraph 2 EC Treaty). This defines a rule-exception relationship, unadulterated competition thereby being the rule and exemption the exception. The introduction of Article 16 EC Treaty by the Treaty of Amsterdam for the first time recognises the special role of services of general economic interest; the impact of this shift of emphasis, however, remains a contentious issue.

What is the impact of the amendments to the Treaty of Lisbon?

1. On the issue of Article 14:

In the new, amended second sentence, it contains a legal foundation for the EU's legislation in the area of services of general economic interest, but solely for services of general economic interest, i.e. market-related services. Legislative competence further only relates to “particularly economic and financial conditions" required for these services to function and for which the EU is responsible "without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services". Furthermore, the legal act can only be executed in the form of Regulations.

This shows the limitations of this legislative competence and it comes as no surprise that the Commission has already clearly stated that it currently sees no need to exhaust it.

In summary it must be noted that this is not a general legislative competence:

- legislation only pertains to services of general economic interest, i.e. market-related public services;
- it must adhere to due legislative procedures, i.e. involve the European Parliament;
- it must only be related to the EU's powers (i.e. above all competition and state aid law);
- it must have an enabling capacity for these services;
- it must not impair the Member States' possibilities of providing, commissioning and funding such services;
- and furthermore, it can only be executed in the form of Regulations.

Finally, importance must be attributed to the reference in the first sentence of Article 16 to Article 4 TEU. Article 4, paragraph 2, not only recognises national identity, including the fundamental political and constitutional structures, but also, expressly and **for the first time in European primary legislation, regional and local self-government**.

For some time, Parliament and parts of the European public have been debating the opportunities and risks of a **European framework directive** on the definition and for the protection of public services in Europe. I, for my part, also supported this demand for a long time.
Yet meanwhile, I have grown more sceptical for two reasons:

- On the one hand, the Treaty of Lisbon contains a legislative competence for Regulations only, not for directives. But Regulations have a much deeper impact on the legal structure of the Member States. They would leave only little space for diversity, which is a particular characteristic of public services in Europe.

- On the other hand, there is a danger of legislation at European level challenging the sole right of the Member States and their regional and local sub-structures of defining what services of general economic interest are (the Commission's competence is limited to controlling abuse) and, in case of this definition also including services of general interest, it would for the first time give the EU authority in this field. Though it must be noted that the EU Commission already attempted to introduce this definition in a Communication dating back to November 2007 - an extremely restrictive one, by the way - but this Communication is not legally binding.

However, an interesting option would be to apply the new legislative competence to an area over which the Commission so far has sole command: **state aid law**. Parliament should insist that a revision of the Monti-Kroes package no longer be carried out in the context of Article 106, paragraph 3, TFEU (formerly Art. 86, para. 3 EC), but of the new Art. 14 TFEU, which envisages express involvement of Parliament.

2. Protocol No. 26 on services of general interest

This protocol is part of the treaties and on one level with other primary legislation, it neither has priority over other provisions, nor is it sub-ordinate. It does not make any fundamental change to the applicability of European legislation related to competition and the internal market. However, principles stated in the protocol must be taken into consideration by the ECJ and the Commission when interpreting the union's laws. They must further be observed by the legislator in future law-making.

The protocol contains four main points:

- Recognition of the principle of local self-government and strengthening of organisational autonomy for services of general interest (emphasis on broad discretionary powers);
- emphasis on the diversity of services according to the users' needs and the respective geographical, social and cultural conventions; the principle of diversity likewise strengthens autonomy;
- high level in terms of quality, safety, affordability, and universal access - which could also justify cross-subsidisation;
- and article 2 states no competence for non-economic services for the EU.

The protocol substantiates the common values mentioned in the new article 14. This substantiation does not entail immediate legal consequences, but it does establish a framework for future measures by the EU. In this sense, it may even be possible to derive a limit from the protocol for further liberalisation projects (e.g. in the area of water supply and wastewater disposal). Liberalisation of the internal market similar to that provided by the Utilities Directives should be hard to introduce with the principles of the protocol, in particular the autonomy of the responsible bodies and the diversity of services.

However, there is no direct change to the legal scope - it makes the Reform Treaty possible, but does not dissolve the basic field of conflict. This is supported, amongst other things, by the perpetuation of article 116, which, however, only creates a political framework for future law-making at EU level to be exploited by Parliament and the Council - or by the national parliaments and the Committee of the Regions in the context of subsidiarity monitoring.

Reactions from political institutions

In contrast to the Commission, which up to now showed only little willingness to take note of the changed political framework conditions, recent judgements by the European Court of Justice (ECJ) indeed reflect the new context:

- Coditel/Brabant and Stadtreinigung Hamburg on the freedom of contract for public-public cooperations,

- Eurawasser concerning the flexible usage of service concessions.

The European Parliament likewise is closely examining the amendments to the Treaty of Lisbon in several committees and investigating the impact on political work. This is also the context in which my initiative report on latest developments in the area of procurement law came into being, which was accepted by a vast majority at the plenary session on 27 May 2010.

Latest developments in procurement law, the so-called Rühle Report

The so-called Rühle Report addresses the changed political framework conditions in European primary legislation and the most recent ECJ judgments. It affirms these and highlights that the European Court of Justice (ECJ) in several judgments emphasises the municipal right to self-government and has pointed out that *"a public authority has the possibility of performing the public interest tasks conferred on it by using its own resources",* (judgement in case C-324/07); it further refers to the judgment of the ECJ's Grand Chamber of 9 June 2009 (case C-480/06), which adds that the Community law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks:

"accordingly, regards public-public partnerships, such as cooperation agreements between local authorities and forms of national cooperation, as falling outside the scope of the public procurement directives, provided that the following criteria are all met:

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

"Points out that the Commission has clarified that not every action taken by public authorities is subject to procurement law, and that as long as European law provisions do not require the creation of a market in a certain area, it remains up to the Member States to decide whether and to what extent they want to perform public functions themselves; Points out that the CJEU's conclusions in the aforementioned judgment not only apply directly to cooperation between local authorities but are generally valid, with the result that they can be applied to cooperation between other public contracting authorities."

However, the report also takes a clear stance with regard to the issue of private capital involvement. In the revision of the Procurement Directives of 2004, the legislators failed to agree on one threshold value (amongst other things because of Germany's disunity). The ECJ then closed this loophole and ruled out the involvement of private capital in public-public partnerships in the so-called Teckal criteria. The report agrees with this line. The involvement of private capital changes the character of an organisation because private capital is subject to other business targets and other market mechanisms. Anyone challenging this fact would also be challenging the special character of public-public cooperations - thereby doing a disservice. Yet the question remains as to how to treat compulsory memberships, silent partnerships and coopera-

tives. So far I assumed that the Commission's Communication on institutionalised public-private partnerships of Feb 5, 2008, which I also refer to in my report, regulates this. However, the EU Commission's action concerning wastewater disposal by the City of Hamm puts this into question. Once again we are redirected to the European Court of Justice and its judgment - in an issue which seemed clarified, politically.

Hence, Parliament has taken a stand in one of the most contentious issues concerning the question whether public-public partnerships are subject to the procurement directives and thus to intensified pressure from European competition law to liberalise. In the Rühle Report, Parliament rejects further liberalisation via procurement law as a backdoor: *"takes the view that in the last few years procurement law has permeated areas which are not inherently classified under public purchasing, and suggests, therefore, that the criterion of purchasing be emphasised still more strongly in the application of the rules of procurement law;*

Service concessions

Parliament has also taken a clear stand on the issue of service concessions - which, by the way, reflects the opinion predominant amongst European "stakeholders". However, this was the most disputed issue of all. The French socialists in particular supported the idea that ECJ judgments would not suffice and it was urgently necessary for the legislator to take action. But Parliament unanimously agrees that service concessions are not subject to the procurement directives but were intentionally excluded by the legislators to enable greater flexibility and account for the diverse legal traditions in the European Member States. Parliament affirms by the majority that legislation should only be introduced in this area if the Commission can prove an impairment to the internal market and if the entire legal framework including the Public Procurement Remedies Directives is first evaluated. Yet Commissioner Barnier has meanwhile made it clear that he will hold on to the Commission's plans to propose a legal act in the co-determination procedure. The Commission wants a "light" law, as an independent law, not as part of the Procurement Directives. However, in my opinion, Parliament can and will only agree to a solution that incorporates the most recent ECJ judgments in this area as well as the conclusions from the Rühle Report.

Closing words:

Though the Treaty of Lisbon does not provide legal certainty in the area of public services, it does highlight the issue of the provision of services of general interest in the political arena. It opens up EU law to different models of organisation and provision of public services and creates space, in which to hold the political debate on the future of services of general interest in Europe.

Annex legal changes from the Treaty of Lisbon in the area of services of general interest:

Article 3
(formerly Article 2 TEU)
(3) The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

Article 4
(1) In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.
(2). 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 14
(formerly Article 16 EC Treaty)
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.

Article 116
(formerly Article 96 EC Treaty)
Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the internal market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.

If such consultation does not result in an agreement eliminating the distortion in question, the European, Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall issue the necessary directives. Any other appropriate measures provided for in the Treaties may be adopted.

Article 106
(formerly Article 86 EC Treaty)
(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.

PROTOCOL (No. 26) ON SERVICES OF GENERAL INTEREST

THE HIGH CONTRACTING PARTIES,

WISHING to emphasise the importance of services of general interest,

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

Article 1

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

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

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

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

Article 2

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

Charter of Fundamental Rights of the European Union

Article 36
Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.