TOWARDS A **NEW IMPETUS** FOR **PUBLIC SERVICES**

European Trade Union Confederation (ETUC)

INTRODUCTORY REMARKS

1 Quality of life of European citizens is fashioned greatly by public policies responsible for maintaining vital infrastructures like hospitals or roads and for providing major social services as health, housing and education. Public services[1] are a pillar of the European social model, important for welfare and social cohesion, job creation and economic prosperity, contributing to more than 26% of the EU27 GDP and employing more than 64 million people. There is a fundamental mutuality between a prosperous modern economy and a fully developed public sector. A successful economy depends upon the availability of a well-educated workforce. This not only implies a need for a well-resourced, effective public education system but also for decent housing and effective health care. Public services are not only major employers but also purchasers of goods and services, investing more than 150 billion € yearly. Furthermore, public investments in green electricity, renewable energies and green transport should be important contributions to ensuring the transition to a sustainable and low carbon economy.

2 Public services are confronted today with a double challenge: the worst crisis since the 1930s and the ongoing policy emphasis on the austerity measures by the European Institutions. The public sector has become the main target to compensate for the budget deficits generated by the financial bail-outs for defaulting banks. Draconian cuts in public expenditure are imposed by various national governments seriously jeopardizing social justice and social inclusion. The European Commission exerts pressure on member states by giving absolute priority to budget consolidation over growth. This will further deepen the recession resulting in high unemployment. The quality of public services and their accessibility for citizens will be dramatically reduced, whilst the financial and banking sector reaps in massive profits again. Moreover, even in the middle of the crisis, the Commission is upholding its approach of putting competition first. It is interfering with the competence of the Member States when defining public services, for instance when limiting the scope of social housing in the Netherlands. This intrusion is unacceptable as it severely limits the possibilities of financing quality public services.

3 Public services play a key role in the current financial crisis ensuring social cohesion and cushioning the effects of the crisis and could play an even bigger role. Even neo-liberals have acknowledged that the public services are twin economic and social "automatic stabilisers". ETUC insists therefore that funding for public services needs to be underpinned by appropriate fiscal policy measures, including the introduction of fairer and progressive taxation systems (for instance financial transaction tax), as well as improving the efficiency of tax collection. Exit strategies and adjustments of public finances need to be planned over the medium and long-term. The pre-crisis concepts of the European Commission contained no reference to the contribution which public services make to job creation, prosperity and welfare nor to the importance of public investments and wide access to public services. However, the pre-crisis strategy to win the race to lead the world has not delivered the desired results. The new 2020 strategy should acknowledge the role the public sector and public services play in building sustainable growth and a fair inclusive society.

[1] *In European jargon, Public services are divided into two categories, (non-economic) services of general interest ((NE)SGI) and services of general economic interest (SGEI). SGEIs are subject to the European Treaties, but derogations are possible subject to specific public service obligations by virtue of a general interest criterion.*

4 In recent years, many problems for public services have occurred at the EU level; the delivery of SGIs, public procurement, state aid have been subject to European Court of Justice (ECJ) cases. Public services have come under increasing scrutiny from the European Commission seeking to expand its internal market concept. The slow "creep" of Commission and ECJ decisions seeking to define more and more services as "economic" strengthens the trend that more and more local non-profit public services could be deemed to be "economic". There is a dilemma between the need to increase legal security by legislation or leaving the question to the ECJ which will end up opening and liberalising all public services.

5 When the ECJ continues to rule that market freedoms and competition are superior to fundamental rights, the principle of public services is at stake and the idea of social Europe takes a blow. This trend is reinforced in particular by the Laval and Rüffert cases in which public authorities are involved and public procurement rules are under attack. The local or regional authorities applied local collective agreements as a condition for the acceptance of tenders from foreign service providers. Public authorities' obligation to tender for construction works and services provided to them puts local authorities in particular at the heart of this matter. They can apply social criteria, but in a restricted way.

6 The **Lisbon Treaty** brings about new institutional developments and introduces changes, calling for an update of the ETUC strategy. The logic of the Lisbon Treaty is one of greater openness in the debate on Services of General Interest. The social market economy has become the new framework, and competition is no longer a goal, but a tool.

7 The **Charter** of Fundamental Rights by virtue of Article 6 (1) becomes legally binding. The Charter lays down, in its Article 36, a right of access to SGEIs "in order to promote the social and territorial cohesion of the Union". In addition, 3 several provisions of the Charter imply the existence of a mission of general interest. For instance, the right to education (Art.14), the right of children to protection and care (Art. 24.1), the right to social and housing assistance (Art. 34.3), the right to healthcare (Art. 35) etc. constitute fundamental rights recognised and protected by the Union.

8 The new **Article 14** TFEU provides a **legal basis**. It is a widespread consent that article 14 leaves the Community legislator with no choice as to the form of action: it imposes the instrument (Regulation) and the procedure for its adoption (the ordinary legislative procedure). Regulations leave Member States no leeway in implementation and it may therefore be difficult to achieve a consensus for adoption, but not impossible, as the new Regulation on public passenger transport services by rail and by road (1370/2007) showed.

9 The **new protocol** (no. 26) on SGIs lays down interpretative provisions concerning the common values of the EU with regard to SGEIs and confirms the broad margin of manoeuvre of the Member States in providing, commissioning, financing and organising SGEIs as closely as possible to the needs of the users. Article 1 of the protocol acknowledges the essential role and the wide discretion of national, regional and local authorities.

10 These three new foundations (Charter, new protocol, legal base in Article 14) of the Lisbon Treaty are an important cornerstone in the construction of a new architecture for SGIs and a transversal regulatory approach with regard to SGEIs, not only by making it legally possible henceforth, but also by making it necessary in the light of the guidelines now set out firmly in primary law (Protocol). Article 14 offers the possibility to move away from a mere derogation from internal market rules to a more positive stance, taking into account the shared values embodied by public services across the EU. The Charter of Fundamental Rights, together with Article 14 TFEU and the new protocol can be used to build up an authentic notion of SGIs as common values of the EU. These three new foundations above all place a shared responsibility on the EU and Member States to ensure the application of principles that are inherent to public services, i.e., the principle of solidarity, universal access, equal treatment, availability, continuity and sustainability, of quality public services and principle of user rights. The EU should now skip from the strict derogation approach that has prevailed so far to a promotion approach based on the notion of common value, i.e. solidarity and social and territorial cohesion. It is also important to note that the treaty reserves an original

ETUC PROPOSALS AND ACTIONS TO PROMOTE PUBLIC SERVICES

11 The ETUC is convinced that the new article 14 together with the new protocol is an **obligation** to act. It is unacceptable that the Commission continues to abstain from any action. The ETUC asks the Commission to come up with a legislative proposal on the basis of the new article 14. The previous demand for a "framework directive" which was based on internal market rules (Article 114) is from now on replaced by the new demand for regulation(s).

12 The **content** of such a regulation should reinforce the 'public service mission' of public services and provide that (1) the power of definition is with the relevant local, regional and national public authorities, (2) the exercise of this discretion should not be open to challenge in any legal proceedings except in case of manifest error, and (3) the burden of proof should fall on the European Commission or other complainant and not on the local or regional or national authority. More provisions are possible. The **subsidiarity** rules are important in creating a balance between the nationally established public services and European competition rules and the internal market. The Member States can exercise wide discretion which is strengthened by the new treaty to define missions and obligations of general interest. The times, when the Commission turned a "blind eye" towards the regional and local organisational levels, prioritising market and competition over regional and local self governance, should definitely be over.

13 In complement to regulations each Member State, local and regional public authorities can (on the appropriate level) establish a **register** of non-economic services of general interest, which are excluded from the application of the rules on the provision of services, on competition and on state aid. The new double track approach has the advantage that the diversity of national traditions, cultures, values etc. can be fully taken into account and a Member State with an ambitious definition of public services can establish a broader list than a Member State with less ambition. Unanimity would no longer be necessary and the situation that one Member State can block any progress would be avoided as well. The register can be updated whenever necessary.

14 Member States have the competence to provide, commission and fund SGEIs. As it is shared with the EU institutions, there is at present considerable legal uncertainty and insecurity, so it will be necessary to clarify the conditions for implementation in regulations, namely:

a) the conditions for defining SGIs, SGEIs, non-economic SGIs and social SGIs - in respect of the Member States' competence of definition. A clarification of the conditions for "particular tasks", their methods of implementation, and the methods for appointing operators is necessary as well;

b) the definition of their forms of organisation – under what conditions may any exclusive or special rights be decided, and more generally what type of derogations may be applied to the rules set out in the Treaties, the conditions for choosing management methods ("in-house"), and the conditions for cooperation of activities and/or services between local public authorities;

c) the financing of SGEIs, - particularly from the viewpoint of the application of the rules for the supervision of state aid, in the context of a revision of the "Altmark" package (of November 2005). It is necessary to better define which compensations do not fall under the treaty provisions on state aid.

15 The ETUC demands a serious assessment of **Public Private Partnerships** (PPPs). It is not acceptable for the Commission to push, without any critical assessment of problems and failures, for an increased scope for PPPs, to 5 stimulate unilaterally a greater role for the private sector. The Commission treats as evidence the claim that PPPs improve efficiency and reduce burdens on public budgets, which is contested by many scientific researchers. So there should be an independent evaluation about PPP and much larger transparency about legal, economic and social consequences of PPP contracts and subcontracts. The responsible public authorities should have sufficient public resources to finance public services. Statistical requirements about public deficits should not lead to indirectly promote PPPs.

16 The ETUC has been asking for a handbook on **social public procurement** for more than six years to explain how social, employment and ethical considerations can be included in contracting processes varying from providing information and ensuring compliance relating to employment protection, working conditions, respect for ILO Conventions and collective agreements.

17 The ETUC demands a **critical in-depth assessment** of previous liberalisations and privatisations with the participation of all major stakeholders and maintains its demand for a **moratorium for liberalisations**. In particular, the ETUC asks the Commission to declare that there is no intention to come forward with proposals to liberalise **water or waste** as well as domestic rail passenger services, and to commit itself to this declaration.

18 The ETUC supports the efforts of the European Parliament and the Belgian Presidency to improve the security, quality and availability of social services of general interest. **Social services** are part of a "grey area", which is prejudicial to the accomplishment of the missions entrusted to them. They are faced with an increasing level of legal insecurity, uncertainties and disputes. Therefore, regulations on health and social services should take the new treaty provisions fully into account. A derogation from internal market rules should be applied according to Art. 86, paragraph 2 EC, as far as the development of trade is not really affected[2].The creeping precarization of public services must be reversed. The Decision of the Commission against the Netherlands on social housing which sets an income limit (of 33 000 €) and prevents mixing inhabitants from different social classes is a clear breach of the subsidiarity rules and should be challenged. The ETUC remains sceptical vis-à-vis voluntary frameworks on the quality of social services. Quality of work, social dialogue and secure funding are essential elements of strategies to promote quality public services. ETUC calls in addition for a strengthening of the Open Method of Coordination processes related to public services and for the appropriate involvement of social partners.

19 In general, new initiatives regarding public services should be benchmarked against the public service provisions of the Lisbon Treaty and should have Article 14 as their legal basis. Existing **sectoral directives** should be revised and improved in the light of the new treaty provisions and in particular complemented by the Monti Clause (EC Reg. 2679/98) and a social clause. The aim of this clause is to anchor fundamental rights in all legislation on the single market. It would ensure that the implementation of the economic fundamental freedoms of the single market does not impede collective bargaining rights and the right to strike as defined by national legislation.

20 The ETUC attaches a very high priority to the introduction of a **social progress clause** governing primary law, and for the necessary instruments in secondary law to balance the movement of workers and services, fundamental rights and the competition rules. In case of conflict social rights should prevail over internal market freedoms. The ECJ cases like Rüffert etc. have been extremely detrimental to workers' support for the EU.

21 The Belgian Presidency, the European Parliament and the European Commission are asked to act and to come forward with proposals to strengthen high quality, accessible, affordable public services, and essential for social, territorial and economic cohesion and to ensure more legal security in order to allow the development of sustainable public service missions and to guarantee fundamental rights.

[2] *(in the case of social services: absence of a profit motive, services of proximity: Article 106.2 TFEU "the development of trade must not be affected to such an extent as would be contrary to the interests of the Union", operation on the basis of the principle of solidarity.)*

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