



Towards an ETUC policy declaration and action plan on sustainable public services

(Conclusions of the ETUC Conference "Services of General Interest (SGIs) and the internal market - What does the future hold?" Lisbon, 9-11 April 2008)

1. Introduction

Public services are a pillar of the European Social Model, important for territorial, economic and social cohesion. Since the mid-90s the ETUC has been asking for a horizontal approach, originally to be laid down in a protocol annexed to the Nice Treaty. The ETUC's main objective was to establish more balanced rules in order to give more legal security to Services of General Interest (SGIs) as the internal market develops. In November 2006 the ETUC launched a petition in favour of such a European framework and one year later the ETUC presented the petition with more than half a million signatures to European Commission President Barroso. At the same time the ETUC asked for a moratorium on liberalisation of public services and for an evaluation of its consequences. In November 2007, the mayors of European capital cities (Brussels, Paris, London, Vienna, Luxembourg, Lisbon, Sofia, Amsterdam, Tallinn....) have signed a declaration in support of "high-quality public services, accessible to all".

2. European challenges

2.1 Growing concerns about neoliberal tendencies

Many European citizens and trade unions express doubts about the nature and the objectives of the European project. They are increasingly worried about the transposition of the Services Directive, the consequences of Laval, Viking, Ruffert and other cases, the poor social record of the current Commission, the deregulatory bias when revising existing directives like working time, the blocking of the directive on temporary agency work, the ongoing liberalisation of public services, etc. Public services are being undermined by the dominant EU policy paradigm which is liberalisation. It is far from obvious that users get a fair dividend from the liberalisation of network industries. On the other hand, concerns are raised with regard to the reduction in training and labour quality as a result of outsourcing. There is a need to recognise that labour makes a vital contribution to the delivery of SGIs.

Services of General Interest and Services of General Economic Interest (SGEIs) must not be neglected - they are under increasing budgetary and financial pressure, while the European economies are getting richer. European trade unions have organised campaigns calling for alternatives to budgetary restrictions (like the artificial 3% criterion). At stake is the capacity to give the political decision-making process back to the local, regional and national political levels by reducing budgetary and bureaucratic constraints.

2.2 Solidarity and fundamental rights under threat from internal market rules

The internal market rules create legal insecurity not only on SGIs/SGEIs, but also about fundamental rights. Derogations are admitted with regard to missions of general interest, but in the vacuum left by the European legislator, the Court of Justice through its jurisprudence sets the rules of functioning and financing. An abundant case law is like undergrowth and adds to the existing lack of legal clarity and security facing actors at local, regional, and national levels (buses, ambulance services, water treatment, inter-communal public cooperation...).

When market freedoms are ruled superior to fundamental rights, the principle of public services is at stake and the idea of social Europe takes a blow. This trend is reinforced by the *Laval* and *Rüffert* cases in which public authorities are involved and public procurement rules at stake. The local or regional authorities made application of local collective agreements a condition for the acceptance of tenders from foreign service providers. Public authorities' obligation to tender for construction works and services provided to them puts local authorities in particular at the heart of this matter. They can apply social criteria, but in a restricted way.

Fundamental rights are now at risk together with trade union autonomy. Unions and workers across Europe are deeply concerned with defending their national systems and public services - and we risk a protectionist reaction. Bolkestein's proposal for a Services Directive derailed the EU Constitutional Treaty. The *Laval* and *Rüffert* cases, in particular, could damage the ratification of the Lisbon Treaty as awareness of their implications spreads. Put simply, the action of employers using free movement as a pretext for social dumping practices is resulting in unions having to justify, ultimately to the courts, the actions they take against those employers' tactics.

3. Current positive European trends

The European Parliament and the Council, together with European trade unions, succeeded in eliminating from the initial Bolkestein proposal the country of origin principle which would have facilitated social dumping to the detriment of quality and safety of services, as well as a redefinition of the Posting of Workers legislation, from a minimum (floor of rights) to a maximum (ceiling of rights) Directive. In addition, the final text of the Directive recognises the specificity of SGIs by a general derogation for non-economic services of general interest and the exclusion of health and social services.

Eight years after the adoption of the Nice Treaty, the *Lisbon Treaty* fulfils some key ETUC demands: The Charter of Fundamental Rights by virtue of Article 6 (1) becomes legally binding - the main reason for the ETUC to support this treaty. The Charter lays down, in its Article 36, a right of access to SGEIs "in order to promote the social and territorial cohesion of the Union". In addition, several provisions of the Charter imply the existence of a mission of general interest. For instance, the right to education (Art14), the right of children to protection and care (Art 24.1), the right to social and housing

assistance (Art 34.3), the right to healthcare (Art 35) etc. constitute fundamental rights recognised and protected by the Union.

Furthermore, the *new protocol* on SGIs lays down interpretative provisions concerning the common values of the EU with regard to SGEIs and confirms the broad margin of manoeuvre of the Member States in providing, commissioning, financing and organising SGEIs. The Lisbon Treaty also amends the present Article 16 EC which becomes the future Article 14 by adding a *legal base*. Article 14 leaves the Community legislator with no choice as to the form of action: it imposes the instrument (Regulation) and the procedure for its adoption (the ordinary legislative procedure). Regulations leave Member States no leeway in implementation and it may therefore be difficult to achieve a consensus for adoption, but not impossible, as the new Regulation on public passenger transport services by rail and by road (1370/2007) showed.

The Lisbon Treaty is an important cornerstone in the construction of a new architecture for SGIs and a transversal regulatory approach with regard to SGEIs, not only by making it legally possible henceforth, but also by making it necessary in the light of the guidelines now set out firmly in primary law (Protocol). Article 14 offers the possibility to move away from a mere derogation from internal market rules to a more positive stance, taking into account the shared values embodied by public services across the EU. These provisions enter into force once the Lisbon Treaty ratification process is finished.

4. The new ETUC strategy

The Lisbon Treaty brings about new institutional developments, calling for an update of the ETUC strategy. The logic of the Lisbon Treaty is one of greater openness in the debate on SGIs, linked to a democratisation of the decision-making process at European level: introduction of co-decision, alongside the discretionary powers of the Commission based on the present Article 86 of the EC Treaty. The Commission wants if not to ignore at least to play down the importance of this new political, legal and institutional context.

The Charter of Fundamental Rights, together with Article 14 and the new protocol can be used to build up an authentic notion of SGIs as common values of the EU. The EU could now skip from the strict derogation approach that has prevailed so far to the notion of common value, i.e. solidarity and social and territorial cohesion. It is also important to note that the treaty reserves an original power of self-determination and autonomy for local and regional authorities.

The ETUC upholds its horizontal approach towards specific issues and sectoral directives which should be revised in the light of the new treaty provisions and complemented by the Monti Clause and a social clause. Finding specific solutions for 'leftover' issues (from the framework directive approach) is an important task. In particular, the potential of the new protocol has to be used.

The subsidiarity rules are important in creating a balance between the nationally established public services and European competition rules and the internal market. Yet it

might seem to be impossible to find a balance at European level between public services and the internal market as the Commission continues to regard public services as a simple derogation to the general rules. The possibility to ask for “minimum requirements” in order to have a positive approach in respect of subsidiarity is important. The primacy of tasks of general interest defined by the Member States over application of the rules of the treaty has to be underlined. The Member States can exercise wide discretion which is strengthened by the new treaty to define missions and obligations of general interest and the Commission can challenge this competence only in the case of manifest error.

The sector-specific and transversal actions should be combined, rather than opposed. The ETUC proposes the following coherent strategy in view of the new legal framework provided by the Lisbon Treaty:

4.1 Pluralistic assessments shall be conducted at all levels and workers and their representatives shall be involved in this process. The Commission shall in each legislative proposal with respect to services of general interest assess what the effects will be on the quality, health and safety, affordability, equal treatment, universal access, user rights, employment situation, working conditions and the diversity of the services concerned. These assessments shall be based on scientific research commissioned from independent institutes or consultants, selected after consultation with the European social partners as well as representative organisations of users, consumers and environmentalists.

4.2 Member States have the competence to provide commission and fund SGEIs. As there is at present considerable legal uncertainty and insecurity, it will be necessary to clarify the conditions for implementation in regulations, namely:

a) the conditions for defining SGIs, SGEIs, non-economic SGIs and social SGIs - in respect of the Member States’ competence of definition. A clarification of the conditions for “particular tasks”, their methods of implementation, and the methods for appointing operators is necessary as well;

b) the definition of their forms of organisation – under what conditions may any exclusive or special rights be decided, and more generally what type of derogations may be applied to the rules set out in the Treaties, the conditions for choosing management methods, (in particular for “in-house” or public service concessions) and the conditions for cooperation of activities and/or services between local public authorities;

c) the financing of SGEIs, - particularly from the viewpoint of the application of the rules for the supervision of state aid, in the context of a revision of the “Altmark” package (of November 2005). It is necessary to better define which compensations do not fall under the treaty provisions on state aid.

4.3 The ETUC proposes a *social clause*, which would have as its objective to clarify the relation between the internal market and fundamental social rights. We call for

early action to reassure unions that fundamental rights are not undermined by the internal market rules and/or free movement provisions in Europe. The ETUC insists on including a social clause in all single market legislation, specifying that the legislation cannot interfere with labour law and social security rules.

4.4 The single market strategy should strengthen social welfare, workers' rights and ensure fair working conditions for all Europeans. It is necessary to examine existing sectoral directives in the light of the interpretive guidelines of the treaty Protocol on SGIs and to ensure that the new provisions of primary law are taken into account when revising or updating sector-based directives. Social services are part of a “grey area”, which is prejudicial to the accomplishment of the missions entrusted to them. They are faced with an increasing level of legal insecurity, uncertainties and disputes. Therefore, forthcoming regulations on health and social services should take the new treaty provisions fully into account. A derogation from internal market rules should be applied according to Art. 86, paragraph 2 EC, as far as the development of trade is not really affected (in the case of social services: absence of a profit motive, services of proximity, operation on the basis of the principle of solidarity..).

4.5 Whenever a contract is subject to public procurement procedures, affiliates should be asked to verify if and to what degree their national legislation on public procurement has introduced the possibility of applying social criteria, especially with regard to wages and working conditions.

4.6 As a lesson from the battle on the Services Directive, the ETUC insists on including the *Monti Clause* (EC Reg. 2679/98). The aim of this clause is to anchor fundamental rights in all legislation on the single market. It would ensure that the implementation of the economic fundamental freedoms of the single market does not impede collective bargaining rights and the right to strike as defined by national legislation. Already appearing in some sector-related legislation, the Monti Clause is an effective instrument to guarantee a balance between the completion of the internal market and the maintenance of a high level of social welfare. The transposition of the Services Directive into national law should be supervised to avoid negative consequences.

4.7 The ETUC proposes that Member States establish a register of services of non-economic general interest, which are excluded from the application of the community rules on the provision of services, on competition and on state aid.

4.8 The ETUC therefore asks

- the Commission to implement forthwith the new treaty provisions in all new legislative proposals,
- the Council to establish a working party on SGIs/SGEIs in view of transposition of the new treaty provisions, and
- the European Parliament to make a full report on the consequences of the new treaty provisions.