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The universal postal service after the Lisbon Treaty: a true step forward?

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I. Summary

On 1st December 2009 the Lisbon Treaty[1] entered into force after a long and controversial process of negotiation, adoption and ratification. Agreed upon and signed on 13 December 2007, as the result of negotiations between EU member countries in an intergovernmental conference which also involved the Commission and Parliament, it was finally ratified by each of the EU's 27 members nearly 2 years later.[2] Not only was the Treaty itself discussed at length, but the notification negotiations dragged on until the end of 2009, when Ireland's second referendum resulted in a positive outcome and the Czech President received the requested assurances regarding the application of the Charter of Fundamental Rights[3] in the Czech Republic.[4]

The Treaty amends the EU's two core treaties, the Treaty on European Union and the Treaty establishing the European Community, and contains several protocols and declarations, including the protocols on the principles of subsidiarity and proportionality and on services of general interest. It provides for prominent institutional and political changes, while consolidating and developing established principles of EU Law.

To what extent will the Lisbon Treaty affect postal services regulation and in particular the universal postal service's? This paper aims to present some of the novelties introduced by the Treaty by comparing its provisions with the *acquis communautaire* on postal services, in

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[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13/12/2007, OJEU C 306 of 17/12/2007.

[2] Under the original timetable set in 2007, the Treaty was scheduled to be fully ratified by the end of 2008, thus entering into force on 1 January 2009. This plan failed however, primarily due to the initial rejection of the Treaty in 2008 by the first Irish referendum.

[3] Charter of Fundamental Rights of the European Union, OJEU C 303 of 14/17/2007.

[4] The Czech instrument of ratification was the last to be deposited in Rome on 13 November 2009.

particular to the universal service as a service of general economic interest (SGEI), with a view to assessing their impact on the "*status quo*".

While the Treaty does not impinge on the Postal Directive and the (renumbered) Treaty provisions dealing with internal market and competition law (State aid in particular), which are at the core of universal service regulation, there are three sections of the Treaty which set out key principles for action to promote "*effective services of general interest*" and provide the framework for future EU action in this respect. The increased EU significance of SGEIs might have an impact on the relationships between Member States and the EU, and between providers and users of universal postal service. In fact, the legal and political mandate contained in the Treaty and the protocol provides a clear benchmark for the scrutiny of the responsibilities of those associated with the provision of public services in the context of an "*effectiveness-driven*" legal framework: it may be argued that obstacles to the delivery of the universal service mission across the EU – or measures that seriously compromise their effectiveness – shall accordingly be removed.

II. The Lisbon Treaty, main institutional and procedural changes

Unlike the 2004 Treaty establishing a Constitution for Europe,[5] the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community is not a single and autonomous text. As its full title suggests, the Treaty of Lisbon amends, without replacing them, the Treaty on European Union and the Treaty establishing the European Community, the latter renamed Treaty on the functioning of the EU (FEU), given that the Union "*replace[s] and succeed[s] the Community*"[6]. Moreover, the Lisbon Treaty includes a series of protocols to be annexed to the treaties, as well as an annex which contains the tables of equivalence between the previous and the new numbering of the treaties, as both treaties have been completely renumbered following the adoption of the Lisbon Treaty. As for the protocols, they cover a wide range of topics, including, for what matters here, the application of the principles of subsidiarity and proportionality[7] and services of general interest.[8]

The Lisbon Treaty, whose stated aim is "*to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic*

[5] Treaty establishing a Constitution for Europe, OJEU C 310 of 16/12/2004.

[6] Article 1(3) Treaty on European Union, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJEU C 115 of 9/5/2008.

[7] Protocol No. 2 on the application of the principles of subsidiarity and proportionality, Treaty on the Functioning of the European Union.

[8] Protocol No. 26 on services of general interest, Treaty on the Functioning of the European Union.

legitimacy of the Union and to improving the coherence of its action",[9] provides for prominent institutional and procedural changes. It modifies the institutional structure of the EU, as well as its decision making process, by strengthening the legislative role of the European Parliament, increasing qualified majority voting in the Council of Ministers, and creating a long-term President of the European Council and a High Representative of the Union for Foreign Affairs and Security Policy to present a united position on EU policies. The Treaty also makes the Union's Charter of Fundamental Rights[10] legally binding.

Procedure-wise, co-decision - which "*prevents a measure being adopted without the approval of the Council and the European Parliament, and emphasizes the reaching of a jointly approved text*"[11] - has now become the "*ordinary legislative procedure*",[12] and qualified majority voting has been extended to new areas in the Council, enabling the legislative process to become less subject to unanimity and unilateral decisions than before.

Amongst other, the Lisbon Treaty has also introduced two important modifications to the rules governing infringement proceedings.[13] The changes concern cases of non-communication of transposition measures and cases for non-compliance with judgments of the Court of Justice of the EU (CJEU). While the main steps of the standard procedure laid down in Article 258 FEU have remained unchanged (letter of formal notice, reasoned opinion, referral to the CJEU), the Lisbon Treaty has introduced the possibility for the Commission to immediately propose pecuniary sanctions when referring a Member State to the CJEU for failure to notify to the Commission measures transposing Directives.[14] This possibility was so far only available following a judgment of the Court. The second modification introduced by the Lisbon Treaty speeds up the system of pecuniary sanctions (lump sum and/or penalty payment) in the event a Member State fails to comply with a judgement of the CJEU establishing an infringement:[15] in contrast with the previous infringement rules, the Commission has no longer the obligation to issue a reasoned opinion before the second referral to the CJEU.

[9] Preamble, Treaty of Lisbon.

[10] Charter of Fundamental Rights of the European Union, *see note 3*.

[11] Craig, Paul and Gráinne de Búrca. *EU Law, text, cases, and materials*, 4th Ed., 2008, Oxford University Press, p.113.

[12] Article 294 FEU. Co-decision is now extended into agriculture, fisheries, transport and structural funds, in addition to the whole of the previous 'third pillar' of justice and interior affairs.

[13] Articles 258 and 260 FEU (ex Articles 226 and 228 EC). The final decision on the imposition of the sanctions lies with the Court of Justice but the level is limited by what the Commission has asked for.

[14] Article 260(3) FEU.

[15] Article 260(2) first and second subparagraph FEU.

As for the impact of the Treaty on substantive law, the question which is at the centre of this paper is whether, and to what extent, the Lisbon Treaty affects postal services regulation and in particular the universal postal service's.

At the outset, it can be said that the new Treaty consolidates and develops existing EU law on most issues which are relevant for postal services regulation. In particular, as far as the functioning of the internal market[16] and competition are concerned, the Lisbon Treaty cannot be considered as bringing about significant changes, as it does not affect the existing "*postal acquis*", *i.e.*, the Treaty provisions and the related *corpus* of regulation and case-law (in particular the applicable EU decision making process, the Member States' margin of appreciation and the scope of the service under the relevant Directives). The following paragraphs will shortly review the postal "*acquis*" which is not affected by the Treaty (the Postal Directive and the renumbered Articles 106 and 114 TFEU[17]) and then look at the innovations brought along by the Lisbon Treaty provisions, with the view to assess their impact on postal services regulation.

III. Unchanged postal "acquis": the Postal Directive, Articles 106(2) and 114 FEU

From a legal perspective, the Postal Directive (Directive 97/67/EC,[18] as amended by Directives 2002/39/EC and 2008/6/EC)[19] and the (renumbered) Treaty provisions dealing with internal market and competition law (State aid in particular) will still be at the core of universal service regulation. The Lisbon Treaty has modified neither one nor the other.

The Postal Directive, and its interpretative case law,[20] established a complete regulatory framework for European postal services. As any EU Directive, the Postal Directive is binding as

[16] Freedom of establishment ruled by Articles 49 to 55 FEU (ex Articles 43 to 48 and 294 EC), freedom to provide services ruled by Articles 56 to 62 FEU (ex Articles 49 to 55 EC).

[17] Ex Articles 86 and 95 EC.

[18] Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJEU L 15 of 21/1/1998, p.14-25.

[19] Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, OJEU L 176 of 5/7/2002, p.21-25 and Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, OJEU L 52 of 27/2/2008, p.3-20.

[20] See, among others: CJEU, Cases C-340/99, *TNT Traco*, 17/5/2001, Rec. p. I-4109; C-240/02, *Asempre and Others*, 3/11/2004, Rec. p. I-2461; C-162/06, *International Mail Spain,* 15/11/2007, Rec. p. I-9911; C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia*, 18/12/2007, Rec. p. I-12175; Joined Cases C-287/06 to C-292/06, *Deutsche Post*, 3/6/2008, Rec. p. I-1243; and C-357/07, *TNT Post UK,* 23/4/2009, not yet published.

to the end to be achieved[21] and its provisions are applied at national level through domestic implementing acts. The Commission monitors and ensures the correct implementation of the regulatory framework and, where appropriate, proposes changes to this framework in order to achieve the Community's postal policy objectives. While the adoption of the Lisbon Treaty has no impact on the Postal Directive, in terms of both applicable procedure and content, it might become relevant for its transposition. If, as mentioned above, after a letter of formal notice and a reasoned opinion, the Member State concerned has not yet notified the transposition measure to the Commission, the Commission can not only refer the case to the CJEU but also immediately propose financial sanctions to be imposed upon the first judgment. It shall be noted that this provision applies not only to national transposition measures as such but also to all subsequent changes to the respective national legislation.

When it comes to the Treaty's provisions which are significant for postal services and SGEIs, two main "*branches*" of law are relevant, none of which affected by the Lisbon Treaty: competition law applies to undertakings in charge of SGEIs in receipt of public service compensation; and internal market law and the fundamental freedoms of establishment and to provide services apply to services (control of any obstacles to such freedoms which are not justified by an "*overriding reason relating to public interest*" and/or not necessary for the performance of the public service tasks, exclusive rights and special rights in the form of authorisation schemes).

The most prominent provision is Article 106(2) FEU (ex Article 86(2) CE), in the chapter on rules of competition applying to undertakings. Article 106(2) FEU provides that "*[u]ndertakings entrusted with the operation of services of general economic interest [...] 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*".

Just in the postal sector, the *Corbeau*[22] case gave the Court the opportunity to justify a restriction on competition for economic operators, "*in order to allow the holder of the exclusive right to perform its task of general interest and in particular to have the benefit of economically acceptable conditions.*"[23] The provision was also relied upon in the context of

[21] Craig and de Búrca, *see note 11,* p.85.

[22] CJEU, Case C-320/91, *Corbeau*, 19/5/1993, Rec. p. I-02533.

[23] *Ibid.* pt 16.

compensation granted by Member States to providers of SGEIs and has been the object of much contradictory case law. One of the core questions of the debate, as emphasized by the Court, was "*whether, and under what conditions, financial compensation granted by a Member State to an undertaking providing a public service should be regarded as State aid.*"[24] In the 2003 *Altmark* judgement,[25] the CJEU finally outlined the four conditions that shall be met for the compensation not to be regarded as State aid.[26] Otherwise, if one or more conditions are not satisfied, the compensation is State aid and is subject to the Commission's clearance under Article 106(2) FEU.[27] Following the *Altmark* judgment, the Commission issued the so-called *Monti Package*, which includes a Commission Decision,[28] a Commission Directive[29] and the *Community framework for State aid in the form of Public Service Compensation.*[30] The latter sets up some evaluation guidelines for all compensatory measures which would not fall under *Altmark* or under the Decision, and thus will have to be notified and approved by the Commission under Article 106(2) FEU. Article 106(2) FEU, the *Altmark* principles and the measures under the *Monti Package* will continue to apply, unchanged, to compensations for the universal postal service.

Similarly relevant for postal services regulation and similarly left unchanged by the Lisbon Treaty is Article 114 FEU (ex Article 95 CE). As part of the Treaty section on the approximation of laws, Article 114 FEU is a general legal basis aimed at the adoption of legislation necessary to the achievement of the internal market and it constitutes the legal basis of the Postal

[24] Opinion of Advocate-General Jacobs of 30/4/2002, in Case C-126/01, *GEMO*, 20/11/2003, Rec. p. I-13769, pt 4.

[25] CJEU, Case C-280/00, *Altmark*, 24/7/2003, Rec. p. I-7747. The case was triggered by a preliminary ruling concerning the grant of licenses to operate regular local bus services to Altmark Trans, a local bus transport operator receiving public subsidies. The German High Federal Administrative Court asked the Court to determine whether subsidies granted by public authorities to offset the cost of public service obligations imposed on an undertaking operating a local passenger service constitute State aid.

[26] The *Altmark* ruling establishes four conditions: 1. the undertaking must be explicitly made responsible for the provision of the SGEI; 2. the compensation calculation parameters must be objectively and transparently established beforehand; 3. the compensation must be limited to covering the costs of providing the SGEI; 4. the undertaking must be selected by public contract or the compensation established based on the costs of the average company, the latter being well-managed and appropriately-equipped to provide the SGEI. This final condition implies that the choice of company may not be made by means of a public contract procedure, as is the case of service concessions and the granting of special or exclusive rights. However, the notion of the average, well-managed company remains difficult to implement, as the Commission is yet to specify its content.

[27] The measures shall be notified to the Commission pursuant to Article 108(3) FEU. The Commission may authorise the notified measures under Article 106(2) FEU.

[28] Decision on the application of Article 86 of the Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest of 28/11/2005, OJEU L 312 of 29/11/2005, p.67-73.

[29] Commission Directive 2005/81/EC amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings of 28/11/2005, OJEU L 312 of 29/11/2005, p.47-48.

[30] Community framework for State aid in the form of public service compensation, OJEU C 297 of 29/11/2005, p.4-7.

Directive. As it was not modified by the Lisbon Treaty, Article 114 FEU's relevance should remain unchanged for further EU action in the postal sector.

IV. Innovations brought along by the Lisbon Treaty: Article 14 FEU, Article 36 of the European Charter of Fundamental Rights and Protocol 26 on SGIs

In contrast, the Lisbon Treaty brings about three major changes which affect SGIs in broad terms: Article 14 FEU that complements Article 16 EC by adding a statement that provides for secondary legislation, the binding value of the Charter of Fundamental Rights and a special protocol annexed to the Treaty (Protocol No. 26 on Services of General Interest), which sets out key principles for action to promote "*effective services of general interest*".

a. Article 14 FEU

Article 14 FEU is made up of two sentences: the first one corresponds to the original Article introduced by the Treaty of Amsterdam (Article 16 EC); the second sentence was introduced by the Lisbon Treaty and is likely to have an impact on SGIs regulation in the future.

Under the first sentence of Article 14 FEU, "*given the place occupied by services of general economic interest in the shared values of the Union [...], the Union and the Member States, each within their respective powers [...], shall take care that such services operate on the basis of principles and conditions [...] which enable them to fulfil their missions.*"

Before moving to the analysis of the newly added sentence, it is appropriate to review the impact of the first sentence of what is now Article 14 FEU. As recalled by Advocate-General Ruiz-Jarabo Colomer, "*[c]e texte a été inséré dans le traité CE par le traité d'Amsterdam, en plein processus de libéralisation de secteurs stratégiques, en raison de la «profonde inquiétude suscitée dans certains milieux sociaux par la dérive libérale à l'échelon européen»*".[31] While its text does not appear to confer explicit and directly enforceable rights in case of breach of the principles and conditions it refers to[32](under Article 16 EC, Member States and EU institutions "*shall take care*" that the services operate under the said principles and conditions), references to Article 16 EC have been made by the General Court (ex Court of First Instance) in several judgements, and by the Advocates-General before the Court itself. These references reflect

[31] Opinion of Advocate-General Ruiz-Jarabo Colomer of 20/10/2009, in Case C-265/08, *Federutility v. Autorità per l'energia elettrica e il gas,* case still pending, footnote No. 43, not yet available in English.

[32] Ross, Malcolm. "Promoting Solidarity: from Public Service to a European Model of Competition", in *Common Market Law Review*, vol. 44, 2007, p.1073.

diverging opinions. For example, in the *BUPA* case, the General Court referred to Article 16 EC as reflecting the division of powers between Member States and EU institutions in the determination of SGEIs obligations.[33] Other references to Article 16 EC were made by stating that "*[t]he importance of SGEIs for the European Union and the need to guarantee the proper functioning of those services has, moreover, been underlined by the insertion of Article 16 EC in the EC Treaty*".[34] The General Court also had the opportunity to limit the application of Article 16 EC which doesn't, in any way, "*give «carte blanche» for the grant of any kind of aid to public services undertakings*".[35] As for Advocates-General, several referred to the special importance of SGEIs in the EU "*as is now emphasized by Article 16 EC*".[36] Besides, Advocate-General Maduro stated that "*[w]hile Article 16 EC emphasises the need for guaranteeing the operation of services of general economic interest, it does not constitute a restriction on the scope of Article 86(2) EC [now 106(2) FEU], but instead provides a point of reference for the interpretation of that provision*".[37] However, the Court never cited Article 16 EC in any judgement. As a consequence, the overall reaction of the Court (General Court and Court, Advocates-General included) reflects the mixed reactions to the existence of Article 16 EC.

But there were not only judicial reactions to the adoption of Article 16.[38] At the academic level, while some authors referred to it as a mere instrument for the interpretation of Article 106(2) FEU, others were keener to link it to notions such as citizenship or solidarity. At the political level, the Socialist group at the European Parliament considered it as a "*political mandate*" in its proposal for a framework directive on SGIs. As for references in secondary legislation, Article 16 EC was inserted, in a reformulated way, as third recital of the Postal Directive (Dir. 2008/6/EC).[39] Overall, what appears to be broadly agreed upon is that the relevance of Article 16 EC, and therefore the first part of Article 14 FEU, is closely related to other provisions of the Treaties, and that it can be used as a "*yardstick by which other measures and acts can be judged*".[40]

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[33] General Court EU, Case T-289/03, *BUPA*, 12/02/2008, Rec. p. II-81, pt 167; see also Case T-8/06, *FAB v. Commission*, 9/10/2009, not yet published, pt 3.

[34] General Court, Case T-442/03, *SIC v. Commission,* 26/6/2008, Rec. p. II-1161, pt 196; and Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04, 22/10/2008, *TV 2/Danmark and Others v. Commission*, Rec. p. II-2935, pt 102.

[35] General Court, Case T-189/03, *ASM Brescia SpA v. Commission*, 11/6/2009, not yet published, pt 128.

[36] Opinion of Advocate-General Jacobs of 17/5/2001, in Case C-475/99, *Ambulanz Glöckner*, 25/10/2001, Rec. p. I-8089, pt 175.

[37] Opinion of Advocate-General Poiares Maduro of 10/11/2005, in Case C-205/03P, *FENIN v. Commission*, 11/7/2006, Rec. p. I- 6295, footnote No. 35.

[38] Ross, *see note 32*, p.1071.

[39] Dir. 2008/6/EC, Recital 3.

[40] Ross, *see note 32*, p.1072.

The debate on the significance of Article 16 EC is most likely to continue under Article 14 FEU, especially in the light of the second sentence that was inserted thereof: "*[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*".

This new provision introduces for the first time a generally-applicable legal basis for the adoption, under the ordinary legislative procedure (ex co-decision procedure), of EU regulations with regards to SGEI. This legal basis is different from that relating to the internal market and on which the sector-based Directives relating to the liberalisation of network SGEI are based (*i.e.,* Article 114 FEU).[41] It focuses its attention on the economic and financial conditions necessary for the performance of the particular tasks assigned to the SGEI and requests that the European Council and Parliament establish regulations on that matter. This, of course, shall cover public service compensation as well as governance issues, assignment of exclusive and special rights being necessary for the provision of SGEIs which are financially accessible to users and which have guaranteed financial continuity.

Some have already called for the adoption of a European legal framework for public services based on Article 14 FEU[42] in "*order to consolidate the public authorities' perimeter for action at national, regional and local level and ensure the legal consistency of powers and definitions within this perimeter when, over the years, the liberalisation of various public service networks has been based on different rules*". Such new legal framework should provide a genuine "package" of consistent and innovative legislation on the shortfalls in matters regarding, amongst other, the financing of SGEIs, means for action and obligations for local communities and public authorities, conditions of the application of Article 106(2) FEU, concession contracts and public-private partnerships. As to the concrete impact of this provision, while it grants a new legal competence to the European Parliament jointly with the Council, it shall be reminded that ordinary legislative procedure implies a proposal from the European Commission and that such a proposal depends entirely on political evaluations. As a matter of fact, the Commission's ultimate position on the need for a transversal legislative framework for SGIs remains to be seen.

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[41] European Economic and Social Committee, Opinion on services of general economic interest: how should responsibilities be divided up between the EU and the Member States?, 4/11/2009, TEN/389, pt 1.5.

[42] See European Liaison Committee on Services of General Interest, "Challenges of the European elections of June 2009", European Seminar at the Committee of the Regions, November 2008, http://www.celsig.org/documents/docsCELSIG/SemCELSIG2008final_EN.pdf.

Indeed, shortly after the Lisbon Treaty was agreed upon in 2007, the Commission concluded that the adoption of a framework directive on SGIs – which, under the Lisbon Treaty, would be a regulation in application of Article 14 FEU – was made unnecessary by the very existence of Protocol 26 of the FEU.[43] The Commission gave its opinion on the interpretation of the provision on SGIs in the Lisbon Treaty in a Communication where it expressed its intention to "*continue to consolidate the EU framework applicable to services of general interest [...] providing concrete solutions for concrete problems where they exist*",[44] underlining its preference for a sectoral and case-by-case approach on SGIs. Such a position was widely understood as the Commission's unwillingness to propose any general legislation on SGIs.[45] However, a recent statement of the President of the Commission Barroso appears to suggest different approach, at least in terms of political inclination. At the occasion of its re-election as head of the Commission in September 2009, in fact, he declared before the EP plenary that, as SGIs fulfil an essential function in our model of a European society, he was "*ready to work with the European Parliament to develop a quality framework for SGIs*".[46] Therefore, and to the extent that such quality framework is indeed developed, it might well be that Article 14 FEU will have a deep impact on the definition, nature, and functioning of SGIs. It shall be recalled, incidentally, that a regulation is a legal provision directly applicable and enforceable at both EU and national levels.

b. Article 36 Charter of Fundamental Rights

The second innovation brought along by the Lisbon Treaty is Article 36 of the European Charter of Fundamental Rights. It refers to access to SGEIs by stating that "*[t]he 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 36 is not new. The innovation consists in the fact that the Lisbon Treaty is the first EU Treaty to refer directly to the European Charter of Fundamental Rights, which was formally

[43] Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions accompanying the 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, 20/11/2007.

[44] *Ibid.* pt 4.

[45] See, for example: Sénat, *Rapport d'information sur les SIG après le Traité de Lisbonne*, 4/6/2008, p.16; House of Commons, House of Commons, *European Scrutiny – Eight report*, 16/1/2008, Part 8 Services of general interest, pt 8.13; Wolf Sauter, *"Services of general economic interest and universal service in EU law"*, in *European Law Review*, vol. 33, April 2008, p.173.

[46] Durão Barroso, José Manuel. Passion and responsibility: Strengthening Europe in a Time of Change, 15/9/2009, Speech/09/391.

adopted and signed by all EU Member States in December 2000 and adapted in December 2007. According to Article 6, par. 1 EU, in fact, "*[t]he 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 in Strasbourg on 12 December 2007, which shall have the same legal value as the Treaties*".

However, the reference to the Charter in Article 6 EU does not necessarily mean that Article 36's impact on SGIs will be modified. The lack of legally binding force did not mean that the Charter was ignored until the Lisbon Treaty. As a political document which expresses the aspirations of the EU institutions and the Member States as regards the level of fundamental rights protection in the EU, it has indirectly influenced the EU action already. Indeed, since its adoption, it was taken into account by the CJEU and the other institutions as an "*important but non-binding form of legal guidance on the existence and identity of the fundamental rights which are protected as part of EU law*".[47] Increasing reference was also being made to the Charter in the EU Courts. For instance, Article 36 of the Charter was referred to by Advocates-General as underlying the importance of SGEIs in the EU beside Article 16 FEU.[48]

It is therefore likely that the introduction of a reference to the Charter in the Lisbon Treaty will hardly result in a modified or reinforced protection of fundamental rights thereof. Access to SGEIs as provided for in national laws and practices, in accordance with the Treaties, will thus continue to be recognised and respected in order to promote the social and territorial cohesion of the Union.[49] At most, it can be predicted that references will increasingly be made to the Charter both before and by the CJEU.

c. Protocol 26 on SGIs

Protocol 26 is probably the most significant innovation in the Lisbon Treaty with regards to SGIs.

First, it covers all SGIs, which is the first time for a provision of the Treaty,[50] and clarifies the notion of non-economic services of general interest (NESGIs). Although these notions have

[47] Craig and de Búrca, *see note 11,* p.413.

[48] See Opinion of Advocates-General Alber of 17/5/2001, in Case C-340/99, *TNT Traco,* see *note 20*, pt 94; and Jacobs in Case C-126/01 *see note 24*, pt 124.

[49] For an overview of the debate on the legal value of the Charter of fundamental rights before the adoption of the Lisbon Treaty, see Craig and de Búrca, *see note 11,* p.412-418 and cited references.

[50] According to Article 51 EU, "*the Protocols and Annexes to the Treaties shall form an integral part thereof*". Therefore, they have equal weight to the Treaty articles, and Protocol 26 on SGIs has the same legal value as the other SGIs-Treaty related provisions (*i.e.,* Article 106(2) FEU and Article 14 FEU).

already been used at EU level (*e.g.,* in communications, directives and judgements),[51] they did not have any standing at Treaty level yet. Until the entry into force of the Lisbon Treaty, primary legislation only referred to SGEIs, which mirrors the fact that the EU was built on economic integration and conceived as a common market and then a single market, with the gradual establishment of an internal market. As time passed, it has been progressively recognised that SGIs should not necessarily be seen as restrictions to the functioning of the internal market (neither against nor external to it), and could be considered as "*important for our European model of Society*".[52] The evolution and the change of paradigm are remarkable and it looks like the adoption of a Protocol on SGIs constitutes an integral part of it.

Second, the Protocol takes on an operational nature in that its provisions, which are divided into two parts: Article 1 on SGEIs, and Article 2 on NESGIs, are an interpretation of the '*shared values'* of the EU with regards to SGEIs.

As far as postal services are concerned, being these services economic in nature, the provisions of Article 1 are central to the analysis of the impact of the Protocol, and therefore of the Treaty, on the universal postal service.[53] Article 1 states that *"[t]he shared values of the Union in respect of [SGEIs] within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular"*: (i) the role and discretion of national, regional and local authorities in providing, commissioning and organising SGEIs; (ii) the diversity between various SGEIs and the differences in the needs and preferences of users; and (iii) a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

It has been argued that this provision conveys a clear political message to both Member States and the EU institutions, by putting emphasis on three main elements: the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organizing SGEIs as closely as possible to the needs of the users; the diversity between SGEIs

[51] The notion of services of general interest may be found in the Commission Green Paper on services of general interest (COM(2003)270 final, 21/5/2003), which states that the term "services of general interest" which is "*derived in [Union] practice from the term «services of general economic interest», which is used in the Treaty [...] covers both market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations*". The Green Paper also defines universal service as "a set of general interest requirements ensuring that certain services are made available at a specified quality to all consumers and users throughout the territory of a Member State, independently of geographical location, and, in the light of specific national conditions, at an affordable price". The Services Directive also makes a distinction between SGEIs and Non-Economic SGIs (Dir. 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJEU L 376 of 27/12/2006, p. 36-68, Article 2, par. 2, *a*).

[52] Durão Barroso, *see note 46.*

[53] Article 2 of the Protocol states the following: *"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".*

and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations; and a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

However there is no widely shared view on whether Protocol 26 - and Article 1 thereof - provides a truly useful framework for action[54] and diverging positions have been expressed in this respect.

The Commission, among the first institutions to issue a public document on the question, stated that, by spelling out the role of the Union, clarifying the principles and setting out the common values underpinning EU policies, the Protocol not only brings "*the necessary clarity and certainty to EU rules*", but also "*provides a coherent framework that will guide EU action*", and "*serves as a reference for all levels of governance*".[55] The Commission's view on the value of the Protocol is to be read against the background of its position on SGIs, mentioned above, which prefers a case-by-case approach to the adoption of generally applicable rules. In other words, in the Commission's view, the Protocol provides a precise and coherent enough reference that does not call for the adoption of any other general rule. In this respect, it is true that the President of the Commission declared himself in favour of the development of a "*quality framework for SGIs*". However, this does not necessarily reflect a change in the Commission's appreciation of the legal value of the Protocol, given that it is still possible to develop a "*quality framework*" through sector-specific and issue-specific actions.

On the other hand, not all institutions agree with the Commission on the value and impact of the Protocol. The position of the European Economic and Social Committee (EESC),[56] for example, is different. While it shares the Commission's view on the value of the Protocol (it "*is not just an interpretative declaration on the Union's treaties and common values regarding SGIs; rather, it is a set of operating instructions aimed at the Union and its Member States*"),[57] the EESC deplores that SGIs still face uncertainty as to (i) "*the respective powers and responsibilities of the Union and the Member States and the local authorities*", and (ii) "*the economic or non-economic character of services, which determines the body of law by which*

[54] For a general approach to the value of the Protocol, see: Sénat, *Rapport d'information sur les SIG après le Traité de Lisbonne*, 4/6/2008, p.16.

[55] Commission Communication on "A single market for 21st century Europe", *see note 43.*

[56] European Economic and Social Committee, Opinion on Services of general economic interest: how should responsibilities be divided up between the EU and the Member States?, 4/11/2009, TEN/389.

[57] *Ibid.* Recital 1.3.

they are governed".[58] Such uncertainty calls for the adoption of legislative initiatives that will provide the requested clarity and guarantees on the basis of Article 14 FEU.

National institutions, especially chambers of national Parliaments, have also analysed the situation of SGIs on the basis of the Lisbon Treaty and expressed their opinion thereof. The French *Sénat* highlighted the fact that the main impact of the Protocol on SIGs is that they have become a "*catégorie juridique à part entière*".[59] More incisively, the UK House of Lords[60] is of the opinion that there is no need to complement the Protocol with a general rule. It emphasizes the overall SGIs provisions of the Treaty and concludes that, whereas "*Article 14 [FEU] gives the EU greater powers to put in place EU level legislation on SGEIs, however it is balanced by the Protocol, which underlines the primary role of MS in organizing SGEIs on their territory*".[61]

On whether the Protocol is clear and precise enough to make the adoption of a complementary general law redundant, it is hard to agree with the position of the Commission. Except for the statement on shared responsibility between Member States and the EU institutions, the existing ambiguities on the notion of SGIs, and on the sharing of the competences, remain. The "*interpretative provisions*" of the Protocol provide no further definition, or precise indication, at a time where the progressive evolution of SGIs and the increasing public debate have shown their complexity. In the absence of EU level legislation, those ambiguities and gaps will be filled in by the Courts with the case law. However, as far as the universal postal service is concerned, this uncertainty will affect neither its definition, nor its functioning, due to the unambiguous framework already provided by the existing sectoral legislation. Similarly, while the lack of definition of SGIs and the absence of criteria for the distinction of SGEIs and NESGIs are also likely to have an impact on the significance of the Protocol, this is of little relevance for postal services.

V. Conclusions: increased responsibilities in the field of universal postal service

To conclude, the Lisbon Treaty offers three innovations that are potentially relevant for the future regulation of universal postal service: a generally-applicable legal basis relating to SGEIs giving the European Council and Parliament responsibility for establishing and setting the

[58] *Ibid.* Recital 2.9.

[59] Sénat*, see note 54*, p.14.

[60] House of Commons, *European Scrutiny – Eight report*, 16/1/2008, Part 8 Services of general interest.

[61] *Ibid.*

principles and conditions of the performance of the particular public service tasks assigned to SGEI; a recognised binding force of the Charter of Fundamental Rights which acknowledges the right to access to SGEIs; and an innovative protocol on SGIs which deals with both SGEIs and NESGIs whilst interpreting the notion of '*shared values'* for the EU.

It has been argued above that, although it modifies the applicable rules on SGIs, the Lisbon Treaty is not expected to have any "express" effect on currently applicable EU law and regulation governing the universal postal service.

However, it cannot be denied that, while existing sectoral rules on the universal service remain unaffected, its legal Treaty basis is reinforced. By introducing the principles underlying the nature and definition of SGIs in primary law, Member States have settled for a general strengthening of SGIs. Whatever legal value is attributed to Protocol 26, the Treaties now formally include its provisions, Member States are bound to comply with it and the Protocol can provide interested parties with new grounds for action to pursue their "universal service related" interests. Within this context, the increased responsibility of Member States and the EU institutions for the achievement of the "*shared values*" of the Union in respect of SGEIs may be measured against the benchmark of Protocol 26.

In fact, as stated by Article 1 of the Protocol, Member States and the EU institutions are responsible, within the limit of their respective competences, under the EU Treaties provisions and therefore under the EU scrutiny, of the shared values of the Union including "*a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights".*

With full postal market liberalisation due in 2011, financial security and social equity are now at the heart of the universal service debate at the national (and the EU) level. Under-compensation of the universal service costs might result in a failure to provide the universal postal service at the standards required by the Protocol. Were the effectiveness of universal service provision be compromised, for example because of unsatisfactory financing mechanisms to ensure that it remains financially viable in a competitive market, Protocol 26 might be relied upon to claim that obstacles to the delivery of the universal service mission across the EU – or measures that seriously compromise their effectiveness – shall accordingly be removed.

Universal service providers could rely on Protocol 26 to put their own Member State under the EU scrutiny for the provision of the universal service with "*a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights*". The

Commission could be asked to take action against the national authorities for breach of their obligations under Article 258 FEU (ex Article 225 CE), though it remains to be seen whether Protocol 26 alone would constitute a suitable legal basis for action against a Member State which failed to provide the universal postal service in accordance with the "*shared values*" listed in its Article 1. At national level, Protocol 26 could also be used in the course of actions before national courts by customers who receive an unsatisfactory universal service provision against the designated provider. However, if the provisions of Protocol 26 can be used as a supporting argument, their application as core ground for action depends on whether it is deemed to be directly applicable. This will be a matter for the CJEU in the near future.

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