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THE SINGLE MARKET 20 YEARS ON

PUBLIC SERVICES AND EUROPEAN COMPETITION: CONTRADICTION OR CONCILIATION?

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SUMMARY

The European Union makes it is business to ensure that public services – whether we are talking about network services or social services – function in the kind of economic and financial environment that can allow them to fulfil their mission. **After a long and lively date, the Lisbon Treaty has recognised the values of public service and has thus acknowledged the fact that the application of the treaty rules, in particular the rules of competition, should not prevent them from functioning well.** Despite this development, the notion that the rules governing the single market can be applied, under given circumstances, to the provision of certain social services is still broadly disputed by a large part of public opinion, especially in France.

This question is well worth asking. After all, **why should the rules governing the European single market be applied to initiatives that citizens adopt in response to social needs?** These initiatives have often preceded initiatives taken by government, by local communities and by profit-oriented businesses because none of these players was in a position to address those needs. More often than not, these initiatives offer a solution characterized by criteria of quality, proximity and availability which are not always to be found in competitive markets – when the latter exist, that is. Thus it is perfectly legitimate to question the social usefulness of the application of single market rules to such activities, in view of the fact that the market-based approach has proven to be inadequate in the first place.

This policy paper attempts to identify the legal situation in order to prove that the implementation of single market rules is not an attempt to introduce unbridled, destructive competition in the field of public services. Instead, its primary objective is to ensure that transparency and equality becomes the rule for public service providers whenever a market can be identified.

"THE IMPLEMENTATION OF SINGLE MARKET RULES IS NOT AN ATTEMPT TO INTRODUCE UNBRIDLED, DESTRUCTIVE COMPETITION IN THE FIELD OF PUBLIC SERVICES"

Undoubtedly, this marks a profound shift in the relationship between public authorities and private institutions entrusted with a mission of general interest. Public authorities have an enormous responsibility in this respect because they enjoy broad discretionary power in the definition of what constitutes a social service of general interest. **This is a process that is going to take time bearing in mind the extent of changes in behaviour that it demands.**

If some opposition still remains, it is primarily because the transition process has not been managed well: obstacles have not been identified and stages of evolution have not been figured out. Consequently, we have got stuck in a debate on a matter of principle, occasionally even ideological in nature, over the merits or damaging effects of competition; and this, to the detriment of the European construction process.

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INTRODUCTION

The European Commission has recently updated the State aid rules applicable to compensation for public services granted to certain undertakings entrusted with the operation of services of general economic interest[1]. It has simultaneously tabled two directive projects that could modify the conditions in which the provision of services of general economic interest are delivered: a directive project on the public procurement and a second one on the award of concession contracts[2].

These initiatives lie within the intention of the European Union to ensure that public services, be it network or social services, function in economic and financial conditions, which enable them to accomplish their mission. After a long and intense debate, the Treaty of Lisbon establishes the recognition of the values of public service and thus the application of treaty rules, notably those concerning competition, do not prevent the accomplishment of their mission[3].

The SSGI (Social Services of General Interest) Collective[4] was pleased about the fact that the European Commission had taken into consideration the specific nature of social services both in the regulations for State aids and in the two directive projects. However, the debate is not over. Despite the significant evolution of treaties, European regulations and the practice both at the Court of Justice and the Commission over the last ten years, the idea that market rules[5] can in certain circumstances apply to the provision of certain social services remains strongly contested by a large part of public opinion, particularly in France.

> "THE IDEA THAT MARKET RULES CAN APPLY TO THE PROVISION OF CERTAIN SOCIAL SERVICES REMAINS STRONGLY CONTESTED"

This question is worth asking. Indeed, why should the rules of the European Single Market be applied to the initiatives that citizens have taken in response to social needs? These initiatives have often preceded the action of the State, local collectivities and profit oriented businesses because the latter were not in a position to address these needs. More often than not, these initiatives offer a solution characterized by criteria of quality, proximity and availability that are not always to be found in competitive markets, when these exist. It is, therefore, quite legitimate to question the social utility[6] of the application of Single Market rules to these activities, given that the market based approach proved to be inadequate in the first place.

First of all, this Policy Paper examines the scope of the State aid rules to public service compensation adopted within the Almunia package and of the two aforementioned directives (public markets and concessions). Secondly, an analysis will be carried out to determine to what extent, as indicated in article 106-2 of TFEU, "the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them"[7].

1. *Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest*, 2012/C8/02; Communication from the Commission, *European Union Guidelines for State aids in the form of public service compensation*, 2012/C8/03; Communication from the Commission, *Approbation for the content of a draft regulation of the Commission relative to de minimis aids for the provision of services of general economic interest*, 2012/C8/04; *Commission decision of 20 December 2011 relative to the application of Article 106, paragraph 2, of the Treaty on the Functioning of the European Union concerning State aids in the form of compensation granted to certain undertakings entrusted with the management of services of general economic interest*, 2012/21/EU. These texts, known under the name of the "Almunia package" are the follow-up to the 2005 "Monti-Kroes package". They were published in the OJEU of 11 January 2012.
2. *Proposal for a directive of the European Parliament and Council on the attribution of concession contracts*, COM (2011) 897 final of 20 December 2011; *Proposal for a directive of the European Parliament and Council on the transfer of public procurements*, COM(2011) 896 final of 20 December 2011.
3. Article 14 of the TFEU provides a new legal basis to establish the principles and fix the conditions of the functioning of services of general economic interest. A new protocol on services of general interest is annexed to the Treaty and the right of access to services of general economic interest is recognised amongst the fundamental rights of the Union (Article 36 of the Charter of Fundamental Rights).
4. The SSGI Collective was formed on 30 May 2006 following the publishing of the European Commission Communication on SSGIs on 26 April 2006 "because the Treaty and the Court of Justice protect social service missions from market forces alone" (http://www.ssig-fr.org).
5. What is called here the "rules of the Single Market" concerns the rules of public purchasing and those relative to the ban on State aids which distort the market.
6. I employ this expression deliberately to indicate better quality services at a lower cost for the community.
7. Article 106 paragraph 2 of the Treaty on the Functioning of the European Union: "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".

1. To what extent are social services of general interest concerned by the rules of the Single Market?

1.1. The State aid regime applies when compensation for public service is granted to an entity operating on a market and that this compensation affects trade between Member States[8].

1.1.1. Compensation for public service...

These rules are applicable as soon as financial compensation is granted for the provision of a service of general interest or when a public purchase occurs. The companies offering services of general interest are more often than not incapable of invoicing the total cost of provision to the final beneficiary. Therefore, they seek support from the State or local authorities to compensate for the difference. These services of general interest are often subject to public policies, which define the nature of the service offered and the populations targeted as beneficiaries. In this case, the State or the local authority defines the specifications of the activity and buys the provision of the services. Three players may thus be distinguished: the prescriber, the service manager and the final beneficiary.

The transfer of State resources may take many forms such as direct subsidies, tax credits or particular benefits granted to the service provider such as the availability of premises at a nominal rent. Equally, the fact that the State or the local authority does not invoice at market price the goods or services made available to the managing entity also constitutes a form of public aid.

1.1.2. ...granted to an economic activity...

All entities, carrying out an economic activity, whatever their status and their means of funding, are concerned. Thus, an association, a foundation, a consortium, a public establishment, a joint-stock company be it private, public or mixed capital, profit driven or not, are concerned by the application of the State aid rules.

But these entities must carry out an economic activity offering goods or services on a given market, which in other words constitutes a market activity.

Whether a market exists for certain activities depends on the way the services are organised in each Member State. The market exists when operators are willing and able to provide the service in question according to the organisational conditions laid down by the public authority. If the requirements (in terms of content and quality of the provision, supply distribution across the territory, or availability with regard to final beneficiary) laid down by the State, for example, to provide training for job-seekers were such that no company would have an interest in undertaking this activity, today there would be no market in vocational training for job-seekers.

On the other hand, "the decision of an authority not to allow third parties to provide a certain service (for example, because it wishes to provide the service in-house) does not rule out the existence of an economic activity"[9].

The Commission, therefore, recognizes that it is impossible to draw up an exhaustive list of activities that *a priori* would never be economic. Thus, an association which provides training for young people without qualifications, home care services or runs a retirement home, summer camps, farmhouse accommodation, etc.,

8. In the terminology of European institutions, the term State designates all public authorities likely to grant financial aid from public funds.
9. Point 13 of the above-mentioned communication, 2012/C8/02.

can be categorised as an economic activity as soon as the service offered is or could be provided by another economic operator.

However, the Commission recognizes that "activities that intrinsically form part of the prerogatives of official authority and are performed by the State do not constitute economic activities". The same applies to social security schemes based on the principle of solidarity, to "hospitals that are an integral part of a national health service and that are almost entirely based on the principle of solidarity", to public education organized within the framework of a national education system, and to the main activities of universities and research organisations.

1.1.3. ...which affects or threatens to affect exchanges between Member States.

In the internal market of the European Union, any entity of a Member State which engages in an economic activity must be in a position to offer its services without discrimination throughout the territory of the Union. The objective of the internal market is to ensure the best quality at the lowest cost. Any operator which is in a position to meet the specifications of the service must be in a position to submit its offer. "According to the case-law of the Court of Justice, there is no threshold or percentage below which trade between Member States can be regarded as not having been affected. However, the Commission has in several cases concluded, that certain activities had a purely local character (swimming pools, hospitals, museums or events for use by, or, targeting a purely local population)"[10].

1.2. Compensation for public service is not always a State aid that is incompatible with the internal market.

Compensation, whatever its form, represents the counterpart for services provided by the benefiting companies carrying out the obligations of public service. In the conditions defined by the Court of Justice in the Altmark judgement[11], this compensation can be compatible with the internal market. These conditions can be stated in the three ways described below.

> "THE STATE AND LOCAL AUTHORITIES BENEFIT FROM A BROAD DISCRETIONARY POWER TO DEFINE WHAT CONSTITUTES A SOCIAL SERVICE OF GENERAL ECONOMIC INTEREST"

1.2.1. Clearly defined public service obligations

For the Commission, "The concept of service of general economic interest is an evolving notion that depends, among other things, on the needs of citizens, technological and market developments and social and political preferences in the Member State concerned". The State and local authorities benefit, therefore, from a broad discretionary power to define what constitutes a social service of general economic interest. "Generally speaking, the entrustment of a 'particular public service task' implies the supply of services which, if it were considering its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions"[12]. The conditions in which the public service is carried out are, therefore, absolutely fundamental. These conditions must be defined by the public authority whose decision will determine whether a competing operator could provide the service required. Consequently, today vocational training for job-seekers in France can be provided by a large number of operators, because the conditions in which this service is carried out emphasize the level of price and sometimes the geographical origin of the job-seeker and more rarely the quality of the training and support for reintegration into the labour market. The existence of a public training service for job-seekers is, therefore, a matter of a decision by the State or regional authority.

10. Point 39 of the above-mentioned communication, 2012/C8/02.
11. In the judgement in Case C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg/Nahverkehrsgesellschaft Altmark GmbH, points 87 to 93.
12. Point 47 of the above-mentioned communication, 2012/C8/02. See also Article 2 of *Regulation EC n°1370/2007 of the European Parliament and Council of 23 October 2007 relative to public services for the carriage of passengers by rail and by road.*

1.2.2. A mandate to entrust the management of a social service of general economic interest to a company

A public service remit must be entrusted through an explicit act (law, decree or contract) which details the nature and the duration of the obligations of the public service, the company and the territory concerned, the nature of the exclusive rights granted if appropriate, as well as the parameters relating to the calculation, control and review of the compensation granted to finance the public service obligations. This remit can be granted following a proposal by the provider itself, given this proposal is approved by a public authority. Thus, a vocational training association could propose to train and support job-seekers who are isolated from the labour market to regain access to work, without a prior definition of the nature of the training courses and the means available to obtain the desired result. Here, the object of the contract is not the purchase of training courses but, the global service covering the training, support and reintegration.

1.2.3. Compensation proportional to the obligations of public service

If the compensation granted is proportional to the obligations of the public service, it will not be qualified as a State aid incompatible with the internal market. "The compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit"[13]. Simple as it may appear, this condition is, however, the most difficult to satisfy.

On the one hand, it supposes that the institutions participating in the implementation of the public service account for their management resources in a precise and transparent way. Yet, even if the accounts are kept in accordance with the official accounting standards and the presence of an auditor is a widespread practice in these institutions, cost accounting statements are generally too incomplete to provide a true picture of the cost of the supply of the public service. It constitutes a considerable obstacle to the development of public service mandates.

On the other hand, it supposes that the public authority and the institution responsible for the service of general interest agree on the nature of the costs, which must be taken into consideration, and on the procedures for their calculation. Indeed, it is not unusual to see the State or a public authority refuse to bear the cost of its pro-rata share of investments or general expenses vital to the realization of the subsidised activity (central and local offices overheads, provisions for paid holidays, risks and liabilities, etc.). Likewise, the idea that an activity financed by a public authority could make a reasonable profit is rarely accepted, whereas, this profit constitutes, at least for non-profit associations, the first means of constituting its own funds.

1.3. Recourse to a public contract or a concession contract is not always compulsory.

According to the Commission, the simplest way for public authorities to ensure that the candidate is capable of providing the service at the lowest cost to the community consists in organizing a transparent and non discriminatory public procurement procedure[14]. Concerning the award criterion, even if the lowest price evidently satisfies the condition established by the Court of Justice in the Altmark judgement, the public authorities are "not prevented from setting qualitative standards to be met by all economic operators or from taking qualitative aspects related to the different proposals into account in [their] award decision".

But, "there can be circumstances where a procurement procedure cannot allow for the least cost to the community as it does not give rise to a sufficient open and genuine competition" notably because of the specificities of the service or the necessary infrastructure required. This could be the case if, for instance, a region or a departement wished to fund vocational training for workers in public works requiring the acquisition of expensive heavy equipment, a training programme for unqualified young people in a disadvantaged rural areas or

13. Points 60 and 61 of the above-mentioned communication, 2012/C8/02, in which the Commission defines what it understands by reasonable profit.
14. Point 62 of the above-mentioned communication, 2012/C8/02.

even a home care service at weekends in an area with a low population density requiring extensive travel… The subsidy can, therefore, be a means of funding of a social service of general economic interest. However, the amount will have to be determined on the basis of an analysis of the costs "that a typical undertaking, well run and adequately provided with material means 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".

"THE SUBSIDY CAN BE A MEANS OF FUNDING OF A SOCIAL SERVICE OF GENERAL ECONOMIC INTEREST"

In its proposals for "concessions" and "public procurement" directives[15] the Commission recognizes the specificity of services to individuals, such as certain social services in the field of health and education, because they "belong to a particular context with great variations from one Member State to another, due to different cultural traditions". Thus, it specifies in the recital number 22 of its proposed directive on concession contracts that "Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of concessions, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority or contracting entity, without any limits or quotas, provided such system ensures sufficient advertising and complies with the principles of transparency and non-discrimination"[16].

Likewise in the recital number 11 of its proposed directive on public procurements, the Commission specifies that "given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee…".

Member States could, therefore, benefit from a broad discretionary power in the organization of the choice of service provider as soon as these directives are adopted. It will be up to the public authority to make a choice. From the moment it decides that a public service can be provided by the market, it will have to respect the rules in order to enable any operator in a Member State of the European Union to be able to offer the service without discrimination. If the public authority considers that the market is unable to provide a service of sufficient quality and at a reasonable price, it will have to define the obligations that the service provider must meet and either provide the service itself[17], or find an operator who accepts to undertake the service and offer him compensation for the specific costs generated by the obligations of public service.

15. *Proposal for a directive of the European Parliament and Council on the attribution of concession contracts*, COM (2011) 897 final of 20 December 2011; *Proposal for a directive of the European Parliament and Council on the transfer of public procurements*, COM(2011) 896 final of 20 December 2011.
16. Recital 22 of the proposal for a directive "concession".
17. In France, Article 3 of the Public Procurements Code states that "the dispositions of this code are not applicable to agreements and markets concluded between a contracting authority and a contracting partner over whom it exercises a control comparable to the one it exercises on its own services and who carries out the core of its activities for the contracting Partner…". The *Conseil d'État* (Council of State) has applied this provision to its judgement (Conseil d'État, Commune d'Aix en Provence, 23 March 2007). A public service managed by a private individual can exist without the prior creation of a public entity but public authorities can be seen as managing directly the public service if they create for that purpose an organization whose exclusive statutory nature is, subject to a purely secondary diversification, to manage this service and if they exercise over this organization a control comparable to the one they exercise over their own service. This organization can notably, be set up when several public authorities decide to create and manage together a public service.

2. Does the application of these rules obstruct the mission assigned to social services of general interest?

The Commission's proposals on contracts regarding concessions and public procurement lie within the philosophy defined by the Court of Justice in the Altmark judgement and taken up by the Monti-Kroes and the Almunia packages according to which the State enjoys broad discretion in the definition and organization of social services of general economic interest. The question of the SSGEIs should be more a matter of national political debate than of European political debate as, in theory, the application of Community rules does not obstruct the mission assigned to social services of general interest. But, in practice, in a context where jurisprudence on these subjects is far from being established, the broad discretion enjoyed by public authorities, insufficiently prepared to exercise their buyer power, leads to an undermining of the exercise of these social service missions.

2.1. The application of the rules of the internal market is compatible with the development of social services of general interest.

The objective of Treaty rules is to encourage the development of the internal European market based on the idea that Europeans will benefit more from a large competitive market than from local markets closed to competition. More competition means more innovation to meet the demand and a lower price.

> "MORE COMPETITION MEANS MORE INNOVATION TO MEET THE DEMAND AND A LOWER PRICE"

These rules are there to ensure that, as soon as a demand is expressed on the market, all European operators can submit their proposal without discrimination. Beyond the economic result that it is expected to produce, this principle of non-discrimination is at the heart of European values. The ambition of the European Union is to offer each of its nationals the same rights including the exercise of their economic activity.

The objective of these rules is also to guarantee a good use of public funds by offering a guarantee to each taxpayer that the price paid by the community for the service or the goods is the best price for the quality required.

If the competition rules are only used as a means of obtaining a greater quantity of goods or services for the lowest price, they will inevitably lead the withdrawal of the institutions, which provide a service of general interest, from their activity. This is because, by definition, the prices of those institutions incorporate the inherent characteristics of a service of general interest, notably the continuity of service, non-discriminatory access, territorial coverage, the supply of services in response to specific needs, the participation of users in the definition and in the management of the service and innovation.

From the moment the State or public authorities benefit from a broad discretionary power in the organization of services of general interest they can invite competitive bids by carefully defining the service obligations in the specifications of the call for tender to which the operators will be subjected, or, they can entrust the service to an operator that they subsidise. If several companies are likely to tender the service according to the conditions defined in the specifications, a market would exist[18] and it would not be absurd to invite competitive bids. But, the question of knowing whether a market exists for specific services can also depend on the way these services are organized in the Member State concerned[19].

It is, therefore, unfair to accuse Europe of wishing to undermine services of general interest. But it is true that the framework in which relations are established between public buyers and service providers has evolved,

18. Above-mentioned communication, 2012/C8/02.
19. Point 12 of the above-mentioned communication, 2012/C8/02.

that the transition has not been well prepared and that the behaviour of national regulation authorities has, in particular in France, added to the confusion.

2.2. The behaviour of operators and regulation authorities is an obstacle to the development of the new regulatory framework for activities of general interest based on transparency and equality of treatment.

The rules of the internal market are more led by the principles of transparency and equality of treatment of all economic operators than by the application without due discrimination of cut-throat competition. It is, nevertheless, an important change for public authorities and institutions which for a long time benefited from opaque, ambiguous and privileged relations.

Operators, often community-based in France, provide collective services that the public authorities do not wish or cannot render with their own means. They have often been innovative in the construction of this service provision but guard jealously their independence, whereas most of their income is gained from public funds; certain operators go as far as to refuse to associate the public authorities with the definition of the service and therefore the policy to be followed. Despite considerable progress made in recent years, transparency in the management of operators is not always satisfactory[20] and in some cases, conflicts of interest remain when elected representatives who decide on the subsidy also occupy management positions of the operators.

The shift in these relations, introduced by the Altmark jurisprudence, has given public authorities the opportunity to play a more directive role in the definition of services of general interest which, consequently, transforms their role into that of service buyers and no longer mere supporters of the citizen initiatives. Yet, these public authorities tend to forget what makes the service of general interest unique, by very often choosing to favour the price criterion above all. When they decide to directly subsidise an operator, rarely do they acquire the new skills and competences to ensure the overall control of the provision of this service of general interest. It is especially true for the responsabilities of defining the obligations of public service, of appreciating what amounts to fair compensation and of setting the rules of efficient yet not too costly management control. Operators of services of general interest have, therefore, hastily come to the conclusion that the competition rules imposed by Brussels had the effect of killing their activity.

> "DESPITE CONSIDERABLE PROGRESS MADE IN RECENT YEARS, TRANSPARENCY IN THE MANAGEMENT OF OPERATORS IS NOT ALWAYS SATISFACTORY"

Simultaneously, these operators have not always taken the necessary initiatives to adapt their supply to the needs of the public authority providing their funding and to identify the costs involved in the provision of the service in order to give a clear picture of their ability to provide the best service at the best price in a transparent manner. The preference for a lump-sum global subsidy is an easy way out and masks the refusal of a professional approach and the search for efficiency. Improving the efficiency and effectiveness of services of general interest is, nevertheless, a fundamental value of these activities of general interest, which have been for a long time and remain still the sources of innovation; yet, this innovation has not been yet applied sufficiently to the production and management of these services themselves.

Finally, in France, the State has not adapted the national law to this new equilibrium framework between the government and social services. Thus, the circular from the Prime Minister on 18 January 2010[21] recognises that there is no "obligation for communities to have recourse to public procurements with regard to European rules governing State aids" and it immediately asserts that "for all that, national law governing

20. In France, successive reports by the Court of Auditors and inspection bodies can attest.
21. "Circular from the Prime Minister on 18 January 2010 relative to relations between the government and associations: agreements on objectives and simplification of steps relative to certification procedures", *Official Journal of French Republic (JORF)* of 20 January 2010.

public procurement delineates recourse to subsidies : the association must initiate the project". At the same time the circular confines itself to recall the jurisprudence of the administrative tribunals.

In a judgement of 26 March 2008, the *Conseil d'État*[22] decided that a payment is not a subsidy if the community which carries it out obtains an immediate or direct compensation. When a community has directed the activities and it has intended, by paying the applicant company, to pay the cost of the services corresponding precisely to the objectives it assigned and to the characteristics it had defined, it has not provided a subsidy but it has paid a price.

France, in this case, could have adapted national law to take into account the spirit of the European jurisprudence, which recognises the partnership established between a public authority and an institution entrusted with the social service of general interest, a partnership in which both parties define together the service provided to the user. This is what the Limousin region had wanted to do with several local associations concerning vocational training in 2008. However, the Limoges administrative tribunal annulled the partnership in 2010 on the grounds "that the region does not provide the elements enabling it to be seen as having confined itself to defining not the actions but only the objectives or a general framework which could be considered as a simple call for projects; *that it must be considered as having taken the initiative for the project* whose implementation has been entrusted to the organizations benefiting from the allocations"[23].

Finally, the definition of a mandate and public service obligations encounters what Marc Le Roy calls "the growing imperfection of identification criteria in the delegation of public service"[24]. Jurisprudence defining public service missions has considerably evolved in recent years. Formerly based on the existence of a public figure endowed with public powers, today the definition of public service missions is based on the presence of a general interest and that of the obligations imputed to the service manager by the public figure. This definition is consistent with that retained in Community documents. In fact, jurisprudence goes even further. It seems to require a real desire for management by the public figure rather than a distant supervisory control[25]. Certain jurisprudences imply that a public service cannot exist without the prior intervention of a public authority whereas others imply the opposite. This imprecision in the definition of a public service mission constitutes a threat to initiatives that public authorities and operators can take when defining a public service mandate.

22. EC (3/8 SSR) of 26 March 2008, Région de la Réunion (Reunion Island region), application 284412, published in the Lebon Report.
23. Decision of the Limoges Administrative Tribunal of 6 May 2010, AFORMAC versus Limousin Regional Council.
24. Marc Le Roy, "L'imperfection croissante des critères d'identification de la délégation du service public (The growing imperfection of identification criteria in the delegation of public service)", *AJDA*, 2008, p. 2268.
25. In his conclusions on the Ville de Melun Case, the *Conseiller d'État* (State Councillor) Marcel Pochard had specified that the qualification of public service should be taken for granted "from a certain degree of constraint or dependence of the private organization", *Conseil d'État* of 20 July 1990, Ville de Melun and Association Melun Culture-Loisirs, Lebon, p. 220.

CONCLUSION

The application of internal market rules does not have the objective of introducing cut-throat competition destructive of public services. Their primary objective is to make sure that the transparency and equality of economic operators becomes the rule as soon as there is a market. Undoubtedly, it is a profound evolution in the relationship between public authorities and private institutions entrusted with a mission of general interest. But public authorities enjoy a broad discretionary power in the definition of what constitutes a social service of general interest liable to receive compensation proportionate to its public service obligations.

The transformation of relations between public authorities and operators of social services of general interest is a process that will take time given the scale of changes in behaviour that it implies. This necessary transition has not been managed. Obstacles have not been identified, stages of evolution have not been worked out and therefore, we remain stuck in a debate on a matter of principle, sometimes ideological, on the merits and damaging effects of competition to the detriment of European construction.

"EUROPEAN UNION OBJECTIVES AND RULES ARE CLEAR"

European Union objectives and rules are clear and it would be hard to contest that the introduction of transparency and equality of treatment of economic operators in the management of social services of general interest will provide progress for all citizens of the European Union since this management now is opaque and often inefficient. However, it is the role of public figures nationally to ensure that the application of these rules does not result in destructive competition of what constitutes the uniqueness of operators of social services of general interest.

Henceforth, it is their responsibility to transcribe these rules into national law, to educate local authorities and operators of social services of general interest with regard to them and to bring about the necessary transitions.

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