

**UNICE COMMENTS
ON THE COMMISSION GREEN PAPER
ON SERVICES OF GENERAL INTEREST
(COM 2003-270 FINAL)**

Executive Summary

Services of general interest (SGI) are essential for the well-being of European citizens as well as for strengthening Europe's competitiveness in line with the Lisbon strategy.

Increased competition in SGI has led to remarkable - and proven - progress in the provision of SGI. However, this situation is sometimes imperfectly understood by public and politicians, some of whom are calling for development of a new type of European regulatory arsenal.

Such an arsenal would comprise a framework-directive governing the operation and development of all SGI (or a major portion of them).

Companies believe that the envisaged regulatory work would be totally counterproductive. Such general rules would be:

1. unworkable, bearing in mind the great diversity of SGI;
2. unnecessary, given the major progress made in the field of SGI over the last ten years;
3. highly damaging for economic and social development. It would stop the process of progress and renovation in the field of SGI, and would trigger a backward movement through reactivation of protectionist influences, as well as re-introduction of obstacles to competition and private entrepreneurial dynamism.

UNICE therefore urgently calls on the European institutions and Member States not to modify the provisions of the current Treaty applicable to SGI, and not to introduce a framework directive or other horizontal legislation in this area.

A. INTRODUCTION

Services of general interest (SGI)¹ are essential for the well-being of European citizens and very important for development of society and of the economy as well as strengthening Europe's competitiveness in line with the Lisbon strategy.

In this context, UNICE believes that the green paper represents an excellent piece of analysis to shed light in the debate on ways of promoting high-quality SGI.

The green paper pays particular attention the following two questions, which are prominent in the public debate:

- a) Should there be more EU regulation aimed at defining in more detail the general framework in which SGI should develop in Europe?

Should a European framework directive on SGI be introduced with that aim?

- b) Should an extended EU regulatory framework for SGI define universal principles and methodologies, of a centralistic inspiration, for:

- definition of public service obligations ;
- economic calculations linked to the provision of SGI;
- financing of public service missions;
- regulation of SGI;
- evaluation of SGI performances?

UNICE's response to these two questions is negative, for the reasons set out in this opinion, which describes the alternative directions to be taken in order to stimulate further progress in the area of SGI.

B. THE COMMISSION'S ANALYSES REPRESENT AN IMPORTANT STARTING POINT FOR RESPONDING TO THE STRATEGIC QUESTIONS POSED IN THE GREEN PAPER

UNICE fully endorses the Commission's findings and analyses in the five following points of the green paper:

1. Based on the available information², there is no evidence supporting the thesis that liberalisation has had a negative impact on the overall performance of SGIs, in particular as far as affordability and the provision of universal service are concerned (para. 5).
2. 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

¹ In line with the terminology used in the green paper, the term "services of general interest" is used here to cover economic and non-economic services.

² See in particular the Commission 2001 and 2002 horizontal assessments of the performance of network industries and its sectoral evaluation reports, and the European Central Bank 2001 study on price effects of regulatory reform in network industries.

State and the characteristics of the activity concerned, in particular technological development (para. 10).

3. 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. The Commission stressed in its report to the Laeken European Council that it would be neither feasible nor desirable to provide a definitive a priori list of all services of general interest that are to be considered “non-economic” (para. 45).
4. 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 (para. 72).
5. Finally the Commission stresses the fact that the precise definition of the scope, quality and affordability of services of general economic interest (SGEIs) is – with a few exceptions – up to member countries (para. 58) as is the method of financing SGEIs (para. 88).

C. REASONS WHY IT IS NEITHER NECESSARY NOR USEFUL TO DEVELOP A GENERAL EU LEGISLATIVE FRAMEWORK FOR SGI

1. Subsidiarity and the current legal framework provide for effective development of SGI

SGI are excellent examples for an intelligent application of the subsidiarity principle. Design and actual provision of SGI is essentially a responsibility for the national and regional level. Paragraph 10 of the green paper (quoted above) recognises this state of affairs. General European framework legislation is therefore not appropriate for governing the design and practical organisation of SGI. For certain industries with high internal market relevance sectoral framework regulations have been set at European level, ensuring efficient and high quality services by opening the market and simultaneously safeguarding universal and public service concerns by setting relevant requirements. As stated in paragraph 5 of the green paper, this system has hitherto functioned efficiently with regard to meeting public service obligations. In UNICE’s view, when a need for action at Community level is clearly identified, the use of sectoral directives is the most effective approach.

Given the good results produced by use of sectoral directives in the area of SGI, UNICE has strong reservations about defining a Community concept of services of general interest based on a common set of public service obligations which should drive the development of all SGI, or large segments of them.

This is not to say that the existing sectoral directives have always achieved their objectives for creation of a large internal market (the case of energy) or for establishment of a level playing field (telecommunications). A number of deficiencies have been observed, which are often explained by:

- non-application or incorrect/superficial application of Community rules by Member States;
- the highly unsatisfactory compromises reached by Member States on some provisions of directives in the final stages of negotiations in order to secure agreement.

Such deficiencies should be repaired by modifying these instruments, not by putting in place a one-size-fits-all European framework.

The task - and it is an important one - which must be performed at Community level for SGI outside the big network industries consists in verifying that national/regional/ local initiatives for provision of SGI are compatible with the internal market.

Refraining from Community legislation for SGI outside the big network industries not only offers the advantage of taking into account regional or national specificities and long-standing traditions, but also offers a wide field of different policies and practices which should be analysed and benchmarked in order to provide examples of good practices without, however, initiating a formal process of open coordination.

2. Introduction of general EU legislation on SGI would run into very serious problems for good and acceptable definition of its object

Paragraph 45 of the green paper underlines that the distinction between economic and non-economic activities has been dynamic and evolving, and that in recent decades more and more activities have become of economic relevance. The Commission report to the Laeken European Council stressed that it would be neither feasible nor desirable to provide a definitive a priori list of all services of general interest that are to be considered "non-economic". This shows that introduction of general EU legislation on SGI would run into very serious problems for good and acceptable definition of its object.

3. Positive effects of competition in the area of services of general economic interest (SGEI) would be jeopardised

Calls for EU framework legislation for SGEI are clearly inspired by concerns for negative effects that competition might have on the provision and quality of services, but sometimes also by sheer protectionism. Yet, it is the initiatives taken by the Commission itself since the mid-1980s with a view to promoting liberalisation and competition in the energy, telecommunications, transport and postal sectors that have ushered in the major progress that has been observed in the provision of SGEI.

UNICE is therefore strongly in favour of more competition and therefore more private sector involvement in SGEIs. Indeed, both theoretical insight and lack of adequate public funds have in recent years accelerated the transition from SGIs to SGEIs and private sector involvement. This tendency does by no means put into question the authority of government to define scope, quality and financing of SGEIs. However, government less and less involves itself in the production and distribution of these services and this development should not be stopped but rather be encouraged. In the present difficult economic situation, putting brakes to private initiative and strengthening the public sector would definitely be counterproductive. It would also be counterproductive from the angle of the long-term objectives pursued by the Lisbon strategy.

4. Concerns about liberalisation of network industries and long-term security of supply lack empirical foundation

There are some concerns in the discussions about liberalisation of network industries as to sufficient incentives for investments in the infrastructure in the longer term and therefore as to long-term security of supply. Such concerns so far lack empirical foundation. Therefore there is no reason to use the regulatory arsenal. However, such concerns should be taken serious enough to ask the European Commission to study the problem and to permanently monitor it for example through workshops with representatives of national governments, regulators and the industries concerned.

5. Where regulation is needed, a European centralistic approach to SGI should not be systematically implemented

The proponents of more EU regulation for SGEI often recommend that an EU framework directive should introduce universal principles and methodologies, of a centralistic inspiration, for:

- definition of public service obligations ;
- economic calculations linked to the provision of SGI;
- financing of public service missions;
- regulation of SGI;
- evaluation of SGI performances.

UNICE believes that introducing such a centralistic, one-size-fits-all approach for all or a major portion of SGI is inappropriate.

The Commission itself points out (paragraph 72) that experience shows that there is probably no single ideal approach to the regulation of network access and that choices must take account of the characteristics of each industry.

There may be a case for a stronger coordination and cooperation of and between national regulators of network industries. However this does not necessarily imply the creation of European regulatory agencies in addition to the existing national ones. The next step should rather be the improvement of the existing cooperation structures including an evaluation after 2 – 3 years.

D. CONCLUSIONS

Summing up, the successful system of subsidiarity in place at present should not be burdened by new European regulations at a time, when there is a general call for simplification (and above all no complication) of EU-legislation and decision-making.

A general framework directive on SGI could contradict existing sectoral directives and create highly damaging confusion for actors on the market.

In the light of the very successful policy of market liberalisation in the EU without impairing the provision of the population with SG(E)I it is up to those who ask for a change in the system to give empirical support for the need to do so.

E. ANSWERS TO SPECIFIC QUESTIONS ASKED IN THE GREEN PAPER

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 general economic and non-economic interest?

No, as these high-quality services are already being provided. There is also no need to fear they will be “cut down”. It should be ensured that tasks relating to services of general interest are performed in accord with, and not contrary to, the competition principle and continued liberalisation. The Commission has also taken this view so far. Thus, the Commission should not abandon its previous strategy and retain its scepticism as regards a framework Directive. Such a Directive could, in fact, be misused to strengthen existing protectionist tendencies in the single market and jeopardise the achievements of liberalisation to date. Even if a framework Directive is not intended to be more than a purely declaratory statement, its usefulness is not really clear. The danger of a so-called “roll-back” effect, which could lead to further exceptions being made in certain sectors to the competition rules contained in the EC Treaty, would at all events be a too high and unacceptable price to pay for the debate on services of general interest.

Moreover, a framework directive is not needed as the services in question are already covered by the internal market strategy and liberalisation directives. A framework directive might depart from the strategy decided by the Lisbon European Council to promote competition, further reduce aid and accelerate liberalisation in order to complete the single market. Emphasis should be placed on liberalising further markets, such as water resources management, local public transport services and waste management, as well as strengthening controls on competition and state aid.

The Charter of Fundamental Rights recognises the importance of access to services of general interest. Combined with the Charter, articles 16 and 86 of the Treaty create a balanced and sufficient general framework for development of SGI in the Union.

(See also point C above)

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 ?

No.

3. Are there services (other than the large network industries mentioned in para. 32) for which a Community regulatory framework should be established?

There is no need for a general framework covering all or a large part of SGI.

Liberalisation of the waste sector has started in some Member States, with positive results. The EU should not do anything that would slow down or even roll back this process.

UNICE welcomes the fact that the Commission has launched an in-depth study to evaluate the situation in the water sector. This study should assess in particular to what extent barriers to trade arise because of :

- the attribution of exclusive rights without tender calls or publicity,
- discrimination between public and private sectors regarding budget transparency, taxation and state aid;
- national rules on ownership of water corporations (presence of public shareholders).

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?

There is no need to have a European regulator in each regulated industry.

However cooperation between and national regulators and coordination of them should be encouraged under the responsibility of the Commission.

Introduction of enhanced cooperation inspired by the “Lamfalussy method” applied for financial services has been proposed by Mr Herzog MEP for regulation of SGI linked to the large networks³. This would entail creation of a European committee of national regulators for each large sector, consulted by the Commission for major strategic options. The system would include consultation of national parliaments.

Mr Herzog proposes this idea as an alternative to a model in which the European Commission would play the role of European regulator. He believes that the legislative framework is not assured for the Commission to be able to play such a role, and that it currently has neither the capacity nor the legitimacy. UNICE does not believe that this “Lamfalussy method” is really an option, because it would make decision-making extremely complicated.

(See also point C 5 above).

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)?

Such a uniform framework regulation is not desirable (see response to 1).

Besides, as the EU Commission itself states, a uniform framework regulation could only be of a very general nature, as it would have to consider the sector-specific conditions which vary a great deal. To what extent, therefore, a general regulation would create any improvement at all is debatable. The question which concrete universal service obligations (e.g. telecommunications) should be imposed at which prices, could thus not even be solved rudimentarily by a framework regulation.

(See also point C above)

³ See May 2003 article by Mr Herzog “Une perspective commune pour les services d’intérêt général en Europe”.

6. What has been the impact of sector-specific regulation so far ? Has it led to any incoherence ?

(See comments under point C 1).

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?

Demarcation is not likely to be feasible in practice, as the Commission pointed out in its Laeken report (see COM (2001) 598 of 17 October 2001 and point 45 of the green paper), given that services evolve constantly and are not static. Apart from that, according to the ECJ jurisprudence quoted in the green paper (point 44) “any activity consisting in offering goods and services on a given market is an economic activity”. Services which combine economic and non-economic activities in an indivisible unit should be regarded as economic, since under ECJ jurisprudence it should generally be possible to establish the business character of the service provider and therefore the economic nature of a service.

8. What should be the Community’s role regarding non-economic services of general interest?

There is a priori no role for the Community, because of the principle of subsidiarity.

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?

The requirements of universal service, continuity, quality of service, affordability, user and consumer protection, are important issues but they are satisfactorily covered in the Commission communication on general principles. Over-regulation in the area of SGI can already be seen in several Member States, and this trend must be reversed. UNICE repeats its reservations about the idea of a common concept of SGI. Therefore, UNICE does not see a justification for introducing other requirements in a common concept of SGI.

10. Should all or some of these requirements be extended to services to which they currently do not apply ?

UNICE does not believe it necessary to extend requirements at the European level beyond non-discrimination and those contained in the public procurement directive to services where there is no requirement at the EU level for markets to be opened. Member States should be able to make their own provisions to ensure public service provision when liberalising a new sector. Liberalisation improves customer service by reducing prices and increasing innovation.

11. What aspects of the regulation of these requirements should be dealt with at Community level and which aspects left to the Member States ?

As the “specific national conditions” in particular have to be taken into account within the framework of the affordability of universal services (in the telecommunications sector), the task

of deciding on the requirements should be that of the national regulatory authorities (telecommunications) and/or regulatory approaches (energy sector) only.

12. Have these requirements been effectively implemented in the areas where they apply?

Studies carried out by the Commission and other institutions make it possible to give a positive response to this question.

13. Should some or all of these requirements also be applied to services of general interest of a non-economic nature?

The Community has no competence, hence the question does not apply.

14. Which types of services of general interest could give rise to security of supply concerns? Should the Community take additional measures?

In the area of energy, the Commission should monitor the situation in cooperation with the Member States and the industries concerned. The issue of security of supply is not acute at the present time. If regulations allow a reasonably profitable activity, there will not usually be any security of supply problem. Should it appear that market forces on their own do not guarantee the necessary long-term investments, initiatives should be studied that work with the grain of market mechanisms.

If regulations allow a reasonably profitable activity to develop, there will not usually be any security of supply problem.

As a general comment for network industries, it should be noted that the main problems observed in terms of security of supply are due to strikes.

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?

The need for such measures is felt essentially in the rail sector on the continent.

16. Which other sector-specific public service obligations should be taken into consideration ?

It would be useful for the Commission to draw up guidelines targeting governments and indicating the need to define and guarantee a minimum service in the network industries where there are dominant or monopoly operators (in particular in the case of strikes).

17. Should the possibility to take concrete measures in order to protect pluralism be reconsidered at Community level ? What measures could be envisaged ?

This is a matter for Member States.

18. a) 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? b) 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 ?

Ad a): No case known.

Ad b):

Broadcasting: problems arise due to the fact that the EU legislation defines public service obligations, but these are neither monitored nor controlled.

The absolute priority given in Belgium to passenger rail transport has negative consequences for the service offer to companies, and thereby hampers their participation in the internal market.

The way in which waste services markets are organised in Germany at national/ regional/local level poses problems with which the Commission is familiar through its own investigations. UNICE encourages the Commission to continue these factual and legal investigations intensively.

19. Should sector-specific public service obligations be harmonised further at Community level ? For which services ?

The principle of subsidiarity should apply.

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 ?

Exchange of experience and best practice can help to promote the offer of high-quality SGI. However, this should not be formalised, in order not to create further red tape at great cost in time and money.

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 ?

Impediments to financing: UNICE is unaware of any such cases. On the contrary, UNICE has always argued for strict state aid control. In this regard, it supports the European Commission's policy of strict state aid control, given that state aid distorts fair competition between companies. Only where markets cannot bear competition in exceptional cases can state aid be permissible, in the cases provided for by law and within narrow limits. Compensation should be established in an objective and transparent manner.

The state aid provisions should be applied to limit the flow of resources to the amount that is needed to offset the additional costs incurred by the undertaking in question to fulfil the tasks assigned to it.

Inefficient choices: Yes, in many countries, institutionalised financing of wide public service obligations whose relevance needs to be revisited has led to maintenance of services that are inefficient or no longer correspond to user needs.

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 ?

Basically this should also be subject to the subsidiarity principle. One best model probably does not exist. However, here too benchmarking could be useful in order to find out good examples which satisfy the goals of transparency, efficiency and so on. Attention should be given to a possible distortion of competition in the single market by different ways of financing thereby putting heavier or lighter financial burdens on companies. It is essential to eliminate financial mechanisms which result in over-compensation and which represent an easy way for Finance Ministries to garner resources.

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 ?

No.

24. Should the consequences and criteria of solidarity-based financing be clarified at Community level ?

Community framework legislation is not needed for that. However, guidelines could give useful clarification on these consequences and criteria, but only in the context of the internal market and competition rules.

25. How should the evaluation of the performance of services of general interest be organised at Community level? Which institutional arrangements should be chosen?

In UNICE's view, the need for EU involvement in the evaluation has not been demonstrated. If such an activity were to develop at Community level, it should be conducted by the Commission. It should not be forgotten that these types of performance evaluation are already implemented in the so-called Cardiff process.

Above all, the Community could play a useful role in explaining to the citizen that liberalisation provides him with the services he expects. By proceeding in this manner, there would be no need to carry out major evaluation work at EU level. Rather, evaluation is a task for the local/national level.

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 ?

Does not apply - see question 25

27. How could citizens be involved in the evaluation? Are there examples of good practice ?

Does not apply - see question 25

28. How can we improve the quality of data for evaluations? In particular, to what extent should operators be compelled to release data?

It is not necessary to regulate the supply of data. It is in the interest of companies themselves to provide data to consumers and to the other parties concerned.

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.

European industry has a clear interest in comprehensive liberalisation in all commercial service sectors. Sectors which have already been opened to competition, i.e. where public or private monopolies no longer exist, should also be opened to international competition. By way of example, greater weight than hitherto should be attached to energy services in negotiations with the GATS contracting parties. So far, services in the energy sector have not been included as a separate sector. At the current time only sub-sectors of other sectors have been integrated. A comprehensive classification and demarcation of energy services, which should include not only energy services in the narrow sense but also energy-related services, is a precondition for the opening of national markets to international competition and foreign investors.

The objective of GATS is liberalisation of all commercial service sectors. By contrast, public services such as state schools are not covered by the liberalisation negotiations. In sensitive sectors where public and private services exist side by side, GATS takes account of the existing political perceptions. On the basis of the sector-specific approach, more generous or stricter rules may be agreed for each particular area.

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?

When setting up infrastructure, developing countries are largely dependent on the support of industrialised countries. With the help of technical assistance and foreign investment, central infrastructure, such as water supplies, telecommunications, transportation and shipping, as well as the financial sector, can be built up. Such an involvement on the part of the private sector, however, requires an opening of the market (GATS - Mode 3), together with meaningful regulation. At the same time to secure investments made on a multilateral level a protection of the investments as well as foregoing emergency protection clauses (ESM) should be agreed on. Also, in addition, investments made by the private sector can receive positive support from the public authorities through Public Private Partnerships.

UNICE insists on the importance of a multilateral legal framework that is conducive to international investment.

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