# The European Commission's Understanding of "Provider Neutrality"

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**Abstract:** The European Commission (EC) does not take into account the profit or not-for-profit nature of services when developing policies relevant to them. Indeed, whereas the EC does differentiate between the public and private sectors and recognise the growing role of the latter in the provision of what traditionally would have been public services, it does not take into account whether the service is for-profit or not-for profit. The EC stresses the specific nature of social services which address key societal needs, yet does not mention the fact that a majority of the private social services sector in the EU is not-for-profit, and consequently of a different economic nature from the for-profit sector and many other services of general interest.

The paper analyses the Commission approach towards service providers and tries to identify the legal reasons at the origin of its neutral approach. It focuses on the EC's understanding of provider neutrality, trying to get a solid understanding of the EC's vision, where its understanding originates from, and in particular how it takes into account the for-profit/not-for-profit divide and why.

The analysis that follows is based on desk research, interviews and discussions.

# Introduction

EASPD, the European Association of Service providers for Persons with Disabilities, is a not-for-profit organisation that represents over 10,000 social service provider organisations across Europe and disability. Its main objective is to promote equal opportunities for people with disabilities through effective and high-quality service systems. In the context of its advocacy activity throughout Europe, it emerged that the European Commission (EC) does not take into account the profit or not-for-profit nature of services when developing policies relevant to them. Indeed, whereas the EC does differentiate between the public and private sectors and recognise the growing role of the latter in the provision of what traditionally would have been public services, it does not take into account whether the service is for profit or not-for profit.

Indeed, as it considers that these "services are of an economic nature, the internal market and competition rules apply to them", insofar as they are provided as based on the EU's Quality Framework. However, it is important to note that the EC stresses on the specific nature of social services which address key societal needs, yet does not mention the fact that a majority of the private social services sector in the EU is not-for-profit, and consequently of different economic nature from the for-profit sector and many other services of general interest.

Therefore, the need emerged to analyse the issue in greater depth.

The analysis that follows focuses on the EC's understanding of provider neutrality, in particular with regard to the social service provider sector. The objective is to get a solid understanding of the EC's vision of provider neutrality, where its understanding originates from, and in particular how it takes into account the for-profit/not-for-profit divide and why. It has also examined the EC's understanding of the importance of the not-for-profit social services sector in the European economy.

# 1. Provider Neutrality

According to the European Centre for Not-for-Profit Law[1] the term "not-for-profit organizations" is used as a broad-based qualification that encompasses all organisations that do not have as main their aim to make profits for private gain. Among them it is possible to include various types of organisations as charities, non-profits, non-governmental organisations (NGOs), private voluntary organizations (PVOs), civil society organisations (CSOs), etc. It is possible that such an organization will make a profit, but that is not the principal purpose for which it is organised and operated. Nor is its purpose to distribute any portion of any profit for private gain. This concept includes the social enterprises, even though the entrepreneurial dimension gives them a more restricted dimension[2].

The concept of neutrality is known in competition law and it is usually considered in terms of competitive neutrality: no business should be advantaged (or disadvantaged) solely because of its ownership. In this sense competitive neutrality means that state-owned and private businesses compete equally on a level playing field. This is considered essential to use resources effectively within the economy and thus achieve growth and development.

This concept is not deeply developed in the EC literature though a number of external organisations have published views on it[3]. Here the concept of

[1] http://www.ecnl.org/index.php?part=04notforprofit

[2] At EU level it is recognised that the Social Enterprise has entrepreneurial dimension, i.e. engagement in continuous economic activity, which distinguishes social enterprises from traditional non-profit organisations/ social economy entities (pursuing a social aim and generating some form of self-financing, but not necessarily engaged in regular trading activity). Common Characteristics of Social Economy Enterprises are:
- They **contribute to more efficient market competition** and encourage solidarity and cohesion.
- Their **primary purpose is not to obtain a return on capital**. They are, by nature, part of a stakeholder economy, whose enterprises are created by and for those with common needs, and accountable to those they are meant to serve.
- They are run generally in accordance with the principle of **solidarity** and **mutuality** and **managed by the members** on the basis of the rule of **"one member, one vote"**.
- They are **flexible** and **innovative** (they meet changing social and economic circumstances).
- They are based on **active membership** and commitment and very frequently on voluntary participation.

See "*Social enterprises: report presents first comparative overview*" available at http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=2149&furtherNews=yes&preview=cHJldkVtcGxQb3J0YWwhMjAxMjAyMTVwcmV2aWV3

[3] The OECD has analysed the concept of competitive neutrality in the study *Competitive Neutrality: Maintaining a level playing field between public and private business*, available at http://www.oecd.org/competition/competitiveneutralitymaintainingalevelplayingfieldbetweenpublicandprivatebusiness.htm. The concept of competitive neutrality has been also analysed by the European Federation of Public Service Unions whose view is available at

neutrality is considered from a different angle. In particular, the interest focuses on the European Commission's approach towards the (social) service providers. In this sense, it seems closer to the concept of regulatory neutrality.

The concept of regulatory neutrality comes from the origin of the Internal Market when the main objective of the Community was the creation of an 'area without internal frontiers' (Article 26(2) TFEU). In this context, the regulatory neutrality paradigm aimed at ensuring that the correct functioning of competition among private businesses was not distorted by national regulations. Here also, the ultimate strategic goal was the creation of a so-called 'level playing field', an idealised situation in which all economic agents competing within the European Union would be subject to identical regulatory conditions throughout the internal market[4]: "*The regulatory ideal of the common market consisted in the creation of a 'level playing-field' on which all economic actors could operate under equal competitive conditions, and across which goods, persons and services could be exchanged unhindered*"[5].

This approach toward regulations and economic operator has characterised the EU in its development and it can be considered among the elements at the origin of the European Commission neutrality attitude towards private operators.

# 2. The European Commission and its approach towards service providers

The European Commission is one of the main institutions of the European Union. It represents and upholds the interests of the EU as a whole. It drafts

http://www.epsu.org/IMG/pdf/TU_Comments_on_CN_17Feb2012.pdf; The Confederation of British Industry (CBI) analysed the topic in *Competitive neutrality in UK public service markets*, available at www.tsoshop.co.uk/bookstore.asp?FO=1202697&DI=561939; the UK Office of Fair Trading ("OFT") also published a working paper in July 2010, *Competition in Mixed Markets: Ensuring Competitive Neutrality*.

[4] Saydé, A., One law, two competitions : an enquiry into the contradictions of free movement law, in Cambridge yearbook of European legal Studies 2010/2011 (2011), v. 13, p. 365-413.

[5] Dougan, M., 'Minimum Harmonization and the Internal Market' (2000) 37 Common Market Law Review 853, 860.

proposals for new European laws. It manages the day-to-day business of implementing EU policies and spending EU funds. It is composed by 28 Commissioners (1 President, 7 Vice-Presidents and 20 Commissioners), appointed every five years. Each Commissioner is assigned responsibility for specific policy areas by the President.
According to the Treaty on the European Union (article 17 TEU), the European Commission has the following functions:

- It **initiates legislation**. It makes proposals for European laws, which are sent to the Council and European Parliament for amendment and approval.
- It **acts as a guardian** of the EU treaties. It ensures that EU legislation is applied by all Member States. It can institute proceedings against Member States or businesses that fail to comply with EU law.
- It **acts as an executive body** - it manages policies and the annual budget.
- It **represents the EU on the international stage**. It negotiates trade and co-operation agreements with non-EU countries.

As the executive body of the European Union, the EC therefore exercises an administrative role. In particular, the Treaties confer upon the Commission extensive powers of execution to ensure the attainment of the objectives set out in them: the good functioning of the Single Market and of the Economic and Monetary Union, control of the rules of competition, the management of the budget of the Union and, most importantly, the implementation of all the legal acts of the decision-making authorities[6].
As an administrative body, the EC actions should be inspired by the principles that govern the public administration and the activity of its civil service. Among those principles it is possible to find the principle of neutrality.
In particular, article 298 of the TFEU states that "*in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration*". In this sense, independence can be considered as the administrative action should be inspired by neutrality and free from external influences. Furthermore, article 41 of the Charter for Fundamental Rights (CFR) states that "*every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union*". Here, fairness and impartiality comprehends the principles non-discrimination

[6] http://www.europedia.moussis.eu/books/Book_2/2/4/1/2/index.tkl?term=&s=1&e=10&pos=35&all=1

and equal treatment[7].
The obligation to act in an independent and impartial way is also stressed by the Staff Regulation, according to which the action of the officials should be independent and neutral and inspired by the principle of non-discrimination[8].
Furthermore, the same principles are mentioned in the European Code of Good Administrative Behaviour[9] in its articles 5 (absence of discrimination)[10] and 8 (impartiality and Independence)[11].

It is therefore possible to say that neutrality is part of the "code of conduct" that inspires the action of the European Commission as an administrative body. This is further confirmed by the fact that the EC also acts as "guardian of the Treaties" and its action should be characterised by neutrality towards private and public operators[12].
The principles of independence and neutrality are also shared by most of the Member States' administrative systems.
In France, impartiality is a general principle of law that applies to all administrative bodies (*Conseil constitutionnel Décision n° 89-260 DC du 28 juill. 1989;* Conseil d'État 29 April 1949, Bourdeaux, Rec. P. 188).
In Belgium as well, neutrality can be considered a general principle of law. Although the principle is not mentioned as such in the Constitution, it is

[7] EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union, article 41, p. 328, http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf
[8] Rules of Procedure of the Commission [C(2000) 3614] - OJ L 308, 8.12.2000, p. 26–34, Annex, Code of Good Administrative Behaviour for Staff of the European Commission in Their Relations with the Public, Non-Discrimination and Equal Treatment: *The Commission respects the principle of non-discrimination and in particular, guarantees equal treatment for members of the public irrespective of nationality, gender, racial or ethnic origin, religion or beliefs, disability, age or sexual orientation. Thus, differences in treatment of similar cases must be specifically warranted by the relevant features of the particular case in hand*.
[9] The Code of Good Administrative Behaviour is a document elaborated by the European Ombudsman that collects the principles and values to which the European civil service is committed. The Code helps to ensure that the principles of good administration are put into practice on a daily basis and that the Commission adheres to its duty of service to the European public. It sets out the principles that guide administrative conduct. http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1
[10] Article 5, *absence of discrimination*, of the European Code of Good Administrative Behaviour states that: "*1. In dealing with requests from the public and in taking decisions, the official shall ensure that the principle of equality of treatment is respected. Members of the public who are in the same situation shall be treated in a similar manner. 2. If any difference in treatment is made, the official shall ensure that it is justified by the objective relevant features of the particular case. 3. The official shall in particular avoid any unjustified discrimination between members of the public based on nationality, sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation*".
[11] Article 8, *impartiality and Independence*, of the European Code of Good Administrative Behaviour states that: *1.* "*The official shall be impartial and independent. The official shall abstain from any arbitrary action adversely affecting members of the public, as well as from any preferential treatment on any grounds whatsoever. 2. The conduct of the official shall never be guided by personal, family, or national interest or by political pressure. The official shall not take part in a decision in which he or she, or any close member of his or her family, has a financial interest*".
[12] As guardian of the Treaties, the Commission oversees the application of Union law under the control of the Court of Justice for the European Union. In this sense it is responsible of the first steps of the infringement procedure (article 258 TFEU).

deduced from several articles (in particular, 19, 20 and 21). The Belgian *Conseil d'État* confirmed and clarified the neutrality principle in its Opinion No. 44521 (AG 20 May 2008), stating that it specifically concerns the exercise of the function of public service agents.

In Italy, for example, the principle of neutrality has a constitutional relevance as it is mentioned in the Article 97 of the Italian Constitution as the basic principle that should guide the action of the government and the administration. This principle concerns both the organisation and the activity of the public administration and can be considered a general principle that guides administrative life as a whole.

# 3. Jurisprudence of the European Court of Justice

From a different angle, the EC's neutral approach toward service providers corresponds to the European Court of Justice (ECJ) constant jurisprudence. According to the ECJ, only entities engaged in an economic activity can be considered to be undertakings, regardless of their legal status and the way in which they are financed[13]. As witnessed by several judgements, it seems that the ECJ opts for a broad concept of undertaking. More precisely, it considers that "*in the context of Community competition law the concept of an undertaking covers any entity engaged in any economic activity, regardless of the legal status of the entity or the way in which it is financed*"[14]. This should be read together with the fact that an economic activity is considered "*as any activity consisting in offering goods and services on a given market* ", which

[13] Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451.

[14] In Pavlov (Joined cases C-180/98 to C-184/98, ECR 2000 Page I-06451), asked to judge the nature of a Pension Fund for Medical Specialists in the Nederland, the ECJ recognised its non-profit making nature but confirmed that it carried out an economic activity since it handled the contributions and benefits and functions on the basis of capitalisation and, therefore, was an undertaking within the meaning of the Treaty. Similarly, in *Fédération Française des Sociétés d'Assurance and Others* (C-244/94, [1995] ECR I-4013, paragraph 14) the Court held that a non-profit-making body which managed an old-age pension scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalisation, was an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty. Optional membership, application of the principle of capitalisation and the fact that benefits depended solely on the amount of the contributions paid by beneficiaries and on the performance of the investments made by the managing body meant that that body carried on an economic activity in competition with life-assurance companies. Neither the social objective pursued, nor the fact that the body was non-profit-making, nor the requirements of solidarity, nor the other rules concerning, in particular, the restrictions to which it was subject in making investments altered the fact that the managing body was carrying on an economic activity.

confirms that the aim of the court is to consider the word "undertaking" as having a broad meaning[15].

In this sense, the status of an entity under national law is not crucial as the only relevant element is whether it carries out an economic activity. Furthermore, it is not important whether the entity is set up to generate profits or not, since non-profit entities can offer goods and services on a market too[16]. Where this is not the case, non-profit providers remain entirely outside state aid control as their activity can be considered as non-economic.

This consideration does not change in cases where the activity carried out has a social dimension. As mentioned by the Court of Justice on various occasions, the social purpose of an organisation is not, in itself, sufficient to preclude its activity from being classified as an economic activity for the purposes of the Treaty provisions on competition[17].

[15] See "*Latest developments in the European Court of Justice's. Case Law on Pension Funds. Conflicts and limitation matters of Competition Law and Social Insurance: a fragile balance. Pension Funds: "undertakings" sui generis?*" Notes on judgement of 12 September 2000, C-180/98 to C-184/98, Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten.
http://www.dgjv.de/documents/a_pavlov_english.html

[16] Case C-244/94 FFSA and Others [1995] ECR I-4013; Case C-49/07 MOTOE [2008] ECR I-4863, paragraphs 27 and 28: "*As regards the effect that the fact that ELPA does not seek to make a profit may have on that classification, it should be noted that, in Case C-222/04 Cassa di Risparmio di Firenze and Others [2006] ECR I-289, paragraphs 122 and 123), the Court stated that the fact that the offer of goods or services is made without profit motive does not prevent the entity which carries out those operations on the market from being considered an undertaking, since that offer exists in competition with that of other operators which do seek to make a profit. That is the case of activities engaged in by a legal person such as ELPA. The fact that MOTOE, the applicant in the main proceedings, is itself a non-profit-making association has, from that point of view, no effect on the classification as an undertaking of a legal person such as ELPA. First, it is not inconceivable that, in Greece, there exist, in addition to the associations whose activities consist in organising and commercially exploiting motorcycling events without seeking to make a profit, associations which are engaged in that activity and do seek to make a profit and which are thus in competition with ELPA. Second, non-profit-making associations which offer goods or services on a given market may find themselves in competition with one another. The success or economic survival of such associations depends ultimately on their being able to impose, on the relevant market, their services to the detriment of those offered by the other operators*".

[17] See, Case C-355/00 Freskot AE v. Elliniko Dimosio [2003] ECR I-5263 paragraph 77;Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451, paragraph 118; Case C-218/00 Cisal [2002] ECR I-691, paragraph 37

# 4. The principle of non-discrimination of economic operators

We have seen that neutrality and independence are part of the "code of conduct" of the European Commission and its administration.

However, when developing relevant policies for the service sector, the action of the European commission is also inspired and influenced by the principle of *equality of treatment* and the *non-discrimination of the economic operators*. These principles are interesting as the latter one is not specifically mentioned in the Treaty but is the development of the principles of non-discrimination, and the former one was initially introduced to fight gender discrimination becoming a fundamental principle of European law which applies to all aspects of life in society[18].

So, the principles of non-discrimination and equal treatment were initially thought of as instruments to eliminate inequalities among EU citizens as well as to fight against discrimination. However, in the context of public procurement legislation they "evolved" as principles of equality of treatment and non-discrimination of the economic operators in order to prevent discrimination against bidders from other Member States and allow all bidders to get equality of opportunity when submitting their tenders[19].

These evolved principles can be considered nowadays as a "general principle of

[18] Article 2 TEU: *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*. Article 10 TEU: *In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*. Article 18, 1, TFEU: *Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*. Article 21 CFR: *1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited*.

[19] See T-461/08 Evropaïki Dynamiki v European Investment Bank, ECR 2011 II-06367, where the Court of First Instance states that *it has been consistently held that the contracting authority is required, at each stage of the tendering procedure, to act in accordance with the principle that tenderers should be treated equally*".

EU law" able to be taken as a parameter to interpret EU legislation[20]. Derogations from these principles are admitted if justified on grounds of public morality, public order or security or pursuance of another objective of general interest such as safety of workers or environmental protection[21], and if they fulfil the proportionality test and must be apt to pursue the objective at stake and not go beyond what is necessary to obtain it[22].

# 5. The European Commission's view on profit/not-for-profit making and the new Public Procurement directive

In the previous paragraphs we have noticed that the European Commission approach towards service providers is in principle inspired by neutrality. This is due to its code of conduct and other important principles that guide its action.

[20] from Briefing 3: *The guiding principles of public procurement transparency, equal treatment and proportionality*, Edited by Clentearth, http://www.clientearth.org/reports/procurement-briefing-no-3-guiding-principles-equal-treatment-transparency-proportionality.pdf

[21] Case C-120/78, Rewe-Zentral AG ('Cassis de Dijon') [1979] ECR 649 and Case 302/86, Commission v Denmark ('Danish bottles') [1988] ECR 4607.

[22] This is well explained in the whereas 46 of the Directive 2014/24 EU explain: "*Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: "the lowest price" and "the most economically advantageous tender". To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation - established by case-law - to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Contracting authorities may derogate from indicating the weighting of the criteria for the award in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases, they must indicate the descending order of importance of the criteria. Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs - defined in the specifications of the contract - of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong*".

This explains why, while the EC recognise the specific nature of social services that address key societal needs, it does not mention that a majority of the social services providers are not-for-profit.

However, in certain situations the EC does discriminate between non-profit and for-profit companies. This happens in particular in a number of areas such as operating subsidies for NGO umbrellas and PROGRESS[23] and EaSI[24] grants for social experimentation. In this sense it explicitly recognises the special qualities of non-profit distribution and participation, since being a non-profit making organisation is one of the characteristics required for the applicants.
As we have seen, not-for-profit is a broad-based qualification that encompasses all organisations that do not have as their main aim making profits for private gain. Among them we can include social enterprises and other organisations which are part of the Social economy, including many social service providers.

Even though it is not possible to discriminate in favour of specific types of operators, there are hints that suggest a sort of favour, in certain sectors, towards organisations that have the characteristics of non-profit entities.

Analysing several EC documents it is possible to identify a sort of favour towards organisation with specific characteristics that seems to indirectly refer to the non-profit sector.

In particular, in the EC Social investment package[25] *Communication Towards Social Investment for Growth and Cohesion*[26] non-profit organisations are described as providers of a wide range social services on a substantial scale. In this context, social enterprises are seen as a complement of public sector efforts, and pioneers in developing new markets.

[23] The PROGRESS programme was a European 2007-2013 financial instrument supporting the development and coordination of EU policy in the five areas of Employment, Social inclusion and social protection, Working conditions, Anti-discrimination, Gender equality.
http://ec.europa.eu/social/main.jsp?catId=987&langId=en.

[24] EaSI is the new 2014-2020 programme for Employment and Social Innovation that supports Member States efforts in the design and implementation of employment and social reforms at European, national as well as regional and local levels by means of policy coordination, the identification, analysis and sharing of best practices.

[25] The Social Investment Package (SIP) is a series of non-binding documents adopted by the European Commission as a response to the economic crisis and whose aim is to foster Member States to maintain investment in social policy areas despite the current negative fiscal situations.
See more at http://ec.europa.eu/social/main.jsp?catId=1044

[26] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020, COM(2013) 83 final, http://eur-lex.europa.eu/procedure/EN/202419

In the Strasbourg declaration[27], it is recognised that social enterprises come in many shapes and sizes and take different legal forms across Europe but they have the following common characteristics:

- Earning income by trading;
- Having a social or societal objective of the common good as the reason for their economic activity, often in the form of a high level of social innovation;
- Profits being mainly reinvested with a view to achieving this social objective;
- A method of organisation or ownership system reflecting their mission, using democratic governance or participatory principles or focusing on social justice.

More interesting the approach of the 2013 Guide to Social Innovation where is pointed out that social enterprises devote their activities and reinvest their surpluses to achieve a wider social or community objective either in their members' or in a wider interest. However, it is also pointed out that it is not fully appropriate to refer to them as 'not for profit' as any enterprise needs to make a surplus in order to have a long-term future.

It is possible to say that at European level, the important role of social services and the role they play in improving quality of life and providing social protection are well recognised. It is also recognised that non-profit providers as well as voluntary workers often play an important role in the delivery of social services, thereby expressing citizenship capacity and contributing to social inclusion, the social cohesion of local communities and to intergenerational solidarity as well as to the economy. Not being driven by the maximisation of the profit, their activity is focused on the pursuit of their social aim and maximisation of their social values[28].

The social aspects of the European integration phenomenon have received recognition also in the Treaty. In particular, in the article 9 TFEU it is stated that "*in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of*

[27] The Strasbourg Declaration, which represents the views of various stakeholders from the social enterprise sector, is the final document of the two-day event that took place in the Alsatian city on 16 and 17 January 2014.
[28] *The Shadow State, A report about outsourcing of public services*, edited by Social Enterprises UK, available at http://www.socialenterprise.org.uk/uploads/files/2012/12/the_shadow_state_3_dec1.pdf

*employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health*".

This relevance has been taken into consideration in the recent reform of the European Public Procurement directive[29] where it is given more weight to social aspects with the aim of contributing to the implementation of social inclusion and innovation policies[30].

In particular, with this aim, in the new directive it is foreseen that the contract is awarded to the most economically advantageous tender to be identified in particular on the basis of the best price-quality ratio. This criterion takes into account such factors as the overall cost effectiveness, quality, environmental and social aspects, trading and delivery conditions.

The new procurement directive establishes rules that promote social entrepreneurship and social aspects. In particular, it foresees the application of a "light regime" that recognises the specific characteristics of social services by providing a list of "social and other specific services" that are not relevant for EU internal market rules if they are below the (higher) threshold of €750,000 (article 4 Directive 2014/21/EU).

Under the new discipline, public purchasers may now consider the process by which the goods, services and specific work they intend to purchase are produced.

Furthermore, the new procurement directive introduces measures that support social entrepreneurship. In particular this is the case of the reserved contract (article 20): It is possible to reserve public contracts for sheltered workshops or social businesses whose aim is the integration of persons with disabilities or other disadvantaged persons such as long-term unemployed people, former convicts, drug-addicts, and members of disadvantaged minorities. To take part in a sheltered contract, the percentage of disabled or disadvantaged persons employed has been reduced from 50% to 30% giving more room to enterprises that employ disadvantaged groups. Reserved contracts are also admissible, for

[29] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement replacing directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65–242

[30] European Commission, Public procurement reform. Fact sheet no 8: Social aspects of the new rules: http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-08-social_en.pdf . See also the Answer given by Ms Bieńkowska on behalf of the Commission on the occasion of the EU Parliamentary questions on the Reform of the law on social services in Asturias affecting the quality of social services provided to the 'third sector' and the population in general(E-000912/2015).

a maximum of 3 years, for non-profit companies with a public service remit based on employee participation.

Even before the reform, the social aspect in public procurement has long been analysed[31] and it is possible to find interesting examples in Europe.

Some interesting examples of social clauses in public procurement are offered by the housing sector[32]:

- An example of fruitful cooperation is that of the Zoia project in Milan, where a consortium of cooperatives won a public tender for a plot of land to build mixed use housing, including a high percentage of social housing. The tender also included rehabilitation of public spaces and social services in the area. The result is a revived neighbourhood that fosters social mix, exchange between residents, respect of the environment and natural resources as well as creativity.

- Another example in Örebro in Sweden where the contract for the refurbishment of a public housing neighbourhood required the tenderer to provide training and employment opportunities for the local residents, as well as achieving high energy efficiency standards.

However, the ECJ case C-549/13 pointed out an interesting element: if the procurement has a European dimension, social clauses are admissible but they cannot become a limitation to the free movement of services[33].

[31] Buying Social, A Guide to Taking Account of Social Considerations in Public Procurement, http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=978

[32] These examples were presented by Alice Pittini, Housing Europe, during the Conference on Social Economy held in Rome on the 17 and 18 of November 2014.

[33] In this case the point discussed was a Law of the Land of North Rhine-Westphalia (Germany) that, aiming at ensuring that employees are paid a reasonable wage in order to avoid 'social dumping', provided that certain public service contracts may be awarded only to undertakings which, at the time of the submission of the tender, have agreed to pay their staff a minimum hourly wage of € 8.62 for the performance of the service. The city of Dortmund, applying that law to a tender for a public contract relating to the digitalisation of documents and the conversion of data for its urban planning service, required that the successful tenderer guarantee a minimum wage of € 8.62 even for workers employed by a subcontractor established in another Member State (in this case, Poland) and who would carry out the work exclusively in that State. Appointed of this case, the Court of Justice replies that, in a situation such as that at issue in the present case, in which a tenderer intends to carry out a public contract by having recourse exclusively to workers employed by a subcontractor established in a Member State other than that to which the contracting authority belongs, the freedom to provide services precludes the Member State to which the contracting authority belongs from requiring the subcontractor to pay a minimum wage to workers.

# 6. Services of General Economic Interest

The issues analysed in the previous paragraphs are relevant under the state aid discipline and also touch the Service of General Economic Interest (SGEIs). In this sense, it is important to remind the specificity of public services as they differ from other services because public authorities have a responsibility to ensure their supply regardless of whether they are profitable in a free market. In recent decades these services have been more and more outsourced.

Services of General Interest (SGIs) are activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention. If the service consists in an activity of offering goods and services on the market, the SGI becomes Economic (SGEI) and the EU rules apply to it. Examples of SGEIs are the postal services, public emergency services, water supply, waste management, public service broadcasting, sectorial pension schemes, services provided by network industries (such as energy, telecommunications), and mooring services for vessels in ports[34].

The demand for such services and the way they are organised and provided has changed significantly over the years. Services that traditionally were delivered directly by the State have been outsourced by national, regional and local authorities, and are more and more provided by the private sector (profit or not-for-profit)[35]. As these services are generally of an economic nature, the internal market and competition rules apply to them, 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 (article 106, 2, TFEU)[36].

[34] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – A Quality Framework for Services of General Interest in Europe, COM(2011) 900 final,
http://ec.europa.eu/services_general_interest/docs/comm_quality_framework_en.pdf

[35] Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Quality Framework for Services of General Interest in Europe - COM/2011/0900 final.

[36] . V. Louis, S. Rodrigues, *Les services d'intérêt économique générale et l'Union européenne*, Bruylant, Bruxelles, 2006

SGEIs are generally provided by companies on the basis of concessions awarded to them for a fixed period of time (concession period), a concession being a sort of partnership between the public sector and a private company that has shown its added value in a specific area[37]. If the service does not generate sufficient revenues, compensation is provided by the public authority to enable the concession holder to realise a reasonable profit[38]. In general, based on the principle of conferral (Article 5 TEU), Member States are competent in the qualification of a service as of general economic interest, while the European Commission is competent in determining whether public service compensation granted to an undertaking entrusted with the operation of a SGEI constitutes aid and, if so, is compatible with the internal market[39].

Even under the SGEI discipline the question of the nature of the provider (for profit or not-for-profit) is marginal, as making a reasonable profit out of the compensation is considered admissible by the SGEI discipline and the ECJ jurisprudence.

However, SGEIs are generally services that should be ensured to all citizens at a reasonable price and that refers to a market where, if the forces operate alone, some deserving citizens would not be able to buy products and services at an affordable price[40]. In this sense the concept of SGEI is close to that of Universal Service Obligation (USO)[41]. In this field, the incomplete attribution of the

[37] European Commission, Concessions. Definition of a concession: ttp://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-12- concession-definition_en.pdf

[38] The Prohibition of Overcompensations to Services of General Economic Interest, Koert van Buiren, Matthijs Gerritsen and Janneke van der Voort, in EStAL - Issue: 1/2014 - pp. 61-66

[39] See *K. Lenaerts*, Defining the concept of 'services of general interest 'in light of the 'checks and balances' set out in the EU treaties, in Jurisrudence Research Journal: "*In the absence of EU harmonisation measures, the Commission must limit itself to controlling whether there is a manifest error of assessment in qualifying an economic activity as a SGEI. Next, it will proceed to apply the four cumulative criteria laid down in Altmark (C-280/00 Altmark Trans and Regierungspräsidium Magdeburg [2003] ECR I-7747) for public service compensation granted to an undertaking entrusted with the operation of a SGEI not to constitute aid so that the prior notification obligation laid down in Article 108(3) TFEU does not apply. Those cumulative criteria are the following: First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking that is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical undertaking, well-run and adequately provided with the relevant means, would have incurred. If one or more of the Altmark criteria are not met, then public service compensation constitutes State aid and is subject to Articles 93, 106, 107 and 108 TFEU*".

[40] Services of General Economic Interest, Opinion Prepared by the State Aid Group of EAGCP, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52012XC0111%2803%29

[41] A Universal Service Obligation (USO) is considered the obligation to provide services available to all end-users in their territory, independently of geographical location, and, in the light of specific conditions, at an affordable price. See Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002

service to the market has its reason in the need that these services should be provided indiscriminately to everyone[42].

A SGEI operator acting under concession may have two obligations imposed on it: universal coverage and/or universal pricing. In providing such a service it is therefore natural to ask if a non-for-profit entity would be a more suitable option. In particular, considering that these services are usually provided at a loss (and there is the need of compensation from the public authority) and related to non-efficiency objectives such as the desire to prevent social exclusion, it would probably be more coherent that these services are provided by entities that are not aiming to make a profit but are driven by the pursuit of social aims.

# 7. Conclusions

We started our research observing that the EC approach towards service providers is characterised by neutrality. Therefore, we began our analysis asking where this approach comes from and what the reasons that justify it are.

We have seen that the concept of neutrality is known under competition law and aims at the realisation of a "level playing-field", a situation where all economic actors, public and private, could operate under equal conditions.

This concept is not particularly developed in the EC literature but it can be deduced from the role the EC plays as a EU institution. As an administrative body, the EC's actions should be inspired by the principles that govern the EU's public administration and the activity of its civil service. Among those principles it is possible to find the principle of neutrality (Articles 298 TFEH and 41 CFR). Neutrality is therefore part of the "code of conduct" that inspires the action of the European Commission and its officials. This has also emerged from the Staff Regulation, which makes mention of the obligation of the officials to act in an independent and impartial way. This is confirmed by the fact that the EC acts as

on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108 of 24 April 2002. http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0022&from=EN

[42] In this sense the SGEI keeps the aspect of a public service obligation.See M. Lombardo, '*I servizi di interesse economico generale nel settore dell'energia*', in *Quaderni europei. Serie 'Energia'*, Centro di documentazione europea, Università di Catania, n. 01/12, pp. 19-31.

"guardian of the Treaties" and its action should be characterised by neutrality towards private and public operators. Furthermore, when developing relevant policies for the service sector, the action of the European commission is also inspired and influenced by the principles of *equality of treatment* and *non-discrimination of the economic operators*. These principles were initially thought of as instruments to eliminate inequalities among EU citizens and to fight against discriminations but, in the context of public procurement legislation, they evolved as principles of equality of treatment and non-discrimination of the economic operators in order to prevent discrimination against bidders from other Member States and allow all bidders to obtain equality of opportunity when submitting their tenders

We have also seen that the EC approach corresponds to the ECJ constant jurisprudence that states that is not important whether or not an entity is set up to generate profits, as non-profit entities can offer goods and services on a market too and are therefore economic operators.
Even though it is not possible to discriminate in favour of specific types of operators, there are hints that suggest a sort of favour, in certain sectors, towards organisations that have the characteristics of non-profit entities. Furthermore, in certain situations the EC does discriminate between non-profit and for-profit companies. This happens in particular in a number of areas such as operating subsidies for NGO umbrellas and PROGRESS and EaSI grants for social experimentation. In this sense it explicitly recognises the special qualities of non-profit distribution and participation, since being a non-profit making organisation is one of the characteristics required for the applicants.

At European level, the importance of social services and the role they play in improving quality of life and providing social protection are well recognised. This is proven by the recent reform of the public procurement directive where it is given more weight to social aspects with the aim of contributing to the implementation of social inclusion and innovation policies.

It was also interesting to take stock of the regulation of SGEIs. In this field it is possible to find the delicate search for a balance between the principle of competition in a free market and the public interests that are worthy of protection. Here it is possible to identify an important element of European integration, the recognition of the social rights that may clash with the

economic objectives of the free market but that have to be taken into account so as not to sacrifice users' needs and the protection of public interests.

Our findings were matched by the comments of the officials we were able to interview[43]. In particular, during the interviews with EC officials it emerged how neutrality forms part of Commission's ethics. The EC has a duty to treat all stakeholders equally and to listen to all voices, so that policy argument is rational. However, it does recognise that the market is imperfect, that the playing field is not level and that for-profit corporations have more negotiating muscle – that is why it gives operating subsidies to EU umbrella NGOs. This is a second-degree way of ensuring neutrality. It is also difficult to discriminate in favour of the non-profit sector, as this sector is vaguely defined at European level. However, the Commission does recognise the important role of non-profits in delivering social services. Impact investing has the upside that it brings new actors into the task of financing social services. But the financiers of social impact bonds also recognise the quality factor of NGOs by bringing them in to do the delivery.

Final considerations

The EC is bound to the obligation to act in an independent and neutral way towards service providers. However, the absence of documentary references shows the Commission has never really put much effort into developing a definition of the concept of neutrality.

Our study brings out that the concept of neutrality springs from two entirely separate sources, which are not comparable:

1) *economic efficiency*: according to classical economics, free trade in a perfect market amis at maximiseing utility. To this extent it is irrelevant whether an enterprise is profit-seeking or not to whether the practice of provider neutrality by purchasers benefits human welfare. However, there are at least 3 problems with this:
   - distribution: efficiency does not imply a just/equitable distribution;

[43] During the research activity we were able to interview Apostolos Ioakimidis (DG Enterprise and Industry, Unit D1), Susan Bird (DG Employment, Social Affairs & Inclusion, Unit D1), Nadia Costacurta (DG Internal Market and Services, Public procurement legislation II).

- rationality: the highly dubious assumption that humans are driven by 'economic rationality' and seek to maximise their utility through buying things.
- information: no market in the real world is perfect. A principal cause of imperfection is asymmetrical information – i.e. the sellers have more power than the buyers, and know more about the quality of the goods/services to be traded, competitors etc.

2) *Administrative justification*: administrative ethics represents a standard of good administrative practice by a public service. Among the principles that ogvern the EU's public administration and the activity of its civil service it is possible to find the principle of neutrality (Articles 298 TFEH and 41 CFR). This is based on notions of fundamental rights and non-discrimination and It is an ethical (almost religious) argument that offers a way to penetrate a reliance on 'superficial'' neutrality by appealing to citizen base.

We have seen that, in certain areas, the EC does discriminate between non-profit and for-profit companies recognising that the market is imperfect, that the playing field is not level and that for-profit corporations have more negotiating muscle.

It is therefore possible to say that the EC does explicitly recognise the special qualities of non-profit distribution and participation as it emerges from the SBI definition of social enterprise and the European Code of Conduct on Partnership where they are mentioned as "Bodies representing civil society". It is also possible to argue that the European Commission should compensate weaker market operators for their lack of power and suppression of voice in the market. This would increase welfare, encourage more entrants into the market. This is appropriate for social services where quality benefits from local relationships (e.g. people prefer to retire to retirement home which is close to where they already live, so that friends and relations can visit easily).

So, if the EC is aware that non-profit distribution and/or participation are factors in higher service quality, then it is not unthinkable to imagine being it obliged to discriminate in favour of such organisations, in preference to some ill-defined idea of neutrality. If public authorities have a duty to promote the welfare of their citizens, then participation and voice are part of this welfare and they have a duty to promote these practices.

Furthermore the neutral approach, particularly in a more empirical dimension, may hide some risks and distort the market. More precisely, a superficial doctrine of neutrality might conceal implicit discriminations, for example where tender specifications require a certain financial turnover or capital strength. These may impact more severely on non-profit operators.

Services are delivered in a context of interrelated factors and a complex web of long-term knock-on effects. To get best value, purchasers cannot look at one of them in isolation. It is generally accepted that non-profits are good at delivering social services to disadvantaged people, as they are (a) close to the user group and understand their needs; (b) have committed workers who believe in what they are doing. This is particularly important in highly relational services whose quality depends on personal relationships.

As service providers handling a public services (under concession or as procurement winners) are usually bound to universal coverage, universal pricing or other requirements foreseen in the general interest, it would probably be more coherent that these services are provided by entities that are not aiming at making a profit out of those activities and are driven by the pursuit of their social aim and the maximisation of their social value. This is even more convincing if we consider that commercial companies are driven by the aim of maximising profits and willing to cut services that are less profitable. This can lead to a market failure excluding the most vulnerable service users. For example, in the UK children's homes sector and adult social care there is evidence that private firms tend to place vulnerable children and adults in parts of the country often many miles from home, but where care is cheapest for the firms to deliver it[44]. In certain cases the need to make profit can also push companies to the point of committing even serious irregularities, as in the A4e case, where the British company Action 4 Employment (A4e), which was contracted by the government to help people from difficult backgrounds to gain the necessary training and skills, was accused of fraudulent claims[45].

Public authorities are sophisticated enough to recognise that in order to fulfil their policy objective (duty?) of maximising the welfare of their populations,

[44] *The Shadow State, A report about outsourcing of public services*, edited by Social Enterprises UK, available at http://www.socialenterprise.org.uk/uploads/files/2012/12/the_shadow_state_3_dec1.pdf

[45] In particular, A4e created 167 false claims, costing the British Department for Work and Pensions about £300,000.
http://www.theguardian.com/uk-news/2015/mar/30/a4e-welfare-work-company-workers-sentenced-fraud

they need to adjust for inequalities of power among market operators, to avoid being deceived by 'superficial' neutrality which is likely to tacitly favours large well-financed capitalist companies. Authorities could use their power to get the best deal for their communities and that is likely to involve companies whose activities is driven by the maximisation of their social value.

Our research focused on the European Commission and the EU dimension. However, these aspects can be further developed in the context of an analysis that focuses on the local dimension. In general, the local administrations are the ones that outsource services and set the requirements for service providers. As the tendency is to outsource services that were once provided by the public administration, the new procurement reform can offer room to non-profit providers and the value that they are able to bring and promote. Furthermore, a follow-up of the research should look in greater depth at the relationship between non-profit status and participation.

# 8. EU literature on provider neutrality

Even if the concept of neutrality is not particularly developed in the EC literature, it is possible to find legal acts and documents where this concept is indirectly mentioned or approached.

- Treaties
  - Article 2 TEU: *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. Article 10 TEU: In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*
  - Article 18, 1, TFEU: *Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*.
  - Article 298, 1, TFEU: *In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration*.
  - Article 21 CFR: *1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited*.
  - Article 41, 1, CFR: *In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.*
  - Protocol (No 26) on Services Of General Interest, 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: … - a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights*.

- Art.2 dir 2004/18 EC and 2014/24 EU - Principles of awarding contracts: *Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way*.

- European Commission, Public procurement reform. Fact sheet no 8: Social aspects of the new rules: http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-08-social_en.pdf

- Buying Social, A Guide to Taking Account of Social Considerations in Public Procurement, http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=978

- EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union, article 41, p. 328;

- Rules of Procedure of the Commission [C(2000) 3614] - OJ L 308, 8.12.2000, p. 26–34, ANNEX, CODE OF GOOD ADMINISTRATIVE BEHAVIOUR FOR STAFF OF THE EUROPEAN COMMISSION IN THEIR RELATIONS WITH THE PUBLIC, Non-discrimination and equal treatment: The Commission respects the principle of non-discrimination and in particular, guarantees equal treatment for members of the public irrespective of nationality, gender, racial or ethnic origin, religion or beliefs, disability, age or sexual orientation. Thus, differences in treatment of similar cases must be specifically warranted by the relevant features of the particular case in hand;

- The Code of Good Administrative Behaviour is a document elaborated by the European Ombudsman that collects the principles and values to which European civil service is committed to. http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1

- Commission Staff Working Document, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, SWD(2013) 53 final/2, point 309, p. 95;

- 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, Official Journal C8, 11.01.2012, p. 4-14;

- Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, Official Journal L7, 11.01.2012, p. 3-10;

- Communication from the Commission, European Union framework for State aid in the form of public service compensation (2011), Official Journal C8, 11.01.2012, p. 15-22;

- Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest Official Journal L 114 of 26.4.2012, p. 8;

- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – A Quality Framework for Services of General Interest in Europe, COM(2011) 900 final

- Main Court of Justice Case-law:

  - Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451;
  - Case C-244/94 FFSA and Others [1995] ECR I-4013;
  - Case C-355/00 Freskot AE v. Elliniko Dimosio [2003] ECR I-5263;
  - Case C-218/00 Cisal [2002] ECR I-691;
  - Case C-222/04 Cassa di Risparmio di Firenze and Others [2006] ECR I-289

- Case C-49/07 MOTOE [2008] ECR I-4863;
- T-461/08 Evropaïki Dynamiki v European Investment Bank, ECR 2011 II-06367