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GREEN PAPER

ON SERVICES OF GENERAL INTEREST

(Presented by the Commission)

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INTRODUCTION

1. The European Union is at a turning point in its history. It is preparing itself for an unprecedented wave of enlargement and, at the same time, within the context of the Convention, for a redefinition of its tasks and how its institutions operate under a new constitutional Treaty. It has also launched a development strategy based on the synergy between economic and social reforms with the added dimensions of sustainability and the environment.
2. In this context, *services of general interest* play an increasing role. They are a part of the values shared by all European societies and form an essential element of the European model of society. Their role is essential for increasing quality of life for all citizens and for overcoming social exclusion and isolation. Given their weight in the economy and their importance for the production of other goods and services, the efficiency and quality of these services is a factor for competitiveness and greater cohesion, in particular in terms of attracting investment in less-favoured regions. The efficient and non-discriminatory provision of services of general interest is also a condition for the smooth functioning of the Single Market and for further economic intergration in the European Union. Furthermore, these services are a pillar of European citizenship, forming some of the rights enjoyed by European citizens and providing an opportunity for dialogue with public authorities within the context of good governance.
3. In the perspective of the accession of the new Member States, the guarantee of efficient and high-quality services of general interest and in particular the development of the network industries and their interconnection are essential to facilitate integration, to increase citizens' well-being and to help individuals to make effective use of their fundamental rights. Also, several new Member States have over the last decade gone through the transition towards a market economy and their citizens must be assured as to the importance the Union attaches to everyone's access to services of general interest.
4. Services of general interest are at the core of the political debate. Indeed, they touch on the central question of the role public authorities play in a market economy, in ensuring, on the one hand, the smooth functioning of the market and compliance with the rules of the game by all actors and, on the other hand, safeguarding the general interest, in particular the satisfaction of citizens' essential needs and the preservation of public goods where the market fails.
5. In the early years of the Communities, the objective of economic integration led to concentrating efforts on the removal of barriers to trade between Member States. In particular, since the second half of the 1980s a number of sectors in which mainly, or at least also, services of general economic interest are provided, have gradually been opened up to competition. This has been the case with telecommunications, postal services, transport and energy. Liberalisation stimulated the modernisation, interconnection and integration of these sectors. It increased the number of competitors and led to price reductions, especially in those sectors and countries that liberalised earlier. Although there is as yet insufficient evidence to assess the long-term impact of the opening to competition of services of general interest, there is, based on the available information, no evidence supporting the thesis that liberalisation has had a negative impact on their overall performance, at least as far

as affordability and the provision of universal service are concerned. The Community has always promoted "controlled" liberalisation, i.e. gradual opening-up of the market accompanied by measures to protect the general interest, in particular through the concept of universal service to guarantee access for everyone, whatever the economic, social or geographical situation, to a service of a specified quality at an affordable price. In this context, it has given special attention to ensuring adequate standards for cross-border services that cannot be adequately regulated only at national level.

6. Initial fears that market opening would have a negative impact on employment levels or on the provision of services of general economic interest have so far proved unfounded. Market opening has generally made services more affordable. For consumers in the lowest income brackets, for example, the percentage of personal income needed to buy a standard basket of telephone calls or a standard volume of electricity consumption has fallen in most Member States between 1996 and 2002. The impact of market opening on net employment has also been broadly positive. Job losses, particularly amongst former monopolies, have been more than compensated for by the creation of new jobs thanks to market growth. Overall, the liberalisation of the network industries is estimated to have led to the creation of nearly one million jobs across the European Union¹.
7. In spite of these results, certain misapprehensions have been expressed after the first steps towards liberalisation. The Commission has repeatedly tried to clarify the relevant Community policies. In a first horizontal communication of 1996,² it explained the interplay for the citizens' benefit between Community measures in the areas of competition and free circulation and public service tasks. This communication also suggests adding the promotion of services of general interest to the objectives of the Treaty. It was updated in 2000³ with a view to increasing the legal certainty for operators as regards the application of competition and internal market rules to their activities. In 2001, these two communications were complemented by a Report to the Laeken European Council⁴. This report responds to concerns with regard to the economic viability of operators entrusted with public service tasks. It highlights the guarantees offered by Article 86 (2) of the Treaty,⁵ Community action and the responsibility of the Member States, in particular as regards the definition of public service obligations. In addition, the Commission has made efforts to better assess the performance of the industries providing services of general interest by carrying out sectoral and horizontal evaluations.
8. In the meantime, the debate has evolved and its emphasis has shifted. The Treaty of Amsterdam recognises the place of services of general economic interest among the

¹ The Internal Market – Ten Years without Frontiers, SEC(2002) 1417, 7.1.2003

² «Services of general interest in Europe», OJ C 281, 26.9.1996, p.3

³ «Services of general interest in Europe», OJ C 17, 19.1.2001, p.4

⁴ COM(2001) 598 final, 17.10.2001

⁵ Article 86 (2) provides: «Undertakings entrusted with the operation of services of general economic interest ... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar 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 Community»

shared values of the Union⁶. It also assigns the Community and the Member States, «each within their respective powers», responsibility for the smooth functioning of these services. In the “Protocol on the system of public broadcasting” it highlights that public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism. In addition, the Union recognises and secures citizens’ right of access to services of general economic interest in the Charter of Fundamental Rights⁷. These new provisions are important elements in the development of the process of European integration: from the economic sphere towards broader issues relating to the European model of society, to the concept of European citizenship and to the relations between every individual in the Union and the public authorities. They also raise the question of the means for their effective implementation. The Commission believes that these questions deserve a broader and more structured debate. Naturally, this debate will take into account and be inspired by work in progress – regarding, for example, the Union’s values and objectives, the question of competencies or the principles of subsidiarity and proportionality - within the European Convention and in the forthcoming intergovernmental conference.

9. The uncertainties and concerns of citizens remain in evidence and require a response. The European Parliament suggested the Commission should present a proposal for a framework directive on services of general interest and the Council also asked the Commission to look into this question⁸.
10. The reality of services of general interest which include services of both general economic and non-economic interest, is complex and constantly evolving. It covers a broad range of different types of activities, from certain activities in the big network industries (energy, postal services, transport, and telecommunications) to health, education and social services, of different dimensions, from European or even global to purely local, and of different natures, market or non-market. The organisation of these services varies according to cultural traditions, the history and geographical conditions of each Member State and the characteristics of the activity concerned, in particular technological development.
11. The European Union respects this diversity and the roles of national, regional and local authorities in ensuring the well-being of their citizens and in guaranteeing democratic choices regarding, among other things, the level of service quality. This diversity explains the various degrees of Community action and the use of different instruments. The Union also has its own role to play as part of its exclusive

⁶ The Treaty provides in its Article 16 : «*Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions*»

⁷ Article 36 of the Charter provides: «*The Union recognises and respects access to services of general economic interest as provided for in national law and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union*»

⁸ See also the Presidency conclusions of the Barcelona European Council, 15 and 16 March 2002, para. 42 and of the Brussels European Council, 20 and 21 March 2003, para. 26

competencies. Moreover, throughout the European Union services of general interest raise a number of questions and issues that are common to different services and different competent authorities.

12. The debate that this Green Paper intends to launch raises questions with regard to
 - the scope of possible Community action that implements the Treaty in full respect of the principle of subsidiarity,
 - the principles that could be included in a possible framework directive or another general instrument concerning services of general interest and the added value of such an instrument,
 - the definition of good governance in the area of organisation, regulation, financing and evaluation of services of general interest in order to ensure greater competitiveness of the economy and efficient and equitable access of all persons to high-quality services that are satisfying their needs,
 - any measures that could contribute to increasing legal certainty and to ensuring a coherent and harmonious link between the objective of maintaining high-quality services of general interest and rigorous application of competition and internal market rules.
13. The Green Paper consists of five main parts plus an introduction and an operational conclusion. The first part outlines the background, the second part discusses the scope of Community action in the area of services of general interest, the third part provides a number of elements for a possible common concept of services of general economic interest, on the basis of existing sector-specific legislation, the fourth part looks at issues related to the way services of general interest are organised, financed and evaluated, and the fifth part addresses the international dimension of services of general interest. The Green Paper is accompanied by an annex which sets out public service obligations in more detail, as derived from existing sector-specific legislation and the policy instruments available to ensure compliance with these obligations.
14. The Green Paper raises a number of questions on which the Commission seeks comments from interested parties. A summary table of all the questions is attached to this document.

1. BACKGROUND

1.1. Definitions and terminology

15. Terminological differences, semantic confusion and different traditions in the Member States have led to many misunderstandings in the discussion at European level. In the Member States different terms and definitions are used in the context of services of general interest, thus reflecting different historical, economic, cultural and political developments. Community terminology tries to take account of these differences.
16. The term «*services of general interest*» cannot be found in the Treaty itself. It is derived in Community practice from the term «services of general economic interest», which is used in the Treaty. It is broader than the term «services of general

economic interest» and covers both market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations.

17. The term «*services of general economic interest*» is used in Articles 16 and 86(2) of the Treaty. It is not defined in the Treaty or in secondary legislation. However, in Community practice there is broad agreement that the term refers to services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion. The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications. However, the term also extends to any other economic activity subject to public service obligations.
18. The Green Paper focuses mainly, but not exclusively, on issues related to «services of general economic interest», as the Treaty itself focuses mainly on economic activities. The term «services of general interest» is used in the Green Paper only where the text also refers to non-economic services or where it is not necessary to specify the economic or non-economic nature of the services concerned.
19. The terms «service of general interest» and «service of general economic interest» must not be confused with the term «*public service*». This term is less precise. It can have different meanings and can therefore lead to confusion. The term sometimes refers to the fact that a service is offered to the general public, it sometimes highlights that a service has been assigned a specific role in the public interest, and it sometimes refers to the ownership or status of the entity providing the service⁹. Therefore, this term will not be used in this Green Paper.
20. The term «*public service obligations*» is used in this Green Paper. It refers to specific requirements that are imposed by public authorities on the provider of the service in order to ensure that certain public interest objectives are met, for instance, in the matter of air, rail and road transport and energy. These obligations can be applied at Community, national or regional level.
21. The term «*public undertaking*» is normally also used to define the ownership of the service provider. The Treaty provides for strict neutrality. It is irrelevant under Community law whether providers of services of general interest are public or private; they are subject to the same rights and obligations.

1.2. An evolving and crucial role for public authorities

22. The market usually ensures optimum allocation of resources for the benefit of society at large. However, some services of general interest are not fully satisfied by markets alone because their market price is too high for consumers with low purchasing power or because the cost of providing these services could not be covered by market price. Therefore, it has always been the core responsibility of public authorities to ensure that such basic collective and qualitative needs are satisfied and that services

⁹ There is often confusion between the term «public service» and the term «public sector». The term «public sector» covers all public administrations together with all enterprises controlled by public authorities

of general interest are preserved wherever market forces cannot achieve this. To date, the crucial importance of this responsibility has not changed.

23. However, what has changed is the way in which public authorities fulfil their obligations towards the citizens. Indeed, the role of public authorities in the context of services of general interest is constantly adapting to economic, technological and social developments. In Europe, a number of services of general interest have traditionally been provided by public authorities themselves. Nowadays, public authorities increasingly entrust the provision of such services to public or private undertakings or to public-private partnerships (PPPs)¹⁰ and limit themselves to defining public objectives, monitoring, regulating and, where necessary, financing those services.
24. This development should not mean that public authorities renounce their responsibility to ensure that objectives of general interest are implemented. By means of appropriate regulatory instruments public authorities should have the capability to shape national, regional or local policies in the area of services of general interest and to ensure their implementation. However, this development from self-provision towards the provision through separate entities has made the organisation, the cost and financing of these services more transparent. This is reflected in a broader debate and in stronger democratic control of the ways in which services of general interest are provided and financed. This increased transparency also reduces the possibility to use financing mechanisms to limit competition on these markets.
25. In the European Union, the creation of the internal market has accelerated this process. At the same time, the changing role of public authorities regarding the provision of services of general interest has also influenced the development of Community policies.
26. The process of European integration has never called into question the primary responsibility or the capability of public authorities for making the necessary political choices regarding the regulation of market activities. The Commission intends to reaffirm this responsibility by stimulating a European debate on the political choices to be made concerning services of general interest at European level. The results of this debate will form the basis for future Community policies in this field.

2. THE SCOPE OF COMMUNITY ACTION

27. As regards the scope of Community action, three main issues are addressed in this section:

¹⁰ The Commission intends to publish a Green Paper on public procurement and Public-Private-Partnerships in the second semester of 2003. In its Communication "Developing the trans-European transport network: innovative funding solutions and interoperability of electronic toll collection systems", COM(2003) 132final, 23.4.2003, the Commission examined PPPs in the light of the need to find funding solutions for the development of the transport network

- How, in the light of the principle of subsidiarity, should responsibilities in the area of services of general interest be shared between the Community and the Member States, including regional and local administrations?
- Should Community action be based on an essentially sector-specific approach or should a general framework be created?
- How is the scope of Community action affected by the distinction between economic and non-economic services?

2.1. What kind of subsidiarity?

28. In the area of services of general interest the division of tasks and powers between the Community and the Member States is complex and sometimes leads to misapprehension and frustration on the part of consumers, users and operators.
29. The Treaty does not mention the functioning of services of general interest as a Community objective and does not assign specific positive powers to the Community in the area of services of general interest. To date, except for a sector-specific reference in the title on transport,¹¹ these services are referred to in two provisions of the Treaty:
- Article 16 confers responsibility upon the Community and the Member States to ensure, each within their respective sphere of competencies, that their policies enable services of general economic interest to fulfil their missions. It spells out a principle of the Treaty although it does not provide the Community with specific means of action.
 - Article 86(2) implicitly recognises the right of the Member States to assign specific public service obligations to economic operators. It sets out a fundamental principle ensuring that services of general economic interest can continue to be provided and developed in the common market. Providers of services of general interest are exempted from application of the Treaty rules only to the extent that this is strictly necessary to allow them to fulfil their general interest mission. Therefore, in the event of conflict, the fulfilment of a public service mission can effectively prevail over the application of Community rules, including internal market and competition rules, subject to the conditions foreseen in Article 86 (2)¹². Thus, the Treaty protects the effective performance of a general interest task but not necessarily the provider as such.
30. Furthermore, according to the Charter of Fundamental Rights of the European Union, the Union recognises and respects access to services of general economic interest, in order to promote the social and territorial cohesion of the Union.¹³
31. It is primarily for the competent national, regional and local authorities to define, organise, finance and monitor services of general interest. The Community for its

¹¹ See Article 73 of the Treaty

¹² In its Communication on Services of general interest in Europe of 2000 the Commission explained the three principles that underlie the application of this provisions, i.e. the principles of neutrality, freedom to define and proportionality

¹³ See Article 36 of the Charter of Fundamental Rights

part has competencies in areas that are also relevant for services of general interest, such as: the internal market, competition and State aid, free movement, social policy, transport, environment, health, consumer policy, trans-European networks, industry, economic and social cohesion, research, trade and development co-operation, and taxation. The competencies and responsibilities conferred by the Treaty provide the Community with a whole range of means of action to ensure that every person in the European Union has access to high-quality services of general interest.

Services of general interest linked to the function of welfare and social protection are clearly a matter of national, regional and local responsibilities. Nevertheless, there is a recognised role for the Community in promoting co-operation and co-ordination in these areas. A particular concern for the Commission is promoting the co-operation by Member States in matters related to the modernisation of social protection systems.

32. Three categories of services of general interest can be distinguished as regards the need and intensity of Community action and the role of the Member States:

(1) Services of general economic interest provided by large network industries

Since the 1980s the Community has pursued the gradual opening of the markets for large network industries such as telecommunications, postal services, electricity, gas and transport in which services of general economic interest can be provided. At the same time, the Community has adopted a comprehensive regulatory framework for these services which specifies public service obligations at European level and includes aspects such as universal service, consumer and user rights and health and safety concerns. These industries have a clear Community-wide dimension and present a strong case for developing a concept of European general interest. This is also recognised in Title XV of the Treaty, which gives the Community specific responsibility for trans-European networks in the areas of transport, telecommunications and energy infrastructure, with the dual objective of improving the smooth functioning of the internal market and strengthening social and economic cohesion.

(2) Other services of general economic interest

Other services of general economic interest, such as waste management, water supply or public service broadcasting, are not subject to a comprehensive regulatory regime at Community level. In general, the provision and organisation of these services are subject to internal market, competition and State aid rules provided that these services can affect trade between Member States. In addition, specific Community rules, such as environmental legislation, may apply to certain aspects of the provision of these services.

For the disposal of waste (e.g. landfill), for example, provisions in Community waste legislation establish the “principle of proximity”¹⁴. According to this principle, waste should be disposed of as near as possible to the place it was generated.

¹⁴ See in particular Council Directive 75/442/EEC on waste, OJ L 194, 25.7.1975, p. 47, and Council Regulation (EEC) 259/93 on shipment of waste, OJ L 30, 6.2.1993, p. 1

As regards television broadcasting, the regulatory regime is co-ordinated at Community level by the “Television without Frontiers Directive”,¹⁵ in particular in respect of events of major importance for society, promotion of European works and independent production, advertising and protection of minors. Because of the importance of public service broadcasting for the democratic, social and cultural needs of each society a specific Protocol on the systems of public broadcasting in the Member States has been annexed to the Amsterdam Treaty. In its communication on “Principles and guidelines for the Community’s audio-visual policy in the digital age”¹⁶, the Commission sets out regulatory principles concerning public service broadcasting. The Commission has further explained its approach in a Communication of 17 October 2001 on the application of the state aid rules to public service broadcasting¹⁷. It takes into account in particular the fact that the audio-visual landscape in the European Community is characterised by a dual system comprising public and private broadcasters.

(3) *Non-economic services and services without effect on trade*

Services of general interest of a non-economic nature and services without effect on trade between Member States are not subject to specific Community rules, nor are they covered by the internal market, competition and State aid rules of the Treaty. However, they are covered by those Community rules that also apply to non-economic activities and to activities that have no effect on intra-Community trade, such as the basic principle of non-discrimination.

33. Thus, the Community has developed a policy on services of general interest based on various degrees of action and on the use of different instruments. However, on the one hand, the creation of a sector-specific framework at Community level does not in itself guarantee that every individual has access to efficient and high-quality services throughout the European Union. It is up to the competent authorities in the Member States to specify and complement the Community rules on public service obligations and to monitor their implementation. On the other hand, the Commission can take specific direct measures to enforce Community rules in the areas of competition and State aid. This could give the impression of an imbalance in Community action that could ultimately affect its credibility.
34. Community legislation on network industries has taken account of the importance of public administrations of the Member States in the implementation of legislation in the area of services of general interest by requiring the creation of independent regulatory authorities. Community legislation leaves the detailed institutional

¹⁵ Council Directive 89/552/EEC of 9 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, p.23

¹⁶ COM(1999) 657, 14.12.1999

¹⁷ OJ C 320, 15.11.2001, p. 5. In this Communication, the Commission recognises the particular role of public service broadcasting in the promotion of democratic, social and cultural needs of each society, as acknowledged by the Protocol to the Amsterdam Treaty. Member States are competent for the definition and choice of funding of the public service and are free to define as public service remit a broad programme spectrum that may include, for instance, entertainment and sports events. The Commission retains a duty to check for abusive practices and absence of overcompensation according to the specific criteria laid down in the Communication

arrangements regarding the regulatory authority to the discretion of Member States. It can thus be an existing body or the Ministry responsible for the sector, a solution adopted by a limited number of Member States. This solution has proven to be problematic in terms of the independence of the national regulatory authority in some instances where Member States also retain ownership or control over companies active in the sector concerned. The importance and ongoing, complex and evolving nature of the regulatory tasks involved often requires the expertise and independence of a sector-specific regulatory body¹⁸. Such a regulator is important to complement the action of competition authorities in terms of objectives, sectoral expertise, and timing and continuity of the intervention. In particular, specific regulatory bodies have a major role to play to ensure the provision of services of general interest, to put in place the conditions for fair competition, to prevent disruptions of service or supply, and to ensure an adequate level of consumer protection. Nearly all Member States have set up such a body for the sectors concerned. However, even where a sector-specific regulatory authority exists, the government – i.e. the competent Ministry – often retains responsibility for certain regulatory decisions.

35. Furthermore, Community legislation and practice encourages co-operation and exchanges of best practice among regulatory authorities in the Member States and between them and the Commission. Whilst the creation of national regulatory authorities is to a large extent a reality, the creation of European regulators for services of general interest or the deepening of co-operation between regulators of each Member State (e.g. structured networks) has not yet been widely discussed and could raise questions. Among the objectives are the necessity to obtain a degree of consistency of national regulatory approaches to avoid distortions stemming from different approaches that could have an impact on the good functioning of the internal market as well as the need to improve the operation of these services.

36. The following questions are submitted for discussion:

- (1) Should the development of high-quality services of general interest be included in the objectives of the Community? Should the Community be given additional legal powers in the area of services of general economic and non-economic interest?
- (2) Is there a need for clarifying how responsibilities are shared between the Community level and administrations in the Member States? Is there a need for clarifying the concept of services without effect on trade between Member States? If so, how should this be done?
- (3) Are there services (other than the large network industries mentioned in para. 32) for which a Community regulatory framework should be established?
- (4) Should the institutional framework be improved? How could this be done? What should be the respective roles of competition and regulatory authorities? Is there a case for a European regulator for each regulated industry or for Europe-wide structured networks of national regulators?

¹⁸

A definition of a sector-specific regulatory authority is contained in Commission Decision 2002/627/EC of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, OJ L 200/38, 30.7.2002: «*For the purpose of this Decision: 'relevant national regulatory authority' means the public authority established in each Member State to oversee the day-to-day interpretation and application of the provisions of the Directives relating to electronic communications networks and services as defined in the Framework Directive*»

2.2. Sector-specific legislation and general legal framework

37. Up to now, the Community has adopted legislation on services of general interest on a sectoral basis. Thus, a comprehensive body of sector-specific legislation has been developed for different network industries such as electronic communications, postal services, gas and electricity, and transport, in which services of general economic interest can be provided. In the light of the experience gained, the question was raised whether a common European framework should be developed in order to ensure coherent implementation of the principles underlying Article 16 of the Treaty at Community level. In this context, the Commission made a commitment to the Laeken European Council to find the best instrument to ensure the development of high-quality services of general interest in the European Union, in strict coherence with all Community policies.
38. A general instrument could set out, clarify and consolidate the objectives and principles common to all or several types of services of general interest in fields of Community competence. Such an instrument could provide the basis for further sectoral legislation, which could implement the objectives set out in the framework instrument, thus simplifying and consolidating the internal market in this field.
39. Consolidation of the Community “*acquis*” could be based on common elements of existing sector-specific legislation and would help to ensure overall consistency of approach across different services of general interest sectors. It could also have important symbolic value in that it would clearly demonstrate the Community’s approach as well as the existence of a Community concept of services of general interest. Furthermore, consolidation could help the new Member States to develop their regulatory strategies in this area.
40. However, such an approach would also have its limitations in that a framework instrument setting out common objectives and principles would be general in nature, as it would have to be based on the common denominator of different services with very different characteristics. If current levels of protection were to be maintained, it would still have to be complemented by sector-specific legislation laying down more detailed provisions which take into account the specific characteristics of different services of general interest. Moreover, Article 16 does not provide a legal base for the adoption of a specific instrument. Other Treaty provisions could serve as a legal basis, depending on the content of the instrument. For example, Article 95 could be used, but a framework instrument based on this provision would have to be limited to services of general *economic* interest having an effect on intra-Community trade. This would mean that many important sectors would be excluded from the scope of the instrument because of their non-economic nature or because of their limited effect on trade. If Community legislation such sectors is considered desirable, an amendment of the Treaty might be the best way of providing an appropriate legal basis.
41. As regards its legal form, consolidation of common objectives and principles could be set out in a legislative instrument (i.e. in a directive or in a regulation) or in a non-legislative instrument (recommendation, communication, guidelines, inter-institutional agreement). Apart from their different legal effects, the various

instruments also differ from the point of view of the degree of involvement of the different Community institutions in the adoption procedure¹⁹.

42. The following questions are submitted for discussion:

- (5) Is a general Community framework for services of general interest desirable? What would be its added value compared to existing sectoral legislation? Which sectors and which issues and rights should be covered? Which instrument should be used (e.g. directive, regulation, recommendation, communication, guidelines, inter-institutional agreement)?
- (6) What has been the impact of sector-specific regulation so far? Has it led to any incoherence?

2.3. ECONOMIC AND NON-ECONOMIC SERVICES

43. The distinction between services of an economic nature and services of a non-economic nature is important because they are not subject to the same rules of the Treaty. For instance, provisions such as the principle of non-discrimination and the principle of free movement of persons apply with regard to the access to all kind of services. The public procurement rules apply to the goods, services or works acquired by public entities with a view to providing both services of economic and non-economic nature. However, the freedom to provide services, the right of establishment, the competition and State aid rules of the Treaty only apply to economic activities. Also, Article 16 of the Treaty and Article 36 of the Charter of Fundamental Rights refer only to services of general *economic* interest.
44. As regards the distinction between services of an economic nature and services of a non-economic nature, any activity consisting in offering goods and services on a given market is an economic activity²⁰. Thus, economic and non-economic services can co-exist within the same sector and sometimes even be provided by the same organisation. Furthermore, while there may be no market for the provision of particular services to the public, there may nevertheless be an upstream market where undertakings contract with the public authorities to provide these services. The internal market, competition and state aid rules apply to such upstream markets.
45. The range of services that can be provided on a given market is subject to technological, economic and societal change and has evolved over time. As a consequence, the distinction between economic and non-economic activities has been dynamic and evolving, and in recent decades more and more activities have become of economic relevance. For an increasing number of services, this distinction has become blurred. In its Communication of 2000, the Commission set out a number of examples of non-economic activities²¹. These examples concern in particular matters which are intrinsically prerogatives of the State, services such as

¹⁹ In this context it should be noted that the Union's legal instruments are the subject of discussions within the European Convention. Indeed, Articles 24 to 28 of the Preliminary Draft Constitutional Treaty set out the proposed range of legal instruments

²⁰ Judgment of the Court of Justice in joint cases C-180-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451

²¹ OJ C 17, 19.1.2001, p. 4 (Nos 28-30)

national education and compulsory basic social security schemes, and a number of activities conducted by organisations performing largely social functions, which are not meant to engage in industrial or commercial activity. Given that the distinction is not static in time, the Commission stressed in its Report to the Laeken European Council that it would neither be feasible nor desirable to provide a definitive *a priori* list of all services of general interest that are to be considered «non-economic»²².

46. Although the evolving and dynamic character of this distinction has not created problems in Commission practice so far, it has raised concerns, in particular among providers of non-economic services who ask for more legal certainty regarding their regulatory environment.
47. Furthermore, the future of non-economic services of general interest, whether they are related to prerogatives of the State or linked to such sensitive sectors as culture, education, health or social services, raises issues on a European scale, such as the content of the European model of society. The active role of charities, voluntary organisations and humanitarian organisations explains in part the importance that European citizens attach to these issues.
48. The following questions are submitted for discussion:

- (7) Is it necessary to further specify the criteria used to determine whether a service is of an economic or a non-economic nature? Should the situation of non-for-profit organisations and of organisations performing largely social functions be further clarified?
- (8) What should be the Community's role regarding non-economic services of general interest?

3. TOWARDS A COMMUNITY CONCEPT OF SERVICES OF GENERAL INTEREST?

49. It is probably neither desirable nor possible to develop a single comprehensive European definition of the content of services of general interest. However, existing Community legislation on services of general economic interest contains a number of common elements that can be drawn on to define a useful Community concept of services of general economic interest. These elements include in particular: universal service, continuity, quality of service, affordability, as well as user and consumer protection. These common elements identify Community values and goals. They have been transposed into obligations in the respective legislations and aim to ensure objectives such as economic efficiency, social or territorial cohesion and safety and security for all citizens. They can also be complemented by more specific obligations depending on the characteristics of the sector concerned. Developed in particular for certain network industries they could also be relevant for social services.

²² COM(2001)598, 17.10.2001 (No 30)

3.1. A common set of obligations

3.1.1 Universal service

50. The concept of universal service refers to 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 price²³. It has been developed specifically for some of the network industries (e.g. telecommunications, electricity, and postal services). The concept establishes the right for every citizen to access certain services considered as essential and imposes obligations on industries to provide a defined service at specified conditions, including complete territorial coverage. In a liberalised market environment, a universal service obligation guarantees that everybody has access to the service at an affordable price and that the service quality is maintained and, where necessary, improved.
51. Universal service is a dynamic concept. It ensures that general interest requirements can take account of political, social, economic and technological developments and it allows these requirements, where necessary, to be regularly adjusted to the citizens' evolving needs.
52. It is also a flexible concept that is fully compatible with the principle of subsidiarity. Where the basic principles of universal service are defined at Community level, the implementation of these principles can be left to the Member States, thus allowing different traditions and specific national or regional circumstances to be taken into account. Furthermore, the concept of universal service can apply to different market structures and can therefore be used to regulate services in different stages of liberalisation and market opening.
53. During the last two decades, the concept of universal service has developed into a major and indispensable pillar of the Community's policy on services of general economic interest. It has allowed public interest requirements to be addressed in various domains, such as economic efficiency, technological progress, environmental protection, transparency and accountability, consumer rights and specific measures regarding disability, age or education. The concept has also contributed to reducing the levels of disparity in living conditions and opportunities in the Member States.
54. Implementation of the principle of universal service is a complex and demanding task for national regulators which in many cases have only been recently created and whose experience is therefore necessarily still limited. At Community level, rights of access to services are defined in different directives, but the Community institutions alone cannot ensure that these rights are fully granted in practice. There is a risk that these rights as set out in Community legislation remain theoretical, even where they are formally transposed in national legislation.

²³ Cf. Article 3(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51

3.1.2 Continuity

55. A number of services of general interest are characterised by a continuity requirement, i.e. the provider of the service is obliged to ensure that the service is provided without interruption. As regards some services, uninterrupted provision may already be in the commercial interest of the provider and it might therefore not be necessary to impose a legal continuity requirement on the operator. At national level, the continuity requirement needs to be reconciled with the employees' right to strike and with the requirement to respect the rule of law.
56. The requirement of ensuring a continuous service is not consistently addressed in sector-specific Community legislation. In some cases, sector-specific Community legislation explicitly sets out a continuity obligation²⁴. In other cases, sector-specific regulation does not contain a continuity requirement, but it explicitly authorises Member States to impose such an obligation on service providers²⁵.

3.1.3 Quality of service

57. The definition, monitoring and enforcement of quality requirements by public authorities have become key elements in the regulation of services of general interest.
58. In the sectors that have been liberalised the Community did not rely on market forces alone to maintain and develop the quality of services. Whilst in general it is for the Member States to define quality levels for services of general interest, in some cases, quality standards are defined in Community legislation. They include, for instance, safety regulations, the correctness and transparency of billing, territorial coverage, and protection against disconnection. In other cases, Member States are authorised or required to set quality standards. Furthermore, in some cases Member States are required to monitor and enforce compliance with quality standards and to ensure publication of information on quality standards and actual performance by operators. The most developed regulation of quality at Community level can be found in the legislation on postal services and on electronic communications services.
59. In addition, the Commission has developed non-regulatory measures to promote quality in services of general economic interest – including financial instruments, voluntary European standards, and exchanges of good practice. For instance, in the

²⁴ For instance, Article 3(1) of the postal directive (97/67/EC) obliges Member States to "*ensure the permanent provision of a postal service.*" Cf. 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, OJ L 15, 21.1.1998, p. 14

²⁵ Article 3(2) of the electricity directive provides that "*Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including ... regularity... of supplies... . Such obligations must be clearly defined, transparent, non-discriminatory and verifiable; they, and any revision thereof, shall be published and notified to the Commission by Member States without delay.*" Cf. Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27, 30.1.1997, p. 20

electricity and gas sectors, the Community promotes voluntary co-operation between regulators.

3.1.4. *Affordability*

60. The concept of affordability was developed in the context of the regulation of telecommunications services. Subsequently, it was also introduced into the regulation of postal services.²⁶ It requires a service of general economic interest to be offered at an affordable price in order to be accessible for everybody. Application of the principle of affordability helps to achieve economic and social cohesion within the Member States.
61. The sector-specific legislation in place does not specify the criteria for determining affordable prices. These criteria must be defined by the Member States. Relevant criteria could be linked, for example, to the penetration rate or to the price of a basket of basic services related to the disposable income of specific categories of customers. Particular attention should be paid to the needs and capacities of vulnerable and marginalised groups. Finally, once an affordable level has been set, the Member States should ensure that this level is effectively offered, by putting in place a price control mechanism (price cap, geographical averaging) and/or by distributing subsidies to the persons concerned.

3.1.5. *User and consumer protection*

62. In services of general interest, horizontal consumer protection rules apply as they do in other sectors of the economy. In addition, because of the particular economic and social importance of these services, specific measures have been adopted in sectoral Community legislation to address the specific concerns and needs of consumers and businesses, including their right to have access to high-quality international services²⁷. Consumer and user rights are set out in sector-specific legislation on electronic communications, postal services, energy (electricity, gas), transport and broadcasting. The Commission's consumer policy strategy 2002-2006²⁸ has identified services of general interest as one of the policy areas where action is needed to ensure a high common level of consumer protection.
63. The Commission Communication on services of general interest of September 2000²⁹ sets out a number of principles that can help to define consumers' and users' requirements for those services. These principles include good quality of service, high levels of health protection and physical safety of services, transparency (e.g. on tariffs, contracts, choice and financing of providers), choice of service, choice of supplier, effective competition between suppliers, existence of regulatory bodies, availability of redress mechanisms, representation and active participation of consumers and users in the definition and evaluation of services and choice of forms of payment. The Communication highlighted that a guarantee of universal access, continuity, high quality and affordability constitute key elements of a consumer

²⁶ In the context of the proposed amendment of the electricity and gas directive the broader concept of "reasonable pricing" is being discussed

²⁷ For example, in air transport, this includes measures against over-booking and a compensation scheme for denied boarding

²⁸ COM(2002) 208; OJ C 137, 8.6.2002, p. 2

²⁹ OJ C 17, 19.1.2001, p. 4

policy in the area of services of general economic interest. It also stressed the need to address citizens' concerns that are of a wider nature, such as a high level of environment protection, specific needs of certain categories of the population, such as the handicapped and those on low incomes and complete territorial coverage of essential services in remote or inaccessible areas.

64. The following questions are submitted for discussion:

- (9) Are there other requirements that should be included in a common concept of services of general interest? How effective are the existing requirements in terms of achieving the objectives of social and territorial cohesion?
- (10) Should all or some of these requirements be extended to services to which they currently do not apply?
- (11) What aspects of the regulation of these requirements should be dealt with at Community level and which aspects left to the Member States?
- (12) Have these requirements been effectively implemented in the areas where they apply?
- (13) Should some or all of these requirements also be applied to services of general interest of a non-economic nature?

3.2. Further specific obligations

65. A number of sector-specific related obligations that are in the general interest could add to a common set of public service obligations. These obligations include safety and security, security of supply, network access and interconnectivity, and media pluralism.

66. Safety and Security

In a world that is rapidly and dramatically changing, citizens in the European Union need to feel, and be, safe and secure. This is becoming increasingly important following a number of events. In particular after 11 September 2001, safety and security has even come on stage as a priority for Europe as a whole. Various other events have recently underlined this concern.³⁰ One of the basics of the European model of society is therefore security and safety.

Safety and security refer to a common set of objectives that exist in almost all Member States. Notably, the idea is to prevent prejudices to or attacks against society. They can take on different forms. Typically, these objectives have been pursued in Europe by means of services of general interest. Traditionally they have been carried out under the umbrella of the State and without always pursuing commercial objectives.

Lately, the Commission is committed to increasing the level of security as well as adopting a more European approach in certain fields, for instance in transport and

³⁰ Sinking of the Petrol vessel "Prestige" and the recent SARS

energy. It is worth mentioning the Commission's Communication on "*the repercussions of the terrorist attacks in the United States or the air transport industry*"³¹, its proposals after the various major maritime accidents along the European coasts³² or the recent nuclear package towards a Community approach to nuclear safety³³. These texts underline various objectives to be pursued by Europe as a whole. Major impetus has been given and the levels of safety and security should thus be increased. The reasons for this new approach are widespread and various. For example, problems usually exceed national frontiers, international conventions and rules do not usually have binding force, and Member States are sometimes confronted with the limitations imposed by Community rules.

67. *Security of supply*

A high level of service quality implies that a sustainable provision of the services is ensured in the long term. In general, the development of the internal market has generated a considerable increase in the level of security of supply of products and services, to the extent that the markets concerned are functioning competitively. However, in some cases of services of general interest public intervention may be necessary to improve the security of supply, in particular in order address the risk of long-term underinvestment in infrastructure and to guarantee the availability of sufficient capacity.

68. In the energy sector, the issue of supply security has been the subject of a broad public debate at Community level on the basis of a Green Paper the Commission published in 2001³⁴. The Green Paper aims to initiate a debate with a view to defining a long-term strategy for energy supply security that is geared to ensuring the uninterrupted physical availability of energy products on the market, at a price which is affordable for consumers and users, while taking account of both environmental concerns and sustainable development. The Commission reported on the results of the public debate in a communication in June 2002³⁵. On the basis of this consultation, the Commission concluded in its Report that it was necessary to increase the co-ordination of measures ensuring security of supply in the field of energy. As a follow-up, the Commission submitted, in September 2002, two proposals for directives, which will help to improve the security of supply of petroleum products and natural gas in the European Union³⁶.

³¹ Dated 10.10.2003

³² In addition to the most recent proposals following the Prestige accident, see also the proposals put forward by the European Commission after the sinking of the Erika vessel in 1999: COM (2000) 142 and COM (2000) 802

³³ Adopted on the 6 November 2002. See in particular the Communication on nuclear safety (COM 2002) 605 final

³⁴ Towards a European strategy for the security of Energy supply, Green Paper, COM(2000)769, 29.11.2000

³⁵ Final Report on the Green Paper "Towards a European strategy for the security of Energy supply", COM(2002)321, 29.6.2002

³⁶ Proposal for a Directive of the European Parliament and of the Council concerning the alignment of measures with regard to security of supply for petroleum products, OJ C 331 E, 31.12.2002, p. 249; and Proposal for a Directive of the European Parliament and of the Council concerning measures to safeguard security of natural gas supply, OJ C 331 E, 31.12.2002, p. 262

69. Some services of general interest outside the energy sector may also give rise to supply security concerns. Yet Community secondary legislation generally does not address the issue. It may therefore be useful to consider whether there are other sectors in which the issue of supply security should be raised specifically. However, any assessment should take into account that specific additional measures aimed at increasing the security of supply usually entail an additional economic cost and could reduce competition. Any action proposed to increase security of supply therefore needs to ensure that the ensuing cost is not greater than the expected benefits³⁷.

70. *Network access and interconnectivity*

Where there is effective competition, market mechanisms may ensure the provision of affordable services of an adequate quality, thus greatly reducing the need for regulatory intervention. Where services of general economic interest are provided on the basis of networks with universal coverage, the incumbent undertaking enjoys a substantial competitive advantage, mainly due to substantial sunk costs involved in establishing and maintaining alternative networks. In cases where competitors can only operate as service providers, access to the incumbent network is indispensable for market entry. However, even in sectors where competitors do have the right to deploy their own network infrastructure network access may be necessary for competitors to be able to compete with the incumbent on downstream markets. If third party access to existing networks at fair and non-discriminatory conditions was not possible, *de facto* monopolies or at least the incentive for the incumbent to discriminate in the access terms, thus distorting competition downstream, would be maintained. Therefore, in order to meet competition policy and internal market objectives, thereby offering customers more choice, higher quality and lower prices, sector-specific Community legislation for the sectors liberalised at Community level harmonises and regulates the access to network infrastructures.

71. The Community has adopted different regulatory strategies for different network industries and services of general interest. This is because these industries are indeed different and at different stages of the liberalisation process. They differ notably in their profitability, their production structure, their capital intensity, their methods of service delivery, and their demand structure. In some sectors, the incumbent operator can remain vertically integrated, but must grant network access to allow market entry by competitors. In telecommunications, public operators have an obligation to negotiate interconnection their networks. In addition, competitors have the right to use the incumbent's infrastructure. This is also the current system in electricity and gas. In the postal sector, new entrants have established networks for the distribution of parcels without requesting access to the incumbent's infrastructure. Where an obligation to grant access exists, the pricing of access has proven to be the crucial regulatory issue.

72. Experience shows that there is probably no single ideal approach to the regulation of network access. Choices must take account of the characteristics of each industry. For this reason, the Community has so far pursued a sector-specific approach in regulating access in the network industries. However, consideration could be given to

³⁷ Cf. Commission Staff Working Paper, Security of supply, The current situation at European Union level, SEC(2002)243, 28.2.2002

whether useful lessons could be learned from a cross-sectoral comparison of regulatory strategies and techniques.

73. *Media pluralism*

Measures to ensure media pluralism typically limit maximum holdings in media companies and prevent cumulative control or participation in several media companies at the same time. Their aim is to protect the freedom of expression and to ensure that the media reflect a spectrum of views and opinions that characterise a democratic society.

74. It should first be noted that the protection of media pluralism is primarily a task for the Member States. At present, secondary Community legislation does not contain any provisions directly aiming to safeguard the pluralism of the media. However, Community law allows the application of national safeguards with regard to media pluralism. The purpose of existing Community law instruments is to ensure a certain economic balance between market operators: these instruments, therefore affect the media sector as an area of economic activity and not – or at least only very indirectly – as a means of delivering information to the citizen. Back in December 1992, the Commission published a Green Paper³⁸ designed to launch public debate on the need for Community action in this field. The debate did not allow clear operational conclusions to be drawn and no formal initiative was taken by the Commission. Ten years later, given the progressing concentration of the media sector and the proliferation of electronic media, the protection of media pluralism remains an important issue³⁹. Views are sought as to whether the Commission should re-examine the need for Community action in this field in more detail.

75. The following questions are submitted for discussion:

- (14) Which types of services of general interest could give rise to security of supply concerns? Should the Community take additional measures?
- (15) Should additional measures be taken at Community level to improve network access and interconnectivity? In which areas? What measures should be envisaged, in particular with regard to cross-border services?
- (16) Which other sector-specific public service obligations should be taken into consideration?
- (17) Should the possibility to take concrete measures in order to protect pluralism be re-considered at Community level? What measures could be envisaged?

³⁸ Pluralism and Media Concentration in the Internal Market, An Assessment of the need for Community action, Commission Green Paper, COM(92)480, 23.12.1992

³⁹ See also the specific Protocol on the system of public broadcasting in the Member States annexed to the EC Treaty by the Treaty of Amsterdam

4. GOOD GOVERNANCE: ORGANISATION, FINANCING AND EVALUATION

76. As regards the intervention of public authorities in the Member States in the provision of services of general interest, three aspects can be highlighted to provide greater clarity:

- definition and enforcement of obligations and choice of organisation,
- financing of services of general interest,
- evaluation of services of general interest.

4.1. Definition of obligations and choice of organisation

77. As stated above, the national, regional and local authorities of each Member State are in principle free to define what they consider to be a service of general interest. This freedom to define also includes the freedom to impose obligations on the providers of such services, provided that these obligations are in conformity with Community rules. In the absence of specific Community legislation, it is therefore in principle for the Member States to define requirements such as universal service obligations, territorial coverage requirements, quality and safety standards, user and consumer rights, and environmental requirements.

78. Only in the case of the big network industries has the Community harmonised provisions on public service obligations and defined common requirements in specific Community legislation. This is the case, for instance, in the electronic communications and postal sectors. However, where such harmonised obligations exist, Member States are also responsible for their specification and implementation in line with the specific characteristics of the sector. In general, sector-specific harmonisation of public service obligations does not prevent Member States from imposing more far-reaching or additional obligations compatible with Community law, unless otherwise provided for in the harmonisation measures⁴⁰. In electronic communications, such additional obligations cannot be financed from within the sector.

79. Also, as regards the organisation of the provision of a service of general economic interest, Member States are free to decide how the service is operated, provided, however, that Community rules are observed. In any event the degree of market opening and competition in a certain service of general economic interest will be decided by the relevant Community rules on the internal market and on competition. As far as the participation of the state in the provision of services of general interest is concerned, it is for the public authorities to decide whether they provide these services directly through their own administration or whether they entrust the service to a third party (public or private entity)⁴¹.

⁴⁰ For instance, the postal directive obliges Member States to ensure a minimum of five daily deliveries to end users per week. Member States could impose a higher number of deliveries or specify the delivery requirement further

⁴¹ As regards local inland transport, the Commission has proposed legislation that would require Member States to use public service concessions. Cf. Amended proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public

80. However, providers of services of general economic interest, including in-house service providers, are undertakings and therefore subject to the competition provisions of the Treaty. Decisions to award special or exclusive rights to in-house service providers, or to favour them in other ways, , can amount to an infringement of the Treaty, despite the partial protection offered by Article 86. Case law shows that this is true, in particular, where the public service requirements to be fulfilled by the service provider are not properly specified;⁴² where the service provider is manifestly unable to meet the demand;⁴³ or where there is an alternative way of fulfilling the requirements that would have a less detrimental effect on competition⁴⁴.
81. Where a public authority of a Member State chooses to entrust the provision of a service of general interest to a third party, selection of the provider must respect certain rules and principles in order to ensure a level playing field for all providers, public or private, that are potentially capable of providing that service. This will ensure that these services are provided under the economically most advantageous conditions available on the market. Within the framework of these rules and principles, public authorities remain free to define the characteristics of the service to be provided, including any conditions regarding the quality of the service, in order to pursue its public policy objectives. Two situations can be distinguished:
- If the act by which public authorities entrust the provision of a service of general economic interest to a third party is a public service or works contract, as defined by the procurement directives or a works concession, as defined by Directive 93/37/EEC,⁴⁵ it must comply with the procedural requirements defined by the relevant procurement directive, provided it reaches or exceeds a threshold defined in the relevant directive and is not excluded from its scope.
 - If the act by which public authorities entrust a third party with the provision of a service of general economic interest is not covered by the procurement directives, such act must nevertheless comply with the principles that derive directly from the EC Treaty, and in particular the provisions relating to the freedom to provide services and the freedom of establishment. This is the case for instance of public contracts or work concessions falling below the thresholds, of service concessions (i.e. contracts stipulating that the consideration for the service provider consists, at least in part, in the right to exploit the service) or of unilateral acts assigning the right to provide a service of general economic interest. These rules and principles include equal treatment, transparency, proportionality, mutual recognition and the protection of the rights of individuals⁴⁶.
82. In the area of environmental services, in particular as concerns waste management, public authorities may grant exclusive rights to organisations created by producers for the recycling of certain wastes. Such organisations are subject to the competition

service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway, OJ C 151 E, 25.6.2002, p. 246

⁴² See the Court's judgment in *Silver Line Reisebüro* (C-66/86, judgment of 11.4.89)

⁴³ See the Court's judgment in *Höfner* (C-41/90, judgment of 23.4.91)

⁴⁴ See the Court's judgment in *Vlaamse Televisie Maatschappij* (T-266/97, judgment of 8.7.99)

⁴⁵ Independently of the definition used in national law

⁴⁶ Cf. the Commission Interpretative Communication on Concessions under Community Law, OJ C 121, 29.4.2000, p. 2

rules. They are often created in the context of innovative approaches to ensure prevention and recycling of waste, e.g. the application of «producer responsibility». This involves the attribution of financial responsibility for waste management to the producers of the products at the origin of the waste.

83. Thus, public authorities in each Member State retain considerable freedom to define and enforce public service obligations and to organise the provision of services of general interest. On the one hand, this allows Member States to define policies that take into account specific national, regional or local circumstances. For example, remote or sparsely populated areas may have to be treated differently from central or densely populated areas. On the other hand, the absence of specific legislation can lead to legal uncertainty and market distortions⁴⁷. At European level, different forms of co-operation between national regulators have developed in an attempt to improve consistency of policies across Member States, but a European regulatory authority does not exist for any service⁴⁸. A broader process of exchange of best practice and experience involving not only regulators but also other interested parties could also be useful. The Commission believes that a broad debate is necessary on these points.

84. The following questions are submitted for discussion:

- (18) Are you aware of any cases in which Community rules have unduly restricted the way services of general interest are organised or public service obligations are defined at national, regional or local level? Are you aware of any cases in which the way services of general interest are organised or public service obligations are defined at national, regional or local level constitutes a disproportionate obstacle to the completion of the internal market?
- (19) Should service-specific public service obligations be harmonised in more detail at Community level? For which services?
- (20) Should there be an enhanced exchange of best practice and benchmarking on questions concerning the organisation of services of general interest across the Union? Who should be involved and which sectors should be addressed?

⁴⁷ For instance, in the water sector the absence of specific, relevant regulation has led to very different industry structures across Member States. Cf. WRC/Ecologic, Study on the Application of the Competition Rules to the Water Sector in the European Community, December 2002, available at:

http://europa.eu.int/comm/competition/publications/studies/water_sector_report.pdf

However, while commercial aspects are addressed, the Water Framework Directive 2000/60/EC, OJ L 327, 22.12.2000, p. 1, sets out some transparency rules for water services. Article 9 of the Directive deals with pricing policies and requires Member States in particular to take account of the principle of recovery of costs, including environmental and resource costs, and of the polluter pays principle

⁴⁸ See Annex for more detail

4.2. FINANCING OF SERVICES OF GENERAL INTEREST

85. Many services of general interest cannot be viably provided on the basis of market mechanisms alone and specific arrangements are necessary in order to ensure the financial equilibrium of the provider. For instance, universal access or full geographical coverage may not be offered by the market itself. Currently, it is for the Member States to ensure the financing of services of general interest and to calculate the extra cost of the provision of such services. In some cases, the Community may contribute by way of co-financing to the funding of specific projects, e.g. through its structural funds or its TEN programmes.
86. Depending on historical traditions and the specific characteristics of the services concerned, Member States apply different mechanisms in order to ensure the financial equilibrium of providers of services of general interest. The financing mechanisms applied by the Member States include:
- Direct financial support through the State budget (e.g. subsidies or other financial advantages such as tax reductions).
 - Special or exclusive rights (e.g. a legal monopoly).
 - Contributions by market participants (e.g. a universal service fund).
 - Tariff averaging (e.g. a uniform country-wide tariff in spite of considerable differences in the cost of provision of the service).
 - Solidarity-based financing (e.g. social security contributions).
87. Whilst different forms of financing continue to co-exist, a clear trend has developed in recent decades: Member States have increasingly withdrawn exclusive rights for the provision of services of general interest and opened markets to new entrants. This has made it necessary to resort to other forms of financial support, such as the creation of specific funds financed by market participants or direct public funding through the budget, the least distorting way of funding⁴⁹. These forms of financing have made the cost of providing services of general interest and the underlying political choices more transparent and fed the political debate on these services.
88. As a general rule, Member States can choose which system they apply to finance their services of general interest. They have only to ensure that the mechanism chosen does not distort unduly the functioning of the internal market. In particular, Member States can grant public service compensations which are necessary for the functioning of the service of general economic interest. State aid rules only prohibit over-compensation. In order to increase legal certainty and transparency in the application of state aid rules to services of general interest the Commission announced in its Report to the Laeken European Council its intention to establish a Community framework for state aid granted for services of general economic interest, and then, if and to the extent justified by the experience gained with the application of this framework, adopt a block exemption regulation in the area of services of general

⁴⁹ See Liberalisation of Network Industries, Economic implications and main policy issues, European Economy No. 4, 1999

economic interest. Work on guidelines on the application of state aid rules to services of general economic interest is currently underway⁵⁰.

89. In some cases, sector-specific legislation lays down specific rules for the financing of the extra cost of public service obligations. For *electronic communications*, sector-specific regulation requires Member States to withdraw all special or exclusive rights, but it provides for the possibility of creating a fund to cover the extra cost of providing a universal service on the basis of contributions from market participants⁵¹. As regards the *postal service*, the postal directive allows a defined postal monopoly to be maintained and a universal service fund to be created for the purposes of financing the postal service⁵². In *air transport*, Member States can grant a temporary exclusive licence on the basis of an open tender in order to ensure a regular service on certain routes for which the market does not offer an adequate service⁵³. In *public transport*, the Community has laid down rules for the calculation of compensation⁵⁴.
90. Internal market, competition and State aid rules aim to ensure that any financial support granted to providers of services of general economic interest does not distort competition and the functioning of the internal market. Also, the sector-specific legislation in place seeks only to ensure that the financing mechanisms put in place by the Member States are least distortive of competition and facilitate market entry. As a consequence, Community legislation allows in particular for selective market entry.
91. Other relevant criteria for selecting a financing mechanism, such as its efficiency or its redistributive effects, are currently not taken into account in Community legislation. Neither have the effects of the selected mechanism on the long-term investment of providers of services and infrastructure and on security of supply been specifically considered.
92. At this stage, the Commission considers it appropriate to launch a debate on whether these criteria could lead to the conclusion that specific financing mechanisms should be preferred and whether the Community should take measures in favour of specific financing mechanisms.
93. The following questions are submitted for discussion:

⁵⁰ Report on the state-of-play in the work on the guidelines for state aid and services of general economic interest, 13.12.2002

⁵¹ Article 13 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51

⁵² Articles 7 and 9(4) of 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, OJ L 15, 21.1.1998, p.14, as amended by EP and Council Directive 2002/39/EC, OJ L 176, 5.7.2002, p. 21

⁵³ Article 4 of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ L 240, 24.8.1992, p. 8

⁵⁴ Council Regulation (EEC) No 1169/69 of 26 June 1969 on action by the Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, OJ L 156, 28.6.1969, p. 1 as last amended by Council Regulation (EEC) 1893/91, OJ L 169, 29.6.1991, p. 1

- (21) Are you aware of any cases in which Community law, and in particular the application of State aid rules, has impeded the financing of services of general interest or led to inefficient choices?
- (22) Should a specific way of financing be preferred from the point of view of transparency, accountability, efficiency, redistributive effects or competition? If so, should the Community take appropriate measures?
- (23) Are there sectors and/or circumstances in which market entry in the form of «cream-skimming» may be inefficient and contrary to the public interest?
- (24) Should the consequences and criteria of solidarity-based financing be clarified at Community level?

4.3. Evaluation of services of general interest

94. The changing regulatory and technological environment as well as the growing impact of Community policies on services of general interest has highlighted the need for a proper evaluation of the performance of these services at Community as well as at national level. The evaluation of these services of general interest is important because of the significance of these services for the economy as a whole and for everyone's quality of life. It is necessary in order to monitor whether the general interest tasks assigned by public authorities to the providers of such services are effectively achieved. A comprehensive evaluation increases transparency and provides the basis for better policy choices and an informed democratic debate. It allows to assess both the economic efficiency of a service and the effective achievement of other public policy objectives pursued by public authorities. At Community level the evaluation of services of general economic interest is essential to ensure that objectives of social and territorial cohesion and of environment protection are attained. Performance evaluation can also assist in exchanging best practices across borders and between economic sectors. It is a central element of good European governance⁵⁵.
95. In recent years, the Commission has increased its evaluation efforts in the area of services of general interest and developed an evaluation strategy that is based on three strands of assessments:⁵⁶
- The Commission conducts regular evaluations of the network industries that have been liberalised at Community level (sectoral evaluation).
 - In addition, the Commission started in 2001 to perform an annual cross-sectoral evaluation of the network industries (horizontal evaluation).

⁵⁵ Commission White Paper on European Governance, COM(2001)428, 25.7.2001; Report to the Laeken European Council, COM(2001)598, 17.10.2001

⁵⁶ Report to the Laeken European Council, COM(2001)598, 17.10.2001; Communication from the Commission: A Methodological Note for the Horizontal Evaluation of Services of General Economic Interest, COM(2002)331 final, 18.6.2002

- Thirdly, the Commission carries out regular consumer satisfaction surveys in the area of services of general economic interest (e.g. Eurobarometer opinion polls and qualitative surveys).

96. The evaluation of services of general interest is a complex task. A comprehensive evaluation must be multidisciplinary and multidimensional and include political, economic, social and environmental aspects, including externalities. It should also take account of the interests and views of all interested parties. It is important to know what users and consumers (including vulnerable and marginalised groups), social partners and other parties consider a good performance for these services and their expectations for the future. For these reasons, this Green Paper aims at opening a discussion on the criteria that, in the view of interested parties, should be used for evaluation purposes. In the context of its horizontal evaluation, the Commission has submitted a methodology for the evaluation of services of general interest⁵⁷. It has stressed the need to gradually develop and improve its regular horizontal evaluations over the coming years. The huge disparity in data availability and data quality is a main stumbling block for a comprehensive evaluation and ways to improve data quality and availability should be examined⁵⁸.

97. At Community level, the Commission produces evaluation reports on the performance of network industries providing services of general economic interest. It submits its results to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and to all interested parties, with a view to informing the widest possible audience. However, the Commission's resources available for evaluation are limited, and the Commission cannot present a consolidated view representing all the, often diverging, views of the different interested parties. It should therefore be discussed how the evaluation should be performed at Community level and how responsibilities should be shared.

98. Furthermore, performance evaluation at Community level is currently limited essentially to the network industries covered by sector-specific Community legislation. Other sectors are not included in the Commission's evaluation strategy. It could be considered whether there is a need to extend Community evaluation beyond its current scope without infringing the principle of subsidiarity.

99. The following questions are submitted for discussion:

- (25) How should the evaluation of the performance of services of general interest be organised at Community level? Which institutional arrangements should be chosen?
- (26) Which aspects should be covered by Community evaluation processes? What should be the criteria for Community evaluations? Which services of general interest should be included in an evaluation at Community level?
- (27) How could citizens be involved in the evaluation? Are there examples of good practice?
- (28) How can we improve the quality of data for evaluations? In particular, to what extent should operators be compelled to release data?

⁵⁷ Communication from the Commission: A Methodological Note for the Horizontal Evaluation of Services of General Economic Interest, COM(2002)331 final, 18.6.2002

⁵⁸ See Annex for detail

5. SERVICES OF GENERAL INTEREST AND THE CHALLENGE OF GLOBALISATION

5.1. Trade policy

100. International trade agreements, within the framework of the World Trade Organisation (WTO) and often at a bilateral level, include provisions with regard to services that are not provided in the exercise of governmental authority (i.e. that are supplied on a commercial basis or in competition with one or more service suppliers). Such provisions concern the exchange of services and the conditions under which service suppliers can operate in foreign markets. Under the General Agreement on Trade in Services (GATS) each member freely determines the service sectors that it is prepared to open to foreign service providers (the so-called “bottom-up-approach”) and under what conditions. Furthermore, the GATS explicitly recognises the WTO members’ sovereign right to regulate economic and non-economic activities within their territory in pursuance of public policy objectives. With regard to the services covered by these agreements, each contracting party maintains the right to determine the specific obligations that can be imposed on the operators. Members fully retain the possibility of excluding from its GATS commitments sectors where it believes an opening to competition could threaten for example the availability, quality and affordability of such services. Thus, members can maintain the service as a (public or private) monopoly. The negotiations in the WTO framework has no direct or indirect influence on the decisions of Member States to privatise certain undertakings.
101. In this context, the European Community has freely decided to undertake binding commitments in respect of certain services of general interest already open to competition within the internal market. Through these commitments, foreign services suppliers are granted market access to the European Community under the same, or sometimes more restrictive, conditions as any European service supplier. Commitments undertaken in the WTO multilateral context (GATS commitments) or in a bilateral context have so far had no impact on the way in which services of general interest are regulated in Community law. They have also had no impact on the way in which they are financed. Indeed, the most far-reaching obligations in this respect have been assumed at bilateral level and are limited to territorial extension of the Community State aid regime.
102. Further negotiations in the areas of liberalisation of trade in services, as well as on disciplines on subsidies related to trade in services, are under way within the context of the Doha Development Agenda. The European Community is also negotiating bilateral trade agreements in the services sector. In this context, as in the past, the European Community approaches services of general interest with a view to ensuring full coherence with the level of liberalisation and with the regulation that applies within the internal market.
103. The following question is submitted for discussion:

(29) Is there any specific development at European Community internal level that deserves particular attention when dealing with services of general interest in international trade negotiations? Please specify.

5.2. Development and co-operation policy

104. The main objective of the European Community's development policy is the reduction of poverty in the developing countries. Ensuring access to a minimum level of services of general interest is an essential prerequisite for achieving this goal, since services of general interest not only satisfy some of the basic human needs, they also provide an indispensable platform for developing the economy of the poorest countries.
105. Private investment in services of general interest can help to improve the provision of essential services in these countries. However, market opening and privatisation in developing countries can also give rise to legitimate concerns about governance and regulation. Therefore, any reform should take account of the need for an adequate regulatory and institutional framework and be based on a comprehensive assessment of its impact on economic growth, employment, service delivery, equitable access, environmental conditions and the national budget.
106. The following question is submitted for discussion:

(30) How can the Community best support and promote investment in the essential services needed in developing countries in the framework of its development co-operation policy?
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6. OPERATIONAL CONCLUSION

107. The Commission invites all interested parties to comment on the questions set out in this Green Paper. Replies and any additional comments can be sent by mail to the following address:

European Commission
Green Paper on Services of General Interest Consultation
BREY 7/342
B-1049 Brussels

or by email to the following address:

SJI-Consultation@cec.eu.int

Comments should be sent to the Commission by **15 September 2003** at the latest. Replies and comments should mention the number of the questions they are referring to. For the information of interested parties, the Secretariat-General of the Commission will put contributions received electronically, together with the sender's contact data, on the Green Paper website

http://europa.eu.int/comm/secretariat_general/services_general_interest/

provided the senders concerned have explicitly agreed to their publication.

108. Basing itself *inter alia* on the contributions received, the Commission intends to draw conclusions in the autumn and, where appropriate, submit concrete initiatives as a follow-up.

SUMMARY TABLE OF ALL QUESTIONS SUBMITTED FOR DISCUSSION

What kind of subsidiarity?

- (1) Should the development of high-quality services of general interest be included in the objectives of the Community? Should the Community be given additional legal powers in the area of services of general economic and non-economic interest?
- (2) Is there a need for clarifying how responsibilities are shared between the Community level and administrations in the Member States? Is there a need for clarifying the concept of services without effect on trade between Member States? If so, how should this be done?
- (3) Are there services (other than the large network industries mentioned in para. 32) for which a Community regulatory framework should be established?
- (4) Should the institutional framework be improved? How could this be done? What should be the respective roles of competition and regulatory authorities? Is there a case for a European regulator for each regulated industry or for Europe-wide structured networks of national regulators?

Sector-specific legislation and general legal framework

- (5) Is a general Community framework for services of general interest desirable? What would be its added value compared to existing sectoral legislation? Which sectors and which issues and rights should be covered? Which instrument should be used (e.g. directive, regulation, recommendation, communication, guidelines, inter-institutional agreement)?
- (6) What has been the impact of sector-specific regulation so far? Has it led to any incoherence?

Economic and non-economic services

- (7) Is it necessary to further specify the criteria used to determine whether a service is of an economic or a non-economic nature? Should the situation of non-for-profit organisations and of organisations performing largely social functions be further clarified?
- (8) What should be the Community's role regarding non-economic services of general interest?

A common set of obligations

- (9) Are there other requirements that should be included in a common concept of services of general interest? How effective are the existing requirements effective in terms of achieving the objectives of social and territorial cohesion?
- (10) Should all or some of these requirements be extended to services to which they currently do not apply?
- (11) What aspects of the regulation of these requirements should be dealt with at Community level and which aspects left to the Member States?
- (12) Have these requirements been effectively implemented in the areas where they apply?
- (13) Should some or all of these requirements also be applied to services of general interest of a non-economic nature?

Sector-specific Obligations

- (14) Which types of services of general interest could give rise to security of supply concerns? Should the Community take additional measures?
- (15) Should additional measures be taken at Community level to improve network access and interconnectivity? In which areas? What measures should be envisaged, in particular with regard to cross-border services?
- (16) Which other sector-specific public service obligations should be taken into consideration?
- (17) Should the possibility to take concrete measures in order to protect pluralism be re-considered at Community level? What measures could be envisaged?

Definition of Obligations and Choice of Organisation

- (18) Are you aware of any cases in which Community rules have unduly restricted the way services of general interest are organised or public service obligations are defined at national, regional or local level? Are you aware of any cases in which the way services of general interest are organised or public service obligations are defined at national, regional or local level constitutes a disproportionate obstacle to the completion of the internal market?
- (19) Should service-specific public service obligations be harmonised further at Community level? For which services?
- (20) Should there be an enhanced exchange of best practice and benchmarking on questions concerning the organisation of services of general interest across the Union? Who should be involved and which sectors should be addressed?

Financing

- (21) Are you aware of any cases in which Community law, and in particular the application of State aid rules, has impeded the financing of services of general interest or led to inefficient choices?

- (22) Should a specific way of financing be preferred from the point of view of transparency, accountability, efficiency, redistributive effects or competition? If so, should the Community take appropriate measures?
- (23) Are there sectors and/or circumstances in which market entry in the form of «cream-skimming» may be inefficient and contrary to the public interest?
- (24) Should the consequences and criteria of solidarity-based financing be clarified at Community level?

Evaluation

- (25) How should the evaluation of the performance of services of general interest be organised at Community level? Which institutional arrangements should be chosen?
- (26) Which aspects should be covered by Community evaluation processes? What should be the criteria for Community evaluations? Which services of general interest should be included in an evaluation at Community level?
- (27) How could citizens be involved in the evaluation? Are there examples of good practice?
- (28) How can we improve the quality of data for evaluations? In particular, to what extent should operators be compelled to release data?

Trade Policy

- (29) Is there any specific development at European Community internal level that deserves particular attention when dealing with services of general interest in international trade negotiations? Please specify.

Development Co-operation

- (30) How can the Community best support and promote investment in the essential services needed in developing countries in the framework of its development co-operation policy?

ANNEX

Public service obligations and instruments of Community policy in the area of services of general economic interest

This Annex examines, in more detail, a set of public service obligations that can be derived from existing sector-specific Community legislation and that can characterise a Community concept of services of general economic interest (Section I). It also discusses, in more detail, the policy instruments available in order to ensure that these public service obligations are complied with and that the public interest objectives pursued with these obligations are effectively achieved (Section II).

I. PUBLIC SERVICE OBLIGATIONS IN COMMUNITY LEGISLATION

1. Existing Community legislation on services of general economic interest is sector-specific. However, it contains a number of common elements that can be drawn on to define a Community concept of services of general economic interest. These elements include in particular: universal service, continuity, quality of service, affordability, as well as user and consumer protection (see point 1 below). These common elements identify Community values and objectives. They have been transposed into obligations in the pertinent legislations. They can also be complemented by more specific obligations depending on the characteristics of the sector concerned (see point 2 below).

1. A common set of obligations

1.1 Universal service

2. The concept of universal service refers to 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 price¹. It has been developed specifically for some of the network industries (e.g. telecommunications, electricity, postal services). The concept establishes the right of everyone to access certain services considered as essential and imposes obligations on industries to provide a defined service at specified conditions, including complete territorial coverage. In a liberalised environment a universal service obligation guarantees that all persons within the European Union have access to the service at an affordable price and that the service quality is maintained and, where necessary, improved.

3. Universal service is a dynamic concept. It ensures that general interest requirements can take account of political, social, economic, and technological developments and it allows, where necessary, for regular adjustment of these requirements to the evolving needs of users and consumers.

¹ Cf. Article 3(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51

4. It is also a flexible concept that is fully compatible with the principle of subsidiarity. Where the basic principles of universal service are defined at Community level, the implementation of these principles can be left to the Member States, thus allowing account to be taken of different traditions and specific national or regional circumstances. Furthermore, the concept of universal service can apply to different market structures and can therefore be used to regulate services in different stages of market opening.
5. The concept of universal service refers to the content of the service and its method of provision. The content of the service is defined in a dynamic way. Its definition covers the scope of the services, and their characteristics in term of price (which should be affordable) and quality (which should be satisfactory). As regards the method of provision, a Member State does not have to intervene or take additional measures if it finds that the provision of universal service is ensured by the mere functioning of the market, i.e. affordable commercial offers are available for everyone. However, if Member States find that the market alone does not ensure the provision of universal service, Community law allows Member States to designate one or more universal service providers and possibly compensate the net cost of providing universal service in order to minimise market distortion.
6. Existing sector-specific directives defining universal service contain a number of common elements: a set of universal service requirements, principles on the selection of the universal service provider, rules on the compensation of the cost of provision of universal service, the right of Member States to introduce additional requirements, plus rules on an independent regulator².
7. Existing secondary legislation is based on the following principles. If Member States find that market mechanisms alone are not sufficient to provide a universal service, they should intervene to ensure that it is provided. Any intervention should be objective, transparent, non-discriminatory and proportionate. It should entail no distortion of competition, in the sense that it must not create discrimination between undertakings active on the same relevant market, and it should minimise market distortion, in the sense that the service should be provided in the most cost-effective manner and any compensation should be recovered by contributions that are spread as broadly as possible. These principles will ensure that public intervention is transparent and efficient, thereby increasing the rule of law (democratic dimension) and overall welfare (economic dimension).
8. Furthermore, in order to ensure the effectiveness of universal service, the rules on universal service should be complemented by a number of user and consumer rights. These include physical access regardless of disability or age, transparency and full information on tariffs, terms and conditions of contracts, quality performance indicators and customer satisfaction indexes, complaint handling and dispute settlement mechanisms.

² Cf. Directive 2002/22/EC, OJ L 108, 24.4.2002, p. 51; 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, OJ L 15, 21.1.1998, p. 14; Amended Proposal for a Directive of the European Parliament and of the Council amending Directives 92/96/EC and 98/30/EC concerning rules for the internal markets in electricity and natural gas, OJ C 227 E, 24.9.2002, p. 393

9. Universal service requirements may entail a substantial cost. When considering whether such obligations should be maintained or extended, it is therefore important to consider the alternative uses to which the resources concerned could be put.
10. During the last two decades, the concept of universal service has developed into a major and indispensable pillar of the Community's policy on services of general economic interest. It has allowed public interest requirements to be addressed regarding in particular economic efficiency, technological progress, environmental protection, transparency and accountability, consumer and user rights, and specific measures regarding disability, age or education. Also, the concept has proven to be fully in line with the principle of subsidiarity. Furthermore, application of the concept can be based on extended participation of interested parties (e.g. industry, small and medium-sized enterprises, consumers, and other representative social groups). This process may include periodic evaluation of subsequent developments.

1.2 *Continuity*

11. A number of services of general interest are characterised by a continuity requirement, i.e. the provider of the service is obliged to ensure that the service is provided without interruption. Continuity is sometimes not seen as an independent requirement, but defined as part of a universal service obligation. As regards some services, uninterrupted provision may already be in the commercial interest of the provider and it might therefore not be necessary to impose a legal continuity requirement on the operator. At national level, the continuity requirement obviously needs to be reconciled with employees' right to strike and with the requirement to respect the rule of law.
12. The requirement of ensuring a continuous service is not consistently addressed in sector-specific Community legislation. In some cases, sector-specific Community legislation explicitly sets out a continuity obligation. For instance, Article 3 (1) of the postal directive (97/67/EC) obliges Member States to «ensure the permanent provision of a postal service»³. In other cases, sector-specific regulation does not contain a continuity requirement, but it explicitly authorises Member States to impose such an obligation on service providers. Art. 3(2) of the electricity directive⁴ provides that «Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including ... regularity... of supplies... . Such obligations must be clearly defined, transparent, non-discriminatory and verifiable; they, and any revision thereof, shall be published and notified to the Commission by Member States without delay...».

1.3 *Quality of service*

13. The definition, monitoring and enforcement of quality requirements by public authorities has become a key element in the regulation of services of general interest. Achieving a socially acceptable level of service quality often justifies public service

³ 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, OJ L 15 , 21.1.1998, p. 14

⁴ Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27, 30.1.1997, p. 20

obligations. In some cases, quality is seen as being so important that it is the rationale behind the provision of the public service obligation and it is the subject of close supervision and regulation. In areas in which the provision of a service is entrusted to a third party, the establishment of quality standards by public authorities is often indispensable in order to ensure that public policy objectives are met. Also where services are provided by public administrations the definition and monitoring of quality requirements may help to increase transparency and accountability. There is, however, no agreement on a general definition of quality, except that user and consumer protection and safety should be part of it. Environmental protection and sustainable development are also being taken increasingly into account when defining service quality criteria. Qualitative objectives will vary across sectors, depending on their characteristics.

14. In the sectors which were opened to competition at Community level, the Community did not rely on market forces alone to maintain and develop the quality of services. In some cases, quality standards are defined in Community legislation. They include, for instance, safety regulations, the correctness and transparency of billing, territorial coverage, and protection against disconnection. In other cases, Member States are authorised or required to set quality standards. In some cases, Member States are also required to monitor and enforce compliance with quality standards and to ensure the publication of information on quality standards and actual performance of operators. The most developed regulation of quality at Community level can be found in the legislation on postal services and on electronic communications services.
15. In addition, the Commission has developed non-regulatory measures to promote quality in services of general economic interest – including financial instruments, voluntary European standards, and exchange of good practice. For instance, in the electricity and gas sectors, the Community promotes voluntary co-operation between regulators.
16. In discussing the question of quality of service, it is important to bear in mind that there is a trade-off between the quality and the cost of a service. It would be inefficient, for example, for a public authority to impose a costly obligation to provide a very high quality of service when consumers and users would prefer a lower but satisfactory quality at a lower price. Furthermore, the imposition of quality standards might be unnecessary in markets where there is effective competition, provided that consumers and users are able to make an informed choice between competing service providers. This emphasises the role for regulators in ensuring that adequate and accurate information is available to users and consumers.

1.4 Affordability

17. The concept of affordability was developed within the regulation of telecommunications services. Subsequently, it was also introduced into the regulation of postal services. It requires a service of general economic interest to be offered at an affordable price in order to be accessible for all persons. Application of the principle of affordability helps to achieve economic and social cohesion in the European Union.
18. Affordability should not be confused with, and does not necessarily equate to, cost orientation. Indeed, the best the market could offer is a price oriented towards cost.

But if this cost is not judged to be affordable, the State may choose to step in ensure that everybody has affordable access. In some cases, affordability can imply that a service is offered free to everyone or to specific groups of persons. Member States may, in the light of national conditions, require that designated undertakings provide tariff options or packages to persons that depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing or using a service⁵. The concept of affordability appears to be narrower than the concept of “reasonable prices” that is currently discussed in the context of the proposed amendment of the internal market directives for gas and electricity. While affordability is a criterion that takes account mainly of the customer perspective, the principle of “reasonable pricing” suggests to take account also of other elements.

19. The sector-specific legislation in place does not specify the criteria for determining affordable prices, leaving it to the Member States to verify whether prices are affordable. Some of the criteria for determining affordability must be defined by the Member States. These criteria could be linked, for example, to the penetration rate or to the price of a basket of basic services related to the disposable income of specific categories of customers. Finally, once the affordable level has been set, the Member States should ensure that this level is effectively offered, by putting in place a price control mechanism («price cap», geographical averaging) and/or by distributing subsidies to the consumers and users concerned.
20. Therefore, it might be considered whether this concept should be developed further at Community level. Furthermore, it could be discussed whether the concept should be extended to other services of general economic interest.

1.5 User and consumer protection

21. EU consumer policy is an integral part of the political approach underpinning the European model of society. Its overarching aim is to ensure that the internal market delivers progressively better outcomes for consumers and that market failures to the detriment of consumers are remedied. This includes ensuring the market transparency and the fairness of commercial practices. In services of general interest, horizontal user and consumer protection rules apply as they do in other sectors of the economy. In addition, because of the particular economic and social importance of these services, specific measures have been adopted in sectoral Community legislation to address the specific concerns and needs of consumers and businesses. Consumer and user rights are set out in sector-specific legislation on electronic communications, postal services, energy (electricity, gas), transport and broadcasting.
22. The Commission Communication of September 2000⁶ sets out a number of principles that can help to define the requirements of citizens for services of general economic interest. These principles include good quality of service, high levels of health protection and physical safety of services, transparency (e.g. on tariffs, contracts, choice and financing of providers), choice of service, choice of supplier, effective competition between suppliers, existence of regulatory bodies, availability

⁵ See Article 9(2) of Directive 2002/22/EC

⁶ OJ C 17, 19.1.2001, p. 4

of redress mechanisms, representation and active participation of users and consumers in the definition of services, and choice of forms of payment.

23. The Communication highlighted that a guarantee of universal access, continuity, high quality and affordability form key elements of a consumer policy in the area of services of general economic interest. It also stressed the need to address citizens' concerns that are of a wider nature, such as a high level of environment protection; specific needs of certain categories of the population, such as the handicapped and those on low incomes; and complete territorial coverage of essential services in remote or inaccessible areas.
24. In addition, services of general interest should be covered by the following user/consumer rights and principles:
 - *Transparency and full information*: This must include clear and comparable information on tariffs; terms and conditions of contracts; complaint handling; and dispute settlement mechanisms.
 - *Health and Safety*: This includes the need to guarantee the highest level possible of health protection and the physical safety of services.
 - *Independent regulation*: Regulatory bodies that are independent of industry, with adequate resources, powers of sanction, and clear duties with regard to the protection of user and consumer interests.
 - *Representation and active participation*: Provisions should be made to allow for the systematic consultation of consumer representatives to give consumers a voice in decision making.
 - *Redress*: Fast and affordable complaint-handling systems and alternative dispute resolution mechanisms.
25. On the basis of the user and consumer protection principles that were identified in the Communication, a set of rights for users and consumers as regards a service of general interest could be based on the following principles:
 - access (complete geographical coverage, including cross-border access, access for persons with reduced mobility and for the disabled);
 - affordability (including special schemes for low income people);
 - safety (safe and reliable service, high level of public health);
 - quality (including reliability and continuity of services and compensation mechanisms in case of shortfalls);
 - choice (widest possible choice of services and, where appropriate, choice of supplier and effective competition between suppliers, right of switching suppliers);
 - full transparency and information from providers (e.g. on tariffs, bills, terms and conditions of contracts);

- right of access to the information collected by regulators (data on service quality, choice and financing of providers, complaint handling);
- security and reliability (continuous and reliable services, including protection against disconnection);
- fairness (fair and genuine competition);
- independent regulation (with adequate powers of sanction, clear duties);
- representation and active participation of consumers and users (in the definition of services, choice of forms of payment);
- redress (availability of complaint handling and dispute settlement mechanisms, compensation schemes);
- evolutionary clause (user/consumer rights are evolutionary, in accordance with changing user/consumer concerns and changes in the environment: economy, law, technology);
- equal access and treatment for users and consumers when using cross-border services within Member States.

2. Further specific obligations

2.1. Security of supply

26. The need to ensure continuous and sustainable provision of services of general economic interest calls for security of supply. In general, the development of the internal market has generated a considerable increase in the level of security of supply of products and services, to the extent that the markets concerned are functioning competitively.
27. In the energy sector, in particular, the issue of supply security has been the subject of a broad public debate at Community level, based on a Green Paper that the Commission published in 2001⁷. The Green Paper aims to initiate a debate with a view to defining a long-term strategy for energy supply security that is geared to ensuring the uninterrupted physical availability of energy products on the market, at a price which is affordable for consumers and users, while taking account of both environmental concerns and sustainable development. The Commission reported on the results of the public debate in a communication in June 2002⁸. On the basis of the consultation, the Commission concluded in its Report that it was necessary to improve the co-ordination of measures to ensure security of supply in the field of energy. As a follow-up, the Commission submitted, in September 2002, two

⁷ Towards a European strategy for the security of Energy supply, Green Paper, COM(2000) 769, 29.11.2000

⁸ Final Report on the Green Paper «Towards a European strategy for the security of Energy supply», COM(2002) 321, 29.6.2002

proposals for directives which will help to improve the security of supply of petroleum products and of natural gas in the European Union⁹.

28. Some services of general interest outside the energy sector may also give rise to supply security concerns, e.g. because of the risk of long-term underinvestment in infrastructure or capacity. Yet, Community secondary legislation generally does not address the issue. In the telecommunications sector the Commission has proposed a comprehensive strategy to ensure the security of electronic communications networks¹⁰. It may be useful to consider whether there are other sectors in which the issue of supply security should be raised specifically. However, any assessment should take into account that specific additional measures aimed at increasing the security of supply usually entail an additional economic cost. For any action proposed to increase security of supply therefore needs to ensure that the ensuing cost is not greater than the expected benefits¹¹.

2.2. *Network access and interconnectivity*

29. In cases of natural monopolies with significant sunk costs, increasing returns of scale and decreasing average cost, market entry is particularly difficult. Such services are typically provided by means of stable and long-life technologies. In such cases, the mere application of common rules (e.g. competition or public procurement rules) may prove insufficient and thus needs to be complemented by more intense and continuous sector-specific oversight (regulation), the minimum scope of which is in many cases specified in Community legislation.

30. A number of the industries concerned are network industries in which fair access – in particular for new entrants - to existing networks, e.g. electricity grids, telecommunication networks or rails, will often be a prerequisite to operating successfully in downstream markets¹². The Community has addressed the issue of access in four main ways:

- (1) Retaining a vertically integrated incumbent with an exclusive right to operate services. This was the standard form of organisation of these industries at the time the Community came into being. In most network industries it has now been prohibited through specific Community legislation. It is currently not forbidden for water; for bus/metro/light rail; and for residual parts of the electricity, gas and postal industries. In bus/metro/light rail there are no plans for public authorities to be obliged to separate the operation of infrastructure from the provision of passenger services, and public authorities will be able to continue to grant exclusive rights to operators, provided such rights are awarded following competition.

⁹ Proposal for a Directive of the EP and of the Council concerning the alignment of measures with regard to security of supply for petroleum products, OJ C 331 E , 31.12.2002, p. 249; proposal for a Directive of the EP and of the Council concerning measures to safeguard security of natural gas supply, OJ C 331 E , 31.12.2002, p. 262

¹⁰ COM(2001) 298

¹¹ Cf. Commission Staff Working Paper, Security of supply, The current situation at European Union level, SEC(2002) 243, 28.2.2002

¹² Furthermore, many markets of services of general interest were only recently opened to competition and the incumbent providers often maintain a dominant position in their national market for a certain period of time. A certain degree of regulatory oversight and control is thus necessary to avoid abuse of market power

- (2) Retaining a vertically integrated incumbent, which must open its infrastructure to competitors. Community law obliges incumbents to give competitors access to the local loop in the telecommunications sector, to the electricity grid and to gas pipelines (both at transmission and distribution level) in energy markets, and to national rail networks for international services.
- (3) Enabling vertically integrated competitors to create their own duplicate infrastructure. This approach has been applied in telecommunications, postal services, aviation [and broadcasting]¹³.
- (4) Separating the functions of operator and infrastructure manager. This is the approach chosen so far for access to the electricity network and in rail¹⁴. The Commission has now also proposed the same for gas and this proposal has been endorsed by the Energy Council.

31. There is clearly no single ideal approach to the regulation of network industries. Choices depend on the characteristics of each industry. The table below shows how Community regulation approaches access regulation differently according to the specificities of the industries concerned and the stage of the liberalisation process.

	Electricity and gas	National rail	Bus/metro /light rail	Air	Telecoms (fixed line)	Telecoms (mobile telephony)	Post
Do competitors create competing infrastructure networks?	Minimal in practice	No	In a few places	Yes	Yes, but limited to certain MS	Yes	Yes
Can infrastructure managers also be operators?	No (new Directives will require legal separation)	No (independent allocation and charging function required by Community law)	Yes	Yes	Yes	Yes	Yes
Is there Community secondary legislation preventing Member States awarding a single operator an exclusive right?	Yes (non-households by 2004, all customers by 2007)	Yes (freight) No (domestic passenger)	No (exception: international bus services)	Yes, except on certain routes where public service obligations are	Yes	Yes	Yes/NO (weight/price limit applies)

¹³ In other sectors this is not a technically or economically attractive option

¹⁴ The infrastructure manager and operator can be part of the same legal entity, but the process of allocating capacity on the network and charging for its use have to be performed by a body which is legally, organisationally and managerially independent of any railway undertaking (Cf. Directive No 2001/14/EC, OJ L 75, 15.3.2001, p. 29)

				imposed			
If there are exclusive rights, how are operators usually selected?	Historical operator	Historical operator (Commission wants change)	Historical operator (Commission wants change)	By open competition	n.a.	n.a.	Historical operator
If there are no exclusive rights, are there capacity limits to the volume of services provided by operators?	Yes, in the case of congested networks	Yes	n.a.	Yes	No	Yes	No
If so, how is capacity allocated?	unbundled transmission system operator with rules on congestion management for electricity	Independent infrastructure manager/location body	n.a.	Grandfather rights; informal market mechanisms; slot coordinators	n.a.	Beauty contests Spectrum auctions Administrative allocation	n.a.
What do infrastructure managers charge?	Cost recovery	Incremental cost (narrow definition) + State subsidy	No third party access	Cost recovery	Cost according to national methodology plus mark-up	Service providers charged on a "retail minus basis" (retail price minus a certain profit margin)	For cross-border services, charges must be cost-related
Do public authorities get involved in new infrastructure development?	Normally regulated	Regulated and subsidised	Regulated and subsidised	Commercially driven	Commercially driven	Commercially driven	Commercially driven outside the reserved area

32. In cases of low sunk costs, the degree of public intervention can be lower. Short-term contracts can be awarded to a single provider and quality evaluation by the customers will be taken into account for assessing the provider's performance.
33. Implementation of each of the above-mentioned approaches may be constrained by the public procurement directives or the general rules of the Treaty. The transparent and non-discriminatory selection (whether by tender procedure or not) of the single provider – who will benefit from exclusive/special rights - ensures that the highest quality is delivered at the lowest net extra cost.

2.3 *Requirements aiming to ensure media pluralism*

34. Since the mid-1980s Member states have introduced legislation regarding media ownership. The legislation put in place typically limits maximum holdings in media companies and prevents cumulative control or participation in several media companies at the same time. The objective of these legislative measures is to protect freedom of expression and to ensure that the media reflect a spectrum of views and opinions that characterise a democratic society.
35. Whilst the protection of media pluralism is primarily a task for the Member States, it is for the Community to take due account of this objective within the framework of its policies. Currently, secondary Community legislation does not contain any provisions directly aiming to safeguard the pluralism of the media. However, Community law allows the application of national safeguards with regard to media pluralism. This is highlighted, for example, in Art. 21(3) of the Merger Regulation, which explicitly provides for the possibility of applying national measures protecting the plurality of the media alongside Community merger rules or in Article 8 of the Framework Directive on electronic communications¹⁵ which provides that national regulatory authorities may contribute to media pluralism.
36. Back in December 1992, the Commission published a Green Paper¹⁶ designed to launch a public debate on the need for Community action in this field. The options considered in the Commission Green Paper included taking no action, proposing a recommendation to enhance transparency and proposing Community legislation harmonising national restrictions on media ownership. The debate did not allow clear operational conclusions to be drawn and no formal specific initiative was taken by the Commission.
37. Ten years later, given the progressing concentration of the media sector and the proliferation of electronic media, the protection of media pluralism remains an issue, including within the context of the Amsterdam Protocol on public broadcasting¹⁷. Views are sought as to whether the Commission should re-examine the need for Community action in this field in more detail.

II. POLICY INSTRUMENTS

1. Organisation of regulatory intervention

1.1. Community regulation and National Regulatory Authorities (NRA)

38. Community and Member States' primary and secondary legislation contains the basic rules applicable to markets of services of general interest. However, in order to ensure that the objectives of regulation are achieved it would be insufficient to rely

¹⁵ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33

¹⁶ Pluralism and Media Concentration in the Internal Market, An Assessment of the need for Community action, Commission Green Paper, COM(92) 480, 23.12.1992

¹⁷ Cf. the Protocol on the system of public broadcasting in the Member States annexed to the EC Treaty by the Treaty of Amsterdam

exclusively on the application and usual mechanism of enforcement of legislation. Furthermore, Community legislation may oblige Member States to designate one or several «national regulatory authorities» to be responsible for carrying out these regulatory tasks. Such provisions exist for electronic communications, postal services, railway and aviation. For electricity and gas, the Commission suggested, in its proposal of March 2001 and its amended proposals of June 2002, an obligation on Member States to «*designate one or more competent bodies as national regulatory authorities*». As regards the services that are not covered by a comprehensive regulatory regime at Community level, some Member States, such as the United Kingdom, have decided to create a regulatory authority in the field of water (OFWAT).

39. The detailed institutional arrangements regarding the national regulatory authority required in the relevant Community legislation are left to the discretion of Member States. It can thus be an existing body or the ministry responsible for the sector, an approach adopted by a number of Member States. However, this approach has proven to be problematic in terms of the independence of the national regulatory authority in some instances where Member States also retain ownership or control over companies active in the sector concerned. The communications framework directive requires in such cases «*effective structural separation of the regulatory function from activities associated with ownership or control*». The designation of a Ministry as the predominant regulatory authority in charge of all regulatory decisions remains the exception. The importance as well as ongoing and complex nature of the regulatory tasks involved often requires the expertise and independence of a sector-specific regulatory body¹⁸. Nearly all Member States have set up such a body for the sectors concerned, including electricity and gas, for which current Community legislation does not yet require the designation of a national regulatory authority.
40. It should, however, be noted that even where a sector-specific regulatory authority exists, the government – i.e. the competent Ministry – often retains responsibility for certain regulatory decisions. A situation where the sector-specific regulator is responsible for all regulatory issues is currently the exception. Such regulators are most prevalent in communications and, to a lesser extent, in energy or post, whilst in aviation and railways responsibilities are usually shared between the ministry and the civil aviation or railway agencies. In the water sector, OFWAT in the UK has the power to regulate prices and the level of service to be provided, whilst the water agencies in France could be considered as environmental regulators, given that they collect environmental charges.
41. The key characteristic of a sector-specific regulator is its independence from market operators in the sector concerned. This requirement is essential to avoid conflicts of

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A definition of a sector-specific regulatory authority is contained in Commission Decision 2002/627/EC of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, OJ L 200/38, 30.7.2002: «*For the purpose of this Decision: 'relevant national regulatory authority' means the public authority established in each Member State to oversee the day-to-day interpretation and applications of the provisions of the Directives relating to electronic communications networks and services as defined in the Framework Directive*»

interest and to ensure the impartiality of the regulator¹⁹ and is therefore stipulated in Community legislation whenever the designation of a national regulatory authority is mandatory. More specific rules are in place in Member States to ensure this independence, e.g. regulator staff are not permitted to hold shares of companies in the sector.

42. Sector-specific regulators also have a high degree of independence from the government. In most cases, the government appoints the Head and the members of the regulatory authority and determines its general policy objectives²⁰. However, regulatory authorities are normally not subject to instructions from the government on individual decisions; furthermore, members of the authority could be specifically required to have a good knowledge of the rules applicable to the sector. This increases the impartiality of the regulator and enhances the continuity of regulatory approaches. Some regulatory authorities finance their budgets through autonomous sources of income, as opposed to the general budget administered by the government, which enhances their independence.
43. It is important to note that independence does not mean lack of accountability for performance. Regulators usually have to report regularly to government and/or parliament and, most importantly, the parties concerned can appeal against their decisions in court. On the other hand, appeal possibilities must be proportional. If decisions of the regulator become mired in years of controversy before they become effective, the objective of regulation will not be achieved. Therefore, in a number of cases appeals against decisions of the regulator have no suspensive effect.
44. Before taking decisions, regulators need to consult with interested parties and the public, in order to ensure that all relevant aspects are taken into account. Equally important, regulators are required to consult and co-ordinate their work with other public authorities, such as competition authorities and consumer protection bodies, to ensure compatibility and consistency of decisions taken.
45. In order to carry out their tasks effectively, regulators often rely on information which only regulated undertakings can provide. Therefore, regulators usually have the power to require from undertakings, within a time limit, any information necessary for the task in question. In the case of commercially sensitive information, regulators have to respect the rules on business confidentiality. In order to regulate network access tariffs, for instance, the regulator needs to have reliable and comprehensive information on the costs incurred by the network operators.
46. The powers and responsibilities of regulators in the Member States vary between sectors and in the legislation of the Member States, including the division of tasks between the sector regulator and the competent ministry. This division of tasks is largely influenced by national legal and administrative traditions prevailing in the Member States. Some core responsibilities are, however, shared by nearly all regulators of the sectors concerned. Regulation of the terms and conditions of access to existing networks and regulation of retail prices, in order to exclude abuses of

¹⁹ Cf. ECJ, Case C-202/88, *France v Commission* [1991] ECR I-1223, para 51, 52; Case C-91/94, *Thierry Tranchant* [1995] ECR I-3911, para. 18, 19

²⁰ In some cases, such as in electronic communications, overall policy goals and objectives of the «national regulatory authority» are specified in Community legislation

dominant positions in the market, are probably the most prominent examples. In this respect regulators supplement the activities of competition authorities: whilst the latter apply general competition law to a specific sector by taking measures ex-post, i.e. after the abuse has taken place, a regulator typically intervenes ex-ante by setting rules intended to reduce the risk of the occurrence of abuses from the outset²¹.

47. Usually, the legislative act in question defines the obligations related to the provision of universal service. However, regulators often play an important role in further defining and implementing such rules. For instance, where a universal service provider receives compensation for providing the service, the general rules of the cost calculation and the financing mechanism are usually defined by Parliament or the competent Ministry. The implementation of these rules is left to the regulator.
48. An important element of the universal service concept is affordability of prices for final users and consumers. Where necessary to achieve this objective, price regulation measures are applied by regulators. Since the market should in principle determine the price, such regulation usually takes the form of maximum prices, which exist in many Member States, for instance for electricity. Price regulation may, however also take the form of minimum prices, in order to prevent predatory behaviour by dominant players (e.g. in communications).
49. Particularly important from a consumer or user perspective is the role regulators often play in developing and implementing binding standards of security and quality of service. These are important in terms of meeting expectations with regard, inter alia, to access choice, transparency (including on price), affordability, quality, safety, security and reliability. Adequate redress mechanisms for consumers and users are essential where operators fail to meet standards in this respect.
50. Licensing is an important tool to ensure compliance with binding standards. If a market operator does not meet the standards set by the regulator – and specified in the licence granted to market operators – regulators can withdraw the licence. Other means to ensure compliance with rules include the imposition of penalties.
51. Consumers and users must have the possibility to file complaints, for instance, in the event of non-compliance of an operator with the kind of standards outlined above. Such complaints are usually handled by the regulator and in many cases legislation obliges regulators to take a decision rapidly (i.e. within a certain time limit).
52. Some regulatory authorities are also active in systematically providing market information to consumers,²² whilst in most cases this task is carried out by consumer

²¹ It should be noted that the responsibilities of competition and regulatory authorities usually overlap to an extent. Inappropriate pricing may be incompatible with the rules set by the regulator and at the same time constitute an abuse of dominant position within the meaning of competition law. It is important, therefore, that the respective roles of regulators and competition authorities are clear in practice. In general, it can be said that the regulator applies sector-specific rules, which will often obviate the need for intervention by the competition authority. On the other hand, it is for the competition authority to intervene when the regulator does not have the power to ensure that horizontal competition rules are respected or fails to take action

²² For instance, the energy regulator in the UK and Denmark; in communications, Community legislation stipulates that regulators must encourage the provision of information to consumers

organisations. Apart from the above-mentioned core responsibilities of regulators, many Member States entrust them with further tasks, for instance, in energy the implementation of social and environmental policy²³ and long-term planning on security of electricity and gas supply²⁴. These additional tasks are usually determined by specific national circumstances. The reason for transferring such tasks to the regulators is in many cases their technical expertise and knowledge of the sector.

1.2 Institutional co-operation arrangements at Community level

53. Sector-specific regulators are set up by Member States and regulate the national market of the sector concerned. However, national markets form part of the internal Community market and regulatory decisions taken by national regulators often impact on cross-border transactions. Therefore, a degree of consistency of national regulatory approaches is necessary to avoid distortions stemming from different approaches that could have an impact on the smooth functioning of the internal market. In railways and communications, Community legislation contains a provision obliging regulators expressly to co-ordinate their decision-making principles²⁵.
54. Currently, a number of organisational arrangements aimed at encouraging regulatory consistency exist for the sectors concerned.

European associations have been established for a number of sectors, which bring together regulators from the Member States and often third countries. Examples include:

- The Council of European Energy Regulators (*CEER*) acts as a focal point for contacts between regulators and the European Commission's Directorate-General for Energy and Transport. It maintains close working relations with regulatory authorities in North America and EU candidate countries. The work of the CEER has focused on issues linked to cross-border transactions and it plays an active part in the Florence Regulatory Process and the Madrid Regulatory Process (see below).
- The European Committee for Postal Regulation (*CERP*) is composed of representatives from the CEPT (European Conference of Postal and Telecommunications Administrations) countries' postal regulatory authorities, including EU and candidate countries, EFTA and others like Albania or the Russian Federation. The CERP discusses regulatory and operational postal issues and facilitates contacts with the relevant bodies, in order to develop a common approach that can lead, where appropriate, to proposals and recommendations.
- The Joint Aviation Authorities (*JAA*s) is the umbrella organisation for national civil aviation agencies. It has developed common safety, regulatory standards and

in order to enable customer choice (Articles 21 and 22 of the universal service directive (2002/22/EC))

²³ For instance, in the UK and Sweden

²⁴ For instance, in Belgium

²⁵ Article 31 of Directive EC/2001/14 and Art. 7(2) of the Communications Framework Directive

procedures for most areas of civil aviation. These standards are non-binding, unless transformed into either EU or national legislation.

55. A unique form of co-ordination and co-operation between national regulators exists in the field of electricity and gas. In order to build consensus between all parties on issues relating to cross-border transactions in the gas and electricity sectors, two regulatory forums, the *Madrid Forum* and the *Florence Forum*, were created. These forums, which are chaired by the Commission, bring together the national energy regulators and high-level representatives of the Member States, industry and consumers. The decisions taken by the forums are not formally binding, but they are taken with the understanding that national regulators will implement them at the national level²⁶. The limits of the two forums have, however, increasingly become apparent, in particular when it comes to taking decisions on controversial issues. Therefore, in March 2001 the Commission proposed a regulation on cross-border exchanges of electricity providing for a comitology procedure on issues which have been discussed within the context of the Florence Forum.

56. European groups of regulators

Recently a new organisational form of involvement of national regulators at Community level has developed in the form of European groups of regulators which aim to reinforce and formalise the role of sector-specific regulatory authorities at EU level. Unlike Comitology committees, such groups must be composed of the national regulators in the sector concerned. This concept was, for instance, discussed in detail in the «Lamfalussy report» on the future legislative and regulatory process for the European securities market, with a view to developing a new and more effective form of regulation. As regards services of general economic interest, a «European group of regulators» was recently created by Commission decision²⁷ for electronic communications. Its aims are: (a) to advise and assist the Commission in consolidating the internal market for electronic communications networks and services; (b) to provide an interface between national regulatory authorities and the Commission; and (c) to assist in ensuring consistent application of the regulatory framework in all Member States.

57. For electricity and gas, the Commission has suggested in its amended proposals for the completion of the internal energy market, in response to a proposal made by the European Parliament, that such a group of electricity and gas regulators should be set up.

58. Comitology

In most of the sectors concerned, Community legislation provides for Comitology procedures to define the details of implementation of the rules contained in the basic Community legislation. The common pattern under such procedures is that the Commission adopts decisions after consultation of either an advisory or a regulatory committee made up of representatives of Member States. Issues dealt with are often

²⁶ For more detail on the Florence and Madrid Forum see
http://europa.eu.int/comm/energy/en/elec_single_market/florence/index_en.html;
http://europa.eu.int/comm/energy/en/gas_single_market/madrid.html

²⁷ OJ L 200, 30.7.2002, p. 38

those which are particularly relevant for cross-border transactions, such as, for instance, quality standards for cross-border postal services or railway interoperability. Comitology Committees exist for communications, postal services, railways and aviation. It should be noted that it is for the Member States to determine how they are represented in these Committees and, therefore, participation of the sector-specific regulatory authority is not guaranteed. However, in practice, in most cases where regulators exist they are kept involved in the procedure by Member States. For electricity, the Commission proposes in its proposals to complete the internal energy market a comitology procedure for issues relevant to the cross-border transmission of electricity.

1.3 Is there a need for European regulators?

59. A European regulatory authority does not exist at the moment for any of the sectors concerned. However, the idea of setting up such a body at European level has been discussed for certain sectors for some time, in particular in communications²⁸. In aviation, for example, the Council decided recently, on the basis of a Commission proposal, to set up a European Aviation Safety Agency (EASA). This agency will assist the Commission in adopting common standards on air transport safety and environmental protection issues under a comitology procedure. It will also be responsible for the airworthiness and environmental certification of aeronautical products designed or used in the Member States. This task has until now been carried out by the national aviation authorities. In this (limited) respect the new agency could be considered a European regulator. In railways, the Commission proposed, in its 2nd railway package of January 2002 setting up a European Railway Agency. This agency would not, however, have a direct regulatory role. That said, in certain areas the Agency would have an advisory role which is comparable to the role of the «European group of regulators» in communications.

2. Financing of services of general interest

60. While for a significant number of services of general economic interest market mechanisms alone may ensure their viability, some services of general interest need specific financing schemes in order to maintain a financial equilibrium.
61. In general, Community law does not impose a specific form of financing of services of general interest and it is for the Member States to decide how these services are financed. Yet, whatever financing scheme is applied, this scheme must comply with the competition and State aid rules as well as with the internal market rules of the Treaty. In any event, the Treaty allows providers of services of general economic interest to be compensated for the extra cost of fulfilling a public service mission. Any compensation that exceeds what is necessary to discharge the public service task is, as a matter of principle, not compatible with the Treaty.
62. Financing schemes can take different forms, such as direct financing through the State budget, contributions made by market participants, the granting of special or

²⁸ See the two independent studies undertaken for the Commission: Eurostrategies/Cullen International, *The possible added value of a European Regulatory Authority for telecommunications*, Dec. 1999; Nera & Denton Hall, *Issues associated with the creation of a European Regulatory authority for telecommunications*, March 1997

exclusive rights, tariff averaging or, in the case of non-market social services, solidarity-based financing.

(a) *Direct compensation through a Member State's budget*

One form of providing financial support to services of general interest consists in direct compensation through a Member State's budget. This compensation can take the form of direct payments to the provider of the service or of other financial advantages, such as tax exemptions, that reduce the Member State's budget revenues. In some cases, direct compensation by a Member State can be complemented by Community funding based on the principle of co-financing, e.g. through structural funds.

Direct compensation shares the burden of financing a public service task among all tax payers. This form of financing does not create a barrier to entry. It is subject to parliamentary control in the Member States as part of the budgetary procedure.

(b) *Contributions by market participants*

Member States may also decide that the net costs of the provision of a service of general interest should be recovered from those the service is provided to by means of levies on undertakings. This possibility is explicitly provided for in Community legislation on telecommunications and on postal services.

In this case, Member States should ensure that the method of allocation among undertakings is based on objective and non-discriminatory criteria and is in accordance with the principle of proportionality. This principle should not prevent Member States from exempting new entrants that have not yet achieved any significant market presence. Any funding mechanism should ensure that market participants only contribute to the financing of universal service and not to other activities which are not directly linked to the provision of the universal service obligations. The mechanism should in all cases comply with the principles of Community law, especially, in the case of sharing mechanisms, the principles of non-discrimination and proportionality.

The net cost of universal service obligations may be shared between all or certain specified classes of undertakings. National regulatory authorities should satisfy themselves that those undertakings benefiting from funding provide sufficiently detailed information on the specific costs requiring such funding in order to justify their request. There are incentives for designated operators to raise the assessed net cost of public service obligations. Therefore, Member States should ensure effective transparency and control of amounts charged to finance universal service obligations.

In addition, Directive 2002/22/EC on universal service in electronic communications provides that Member States' schemes for the costing and financing of universal service obligations must be communicated to the Commission for verification of compatibility with the Treaty. Furthermore, recital 21 of this directive provides that "any funding mechanism should ensure that consumers and users in one Member State do not contribute to universal service costs in another Member State, for example when making calls from one Member State to another."

(c) *Special and exclusive rights*

In some cases, Member States grant special or exclusive rights in order to ensure the financial viability of a provider of a service of general economic interest. The granting of such rights is not *per se* incompatible with the Treaty. The Court of Justice ruled²⁹ that Article 86(2) of the Treaty «*permits the Member States to confer on undertakings to which they entrust the operation of services of general economic interest exclusive rights which may hinder the application of the rules of the Treaty on competition insofar as restrictions on competition, or even the exclusion of all competition, by other economic operators are necessary to ensure the performance of the particular tasks assigned to the undertakings possessed of the exclusive rights*». However, Member States must ensure that such rights are compatible with internal market rules and do not amount to abuse of a dominant position within the meaning of Article 82 by the operator concerned. Generally speaking, exclusive or special rights may limit competition on certain markets only insofar as they are necessary for performing the particular public service task.

In addition, Member States' freedom to grant special or exclusive rights to providers of services of general interest can also be restricted in sector-specific Community legislation³⁰.

(d) *Tariff averaging*

For some services, such as certain telecommunications or postal services, Member States require that a universal service is provided at a uniform tariff throughout the whole territory of the Member State. In these cases the tariff is based on an average of the cost of providing the services, which can differ appreciably, e.g. depending on whether the services are provided in a densely populated area or in a remote rural area. In general, and subject to control of abuse by the Commission, tariff averaging is compatible with Community law provided it is imposed by a Member State for reasons of territorial and social cohesion and it meets the conditions set out in Article 86(2) of the Treaty³¹.

(e) *Solidarity-based financing and compulsory membership*

Because of its importance this form of financing is mentioned here, although it only concerns support for services of general interest of a non-economic nature. Basic social security systems in the Member States are generally based on schemes that pursue a social objective and embody the principle of solidarity. They are intended to provide cover for all persons to whom they apply against risks such as sickness, old age, death and invalidity, regardless of their financial status and their state of health at the time of affiliation. The principle of solidarity, for instance, in health insurance schemes, can be embodied in the fact that the scheme is financed by contributions

²⁹ ECJ Case 320/91, judgment of 17 May 1993, Corbeau, [1993] I-2533 (point 14)

³⁰ Cf. Article 2(1) of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, OJ L 249, 17.9.2002, p. 21; Article 7(1) of 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, OJ L 15, 21.1.1998, p. 14

³¹ ECJ Case 320/91, judgment of 19 May 1993, Corbeau, [1993] ECR I-2533 (point 15)

proportional to the occupational income of the persons making them, whereas the benefits are based on the needs of those who receive them. In this case, solidarity entails the redistribution of income between those who are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover. It also mitigates market failures associated with health insurance linked to economies of scale, risk selection and moral hazard. In old-age insurance schemes, solidarity can be embodied in the fact that the contributions paid by active workers serve to finance the pensions of retired workers. It is also reflected by the grant of pension rights where no contributions have been made and of pension rights that are not proportional to the contributions paid. Finally, there can be solidarity between the various social security schemes, in that those in surplus contribute to the financing of those with structural financial difficulties. Such social security schemes are based on a system of compulsory contribution, which is indispensable for application of the principle of solidarity and the financial equilibrium of those schemes. Furthermore, the management of such schemes is generally subject to comprehensive control by the State.

According to the case law of the Court of Justice, organisations entrusted with the provision of such activities that are based on the principle of national solidarity and are entirely non-profit-making fulfil an exclusively social function. These organisations do not engage in an economic activity and are not to be considered undertakings within the meaning of Community law³². Nevertheless, it could be considered whether the criteria and the consequences of solidarity-based financing of social security schemes should be clarified at Community level.

63. Internal market, competition and State aid rules aim to ensure that financial support granted to services of general interest does not distort competition and the functioning of the internal market. Also, the sector-specific legislation in place seeks only to ensure that the financing mechanisms put in place by the Member States are least distortive of competition and facilitate market entry. Other relevant criteria for choosing a financing mechanism, such as efficiency, accountability or its redistributive effects, are not taken into account. At this stage, the Commission considers it appropriate to launch a debate on whether these criteria could lead to the conclusion that specific financing mechanisms should be preferred and whether the Community should take measures in favour of specific financing mechanisms.

3. Evaluation of services of general interest

64. Evaluating services of general interest is intrinsically linked to evaluating the performance of the industries providing these services. This performance rests on delivering quantitative and qualitative benefits to users and consumers, and consequently on increasing their satisfaction. Evaluating the performance of these sectors to ensure that objectives of economic, social and territorial cohesion and environment protection are attained is an essential task at Community level. From a purely economic perspective, the evaluation of services of general interest is important because the sectors providing these services account for a substantial part of EU GDP and prices in these industries have an influence on costs in other sectors.

³² ECJ joint Cases 159/91 and 160/91, judgment of 17 February 1993, Poucet and Pistre, [1993] ECR I-637 (points 18, 19); Case C-218/00, judgment of 22 January 2002 *Cisal di Battistello Venanzio & C. Sas* ./ INAIL [2002] ECR I-691 (point 44)

Evaluating network industries providing services of general economic interest at this particular time is also justified by the fact that these sectors are currently undergoing major structural reforms due to regulatory, technological, social and economic changes. Nevertheless, the evaluation of performance should be undertaken in all industries providing services of general interest, whether they are subject to structural changes or not. Evaluation is also essential because the information it provides is an important input for broad-based political discussions and informed regulation of the sectors. Finally, evaluation is justified in terms of good governance. Evaluation provides evidence, judgment and information for policy conception, adaptation and accountability. For all these reasons, the Commission considers that it is important to assess services of general interest and has defined a strategy in this respect.

3.1 *A three pillar-approach*

65. As already stated in the 2000 Communication on services of general interest in Europe, *"the Community involvement with services of general interest goes beyond developing the Single Market, including providing for instruments to ensure standards of quality, the co-ordination of regulators and the evaluation of operations. (...) Such contributions are meant to enhance, and by no means replace, the national, regional and local roles in their respective fields"*³³. Guided by these principles, the European Commission carries out regular evaluations of the performance of industries providing services of general economic interest. This evaluation is based on three pillars.
66. The Commission has made «horizontal assessments» part of its strategy for efficient evaluation of services of general economic interest. In December 2001, the Commission presented a first horizontal assessment³⁴ annexed to the «Report on the functioning of product and capital markets»³⁵. It provided a baseline for future horizontal monitoring and regular evaluation of these services, as requested by the Council. In line with the Council's invitation to present a methodology for the evaluation of services of general interest, the Communication «A Methodological Note for the Horizontal Evaluation of Services of General Economic Interest»³⁶ defined a methodology to be applied by the Commission in future horizontal evaluations. The Commission will produce annual reports presenting the results of the horizontal evaluation of services of general economic interest. The reports will consist of three main parts: an analysis of structural changes and market performance, the results of the ongoing consumer consultation process, and a cross-sectoral review of horizontal topics. Initially, horizontal evaluations will cover the sectors, in the Member States, of air transport, local and regional public transport, electricity, gas, postal services, railway transport, and telecommunications.

³³ COM(2000) 580, p. 23-24

³⁴ Market performance of network industries providing services of general interest: a first horizontal assessment, SEC(2001) 1998

³⁵ COM(2001) 736 final

³⁶ COM(2002) 331 final

67. Alongside horizontal assessments, the European Commission pursues sectoral assessments of industries providing services of general economic interest³⁷. Indeed, the economic, technical, and regulatory frameworks differ across industries, so that some issues are industry-specific and cannot be fully addressed in horizontal assessments. In addition, these sectoral assessments are suitable instruments for monitoring the transposition of directives and effective application of the rules as transposed into national law, as well as for obtaining a comparison of sectoral regulation. This gives the Commission a basis for guiding the Member States on future regulation and for discussing best sectoral practices. It also provides a clear picture of possible failures to comply with EU laws.
68. Evaluation of the performance of services of general interest would not be comprehensive if it failed to take into account the opinion of the various interested parties (all users/consumers, operators, regulators, social partners, public authorities, etc.) concerned in these services. The views of interested parties are taken into account in the assessment by the Commission and provide guidance for future policy action. Specifically, consumer satisfaction with regard to services of general interest is surveyed by Eurobarometer opinion polls and qualitative surveys³⁸.

3.2 *Scope of the evaluation*

69. In the current environment of structural and regulatory change, the evaluation process should take four questions into consideration.

(a) Do the structural changes occurring in the industries providing services of general interest lead to benefits to users and consumers in terms of lower prices and better services?

Liberalising industries providing services of general economic interest should foster competition and therefore increase choice, and should force companies to rationalise production and to offer better and innovative services at lower prices. These multiple benefits should increase welfare, provided appropriate measures are taken to safeguard consumer and user rights. However, the benefits of market opening can only be transmitted to users and consumers if appropriate regulation and competitive conditions are in place. The evaluation of services of general economic interest is important to detect evidence of possible shortcomings in the transmission of these benefits and their possible capture by certain economic operators. This objective is consistent with the Commission's general initiative to improve governance and the quality of regulation in the European Union.

(b) How are access and quality evolving with regard to the provision of services of general interest?

Market performance includes the quality and the affordability of the service provided. With market opening, there is a potential risk that a competitive environment could put pressures on prices at the expense of the quality of these services or at the cost of an unequal distribution of benefits among users and

³⁷ See the examples from the telecommunications, postal, energy and transport sectors in the Commission Report on services of general interest, COM(2001) 598, 17.10.2001, p. 15

³⁸ http://europa.eu.int/comm/consumers/cons_int/serv_gen/cons_satisf/index_en.html

consumers. Therefore, the evaluation should take particular account of the interaction between different infrastructure networks, as well as the objectives of both economic efficiency, consumer and user protection and economic, social and territorial cohesion. In this context, an essential aspect to be considered is the degree of accessibility to networks. For instance, in energy and transport, it is useful to assess the degree of interconnection between different networks, and in particular their geographical link between the most developed areas and the less favoured regions.

(c) How is employment affected by changes in the sectors providing services of general interest?

Industries providing services of general interest have traditionally been run by the public sector and are major employers. The introduction of competition raises the fear of substantial employment adjustment costs. These fears represent a main source of resistance to the structural changes. For this reason, it is important to assess the extent to which these costs occur. The aim of the assessment is to appraise both direct and indirect effects on employment. Therefore, it is particularly important to broaden the scope of the analysis and to assess long-term impacts on the economy as a whole, alongside the short-term effects in the industries providing the services.

(d) How are these developments perceived by users/consumers?

The last issue to be dealt with is how developments in the performance of these sectors are perceived in practice. A mismatch may indeed arise between the developments observed and their perception by the public. As users and consumers should be the ultimate beneficiaries of the services provided by these industries, it is crucial to canvas their opinion. It should nevertheless be borne in mind that the beneficiaries are a multiplicity of actors ranging from private households to companies with differences in revenues, size and other characteristics. Therefore, different groups should be considered separately in any evaluation.

3.3 *Issues*

70. One of the main stumbling blocks for a comprehensive evaluation is the huge disparity in data availability. By providing guidance, the European Commission has played an important role in streamlining and standardising data collection. Since 2000, the Commission has published a list of structural indicators,³⁹ some of which are related to industries providing services of general interest. The Communication on a Methodology to evaluate services of general interest contains in its annex a list of indicators, some of which are currently unavailable, that provide an ideal map for evaluation. This list could be the basis for discussion with potential data providers to improve data collection. Alongside a lack of resources of national regulatory or statistical bodies and remaining differences in methodologies that make comparisons difficult, one increasing difficulty is that the process of market opening itself can affect the availability and quality of data. On the one hand, the introduction of competition has in some cases led to more comprehensive data gathering and

³⁹ See COM(2002) 551, 16.10.2002 and Commission Staff Working Paper in support of the Report from the Commission to the Spring European Council in Brussels – Progress on the Lisbon Strategy (COM(2003) 5), SEC(2003) 25/2, 7.3.2003

evaluation than existed before the emergence of private sector operators. On the other hand, some Member States are having difficulty where private companies refuse to disclose strategic information on the grounds that it is market sensitive, though it is not always apparent that this is the case. One issue for discussion is to strike the balance between the need to obtain data for evaluation and policy-making and the right of companies to treat this information as confidential.

71. In addition, the evaluation needs to reach the right balance between economic and social policy considerations, especially as regards service quality provision and social and territorial cohesion. This is an issue on which the existing legal framework relating to services of general interest provides only partial guidance.
72. To grasp these issues, the Commission has developed an evaluation strategy and provides the necessary input for the debate. So far, its role has included carrying out horizontal evaluations across countries and sectors, plus the task of ensuring more co-ordination between national regulators to make the conditions of competition and regulation more similar across Member States. However, the Commission cannot encompass, summarise and present a consolidated view representing all the often diverging views of the different interested parties on the performance of services of general interest. This means that there is a need for a broad debate on how to evaluate and on who should carry out this task. In addition, the evaluation carried out by the Commission at Community level does not preclude supplementary evaluations at other levels (in accordance with the principle of subsidiarity) or by other bodies. The question of whether an evaluator at Community level should be independent from the Commission and/or the Member States remains open to debate.
73. As suggested in the European Parliament's resolution,⁴⁰ public participation could be greatly expanded. The Parliament proposes to «*organise the debate within the various existing forums (Economic and Social Committee, Committee of the Regions, consultative bodies, associations involved in services of general interest initiatives and consumer associations)*». The results of this debate should be taken into account and provide guidance for the evaluations, and the evaluations should themselves be the subject of debate. Such a broad social debate on the performance of services of general interest is welcome, provided that the interests of all interested parties are well balanced and properly represented. Within the current institutional framework, it remains unclear what the respective roles should be of the different institutions and organisations in the evaluation of services of general interest and how the debate should be structured and organised.

⁴⁰ European Parliament report on the Commission Communication on «Services of general interest in Europe», COM(2000) 580 C5-0399/2001 – 2001/2157/COS; Final A5/0361/2001. Rapporteur: Werner Langen. 17.10.2001

4. The international dimension: trade policy

4.1 *Liberalisation of trade in services of general interest within the context of the World Trade Organisation (WTO)*

74. The Community and its Member States are parties to the General Agreement on Trade in Services (GATS),⁴¹ which is the main multilateral set of disciplines on trade in services, where WTO members have undertaken binding commitments to open up, subject to listed limitations, specific services sectors to competition from foreign providers.

4.1.1 *Services of general interest are not excluded as such from the GATS*

75. The term «services of general interest» cannot be found in the GATS. GATS disciplines apply to all committed services with two exceptions:

- in the air transport sector, traffic rights and all services directly related to the exercise of traffic rights, and
- for all sectors, services provided to the public in the exercise of governmental authority, which means any service that is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

It may be added that the supply of services to public entities through procurement – including services of general interest – is not currently subject to the GATS core obligations (most-favoured-nation, national treatment, market access, possible additional commitments). However, the Community has undertaken to grant most-favoured-nation and national treatment vis-à-vis the contracting parties of the Agreement on Government Procurement (GPA), also negotiated within the WTO framework.

4.1.2 *The GATS provides for general and security exceptions, which to a large extent correspond to the exceptions of the EC Treaty*

76. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in the GATS can be construed to prevent the adoption or enforcement by any Member of measures necessary to protect public morals or to maintain public order, to protect human, animal or plant life or health, to secure compliance with laws or regulations relating to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts, the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts, and safety (Article XIV of the GATS).

77. In addition, nothing in the GATS can be construed to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security

⁴¹ See the Commission publication «GATS. A guide for business» and the WTO publication «GATS. Facts and fiction». The text of the GATS is published in OJ L 336, 23.12.1994, p. 190

interests or to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests (Article XIV bis of the GATS). The GATS preamble also provides for the right of Members to regulate the supply of services in order to meet national policy objectives.

4.1.3 The liberalisation of trade in services of general interest depends on commitments undertaken by WTO Members

78. For those services of general interest that are not excluded from the scope of the GATS, the degree of openness that countries offer is not set automatically and must be the subject of negotiations. Whereas some GATS disciplines – such as the Most Favoured Nation obligation and transparency – apply across the board to all services sectors covered by the GATS, the provisions concerning specific commitments - market access, national treatment and possible additional commitments - apply only insofar as countries have made a commitment in a given sector. The degree of sectoral coverage of Members varies greatly, and no Member has made commitments in all services sectors. Once undertaken, commitments can still be withdrawn or modified under specific conditions. The specific procedure is set out in Article XXI of the GATS.

4.1.4 The GATS does not require privatisation, nor deregulation of services of general interest. It is up to WTO Members to decide on these issues in the exercise of their sovereign rights

79. There is no single model of services of general interest within the WTO membership. The concept varies according to the different sectors and national traditions and legal conditions in the Members concerned. The GATS leaves it entirely for Members to decide whether they provide services of general interest themselves, directly or indirectly (through public undertakings), or whether they entrust their provision to a third party. Thus, services of general interest can be and are carried out either by public or by private undertakings, or jointly.

80. The objective of the GATS is to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalisation. It is not to deregulate services, many of which are closely regulated for very good reasons. In addition, in terms of general exceptions, the GATS does not prevent the adoption or enforcement of measures necessary to protect *inter alia* public morals, public order, and human, animal or plant life and health.

81. It must be observed, however, that whenever WTO Members, in the exercise of their sovereign rights, have undertaken commitments in a given services sector, they are obliged to administer their services regulation for that sector in a transparent and predictable manner. In this context, GATS calls upon WTO Members to develop disciplines for certain specific measures that affect trade in services (qualification requirements and procedures, technical standards and licensing requirements). Such GATS disciplines should ensure that those specific measures are based on objective and transparent criteria and that they do not unnecessarily hamper trade in services having regard to the need to ensure the quality of the service. So far, only disciplines for the accountancy sector have been agreed, but they have not yet entered into force.

82. WTO Members can in any case, in the exercise of their sovereign rights, undertake commitments additional to market access and national treatment, under which they accept that they will abide by specific regulatory obligations. In this context, it has to be noted that about 75 WTO Members have agreed to certain common regulatory principles applicable to the telecommunications sector by subscribing to a «reference paper» which contains rules on, among other things, competition, interconnection, licensing, regulator's independence.
- 4.1.5 The GATS agreement does not preclude the imposition of public service obligations*
83. GATS allows WTO Members to impose public service obligations in a liberalisation context. In their commitments, WTO Members can grant full market access and national treatment to foreign service providers, and at the same time impose on them the same public service obligations that apply to domestic service providers. Even when they go further and subscribe to common regulatory principles, as some have done through the telecommunications «reference paper», they can at the same time keep their right to define the kind of public (universal) service obligation they wish to maintain.
- 4.1.6 Subsidisation of services of general interest is not forbidden by the GATS*
84. At present, the GATS only envisages negotiations with a view to developing the necessary disciplines to avoid trade-distortive effects of subsidies (Article XV of the GATS). In the absence of these multilateral disciplines, all subsidies are allowed, although subject to the national treatment principle, since subsidies are measures that affect trade in services. Accordingly, for those services where a WTO Member has undertaken market access commitments, a country that wants to limit access to subsidies to domestic service suppliers must specify this in the schedule of commitments as a national treatment limitation.
85. A WTO Member that has undertaken commitments in respect of services of general interest is therefore free to decide whether and to what extent domestic subsidies are granted to foreign service suppliers that enjoy market access to those services. Such decision will have to be transcribed in a national treatment commitment.
- 4.1.7 Community commitments in respect of services of general interest are undertaken in coherence with the internal market rules applying to these services*
86. In the Uruguay Round, the Community has undertaken binding commitments for certain services of general interest (e.g. telecommunications, privately funded education, environmental, health and social and transport services). These commitments took into account the situation in the internal market, were limited to certain activities specifically listed and were subject to a number of specific limitations.
87. The specific commitments undertaken at the Uruguay Round have never gone beyond granting to foreign services suppliers the market access and national treatment that Community services suppliers enjoyed within the internal market in sectors open to competition. The rules of the internal market are also fully respected by the Community commitment to subscribe to the «reference paper» in the telecommunications sector. None of these commitments has constrained the internal policy regarding the organisation of these sectors. Member States also maintain the

right, even in areas where specific commitments have been undertaken, to impose public service obligations which are also applied to foreign private providers (for example, on universal service, quality standards or consumer/user protection)⁴². As regards the financing of services of general interest for which market access commitments were undertaken, the Community has reserved the possibility, by way of a horizontal limitation, of providing or subsidising services within the public sector.

88. As far as the current WTO negotiations in services are concerned, the Community has addressed requests⁴³ to other WTO Members for liberalisation in most services sectors: professional and other business services, telecommunications services, postal and courier services, construction services, distribution services, environmental services, financial services, news agency services, tourism services, transport services and energy services. No requests have been made on health services or audio-visual services to any country, and on education services only the US received a request limited to privately funded higher education services. Through these requests, the Community does not seek to dismantle services of general interest, nor to privatise State-owned companies in third countries. It is also recognised that liberalisation of trade in services may, in many cases, have to be underpinned by an institutional and regulatory framework to ensure competition and to help improve access to such services for the poor. In this respect, the requests in no way undermine or reduce host governments' ability to regulate pricing, availability and affordability of services of general interest as they choose. Indeed, the Community is simply asking that Community service suppliers be granted market access to compete with domestic services suppliers under the same conditions.
89. Likewise, the Community offers will not affect the provision of services of general interest within the Community, or the right of the Community to regulate its services sector and to design its own regulatory frameworks. In this context, the offer presented by the European Community and its Member States to the WTO on 29 April 2003,⁴⁴ while being comprehensive, do not propose any new commitments for health and education services. For other services of general interest (e.g. telecommunications services, postal and courier services, environmental services and transport services), the offer does not go beyond the state of liberalisation within the internal market and preserve the possibility of imposing universal service obligations.
90. As regards the financing of services of general interest, it is proposed that horizontal limitations be maintained in respect of subsidies in order to preserve the sustainability of the public sector. For the subsidies negotiations provided for by Article XV of the GATS, which are not very advanced, the Community will in any case take internal developments in respect of services of general interest into full consideration.

⁴² In addition, the Community and the Member States may apply the exceptions of the GATS

⁴³ See <http://europa.eu.int/comm/trade>: «GATS: Pascal Lamy responds to Trade Union concerns on public services, Brussels, 7 June 2002» and «Summary Of The EC's Initial Requests To Third Countries In The GATS Negotiations, Brussels, 1 July 2002»

⁴⁴ See in <http://europa.eu.int/comm/trade>.

4.2 Liberalisation of trade in services of general interest in a plurilateral and bilateral context

91. In a bilateral context,⁴⁵ a number of agreements contain provisions for the liberalisation of services between the Community and the relevant trading partner. They normally cover all trade in services, with a few exceptions relating to audio-visual, maritime cabotage and air traffic rights. No specific exception for services of general interest is provided for in these agreements, except in cases where public utilities enjoy monopolies or exclusive rights.
92. The degree of liberalisation of trade in services varies from one agreement to another. The commitments undertaken by the Parties determine therefore the degree of liberalisation envisaged for services of general interest. While the number of sectors under consideration and the level of ambition for the liberalisation of services are different under GATS and bilateral agreements, the position of the Community is essentially the same in both contexts. In all circumstances, commitments undertaken by the Community in a bilateral context will also be consistent with the Community internal market.
93. In respect of subsidies, some bilateral agreements (the EEA and the Europe agreements) contain provisions that are based on the Community State aid regime. The Community monitors their implementation to ensure coherence with the Community regime. The other bilateral agreements entered into by the Community do not cover subsidies in the services sectors or, if they do, their provisions are not very stringent.

⁴⁵ See http://europa.eu.int/comm/trade/bilateral/index_en.htm