



## Five reasons why action is needed now to promote quality public services in Europe

1. Europe must mean more to citizens than the free movement of goods, capital, services and people – Europe is about having a shared vision for common prosperity and well-being;
2. Quality public services are key to meeting citizen's fundamental rights as well as the EU's objectives of cohesion, sustainable development, gender equality, equal treatment between workers, full employment and competitiveness;
3. The principles that underpin public services – such as universality, continuity, affordability, democratic control, and user protection – are shared across Europe and are part of our common values;
4. Europe must align its competition rules to ensure that future generations have access to quality public services that are run on the basis of solidarity;
5. A European framework law, as a counterweight to the liberalisation agenda, is needed to underpin quality public services as part of the European social model, and to safeguard the rights of national, regional and local authorities to meet their citizens' needs.

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*This paper sets out the arguments in support of a positive EU legal framework on public services. It raises some issues regarding how to campaign in support of this framework and the principles that should underpin it. Annex 1 sets out some of the different EU policies that are affecting public services.*

### **Why public services are important to Europe's future**

1. Public services – sometimes referred to as services of general interest in “EU speak<sup>1</sup>” – are part of the economic and social system of each Member State, as well as of the European social model as a whole. Public services ensure that collective needs and interests can be met. The rights that EU citizens are entitled to claim in this field are recognised at EU level. Article II-96 of the draft Constitutional Treaty "*recognises and respects access to services of general economic interest*" as set out in the Charter of Fundamental Rights.
2. Public services represent one of the key instruments with regard to the realisation of the Lisbon Strategy in terms of job creation, sustainable development and developing a knowledge-based economy. Articles I-2 and I-3 of the draft Constitutional Treaty make this clear when by saying that the EU should be "*a highly competitive social market economy, aiming at full employment and social progress*" as well as "*an internal market where competition is free and undistorted*". The Treaty also makes it clear that the Union is required to "*promote economic, social and territorial cohesion, and solidarity among Member States*".
3. However in practice the European Union has extended its powers to enforce competition whereas its competences regarding solidarity remain limited. Reconciling this dilemma is what much of the current debate on public services is about. The European Commission made a start when it stated that "*the effective performance of a general interest task prevails, in case of tension, over the application of Treaty rules*",<sup>2</sup> which basically means that solidarity should come first. But the laws coming from the EU are not doing this, on the contrary, they are undermining public services and the values they represent.

### **The predominance of EU competition law**

4. Conflicts between the internal market rules and public services have had a significant impact on the structure of public services in Member States through four main mechanisms<sup>3</sup>.
  - liberalisation directives prohibiting integrated public sector<sup>4</sup>;
  - legal challenges to the funding of public services, based on the Treaty's restrictions on State aid;

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<sup>1</sup> The Commission uses the phrase “general interest” because it considers the term public services is seen as “too imprecise”

<sup>2</sup> Para 3.2, White Paper on Service of General Interest - COM(2004) 374

<sup>3</sup> A critique of the EC green paper on Services of General Interest by David Hall, PSIRU, University of Greenwich [d.j.hall@gre.ac.uk](mailto:d.j.hall@gre.ac.uk), September 2003

<sup>4</sup> The liberalisation directives (post, telecoms, electricity, gas, transport) also contain a number of public services obligations such as universal services, consumer and user rights, health and safety and environmental concerns.

- legal challenges to direct provision of services by public authorities, or to restriction on provision of services within a country (for example healthcare), based on competition rules;
  - liberalisation of trade in services (GATS) at the WTO, where the EC may enter negotiations which can lead to services, for example water, being opened to private competition on behalf of member states.
5. Within the European Commission public services are part of the DG Internal Market, which is the DG responsible for removing obstacles to competition. Only “*non-economic*” services without effect on trade are beyond the reach of Community rules on competition and on State aid. However “*non-economic*” has no meaning outside the EU legal context of competition policy<sup>5</sup> and it is the European Court of Justice (ECJ) that decides on whether a service is economic or not, according to specific cases. As soon as there are private operators in a specific public service area, it can be argued that the service is “*economic*.” This is more and more the case.
6. EPSU has called for education, health, water, waste and social services to be exempted from competition policy all together, but this is difficult because of the supremacy of competition law and the differences within Member States. Discussions taking place on exempting certain sectors and/or activities below certain thresholds from the EU policy on State aid are difficult. Agreeing (at national level) “no-go” areas for private (profit making) companies e.g. the Dutch law preventing privatisation in water can slow down, but not stop, the encroachment of competition law.

### ***The status quo is not an option!***

7. In any event, the status quo is not an option. Recent developments - in particular the Commission’s proposal for a Directive on services and the “Monti package” on State aids – illustrate that the current situation is untenable: In the absence of specific EU laws protecting public services, the EU will continue to “open-up” public services to competition and, when this is done, to strictly limit the public service obligations of the private operators. A proactive strategy that leads to EU action to support solidarity-based public services is needed. However, this demands pressure from the “bottom up”, not least as it is often local and regional actors that determine the status and functioning of public services, e.g., awarding contracts, providing services, ensuring employment, promoting democratic participation.... These actors have to be convinced that EU action in this area will strengthen their freedoms.
8. Now is a good time to act because a number of representatives in the European Parliament, most recently the European Socialist Group, are reasserting the need for a legal framework on public services as a counterweight to the Commission’s accelerated liberalisation agenda. How can EPSU maximise this renewed opportunity to mobilise in favour of a positive legal framework on public services?

### ***We need to be more specific about the aims and content of a legal framework***

9. In its resolution adopted by the EPSU Executive Committee in November 2003, EPSU confirmed its support for a legal framework on public services, under co-decision (i.e., the European Parliament and Council would decide jointly). We said that such a framework would set out:
- Common public service principles;

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<sup>5</sup> “Non-economic” is said to cover basic education, legal social protection systems, judiciary, police...

- Legal certainty regarding the prevalence of the general interest over competition rules including exemptions from the latter of social services, healthcare, water, education<sup>6</sup>;
  - The right for local and regional authorities to self-produce essential services without fears of further encroachment from the Commission or Court of Justice;
  - An Observatory on public services with participation of trade unions to monitor and evaluate public services and the impact of liberalisation, to promote cooperation, improve standards, monitor changing needs of citizens etc.);
  - financing mechanisms for public services which take into account the need and positive aspects of risk-sharing<sup>7</sup>.
10. EPSU has adopted many other texts that explain that the above points and set out the reasons a legal framework at EU level is necessary, also with other organisations<sup>8</sup>. We also agreed that a sectoral approach would not be sufficient because important public service objectives may be satisfied by more than one service (e.g. heating by electricity or gas).<sup>9</sup>
11. A legal framework would first-and-foremost underpin these “*common public service principles*” and the objectives of public services. The most frequently mentioned are the following: universal service, continuity, quality of services, affordability, and user and consumer protection. Other principles, such as safety and security, security of supply, network access and interconnectivity, media pluralism have also been referred to by the European Commission, along with the need for evaluation and adequate financing.
12. EPSU has also stressed the importance of “*concertation*” with workers and trade unions, with users and citizens, and democratic control, transparency and public responsibility. In addition, we would add solidarity, as public services are a tangible expression of solidarity<sup>10</sup> between generations; through the sharing of risks; towards vulnerable groups; and between locations and regions (equal pricing).
13. There has been little discussion at EU level, in EPSU or elsewhere, about what these principles mean in practical terms in the different Member States, not least because a framework directive would not go into detail on these – this would be left to the Member States. Indeed, Article III-122 of the draft Constitutional Treaty recognises that the EU may adopt laws on public services, but the competent authorities at national, regional and local level are responsible for defining, organising, financing and supervising them.<sup>11</sup>
14. However, if a legal framework is to spell out that Member States have to ensure the availability, quality, regulation, and financing of public services according to specified criteria, then we should reflect together on what this will mean in practice. We think it will be useful to verify if the principles mentioned above are still the right ones today,

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<sup>6</sup> There is an explicit exemption for the manufacture and trade of arms

<sup>7</sup> For public services principles of solidarity, equality and risk-sharing are of primary importance, but for markets such mechanisms are seen as public subsidies which risk distorting competition. The SGI Green Paper observed that criteria for selecting a financing mechanism, such as its efficiency or its redistributive effects, are currently not taken into account in Community legislation.)

<sup>8</sup> The ETUC, its relevant industry federations, including EPSU, have together with CEEP advanced the concept of a European framework on SGI and the need for a clear Treaty base.

<sup>9</sup> Evaluating the impact of liberalisation on public services -a critique of the European Commission 2004 report “Horizontal Evaluation Of The Performance Of Network Industries Providing Services Of General Economic Interest” EC SEC(2004) 866 by David Hall [d.j.hall@gre.ac.uk](mailto:d.j.hall@gre.ac.uk)

<sup>10</sup> ETUC/CEEP Charter for SGI, 2000

<sup>11</sup> Many of these principles are of already set out to a certain extent in the sectoral directives (post, telecoms etc) as “public service obligations”

and also to give examples of what these principles already mean in the different Member States. The table below is an attempt to do this. There is some overlap between the different headings.

<b>Examples of public service principles and practices</b>		
<b>Principles / objectives</b>	<b>What it means</b>	<b>Examples of existing standards / instruments</b>
equal access	the prohibition of discrimination based on social or personal status, or geographical location, or amongst different categories of users	BE right to minimum electricity
Universality	provision of service must be universal, even when runs counter to considerations of a commercial nature or to profitability	
continuity, quality of service	Obligation to maintain supply; long-term maintenance, investment	NL prohibition of privatisation in water
affordability	Price controls / subsidies Limits on profits?	BE prohibition on profit-making companies receiving childcare subsidies
User/consumer protection	Information, redress	Patients' charters
concertation	Information, consultation and participation rights of workers User groups	
democratic control	Transparency, accountability	National regulators for liberalised sectors EU Observatory??
Solidarity	This is illustrated: between generations (education for children, care for the elderly); through the sharing of risks (e.g., healthcare); towards vulnerable groups (ensuring access to essential services and fostering integration and employment); between locations and regions (equal pricing).	Collective pension "Childless" families, sick and healthy, access for disabled, quotas for employment DE constitution "equal living conditions" EU structural funds

15. A legal framework would also contain a number of other provisions, on evaluation, financing etc. It could also set down some criteria for developing pan-European public services (e.g., internet access) supported by the European Structural Funds. These would be a tangible expression of non-discrimination and solidarity between EU citizens, perhaps laying the groundwork for a future European pact for social and economic cohesion.

### ***Current positions concerning a legal framework for public services***

16. There is ongoing discussion as to the legal basis of such a framework. The Commission has said that no text will in any case be put forward until the draft Constitution Treaty is ratified, which will not be before 2006. Werner Langen, MEP, one of the main actors in the Parliament on public services, still questions the EU's competence to regulate on public services, and the usefulness of a general legal framework. However, many Members of the European Parliament and national politicians do see the need for such a framework - not least as a counterweight to the draft services directive. We need to convince them to act, and we need to do this in cooperation with other organisations.

## Annex 1

### **Overview of current EU issues affecting public services**

#### **Draft Services directive<sup>12</sup>**

The proposal for an EU Directive on Services in the Single Market, was published on January 13, 2004. The draft directive covers all services in Member States that are provided on a “*remunerated basis*”. Given this broad definition, this includes virtually all public services as these are generally paid for one way or another. All basic services (e.g. water, electricity, waste disposal) and even healthcare and social services come under the Directive. The impact of the Directive on public services and on social and labour law is a real concern. The directive introduces a “country of origin principle” under which service companies in each of the 25 EU member states can provide services solely in accordance with the law of their country of origin – not the country where the service is provided. There are only a limited number of exceptions to this principle.

The Directive is currently with the European Parliament. The Parliament must decide what to do now with the text.

#### **State Aids package**

On 18 February 2004 the Commission adopted a new regulatory framework for undertakings that provide services of general economic interest -SGEI. These proposals are still at a drafting stage and should be finalised in June 2005, possibly taking into account the views of Council and Parliament. The aim is to provide legal certainty regarding the funding of SGEI and the rules on state aids at EU level. This set of proposals include:

- **A Decision** exempting “small local services” e.g. social housing and hospitals (as well as maritime island transport) from the obligation of notification to the Commission;
- A revision of the **Directive on the transparency** of financial relations between member states and SGEI undertakings.
- A **Communication** interpreting the Altmark case. It will aim at clarifying the key notions of an “economic activity” and “impact on trade”, as well as the two elements of the fourth Altmark criterion, i.e. definitions of “competitive procedure” and “a well-run company”. This is likely to be the most important aspect of the package. A first draft was withdrawn following criticisms in Parliament that the Communication would pre-empt the consultation process launched in the SGI Green Paper.

In February 2005 the Parliament adopted a regressive opinion on the draft Decision. The opinion, drawn up by Dutch Liberal MEP In't Veld, challenges the exemptions of social housing and hospitals arguing these would lead to market distortions. It proposes instead to exempt services that do not exceed a certain amount of state aids. EPSU, Eurocities and other NGOs lobbied Parliament to maintain explicit exemptions for social housing and hospitals as well as for all local social services, to no avail. The final decision on this dossier rests with the Commission.

This package is separate from the wider revision of State aids rules aiming at refocusing subsidies to the most needy regions of the EU

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<sup>12</sup> See also EPSU's emergency resolution on the services and EPSU's *10 points why we say NO to the directive*

### **Public Procurement directives<sup>13</sup>**

The European Directives on Public Procurement are another influence on public services. The European Commission has used these Directives to limited the influence of public enterprises. The Directives specify the procedures that need to be followed if a public contract is brought on the market. Contracts must be awarded on a non-discriminatory basis and in a transparent manner. This means that all companies in the EU should be able to bid for such contracts.

The public procurement rules mean that a municipality will find it difficult to use its locally generated public funds to stimulate local business, employ long-term unemployed, or that public authorities can have a hard time to justify public procurement policy to achieve national policy objectives. And there are similar questions as regards the respect for relevant collective agreements by those who win the contract, or the use of social and environmental criteria.

A number of rulings of the European Court of Justice have reduced the space for public enterprises further. While the European Court of Justice has settled some cases concerning social and environmental criteria positively, allowing the use of these criteria, it has had a very restrictive interpretation of what it concerns in-house contracts or contracts under the authority of a public authority. The European Commission has relied on the European Court of Justice to limit the space for public authorities to give contracts to public companies. There are three cases in this regard of importance: Teckal, Altmark and Halle.

The rulings of the Court of Justice are interpreted by the Commission to mean that even if a local authority gives a contract/ concession to a 100% owned municipal company, but which is distinct from the municipality, this contract should be put on the market. Similarly, if two or more municipalities join together in an inter-municipal company, the Commission (Internal Market) argues that such a contract should be brought on the market.

The Commission also seeks to narrow what can come under a concession. The argument is that concessions remove certain services from the market (as they can no longer be bid for or be contested) hence the duration of concessions should be limited. Also, as some concessions include not only the primary activities, like the distribution of drinking water, but also other services such as meter-reading, invoicing etc. the scope of the concessions should be more limited. This discussion is in some respects similar to the one in the electricity and gas sector. The Commission has argued that generation, transmission and distribution activities should be unbundled and run by companies with distinct legal personalities rather than in an (vertically) integrated manner. The Commission has gone a step further in internal notes arguing that services like meter-reading could also be unbundled from the core activities.

### **Upcoming Communication on “social” SGI**

The White Paper on Services of general interest did announce a Communication to recognise the specificity of "social" public services and further clarify the impact of Community rules on the functioning and modernisation of these services. The Communication may cover a broad range of activities: Statutory social protection schemes, supplementary social protection schemes, income protection, health and social care services, access to employment services, support for families including child care, services

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<sup>13</sup> There are several directives. The most important are: Directive [2004/18/EC](#) of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Directive [2004/17/EC](#) of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. These directives do not regulate concessions.

to promote social integration and to support people in difficulties (e.g. homelessness, drug dependence, disability, mental or physical illness), education and training, and social housing. It is understood that the publication of the Communication is being delayed in view of the discussion on the implications of the services directive for health and social services.

### **Green Paper on PPPs and Community law on public contracts and concessions and public procurement**

PPPs are now found in most areas of public services. In EPSU's response<sup>14</sup> we said that the Green Paper was not the right starting point to develop EU policy on PPPs. The main question that needs to be addressed, namely not whether a PPP should be done this way or that, but whether it should be done at all. While the Green Paper acknowledges that *"recourse to PPPs cannot be presented as a miracle solution for a public sector facing budget constraints. Experience shows that, for each project, it is necessary to assess whether the partnership option offers real value added compared with other options..."* (para 5), it fails to discuss these other options, and does not elaborate at any point on how this assessment should be carried out, or on what principles such an evaluation should be made.

The Green paper looks at PPPs exclusively from the perspective of competition policy and the interest of private economic operators. It ignores issues linked to the broader, long-term public interest and to social and employment concerns. It does not evaluate PPPs or show that they provide "value for money". It assumes that the private sector is better than the public sector and so it can ignore all evidence to the contrary.

In EPSU's view, the Commission should produce a report which addresses:

- The risks and problems experienced with PPPs
- The dangers for public authorities in entering into long-term deals with the private sector
- The need to protect public services, their workers, and citizens from erosion of quality by commercial opportunism
- The economic and social case for public sector investment and provision of services.

The Commission has indicated that it will publish a "technical" summary of responses received to the Green Paper in April/May 2005 and political follow-up is expected in the autumn.

### **GATS**

The pressure to make the EU more competitive is mirrored at international level. The European Commission, in its role as negotiating partner for the EU has formulated a pro-liberalisation agenda regarding world trade. The Green Paper on SGI stated that in the GATS negotiations the *"European Community has freely decided to undertake binding commitments in respect of certain services of general interest already open to competition within the internal market."* It does not specify which these services are, but it claims that the commitments *"have so far had no impact on the way in which services of general interest are regulated in Community law. They have had no impact on the way in which they are financed."* EPSU has called on the European Commission to recognise the limits of its negotiating mandate and demanded a coherent EU policy to be applied to both internal and external trade. The exclusion of health, education, research, culture, social services and water from any trade obligations must be made unequivocal.

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<sup>14</sup> This was adopted by EPSU's Steering Committee in 2004