



**Public Services Intergroup (SGI-SSGI)
Intergroupe Services publics (SIG-SSIG)**

Article 14 TFEU – Protocol n°26 on SGI TEU-TFEU

**PUBLIC SERVICES
IN
THE EU LAW**

50 FAQ for a common understanding of stakes

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The EU notion of **Service of General Interest** covers the daily actions of public authorities, from employment and water services to education, vocational training, social housing, healthcare, childcare, social security benefits, energy, transports, telecommunications... The Union's treaties give priority to the **performance of their public service tasks** over its own rules as a shared value of the EU, given their role in promoting social and territorial cohesion of the EU. As a provision having general application of the new Lisbon Treaties, the European Parliament, with the Council, shall now **establish the principles and set the conditions** in which SGEI shall operate in order to enabling them to fulfil their public service missions.

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1 to 10 Definitions of Public Services

SGI, SSGI, SGEI, NESGI...

1 What is a Service of General Interest - SGI?

A SGI is a service a public authority deems it necessary to provide directly or to commission. It is characterised by specific conditions of provision and extremely stringent common-law requirements and obligations due to the need for it to be satisfactorily provided. This concept covers a wide variety of services of which **the necessary nature is based on the basic collective values and preferences of the European Social Model** (fundamental rights, social protection, social and territorial cohesion, solidarity...). There is no definitive list of SGI. They are freely organised by public authorities in relation to local needs and preferences, which vary both over time and geographically, in response to different social, cultural or climate-related conditions.

2 What are the reasons of existence of a SGI?

The basis of a SGI lies in **the necessary nature of the societal need to met**, taking into account the failure or inefficiency of the market in spontaneously meeting the need under **economic conditions compatible with collective preferences and social norms** (universal access, affordability, fundamental rights, social protection, cohesion, solidarity...). Such market failure is largely explained by informational asymmetry and the vulnerability of users in need. The imposition of public service obligations is aimed at **protecting these SGI and their ‘users’ from the effects of free market forces** by imposing an obligation to provide the service in accordance with common principles relating to the conditions for satisfying these needs, namely universal access, safety, high quality, price accessibility and protection of users’ rights.

3 What differentiates a SGI from an “ordinary service”?

SGI differ from “ordinary services” in that public authorities deem them necessary even when the market is not necessarily in their favour because of market failure. They also differ from ordinary services because they are subject to public service obligations with regards to the performance of particular public service tasks assigned to them. Unlike ordinary companies in the market, undertakings entrusted with provision of SGI by a public authority are obliged to provide the service outside of the usual contractual relationship with the users. They are obliged to enter into contracts with eligible users and to waive their contractual right to reject any user of the SGI considered as such by the public authority and who has recognised access rights. These are the core difference between a SGI and an “ordinary service”.

4 What types of services are considered as SGI?

SGI include services which meet basic human needs (health, housing, education, training and employment) and which fall within the fields of social protection, social cohesion and solidarity, services which are necessary to enable society to function correctly (public authority functions, transport, telecommunications, postal services, energy, water distribution and sanitation, land and town planning, waste collection and disposal, funeral services, audiovisual and culture services and basic banking services) as well as services offering support for vulnerable people (the elderly, the disabled, the unemployed, young people, those on income support, the homeless, etc.). The public authority have a wide discretion to qualify a service as an SGI and to determine the scope and eligible users thereof and the public service obligations pertaining thereto.

5 What is a Social Service of General Interest (SSGI)?

According to a Commission’s communication, a SSGI is an SGI of which the purpose is to meet the vital needs of the human being to enable people to exercise their fundamental rights, such as dignity and personal integrity, and to give them access to a high level of social protection. With regards to SSGI, the Commission differentiates

between health and education services and social protection systems (health, elderly, work accidents, unemployment, retirement and disability) and essential social services, including services offering support for vulnerable people (as a result of debt, unemployment, drug addiction, family break-up, etc.), economic and social integration services (vocational training, rehabilitation, etc.), social inclusion services (disability, health, etc.) and social housing. SSGI do not fall within specific legal provision in community law. They are governed by the provisions applied to all SGI.

6 What are the characteristics of SSGI?

The Commission recognises that SSGI have certain characteristics in terms of organisation and funding, notably that they operate on the basis of the solidarity principle, required, in particular, by the non-selection of risks, the adaptable and personalised nature of the service, the integrated nature of the response to basic social needs, the absence of any profit-making aim on the part of service providers, the participation of voluntary workers and local cultural involvement, as well as an asymmetric relationship between service providers and beneficiaries which cannot be compared with an ordinary provider-consumer-type commercial relationship. Such services are generally based on the solidarity principles and greatly depend on public funding in order to guarantee equal access, regardless of wealth or income, making them more sensitive to the issue of State aid control than others SGI.

7 Are SSGI subject to specific provisions in the EU Law?

Although the Commission deemed it useful to formalise the concept of the SSGI, it was not deemed necessary to adapt the provisions of the law applicable to SGI to reflect their specific characteristics in terms of organisation and funding. This is not to say that social services per se are not subject to specific provisions. Indeed, they are exempt from the call for tenders obligation of the Public service contracts Directive. Three categories of social services are also excluded from the scope of application of the Services Directive. These enjoy special dispensations enabling Member States to apply reduced VAT rates. This specific treatment is not explicitly linked to their being classified as an SGI or an SSGI by Member States, but more generally to their purpose and involvement in social protection policies.

8 What is a Service of General Economic Interest (SGEI)?

When SGI, including SSGI, relate to activities of an 'economic nature' as defined by the treaty, they are qualified as SGEI. Whether or not a service is of an 'economic' nature is determined on a case-by-case basis by the CJEU in relation to whether or not there exists a market (notion of undertakings) and/or any payment of a remuneration for the provision of the service (notion of services). SGEI are governed by competition and internal market rules, provided that they do not fail to perform the particular public service task assigned to them.

9 What is a Non-Economic Service of General Interest (NESGI)?

SGI, including SSGI, which do not relate to activities of an economic nature are qualified as NESGI. The competition and internal market rules which apply to undertakings and services are not, therefore, applicable in this case, where only the major principles of the treaty apply. Public authority sovereign functions and exclusively social functions are considered by the CJEU as relating to activities of a 'non-economic nature'. The former are characterised by the absence of an economic equivalent or by a disconnection between the actual cost of the provision and the user invoicing thereof (examples of SSGI relating to solidarity-based social protection such as compulsory social protection, education systems and public health services such as National Health Service in UK).

10 What is the difference between SGEI and NESGI?

NESGI include sovereign and public authority functions (police, defence, civil registry, justice, etc.) and compulsory social protection (health, old age, unemployment and family) and education systems based on solidarity. SGEI used to include network services (energy, telecommunications, transport and postal services), port and airport services, water, waste and basic banking services as well as health and social services, such as hospital and non-hospital treatment, social housing, vocational training, placement of the unemployed, services offering support for the elderly, the disabled, those on income support, the homeless, etc. and also additional non-compulsory social protection and

education systems.

11 to 19 Provision of Community Law

Public service tasks and obligations...

11 What position do SGEI occupy in the Treaties?

The Treaties classify SGEI as among the 'shared values' with regards to their role of "promoting social and territorial cohesion in the EU". It calls for the Union and its Member States to ensure "that such services operate on the basis of principles and conditions which enable them to fulfil their missions". It contains a general clause whereby its own rules do not apply to "undertakings in charge of operating SGEI" where the application thereof would "obstruct the performance, in law or in fact, of the particular task assigned to them". The Commission has established from this a 'principle of primacy of the performance of general interest tasks'. Access to SGEI is recognised and respected by the European Union (EU) as a fundamental right aiming at promoting social and territorial cohesion.

12 What examples of the protection of public services tasks?

With regards to State aids, the public service compensation regime accounts for the funding of up to 100% of the costs involved in the provision of a SGEI, there being no limit on the intensity of the aid. The maintenance and creation of special or exclusive rights is also related to this principle of protection public services tasks, which can also result in the exclusion of SGEI from certain horizontal legislative provisions, such as those relating to the principle of freedom to provide services (*Art. 17 of the Services directive*) or only insofar as the application does not obstruct the performance of the public services task assigned to them. (*Art.15.4 of the Services directive*) according to recital 72 of the Services directive.

13 Have the Lisbon Treaty softened this protective treatment?

Paradoxically, the Constitutional Treaty rejected by France and the Netherlands and the Lisbon Treaty rejected by Ireland actually help reinforce the protection of SGEI. These treaties give the Council and the Parliament responsibility for establishing, by means of regulations, the principles of satisfactory performance of public service tasks and to set the conditions, notably economic and financial, by which they are governed. The Lisbon Treaty introduces a protocol on SGI which interprets the notion of shared values in relation to SGEI, reinforces the requirement for users' needs to be met and clarifies the competence of the Member States in relation to SGEI. Last but not least, both treaties give entitlement to access to SGEI, which constitutes a fundamental right of the EU, a legal value which corresponds to their own provisions.

14 What are the common principles applicable to SGI?

Developed by the CJEU, the principles common to all SGI have very recently been clarified in the Lisbon Treaty by means of a protocol on SGI. They were defined as a breakdown of the shared values recognised of SGEI by the treaty and include principles such as a higher level of quality, safety and accessibility, equality of treatment and the promotion of universal access and users' rights. These common principles are designed to guide public authorities in the EU in defining the scope of the SGI, the effective conditions of its implementation and, more specifically, in defining public service obligations and eligible users.

15 Which general principles of the treaty must SGI comply with?

SGI must respect the principles of necessity, proportionality, transparency, equality of treatment and non-discrimination based on nationality. Such principles result in the imposition of certain requirements of public authorities and

undertakings entrusted with the operation of the SGI. The principle of transparency requires the conditions of entrustment to be established in an official act, along with public service compensation calculation criteria. The granting of special or exclusive rights and the choice of a specific undertaking by services concession must be done after a adequate publicity (principles of transparency and equality of treatment). Special or exclusive rights must be necessary and proportionate to the satisfactory performance of public services tasks and must not discriminate on the basis of nationality.

16 Which provisions of Community law apply to SGEI?

Three branches of law apply, subject to the satisfactory performance of the public service tasks. Competition law applies to undertakings in charge of SGEI in receipt of 'public service compensation'. Internal market law and the fundamental freedoms of establishment and to provide services apply to services (control of any impediments to such freedoms which are not justified by an "overriding reason relating to public interest" and/or not necessary for the performance of the public service tasks, exclusive rights and special rights in the form of authorisation schemes). Public contract and the general principles applicable to service concessions apply to public authorities when the latter select the companies responsible for managing the SGEI outside of direct entrustment by the granting of special or exclusive rights.

17 What is a 'specific public service obligation'?

These are specific requirements imposed upon the understandings in charge of the SGEI in order to guarantee performance of their 'particular public service task'. The specific public service obligation is aimed at protecting the service and its 'user' from market forces by imposing extreme principles of common law. Using this as a basis, the public authority will fund the provision of the SGEI by granting 'compensation'. The PSO differs from any generally-applicable legal obligation through its 'specific' nature and its direct connection with the 'particular public services task' assigned to the company. The public authority has the **large discretionary power** to define the nature, content and scope of public service obligations as well as the terms under which they will be imposed upon the undertakings responsible for managing the SGEI wherever these are necessary and proportionate.

18 Which SGEI are covered by European directives?

Certain SGEI are governed by specific Community directives or regulations. Such texts are aimed at the realisation of the internal market and the harmonisation of national provisions. They aim to open them up to competition and to put an end to historical monopolies (withdrawal of exclusive national rights). They also establish common objectives at Union level with regards to accessibility through the definition of a 'universal service', that is a minimal set of services accessible to users at an affordable price, and even specific means of funding and regulation. The main sector-based directives focus on network-based industries such as communications, postal services, electricity, gas and transport.

19 Do SGEI fall within the application of the Services Directive?

Yes, though it is not intended to liberalise or undermine State competence in the matter. Certain SGEI governed by directives are, nevertheless, excluded from the field of application (SGEI relating to communications, transport and audiovisual services). Other services which may come under SGEI initiated by the Member States are excluded per se (such as healthcare), or are subject to the entrustment of service providers (social housing, childcare, services to those in need, etc.). All SGEI are also, by definition, exempt from any provisions relating to the principle of freedom to provide services (*Art. 17*). Finally, the paragraphs relating to the assessment of authorisation schemes apply "to legislation in the field of SGEI only insofar as the application of these paragraphs does not obstruct the performance, in law or in fact, of the particular task assigned to them" (*Art. 15.4*).

20 to 38 Governance and funding

Entrustment, State Aids, Compensation of public services...

20 Who defines, organises, provides and funds SGI?

Any national, regional or local public authority, or any entity appointed to this effect, has the wide discretionary power to organise, provide, commission and fund SGI 'in a way which meets users' needs insofar as is possible'. This discretionary power, which was recently brought up by the CJEU ('Bupa' ruling), has been clarified by the treaty by means of the SGI protocol. It gives Member States the ability to create new SGEI in accordance with the changing needs they deem it necessary to meet and also to withdraw them. This discretionary power granted to Member States nevertheless remains subject to the control of the Commission and the CJEU in case of a manifest error in relation to the definition of the SGEI.

21 Can a public authority provide an SGI directly or is it obliged to have the service provided by a third entity?

Any public authority in the EU is free to provide the SGI directly, under direct control or via an entity over which it has a control similar to that of its own departments, or to have it provided by an external entity which it will make responsible for the provision of the service by means of an official act of entrustment. Despite the fact that the Commission has tried to limit this choice of organisation to the only external solution in terms of transport, nothing in the treaty permits this freedom of organisation to be questioned. The provisions of Community law relating to public contracts in terms of the entrustment of the SGEI differ according to the public authority's choice of organisation and its provision under State control by an 'in-house' body and by an external entity.

22 Why do external service providers have to be entrusted and what are the consequences of this?

The requirement for undertakings who perform the service for the public authority to be entrusted comes from the notion of 'undertakings entrusted with the operation of SGEI' (*Art. 106.2 TFUE*). In accordance with the principle of transparency, this entrustment must take the form of an official act resulting in an obligation to perform the service. This obligation to provide the service in accordance with the specific public service obligations results, according to the CJEU in the entrusted company waiving its contractual right to be able to reject any 'user' of the SGI considered as such by the public authority and who has recognised access rights as well as the principles of protection, security and financial continuity and accessibility of the service.

23 What role does the Commission play in SGEI which are not governed by sector-based directives?

The Commission has a dual role to play: 1/ it ensures that the law is applied in the actual performance of the SGEI in terms of the choice of the understanding in charge of managing it (public contracts, service concessions and special or exclusive rights), potential impediments to the freedoms of establishment and to provide services resulting from this choice of organisation (internal market) and funding the SGEI through 'public service compensation' (control of any resulting economic advantages likely to distort competition);

2/ it ensures that there has been no evident misinterpretation in the qualification of the SGEI as such by assessing the effective necessary nature of the need to be met and the justifiability of the public authority's decision to provide it or to have it provided. Such control concerns both the nature and scope of the service and the definition of eligible users in

need for social public services.

24 On which objective criteria is the notion of obvious error in the classification of an SGEI assessed?

There are no previously established objective criteria for challenging the classification of an SGEI as such. The Commission bases its decision on the ‘particular’ nature of the task and on the ‘specific’ nature of the public service obligations. For example, it deems that ‘the possibility of renting social housing to higher income groups (...) must be considered an obvious error in classifying social housing as an SGEI’. Given that the SGEI is of a social nature, ‘the definition of activities (...) must maintain a direct link with socially disadvantaged households’. This assessment has been contested by the Dutch authorities at whom it is directed. The protocol on SGI echoes the wide discretionary power of public authorities in relation to the organisation of SGEI, with regards to local and cultural collective preferences.

25 What should the official act of entrustment contain, who should establish it and how?

In accordance with the principle of transparency, the official act of entrustment should state all the parameters of the SGEI that the public authority intends to impose upon the company including the nature and duration of the specific public service obligations, the companies and the area concerned, the nature of any possible exclusive or special rights assigned, the public service compensation calculation, control and revision parameters and the terms of reimbursement governing any possible overcompensation and means of avoiding this. This official act of entrustment must be adopted by the public authority responsible for organising and providing the SGEI. The choice of legal status falls within the discretionary competence of the public authority when the act is enforceable against the company responsible for managing the SGEI.

26 What recent examples exist of SGEI acts of entrustment concerning local authorities?

The initial examples pertaining to the implementation of this demand expressed by the Altmark ruling of 2003 and the Community decision of November 2005 relating to the compatibility of State aid in the form of compensation were local authority deliberations. These include, for example, the Poitou-Charentes Regional Council deliberation regarding the creation of the vocational training and the city of Bègles regarding the access to employment and integration. Such local authority deliberations, based on the treaty and national competence delegation laws, should gradually become common to all SGEI organised locally in the interests of the legal security of grants awarded and ways of entrusted them outside of public contracts.

27 How much flexibility and room for initiative do companies responsible for the management of an SGEI have?

Nothing in the treaty forbids the appointed company from initiating the identification of the need to be met, or from being proactive with regards to the creation or adaptation of the SGEI and its public service obligations to the changing needs of the region. The CJEC points out, in its ‘Bupa’ ruling, that ‘the compulsory nature of an SGEI mission does not require that the law demand and predetermine the provision of a specific service by depriving the operator concerned of all commercial freedom’.

In order for an SGEI to be classified as such, this room for initiative must be materialised by an official act in which the public authority explicitly makes the company responsible for the provision of the service and demands that the service be effectively provided in accordance with the conditions outlined by the specific public service obligations.

28 What recognised rights do users of SGEI have?

The protocol on SGI places the ‘user’ and meeting the needs thereof at the heart of the recognised shared values of SGEI. They must be provided and organised in a way which meets these needs insofar as is possible, taking into account any relevant disparities and user preferences whilst promoting their rights. The Lisbon Treaty places equal importance on the respect for the right to access to SGEI proclaimed by the Charter of Fundamental Rights and its own provisions. The CJEU regards the SGEI provider-user relationship as extra-contractual insofar as the provider of the SGEI is obliged to enter into a contract with the users designated by the public authority. The asymmetrical relationship between SGEI providers and users cannot, therefore, be compared with an ordinary provider-consumer-type commercial relationship.

29 Under what conditions can public aid for an SGEI come under State aid which is *a priori* compatible with the treaty?

The Commission adopted a decision aimed at making certain State aid in the form of public service compensation which is *a priori* compatible in November 2005. The objective was to provide legal security for compensation which does not respect the 4th criterion of the ‘Altmark’ ruling whilst avoiding the systematic notification of such aid to the Commission (material impossibility for the Commission to deal with all those notifications). The decision applies to ‘small SGEI’ (companies with a turnover of less than 100 million euros and/or compensation of less than 30 million euros), social housing and hospitals outside of the thresholds. The decision is applicable under two conditions, namely that there be an official act of entrustment involving the company in receipt of the compensation and that the public authority regularly monitor the fair compensation to be paid.

30 What does the official act of entrustment contain?

The official act of entrustment must state:

- the nature and duration of public service obligations;
- the undertakings entrusted with the provision of the SGEI and the area concerned;
- any exclusive or special rights granted to the undertakings;
- the compensation calculation, control and revision parameters;
- the terms of reimbursement and means of avoiding overcompensation.

The obligation to establish such an act of entrustment has been in force since 29th November 2006 and relates to a Community decision which has been directly applicable in internal law since 19th December 2005.

The role of the public authority consists of establishing these acts of entrustment and imposing the specific provisions thereof upon companies responsible for managing the SGEI using a suitable contractualisation tool (public contract, service concession, granting of exclusive or special rights, etc.). It must also ensure that the fair compensation to be paid is regularly monitored.

31 Does the public funding of SGEI through public service compensation fall within the Community State aid control system?

This question has been the object of much contradictory case law. Sometimes compensation is considered as State aid and sometimes it is not. The latest episode, the 2003 ‘Altmark’ ruling, outlines 4 conditions. If these conditions are met, the compensation is not regarded as State aid. Otherwise, it does fall within this system but may be considered *a priori* compatible under certain conditions outlined by a Commission decision which is directly applicable in internal law. If these conditions are fulfilled, the public authority which grants the State aid is exempt from prior notification of the Commission. Otherwise, the compensation is regarded as *a priori* incompatible State aid and is therefore illegal. The public authority must then notify the Commission of this with a view to verifying compatibility before granting the aid.

32 Under what conditions is public grant for an SGEI not regarded as State aid?

The 'Altmark' ruling establishes 4 conditions:

1. the undertaking must be explicitly made responsible for the provision of the SGEI;
2. the compensation calculation parameters must be objectively and transparently established beforehand;
3. the compensation must be limited to covering the costs of providing the SGEI;
4. the undertaking must be selected by public contract or the compensation established based on the costs of the average company, the latter being well-managed and appropriately-equipped to provide the SGEI.

This final condition implies that the choice of company may not be made by means of a public contract procedure, as is the case of service concessions and the granting of special or exclusive rights. However, the notion of the average, well-managed company remains difficult to implement given that the Commission has failed to specify its content.

33 Does failure to fulfil these conditions necessarily mean that the aid is incompatible?

No, but it is *a priori* incompatible and therefore illegal. The Community Competition Authority (the Commission's competition services) must be notified and will then decide on the fair compensation to be paid based on an analysis of the net costs of providing the SGEI. If any undue economic advantage related to overcompensation exists, this must be paid back to the public authority and the calculation parameters reviewed.

The illegal nature of any State aid of which the Commission has not been notified means that it will systematically be reimbursed to the public authority by the recipient company based on the sole decision of an administrative court which does not have the power to pronounce judgement on the compatibility of the aid. The treaty grants exclusive power to carry out such control to the Commission, hence the need for notification.

34 How should the European Commission be notified of any incompatible State aid by public authorities?

Any local authority wishing to notify the Commission of any State aid in the form of public service compensation which is *a priori* incompatible should submit their request for notification to the competent authority at the national level. Following examination, this authority will formalise the notification in a specific application using the official Commission forms and will then officially forward it to the European Commission through its permanent representation in the European Union.

35 Where does the concept of public service compensation come from?

The notion of public service compensation was developed by the CJEU with regards to the funding of SGEI and the qualification as State aid. This notion is based on the assessment of any economic advantage which may be gained by the undertaking entrusted for the provision of SGEI as a result of benefiting from public resources. In cases where the aid is limited to covering the net costs of providing the SGEI, the economic advantage is overridden by the respect of the principle of just compensation. Otherwise, any undue aid is likely to distort competition and must be reimbursed. Any assessment of fair compensation is based on the nature of the specific public service obligations. The more precise these are, the more clearly identifiable the net costs involved in providing the SGEI will be for monitoring purposes.

36 How should just SGEI compensation be calculated and monitored?

The public authority must ensure that the compensation does not exceed the amount required to cover the net costs involved in performing the public service obligations, that is the fixed and variable costs of providing the service, including any costs relating to investment required for the provision of the service, taking into account any possible revenue received from the sale of the service and reasonable profit on the equity required for performing the public service obligations. The rate of return on equity must not exceed the average rate observed in the sector in question. Just compensation must be regularly monitored *a posteriori* based on a cost accounting system which differentiates between the company's SGEI activities and its ordinary activities (*Commission's 'Transparency Directive' 2006/111.EC of 16th November 2006 OJEU L 318, 17/1112006, p. 17-25*).

37 Why is overcompensation contrary to the provisions of the treaty with regards to competition?

Overcompensation results in an economic advantage for recipient undertaking which is likely to distort competition between the latter and undertakings providing ordinary services, or even between undertakings entrusted for the provision of SGEI. In the event of overcompensation, the public authority must proceed to reimburse any undue aid or to defer it from one tax year to the next if the overcompensation is of less than 10% (20% for social housing SGEI) and review the calculation parameters used to determine compensation.

38 What are the rules which apply with regards to accounting transparency for companies responsible for managing an SGEI?

When a company performs operations which fall both within the framework of the SGEI and outside of it, the public authority must ensure that the company's accounts state all costs and revenue related to both this service and others separately, along with cost and revenue distribution parameters (cost accounting). Costs related to any possible ordinary activities unrelated to the SGEI must cover all variable costs, an appropriate contribution to fixed costs and appropriate payment of capital. No compensation can be awarded for such costs related to ordinary activities unrelated to the SGEI.

39 What law applies in the event of the provision of an SGEI controlled by the public authority or by an 'in-house' body?

When the public authority decides to provide the SGEI directly by its own departments, the provisions of Community law relating to public contracts do not apply in the absence of a 'contract' as defined by the directive. The same is true when the public authority decides to have the SGEI provided by an external company over which it has a control similar to that which it has over its own departments ('in-house entity') and which develops the majority of its activity with the public authority which controls it.

39 to 46 Organisation and entrustment

Public tendering, concessions, exclusive and special rights...

39 What are the provisions for a public authority entrusting an external company for the provision of a SGEI?

An external company can be made responsible for providing a SGEI in two ways, namely either by open entrustment by means of a public service contract or service concession procedure depending on the nature of the contract and the method of payment thereof, or by means of direct entrustment through the assignment of special rights (subject to prior authorisation) or exclusive rights (monopoly in a given territory). These terms of contractualisation must respect the general principles of necessity, proportionality, transparency, equality of treatment and non-discrimination based on nationality. Such principles result in a common demand for an adequate publicity with the exception of contractualisation methods regarding the specific tender procedure of the Public Contracts Directive.

41 What provisions apply for the entrustment by means of a public service contract?

When a public authority entrusts an external company of the provision of the SGEI relates to a public service contract as defined by the Directive, namely a contract for pecuniary interest involving the provision of the SIEG in return for payment, the public authority must respect the provisions of the Directive in terms of calls for tenders, with the exception of services excluded from this obligation by the directive (Appendix II B: health services, social services, education and vocational training services, etc.). In the latter case, an adequate publicity is imposed as part of the general principles of transparency, equality of treatment and non-discrimination based on nationality.

42 What provisions apply for the entrustment by means of a public service concession?

When a public authority entrusts an external company of the provision of the SGEI relates to a service concession, namely the provision of the SGEI in return either solely for the right to exploit it or for this right together with payment, this does not relate to a public service contracts as defined by the Directive. In this case, an adequate publicity is imposed as part of the general principles of transparency, equality of treatment and non-discrimination based on nationality. This is the case, for example, when the company responsible for managing the SGEI must cover all or part of the costs of providing the SGEI with the revenue received from the provision thereof or when the public authority grants it compensation according to the number of users having actually signed up to use the service.

43 What provisions apply for the entrustment through the assignment of exclusive or special rights?

Direct entrustment through the assignment of special (authorisation schemes, quality marking, multi-operator licences, etc.) or exclusive (national or local based monopoly) rights, an obligation of adequate publicity is imposed as part of the general principles of transparency, equality of treatment and non-discrimination based on nationality. The assignment of special or exclusive rights must be necessary and proportionate to the performance of the particular tasks assigned to the SGEI.

44 How can the assignment of exclusive or special rights be justified in terms of Community law?

The assignment of exclusive or special rights is a very widespread practice with regards to the provision of SGEIs. Such rights must be necessary and proportionate to perform the particular tasks assigned to the SGEI. Reasons accepted by the CJEU include the imposition of public service obligations, the financial continuity of the SGEI and the application of the principles of accessibility, universal access and user protection. Such rights must allow for ensuring that the undertakings entrusted with the provision of SGEI satisfy the requirements necessary for the performance of public service obligations and the effective satisfaction of users' needs and preferences.

45 Can a public authority reserve the provision of SGEI for non-profit-making organisations and charities?

According to the CJEU, the provisions of the treaty do not prevent a public authority from allowing private not-for-profit operators to exclusively manage an SGEI offering medico-social assistance through the conclusion of agreements bearing compensation for the costs of providing the service. This particular case relating to the management of independent living facilities for elderly people in Italy ('Sodemare' ruling) must be read in conjunction with the wide discretionary power of public authorities to organise, commission and fund SGEI, and notably to outline the conditions of compensation. The public authority can therefore insist that no profit is made from the provision of the SGEI or the compulsory reinvestment thereof in the provision of the SGEI, deductible from any compensation.

46 How can the general principles of transparency, equality of treatment and non-discrimination of the treaty be respected?

These three major principles of Community law must result in a requirement for appropriate prior publicity, for example with regards to the entrustment of undertakings by means of public services contracts which are not covered by the call for tenders obligation (health services, social services and education and vocational training services), service concessions or the assignment of special or exclusive rights. This adequate publicity must be through the Official Journal of the European Union (OJEU) or at regional level depending on the nature of the SGEI and its level of involvement with the internal market and intra-Community exchanges and/or provision in cross-border regions.

47 to 50 Lisbon Treaty and Public Services

Protocol on SGI, article 14 TFEU, art.36 Charter....

47 What does the new Lisbon Treaty offer in terms of SGI?

The treaty offers three fundamental innovations:

1. a generally-applicable legal basis relating to SGEI giving the European Council and Parliament responsibility **for establishing and setting the principles and conditions** of the performance of the particular public service tasks assigned to SGEI;
2. an innovative protocol on SGI which deals with both SGEI and NESGI whilst interpreting the notion of ‘shared values’ for the EU;
3. a recognised restrictive force of the Charter of Fundamental Rights which recognises the right to access to SGEI.

48 What is the scope of the Article 14 of the Lisbon Treaty?

This article introduces for the first time a generally-applicable legal in co decision with regards to SGEI, a legal basis which is different from that relating to the internal market and on which the sector-based directives relating to the liberalisation of network SGEI are based. It focuses its attention on the economic and financial conditions necessary for the performance of the particular tasks assigned to the SGEI and requests that the European Council and Parliament shall establish regulations on that matter. This, of course, shall cover public service compensation as well as governance issues, assignment of exclusive and special rights necessary for the provision of SGEI which are financially accessible to users and which have guaranteed financial continuity.

49 What is the purpose of the protocol 26 on SGI?

The protocol on SGI is a significant innovation in the Lisbon Treaty. It covers all SGI, which is the first time for a provision of the treaty, and clarifies the notion of NESGI and the competence of Member States. It also takes on an operational nature in that its provisions are an interpretation of the ‘shared values’ of the European Union with regards to SGEI. It firmly places the ‘user’, and satisfying the needs, preferences and rights thereof, at the heart of its interpretative provisions whilst highlighting the wide discretionary power of public authorities in the Member States to provide, commission and organise SGEI. Finally, it goes on to list the common principles of higher levels of quality, safety and accessibility, equality of treatment and the promotion of universal access and users’ rights.

50 What are the major issues of the next 2009-2014 term?

The assessment of the Decision relating to the compatibility of State aid in the form of public service compensations and the law applicable to entrustment by means of public service concessions will be the two major issues at the start of the next term.

However, the European Parliament is expected, first and foremost, to establish a doctrine relating to SGEI, whilst defining by means of regulations, principles and conditions, particularly economic and financial, of the performance of particular public service tasks assigned to SGEI and undertakings entrusted. A new legal competence of the European Parliament granted to it by the Lisbon Treaty in joint decision with the Council.

Annex

SGEI horizontal provisions of the EU Law

General application, competition, internal market, tendering

General application

Public services	EU Treaty	EU regulations	CJEU Ruling
NESGI TUE-TFUE - PROTOCOL 26 ON SGI			
NESGI	Article 2 of the Protocol The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise NESGI.	No	Public functions Exclusively social functions
SGEI TFUE - PROVISIONS HAVING GENERAL APPLICATION SGEI as shared value of the Union – EU and Member States <u>shall take care</u> that SGEI are able to fulfil their missions			
SGEI as shared value <ol style="list-style-type: none"> shared value of the EU, role in promoting social and territorial cohesion, EU and Member States shall take care that SGEI operate on the basis of principles and conditions which enable them to fulfil their missions. 	Article 14 TFUE “given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions”. “The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.”	NEW Regulations EP – Council (ordinary legislative procedure) shall: <ol style="list-style-type: none"> establish the principles in which SGEI shall operate in order to enabling them to fulfil their missions, set the conditions, particularly economic and financial conditions of operating, which enable SGEI to fulfil their missions. 	No specific ruling exclusively based on the former art. 16 EC now art.14 TFEU
Governance of SGEI <ol style="list-style-type: none"> Wide discretion of national, regional and local authorities in providing, commissioning and organising SGEI, as closely as possible to the needs of the users, diversity of SGEI differences in the needs and preferences of users Common principles for SGEI <ol style="list-style-type: none"> high level quality safety affordability equal treatment promotion of universal access promotion of users rights 	Article 1 of the Protocol 26 on SGI The shared values of the Union in respect of SGEI within the meaning of Article 16 TFEU include in particular: <ul style="list-style-type: none"> the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising SGEI as closely as possible to the needs of the users; the diversity between various SGEI and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations; a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights. 	No specific EU Law	Ruling setting this wide discretion of MS authorities and those common principles (see for example the last ruling in BUPA case T 289/03 (February 2008)

Competition

PUBLIC SERVICES	EU TREATY	EU REGULATIONS	CJEU RULING
<p>SGEI Provisions relating to specific chapter of the treaty</p> <p>TFUE - COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS</p> <p>RULES ON COMPETITION</p> <p>RULES APPLYING TO UNDERTAKINGS</p> <p>EU Rules applying to entity as “undertakings” entrusted with an operation of SGEI and required to discharge public service obligations</p>			
<p>Financing undertakings entrusted with an operation of SGEI</p> <ul style="list-style-type: none"> ▪ Performance of the particular tasks assigned to the SGEI and undertakings ▪ Specific regime of “public service compensations” ▪ Specific State Aid regime application set by CJEU ruling. ▪ If State Aid regime applies, conditions of compatibility are set for certain undertakings by a horizontal Decision of the Commission to the Member States according to CJEU ruling. ▪ For others undertakings or when those conditions are not met, State Aid as public service compensation must be notified according to provisions of a Framework of the Commission on public service compensations. <p>Exclusive or special rights assigned to the undertakings required to discharge public service obligations :</p> <ul style="list-style-type: none"> ▪ No discrimination ▪ Necessity ▪ Proportionality ▪ Equality of treatment ▪ Transparency 	<p>Article 106.2 and 106.3</p> <p>2. Undertakings entrusted with the operation of SGEI (...) shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.</p> <p>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.</p> <p>Article 106.1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 (no-discrimination) and Articles 101 to 109 (agreements between undertakings, abuse of dominant position, State Aids,</p>	<p>Directives or Decisions of the Commission to Member States.</p> <p>Decision of November 2005 (Monti-Kroes package)/ Public service compensations, as State Aids, are compatible with the Treaty if :</p> <p>- Responsibility for operation of the SGEI shall be entrusted to the undertaking by way of official acts which specify:</p> <p>(a) the nature and the duration of the public service obligations;</p> <p>(b) the undertaking and territory concerned;</p> <p>(c) the nature of exclusive or special rights assigned to the undertaking;</p> <p>(d) the parameters for calculating, controlling and reviewing the compensation;</p> <p>(e) the arrangements for avoiding and repaying any overcompensation.</p> <p>The amount of compensation shall not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit on any own capital necessary for discharging those obligations.</p> <p>Member States shall carry out regular checks to ensure that undertakings are not receiving overcompensation.</p> <p>This decision applies for public service compensation granted to undertakings with an average annual turnover before tax of less than EUR 100 million during the two financial years preceding that in which the SGEI was assigned, which receive annual compensation for the service in question of less than EUR 30 million (Hospital and social housing undertakings without any ceiling of turnover and compensation);</p> <p>For others undertakings, State Aids must be notified to the Commission according to the Community Framework on public service compensations. (Monti-Kroes package)</p> <p>Revised Directive “transparency” on financial relations between Member States and Undertakings entrusted with the operation of SGEI. (Monti-Kroes package).</p>	<p>Altmark case (C 280/00 – 20.09.03)</p> <p>Public service compensations are not State Aids if :</p> <ol style="list-style-type: none"> 1. undertaking is required to discharge public service obligations and those obligations have 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 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.

Internal Market

PUBLIC SERVICES	EU TREATY	EU REGULATIONS	CJEU RULINGS
<p style="text-align: center;"> SGEI Provisions relating to specific chapter of the treaty TFUE - UNION POLICIES AND INTERNAL ACTIONS THE INTERNAL MARKET FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL SERVICES EU Rules applying to SGEI as “services” in the treaty i.e. “services provided for remuneration”. </p>			

<p>Exclusive or special rights assigned to the undertakings required to discharge public service obligation :</p> <ul style="list-style-type: none"> case-by-case test on effective restriction on freedom to provide services, case-by-case test of overriding reasons relating to the public interest (see CJEU ruling) case-by-case test on principles of necessity and proportionality of the exclusive or special rights to perform the particular tasks assigned to the SGEI and to meet the necessary public service requirements and obligations (art.106§2 TFEU – Analir case) <p>SGEI authorisation schemes (1) as a restriction on freedom to provide services within the Union (Services directive)</p> <ul style="list-style-type: none"> Impartiality, transparency and adequate publicity, Prohibited requirements of SGEI authorisation schemes, Requirements to be evaluated apply to SGEI insofar as they don't obstruct the performance of the public service tasks assigned to them, Freedom to provide Services shall not apply to SGEI which are provided in another Member State. <p>(1) authorisation scheme : “any procedure under which a provider is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof.”</p>	<p>Article 56 TFEU Restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The EP and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union. Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.</p> <p>Article 57 Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.</p> <p>Article 59 In order to achieve the liberalisation of a specific service, the EP and the Council, acting in accordance with the ordinary legislative procedure shall issue directives.</p>	<p>Services Directive Whereas (...) 72) SGEI are entrusted with tasks relating to social and territorial cohesion. The performance of these tasks should not be obstructed as a result of the evaluation process provided for in this Directive. Requirements which are necessary for the fulfilment of such tasks should not be affected by this process (...).</p> <p>Article 2.2.a) This Directive shall not apply to (...): (a) NESGI;</p> <p>Article 10 : Conditions for the granting of authorisation Authorisation schemes shall be based on non-discriminatory, justified by an overriding reason relating to the public interest, proportionate to that public interest objective, clear and unambiguous, objective, made public in advance, transparent and accessible.</p> <p>Article 12 : Selection from among several candidates : Member States shall apply a selection procedure which provides guarantees of impartiality and transparency, including adequate publicity (...).</p> <p>Article 14 : Prohibited requirements Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with discriminatory requirements based on nationality; a prohibition on having an establishment in more than one Member State (...), restrictions on the freedom of a provider to choose between a principal or a secondary establishment (...), conditions of reciprocity (...), case-by-case application of an economic test making (...), the involvement of competing operators in the granting of authorisations (...), obligation to provide or participate in a financial guarantee (...); an obligation to have been pre-registered (...).</p> <p>Article 15.4 : Requirements to be evaluated. Paragraphs 1, 2 and 3 shall apply to legislation in the field of SGEI only insofar as the application of these paragraphs does not obstruct the performance of the particular task assigned to them.</p> <p>Article 17 : Additional derogations from the freedom to provide Services: Article 16 shall not apply to SGEI which are provided in another Member State (...)</p>	<p>Overriding reasons relating to the public interest This concept developed by the CJEU covers :</p> <ul style="list-style-type: none"> public policy public security public health public safety social policy objectives cultural policy objectives protection of consumers protection of workers animal welfare and health preservation of the financial balance of the social security system prevention of fraud protection of the environment including town and country planning protection of creditors road safety social, cultural, religious and philosophical values of society high level of education maintenance of press diversity promotion of the national language preservation of national historical and artistic heritage fairness of trade health and safety of employees or self-employed <p>ANALIR Case (C 205/99) “Community law permits a Member State to include in the conditions for granting and maintaining prior administrative authorisation as a means of imposing public service obligations on a Community shipowner a condition enabling account to be taken of his solvency, such as the requirement that he have no outstanding tax or social security debts, thus giving the Member State the opportunity to check the shipowner's 'capacity to provide the service', provided that such a condition is applied on a non discriminatory basis”.</p>
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Public service contracts

PUBLIC SERVICES	EU TREATY	EU REGULATIONS	CJEU RULING
<p>SGEI Provisions relating to specific chapter of the treaty</p> <p>UNION POLICIES AND INTERNAL ACTIONS</p> <p>THE INTERNAL MARKET</p> <p>FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL SERVICES</p> <p>EU Rules applying to public authorities relating to the provision and the commissioning of SGEI by an entity as an “economic operator”</p>			
<p>Direct provision of SGEI by public authorities (discretion of organisation) :</p> <ul style="list-style-type: none"> ▪ provision by own department ▪ provision by in house entity 	-	<p>Excluded from the scope of the Directive on public service contracts</p>	<p>Many CJEU case-law defining the “in house exception” based on :</p> <ul style="list-style-type: none"> ▪ similar control of the entity which a public authority exercises over its own departments. ▪ entity carries out the essential part of its activities with the public authority.
<p>External Commissioning of SGEI to entity as economic operator :</p> <p>Public service contracts</p> <ul style="list-style-type: none"> ▪ Provision of the SGEI with a payment of a fixed remuneration ▪ Tendering procedure ▪ Specific arrangements for certain SGEI <p>Service concession</p> <ul style="list-style-type: none"> ▪ Right to exploit the SGEI with or without any payment ▪ Not a public service contract ▪ Non-discrimination, equality of treatment, transparency : adequate publicity of the public authority’s intention to conclude a service concessions (CJEU ruling) 	<p>Article 47(2) EC Article 55 EC Article 95 EC</p>	<p>Directive on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts</p> <p>The term ‘economic operator’ shall cover equally the concepts of contractor, supplier and service provider.</p> <p>Article 1.2 : Public service contracts are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the provision of services.</p> <p>Article 2 : Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.</p> <p>Article 17 : Service concessions : This Directive shall not apply to service concessions as defined in Article 1(4). Service concession is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.</p> <p>Arrangements for public service contracts</p> <p>Article 20 : Service contracts listed in Annex II A Contracts which have as their object services listed in Annex II A shall be awarded in accordance with Articles 23 to 55.</p> <p>Article 21 Service contracts listed in Annex II B Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).</p>	<p>Many CJEU case-law defining difference between a public service contract and a service concession.</p> <p>Adequate publicity of the public authority’s intention to conclude a service concessions</p>

<p>Direct Commissioning of SGEI to undertakings – assignment of exclusive or special rights to undertakings :</p> <ul style="list-style-type: none"> ▪ see p.X ▪ non-discrimination, equality of treatment, transparency : adequate publicity of the public authority’s intention to conclude a service concessions (CJEU ruling) 	<p>Article 3 : Granting of special or exclusive rights: non-discrimination clause : Where a contracting authority grants special or exclusive rights to carry out a public service activity to an entity other than such a contracting authority, the act by which that right is granted shall provide that the entity concerned must comply with the principle of non-discrimination on the basis of nationality.</p> <p>Article 18 : Service contracts awarded on the basis of an exclusive right. This Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.</p>	
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