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Lisbon Treaty: A new deal for public services? Hearing on Article 14 TFEU – Protocol Nr. 26 on SGI

General remarks: Lisbon Treaty: Basic revision of the European primary law on SGI and right of local/regional self government

1. The Lisbon Treaty brought a basic revision of the European primary law on SGIs and the right of local/regional self-government. Local/regional self-government has significantly been strengthened. European policy and decision making, e.g. legislation, has to pay attention to the rights of regions and communes. (Details see annex 1, Lisbon Treaty, SGI and Local/regional self government).

2. In most EU member states the delivery of SGI/SGEI is a competence (and legal obligation in the same time!) of cities, counties and municipalities. Therefore, the organisation, definition and delivery of SGIs is - according to the principle of subsidiarity - in general a competence of cities, counties and municipalities.

3. Over the last few years, a lot of problems for the SGIs have occurred on EU level. The delivery of SGIs, public procurement, intercommunal cooperation, public services and state aids have very often been subject to ECJ cases (see some examples in Annex 2: Important Court decisions concerning SGI/public procurement). Problems were very often caused by a conflict of the EU's model of the common internal market on the one hand and the delivery of SGIs as a public service on local and regional level on the other hand.

4. Local government demands: Recognition of the right of local self-government and the basic competence for SGIs and claims for legal certainty for the delivery of SGIs.

5. This legal certainty with respect to the principle of subsidiarity and recognition to the right of local/regional self government should especially cover the following aspects:

- a. right of definition of SGIs/SGEIs by the local/regional government,
- b. direct and in-house provision of services in public-public-partnerships (e.g. intercommunal cooperation)
- c. and in public-private-partnerships (definition of in-house criteria with respect to subsidiarity and right of self government),
- d. clarification of public service compensation and state aids in the delivery of SGIs.

6. Most of these aspects have again been subject to decisions of the ECJ (see some examples in Annex 2: Important Court decisions concerning SGI/public procurement). An analysis of these decisions shows, that the ECJ pays more and more attention to the principle of subsidiarity and the right of local/regional self-government. Most likely this is a result of the new role of local/regional self-government in the Lisbon Treaty. In the Lisbon treaty competition and single market integration are still important aims of the EU, yet they are not the only goals anymore. A possible EU legislation in this field would have to take into consideration this new situation in the European primary law and in the jurisdiction of the ECJ. Furthermore, this legislation should not contain rules concerning quality standards and evaluation mechanisms of SGI/SGIE at European level, because of aspects of consumer protection.

7. As already mentioned, problems were very often caused by a conflict of the EU's model of the common internal market on the one hand and the delivery of SGIs as a public service on local and regional level on the other hand. An attempt to solve this basic conflict could be a modern and practicable definition of the internal market relevance of local/regional SGIs/SGEIs. Practise and political discussion show, that the current de-minimis-rules, and concerning state aids, should be revised with the aim of more local and regional decision-making competence. The answer to this problem could be an own de-minimis threshold for SGI/SGEIs. Cities, counties and municipalities/Regions support the project of the common internal market. Effective and efficient SGIs are a crucial condition for the success of the common market and its acceptance by citizens and companies.

Most of the SGI services on the local and regional level are not relevant, and especially not contradictory to the internal common market of the EU. Therefore, the EU should accept a broad competence of decision-making, delivery and organisation of SGIs on local and regional level.

Annex 1, Lisbon Treaty, SGI and Local/regional self government

Article 3 TEU (ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

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3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a **highly competitive social market economy**, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

Article 4 TEU

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

Article 5 TEU (ex Article 5 TEC)

1. The limits of Union competences are governed by the principle of conferral. **The use of Union competences is governed by the principles of subsidiarity and proportionality.**

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Article 6 TEU (ex Article 6 TEU)

1. 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 adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

Charter of Fundamental Rights of the European Union

Preamble

*The Union contributes to the preservation and to the development of these common values while **respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels**; it seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment.*

Article 34

Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.

2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.

3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all

those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

Article 35 Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Article 36 Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

Article 11 TEU

- 1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.**
- 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.**
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

Article 14 TFEU (ex Article 16 TEC)

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the 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.

Article 106 TFEU (ex Article 86 TEC)

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 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in 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.

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.

PROTOCOL (No 2)
ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY
AND PROPORTIONALITY

THE HIGH CONTRACTING PARTIES,

WISHING to ensure that decisions are taken as closely as possible to the citizens of the Union,

RESOLVED to establish the conditions for the application of the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union, and to establish a system for monitoring the application of those principles,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

Each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union.

Article 2

Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal.

...

Article 5

Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.

This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at

Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators.

Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

PROTOCOL (No 26) ON SERVICES OF GENERAL INTEREST

**THE HIGH CONTRACTING PARTIES,
WISHING to emphasise the importance of services of general interest,
HAVE AGREED UPON the following interpretative provisions, which shall be
annexed to the Treaty on European Union and to the Treaty on the Functioning
of the European Union:**

Article 1

The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

- 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 economic 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.**

Article 2

The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.

PROTOCOL (No 27)

ON THE INTERNAL MARKET AND COMPETITION

**THE HIGH CONTRACTING PARTIES,
CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted,
HAVE AGREED that:**

To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.

This protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.

**Annex 2:
Important Court decisions concerning SGI/public procurement
(only some examples)**

ECJ, C-107/98 „Teckal“, 18.11.1999, Teckal criteria on In-House
ECJ, C-379/98 „Preussen-Elektra“, 13.03.2001, Definition state aid
ECJ C-26/03 „Stadt Halle“, 11.01.2003. In-House
ECJ C-280/00 „Altmark Trans“, 24.07.2003 State aids and SGI
ECJ C-458/03 „Parking Brixen“, 13.10.2005 In-House
ECJ C-231/03 „CONAME“, 21.07.2005, In-House
ECJ C-340/04 „Carbotermo“, 11.05.2006, Concessions
ECJ C-295/05 „ASEMFO/TRAGSA“, 19.04.2007, In-House
ECJ C-382/05 KOM-Italy, 18.07.2007 Service concessions
ECJ C-324/07 „Coditel Brabant“, 13.11.2008, In-House and intercommunal cooperation, concessions
ECJ C-480/06 „Stadtreinigung Hamburg“, 09.06.2009, Inhouse and intercommunal cooperation on contractual basis, recognition of public services and local self government
ECJ C-206/08: „Eurawasser“, 10.09.2009, concessions and public services of local self-government „risk and competition ”
ECJ C-573/07: „Commune de Ponte Nossa“, 10.09.2009, intercommunal cooperation, control criteria