CEEP RESPONSE

Brussels, 28 February 2011

CEEP response -
A Basic Answer to the Commission Communication "Towards a Single Market Act",
Proposals for Future EU policy on Services of General Interest

Executive summary

- CEEP welcomes the Commission's communication 'Towards a Single Market Act' and considers the 50 proposals to be a good base for a discussion. CEEP examines the text of the Single Market Act from the point of view of providers of services of general interest, as well as from the point of view of the European Social Partner, representing public employers in the European Social Dialogue.
- CEEP fully agrees with the Commission on the importance of the Services of General Interest for the successful re-launch of the Single Market, but considers that the measures proposed are not sufficient to reach the goals that are being aimed. Therefore CEEP submits an extensive proposal on how to consolidate the role of Services of General Interest in the annex of this document called "The *Acquis +* for Services of General Interest".
- CEEP fully agrees that social partners at all levels have an important role to play in the creation of the fully functioning internal market. However CEEP underlines that the autonomy of social partners should always be preserved. CEEP also comments on the proposals on pensions, European advance planning of industrial restructuring and the recognition of professional qualifications.
- CEEP welcomes the Commissions initiative aimed at modernising Public Procurement. In principle, CEEP would favour any measure which would enhance flexibility and legal certainty for enterprises concerned as long as new measures would not introduce more red-tape. However, CEEP considers that two questions should be dealt with immediately – clarifications in the EU positive law of the question of inter-municipal cooperation and in-house provision.
- CEEP remains sceptical about the added value of a legislative initiative on service concessions. A flexible legal framework already exists in EU law and a more detailed framework could cause an unnecessary rigidity which could prove detrimental to the quality of service provided.
- CEEP supports the idea of a common method to establish the Corporate Tax base at EU level and suggests that this exercise should be coupled with further harmonisation in the field of depreciations, reserves, value-adjustments transfer pricing and taking into account of foreign losses.

Annex - "The *Acquis +* for Services of General Interest"

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The Commission communication "Towards a Single Market Act"[1] aims *to promote* "a highly competitive social market policy" in order to restart an unfinished process of integration and realise our potential for growth in the service of human advancement; regain confidence, together, in our social market economy model, by placing Europeans at the heart of the market once again; propose a new global approach to the single market that embraces all of the players in the market; and increase understanding of and respect for single market rules in the Union and apply them in our day-to-day activities."

CEEP welcomes the Commission initiative and considers the 50 concrete "proposals for improving our work, business and exchanges with one another" a good subject for debate. There is no alternative to requiring a collective commitment at European level, with all of the players - European, national and regional, public and private, economic and social - making these goals and means their own, as the Commission states.

In order to support this approach CEEP would like to contribute substantially to the debate the Commission has opened with the Single Market Act. CEEP, as the representative of enterprises, administrations and other organisations providing services of general interest undertakes this by examining the text of the Act from the point of view of providers of services of general interest, as well as from the point of view of the European Social Partner, representing public employers in the European Social Dialogue. CEEP is of the opinion that one of the key questions in this regard must be the role of services of general interest within the re-launched internal market.

Restoring confidence by putting europeans at the heart of the Single Market

Services of General Interest in the Re-launched Single Market (proposal No 25)

The Commission rightly states that the "EU and its Member States must ensure that the public services, including social services, that meet the needs of the people of Europe are easier to operate at the appropriate level, adhere to clear financing rules, are of the highest quality and actually accessible to all". Whereas CEEP shares the general goals of the Commission, it does not share all the proposed instruments for achieving these goals. The Commission suggests in particular to:

- *"continue to provide up-to-date answers to the practical questions raised by citizens and public authorities concerning the application of EU law (State aid and public procurement) to services of general interest;*
- *implement measures enabling better evaluation and comparison at European level of the quality of the services of general interest on offer, particularly on the basis of experience in the field; and*
- *examine the suitability and possibility of extending universal service obligations into new areas in the light of changes to the essential needs of European citizens, potentially on the basis of Article 14 of the TFEU"*.

[1] COM(2010) 608 final.

In CEEP´s point of view these measures are not able to sufficiently reach the goals that are being aimed. CEEP would like to stress in particular:

- It should be made clear that it is up to the responsible authorities to take care for the provision of services of general interest at the appropriate level; the EU has a supporting role to ensure that these services are easier to operate at the appropriate level.

- The "toolbox" idea as well as an evaluation of the development of quality of liberalised services by citizens could be helpful for these authorities.

- The implementation of a concept of universal service must go hand in hand with an economically balanced approach.

- Questions concerning services of general interest formulated by citizens should be answered by the political instances in charge of being close to the citizens.

- As for an evaluation and comparison of the quality of services of general interest it should be discussed before in which sectors such initiatives could be helpful.

Moreover, CEEP assumes that the Commission sticks to its conclusion in its "*Communication on "A single market for 21st century Europe". Services of general interest, including social services of general interest; a new European commitment* (COM(2007) 725 final) where it states: "The Protocol and revised provisions in the new the Treaty build on this discussion and experience, and mark a new European commitment. Ten years after the first Communication at EU level, three years after the White Paper, they reflect the broad consensus across the EU about the role and responsibilities of the EU. Now that the EU framework has been consolidated by the Protocol, it is time to focus on implementation. On this basis, together with action at national, regional and local level, the Commission is determined to help ensure clarity, coherence and publicity of EU rules, so that services of general interest can fulfil their missions and contribute to a better quality of life for European citizens."

CEEP on Single Market Act Proposals No 31, 32, 33

CEEP, the representative of public employers in the European cross-sectoral social dialogue, fully shares the view of the European Commission that social partners at all levels have an important role to play in the creation of a fully functioning internal market. Social dialogue is one of the most effective tools to manage labour markets issues in the various sectors of the economy.

In the Commission consultation document it is written that "New life must be breathed into the social dialogue, making it more likely to lead to legislation "by and for" the social partners, as explicitly provided for by the Lisbon Treaty." CEEP feels in this respect the importance of underlining the autonomy of the social partners; they themselves should always be able to set their own agenda including also for instance when to enter into negotiations which can lead to future agreements.

Pensions. With an ageing population across the EU it is important that pension costs are affordable and sustainable. Developments to encourage people to work longer will assist in meeting this objective. CEEP welcomed the Green Paper on pensions published by the European Commission in July 2010. Some of the views expressed in the CEEP answer are worth highlighting for any discussion related to future European initiatives in this area:

- Member States and social partners are responsible for determining national pensions systems. Labour market pensions are one aspect of welfare systems that have developed over a long time. Any one-size fits all approach is not appropriate or possible;
- Fixing European standards for minimum pensions or investment decisions does not correspond to this diversity and might jeopardize those agreements by social partners or governments already made to enhance the sustainability of their pensions. It might even increase pensions costs, which is undesirable. It is far better to let Member States in the first pillar and social partners in the second pillar establish the balance between risk, security and affordability.
- The Open Method of Coordination fits the diversity of pension systems in Europe. The method enables the exchange of best practices.

European framework for the advance planning of industrial restructuring. CEEP is looking forward to contributing to the planned consultation on a European framework for the advance planning of industrial restructuring. In the light of the current crisis and taking into account future challenges, it is more important than ever to manage and anticipating change.

Recognition of professional qualifications. Free movement of workers is one of the fundamental freedoms provided by the Treaty. The system for recognition of professional qualifications including of course the Professional Qualifications Directive is an important part for citizens to fully take advantage of the his freedom.

CEEP will follow with great interest the forecasted evaluation by the European Commission of the Professional Qualifications Directive. Any revision of the Directive needs to be fully assessed and also facilitate the mobility of workers and adapt training to current labour market requirements.

Strong, sustainable and equitable growth for business

Modernisation of the Public Procurement (Proposal No 17)

CEEP welcomes the Commission's initiative to modernise and simplify the EU legal framework on public procurement, in particular, the Green paper which has been published by the Commission in January 2011, which CEEP will answer in due time. In principle, CEEP would favour any modernisation measure that would enhance flexibility and legal certainty for the enterprises concerned as long as such measure would not entail additional red-tape.

CEEP considers however, that two questions essential to the enterprises concerned have to be dealt with immediately. These are the clarifications in the EU positive law of the questions on inter-municipal cooperation and "internal operator" (the so called "in-house"), which until now have been subject only to the interpretations of the European Court of Justice. The lack of EU legislation on those two questions causes enormous ambiguity and legal insecurity for the contracting authorities, which has to be put to an end.

Legislative initiative on service concessions (Proposal No 18)

CEEP remains deeply sceptical about the added value that a legislative initiative on service concessions could bring to the current situation. A flexible legal framework already exists in EU law and the European Court of Justice has developed jurisprudence on various aspects, which clarify and ensure that the core principles of the EU Treaties are being respected (transparency, equality of treatment and non-discrimination). CEEP members fear that introduction of a more detailed legal framework on service concessions will cause an unnecessary rigidity in the legal framework, which would prove detrimental to the quality of service provided. After all, the key concern in the service concession contracts, which are used as a tool to provide services of general interest, is not so much the initial award of the contract, as the ability of the contracting authority to monitor the performance of the contract throughout its period and be able to adjust it to the changing needs of the society.

Taxation issues (Proposals No 19 and 20)

Common Consolidated Corporate Tax Base (CCCTB). CEEP supports the idea of a common method to establish the Corporate Tax base at EU level, so long it is targeted to avoid excessive extra burden to enterprises subject to it. The existence of a uniform base will bring about substantial benefits for cross-border firms helping to consolidate accounts on a sounder basis that currently is the case. It will also help to increase harmonisation, even if the tax rate remains to be settled by Member States according to their national objectives. CEEP is of the view that this move should be coupled by further harmonisation in the field of depreciations, reserves, value-adjustments transfer pricing and taking into account of foreign losses.

VAT. Since its creation, the system has largely remained the same, therefore an update both, at the national and at EU levels, is absolutely necessary. However, before the proposals of the Green Paper are published it should be noted, that a number of still pending issues should also be addressed: taxation in the country of origin or the country of delivery for intra-EU acquisition of goods, which could put an end to the carousel fraud; maintenance of fractioned payments or general reverse charge.

Annex

A CEEP proposal to consolidate the role of services of general interest

"*Acquis +* for Services of general Interest"

Services of general interest need to be granted a solid foundation within a renewed concept of the single market, because they are a basic pillar for the success of this market. Against this background, CEEP has taken the initiative to describe the current *acquis communautaire* on services of general interest and would like to suggest additional propositions, altogether called "***Acquis +* for Services of General Interest".**

Since the Treaty of Rome of 1957, European policies on "public services – services of general interest" have evolved. Between 1957 and 1986, with the absence of any specific Community measure, we witnessed the passage to a europeanisation process that, in a first stage, concerned the large networks (communications, transport, energy), on the basis of the accomplishment of the European internal market. Since the 1990s, several other processes occurred in parallel, one of broadening and intensifying public procurement which influenced in particular the way of providing of local public services, another one of extension to new sectors (e.g. urban transport or social services) and, thirdly the development and deepening of the Community's objectives, which came to increasing complexity of the situation, in particular with the Treaties of Amsterdam and Lisbon.

Today, a body of *acquis communautaire* in the field of "public services – services of general interest" has been developed, but a series of legal uncertainties that still remain must be addressed.

I. *Acquis communautaire* for Services of General Interest

1.1 Primary law

First of all, it relies on **primary law**, which, after the Lisbon Treaty, includes provisions which form an inseparable whole, with, in particular:

- Article 3 of the Treaty on European Union (TEU) that refers, among other EU objectives, to "the well-being of its peoples", "social market economy", "social progress", etc.
- Article 4 TEU, which underlines that EU respect the "national identities" of its Member States, "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government", and "their essential State functions".
- Article 6 TEU, according to which "the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties". Article 36 of the Charter sets out that "the Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order

to promote the social and territorial cohesion of the Union." Article 6 TEU adds that "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

- Article 9 of the Treaty on the Functioning of the European Union (TFEU), which, as provision of general application, contains an horizontal social clause, establishing that "in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health."
- Article 11 TFEU which requires the integration of environmental protection requirements into the definition and implementation of the Union's policies and activities. Article 37 of the Charter of Fundamental Rights of the EU calling for "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."
- Article 14 TFEU on services of general economic interest (SGEI), as a provision of general application, which both defines them as "shared values of the Union", emphasizes "their role in promoting social and territorial cohesion", and defines a shared competence between the EU and the Member States to take care that they "operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions." The same article provides that, on the one hand, "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 service" (so, an attributed competence to the EU); on the other hand, that is "without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services."
- Article 106 TFEU (a provision on competition law, so an exclusive competence of the EU) establishes the principle of the primacy of "particular tasks" assigned to them over the "rules contained of 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 these tasks, under the condition that "the development of trade must not be affected to such extent as would be contrary to the interests of the Union". The same article enable the Commission to address "appropriate directives or decisions to Member States" to ensure the application of the provisions of this article.
- Articles 107 to 109 allow considering as "compatible with the internal market" State aids, under the condition of being proportionate to clearly defined objectives of general interest. Among them, Article 93 TFEU consider aids as "compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service."
- Protocol 26 annexed to the two Treaties (TEU and TFEU), which "shall form an integral part thereof" (Article 26 TEU), concerns the whole Services of general interest and guarantees in Article 2 "the competence of Member States to provide,

commission and organise non-economic services of general interest", whereas Article 1 on services of general economic interest defines "the shared valued of the Union" within the meaning of Article 14 TFEU: "the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users; the diversity between various services of general interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations; a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights."[2]

This primary *acquis communautaire* can be summarised as follows:

- Member States (and their national, regional and local authorities) have the competence of "providing, commissioning and organising" the services of general interest in their respective area of competence in relation to respective national legislation;
- European institutions have the same competence for the European services of general interest that are considered to be necessary to the accomplishment of their objectives under the shared competences enshrined in the Treaties;
- As to non economic services of general interest, the rules of competition and internal market do not apply; they are only subject of the general principles of the EU (transparency, non discrimination, equal treatment, proportionality) without stipulating any specific procedure (e.g. public tender);
- As for services of general economic interest, public authorities must clearly define their "particular task" (the principle of transparency);
- On that basis, they may define appropriate means for the proper accomplishment of the "particular task" (principle of proportionality), which may include necessary, justified and proportionate aids and subventions, exclusive or special rights;
- These definitions should clearly establish the objectives of a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights;
- In all cases, abuses may appear because of an "evident error" that the Commission may raise, under the control of the Court of Justice.

1.2 Secondary law

Secondary law has progressively translated these principles on the one hand into concrete measures for several sectors in the framework of the implementation, then the achievement, of the "internal market", and, on the other hand, into some horizontal rules, such as public procurement or state aids. Without pretending of being exhaustive, in particular following features should be mentioned:

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[2] The Protocol refers to the competence of Member States « to provide, commission and organise » services, whereas Article 14 TFEU emphasises Member State's competence « **in respect of Treaties**, to provide, commission and **finance** these services ».

1.2.1 Universal service

In three sectors, the European Union defines a **universal service** that is "the right of everyone to access certain services considered as essential"; it "imposes obligations on service providers to offer defined services according to specified conditions, including complete territorial coverage and at an affordable price"[3]:

- In the field of **electronic communications**, the European Commission proposed on 20 September 2010 a package of three measures to guarantee for all European citizens access to broadband by 2013 and to higher download and upload speeds by 2020 (Communication COM(2010) 472 final - European Broadband: investing in digitally driven growth). Telecommunication Directive 2002/22/EC ("Universal service" Directive) refers to the universal service as being "a defined minimum set of services of specified quality to which all end-users have access, at an affordable price". It imposes upon national regulatory authorities the obligation to notify the Commission the universal service obligations imposed upon undertakings designated as having universal service obligations. (Article 36§2 Directive 2002/22/EC, as amended by Directive 2009/136/EC).
- In the **postal sector**, Directive 2008/6/EC of 20 February 2008 provides for the obligation of the Member States "to take steps to ensure that the universal service is guaranteed not less than five working days a week, save in circumstances or geographical conditions deemed exceptional, and that it includes as a minimum: one clearance, one delivery to the home or premises of every or premises of every natural or legal person or, by way of derogation, under conditions at the discretion of the national regulatory authority, one delivery to appropriate installations." "In particular, Member States shall take measures to ensure that the conditions under which universal services are entrusted are based on the principles of transparency, non-discrimination and proportionality, thereby guaranteeing the continuity of the universal service provision, by taking into account the important role it plays in social and territorial cohesion." (Article 4§2)
- In the **electricity sector**, some universal service obligations are introduced by the second directive (Directive 2003/54/EC) in order that "all household customers, and, where Member States deem it appropriate, small enterprises, …, enjoy universal service, that is the right to be supplied with electricity of *a specified [eliminated in 2009]* quality" and indicates that prices shall be "reasonable, easily and clearly comparable, transparent *and non-discriminatory [introduced in 2009]* prices." (Article 3§3).

1.2.2 Public service obligations

Public service obligations (PSO) are also defined in some sectors:

- In the field of **air transport**, Regulation n° 1008/2008 (Article 16) provides that "a Member State, …, may impose a public service obligation in respect of scheduled air services between an airport in the Community and an airport serving a peripheral or development region in its territory or on a thin route to any airport on its territory

[3] White Paper on services of general interest (COM(2004) 374 final).

any such route being considered vital for the economic and social development of the region which the airport serves. (…) satisfying fixed standards of continuity, regularity, pricing or minimum capacity, which air carriers would not assume if they were solely considering their commercial interest."

- In the sector of **electricity**, the field of public service obligations was subject to progressive changes and complements after the first directive (Directive 96/92/CE), then by the adoption of directives 2003/54/EC and 2009/72/EC. After the entry into force of the third directive of 2009, "Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, *, including energy efficiency* [provision introduced in 2003]*, energy from renewable sources* [provision introduced in 2009] *and climate protection* [provision introduced in 2003]." Moreover, Member States shall report to the Commission some of their actions, an obligation that was not yet imposed in 1996: "Member States shall, upon implementation of this Directive, inform the Commission of all measures adopted to fulfil universal service and public service obligations"; "They shall inform the Commission subsequently every two years of any changes to such measures".
- Similar provisions are provided for in **the sector of natural gas** by Article 3§2 of Directive 2009/73/EC of 13 July 2009 on common rules for the internal market in natural gas, according to which "Member States may impose on undertakings operating in the gas sector, in the general economic interest, public service obligations which may relate to security of supply, regularity, quality and price of supplies, and environmental protection, including energy efficiency, energy from renewable sources and climate protection."

1.2.3 Urban transport

Regulation (EC) No 1370/2007 of 23 October 2007 on **public passenger transport services by rail and by road** provides in Article 5 that "any competent local authority (…) may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent local authority (…) exercises control similar to that exercised over its own departments."

1.2.4 Passenger rights

Community measures also concern the adoption of **provisions on the protection of the passenger rights**:

- In the sector of the **air transport** (Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 1107/2006 concerning the rights of disabled persons with reduced mobility when travelling by air);
- In the **rail transport** (Regulation (EC) No 1371/2007 on rail passengers" rights and obligations);
- In the bus and coach transport (awaiting publication in the Official Journal)

- Other measures are under development in **other fields of transport** (waterway transport - COM(2008) 816 final).

1.2.5 Services directive

Some services of general economic interest are subject to the horizontal regulatory framework established by the Directive of 12 December 2006 on **services in the internal market**. For Services of General Economic Interest the significant value of this horizontal text rests on the provisions concerning **users" rights**, which forms, according to directive's provisions, one of the objectives of general interest. The Services Directive states that every user enjoys at least the following rights: equality and non-discrimination; right to information (information should be expressed in clear and intelligible way, easy accessible by electronic way, with updates on the essentials conditions of supply, management, financing, and pricing), right of access to information concerning them, held or collected by the service provider and by the competent authority, right of complaint and right to effective remedy.

1.2.6 Not specifically regulated fields

Other sectors such as water, sanitation, education, health, social services are not specifically regulated. In some regards **the Court of Justice** has completed the *acquis*, throughout cases that were submitted in the application of the treaties, and defined jurisprudential principles. These principles have had an impact on the provision of the respective services.

1.2.7 Horizontal provisions applying to Services of General Interest

For example, the **so called Monti-Kroes package** states that **public service obligations** may not be "state aids" but only under restrictive cumulative conditions, such as, for example, that the level of the necessary compensation is determined on the basis of the analysis of the costs that takes as reference "a typical undertaking, well run and adequately provided."

Also, concerning **"in-house"** management, the conditions imposed by the Court[4] are more restrictive than those established in the European law until now only in the field of public passenger transport (Regulation (EC) No 1370/2007 of 23 October 2007, see below). Whereas the Court does not distinguish the provision of services by the authority itself from the direct award, imposing in both cases the condition of an entirely public operator, the European regulation on public passenger transport services by rail and by road provides less restrictive provisions: "internal operator" means "a legally distinct entity over which a competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments."

In two recent decisions (C-324/07 of 13 November 2008 and C-480/06 of 9 June 2009) the Court of Justice of the EU considered that a **cooperation between public authorities for the provision of a public service** does not require to apply public procurement procedures if such a contract concerns the implementation of a shared public service mission, whereas

[4] See Teckal case of 18 November 1999, Stadt Halle case of 11 January 2005, ANAV v/commune of Bari of 6 June 2006, Coditel Brabant of 13 November 2008.

European positive law did not clarify yet the relations of cooperation between public authorities, on different levels, for the implementation of a public service mission.

1.2.7 Public procurement

Several directives define common rules for procedures for the award of public contracts (Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contacts and public service contracts), including for certain sectors so-called special (Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors) and in the fields of defence and security (Directive 2009/81/EC of 13 July 2009). In this context, the concessions are a particular form of public contract, but service concessions, as defined in Article §14 of the Directive 2004/18/EC, are not subject to its provisions. Service concessions are only subject to the general principles of the Treaty (transparency, equal treatment, proportionality, mutual recognition). Furthermore, the award of public contracts for services listed in Annex II B of Directive 2004/18/EC (of which some services of general interest, such as education and vocational services, health and social services, recreational, cultural and sporting services) are subject solely to Article 23 (technical specifications) and to Article 35 paragraph 4 (notices on the results of the public service award) and to fundamental principles of EU primary law.

II. The need of an *Acquis +* for Services of General Interest

Today, despite the existence of this *"*aquis*"*, a series of uncertainties subsist for public authorities, as well as for social and economic actors, that one or several regulations, such as provided for in Article 14 TFEU, should address, in particular in 3 fields:

2.1 Clarifying the conditions of implementation of Article 106

This Article, which has remained unchanged since the adoption of the Treaty of Rome in 1957, is subject of contrasted analyses and interpretations. On the one hand, it is often restrictively interpreted as allowing in favour of Services of General Economic Interest "derogations" or "exceptions" from the general provisions of the treaties on competition and internal market. On the other hand, the European Commission stated in the 2004 White Paper that "under the EC Treaty and subject to the conditions set out in Article 86(2), the effective performance of a general interest task prevails, in case of tension, over the application of Treaty rules."

In fact, since the "particular task" is clearly defined and proportionately implies not to apply some provisions of the Treaty, in particular competition and internal market rules, it should **clearly prevail**.

2.2 Guaranteeing the principles of subsidiarity and "in house" management

Article 14 TFEU gives a definition of a shared competence between EU and its Member States in the field of Services of General Economic Interest. Thus, the modalities of this

shared competence are subject of the principle of subsidiarity, whose implementation conditions are defined in Protocol n°2 of the Lisbon Treaty. So, it is necessary:

- **To establish the rights, freedoms and responsibilities of the public authorities**, including the European services **of the European authorities**, concerning the definition of Services of General Economic Interest as well as their modes of organisation and the conditions of the free choice of their modes of management;
- **To guarantee the principles of Article 4 TEU and of the Protocol n° 26** regarding "the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users";
- To establish clear rules on "in-house" management, existing already as a sectoral provision in the field of public passenger transport ("direct award"), as an option **for all Services of General Economic Interest**, so that the "in-house" provision of services shall no more be considered as an "exception" but as a mode of management for Services of General Interest according to the right of free choice of public authorities, which should be equally legitimate as the other ways the authorities may choose to provide their services to the citizens (such as outsourcing).
- To introduce a clear provision in the positive law of the EU on the **cooperation between public authorities** (local, regional and national authorities), which would reflect the recent developments in the jurisprudence of the European Court of Justice[5] in view of carrying out a public service mission.
- In the field of **public procurement** it is necessary to enable public authorities who wish to include **social and/or environmental clauses** to avoid any form of social and environmental dumping.

2.3 Reinforcing the "economic and financial conditions" which enable Services of General Economic Interest to fulfil their missions

Article 14 TFEU clearly emphasizes the content of regulation(s) that shall establish conditions enabling Services of General Economic Interest to accomplish their missions, in particular "economic and financial" conditions. The so called Monti-Kroes package in 2005 allowed the raise of a series of uncertainties concerning the financing of the compensations of public service obligations, in particular for those of small amount or those concerning social housing and hospitals.

On the one hand, these provisions should be adapted or revised in 2011. Article 14 TFEU should entail this procedure to be conducted in **co-decision between the European Parliament and the Council**. At the same time, the Monti-Kroes package is part of the approach consisting of considering public service obligations as a matter subject to Article 107 of the Treaty (on "state aids"), and therefore it generates all the constraints that such qualification implies in the field of public finances. Or these compensations should not fall within the provisions of the Treaty on state aids, but within a **range of possible ways of financing, in accordance with the principle of proportionality**: public subventions, fiscal advantages, compensation funds between operators, equalisation between users and/or

[5] Stadt Hamburg (C-480/96), Coditel Brabant (Case C-324/07).

providers, associated or not to the grant of exclusive or special rights, “play or pay” mechanisms, etc.

2.4 Clarifying the rules on how to better respect the role of sub-state authorities

European legislation influences in many ways the missions of sub-state authorities in their role as guarantors of Services of General Interest. Territorial governments of all levels, as long as they have the right to self-government, must be respected in their right to organise themselves, including services of general interest, as they think is best for their citizens. In order not to breach the principles of democracy, subsidiarity and proportionality, Internal Market policies have to deal very respectfully and carefully with the competent authorities, the States and in particular also the regional and local authorities. Procedures should be developed to ensure the appropriate implementation of Article 4 TEU. In this context it should be kept in mind that the completion of the internal market and the competition policy are just tools to maximise consumers” and citizens” welfare and to contribute to economic growth and employment. The respective policies have to combine the four fundamental freedoms (free movement of goods, of services, of persons and of capital) with the principles of democracy, subsidiarity and proportionality. In this context any potential legislative approach to regulate service concessions[6] should contain exceptions from the scope of this act in order to avoid liberalisations through the backdoor in service sectors not covered by a specific legislation, as well as an “in-house” clause, flexible and workable rules concerning the award procedure and provisions regarding the final decision on awarding the tender guaranteeing a wide discretion of the competent authorities at State, regional and local levels.

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[6] CEEP does not see a need for such an approach, see above item 1.2.7.