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REPORT TO THE LAEKEN EUROPEAN COUNCIL

Services of General Interest

(Presented by the Commission)

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1. INTRODUCTION

1. In a world of change, services of general interest remain an essential building block of the European model of society. European citizens and businesses have come to expect the availability of a wide spectrum of high-quality services of general interest at affordable prices. These services contribute to the quality of life of citizens and are a prerequisite for fully enjoying many of their fundamental rights. Access to services of general interest by all their members is one of the common values shared by all European societies. Services of general interest contribute to the competitiveness of European industry and strengthen the social and territorial cohesion in the European Union. They are a vital component of the Community's consumer protection policy. For the accession countries well-functioning services of general interest are essential for their smooth integration into the European Union.

An essential building block of European societies

2. The importance European citizens and businesses attach to maintaining and developing such services is taken into account by the policies of the European Union. At the level of the European Union, the role of services of general economic interest has been explicitly recognised in Article 16 of the EC Treaty, introduced by the Treaty of Amsterdam. More recently, the access to services of general economic interest was also placed among the fundamental rights of the European Union. Article 36 of the Charter of Fundamental Rights of the European Union¹, solemnly proclaimed at the European Council of Nice, provides:

Role recognised by the Treaty and the Fundamental Rights Charter

“The Union recognises and respects access to services of general economic interest as provided for in national laws and practices in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.”

3. The market, left to itself, does a good job of supplying many services of general interest for many people. However, sometimes markets fail to deliver socially desirable objectives and, as a result, services are underprovided by the market. This can for example be because (i) the individual or the market fail to appropriately value all benefits occurring in the future or generated for society as a whole (e.g. in the case of education), (ii) a desire by society to encourage the provision and use of “merit goods” and “club goods” such as museums, or (iii) the society's aspiration to ensure that all citizens, including the poorest can have access to certain services of an adequate quality. In such cases public sector intervention may be necessary.

Public sector intervention in cases of market failure

4. The Commission has set out the principles of its policies and its objectives in the area in two complementary communications on “Services of General Interest in Europe” of 1996 and 2000². In its Communication of 1996 the Commission clarified in particular that the provision and development of high-

Two Communications set out principles and objectives of Commission policies

¹ OJ C 364, 18.12.2000, p. 1

² OJ C 281, 26. 9. 1996, p. 3. and OJ C 17, 19. 1. 2001, p. 4

quality services of general interest is fully compatible with the Treaty rules and that the Treaty allows to take full account of the specificities of such services. Recognising the need to increase legal certainty for Member States and operators concerned the 2000 Communication explains the scope and criteria of application of internal market and competition rules of the Treaty.

5. The European Council of Nice of 7, 8 and 9 December 2000 noted “*the Commission’s intention to consider, in close cooperation with the Member States, ways of ensuring greater predictability and increased legal certainty in the application of competition rules relating to services of general interest*” and approved a Statement of the Internal Market Council of 28 September 2000 setting out two specific concerns:

Concerns expressed by the European Council at Nice

- “*Application of internal market and competition rules should allow services of general economic interest to perform their tasks under conditions of legal certainty and economic viability which ensure inter alia the principles of equal treatment, quality and continuity of such services. There is a need here especially for clarification of the relationship between methods of funding services of general interest and the application of the rules on State aid. In particular, the compatibility of aid designed to offset the extra costs incurred in performing tasks of general economic interest should be recognised, in full compliance with Article 86(2).*
- *The contribution made by services of general economic interest to economic growth and social well-being fully warrants regular assessment, in compliance with the principle of subsidiarity, of the way in which their tasks are being performed, particularly in terms of quality of service, accessibility, safety and fair and transparent pricing. Such assessment could be conducted on the basis of exchanges of good practice or peer review, contributions from the Member States and reports by the Commission, at the appropriate level, for example under the Cardiff process. Citizens and consumers could also be consulted, inter alia, via a forum such as that on ‘The internal market in the service of citizens and SMEs’.*”

6. The European Council invited the Commission to report back on services of general interest to the European Council at Laeken in December 2001. This Report is submitted in response to this request. It does not intend to give a comprehensive overview of the policies on services of general interest at Community level and it does not replace the Communications of 1996 and 2000. These Communications and, in particular, the definitions, principles and objectives set out therein remain valid³. The present Report serves the more limited purpose of complementing these Communications by addressing the specific concerns raised by the Internal Market Council and by taking account

Report addresses these concerns

³ For ease of reference, the definitions of terms used in the Communications of 1996 and 2000 are set out in Annex

of additional comments on the Communication of September 2000 received by Member States and interested parties.

2. ENSURING ECONOMICALLY VIABLE SERVICES OF GENERAL INTEREST IN THE INTERNAL MARKET

Public authorities are generally free to organise

7. As a general rule, Community law leaves it up to the Member States to decide whether they provide public services themselves, directly or indirectly (through other public entities), or whether they entrust their provision to a third party.⁴ Where an economic activity with a Community dimension is exercised, compliance with the rules and principles of the Treaty aiming at ensuring equal treatment and fair competition between (public and private) operators meeting the defined requirements guarantees that these services are managed under the economically most favorable conditions available on the market.

Services of general interest need financial equilibrium

8. Services of general interest should be able to fulfil their role in conditions of financial equilibrium. Today a number of services of general interest can be profitably provided under market conditions and do not require any additional support. Other services of general interest need some form of support in order to be viable. The borderline between these two categories of services is not fixed but may evolve as a result of technological and economic developments.

Treaty has proven to be sufficiently flexible to allow financing

9. Whilst Community funding, e. g. from structural funds or from TEN programmes, may contribute to their financing, it is up to the Member States to ensure the financial stability of services of general interest. However, the Treaty allows the Member States to grant the necessary support for services of general interest that would otherwise not be economically viable. Moreover, sector-specific directives addressing the issue of services of general economic interest allow for the creation of funds or other mechanisms of compensation to finance the provision of those services. In principle, the possibilities of Member States to grant financial support for the provision of a service of general economic interest can be restricted by Community rules on state aid. In practice, this Treaty framework has so far always proven to be sufficiently flexible to allow the funding of services of general interest by Member States wherever this was necessary.

Commission has already taken steps to increase legal certainty

10. Given the diversity of these services, of their organisation and their modes of funding the application of the internal market and competition rules sometimes raises complex issues. In the Communication of September 2000 the Commission therefore committed itself to continue to reflect on the best use it can make of the instruments it has at its disposal to increase legal certainty. Since then, the Commission has taken a number of measures in that respect that are also of relevance for services of general interest⁵.

⁴ Except where otherwise provided in specific Community law, such as in the transport sector

⁵ On 12 January 2001, the Commission adopted three block exemption regulations on training aid, on de minimis aid and on aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 20, 30, 33). Furthermore, the Commission has adopted guidelines on State aid for environmental

Selection of provider and financial compensations must still be addressed specifically

11. However, the discussion subsequent to the adoption of the Communication of September 2000 has shown that in particular the application of Community rules to the selection of one or more providers of a service of general economic interest and the issue of financial compensation of public service obligations under the state aid rules still need to be specifically addressed.

2.1. The compensation of public service obligations under state aid rules

Many providers receive financial compensation

12. Many providers of services of general interest receive some form of public funding as a compensation for the public service obligations entrusted to them. Public authorities in the Member States, providers of services of general interest as well as interested third parties therefore need certainty as to the application of state aid rules on such compensations.

2.1.1. Community Framework

Focus on basic principles

13. The general framework defined by the internal market and competition rules of the Treaty have already been explained in detail in the Communication of September 2000. Therefore, this section will be limited to recalling some basic principles applying under the Community state aid rules to compensations granted for fulfilling public service tasks.⁶

2.1.1.1. The qualification of compensation as aid

Compensation payments can be state aid

14. A financial compensation granted by the State to the provider of a service of general interest constitutes an economic advantage within the meaning of Article 87 (1). Referring to the fact that Article 87 (1) does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects, the Court of First Instance confirmed that financial advantages granted by public authorities to an undertaking in order to offset the cost of public service obligations classify as aid within the meaning of Article 87 (1)⁷. Subject to a possible development of the case law

protection (OJ C 37, 3.2.2001, p. 3), a communication on the methodology for analysing State aid linked to stranded costs in the electricity sector (http://www.europa.eu.int/comm/competition/state_aid/legislation/aid3.html#electricity) and a communication on the application of state aid rules to public service broadcasting (C(2001) 3063, 17.10.2001). In its communication on "Certain legal aspects relating to cinematographic and other audiovisual works" (COM(2001) 534, 26.09.2001) the Commission has provided a general orientation with regard to state aid to the cinema sector. In addition, the Commission has since adopted the State aid scoreboard 2001 (COM(2001) 412, 18.7.2001) and made available its State aid register

⁶ The Commission services have prepared a working document explaining the application of state aid rules to compensations in detail

⁷ CFI, Judgement of 27 February 1997, *Fédération Française des Sociétés d'Assurances (FFSA) and Others v. Commission*, Case T-106/95, [1997] ECR II-229; confirmed in ECJ, Order of 25 March 1998, Case C-174/97 P, [1998] ECR I-1303; CFI, Judgment of 10 May 2000, *SIC - Sociedade Independente de Comunicação SA v Commission*, Case T-46/97 [2000] ECR II-2125

of the Court, compensation payments must therefore be subject to the State aid rules if the other conditions of Article 87 (1) are met⁸.

2.1.1.2. The conditions of compatibility

Compensation aid can be compatible

15. If a compensation is caught by the general prohibition of State aid under Article 87 (1) it can still be compatible with Community law. Such compensation can either qualify for one of the specific exemptions under Articles 87 (2) and (3) or 73 in the case of inland transport or it may qualify for a derogation under Article 86 (2) of the Treaty. Whilst the application of Articles 87 (2) and (3) has not posed specific problems in the area of services of general interest, and the application of Article 73 is specified in secondary legislation⁹, the application of Article 86 (2) warrants further clarification.¹⁰ Article 86 (2) provides:

"Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in 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."

Conditions of compatibility under Article 86 (2)

16. According to this provision, aid granted to a provider of a service of general economic interest is in principle compatible with the Treaty if it is necessary for the performance of its public service obligations. In its Judgement in the FFSA case, the Court of First Instance held that: *"the grant of State aid may, under Article 90(2) of the Treaty, escape the prohibition laid down in Article 92 of that Treaty provided that the sole purpose of the aid in question is to offset the additional costs incurred in performing the particular task assigned to the undertaking entrusted with the operation of a service of general economic interest and that the grant of the aid is necessary in order for that undertaking to be able to perform its public service obligations under conditions of economic equilibrium (Corbeau, paragraphs 17 to 19). Determining whether the aid is necessary entails a general assessment of the economic conditions in which the undertaking in question performs the activities in the reserved sector, without taking account of any benefits it may draw from the sectors open to competition."* (para. 178)¹¹.

⁸ These conditions are explained in the Commission Communication of September 2000, OJ C 17, 19. 1. 2001, p. 4

⁹ Regulation 1191/69 and Regulation 1107/70 which are currently the subject of proposals for updating (COM(2000) 7 and 5 of 26.7.2000 respectively)

¹⁰ For the evaluation of the compatibility of compensations to public broadcasters reference should also be made to the Protocol on the system of public broadcasting in the Member States, annexed to the Treaty of Amsterdam, amending the Treaty on European Union (in force since 1st May 1999), OJ C 340, 10.11.1997, p. 109, and to the Commission communication on the application of state aid rules to public service broadcasting of 17.10.2001

¹¹ The numbering of the Treaty Articles has been changed by the Treaty of Amsterdam. The Article referred to by the Court is now Article 86 (2)

*Compatibility
requires that
aid does not
exceed extra-
costs*

17. The method applied by the Court consists in assessing the amount of extra-costs resulting from the public service obligations, and in comparing this amount with the amount of aid granted. If the amount of aid does not exceed the amount of the extra-costs, this aid is in principle admissible on the basis of Article 86 (2)¹².

*Member
States have a
large margin
of discretion
regarding the
means*

18. As regards the means to ensure the compensation, Member States have in fact a large margin of discretion. Depending on the specific needs of the undertakings concerned, these can receive annual subsidies, a preferential fiscal treatment, lower social contributions etc. The decisive element for the Commission lies in the fact that the value of these advantages does not exceed the extra-costs of the undertakings concerned for the provision of a service of general economic interest. Similarly, in accordance with Article 295 the Commission's approach is neutral as regards the public or private nature of the undertakings concerned. This choice is entirely up to the Member States.

*Compensation
granted on the
basis of a
selection
procedure*

19. If a service of general economic interest was attributed as a result of a fair, transparent and non-discriminatory procedure¹³, as regards the services to be provided and the amount of compensation, this amount of compensation is normally deemed to be compatible with the requirements of Article 86 (2), provided that the procedure was effectively competitive.

Case practice

20. The Commission's experience shows that in practice there are relatively few cases in which the amount of compensation was contested or even the subject of a complaint. These problems arise essentially in sectors that were liberalised fully or in part, like telecommunications, transport or postal services. They may also arise in the broadcasting sector. The issues raised include possible cross-subsidies from public service activities to non-public service activities as well as the amount of compensation. In this regard, the Commission thinks that it is necessary that the requirements of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings¹⁴ are strictly respected. In particular, the Member States must put in place the necessary safeguards so as to avoid that aid granted for the provision of a service of general economic interest are in fact used, even if it is only in part, to subsidise non-public service activities. Such cross-subsidies cannot be accepted.

*Entrustment
by public
authority*

21. The application of these principles requires however that the obligations imposed on the undertaking entrusted with the service are specified in an act of public authority or in a contract concluded with the competent public

¹² For example, the Commission applied this approach in two decisions adopted in 1999. In these decisions it was found that the amount of the compensation did not exceed the cost inherent in the provision of the public service and was therefore compatible with Article 86 (2) (Decision of 24.2.1999, Kinderkanal/Phoenix Case NN 70/98, and Decision of 29.9.1999 BBC News, Case NN 88/98)

¹³ In particular on the basis of an open tender, as provided for in the applicable legislation

¹⁴ OJ L 195, 29.7.1980, p. 35, as last amended by Directive 2000/52/EC of 26 July 2000, OJ L 193, 29.7.2000, p. 75

authority¹⁵. The amount of the compensation must in any event be determined on the basis of clear, transparent and non-discriminatory rules. For example, Regulation 1191/69 provides in the area of inland transport for an exemption from the obligation to notify compensation based on formulae laid down in advance rather than on the retrospective making good of deficits.¹⁶

Affectation of trade 22. A derogation from the Treaty rules under Article 86 (2) must not affect the development of trade to an extent contrary to the Community interest.

Aid infringing other provisions of Community law 23. Furthermore, it should be noted that the Commission cannot authorise State aid that is infringing other provisions of Community law¹⁷. In this respect, the Commission considers that the compliance with the rules set out in Council Directive 92/50/EEC, and with the rules and principles of the Treaty as laid down in the Commission interpretative communication on concessions under Community law on public contracts¹⁸, will considerably reduce the risk that the award procedure infringes Treaty provisions other than Articles 86 to 88.

2.1.1.3. Notification

Principle 24. In principle, all compensations qualifying as aid must be notified. According to the case law of the Court of Justice the obligation of prior notification set out in Article 88 is a general obligation covering all aid in order to prevent the implementation of aid contrary to the Treaty¹⁹. Aid must therefore be notified to the Commission before it is granted, even if an aid qualifies for a derogation and is compatible with the Treaty.

Exceptions 25. In the current legal situation, there are only two relevant exceptions to this obligation: First, a notification is not necessary if the aid granted is a « de minimis » aid meeting the conditions of Commission Regulation 69/2001 of 12 January 2001²⁰. Second, compensations granted in conformity with the requirements set out in Council Regulation 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway²¹ are exempted from notification. Furthermore, the Commission will propose an adjustment of procedures for notifying state aid in cases relating to compensation for public service obligations on links to the Community's outlying regions and small islands.²²

¹⁵ Article 4 of Regulation 3577/92 on maritime cabotage provides for an exception in the area of maritime transport

¹⁶ Council Regulation (EEC) 1191/69 of 26 June 1969 on action by 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

¹⁷ CFI, Judgement of 27 September 2000, *BP Chemicals v. Commission*, Case T-148/97, [2000] ECR II-3145 (para. 55, 77)

¹⁸ OJ C 121, 29.4.2000, p. 2

¹⁹ Case C-332/98 *Coopérative d'Exportation du Livre Français (CELF)* [2000] ECR I-4833

²⁰ OJ L 10, 13.1.2001, p. 30

²¹ OJ L 156, 28.6.1969, p. 1

²² White Paper for an European transport policy for 2010 COM(2001)370 final, 12.9.2000

Compensation schemes

26. It should be highlighted that, like in other areas of State aid, the Member States can notify individual compensation projects or compensation schemes to the Commission. When these schemes are approved by the Commission, the individual aid granted in accordance with these schemes do not normally have to be notified to the Commission.

2.1.2. *Measures to improve legal certainty*

2.1.2.1. A two-phased approach

A two-phased approach to increase legal certainty

27. In view of its commitment to continue exploring ways of increasing legal certainty for services of general interest combined with an efficient application of state aid rules the Commission held a meeting with representatives of the Member States on 7 June 2001 in order to better understand the difficulties encountered by the Member States in ensuring the financing of services of general interest. Based on its discussions with Member States and interested parties as well as on its case experience the Commission is considering a two-phased approach.

1: a Community framework

28. As a first step, the Commission intends to establish during 2002, in close consultation with the Member States, a Community framework for State aid granted to undertakings entrusted with the provision of services of general economic interest. Such a framework will inform Member States and undertakings of the conditions under which state aid granted as compensation for the imposition of public service obligations can be authorised by the Commission. It could in particular specify the conditions for the authorisation of state aid schemes by the Commission, thus alleviating the notification obligation for individual aid.

2: An exemption regulation, if and to the extent justified

29. As a second step, the Commission will evaluate the experience gained with the application of this framework, and, if and to the extent justified, the Commission intends to adopt a regulation exempting certain aids in the area of services of general economic interest from the obligation of prior notification. This so-called block exemption would have to specify precise circumstances in which public funding would not be considered as a State aid under the Treaty as it does not fulfil all the conditions of Article 87 (1) and/or define precise criteria that ensure that where such funding is State aid, it is compatible with the Treaty. One example of such criteria could be the provision of a service of general economic interest attributed in a fair, transparent, non-discriminatory and competitive tendering procedure.²³ The regulation could cover all areas of services of general interest or be limited to specific sectors. It could also be used to improve legal certainty in areas such as local and social services of general interest. In order to prepare for the possible adoption of such a block

²³ Another example can be found in the Commission's proposal for a Regulation concerning the granting of aid for the co-ordination of transport by rail, road and inland waterway, COM (2000) 5, 26.7.2000

exemption regulation, the Commission would need to submit in due time a proposal for an amendment of Council Regulation 994/1998²⁴.

2.1.2.2. Further measures to increase transparency

30. Given that, as explained in the Communication of September 2000, all services of general interest that do not constitute an economic activity are not subject to the competition rules and the internal market rules, it has been suggested to the Commission to produce a list of services of general interest that are of a non-economic nature. As regards the distinction between economic and non-economic activities the Court of Justice has consistently held “*that any activity consisting in offering goods and services on a given market is an economic activity*”²⁵. In practice, in most cases of services of general interest this distinction does not create any problems. However, the abstract definition of “non economic” service has proven to be very difficult. In addition, the range of services that can be provided on a market is subject to technological, economic and societal change and has evolved over time. Therefore, whilst a list of examples can of course be drawn up²⁶, it would not be feasible to provide a definitive a priori list of all services of general interest that are to be considered “non economic”.

Definitive a priori list of non-economic activities would not be feasible

31. However, in order to further increase transparency with regard to competition policy and services of general interest the Commission will in the future add a specific section on services of general interest to its annual report on competition policy setting out how the competition rules were applied to such services.

A section will be added in the annual competition report

32. Furthermore, the Commission will in the future identify cases relating to services of general interest in its state aid register so as to facilitate access to current case practice²⁷.

Cases will be identified in the state aid register

2.2. The Application of Community rules to the selection of the Provider²⁸

33. The Member States are free to decide how the service should be operated and may decide to provide a public service themselves, directly or indirectly (through other public entities). But where they decide to entrust the provision of the service to a third party, they must follow the procedural rules and principles which apply to the subsequent selection of the provider, as set out below.

Member States must comply with rules on selection of provider

²⁴ OJ L 142, 14.5.1998, p. 1

²⁵ Judgement 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

²⁶ Cf. the Commission Communication of September 2000, in particular paras. 28 – 30, and the working document referred to in footnote 6

²⁷ http://www.europa.eu.int/comm/competition/state_aid/register/

²⁸ The rules and principles set out in this section concern the general legal framework and do not take account of sectoral Community legislation or national legislation that is compatible with Community law which may be applicable

34. These rules and principles are derived from the Treaty and apply to all contracts concluded by Member States for the provision of economic activities within the meaning of the Treaty, independently of their qualification under national law. However, a number of exceptions are enumerated in the Treaty. The Treaty excludes from the application of these rules the activities connected with the exercise of public authority and allows for derogations if they are justified for reasons of public order, public security and public health. Activities of a “non-economic” nature within the meaning of the Treaty are also excluded from the scope of application of these rules and principles.²⁹ In addition, these Treaty rules and principles do not prejudice the possibility for Member States to award special or exclusive rights for the management of services of general economic interest where the conditions in Article 86, and in particular Article 86 (2) are met³⁰.
- Exceptions*
35. Where a contract by which a public authority entrusts the management of a service of general interest to a third party fulfils the conditions provided for in the Community directives on public procurement³¹, they constitute “public contracts” within the meaning of these directives and their award must respect the provisions set out in the above-mentioned directives.
- Public procurement directives*
36. Furthermore, in conformity with the case law of the Court of Justice, the award of contracts that are not covered by the public procurement directives must nevertheless comply with the relevant rules and principles of the Treaty, i.e. the rules on the freedom to provide services and the freedom of establishment, as well as the principles of transparency, equal treatment, proportionality and mutual recognition. Compliance with these principles implies in general that, save in respect of services to which the Treaty rules and principles are not applicable in the situations described in paragraph 34 above, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed is ensured³².
- Award of contracts not covered by public procurement*
37. This is the case for service concessions and other forms of public-private partnerships which are currently not covered by Directive 92/50/EEC. Public-private partnerships usually refer to all forms of co-operation between public and private sector for the management of services intended for the public. Concessions have been qualified by the Commission as the acts attributable to the State whereby a public authority entrusts to a third party the management of services for which that authority would normally be responsible and for which the third party assumes the risk. In the case of services concessions, the
- Public-private partnerships*

²⁹ Cf. para. 30 above

³⁰ In the audiovisual sector, account should be taken of the Protocol on the system of public broadcasting in the Member States, annexed to the Treaty of Amsterdam, amending the Treaty on European Union (in force since 1st May 1999)

³¹ Cf. Directives 92/50/EEC, 93/37/EEC, 93/36/EEC, and 93/38/EEC

³² See Judgement of 7 December 2000 in the *Telaustria* case, aff. C-324/98 (para. 62)

operator bears the risk involved in operating the services in question, obtaining a significant part of revenue from the exploitation by users³³.

38. The Commission considers that the application of these principles and rules to the selection of the provider can only have beneficial effects for the users as well as for the economic operators. A correct application of these rules and principles will ensure a better operation of services of general economic interest by guaranteeing that they are entrusted to a provider that meets the necessary requirements and at the most favourable market conditions. Thus the consumers will enjoy high-quality services at the best prices available on the market.

*Application of
Community law
ensures high quality
at the best prices
available*

39. The Commission will examine whether additional measures are required to further clarify the Community rules and principles applicable to the selection of the provider of services of general interest.

*Commission will
examine further
measures for
clarification*

ENSURING A HIGH-LEVEL PERFORMANCE OF SERVICES OF GENERAL INTEREST FOR EUROPEAN CITIZENS AND BUSINESSES

40. In line with the principle of subsidiarity, it is generally up to the Member States to define specific performance requirements for these services and to ensure that these requirements are complied with. At Community level, the completion of the internal market and the introduction of competition have helped to improve the performance of a number of services of general economic interest. Community initiatives have been undertaken at different levels. First, the integration of services at the EU level is often an essential element to guarantee the successful provision of the service. Examples of this are the problem of air traffic congestion and the organisation of the infrastructures and market arrangements needed for the operation of the energy internal market. The Commission has proposed and will continue promoting and putting forward actions in those areas where the provision of services of general economic interest has a distinct Community dimension. Secondly, and to the extent that services of general economic interest are regulated at European level, the Community has also established the necessary framework allowing to ensure that the provision of these services meets the relevant public policy objectives. In order to be able to swiftly adapt this framework in line with new technological, economic and social developments, the Commission will reinforce the sectoral and horizontal monitoring of services of general interest.

*Commission will
reinforce monitoring
of services of general
interest*

3.1. An efficient evaluation of the performance of services of general interest

41. Building on a proposal made by the Commission in its Communication of last September the European Council has called for a more systematic evaluation of services of general interest in order to take account of their contribution to

*Need for a
stronger
culture of
evaluation*

³³ For a more detailed analysis of the issue see the Interpretative Communication on concessions in Community law (OJ C121, 29.4.2000, p. 2)

economic growth and social well-being. This is fully in line with the Commission's finding in its White Paper on European Governance³⁴ that

“a stronger culture of evaluation and feedback is needed in order to learn from the successes and mistakes of the past. This will help to ensure that proposals do not over-regulate and that decisions are taken at the appropriate level.”

Effective evaluation facilitates adaptation of policies

42. In the area of services of general interest developing such a culture of evaluation and feedback is particularly important given that in addition to the economic performance of these services their performance with regard to other public policy objectives must be monitored. An effective evaluation of the performance of services of general interest allows to ascertain whether the relevant public policy objectives are being met and facilitates the adaptation or re-orientation of policies in line with technological changes, new consumer needs and new public interest demands. The performance assessment is up to the competent authorities at the appropriate level. In most cases it is the national, regional or local authorities that are responsible for monitoring and evaluating the performance of such services. However, where a specific framework exists at Community level, the Community institutions must also assess the performance of the services concerned. In response to the request made by the European Council the Commission will therefore

- reinforce its sectoral reporting, and
- introduce an annual horizontal evaluation in the framework of the Cardiff process,
- where appropriate, assist in benchmarking the effectiveness of measures taken in the Member States to attain adequate performance of services of general interest in areas not covered by sectoral reporting or the annual evaluation.

3.1.1. Sectoral Reporting

Reinforce sectoral reporting

43. The Commission has already evaluated the performance of services of general economic interest in certain sectors that are regulated in specific Community legislation. The sectoral reports have proven to be useful tools for the assessment and development of policies in specific areas. In particular, they allow to address sector-specific issues in detail and to adapt reporting to the requirements of the sectoral policy agenda. The Commission will continue and improve its sectoral reporting and strengthen the focus on services of general interest where necessary.

³⁴ COM(2001) 428, 25.7.2001

Examples of sectoral reporting

In the **telecommunications sector** the Commission has started in 1997 to regularly submit evaluation reports on the implementation of the regulatory measures adopted with a view to full liberalisation of the sector³⁵. These reports sketch out the major developments in the market, analyse the implementation of the regulatory principles covered by specific Community legislation and draw conclusions regarding future policy developments. They are established in consultation with the Member States and take account of information gathered from a large number of operators, associations and other organisations in the sector.

In the **energy sector**, the Commission has assessed the functioning of the internal market in electricity in a Communication of 16 May 2000³⁶. In a further Communication of 13 March 2001 the Commission has evaluated regulatory and market developments in the European gas and electricity industries, including *inter alia* the achievement of public service objectives and the development of employment³⁷. This Communication was preceded by a broad consultation of all interested parties, i.e. social partners, generators, gas producers, transmission system operators, distributors, consumers and other organisations. In preparation of the Communication, the Commission organised a public hearing in which nearly 120 associations and companies participated.

In the **postal sector**, Directive 97/67 required the Commission to submit a report on the application of the Directive including an assessment of the developments in the sector, in particular concerning economic, social, employment and technological aspects, as well as quality of service. The Commission submitted a proposal for an amendment of Directive 97/67 in May 2000³⁸. The document was based on a series of comprehensive background studies³⁹. The Commission will submit the assessment before the end of the year.

In **railway transport**, Directive 01/12 requires the Commission to systematically monitor the market development for railways.⁴⁰ Within this framework, the Commission will monitor *inter alia* the service levels for railway passengers transport and the financing of the railway market.⁴¹

In **maritime transport**, Regulation 3577/92 requires the Commission to submit a report on the application of the Regulation relating to maritime cabotage, including the public service obligations imposed as a condition to offer regular cabotage services⁴². The fourth report will be submitted in 2002.

3.1.2. An annual evaluation in the framework of the Cardiff process

44. In order to respond to the call for a regular assessment of services of general interest, the Commission will produce a working document annexed to the

³⁵ Cf. e.g. Sixth Report on the Implementation of the Telecommunications Regulatory Package, COM(2000) 814 final, 7.12.2000

³⁶ COM(2000) 297 final, 16.5.2000

³⁷ COM(2001) 125 final, 13.3.2001

³⁸ COM(2000) 319 final, 30.5.2000

³⁹ Available at:

http://europa.eu.int/comm/internal_market/en/postal/evolframe/studies/index.htm

⁴⁰ OJ L 75, 15.3.2001, p. 1

⁴¹ The Commission organises a hearing for rail passengers organisations on October 2001 in order to discuss the service levels in railway passengers transport and to assess the need for EU rail passengers rights for international rail passengers on the model of the one into force in the air transport sector

⁴² OJ L 364, 12.12.1992, p. 7

Commission report on the functioning of product and capital markets ("Cardiff report") to be adopted by the Commission in early December.

This is based on studies recently conducted for the Commission, questionnaires sent to national authorities and regulators in different sectors and especially, on an in-depth consultation of consumers in the 15 Member States. The evaluation will consist in a horizontal monitoring of certain services of general economic interest covering three areas.

(1) Monitoring market structure and performance

The evaluation will cover an assessment of the evolution of prices, market concentration, entry, mergers and acquisitions, and other variables pertaining to the economic performance of the relevant sectors taking into account different consumer and user types. It will include updates of already existing indicators and some new indicators resulting from on-going work conducted by Commission services.

(2) An economic and social assessment of public service obligations

This assessment will focus on the fulfilment of three main groups of public service obligations across countries and sectors: access obligations, universal service obligations, in particular pricing regulation and affordability of tariffs, and qualitative and social aspects of service provision. In addition, this sector will consider different forms of costing and financing arrangements and their impact on competition and other dimensions of market performance. It will be based on existing information about the regulatory framework, Member States' implementation of Community and national rules and other evidence collected by the Commission in the monitoring of the enforcement of Community directives and regulations.

(3) Citizens' opinions on the impact of liberalisation of services of general economic interest

An extensive survey using "focus group" techniques has been conducted to gather in-depth qualitative information on citizens' views about the provision of services of general economic interest. This information will be complementary to the Eurobarometer launched last year. For this year's exercise, three groups have been identified: high income, low income and a third group consisting of citizens especially sensitive to the provision of services of general economic interest (pensioners, consumers living in remote areas, ...). The purpose of the exercise is twofold:

- to learn more about the real importance citizens attach to different aspects of the provision of those services;
- to have a more qualified assessment of their views on the impact of liberalisation processes, especially as regards universal and public service obligations.

The sectoral coverage of the three parts of this horizontal evaluation has been conditioned by data availability.

Commission will reinforce horizontal monitoring in the future

45. The Commission intends to improve and reinforce its horizontal monitoring in the framework of the Cardiff process in the coming years. It will develop and refine, in close co-operation with the Member States, a set of analytic tools and a methodology necessary for an assessment of services of general economic interest that will help to evaluate and guide policy-shaping at Community level.

A communication on evaluation methodology in 2002

46. In this context, it may be necessary to expand the range of topics currently covered. Besides universal service obligations and other public service obligations, other important issues such as the integration of these markets at the EU level or the longer term impact of liberalisation (e. g. impact on productivity, employment, growth and social and territorial cohesion) may require a more in-depth treatment. This is not possible with the information and resources currently available. It may also be necessary to establish a permanent mechanism for the monitoring of citizens' opinion and their evolution as well as to expand that monitoring to other users and parties involved in the liberalisation processes. In line with the principles on a reinforced culture of consultation and dialogue set out in the White Paper on Governance the evaluation should take account of a broad basis of information. Therefore, all stakeholders should also be consulted on specific issues. The Commission will submit a Communication setting out its methodology for the evaluation of services of general economic interest at Community level in the course of next year.

3.1.3. Benchmarking in other areas of services of general interest

Commission is prepared to work on benchmarking in other areas

47. In areas of services of general interest not covered by sectoral reporting or by the horizontal evaluation in the framework of the Cardiff process, the Commission is prepared to work with Member States and other public authorities to introduce a system for benchmarking the effectiveness of measures introduced to achieve an adequate performance of these services. This pertains in particular to those services of general economic interest provided under special or exclusive rights or under a natural monopoly since such services require regulatory supervision. In many cases there will be a Community added value in benchmarking the performance of regulatory systems in order to draw on the wide variety of regulatory techniques in use across Europe and to enable Member States to form a view on possible improvements that could be introduced.

3.2. Developing the principles of Article 16

In many areas markets are best suited to serve the needs of users

48. For many services of general economic interest open markets have proven to be best suited to ensure that the needs of citizens and businesses are met. In the sectors liberalised by Community measures competition has led to more choice and lower prices for consumers and business users.

Community has always applied a structured and gradual approach to liberalisation

49. When introducing competition in a sector the Community has applied a gradual and structured approach to liberalisation so as to ensure the continuity of the services and to allow the operators concerned to adapt to a changing market environment. Community measures have provided for additional transition periods or derogations for individual Member States where this was necessary to take account of specific circumstances. For example, the Directive fully opening the Community telecommunications markets to competition provided

for additional transition periods of up to five years for Member States with very small or less developed networks⁴³. Directive 96/92 on common rules for the internal market in electricity provided for an additional transition period of up to two years for some Member States to take account of the specific technical characteristics of their electricity systems⁴⁴. Also Directive 98/30 on common rules for the internal market in natural gas provides for the possibility of temporary derogations in certain circumstances⁴⁵.

50. Liberalisation legislation adopted at Community level has also never been limited to the mere introduction of competition. The Community measures always provide for safeguards allowing to ensure that services continue to meet defined quality standards. The adoption of health and safety standards as well as pricing requirements is also provided for in liberalisation instruments where necessary. In general, these standards and requirements must be specified and complemented by the competent national authorities. Experience has shown that these safeguards allow the competent national authorities to effectively ensure that service providers meet the relevant public service objectives and quality targets in line with the principles underlying Article 16 of the EC Treaty.

*Liberalisation at
Community level
has always been
accompanied by
safeguards*

⁴³ Commission Directive 96/19/EC of 13 March 1996 amending Directive 1990/388/EEC with regard to the implementation of full competition in telecommunications markets, OJ L 74, 22.3.1996, p. 13

⁴⁴ 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

⁴⁵ Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ L 204, 21.7.1998, p. 1

Examples of Safeguards in specific Community Legislation

In various sectors, Community institutions have adopted secondary legislation allowing to ensure that public service objectives are met.

1. Energy sector

In the directives on the internal electricity market⁴⁶ and the internal gas market⁴⁷ adopted jointly by the European Parliament and the Council, respectively Article 3(2) provides that having full regard of the relevant EC Treaty provisions, in particular Article 86, Member States may impose on undertaking in the electricity sector/natural gas sector, in the general economic interest, public service obligations which may relate to security (including security of supply), regularity, quality and price of supplies, and to environmental protection. Such obligations shall be clearly defined, transparent, non-discriminatory and verifiable. They, and every revision thereof, shall be published and notified to the Commission by Member States without delay. Furthermore, both directive allow Member States to temporarily take additional safeguard measures in the case of a sudden crisis in the energy market. The proposed directive amending directives 96/92/EC and 98/30/EC will reinforce the provisions ensuring the attainment of public service objectives.⁴⁸

2. Telecommunications sector

For the telecommunications sector Directive 98/10/EC sets out a number of telecommunication services that must be made available to all users, independent of geographical location, and at an affordable price.⁴⁹ This directive also defines quality of service and usage conditions as well as tariff principles. In addition, Directive 97/33/EC sets out detailed provisions on costing and financing of universal service in the telecommunications sector.⁵⁰ Provisions on independent national regulatory authorities are contained in Directive 90/387/EEC.⁵¹ The approach has been maintained in the proposals for a new regulatory framework the Commission submitted in July 2000.⁵²

3. Postal sector

The Directive on postal services⁵³ adopted jointly by the European Parliament and the Council aims at a gradual and controlled opening of markets for competition. At the same time the Directive obliges Member States to ensure as a minimum a universal service as described in its Chapter 2 and involving the permanent provision of a postal service of specified quality at all points in their

⁴⁶ OJ L 27, 30.1.1997, p. 20

⁴⁷ OJ L 204, 21.7.1998, p. 1

⁴⁸ COM (2001) 125 final, 13.3.2001

⁴⁹ Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, OJ L 101, 1.4.1998, p. 24

⁵⁰ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), OJ L 199, 26.7.1997, p. 52

⁵¹ Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (ONP), OJ L 192, 24.7.1990, p. 1, as amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997, OJ L 295, 29.10.1997, p. 23

⁵² OJ C 365 E, 19.12.2000, p. 198, 212, 215, 223, 230, 238, 256

⁵³ 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

territory at affordable prices for all users. The Directive also sets out tariff principles, quality requirements and standards and provides for a procedure for the harmonisation of technical standards. National regulatory authorities are obliged to ensure compliance with the obligations arising from the Treaty. These guarantees will remain in place under the proposed amendment of the postal services directive.⁵⁴

4. Air transport sector

According to Article 4(1)(a) of the Regulation on access for Community air carriers to intra-Community air routes⁵⁵, a Member State, following consultations with the other Member States concerned and after having informed the Commission and air carriers operating on the route, may impose a public service obligation in respect of scheduled air services to an airport serving a peripheral or development region in its territory or on a thin route to any regional airport in its territory, any such route being considered vital for the economic development of the region in which the airport is located, to the extent necessary to ensure on that route the adequate provision of scheduled air services satisfying fixed standards of continuity, regularity, capacity and pricing, which standards air carriers would not assume if they were solely considering their commercial interest. The Commission shall publish the existence of this public service obligation in the Official Journal of the European Communities.

5. Public transport

The Commission has proposed a similar approach in its draft regulation on public services in public transport⁵⁶, currently under consideration by the Parliament and Council.

6. Maritime transport

According to article 4 of the Regulation 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), a Member State may conclude public service contracts with or impose public obligations as a condition for the provision of cabotage services on shipping companies participating in regular services to, from and between islands. Whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminating basis in respect of all Community shipowners.

⁵⁴ COM (2000) 319 final, 30.5.2000

⁵⁵ Council Regulation 2408/92/EEC of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ L 240, 24.8.1992, p. 8

⁵⁶ COM (2000) 7, 26.7.2000

*A framework
directive for
services of
general interest ?*

51. The Commission has so far taken account of Article 16 of the Treaty by initiating sectoral policies based on the principles on services of general economic interest underlying this provision. It has recently been suggested to the Commission to consolidate and specify these principles in a single framework Directive to be adopted on an appropriate legal basis. A framework instrument could highlight the importance the European Union attaches to services of general interest and could help to clarify some of the relevant Community law concepts, in full respect of the principle of subsidiarity. The Commission is examining this suggestion.

However, a framework Directive would necessarily be very general in substance and could not take account of the specificities that characterise each service of general interest. Such a Directive could therefore not replace sector-specific regulation and its added value in respect of sector-specific regulation would have to be examined. As a horizontal measure, the Directive could in general only set out minimum standards. In addition, a Directive should match the high level of our ambition. The Commission will assess whether such a horizontal directive would be the right instrument or whether, given the differences in the structure and organisation of different services of general interest a sector-specific approach combined with high standards of horizontal consumer protection is best suited for maintaining and developing high-quality services of general interest at the European level.

*A new
subparagraph
added to Article 3
of the Treaty*

52. It has also been suggested that the forthcoming Intergovernmental Conference should decide to insert a reference to the promotion of services of general interest in the Treaty by adding a new subparagraph to its Article 3. The Commission made this suggestion already in its Communication of 1996 in view of the Intergovernmental Conference preparing the Amsterdam Treaty. In this Communication the Commission advocated the addition of a new subparagraph to Article 3 to read as follows:

“ a contribution to the promotion of services of general interest.”

The Commission considers that Article 16 introduced by the Amsterdam Treaty largely serves the purposes it pursued with this suggestion. However, the insertion of a new subparagraph to Article 3 would also place the good performance of these services clearly among the objectives of the Community.

4. CONCLUSION

53. Having considered the concerns raised subsequent to the adoption of its Communication on services of general interest in Europe of September 2000 the Commission intends to take a number of concrete actions.

*Concrete
Commission
actions*

- (1) In order to increase legal certainty and transparency in the application of state aid rules to services of general interest and in the application of Community rules to the selection of providers of services of general interest the Commission will:

- in a two-phased approach first establish a Community framework for state aid granted for services of general economic interest in 2002, 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 economic interest. In preparation for a possible block exemption the Commission will submit an amendment to Council Regulation 994/1998,
 - add a section on services of general interest to the annual competition report setting out how the competition rules were applied to such services,
 - identify cases concerning services of general interest in the state aid register,
 - examine additional measures to further clarify the Community rules and principles applicable to the selection of the provider of services of general interest.
- (2) In order to ensure an effective evaluation of services of general interest at Community level the Commission will
- improve its sectoral reporting and strengthen the focus on services of general interest where necessary,
 - develop an annual horizontal evaluation in the frame work of the Cardiff process and submit a Communication on its evaluation methodology in 2002,
 - work with Member States and other public authorities on a system of benchmarking in areas of services of general interest not covered by sectoral reporting or the regular horizontal evaluation.

Furthermore, the Commission will examine the suggestion to consolidate and specify the principles on services of general interest underlying Article 16 of the Treaty in a framework directive.

ANNEX
DEFINITION OF TERMS

Services of general interest

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

Services of general economic interest

This is the term used in Article 86 of the Treaty and refers to market services which the Member States subject to specific public service obligations by virtue of a general interest criterion. This would tend to cover such things as transport networks, energy and communications.

Public service

This is an ambiguous term since it may refer either to the actual body providing the service or to the general interest role assigned to the body concerned. It is with a view to promoting or facilitating the performance of the general interest role that specific public service obligations may be imposed by the public authorities on the body rendering the service, for instance in the matter of inland, air or rail transport and energy. These obligations can be applied at national or regional level. There is often confusion between the term public service, which relates to the vocation to render a service to the public in terms of what service is to be provided, and the term public sector (including the civil service), which relates to the legal status of those providing the service in terms of who owns the services.

Universal service

Universal service, in particular the definition of specific universal service obligations is a key accompaniment to market liberalisation of service sectors such as telecommunications in the European Union. The definition and guarantee of universal service ensures that the continuous accessibility and quality of established services is maintained for all users and consumers during the process of passing from monopoly provision to openly competitive markets. Universal service, within an environment of open and competitive telecommunications markets, is defined as the minimum set of services of specified quality to which all users and consumers have access in the light of specific national conditions, at an affordable price.