BACKGROUND PAPER ON A LEGAL FRAMEWORK FOR SERVICES OF GENERAL (ECONOMIC) INTEREST

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I. Introduction

This background paper discusses a number of legal questions which present itself in the context of calls for a legal framework (framework directive) on services of general (economic) interest. In light of the complexities of the issues involved and given that no formal Commission proposal for a framework directive or any other legal instrument exists as of today, the analysis will have to remain incomplete and at times speculative. The paper will focus on the possible objectives and contents of a legal framework which can be deduced from the political debate on such a framework in the European institutions and from four concrete proposals which have been published in 2006.
This paper is organized as follows: It begins by sketching the route towards a legal framework on services of general interest through a summary of the positions of the European institutions and a brief introduction of recent proposals and their main objectives (II.). This will inform the subsequent legal analysis which is the core of the paper and which will address three major issues: First, which are the legal definitions of the key concepts of the debate, in particular services of general economic interest (SGEI) and services of general interest (SGI) (III.)? Second, is there a legal basis for a legal framework in the current EC Treaty and if so, which are its requirements (IV.)? Third, which would be the relationship between a legal framework and existing EC law, in particular competition, state aid and public procurement law as interpreted by the European Court of Justice (ECJ) and could a legal framework modify this (V.)? The final section (VI.) will summarize the main findings.

II. Towards a legal framework

The idea of a legal framework for services of general interest has been debated for a couple of years. In 2006 the debate gained momentum through a number of concrete proposals for a text of such a framework and increased campaigning for a framework by the social partners and civil society.

1. Position of the European Parliament

The European Parliament has been an active demandeur for a framework directive on services of general interest in the past. Based on a report by *Werner Langen* the Parliament called in 2001 for a framework directive "on the objectives and organisational arrangements of services of general interest based on Article 95 of the EC Treaty." [1] The directive should "create a legal framework which guarantees the availability of services of general interest to the public, particularly pursuant to Article 16 of the EC Treaty." Parliament expected the Commission "to define in the framework directive the common principles on which services of general interest are based at an appropriate tier of subsidiarity, to specify and define the common principles of democratic and transparent regulation, to ensure active involvement of citizens and users in the process of definition, evaluation and contract appraisal and to institutionalise a common pluralist appraisal procedure". In its 2004 resolution on the Green Paper on services of general interest, the European Parliament repeated its call for a framework directive "to be drawn up under the codecision procedure and respecting the

[1] European Parliament resolution on the Commission communication "Services of General Interest in Europe", 13 November 2001, OJ 2002 C 140E/153.

subsidiarity principle, when the internal market and competition rules are being implemented".[2]

Most recently, the European Parliament adopted a resolution on the Commission White Paper on services of general interest based on a report by *Bernhard Rapkay*.[3] This resolution claims that the 2001 and 2003 resolutions on services of general interest remain pertinent. However, the 2006 resolution does not explicitly mention the idea of a framework directive. Instead, in paragraph 15 of the resolution, the European Parliament is of the opinion that "the Commission should formulate legal clarifications, guidelines and principles on a number of problematic topics, in particular including the application of internal market and competition rules in the field of SGIs and SGEIs while ensuring democratic accountability for the application of rules to SGIs and SGEIs to the Member States, regional, and local authorities." This wording is more ambiguous than the demands for a proposal of a framework directive in the 2001 and 2004 resolutions.

This ambiguity seems to follow from the fact that there is no consensus on the issue in the current parliament. Rapporteur *Rapkay* states in his Explanatory Statement "Europe needs - without delay, and in parallel to current work on the broader Services Directive - a general legal framework for public services, complementary to existing sectoral and national provisions, and introduced on the basis of joint decision-making with the European Parliament."[4] This view is supported by the Committees on Employment and Social Affairs[5] and on Industry, Research and Energy[6], whereas the Committee on Legal Affairs is doubtful whether there is a legal basis for a general framework and whether such a framework would be beneficial.[7] The debate of the European Parliament on the Rapkay Report on 26 September 2006 showed even more clearly the political division on this issue.[8] While speakers of the PES and the Greens clearly called for a framework directive, speakers of the PPE and the ALDE groups openly rejected this idea.

2. Position of the Commission

Reacting to a request by the 2000 Nice European Council, the Commission submitted a report on services of general interest to the Laeken Council on 17 November 2001. In this report the Commission mentions suggestions "to consolidate and specify" the principles of services of general interest "in a single framework Directive to be adopted on an appropriate legal basis." The Commission announced that it would examine this suggestion.[9] In 2002, the Barcelona European Council asked the Commission to "continue its examination with a view to consolidating and specifying the principles on services of general economic interest, which underlie Article 16 of the Treaty, in a proposal for a framework directive, while respecting the specificities of the different sectors involved and taking into account the provisions of Article 86 of the Treaty."[10]

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[2] European Parliament resolution on the Green Paper on services of general interest, 14 January 2004, OJ 2004, C 92E/294.

[3] Resolution of 27 September 2006, A6-0275/2006, not yet published in the OJ.

[4] Report on the Commission White Paper on services of general interest, 14 September 2006, A6-0275/2006 (Rapkay Report), p. 15.

[5] Rapkay Report, above note 4, p. 21.

[6] Rapkay Report, above note 4, p. 26.

[7] Rapkay Report, above note 4, p. 39.

[8] Minutes of the debate on 26 September 2006, Item 3 "Services of general interest", available at http://www.europarl.europa.eu

[9] Report to the Laeken Council, Services of General Interest, COM(2001) 598 final, paras 51-53.

[10] Presidency Conclusions, Barcelona European Council 15 and 16 March 2002, SN 100/1/02 REV 1, para 42.

However, in the 2002 Communication on the Status of Work on the Examination of Proposal for a Framework Directive on Services of General Interest the Commission stated that it decided to produce a Green Paper instead of a proposal for a directive, because it felt that further reflection and discussion was necessary.[11] In the 2003 Green Paper on services of general interest the Commission discussed the benefits and problems of a general framework.[12] It noted on the one hand: "A general instrument could set out, clarify and consolidate the objectives and principles common to all or several types of services of general interest in fields of Community competence. Such an instrument could provide the basis for further sectoral legislation, which could implement the objectives set out in the framework instrument, thus simplifying and consolidating the internal market in this field." However, the Commission also saw limitations of such an approach and was unsure about the proper legal basis. The Commission therefore submitted the idea to debate and asked: "Is a general Community framework for services of general interest desirable? What would be its added value compared to existing sectoral legislation? Which sectors and which issues and rights should be covered? Which instrument should be used (e.g. directive, regulation, recommendation, communication, guidelines, inter-institutional agreement)?"[13] Reactions to the Green Paper revealed support for and opposition against a framework directive. Views on the need of such a framework remained divided.[14]

In its White Paper on services of general interest of 2004 the Commission chose - at least for the time being - to side with the opponents.[15] Claiming that a number of Member States and the European Parliament were sceptical on the issue and that an added value of a framework so far had not been demonstrated, the Commission considered it appropriate not to proceed with a proposal, but to re-examine the issue at a later time. In particular, the Commission thought it would be appropriate to do so after the Constitutional Treaty entered into force, which provided a clear basis for a legal framework (Article III-122 Constitutional Treaty).

At the time of writing, the Commission does not seem to be interested in proposing such a framework in the near future. In the debate on the Rapkay report in the European Parliament, Commission President *Barroso* clearly stated that for the time being the Commission saw no need to propose a general framework. Instead, he suggested to continue with sector-specific approaches and announced a communication by the end of 2006.[16]

3. Current initiatives and concrete proposals

There are currently a number of different initiatives in favour of a framework directive both inside and outside the European Parliament. Four of these initiatives have produced concrete texts, which will be the basis for the following analysis. On 30 May 2006, the *Socialist Group* in the European Parliament (PES) published a "Proposal for a Framework Directive on Services of General Economic Interest".[17] The directive contains general provisions including definitions of key terms and a recognition of the shared responsibility of Member States and the Community, provisions on the operation method, on public service obligations,

[11] Communication on the Status of Work on the Examination of Proposal for a Framework Directive on Services of General Interest, COM(2002) 689 final.
[12] Green Paper on services of general interest, COM(2003) 270 final, paras 37-42.
[13] Green Paper, above note 12, para. 42.
[14] Commission Staff Working Paper, Report on the Public Consultation on the Green Paper on Services of General Interest, SEC(2004) 326, p. 12-13.
[15] White Paper on services of general interest, COM(2004) 324, p. 11-12.
[16] See statements of Jose Manuel Barroso, in Minutes of the debate of 26 September 2006, above note 8.
[17] Available from http://www.socialistgroup.org/.

on financing of services of general interest, on control and on users' rights, quality and evaluation. The *European Liaison Committee on Services of General Interest* (CELSIG) followed in June 2006 with a "Draft of a Proposed law on Services of General Economic Interest".[18] The *European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest* (CEEP) and the *European Trade Union Confederation* (ETUC) each published a proposal for a "Framework to Guarantee and Develop Services of General Economic Interest" in September 2006.[19] CELSIG's, CEEP's and ETUC's proposals cover similar aspects as the PES proposal. However, CELSIG puts a greater emphasis on the rights and protections of users, whereas CEEP and ETUC emphasize the need to evaluate services of general economic interest. ETUC's draft also contains a provision on corporate social responsibility and employee participation for providers of services of general interest.

4. Objectives of a legal framework

It is obvious that different political actors pursue different goals in the debate on a legal framework on services of general interest. Hence, the objectives they pursue with such a framework are also diverse and vary. Nevertheless, it seems that two main objectives are at the core of all proposals and debates.

According to the current initiatives and proposals, providing legal clarity and certainty is a pivotal objective of a legal framework. The need for legal clarity and certainty is reiterated in the resolutions of the European Parliament and is a common motivator for all three organisations which have suggested proposals for a framework directive. Proponents of a legal framework report a considerable amount of uncertainty and confusion at the regional and local level, in particular through recent ECJ case law and Commission decisions. It is argued that public authorities, providers of public services and users require more legal clarity regarding the application of EC law to services of general interest.

Legal clarity requires that a rule (or a set of rules) is formulated in a clear and transparent way, which makes the results and consequences of the rule predictable for those who must obey the law and those who will eventually apply it. The use of an unambiguous terminology and rules, which clearly define the scope of application, preconditions and legal consequences are hence requirements of legal clarity. Legal certainty requires that in addition to clear and precise rules, the rules are applied in a uniform, consistent and coherent manner by the Courts and the administration.

Open rules which require interpretation usually do not contribute to the objective of legal clarity. Legal clarity and flexibility of norms, therefore, are usually not compatible. In the context of services of general economic interest, for example, it might be useful from the perspective of legal certainty to have a clear and precise definition of services of general interest. Such a definition would, however, reduce the possibility of diverging definitions of this term in different parts of the EC.

In order to provide legal clarity a legal framework on SGEI would have to be clear and precise itself. To achieve this the terminology and structure of existing EC law should be observed and followed whenever possible. Derogations and alterations should be made explicit. Furthermore, principles and rules which apply by virtue of other legal instruments (EC Treaty or legislation) anyway should not be repeated, because this might imply that they don't apply in the first place. Finally, the extent of bindingness of a provision should be clear

[18] Available from www.celsig.org.

[19] CEEP's draft is available from www.ceep.org; ETUC's draft from www.etuc.org

through the choice of the right terminology. For example, there is a difference between should and shall. "Taking into account" means something else than "observing".
It should be noted that the requirement of legal clarity and certainty is normatively neutral. It can be achieved regardless of the contents and consequences of a particular rule as long as the wording of the rule is precise and its application uniform and general. For example, if a directive would require that all services offered by a public authority must be provided through a private entity subject to mandatory tendering, this rule could provide legal clarity. Since such a directive would not be in the interest of those advocating a legal framework, it is usually argued that a legal framework should not only provide legal clarity and certainty, but also guarantee (or restore) policy space for the organisation and provision of services of general interest at national, regional and local level. It is argued that these services are typically provided at those levels and operate best with as little interference from EC law and European institutions as possible. In legal terms, this is a call to respect the principle of subsidiarity (Article 5 ECT). Structurally, this objective aims to reduce the impact of EC law to services of general economic interest.
From a legal perspective, this objective is not without problems. The principle of subsidiarity applies to all actions and measures of the Community anyway and regardless of a future legal framework. It is, however, up to the political organs of the Community and its Member States to ensure that principle in the day-to-day political discourse and law-making process. Regarding the impact of EC law on SGEI, it is also important to distinguish between provisions of the EC Treaty itself and EC legislation, because the impact of a provision of the ECT itself on SGEI cannot be modified by a legal framework.[20] In close context with the objective to restore policy space are elements of some proposals aiming at a clarification and possibly even a modification of the impact of recent ECJ case law and Commission decisions in the fields of state aid and public procurement law on SGEI.[21]
Even though the legal means of guaranteeing policy space and respect of subsidiarity may be limited, a legal framework could be of important political value, because it could be used as an argument in the public discourse about the future of SGEI in the EC.

III. Terminology

A central aspect of and a key challenge to the debate about a legal framework for services of general interest concerns terminology, in particular the distinction between services of general economic interest (SGEI) and services of general interest (SGI).

1. The distinction between services of general economic interest (SGEI) and services of general interest (SGI)

As far as it can be ascertained, the distinction between SGEI and SGI has been used for the first time in the 1996 Communication of the Commission and has been used in all Commission documents and contributions since then. Other institutions and organizations have also adopted that distinction. It will be shown in this section that the distinction creates considerable legal uncertainty. In fact, it can even be argued that the invention of the term services of general interest created some of the very problems which a legal framework intends to solve.

[20] See below V.1.
[21] See below V.2.

At the outset it should be noted that the term services of general economic interest is a legal term which can be found in the EC Treaty and the Charter of Fundamental Rights, whereas the term services of general interest is neither used in the ECT nor in any piece of secondary legislation (yet). The ECJ has never referred to it. The term as such is therefore not a legal term.

In its 1996 Communication, the Commission stated that the term services of general interest "covers market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations." Despite its repeated use – even in the title of all contributions – the term services of general interest is not defined in the 1996 Communication or in any subsequent document. The Commission seems to equate "non-market services" with non-economic activities and considers services such as compulsory education, social security as services of general interest.[22] In the Green and White papers, the Commission claims that it focuses "mainly, but not exclusively" on services of general economic interest. Services of general economic interest are defined in the 1996 Communication as "market services which the Member States subject to specific public service obligations by virtue of a general interest criterion." According to the Commission this "would tend to cover such things as transport, networks, energy and communications".

In the Green and White Paper, the Commission slightly alters the definition of SGEI: "[I]n 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 large 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." In this definition, the term "market service" is replaced by "economic" service. It is not clear whether the Commission intended to imply a different meaning, because the distinction of "market" and "non-market services" is still used to describe the concept of services of general interest.

The Commission recognizes that the term SGI cannot be found in the EC Treaty. In the Green Paper the Commission claims that the term derives "in Community practice" from the term SGEI. It is entirely unclear which Community practice the Commission is referring to. As mentioned above, the term SGI was first mentioned by the Commission in 1996. The other institutions adopted that term in particular when reacting to the Commission's proposals and documents. There is, however, no legal or political practice, in which the term has been used. The "practice" the Commission is referring to seems to be a self-referential practice initiated by the Commission itself.

Apparently the Services Directive could become the first legal instrument to use the term. Paragraph 17 of the reasons of the current draft version of the Services Directive (common position of the Council) states: "Services of general interest are not covered by the definition in Article 50 of the Treaty and therefore do not fall within the scope of this Directive."[23] Article 2. 2.(a) of the draft Services Directive specifically excludes non-economic services of general interest from the scope of the directive. However, the term non-economic services of general interest is not defined anywhere in the draft directive. The term was not used in the original proposal for a Services Directive and seems to have been introduced to address fears that the Services Directive might have detrimental effects on public services. However, the reference to the term SGI in the Services Directive adds nothing to the clarification of its legal meaning.

[22] Services of general interest in Europe, OJ 1996, C 281/3, COM (1996) 443, paras 18 and 52.
[23] Available from http://ec.europa.eu/internal_market/services/services-dir/proposal_en.htm.

It is not entirely clear why the Commission introduced the term SGI. Two possible reasons could be: First, some general EC law principles, such as non-discrimination apply regardless of the economic nature of an activity.[24] Second, the Community possesses certain competences for supportive and co-ordinating measures in areas such as health policy and education. Nevertheless, despite this connection of some SGI to EC law, it is not convincing why these should be considered together with SGEI. In fact, the Commission admits that papers and communications focus mainly on SGEI. All in all, the introduction of the new term has created confusion. Unfortunately, it has also attracted the attention of those arguing in favour of a general legal framework for SGEI. As will be shown below, (too) much energy was invested in the distinction between SGEI and SGI, without any clear results or benefits.

2. Terminology of existing EC law

The term *services of general economic interest* can be found in Articles 16 and 86 (2) ECT, Article 36 of the Charter of Fundamental Rights and Article III-122 of the Constitution Treaty.[25] The term was already part of the EECT in 1957 (Article 90 (2) EECT), but is not defined in the EC Treaty or in secondary legislation. The ECJ has applied the term service of general interest in a number of judgements, in particular since 1990. All of these judgements concern Article 86 (2) ECT. The approach of the Court towards the term services of general economic interest must therefore be seen in the structure of this provision.

The Court has not developed a general definition of the term, but applied it on a case to case basis. The Court has accepted *inter alia* the following services as services of general economic interest: postal services[26], the supply of electricity[27], emergency transport services by ambulance[28], employment procurement[29], mooring services[30], and waste disposal services.[31] On the contrary, the Court has no accepted that the operation of a commercial port constitutes the operation of a service of general economic interest.[32] It is difficult to extract a general approach from this case law. In *Almelo* and *Ambulanz Glöckner* the court pointed at the specific characteristics of universality, equality of access, quality and consumer interests. It can therefore be said that public service obligations, in particular the requirement of a universal service, are typical elements of a service of general economic interest. However, it is not clear whether these obligations are mandatory requirements of a service of general economic interest.

As mentioned above, the division between SGEI and SGI according to the use of the Community institutions is based on the distinction between *economic and non-economic activities*. The distinction is not relevant for the legal definition of services of general economic interest, because – as just explained - EC law does not distinguish between SGEI and SGI. It is therefore not surprising that the ECJ never referred to the "economic" character of a SGEI in its case law. However, the "economic/non-economic" distinction is a key aspect of the definition of a service and of an undertaking. It is therefore a constituting element of the application of the free movement of services and of competition law.

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[24] See e. g. Green Paper, above note 12, para 32.
[25] The wording of these provisions is reproduced in Annex 1
[26] Case C-320/91, *Corbeau*, [1993] ECR I-2533, para. 15; Case C-340/99, *TNT Traco* [2001] ECR I-4109, para. 53, see Annex 2.
[27] Case C-393/92, *Almelo*, [1994] ECR I-1477, paras 47 and 48, see Annex 2.
[28] Case C-475/99, *Ambulanz Glöckner*, [2001] ECR I-8089, para. 55, see Annex 2.
[29] Case C-41/90, *Höfner and Elser*, [1991] ECR I-979, para. 24, see Annex 2.
[30] Case C-266/96, *Corsica Ferries*, [1998] ECR I-3949, para. 60, see Annex 2.
[31] Case C-209/98, *Sydhavnens Sten*, [2000] ECR I-3743, para. 75.
[32] Case C-242/95, *GT-Link*, [1997] ECR I-4449, para. 52.

The term service in the meaning of the free movement of services is defined in Article 50 ECT as an activity which is normally provided for remuneration. In *Humbel*, the ECJ held that the essential characteristic of remuneration "lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service".[33] The term consideration is a term of English contract law and refers to reciprocity, which is usually of an economic nature. The economic nature of remuneration is even more clearly emphasized in other languages of the *Humbel* judgement.[34] The ECJ held that there was no remuneration in cases where the service was not funded by the consumer, but from the public purse.[35] The Court therefore excluded services provided in the context of a national educational system from the scope of Article 50 ECT. This is even the case if fees are required as long as these fees are not the primary financial source for the provision of the service. However, if the service is primarily financed through fees, it will be considered as a service.[36] It can therefore be said that a service in the meaning of Article 50 ECT is an activity which is of an economic nature. Hence, a non-economic service or a service with a non-economic character does not exist under EC law. Rather, a non-economic activity is not a service at all.

Concerning the scope of EC competition law the notion of an economic activity is used to determine whether an entity is an undertaking in the meaning of competition law.[37] The ECJ defined economic activity as "any activity consisting in offering goods and services on a given market".[38] The case law concerning the application of competition law to entities of national health service systems is particularly noteworthy in this context: The ECJ decided that these entities do not perform an economic activity when the system fulfils an exclusively social function, the activities are based on the principle of solidarity and the system is non-profit making.[39] In particular, if membership of the health system is mandatory and the services supplied by the system are determined on a statutory basis, and not in connection with the contributions paid by the insured, the entity is not considered to be performing an economic activity. Conversely, if membership is voluntary and the insurance schemes are based on the principle of capitalisation, the Court of Justice will hold that the entities are engaged in economic activities. In *FENIN* the Court of First Instance – as uphold by the ECJ – stated that offering goods and services on a given market was the "characteristic feature of an economic activity" and specifically distinguished the offering of goods and services from "the business of purchasing, as such".[40]

The case law regarding the scope of free movement of services and the application of competition law, in particular relating to health services and the organisation of national health systems, highlights an important fact concerning the "economic/non-economic" divide. Whether or not an activity is considered economic or provided for remuneration depends largely, if not exclusively, on the way how the provision of the service is organised by the respective Member State or its competent regional and local authorities. It is therefore

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[33] Case 263/86 *Humbel* [1988] ECR 5365, para. 17, see Annex 2; Case C-157/99 *Geraets-Smits/Peerbooms* [2001] ECR I-5473, para. 58 and Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, para. 18.

[34] E. g. *wirtschaftliche Gegenleistung, contrepartie economique, corrispettivo economico, contrapartida económica, economische tegenprestatie, ekonomiske modstykke.*

[35] *Humbel*, above note 33, para. 18.

[36] Case C-109/92, *Wirth*, [1993] ECR I-6447, para. 17 and Opinion of AG Stix-Hackl, Joined cases C-76/05 and C-318/05, *Schwarz* and *Commission/Germany*, paras 34 et seq.

[37] Case C-41/90, *Höfner und Elser* [1991] ECR I-1979, see Annex 2.

[38] Case C-35/96, *Commission v Italy* [1998] ECR I-3851, para. 36.

[39] Joined cases C-159/91 and C-160/91, *Poucet and Pistre*, [1993] ECR I-637, see Annex 2; Joined Cases C-264/01 and others, *AOK Bundesverband a.o.*, [2004] ECR I-2493.

[40] Case T-319/99, *FENIN/Commission*, [2003] ECR II-357, para 36 and and Case C-205/03 P, *FENIN/Commission*, not yet reported, available from http://curia.europa.eu, see Annex 2

up to the Member States to determine whether an activity is covered by free movement and/or competition law. For example, if a system of higher education is predominantly financed by the public purse and provided by public institutions, it remains outside the scope of EC law on free movement of services and EC competition law. However, if the Member States decides to base the financing of the system largely on fees and private funding or introduces elements of competition, higher education becomes a service and universities become subject to competition law. The same is true with health services. In other words, the commercialisation of public services is often the main reason why a public service becomes subject to free movement or competition law.[41]

To summarise: Non-economic activities are not covered by the EC free movement law and competition law. If services of general interest are defined – following the Commission's approach – as non-economic activities, they remain outside the scope of most substantive EC law. Once an activity is of an economic nature, it becomes a service and its supplier becomes an undertaking subject to competition law. If these services are entrusted with special public interest obligations, such as universal service, they are considered services of general economic interest in the meaning of Article 86 (2) ECT.

3. Terminology of the current proposals for a legal framework

The proposals for a legal framework mentioned in Section II.3. above generally follow the distinction between services of general economic interest and (non-economic) services of general interest as suggested by the Commission. SGI are generally excluded from the scope of the proposed texts.

The *PES* draft framework directive applies to "services of general economic interest whenever a competent authority (…) imposes public service or universal service obligations on a service provider exercising an economic activity" (Article 2). A service of general economic interest is defined as "service activity of a commercial nature, mainly financed by the service user and placed under the responsibility of a competent authority in the framework of a system of public services or universal service obligations." (Article 3 (t)). "Public service obligations" are defined as "specific requirements a competent authority may impose on the supplier of a service in order to ensure that the general interest objectives which have been clearly set out in advance by the public authorities in an express measure are satisfied" and "universal service" as "service which meets the requirement of universality", which means " right to be a beneficiary of a service of a specified quality and at an affordable price in the whole of a specified geographical area."

The definition of SGEI in the PES draft has two elements: First, a "service activity of a commercial nature" and second, the imposition of public service or universal service obligations. The first element seems to be built on the economic/non-economic distinction as established in competition law and the law on free movement of services. However, as mentioned above, the ECJ usually does not refer to the economic nature when determining whether an undertaking is entrusted with a service of general economic interest. The PES draft adds to the definition the element "mainly financed by the user". It is not clear whether this qualification is meant to be a deviation from or a clarification of existing EC law, according to which an activity constitutes a service if it is "primarily" financed by fees. It

[41] Krajewski/Farley, Limited competition in national health systems and the application of competition law [2004] ELRev, 842, 850, 851.

should also be noted that the ECJ held that even activities which are only indirectly financed by the user (through contributions to a mandatory health insurance) are services.[42]

The second element of the definition of SGEI in the PES draft incorporates two approaches: A more general approach according to which any general interest objectives are sufficient for a service of general interest and a more specific approach, which seems to follow the service public doctrine of French public law and the notion of universality as defined in EC legislation. The relationship between the two approaches is not clear. In particular, are there universal service obligations which are not equally public service obligations?

The *CEEP* draft framework, which also only applies to SGEI, follows a similar approach regarding the definition of SGEI, but attempts to give the authorities of the Member States greater flexibility. SGEI are defined as "services of economic nature, which the Community, the Member States or responsible authorities of the Member states (…) subject to specific public service obligations by virtue of a general interest criterion". The definition in the *ETUC* draft is almost identical. Like the PES proposal, this definition has two elements: economic nature and public service obligations. Regarding the first element, the draft framework states: "The relevant public authorities have the right and the competence to distinguish whether a service of general interest is of an economic or a non-economic nature." (Article 2 (2)). This would be a deviation from existing EC law, which holds that SGEI is a term of community law, which must be interpreted by the ECJ and in a uniform manner throughout the EC. The second element of the definition, public service obligation, is not defined further in the draft.[43]

The draft law on SGEI proposed by *CELSIG* – like the other proposals – also only applies to services of general economic interest and explicitly excludes "services of general interest of non-economic nature" (Article 2 (2)). Article 4 defines service of general economic interest as "services of an economic nature that Member States or the European Union submit to specific obligations of public service under the criterion of general interest". An "economic activity" is defined as "an activity consisting in offering services on a given market, by an undertaking or institution, in particular charity institution, independently of the legal status of the latter or its way of funding". Obligations of public service are defined as "obligations resulting from law, regulation or provisions, established by public authorities of Member States or by the European Union, put on the provider of services so as to guarantee the achievement of certain objectives of general interest" and objectives of general interest as "objectives set down by the Member States or the European Union with respect to what they consider as coming under general interest, except obvious error." This includes in particular "the implementation of the fundamental rights, satisfaction of essential needs, security of supply, sustainable development, organisation of solidarity and social or territorial cohesion, preparation of the long-term future."

The first part of the definition of an economic activity echoes the definition of economic activity in competition law.[44] However the reference to an undertaking and other institutions is misleading, because under existing EC law, an economic activity is the defining element of an undertaking. Regarding the definition of the objectives if a general interest the reference to a "obvious error" is noteworthy, but it is not clear what this could mean.

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[42] Case C-368/98, *Vanbraekel*, [2001] ECR I-5363; Case C-157/99, *Smits and Peerbooms*, [2001] I-5473 and Case C-385/99, *Müller-Fauré*, [2003] ECR I-4509. Most recently Case C-327/04, *Watts*, Judgement of 16 May 2006, not yet reported, available from http://curia.europa.eu, paras 86-90. Note, however, that in *Watts*, the Court of Justice explicitly left it open, whether health services provided for free within a national health service (such as the British NHS) fulfilled the definition of services within the meaning of Article 49, 50 EC.

[43] It should be noted that the CEEP draft contains the Commission's definitions of SGEI and SGI in an Annex. It is not clear whether this Annex is for reference purposes only or whether it should be part of the framework, in which case it would seem to contradict the freedom of the competent authorities to define SGEI.

[44] See above III.2.

4. Summary: What is economic? What is a general interest?

In summary, all three current proposals adopt the general approach of the Commission regarding the distinction between SGEI and SGI, though they partly modify the definitions. In light of the fact that the distinction adopted by the Commission does not exist in EC law and that the "economic/non-economic" divide is not used to define SGEI in EC law, but to define the concept of services and the scope of competition law, using the distinction between SGEI and SGI in a general framework is bound to create legal ambiguities and uncertainties. Arguably, a better approach would be to adopt the general approach of the ECJ towards the term SGEI in Article 86 (2) ECT and simply take SGEI as a stand-alone term, which refers to specific tasks entrusted to an undertaking in the general interest. Based on established case-law it should be clear that this can only be the case where an entity performs an economic activity.

Rather than adopting the SGEI/SGI divide, it might be more useful to specific the conditions of an "economic activity". Should it be along the lines of the definition of a service, i. e. should the individual transaction be the focus (remuneration)? This seems to be the approach taken by the PES draft. Or should it be based on the definition used in competition law, i. e. should a market perspective be the focus? This seems to be the route taken by the CELSIG draft. Or should the definition of an economic activity be left to the Member States and their competent authorities as suggested in the CEEP and ETUC draft? While many proponents of a draft framework might prefer the latter option, this definition needs further clarification. If the drafters meant to say that the Member States should be able to determine the definition of "economic", this could be (mis-?)understood as a violation of the EC law doctrine according to which EC law must have the same meaning in all Member States. If the drafters meant to say that it is up to the Member States to decide whether an activity is provided for remuneration thereby determining whether or nor an activity is economic or not, this should be stated more clearly.

In addition to specifying more closely the criterion of an economic activity, a legal framework could attempt to define the general (economic) interest in greater detail. Again, three options can be discussed: Should the concept be equivalent or at least similar to the idea of a universal service similar to the PES draft and recent case law? Should the concept be broader and incorporate other – in fact, any – general interest as suggested in the CELSIG draft? Or should the definition be left to the competent authorities as indicated in the CEEP and ETUC draft with the possible result that in some Member States only services fulfilling the universal service criterion would qualify as SGEI whereas other Member States could adopt a broader understanding?

IV. Legal basis

Each legislative act of the EC must be based on a clear legal basis, because the European institutions can only legislate if and insofar as the ECT provides the Community with a specific competence (principle of limited competence). A legal basis is a provision in the ECT which states that Community organs may adopt measures to pursue a certain goal.

The choice of the legal basis depends on the objectives and contents of the legislation and must be based on objective principles. If more than one legal basis is available, the legal basis which is predominant should be used. If a legislative act pursues policies which have to be based on different legal bases, they can be combined. This causes particular problems if

different legal bases require different decision-making procedures. Taking into account that the choice of a legal basis must not jeopardize the rights of the European Parliament[45], it can be argued that in such a case the law-making process must fulfil the requirements of all legal bases. If, for example, one legal basis requires only the consultation of the European Parliament, while another requires co-decision, the entire act must be enacted pursuant the co-decision procedure. Therefore, a measure could e. g. be based on Article 95 ECT (requiring co-decision) and Article 83 ECT (requiring consultation), but the measure would have to be adopted on the basis of co-decision. However, a legal basis, which enables the Commission to adopt directives and regulations on its own, such as Article 86 (3) ECT, cannot be combined with legal bases which give the Parliament and Council the right to legislate, because the main legislator in both cases is different.

1. The constitutional framework

The first provision of the ECT mentioning services of general economic interest is Article 16.[46] This article contains a general reference to the importance of SGEI for the Member States and the Community, but does not contain a legal basis for EC legislation on services of general economic interest. The change of this provision envisaged by the Constitution Treaty supports this understanding of the current law: Article III-122, second sentence, Constitution Treaty specifically states: "European laws shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Constitution, to provide, to commission and to fund such services *(i.e. services of general economic interest)*". It is therefore clear that the Constitution Treaty would introduce a basis for legislation. However, until the entry into force of such a provision, it cannot convincingly be argued that Article 16 ECT already contains a legal basis for a framework on services of general economic interest. Similarly, Article 36 of the Charter of Fundamental Rights does not provide a sufficient legal basis for EC legislation on SGEI.[47] Neither Article 16 ECT nor Article 36 of the Fundamental Rights Charter contain a reference to Community legislation, which is typically part of a legal basis ("The Council shall…"). The same is true of Article 295 ECT, which states that EC law does not prejudice the rules of the Member States governing ownership. Therefore, this provision cannot be used as a legal basis for EC legislation on services if general economic interest as well.

2. The special role of services of general economic interest: Article 86 ECT

The next reference to services of general interest in the ECT can be found in Article 86 (2). Whereas Article 86 (1) ECT addresses public undertakings and undertakings with special rights, paragraph 2 of Article 86 aims to reconcile services of general economic interest with the other principles of the ECT, in particular competition and state aid law.[48] The provision makes EC law applicable to services of general economic interest, but only to the extent this does not obstruct the public service obligations assigned to the respective service suppliers. Article 86 (2) ECT is itself no legal basis, but Article 86 (3) ECT is one: "The Commission shall ensure the application of the provisions of this Article and shall, where necessary,

[45] Case C-300/89, *Commission/Council* (titanium dioxide) [1991] ECR I-2867, paras 13-20.
[46] For the text of Article 16 see Annex 1.
[47] For the text of Article 36 see Annex 1.
[48] For the wording of Article 86 (2) ECT see Annex 1

address appropriate directives or decisions to Member States." This provision enables the Commission alone to adopt legally binding rules, which aim to address the potential tension services of general interest and competition law.
The Commission has used Article 86 (3) ECT for the adoption of the so-called transparency directive, which aims at financial transparency between a public authority and a public undertaking.[49] Furthermore, Article 86 (3) ECT was the basis for directives liberalizing telecommunication services in the EC.[50] The liberalization of other services, such as energy, postal, and gas services was, however, based on different legal bases to ensure that such far reaching directives were adopted by Parliament and Council (see below 3.).
Because of the open and inclusive wording of Article 86 (3) ECT it can be argued that it could be used as a basis for a framework directive. However, it should be noted that Article 86 (3) only provides for the implementation of Article 86 (2). A narrow reading of Article 86 (2) would therefore also lead to a narrow scope for a framework based on Article 86 (3). Furthermore and more importantly, Article 86 (3) only enables the Commission to legislate. Neither the Council nor Parliament are involved in these proceedings. However, those advocating a framework directive strongly support the idea that such a framework directive needs to be adopted according to the co-decision procedure according to Article 251 ECT. In fact, only in this procedure makes the European Parliament a full co-legislator with equal rights as the Council. From the perspective of democratic legitimacy, the co-decision procedure seems most suitable for a framework directive.

3. Harmonization (and liberalization?) of services: Articles 95 and 55, 47 (2) ECT

In addition to Article 86 (3) ECT, a framework directive could be based on Article 95 or Articles 55, 47 (2) ECT or on a combination of these provisions. Article 95 ECT contains the competence of the EC to adopt measures for the approximation of laws and regulations (harmonization) aiming at the establishment and functioning of the internal market. Articles 55, 47 (2) ECT contain the competence to coordinate laws, regulations and administrative actions to make it easier for self-employed persons to take up and pursue their activities in the internal market. This broad competence allows the Community to liberalize and to create common rules for specific services sectors.
The European Parliament and the PES have suggested that a framework directive on SGEI should be based on Article 95 ECT.[51] In fact, many directives concerning SGEI have been based on Article 95 or on a combination of Articles 95 and 55, 47 (2) ECT.[52] For example, the Universal Service Directive[53] and the Framework Directive[54] have been based on Article 95 ECT only. The liberalization of postal, energy and gas services has been based on Article

[49] Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, OJ 2000, L 193/75.
[50] See e. g. Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, OJ 1988, L131/73.
[51] Langen Report, above note 1 and PES draft, above note 17.
[52] Article 52 which contains a legal basis for the liberalisation of a particular service has been of little practice importance. For political reasons directives on services liberalisation have been based on Articles 55, 47 (2) ECT, sometimes in addition to Article 52 ECT, because Article 52 only requires consultation of Parliament and Article 47 (2) requires co-decision.
[53] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ 2002, L 108/51.
[54] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ 2002, L 108/33.

95 in combination with Articles 55, 47 (2) ECT.[55] The same legal basis was used for the procurement directives.[56] Other directives concerning services such as the posting of workers directive, the Television without frontiers directive and most likely also the Services Directive are based on Articles 55, 47(2) ECT only.[57]

Both legal bases, Article 95 and Articles 55, 47 (2) ECT have as their object the establishment and the functioning of the internal market.[58] This means that a measure based on these provisions must aim at a removal of obstacles to the free movement of goods and services or at the elimination of distortions of competition, which are created by diverging laws and regulations in different Member States. Articles 95 and 55, 47 (2) ECT are generally of liberalizing character. In order to base a framework directive on SGEI on these provisions two conditions need to be fulfilled: First, the laws and regulations of Member States concerning SGEI would have to differ, which is clearly the case. Second, it would have to be shown that these differences create obstacles to the free movement of goods and services or distort competition. If both conditions are fulfilled the EC has the competence to adopt measures harmonizing the law on SGEI.

If such a competence exists, the respective measure does not have to adopt the most liberalizing approach and can also pursue other goals in addition to the establishment and maintenance of the internal market. Advocate General *Fennelly*, in *Germany/Parliament and Council* stated that the provisions just mentioned should not "be interpreted as a kind of liberal charter, entailing harmonisation towards the lowest standard or even towards some sort of mean of the pre-existing national standards." He added that the Community had a "duty to take into account public interest concerns and, thus, the degree of protection attained or pursued by the Member States."[59] The ECJ held in that case that a measure legitimately based on Articles 95 and 55, 47 (2) ECT could also pursue goals of public health policy, because health requirements are a constituent part of the Community's policies.[60] On the basis of this case law, it could be argued that a framework directive on SGEI could also pursue the goal of guaranteeing the function of SGEI in the meaning of Article 16 ECT.

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[55] Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ 1998, L 204/1, Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ 1998, L15/14; Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ 1997, L 27/20; Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, OJ 2002, L 176, 21; Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ 2003, L 176/37; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ 2003, L 176/57.

[56] 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 contract, OJ 2004, L 134/114; 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, OJ 2004, L 134/1.

[57] Common Position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on services in the internal market; Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 1997, L18/1; Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Television without frontiers)**,** OJ 1997, L 202/60.

[58] Case C-376/98, *Germany/Parliament and Council (Tobacco Advertising*), [2000] ECR I-8419, paras 81 and 87.

[59] Opinion of AG *Fennelly*, Case C-376/98, above note 58, paras 85 et seq.

[60] *Germany/Parliament and Council*, above note 58, para. 75.

It seems therefore possible that a legal framework on SGEI could provide for core public or universal service obligations for the provision of SGEI such as accessibility, affordability, non-discrimination, quality of the service and users' rights. The ECJ accepted that measures regulating or even restricting economic activities can be legitimately based on Article 95 ECT as long as the measure is proportionate and does not exclude an entire sector from the internal market. An exclusion of SGEI from the scope of the internal market would therefore not be possible.

Another more innovative line of argument, which has, however, not yet been tested before the ECJ could be built on a redefinition of the concept of the internal market. According to conventional understanding, this term only covers the free movement of goods, services, people and capital and undistorted competition. However, in light of the debates about "Social Europe" and considering that the Constitution Treaty would have introduced the concept of a social market economy (Article I-3 (3) Constitution Treaty) it could be argued that a modern understanding of the internal market also implies the maintenance and effective provision of certain social functions of the "European social model", such as solidarity and social cohesion. Therefore, a legislative act based on Article 95 ECT could also aim at the maintenance of these functions. Since fulfilling these functions is a key justification for the provision of SGEI, a legal framework for SGEI would contribute to the establishment of a (social) internal market and could therefore be based on a redefined understanding of Article 95 ECT.

4. Implementing competition law and state aid law: Articles 83 and 89 ECT

Two further provisions need to be mentioned: Article 83 (1) ECT which contains the competence to adopt regulations or directives to give effect to the principles of competition law (Articles 81 and 82) and Article 89 ECT which allows regulations for the application of state aid law (Articles 87 and 88). Both provisions have been used primarily for the adoption of directives concerning procedural issues. However, since they contain a general competence to implement and clarify key concepts of competition and state aid law, they might be useful as additional legal bases for a framework directive aiming at a clarification of the relationship of SGEI vis-à-vis competition and state aid law. It should be noted that both legal bases only require the consultation of the European Parliament. They should therefore only be considered as a supplement of Articles 95, 47 (2) and 55 ECT, because then the co-decision procedure could be used.

The important question in the present context is whether and – if so – to which extent Articles 83 and 89 may be used to modify or even derogate from the scope of competition and state aid law. For example, if a legal framework would want to change the definition of state aid according to the *Altmark* judgement (see e.g. Article 14 of the PES draft), this would be a deviation from Article 87 – as interpreted by the ECJ. It is generally agreed that the two provisions only contain the competence to implement Articles 81, 82 and 87 and that they may therefore not change the scope of these provisions. However, there is a debate regarding the question whether implementation legislation based on Articles 83 (1) and 89 may define terms such as "undertaking" or "state aid". While some commentators argue that this is not possible, others take the view that this possibility should not be excluded.[61] The latter view seems more appropriate, but since the ECJ apparently has not yet decided the question, it cannot be answered with certainty.

[61] Schröter, in: von der Groeben/Schwarze (eds), EU-/EG-Vertrag, Kommentar, Article 83 No. 8, 6th ed., 2003.

5. Sectoral competences regarding transport, education and public health

The competences of the EC discussed so far concern horizontal issues, i. e. issues which apply to all sectors. The EC has, however, also competences in a number of specific sectors which may serve as additional legal bases for a framework directive even if such a directive would be a horizontal instrument.
The most important sectoral EC competence in the field of the SGEI is the competence to establish a common transport policy according to Articles 70 and 71 ECT. This competence covers rail, road and internal waterways transportation. It enables the Community to adopt directives and regulations regarding international transport, conditions under which non-resident carriers may operate, transport safety and other appropriate measures.
Apart from the far reaching competence in Article 71, the EC possesses competences to supplement and support measures of the Member States in the fields of social policy (Article 137 ECT), education (Article 149 (4) ECT) and public health (Article 152 (4) ECT). In the fields of education and public health, the measures adopted by the EC may not lead to harmonisation. While this excludes any substantive EC legislation, it could be used to support public service obligations established at the Member State level in these sectors. However, it is doubtful whether EC legislation based on these competences could establish specific obligations which do not exist at the domestic level. Nevertheless, the supplementary competence regarding social policy, education and public health confer an – albeit limited – competence regarding some specific non-economic services of general interest to the EC.

6. Supplementary competence of Article 308 ECT

The last possible legal basis to be mentioned is Article 308 ECT. This provision can be used to adopt legislation aimed at a Community objective if there are no specific provisions in the EC Treaty. Article 308 could therefore be used as a legal basis for a framework directive on SGEI if it could be established that such a directive aims at a specific Community objective and that there is no other legal basis in the EC Treaty. It should be noted that Article 308 – like Articles 83 and 89 only requires the consultation of Parliament. Unlike Articles 83 and 89, Article 308 ECT requires unanimity in the Council, which makes it a difficult legal basis to work on in practice.
It is agreed that Article 308 can be used in combination with other provisions if a legislative act pursues different objectives, which cannot be based on the same legal basis. In particular, a combination of Article 308 and Articles 95, 47 (2), 55 is possible.[62] For example, if a directive would aim at market liberalization and a high quality standard of SGEI, it could be based on such a combination.
The following four conditions need to be fulfilled in order to rely on Article 308 ECT: First, there must be no specific provision in the EC Treaty which could serve as a legal basis for the legislative act (or parts thereof). Article 308 is a supplementary title of competence and can therefore only be used on a subsidiary basis. Second, the legislative act must pursue an objective of the community for example those mentioned in Articles 2, 3 and 4 ECT. Third, the proposed act must stay in the system of the common market and may not derogate from its general principles. Fourth, the adoption of the legislative act in question must be necessary to achieve the Community goal in question.

[62] Schwartz, in: von der Groeben/Schwarze (eds), EU-/EG-Vertrag, Kommentar, Article 308, Nos 56, 73-76, 6th ed., 2003.

All four conditions raise difficult questions in the context of SGEI. As the preceding analysis has shown there are provisions in the ECT which could serve as a basis for certain aspects and elements of a framework directive on SGEI. In order to use Article 308 as an additional legal basis, one would have to establish carefully which aspects of a framework directive could be based on special provisions of the EC Treaty and which parts would require Article 308 in addition. Regarding the second element of Article 308 – pursuing an objective of the Community – it should be noted that SGEI are not mentioned in Articles 2, 3 or 4 ECT. The Commission suggested the inclusion of SGEI in the catalogue of Article 2 in one of its earlier communications, but this proposal was never taken up. Yet, it can be argued that Article 16 ECT establishes the protection of SGEI as an objective of the Community ("…the Community … shall take care that such services *(i. e. SGEI)* operate on the basis of principles and conditions which enable them to fulfil their missions."). The third criterion of Article 308 requires that a legislative act on SGEI stays within the system and the logic of the common market. Article 308 may therefore not be used for legislation which would generally deviate from key elements of the common market, i. e. free movement of services and competition. Lastly, basing a framework directive also on Article 308 would require that such a measure is necessary to achieve the goal. In this context it should be noted that Article 16 ECT states that not only the Member States, but also the Community has the obligation to ensure that SGEI can fulfil their mandate. This suggests that a measure of the Community is necessary, because the particular Community obligation can only be achieved by a Community measure.

7. Summary: A combination of provisions as legal basis for a legal framework?

Summing up the analysis of possible legal bases for a legal framework, the following observations can be made: There is no explicit reference to a legal framework on SGEI in the EC Treaty. The only direct and explicit reference for a legislative measure on SGEI is Article 86 (3), which calls on the Commission to ensure the application of the principles of Article 86. A legal basis for a directive of Parliament and Council would have to found somewhere else. In this context Articles 95, 47 (1) and 55 ECT or a combination thereof come to mind, which would allow for harmonization measures. However, the main objective of these obligations is the functioning of the internal market. A legal framework therefore has to be predominantly aimed at a removal of obstacles to free movement and to competition unless the term internal market is defined to include functions of a social market economy as well. Such a framework could be combined with measures aiming at a clarification of key concepts of competition law and state aid law (based on Articles 83 and 89 ECT), sectoral measures or additional measures which are necessary to ensure that SGEI can fulfil their tasks (Article 308 ECT). Depending on its contents a legal framework could be based on a combination of Articles 47 (2), 55, 83, 89, 95 and 308 ECT.
It must, however, be remembered that a legal framework based on current provisions of the EC Treaty could not exempt SGEI from the application of EC law or parts thereof entirely. To be clear: The general application of competition law and free movement to SGEI cannot be abolished on the basis of the current EC Treaty.

V. Relationship between legal framework and existing EC law

1. General considerations

As mentioned above a draft legal framework could aim – at least in part – at a modification of existing legislation, case law or Commission practice. This raises the general question about the relationship between a legal framework and existing law. All three proposals for such a framework also address this question in one way or another.
A number of points need to be observed in this context: The legal framework would be part of EC legislation (so-called secondary law). As such it cannot deviate from primary EC law (i.e. the EC Treaty). For example, a measure of secondary law could not exempt SGEI from the application of competition law, because this would contradict Article 86 (2) ECT. However, secondary law can, and often does, clarify primary law. Yet, this requires a specific legal basis for such a clarification. As discussed above, it can be argued that Article 89 contains a legal basis for secondary law clarifying the concept of "state aid".
A measure of secondary law can also change or modify another measure of secondary law, in particular if it is based on the same legal basis. For example, a legal framework on SGEI based on Articles 47 (2) and 55 could modify the scope of procurement law, because the procurement directives are also based on these provisions. For reasons of legal clarity and certainty, the legal framework should make any modification of other secondary law explicit and specifically state which provision of which legal act (directive, regulation, etc.) it intends to change.
The relationship between a legal framework and primary and secondary law becomes particularly complex if the legal framework aims at a modification of ECJ case law. Decisions of the ECJ are generally only binding upon the parties of a dispute unless the ECJ declares a measure of secondary law void. However, if the ECJ interprets the term "undertaking" or "state aid" this interpretation does not become binding law. The ECJ may even change its jurisprudence on a particular issue (though it only rarely does so explicitly). Therefore, the Community legislator is not barred from providing alternative definitions of terms of primary or secondary law which differ from those advanced by the ECJ. The competence of the Community legislator to establish rules and procedures implementing primary law cannot be diminished by prior judicative law-making by the courts. Instead, the exercise of the legislative competence replaces the competence of the Community courts to further develop the law through case law.[63] However, as already mentioned the Community legislator can only clarify, modify or replace an interpretation of the law by the ECJ if there is a legal basis for such a measure.

2. Clarifying (and modifying) ECJ case law in the fields of state aid and procurement law

The preceding general considerations of the relationship between a legal framework and existing EC law as interpreted by the ECJ can be illustrated with two contentious issues which have received a lot of attention in recent years. The first issue concerns the characterisation of financial compensation for public service obligations as state aid in the meaning of Article 87 ECT. The second concerns the application of procurement law to the so-called "in-house" provision of public services.
Turning to the characterisation of financial compensation first: In the landmark *Altmark* case the Court of Justice held that a financial contribution does not constitute state aid if four specific conditions are fulfilled.[64] In 2005, the Commission published three measures aimed

[63] Cremer, in: Calliess/Ruffert (eds), Kommentar zum EU-Vertrag und EG-Vertrag. Article 87 No. 1a, 2nd ed. 2002, regarding Article 88 (3) and 89 ECT
[64] Case C-280/00, *Altmark Trans*, [2003] ECR, I-7747, para. 95, see Annex 2. The four *Altmark* criteria are: (1) The recipient undertaking is actually required to discharge public service obligations and those obligations have

at clarifying the judgement and providing guidelines for public authorities on how to apply the *Altmark* criteria.[65]

Nevertheless, many local authorities, providers of public services and others feel insecure about the proper content and application of these criteria. Therefore, some proposals for a framework directive on SGEI aim to rectify this by making the rules and conditions clearer and more precise. It has also been argued that that the strict conditions of *Altmark* are too much of a burden on national, regional and local authorities. Hence, the three proposals also aim at a modification of the existing definition of state aid under EC law. For example, Article 14 of the PES draft contains only two conditions which must be fulfilled so that compensation for a public service obligation does not count as state aid. These conditions clearly deviate from the *Altmark* conditions. Such a deviation is only possible if there is a legal basis in the Treaty allowing the Community legislator to specify the definition of state aid. As mentioned above, Article 89 could be such a basis.

A second problem concerns the application of procurement law to the provision of services by entities which are not directly part of the administration. The past years have seen an increase of the participation of private capital and private entities in the provision of services of general economic interest. Many public authorities have entrusted companies which are fully or predominantly in public ownership with the provision of a particular public service (e. g. waste management). This has raised the question whether the entrustment of a service of general economic interest to such an entity is subject to tendering procedures under EC procurement law. The ECJ held in *Teckal* that so-called the "in-house" provision of public services is not subject to procurement law if the public entity exercises a control over the providing entity which is similar to the control which the public authority "exercises over its own departments" and if the other entity "carries out the essential part of its activities with the controlling local authority or authorities."[66] In recent judgements, such as *Stadt Halle* and *Parking Brixen*, the Court has interpreted the *Teckal* exception narrowly.[67] Many public authorities view this as too restrictive and also miss legal certainty in light of an emerging case law. As a consequence, this issue is also addressed in proposals for a framework directive. For example, Article 7 (1) of the PES draft defines control, similar to the control a public authority exercises over its own departments as a situation "when the entity cannot take any strategic or important decision without or against the opinion of the competent authority." Again, like in the case of financial compensation this is a deviation from existing case law. This case law relates to the term "contract" in the procurement directives, which are

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been clearly defined, (2) the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner, (3) 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, (4) 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.

[65] Community Framework for State Aid in the form of public service compensation, OJ 2005 C 297/4; Commission Decision of 13 July 2005 on the application of Article 86(2) of the Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ 2005 L 312/67 and Commission Directive 2005/81/EC, Amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, OJ 2005 L 312747.

[66] Case C- 107/98, *Teckal*, [1999] ECR I-8121, para. 50. See Annex 2.

[67] Case C-26/03, *Stadt Halle*, [2005] ECR, I-1 and Case C- 458/03, *Parking Brixen*, [2005] ECR, I-8612, see Annex 2.

measures of secondary EC law. A legal framework could therefore redefine this criterion without a challenge on the basis of existing EC law.

VI. Summary of the main findings

1. The term services of general economic interest is a legal term mentioned in Art. 16 and 86 (2) ECT. The term services of general interest has no basis in existing EC law. The distinction between the two terms was apparently invented by the Commission. The current debate and the existing proposals of a legal framework follow this approach and apply different definitions. Sometimes this creates tensions with the structure of existing EC law and therefore leads to legal uncertainty.

2. In EC law, the divide between "economic" and "non-economic" activities is used to determine the scope of the free movement of services and the scope of competition law. Both the term services in Article 50 ECT and the application of competition law require that an entity engages in an economic activity. Non-economic activities are not covered by EC free movement and competition law. If services of general interest are defined as non-economic activities, they remain outside the scope of most substantive EC law. Once an activity is of an economic nature, it becomes a service and its supplier becomes an undertaking subject to competition law. If these services are entrusted with special public interest obligations, such as universal service, they are considered services of general economic interest in the meaning of Article 86 (2) ECT.

3. The EC has a competence to legislate on services of general economic interest. Apart from the limited exception of the supplementary competence in education, public health and social policy, the EC has no general competence to legislate on services of general interest if they are understood as non-economic activities. A legal framework which aims to bring legal clarity should not adopt the distinction between services of general economic interest and services of general interest, because this could imply that the EC has a competence regarding the latter. However, the lack of a competence regarding (non-economic) SGI and the restriction of a legal framework to SGEI does not mean that the legal framework would be ineffective or deficient, because it would apply to all entities engaged in an economic activity entrusted with an obligation in the general interest. Entities not engaged in an economic activity would remain within the public/governmental sphere of the Member State and not be subject to EC free movement and competition law.

4. Article 86 (3) ECT gives the Commission the right to adopt directives and decisions to ensure the application of the provisions of Articles 86 (1) and 86 (2) ECT. This includes the right to adopt a framework to guarantee the functioning of services of general interest vis-à-vis the application of competition and state aid law. Parliament and Council can adopt directives aimed at the harmonization of the rules on services of general economic interest based on Articles 95 and 55, 47 (2) ECT. This requires that the objective of the legal act is the establishment and maintenance of internal market and competition. This does not exclude provisions which restrict the application of internal market principles and competition law. A legislative act based in Articles 95 and 55, 47 (2) ECT can also pursue general interest goals, such as the universal service obligations. Article 95 ECT could be an even more suitable basis for a legal framework on SGEI, if the term internal market would be redefined in accordance with the idea of a social market economy (Article I-3 (3) Constitution Treaty).

5. Articles 47 (2), 55 and 95 ECT could be supplemented as legal bases by Articles 83 and 89 to further define key concepts of competition and state aid law. Furthermore, Article 308 ECT could be used as an additional legal basis for those elements of a legal framework, which cannot be based on another, more specific legal basis. This requires that such a legal framework would be necessary to pursue and objective of the EC Treaty. It can be argued that Article 16 ECT provides this objective and that Community action is necessary, because this provision specifically mentions the functioning of SGEI as an objective of the Community.

6. A legal framework cannot modify provisions of the EC Treaty itself. It can contain definitions and clarifications of terms of the ECT if there is a legal basis for such definitions and clarifications in the EC Treaty. Articles 83 and 89 ECT could be seen as such legal bases. A legal framework can modify and change other instruments of EC legislation. For reasons of legal clarity such modifications should be made explicit. Lastly, a legal framework could modify the interpretation of terms of the ECT and of EC legislation as developed in the case law of the ECJ. However, regarding the interpretation of terms of the ECT this requires – again – a legal basis which allows the definition and clarification of EC Treaty terminology.

Annex 1: Key provisions of EC law regarding services of general economic interest

Article 16 ECT

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.

Article 86 ECT

(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 12 and Articles 81 to 89.
(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.

Article 36 Charter of Fundamental Rights

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.

Article III-122 Constitution Treaty

Without prejudice to Articles I-5, III-166, III-167 and III-238, and given the place occupied by services of general economic interest as services to which all in the Union attribute value as well as their role in promoting its social and territorial cohesion, the Union and the Member States, each within their respective competences and within the scope of application of the Constitution, shall take care that such services operate on the basis of principles and conditions, in particular economic and financial conditions, which enable them to fulfil their missions. European laws shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Constitution, to provide, to commission and to fund such services.

Annex 2: Summaries of key ECJ cases regarding services of general economic interest[68]

A. Article 86 (2) ECT

- Corbeau, C -320/91
- Almelo, C-393/92
- Corsica Ferries, C-266/96
- TNT Traco, C-340/99
- Ambulanz Glöckner, C- 475/99

B. Support to services of general economic interest as state aid

- Altmark Trans, C-280/00
- Chronopost, C-83/01
- Enirisorse, C-34/01

C. "In House"-provision of services of gerenal interest and public procurement law

- Teckal, C-107/98
- Stadt Halle, C-26/03
- Parking Brixen, C-458/03

D. "Economic/non-economic" activity and the application of competition law

- Höfner und Elser, C-41/90
- Poucet and Pistre, C- 59/91
- FENIN, C-205/03

A. Article 86 (2) ECT

Corbeau, Case C- 320/91, Judgement of 19 May 1993, [1993] ECR I-2533

Corbeau is the first leading case concerning the conditions under which an undertaking entrusted with services of general economic interest may be exempt from the application of competition law. The case concerns an infringement of the Belgian law protecting the monopoly of the postal service (Régie des Postes) by Paul Corbeau, a businessman from Liège, Belgium, who provided a service consisting in collecting mail from the address of the sender and distributing it by noon on the following day, provided that the addressee is located within the district concerned. Régie des Postes has an exclusive right to collect, carry and distribute throughout Belgium all correspondence of whatever nature.
The ECJ decided that the Régie des Postes must be regarded as an undertaking to which the Member State concerned has granted exclusive rights within the meaning of Article 86 (1) EC Treaty. The Court also excepted that collecting, carrying and distributing postal items was a service of general economic interest in the meaning of Article 86 (2) ECT. The Court focussed on the question, under which conditions a full or partial exclusion of competition (i.e. a monopoly) is necessary in order to allow the holder of the exclusive right to perform its task of general interest under economically acceptable conditions.

[68] It should be noted that many of the cases summarised in this Annex were adjudicated on the basis of the ECT before the renumbering of the Treaty by the Treaty of Amsterdam. This summary, however, uses the current article numbers throughout.

The ECJ held that the obligation on the undertaking entrusted with the task to perform its services in conditions of economic equilibrium requires the possibility to offset less profitable sectors against the profitable sectors. That justifies a restriction of competition in economically profitable sectors are concerned. However, the Court ruled that the exclusion of competition is not justified if the services concerned are (1) specific services dissociable from the service of general interest, (2) additional services not offered by the traditional postal service (such as collection from the senders´ address, greater speed or reliability of distribution) and (3) do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right. The ECJ left it to the domestic court to decide whether these condition were fulfilled in the case concerning Corbeau.

Almelo, Case C-393/92, Judgement of 27 April 1994, [1994] ECR I-1477

The case concerns a dispute between the Municipality of Almelo and other local distributors of electric power and Energiebedrijf IJsselmij NV ("IJM"), an undertaking engaged in the regional distribution of electric power. From 1985 to 1988 local distributors had to obtain electric power exclusively from IJM because of an exclusive purchasing clause in the general conditions for the supply of electric power with IJM. The local distributors were therefore banned from importing electricity. IJM charged an equalization supplement to the local distributors from 1 January 1985 to offset the difference between the higher cost incurred by it in distributing electricity to consumers in rural areas and the lower cost incurred by the local distributors in distributing electricity to consumers in urban areas. Without the import ban IJM could not have imposed the equalization supplement because the local distributor would have the possibility of using other suppliers.
The ECJ decided that an agreement containing an exclusive purchasing clause had a restrictive effect on competition in the meaning of Article 81 EC Treaty. The ECJ left it to the domestic court to consider whether there was also a dominant position in a substantial part of the common market in the meaning of Article 82 ECT. Concerning Article 86 (2) ECT the ECJ ruled that IJM has been entrusted with the task of services of general interest, because it has to ensure that all consumers receive uninterrupted supplies of electricity in sufficient quantities to meet demand at any given time, at uniform tariff rates and on terms which may not vary save in accordance with objective criteria applicable to all customers. Restrictions on other competitors must be accepted in so far as they are necessary in order to enable IJM to perform its task. Therefore it was necessary to consider the economic conditions in which the undertaking operates and the legislation, particularly concerning the environment, to which it is subject. As in *Corbeau*, the ECJ decided that it was the task of the domestic court to consider whether an the exclusive purchasing in question was necessary enable the regional distributor to perform its task of general interest.

Corsica Ferries, Case C-266/96, Judgement of 18 June 1998, [1998] ECR I-3949

Corsica Ferries provided a regular car ferry service between Corsica and various Italian ports, including Genoa and La Spezia. Over the period from 1994 to 1996 Corsica Ferries paid – under express reservations - to the Genoa and La Spezia mooring groups various sums in respect of mooring services (mooring and unmooring of vessels). This sums were higher than the costs for the actual services provided. According to Corsica Ferries there was no legal cause for the payments because the tariffs had no relations to the costs of the services provided and varied from one port to another. Corsica Ferries applied to the Tribunale di Genova for refunding the sum.

The ECJ decided that the mooring groups had a dominant position within the meaning of Article 82 ECT, because the exclusive right conferred to them by the Italian public authorities prevented shipping companies from using their own staff to carry out mooring operations. regarding Article 86 (2) ECT the Court held that mooring services can be regarded as a service of general economic interest within the meaning of Article 86 (2) Treaty. Mooring groups are obliged to provide at any time and to any user an universal mooring service, for reasons of safety in port waters. Under these circumstances it was justified to include in the price of the service the cost of maintaining the universal mooring service, inasmuch as it corresponds to the supplementary cost occasioned by the special characteristics of that service. Hence the Court found no violation of competition law.

TNT Traco, Case C- 340/99, Judgement of 17 May 2001, [2001] ECR I-4109

Like *Corbeau* (see above), TNT Traco concerns the the justification of a postal monopoly. TNT Traco provided a private service for the collection, carriage and delivery of express mail throughout Italy. TNT Traco was charged with a breach of the Italian Postal Code, which gave the ecxlusive right of the State to provide collection, carriage an delivery of letter post to the State, which in turn entrusted the Italian Postal Service (Poste Italiana SpA) with those services. In the proceedings before the Tribunale civile di Genova, it was found that TNT Traco's express mail service could be clearly differentiated from the ordinary postal delivery service provided by Poste Italiana as part of the universal service, because it was distinguished by speed, certainty and personalised delivery to the addressee.
The ECJ decided that Poste Italiana had a dominant position within the meaning of Article 82 ECT. The Court held that it was a violation of Article 82 ECT if a private operator providing express mail services had to pay postal dues equivalent to the postage charge normally payable without receiving any services from the postal service. However, the Court considered that this violation could be justified on the basis of Article 86 (2) ECT. The Court held that Poste Italiane constituted an undertaking entrusted with the operation of services of general economic interest for the purposes of Article 86 (2) Treaty. Furthermore, to fulfill Article 86 (2) ECT it is not necessary that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. According to the Court, it is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it or that maintenance of those rights is necessary to enable the holder of them to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions. However, Article 86 (2) ECT must be restrictively interpreted because it permits derogation from the rules of the EC Treaty. Consequently, the total proceeds from postal dues which are paid by private operators supplying express mail service are not allowed to exceed the amount necessary to offset any losses which may be incurred in the operation of the universal postal service. In addition, when the undertaking responsible for the universal postal service itself supplies an express mail service (not forming part of the universal service obligation) the undertaking must also be required to pay the postal dues. In other words, it must ensure that the costs of its express mail service are not subsidised by the universal service.

Ambulanz Glöckner, Case C-475/99, Judgement of 17 May 2001, [2001] ECR I-8089

Ambulanz Glöckner, a private undertaking providing ambulance transports, was granted an authorisation to provide patient transport services until 1994. The public authority, Landkreis Südwestpfalz, refused to renew authorisation on the basis of the Law on the public

ambulance service, because two medical aid organisations entrusted with emergency ambulance services in the area, who also provided patient transport services, feared that an additional operator would require them either to increase user charges or to reduce their services.
The Court recalled that in the context of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. Any activity consisting in offering goods and services on a given market is an economic activity. The provisions of emergency and patient transport services constitute an economic activity. Public service obligations cannot prevent the activities in question from being regarded as economic activities. The Court held that an abuse of a dominant position within the meaning of Article 82 ECT was possible in this case, but left it to the domestic court to decide on the merits. Regarding a justification on the basis of Article 86(2) ECT, the ECJ decided that emergency ambulance services are a service of general economic interest, because it requires to provide a permanent standby service of transporting sick or injured persons in emergencies throughout the territory concerned, at uniform rates and on similar quality conditions, without regard to the particular situations or to the degree of economic profitability of each individual operation. Regarding the question whether the restriction of competition was necessary to enable the exclusive right-holder to perform its task of general interest in economically acceptable conditions the Court recalled that it was possible to offset less profitable sectors (in this case: emergency ambulance services) against the profitable sectors (in this case: patient transport services) and hence justify a restriction of competition in economically profitable sectors. However, in contrast to *Corbeau*, where the service provided by *Corbeau* could be distinguished from the regular postal service, emergency and patient transports are closely linked. The extension of exclusive rights to the non-emergency transport sector enables organisations to discharge their general-interest task of providing emergency transport in conditions of economic equilibrium. Otherwise private operators could concentrate in the non-emergency sector on more profitable journeys ("cherry-picking") which could affect the degree of economic viability of the service provided by the medical aid organisations and, consequently, jeopardise the quality and reliability of that service. However, the private independent operators must be allowed to satisfy demand in the area of emergency ambulance and patient transport services where entrusted organisations are not in the position to fulfil that obligations.

B. Support to services of general economic interest as state aid

Altmark Trans, Case C-280/00, Judgement of 14 January 2003, [2003] ECR, I-7747

The case concerns the grant of licences for scheduled bus transport services to Altmark Trans GmbH in the Landkreis of Stendal and a provision of public subsidies (compensation) for those services. In proceedings iniated by its competitor, Nahverkehrsgesellschaft Altmark GmbH, claimed that Altmark Trans was not an economically viable undertaking, since it was unable to survive without public subsidies. The licences granted to it were therefore unlawful. The ECJ had to decide whether the compensation received by Altmark Trans for providing the transport services contained illegal state aid. It ruled that financial support from the Member Staes representing compensation for public service obligations does not have the characterictics of state aid. To classify a measure as State aid within the meaning of the Treaty, it must be able of being regarded as an "advantage" conferred on the recipient undertaking which that undertaking would not have obtained under normal market

conditions. The Court held that there is no “advantage” where a State financial measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. However, such compensation would only be fall outside of the scope of state aid law, four conditions must be satisfied:
- the recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined.
- the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
- the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit.
- where the undertaking is not chosen in a public procurement procedure, the level of compensation must be determined by a comparison with an analysis of the costs which a typical transport undertaking would incur (taking into account the receipts and a reasonable profit from discharging the obligations).

Chronopost, Joined Cases C-83/01 and others, Judgement of 3 July 2003, [2003] ECR I-6993

SFEI is the association of a private companies offering express courier servicing in France. SFMI-Chronopost is a private company, which is owned to 66% by the French Post Office La Poste also offers these services. SFMI recieved logistical and commercial assistance from La Poste. SFEI argued that the assistance to SFMI constituted state aid within the meaning of Article 87 Treaty. In particular, SFEI complained that the remuneration paid by SFMI for the assistance provided by La Poste was not in accordance with normal market conditions. It alleged that the difference between the market price for the purchase of such services and the price actually paid by SFMI constituted state aid.
The ECJ held that assistance by a public undertaking to its subsidiaries, which are governed by private law and working in free competition, is capable of constituting state aid within the meaning of Article 87 Treaty if the compensation received in return is less than that which would have been demanded under normal market conditions. In assessing these conditions due regard had to be paid to the fact that La Poste was an undertaking entrusted with a task of general economic interest. In particular, because of the characteristics of the service which the La Poste network must be able to ensure, the creation and maintenance of that network are not in line with a purely commercial approach. Therefore that network would never have been created by a private undertaking. As a result, the Court ruled that there was no state aid to SFMI-Chronopost if it was established that the price charged covered all additional, variable costs incurred in providing the logistical and commercial assistance, an appropriate contribution to the fixed costs arising from use of the postal network and an adequate return on the capital investment in so far as it is used for SFMI-Chronopost's competitive activity. Furthermore, those elements should not be underestimated or fixed in an arbitrary fashion.

Enirisorse, Joined Cases C- 34/01 and others, Judgement of 27 November 2003, [2003] ECR I-14243

Using its own resources, Enirisorse loaded and unloaded domestic and foreign goods in the port of Cagliari without making use of the services provided by the Azienda operating in that port, an entity under the supervision of the Merchant Navy Ministry responsible for the management of mechanical loading and unloading equipment. Nevertheless, the Ministry of Finance demanded the payment of port charges for loading and unloading goods.

The ECJ considered whether the collection of charges amounted to state aid. Applying the criteria developed in *Altmark,* the ECJ ruled that from the documents forwarded it was unclear, that Azienda was in fact discharging clearly defined public-service duties. Furthermore the parameters on the basis of which the compensation was calculated were not established in advance and in an objective and transparent manner. In fact the amount of port charges paid to the Azienda did not reflect the costs actually incurred for the purposes of supplying their loading and unloading services. Instead, the amount was linked to the volume of goods transported by all users and shipped to the ports in question. The court ruled that such a system did not satisfy the requirements of *Altmark.*

C. "In House"-provision of services of gerenal interest and public procurement law

Teckal, Case C-107/98, Judgement of 18 November 1999, [1999] ECR I-8121

Teckal is a private company offering heating services. Azienda Gas-Acqua Consorziale (AGAC) is a consortium set up by several municipalities - including the Municipality of Viano (Italy) - to manage energy and environmental services. AGAC has legal personality and operational autonomy. The municipal council of Viano conferred the management of the heating service for a number of municipal buildings to AGAC without a public tendering procedure.
The ECJ decided that Directive 93/36 coordinating procedures for the award of public supply contracts was applicable if there was a contract between two distinct legal persons, one of them being a contracting authority. However, if the local authority exercised over the other person 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, the directive is not applicable. In other words, the "In house" provision of services is not subject to procurement law if the criteria just mentioned (the so-called Teckal criteria) are fulfilled. The ECJ sought to further clarify the Teckal criteria in a number of recent judgements including *Stadt Halle* and *Parking Brixen.*

Stadt Halle, Case C – 26/03, Judgement of 11 January 2005, [2005] ECR I-1

The City of Halle, Germany (Stadt Halle) awarded RPL Lochau a contract for services concerning the treatment of waste without a public tender procedure. RPL Lochau is a limited liability company. A majority, 75.1%, of its capital is held by the Stadtwerke Halle GmbH, whose sole shareholder Verwaltungsgesellschaft is wholly owned by the City of Halle. A minority of 24,9 % is held by a private limited liability company. TREA Leuna, a private competitor of PRL Lochau challenged that decision on the basis that it violated Community law on public procurement.
The ECJ recalled the principal objective of public procurement, namely the free movement of services and a undistorted competition in all Member States. Any exception to the application of public procurement law must be interpreted strictly. A contracting public 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 for a tender. Applying the Teckal criteria the Court held that the participation of a private undertaking, even as a minority, in the capital of a company in which the contracting authority is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments. Any private capital investment in an undertaking follows considerations of private and not of

public interests. Consequently, the award of a public contract to a semi-public company without calling for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment, because such a procedure would offer a private undertaking an advantage over its competitors.

Parking Brixen, Case C-458/03, Judgement of 13 October 2005, [2005] ECR I-8612

The Municipality of Brixen (Italy) awarded Stadtwerke Brixen AG a contract to manage two car parks within the municipality. Stadtwerke Brixen AG is a limited company completely owned by the municipality. Parking Brixen GmbH, a private competitor challenged the award.
The ECJ decided that the award to manage a public pay car park constitutes a public service concession, which is not subject to the public procurement law of the EC, because the provider is paid by third parties for the use of the car park, and not directly by the contracting authority. Nevertheless, the Court ruled that public authorities are bound to comply with the fundamental rules of the EC Treaty in general, and in particular with the principle of non-discrimination on the ground of nationality, which may also require a public tender for service concessions. However, this is not the case of the *Teckal* criteria are fulfilled, because it is not appropriate to apply EC law in cases where a public authority performs tasks in the public interest for which it is responsible by its own administrative, technical and other means. Applying these criteria to the situation in question, the Court stressed that Stadtwerke Brixen AG enjoys a high degree of independence characterised by its broad objects, the obligatory opening of the company to other capital, the expansion of the geographical area of the company's activities and the considerable powers conferred on its Administrative Board, with in practice no management control by the municipality. Consequently, it was not possible for the public authority to exercise over the concessionaire control similar to that which it exercises over its own departments.

D. "Economic/non-economic" activity and the application of competition law

Höfner und Elser, Case C-41/90, Judgement of 23 April 1991, [1991] ECR I-1979

Höfner and Elser is the leading case concerning the concept of an undertaking in the meaning of competition law, including Article 86 ECT. Höfner and Elser are private recruitment consultants. They claimed fees from a client who argued that the contract between it and Höfner and Elser was void since it was in breach of the Arbeitsförderungsgesetz, AFG (Law on the promotion of employment). According to this law, the Bundesanstalt für Arbeit (Federal Office for Employment) has the exclusive right of employment procurement. However, the Bundesanstalt tolerates certain activities on the part of recruitment consultants concerning business executives.
The ECJ ruled that a public employment agency such as the Bundesanstalt must be regarded as an undertaking within the meaning of the Community competition rules, because the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. The Court held that employment procurement is an economic activity. The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. The Court also stated that a public employment agency that is entrusted with the operation of services of general economic interest remains subject to the competition rules pursuant to Article 86(2) Treaty unless it is shown that their application is

incompatible with the discharge of its duties. The Court considered it a violation of Article 82 ECT (abuse of a dominant position) if the public employment agency is unable of satisfying demand prevailing on the market for such activities and private recruitment consultants are not able to do those activities because of a statutory prohibition of such activities.

Poucet and Pistre, Joined Cases C-159/91 and C-160/91, Judgement of 17 February 1993, [1993] ECR I-637

Poucet and Pistre is the leading case regarding the application of competition law to public health insurance systems. Mr. Poucet and Mr. Pistre seek the annulment of orders served on them to pay social security contributions to public insurance schemes for sickness, maternity and old age, because they are of the opinion, they should be free to approach any private insurance company established within the territory of the Community. Those schemes are based on compulsory membership and the principle of solidarity embodied in the fact that the sickness scheme is financed by contributions proportional to the income, whereas the benefits are identical for recipients and the old-age scheme is financed by contributions of active workers.
The ECJ decided that organizations involved in the management of the public social security system are not to be considered as undertakings in the meaning of competition law if they fulfil an exclusively social function, their activities are based on the principle of national solidarity and are entirely non-profit-making and the benefits paid are statutory benefits and have no relation to the amount of the contributions. In such a case, the activity is not an economic activity. In later cases, such as Albany and others the Court distinguished this conclusion from situations in which membership is voluntary and the insurance schemes are based on the principle of capitalisation.

FENIN, Case C–205/03 P, Judgement of 11 July 2006, [2006] ECR I-0000

FENIN concerns the question whether entities of a national health system act as undertakings within the meaning of Article 82 Treaty when they purchase medical goods, which are used to provide healthcare services to members of the national health system. FENIN is an association of the majority of undertakings marketing medical goods and equipment in Spanish hospitals. FENIN's members sell their goods and equipment mainly to bodies managing the Spanish national health service (SNS). FENIN alleged an abuse of a dominant position within the meaning of Article 82 ECT, because SNS delayed payments taking an average of 300 days to settle outstanding debts, while settling outstanding payments to other suppliers within a shorter period of time.
The ECJ ruled that the activity consisting in offering goods and services on a given market is the characteristic feature of an economic activity. To determine the nature of a purchasing activity there is no need to distinguish between the activity of purchasing goods and the subsequent use to which they are put in order. The nature of the purchasing activity must be decided according to whether or not the subsequent use of the purchased goods amounts to an economic activity. An activity on a downstream market, such as providing healthcare services, is not an economic activity, then the corresponding activity on the upstream market, *in casu* purchasing medical goods, is also not an economic activity. As a consequence, an entity is only considered an undertaking for the purposes of competition law if it offers goods and services on a given market. Purchasing activities, as such, do not submit the entity to the scope of competition law; the purchasing activity of the SNS management bodies do not constitutes an economic activity dissociable from the service subsequently provided.

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