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Community activity concerning services of general interest during 2003: disillusion sets in

Introduction

Less than a year after the mid-term review of the Lisbon strategy, it is legitimate to examine developments in the debate on services of general interest (SGIs) in the light of progress made in building the European model of society. From this point of view, our assessment of the institutions' activities gives cause for concern. Nevertheless, the situation is not entirely negative. In confirming its decision in the Ferring case, the Court of Justice of the European Communities (CJEC) made an interesting step forward possible. However, in spite of the efforts of Philippe Herzog, the European Parliament has once again delivered a confused message to the other institutions and to citizens. The European Council and the Council of Ministers have remained silent on the defence and promotion of SGIs. Unlike the period 2000-2001, during which the European Council clearly adopted a more balanced approach, during 2002-2003 the change in tone and direction perceptible since the Barcelona European Council (15 and 16 March 2002) became firmly established. From this point of view, EU enlargement will tip the balance of power slightly further in a direction unfavourable to SGIs. Indeed, it is clear that the ten accession countries are particularly eager neither for a clarification nor for an improvement of the Community framework, nor very interested by the issue of SGIs, with which they claim to be unfamiliar and about which they are cautious. But the worst news comes from the Franco-German partnership, which is finding it increasingly difficult to hide its differences of opinion on this subject. Lastly, the Commission's activities in this arena have been intensive. Most of the

deliberations on this issue during 2003 have taken place within the Commission, but its departments nevertheless remain in a state of uncertainty. In the wake of the political message from the European Parliament, in particular in the second railway package and the Herzog report, could the Commission be preparing to set itself apart from current opinion, which is in favour of leaving the management of general interests to market forces alone?

In Part I, we shall review the action undertaken in 2003 by the European institutions, particularly the European Council, the Council of Ministers and the European Parliament. In Part II, we shall examine the interpretation to be brought to the European Court of Justice ruling in the Altmark case. We shall briefly look at the Convention's deliberations on SGIs. We shall devote a major section to the Green Paper and the follow-up to it planned by Member States, the European Parliament, the social partners and other associations. Finally, we shall attempt to draw an overall conclusion on the general trends underway.

1. Work of the European institutions

1.1 The European Council

The European Council has concentrated its conclusions largely on opening up to competition and liberalisation, which have become a specific aim in themselves. Thus, the Spring European Council (20 and 21 March 2003) noted that "*significant results have been obtained as regards, for example, opening up energy markets, creating a single sky, modernising competition policy* …." (European Council, 2003: point 8). The Heads of State and Government believe that it is important "*to push ahead to open up and integrate European markets further while improving the regulatory framework and ensuring a high standard of consumer protection*". To this end, "*the integration and greater connectivity in network industries such as energy, transport and telecoms must be pursued, while completing and extending networks, especially in view of enlargement*" (European Council, 2003: point 12). The European Council also calls for "*the rapid final adoption and effective implementation of the Electricity and Gas Internal Market Directives and Regulation in compliance with the Barcelona conclusions*" (European Council, 2003: point 28). With respect to transport, the European Council calls on "*the "Transport" Council to rapidly reach a final agreement on the second railway package, as well as to adopt rapidly the "Single European Sky" package and the "Port Services"*

directive" (European Council, 2003: point 29). The leitmotifs emphasised by the Heads of State during the course of 2003 were greater opening, reform, further integration and the completion of unfinished projects.

A twofold message was clearly addressed to the European Union. Firstly, the primacy of growth and competitiveness was asserted and will dominate the agenda for years to come. Secondly, services of general economic interest (SGEIs) appear to have been subordinated to the rules on State aids and competition contained in the Treaty. Consumers are mentioned, but the added value of the Nice European Council (7-9 December 2000), i.e. the economic, social and territorial cohesion of the EU, has faded. There has been a change in perspective: SGIs no longer appear as one of the pillars of the European social model, to be defended and promoted, but rather as a structural adjustment variable in the competition waged between large economic powers. There has clearly been a perceptible downgrading of the manner in which SGIs are perceived by the European Council. Confirmation of this approach can be found, in outline, in the Initiative for Growth [1] in which the three major network industries, which are also the main services of general interest, are perceived as driving growth in Europe and not, as was originally the case, as cementing European Union citizenship.

1.2 Legislative activities of the European Parliament and the Council

1.2.1 Transport

After the first railway package [2], which has not undergone any assessment by the Commission, the second railway package took up a

1 The *Quick-start* programme lies at the heart of the European initiative for growth. This brings together 54 "ready to launch" cross-border investment projects, selected by the Commission in co-operation with the European Investment Bank. 31 projects relate to the European transport network (ETN), 15 to the European energy network and 8 to communications, R & D and innovation networks.

2 The "first railway package" is made up of 3 directives, which came into force on 15 March 2001: the Directive on Access to Infrastructure, the Directive on Railway Licences and the Directive on Capacity. The aim of these three directives is to open the market in 2 stages: in 2003 the 50,000 km of railways constituting the Trans-European Rail Freight network; in 2008 the network as a whole. Moreover, the directives clarify the roles of the various players. Railway

substantial portion of 2003. This second package was proposed by the Commission on 23 January 2002 (CEC, 2002a) and relates to four linked legislative proposals intended to:

- extend rights of access to infrastructure to railway cargo transport within the Member States and speed up the opening of the market;
- ensure consistency in scope between networks to which access will be open and networks to which the interoperability rules will apply;
- develop a joint approach to safety and establish a joint system for the issuing, content and validity of safety licences;
- create a European Railway Agency which would devise joint safety standards and develop and manage a monitoring system for safety on the one hand, and, on the other, ensure the long-term management of a system of technical interoperability specifications.

The European Parliament ([3]) and the Council failed to agree on the pace of rail liberalisation. Whilst the Parliament and the Council have agreed on 1 January 2006 as the date for the opening of international railway cargo services to competition across the entire network, they disagree on the opening to competition of cabotage services (domestic cargo): 2006 for the European Parliament as against 2008 for the Council. The European Parliament went beyond what the Commission had originally proposed and sought in addition the complete opening of the passenger transport market in 2006.

The Transport Council concluded a political agreement on a Common Position regarding the second railway package during its meeting on 28 March 2003 in Brussels ([4]), asking the Commission to submit a

companies will be responsible for transport. Infrastructure management will be carried out by an independent body which will provide access rights to the infrastructure. These three directives signal the beginning of rail liberalisation.

3 The second railway package passed its first reading in the European Parliament on 14 January 2003.

4 As a reminder, three countries (France, Belgium and Luxembourg) voted against the proposal. The reason adduced was the lack of a Commission report assessing the first package on the opening of the market.

report on the implementation and effects of the opening of the railway market by 1 January 2007 at the latest. In the wake of this, the Common Position was adopted on 26 June 2003. However, during the second reading at the plenary session held on 23 October, the Parliament (5) returned to the attack.

In its opinion on the Parliament's amendments, the Commission points out that its amended draft regulation provides for the introduction of regulated competition through the allocation of public service contracts or exclusive rights. The Commission argues in favour of a balanced solution, which should be set in a proper framework and subject to a detailed impact study. Nevertheless, the Commission welcomes the Parliament's amendments on the opening of the passenger sector to competition as "*a strong political message which will lend essential support in the preparation of future proposals*" (CEC, 2003a: 4). Given that the Council and the Parliament were unable to reach an agreement, a conciliation procedure was opened on 27 January 2004 in an attempt to reach a compromise.

A third railway package was under preparation. It was to have been presented by the Commission in mid-February 2004 and was in all likelihood to relate to the liberalisation of passenger transport with a view to completing the single market in the railway sector. No progress was made on public service obligations under either the Greek or the Italian presidencies. Officially, the reason for this was the need to await the Altmark ruling (6) and the Commission's opinion on its original proposal.

1.2.2 Energy

The Council is expected to adopt the "energy package" rapidly with a view to the complete opening of gas and energy markets for commercial users in 2004 and for households in 2007. European Parliament and Council Directives 2003/54/EC (electricity), and

5 The Common Position is published in the OJ C 270E of 11 November 2003.

6 In this regard, on 23 September 2003, the Commission published a document amending a regulation concerning public service obligations in public service contracts in the rail, road and inland waterway transport sectors.

2003/55/EC (gas) of 26 June 2003 (7) unarguably constitute the Energy Council's most important contribution with respect to public service obligations. Both Directives establish in Article 3 a mechanism for public service obligations. Having due regard to the principle of subsidiarity, the Member States must fulfil a certain number of duties:

- ensure that electricity undertakings are operated with a view to achieving a competitive, secure and environmentally sustainable market in electricity;
- impose on undertakings operating in the electricity 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 environmental protection, including energy efficiency and climate protection. Where financial compensation, other forms of compensation or exclusive rights are granted by a Member State for the fulfilment of public service or universal obligations, this must be done in a non-discriminatory and transparent way;
- protect final customers and ensure that there are adequate safeguards to protect vulnerable customers, including measures to help them avoid disconnection;
- protect final customers in remote areas. Ensure high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms;
- achieve objectives with regard to social and economic cohesion and the protection of the environment which may include energy efficiency measures, regularity, quality and price of supplies, as well as measures for climate protection and security of supply.

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7 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerns common rules for the internal market in electricity. It repeals Directive 96/92/EC (OJ L 27 of 30 January 1997) of the European Parliament and of the Council. Directive 2003/55/EC concerns common rules for the internal market in natural gas. It repeals Directive 98/30/EC of 22 June 1998 (OJ L 204 of 21 July 1998) (European Parliament and Council of the European Union, 2003a and b).

Member States must inform the Commission of all measures they have taken to fulfil universal service and public service obligations, including consumer and environmental protection and their possible effect on national and international competition. One difference of particular importance between the two Directives should be noted. Only the Gas Directive provides that Member States shall ensure that all household customers, and, when they deem it appropriate, small enterprises ([8]), should have access to the universal service, i.e. should be supplied within their territory, whilst benefiting from a specified quality of product at reasonable, readily comparable and transparent prices.

Finally, both Directives provide that the Commission should submit a general progress report on the state of play to the Council and Parliament with respect in particular to the economic, environmental and social consequences for consumers of the opening of markets in electricity and gas. In conclusion, the "universal service" Directive contains some undeniable steps forward:

- the three Lisbon pillars are integrated into both implementation and assessment: social and territorial cohesion and environmental protection are reaffirmed;
- public service obligations are extended to cover climate protection (it would have been desirable to include the notions of accessibility and adaptability);
- the relatively broad margin for manoeuvre allowed to Member States obviously raises the issue of the degree of harmonisation and level of protection in an enlarged Europe.

1.2.3 Telecommunications

In March 2002, the European Parliament and the Council adopted a new legislative mechanism ("telecommunications package") (on this subject, see in particular De Streel and Queck, 2003; De Streel, 2003) intended to provide a framework for the electronic telecommunications sector and to replace the 1998 regulatory framework. The main goal of

8 Small enterprises are defined as companies employing fewer than 50 persons and whose annual turnover does not exceed 10 million euros.

this new mechanism, which consists of a new framework directive on the "liberalisation" of electronic communications networks and services as well as four other specific directives, is to make the sector more competitive. This new regulatory framework owes more to evolution than to revolution. It adopts the philosophy of 1987, relying upon market mechanisms to organise human behaviour optimally and carefully examining the need for regulation, which is kept to a minimum. The Directive is based on the postulate that "*competition and market forces are the most effective means to satisfy user needs, but provides national regulatory authorities with the necessary powers to protect users' interests where they need to do so*" (CEC, 2003b: 35). One of these draft directives concerned the universal service relating to electronic communications networks and services (European Parliament and Council of the European Union, 2002a). The Directive defines universal service as the obligation on one or more operators of electronic communications networks and/or services to provide a minimum range of services to all end-users at an affordable price, irrespective of their geographical location within the national territory. It allocates to Member States a set of "universal service obligations":

1. telecommunications services must be made available with the quality specified to all end-users in their territory, irrespective of their geographical location, at an affordable price;
2. at least one comprehensive directory, updated at least once a year, must be made available to end-users as well as a directory enquiry service;
3. public pay telephones must be made available to deal with the needs of end-users, in terms of geographical coverage, the accessibility of these pay phones for disabled users or the quality of services;
4. services adapted to their needs must be available to disabled users;
5. special tariff options or specific support must be available to low-income consumers. Moreover, Member States may require enterprises undertaking universal service obligations to adhere to the capping of tariffs, including geographical averaging throughout the national territory;
6. undertakings with universal service obligations shall be subject to performance targets.

It will be noted that the "Universal Service Directive" establishes an overall framework but leaves it up to Member States to implement universal service obligations. National authorities must provide incentives for operators to fulfil their universal service obligations in a cost-effective manner. Moreover, the costs to be covered must be as limited as possible (access to emergency telephone services, public pay telephones and services or equipment for disabled people), in order to reduce as far as possible any barriers to the entry of new operators. Finally, in an annex, the Directive lays down the procedure for reviewing the scope of the universal service, which may happen in 2005. In this regard, the Socialist MEP Karine Lalieux and others (Lalieux *et al.*, 2004) request that access to the internet and mobile telephony should form a part of universal service from now onwards, in order to reduce digital fracture.

In comparison with the "Energy" directives, it is clear that less is required here in terms of public service obligations. The Directive reveals incidentally that it would be worthwhile to have a framework directive defining the main principles. The three Lisbon dimensions are missing from the assessment: social cohesion and environmental protection are scarcely mentioned if at all. After fifteen years of liberalisation, there is still no common European regulatory culture. Markets remain fragmented along national borders. Legal certainty will inevitably be affected, particularly in relation to *soft law* which is supposed to coincide with the new framework.

1.2.4 Postal Services

After the Barcelona European Council (15 and 16 March 2002), which called for a speeding up of the liberalisation of all EU markets, Directive 2002/39/EC (European Parliament and Council of the European Union, 2002b), amending Directive 97/67/EC, established a time-frame for the progressive completion of this liberalisation in two stages: 1 January 2003 for letters weighing less than 100 grammes (or those whose postage cost is more than three times greater than the tariff for a normal letter), and 1 January 2006 for letters weighing more than 50 grammes (or those having postage costs more than twice as great as the tariff for a normal letter). Member States must ensure that the Directive on postal services is implemented in full and within the prescribed deadline. In 2006, the Commission will complete a study

assessing for each country the impact, on the universal service, of the overall completion of the internal market in postal services. Taking the result of this study as its basis, the Commission will submit further proposals intended, if necessary, to liberalise postal services as a whole. The next deadline for the opening up of postal services as a whole has been set at 2009.

1.2.5 Water, the next step in liberalisation?

The liberalisation of the water sector will certainly be the major topic of debate during the next legislature. In its Communication entitled "Internal Market Strategy – Priorities 2003-2006" of 7 May 2003, the Commission makes clear that "*the Commission services will undertake a review of the legal and administrative situation in the water and waste-water sector. This will include an analysis of the competition aspects, in full respect of Treaty guarantees for services of general economic interest and environmental provisions"* (CEC, 2003c: 14). The Director General of DG Competition, Philip Lowe from the United Kingdom, clarified in a letter addressed to the Member States, dated 2 June 2003, that this initiative follows up on a study carried out by DG Competition ([9]) on competition in the water sector. According to the Commission, the initial task must be to gather information on the water sector in the Member States with a view to *"modernising the legal framework",* a euphemistic expression which conveys the Commission's desire to apply competition rules to the sector. All options will be considered, including possible legislative measures. Within the Commission, it is felt that "*the issue is ripe for discussion at Community level and that this sector needs to be tackled*".

In their joint response, the Belgian authorities ([10]) pointed out that "water is not a tradable good like any other (…). The special status of water, the continuity and the long-term perspective that are required to manage it with a view to sustainable development (…) do not lend themselves to liberalisation but, on the contrary, suggest the need for public control of the water sector on a stable and long-term basis". The

9 Available at http://europa.eu.int/comm/competition/publications/#water

10 This is a joint response from all three regions (Flanders, Wallonia and Brussels Capital) on behalf of the regional Environment Ministers.

Commission services are currently engaged in perusing the Member States' responses. It is unlikely that the Prodi Commission will run the risk of taking an initiative before the European Parliament elections. It will probably be necessary to await the beginning of 2005 in order to be certain of the Commission's intentions in this area. What is at stake is the liberalisation of water distribution (commercial management of meters and other associated trades) and the entrance onto the national market of brokerage firms, particularly through concessions; this could lead to a fragmentation of the four basic trades (production, distribution, measurement and monitoring of quality) involved in managing the water cycle (11).

This is a highly controversial issue. Indeed, whilst the majority of Member States are hesitant or reluctant to undertake liberalisation of the water cycle, the same cannot be said of their industries. Thus, the two largest German electricity operators (RWE and EON), and the French operator (Vivendi Eau, formerly Lyonnaise des Eaux), are already proving very active in the market for buying up operators in the water trade.

2. Three key moments in 2003

2.1 European Court of Justice: the Altmark ruling (12) and its effects

The case dates back to 1990. The German company Altmark Trans obtained licences and subsidies for the transport of persons by bus in the Landkreis (rural district) of Stendal. In 1994, the German authorities renewed Altmark's licences, rejecting the applications by Nahverkehrs-gesellschaft Altmark, another bus transport company. The latter brought an action before the German courts, alleging that Altmark Trans was not an economically healthy company and would not have been able to survive without public subsidies; the licences were therefore illegal. In its

11 As an example, the water cycle is managed in the Wallonia region by 73 producers, 81 distributors (often producers) – of which 63 are government corporations and municipal services, 17 are inter-municipal services and one is a regional company – as well as 8 which are purifiers.

12 CJEC, 24 July 2003, *Altmark Trans GmbH,* case C-280/00.

ruling, the Court confirmed its decision in the Ferring case ([13]), according to which a State measure compensating services carried out by enterprises to discharge public service obligations does not constitute an "advantage" and should therefore not be regarded as State aid. In this ruling, the Court clarifies the four conditions which such compensation must fulfil in order to avoid being classified as aid (in summary: clear definition of public service obligations; objective and transparent parameters for the calculation of compensation; absence of "overcompensation"; level of compensation for public service obligations to be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred).

In concert with the decision in Ferring, this case provides a very useful guide as to how to interpret the financing at issue and the method of calculating the compensation needed to cover all or part of the costs arising from the discharge of public service obligations. The Ferring and Altmark rulings have enabled progress on the issue of financing SGEIs. But these rulings only concern public subsidies. What is the situation with respect to other forms of financing, such as compensation in the form of tax exemptions, tax credits or benefits in kind? or tariff averaging between economically viable and non-economically viable activities? or contributions from users and market operators? The Altmark ruling constitutes progress, but some areas of uncertainty have been left by the Court which raise the issue of the desirability of a Community instrument (framework directive). These areas relate in particular to:

- the nature of those public service obligations which may be compensated through public financing;
- the exact scope of the transparency obligation binding on Member States with respect to the calculation of compensation awarded to undertakings with public service obligations to discharge;
- the parameters (nature of relevant costs, calculation method, etc.) selected by Member States as the basis for the calculation of compensation, as well as the parameter linked to "reasonable profit" for the discharge of public service missions.

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13 CJEC, 22 November 2001, *Ferring SA*, case C-53/00.

Moreover, the Altmark ruling raises new questions: what is the cost of public service? What portion of the additional costs becomes unlawful? Must the compensatory sum be equivalent to the market price? If SGEIs are allocated to those undertakings with the lowest costs, will this not condemn all operators to downgrading the services provided? As part of the debate on the compensation linked to the cost of public service, at least three questions must be raised:

- will the tendency of costs and pricing realities not lead to at least partial disengagement on the part of SGEI operators in territorial and social terms, or even to price hikes particularly in peripheral regions (risk of cherry-picking)?
- what costs should be included? How should the costs linked to economic, social and environmental cohesion be assessed? Does the calculation of actual costs include costs relating to cohesion, continuity and long term development?
- Should European-level harmonisation of cost calculation methods not be considered, particularly for networks of services of general interest? Should other possible forms of financing not be considered, especially at European level?

With a view to answering the many questions left unanswered by the Altmark ruling, the Commission tabled three documents on 4 February 2004:

- a decision, based on Article 86(3) of the EC Treaty, applicable to small SGEI operators. Its aim is to recognise that some low-level aid may be compatible with the Treaty and could be exempted from prior notification to the Commission;
- a new Community framework, setting out clear criteria and simplified procedures for assessing the "compensation" awarded by major SGEI operators for the financing of public service obligations;
- a minor amendment to Directive 80/723/EC on the transparency of financial relations between Member States and public enterprises, making them comply with the obligation to keep separate accounts relating to the specific costs of SGEI activities.

2.2 The Convention and SGIs

Before the Brussels European Council (12 and 13 December 2003) ends in failure and calls into question the achievements of the 105 Convention members after 18 months of intense negotiations ([14]), we should return to the draft Treaty establishing a Constitution for Europe, as made public by the Convention Praesidium on 18 July 2003 in Rome (European Convention, 2003). Part III of the final document, on the Policies and Functioning of the Union, contains an Article III-6 ([15]) which reflects the key aspects of Article 16 of the EC Treaty. This confers a new legal scope on the document, though some have pointed out that this article maintains SGEIs in state of subordination to competition rules, and that the scope of this provision remains restricted to services of general economic interest. It is worth noting in passing that Article III-6 is included in Part III, entitled "clauses of general application", whilst the current Article 16 comes in the first part of the Treaty which concerns "principles". Clauses of general application call on the EU and its Member States to bear in mind the requirements relating to the proper functioning of SGEIs in all their policies.

It is worth pointing out two further amendments. The first is a rewriting of Article 16 ("given the place occupied by services of general economic interest as services to which all in the European Union attribute value") which seems to involve a step backwards from the present wording ("given the place occupied by services of general economic interest in the shared values of the Union"). Stéphane Rodriguès nevertheless points out that "it is no longer only the Union which is concerned through its shared values, but "everyone", including Member States, local authorities, socio-

14 For a full description of the genesis of Article III-6 of the draft Treaty, see in particular Rodriguès, 2003.

15 "*Without prejudice to Articles III-55, III-56 and III-136, and given the place occupied by services of general economic interest as services to which all in the Union attribute value as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Constitution, shall take care that such services operate on the basis of principles and conditions, in particular economic and financial, which enable them to fulfil their missions. European laws shall define these principles and conditions*" (European Convention, 2003: 62).

economic players and, at the end of the day, European citizens" (Rodriguès, 2003: 508). The second amendment clarifies the nature of the conditions under which SGEIs must function in order to fulfil their allotted tasks. SGEIs are "in particular economic and financial". Although it adds nothing in legal terms, this interpolated clause clearly echoes the concerns of the Court of Justice which has returned on many occasions to questions of compensation and the cost of public services obligations. It would have been preferable to have some clearer reference to the principles of adaptability, continuity, equality of access, provision free of charge, democratic evaluation, participation or precaution as some Convention members had wished (16). But it is above all the last sentence of Article III-6 which has the most potential: "European laws shall define these principles and conditions". First and foremost, this is a prescriptive measure which obliges the Commission to make use of its right of initiative to submit draft European legislation, which will have to be adopted jointly by the European Parliament and the Council under the future procedure provided for in Article III-302 of the draft Constitution, i.e. the current co-decision procedure. Secondly, the measure provides a possible justification for establishing a new balance between competition law and the carrying out of public service obligations.

2.3 Green Paper on SGIs and the issue of the framework directive

Published on 21 May 2003 (CEC, 2003d) in response to the European Parliament's request made in November 2001 (European Parliament, 2001) and the conclusions of the Barcelona European Council (15 and 16 March 2002), the Green Paper on Services of General Interest (SGIs) is a key document which will make its mark. The Commission's aim was to stimulate discussion (17) on promoting the supply of high-quality services in the EU. Broad consultations were held. No fewer than 281 contributions (18) were received by the Commission (19). With

16 See in particular the Lequiller, Proinsias de Rossa, Lichtenberger-Nagy-MacCormick-Wagener amendments, cited in Rodriguès (2003: 506).

17 To this end, 30 questions were submitted for public consultation. All interested parties had until 15 September 2003 to send in their contributions.

18 By way of comparison, more than 6,000 responses were sent to the Commission in the consultation on chemical products (draft "REACH" regulation).

the exception of Luxembourg, all fifteen current members of the EU made contributions. However, only three of the new Member States (Lithuania, Poland and the Czech Republic) responded. As the Green Paper came at a mid-point between various crucial European Union deadlines, the responses to it lie at the very heart of political debate ([20]). They provide an interesting snapshot of the balance of power within the Union between proponents of the *status quo* or even of deregulaton, and those who believe, on the contrary, that the protection afforded to SGIs must be reinforced because of the nature of their tasks, particularly in the light of liberalisation. This debate touches on the central question of the role played by the public authorities in a market economy.

From the outset, the Green Paper gives services of general interest pride of place: "*They are part of the values shared by all European societies and form an essential element of the European model of society. Their role is essential for increasing quality of life for all citizens and for overcoming social exclusion and isolation*" (CEC, 2003d: 3). According to the Commission, however, there is one incontestable prerequisite: liberalisation is a good thing from an overall point of view. Without actually referring to any verifiable or contradictory information, and in a rather high-handed fashion ([21]), the Commission lists the advantages of liberalising services of general economic interest: increased competition, price reductions, job losses compensated by the creation of new jobs. In this context, the debate launched by the Green Paper tackles five questions:

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19 The contributions may be consulted on the Commission's website (http://europa.eu.int/comm/secretariat_general/services_general_interest/comments/public_en.htm).

20 A great many meetings were held in 2003. Of particular significance was the public conference held by the European Parliament's Committee on Economic and Monetary Affairs, 11 June 2003 (http://www.europarl.eu.int/hearings/20030611/econ/default.htm) and the seminar held by the Belgian and French governments in Paris on 21 November 2003.

21 In order better to be able to appraise the overall impact, it would have been interesting if the Commission had also given the figures relating to jobs lost or destroyed in the wake of liberalisation and the subsequent restructuring.

- the scope of any possible European measures taken in conformity with the subsidiary principle;
- the principles which may be included in a possible framework directive or other general instrument on SGIs and their added value;
- the definition of good governance with regard to the organisation, regulation, financing and evaluation of SGIs;
- measures likely to enhance legal certainty and to permit an appropriate balance between the maintenance of quality SGIs and the rules on competition and the single market;
- the challenge of globalisation.

These five chapters contain thirty questions which provide a framework for future reflection. The responses to these questions are available on the internet and are intended to guide any possible Commission action.

2.3.1 Responses to the Green Paper on services of general interest

The Green Paper has in general received a warm welcome. Most respondents are pleased that it deals with both services of general economic interest (SGEIs) and services of general non-economic interest (SGNEIs), even though there is no legal basis for the latter in the EC Treaty.

Role of the EU and the need to amend the Treaty. There is no consensus as to the need to add a reference to SGIs in the Treaty. Opinion is divided between two camps: those who defend the *status quo* and those who more or less propose amending the EC Treaty: either by including a reference to SGIs amongst the aims of the EU (Article 3), with a view to clarifying their roles, or else by amending Article 86(3) of the Treaty, or by supporting the new Article III-6 drafted by the Convention. In any event, most responses agreed not to grant additional power over SGEIs to the Community. Most of those who advocated a Treaty amendment did not wish to see an expansion of the Community's powers in this area. On the contrary, various contributions called for a strengthening of subsidiarity and the freedom of Member States to define, organise and fund SGIs nationally, regionally and locally. There were a number of calls for a framework directive dealing with the application of Community rules to SGIs, the distinction between SGEIs

and SGNEIs, and the consequences for trade between Member States. Whilst some respondents envisaged the need for a regulatory framework for network industries, nobody wishes to establish a Community framework for social services, social protection or public service radio broadcasting. The general view is that it is not necessary at this stage to create European regulators. Services must be managed as closely as possible to markets. On the other hand, most people agreed that European networks of regulators would be the most appropriate model for co-operation.

Specific sectoral legislation and the general legal framework. Opinion is sharply divided between those in favour of a framework instrument and those against. Those who are in favour of a framework instrument envisage it as a tool for the promotion of consistency and a reinforcement of the rules applying to services of general interest as well as the respective responsibilities of the Community and the Member States. This instrument would cover matters such as the definition of general principles concerning the provision of services of general interest (access, universal service, transparency, adaptability, non discrimination, continuity, etc.), their funding, organisation, regulation, evaluation and the role of the Member State, including regional and local authorities, and the Community. This framework would also cover provisions on cost calculations and exclusive rights. Many people expect that such an instrument would restrict the application of the single market and competition rules which apply to SGIs. Some go as far as proposing exemption from competition and single market rules. Those who are opposed to a framework instrument maintain, on the contrary, that the current legislation based on a specific sectoral approach has proved its worth. It is not necessary to introduce framework rules. Articles 16 and 86(2) of the current Treaty are sufficient. Contradictions could arise between the framework instrument and existing sectoral legislation. This could delay the "normalisation" of certain sectors, call into question the sectoral legislation or even lead to steps backwards in most of the liberalised sectors. Such framework legislation would inevitably lead to additional charges and costs. It would necessarily be complex and lack transparency. The different levels of liberalisation existing in different sectors would make it difficult to establish this framework instrument.

The distinction between SGEIs and SGNEIs. In general, the distinction between the two is perceived as important and relevant. It appears to be broadly accepted that the demarcation line between economic and non-economic activities should be dynamic and evolving. As a result, many feel that an *a priori* list of non-economic activities should be drawn up. Some have suggested the drawing up of a negative list of services which are not subject to competition or the rules of the single market (local public transport, distribution and management of water, social services, health care, education, culture and services provided by non profit-making organisations). In this regard, various commentators – largely from the social sector, trade unions and the regions – consider that a distinction between economic and non-economic services based solely on the market would be too narrow. The former argue in favour of broader criteria, such as social and environmental objectives, an absence of profit or the involvement of volunteers, in order to determine whether a service is economic or non-economic in nature. Some even hold the view that the activities of non-profit making organisations or organisations which reinvest profits in public service activities should be considered as being non-economic in nature ([22]). Other commentators from industry stress, on the contrary, that the current functional definition based on the nature of the activity is appropriate and should be maintained. In any event, there is broad agreement that the Community should not be seeking further powers in the realm of non-economic services.

A common set of public service obligations. Differences in approach with regard to the framework instrument are also reflected in the responses on public service obligations (PSOs). As for the framework directive, opinion is divided. Some formally contest the need to establish a common set of obligations at Community level which would necessarily be too broad and would lead to excessive red-tape. PSOs must be defined on a sector by sector basis. The reform of electronic communications is an example of successful regulation in a specific sector. Others consider, on the contrary, that this common definition is

[22] For the record, the Commission considers that the status of an organisation is not relevant to the process of judging its activities within the meaning of the rules in the EC Treaty. Only the nature of the service provided is relevant.

necessary and would find an application in major network industries. Broad agreement seems to be emerging that further harmonisation of PSOs is not desirable. On the other hand, there is a great deal of interest in exchanging good practice and in benchmarking the way services are organised. On relations between the Community and the Member States, it is accepted that Community regulation should be restricted to the establishment of principles and objectives; Member States must retain the power to integrate these principles at national and regional level. The organisation, financing and monitoring of services of general interest must in particular remain the prerogative of the Member States, even though some people are in favour of Community regulation.

Financing. Most respondents wish to see a clarification of the financing rules. The desire for greater legal certainty is particularly emphasised in relation to local services. There are many comments on the Altmark ruling, which is viewed as a positive but insufficient step towards greater legal clarity. Some respondents, referring to the two-stage approach adopted by Commission ([23]) in the report for the Laeken European Council, propose the adoption of an exemption regulation ([24]): the establishment of a Community framework followed, after assessment, by a regulation exempting certain aid from the requirement for prior notification. Others request that this clarification should not take the form of legislation. Industry is clearly in favour of a strict application of competition rules with respect to State aid; the existing framework is sufficient. The hoped-for clarifications suggest a desire to water down the existing rules. There seems to be broad agreement amongst Member States, which wish freely to determine the financing method for SGIs. Thus, it appears that there is no single ideal financing method which would lend itself to all services. The Member States are best placed to choose the financing method.

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[23] See points 27 to 29 in the Commission's Report to the Laeken European Council on Services of General Interest (CEC, 2001).

[24] In this regard, it appears moreover that a certain number of contributions confuse the issue of a framework directive with that of a clarification of State aid. Many organisations which came out in favour of the framework instrument expect it to regulate the financing conditions for SGIs.

Risk of cherry-picking. A significant number of comments point out that this problem is widely observable in liberalised sectors and leads to results which undermine efficiency and the general interest; others, on the other hand, claim that this will not constitute a problem once sectors have been fully liberalised.

Evaluation. The different contributions attach relative degrees of importance to this subject. Some feel that evaluation is a very important, even essential, challenge; others regard it as being of lesser, even secondary, importance. As is the case in other areas of the consultation, points of view vary. Some believe that the current Community evaluation carried out within the framework of the Cardiff process, at both vertical and horizontal level, is sufficient. Others suggest, on the contrary, that all services of general interest, whether economic or non-economic, should be evaluated at Community level. Others still consider that evaluation should be conducted at national, regional or local level. For instance, local services should be evaluated by local authorities. The same goes for radio broadcasting services. Broad agreement is emerging that evaluation is multidimensional and should be based not only on criteria such as economic efficiency and short-term competition, but also on political, economic, social and environmental criteria ([25]). Some suggest a broader, more complete approach and stress the need for pluralist evaluation. For example, it is proposed that the social partners should also be involved in the evaluation process. The need to discuss evaluation outcomes with all parties concerned is also mentioned. Some contributors, on the other hand, mainly from industry, assert that the relevant information is already available on the whole and are opposed to any compulsory measures along these lines.

The international dimension. The need to ensure consistency between the regulatory framework within the Community and international obligations was strongly emphasised. Conversely, it is also stressed that the internal framework must conform to World Trade Organization (WTO) obligations. Industry expects the Community to negotiate other

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25 In this regard, the Commission's 2002 Communication on the evaluation method is seen as appropriate by some (CEC, 2002b).

market openings during the course of WTO negotiations, so as to create new business opportunities for European enterprises. However, others (Member States, associations) hope that the Community will not become further involved in market opening before the effects of liberalisation have been carefully evaluated. A series of comments stress the need to protect public services in trade negotiations. It would be up to the EU and Member States to lay down a regulatory and institutional framework which would ensure that SGI operators accomplish their allotted public service tasks. Some comments go further and suggest a review of the General Agreement on Trade in Services (GATS) so as to reinforce safeguards for SGIs. Others suggest that an exemption for all services of general interest should be negotiated in context of the WTO. Several sectors, such as education, social services, health and water, would be excluded from the scope of the WTO. The same difference of opinion arises with regard to audiovisual services. Most participants wished to see a clarification in the Community's approach to SGIs in the context of international trade negotiations.

2.3.2 Evaluation of the internet consultation

The internet consultation reveals a dividing line between Member States, more or less as follows:

- one group of countries convinced of the need to defend and promote SGIs, led by France and Belgium and backed by a significant number of associations (trade unions, NGOs, etc.). The latter are mainly in favour of the Community method and a framework instrument to ensure greater legal certainty;
- an opposing group in favour of the *status quo* or even of deregulation: this group includes in particular the United Kingdom ([26]), Spain, the Netherlands, Sweden and Denmark but also a large number of enterprises;
- a group of sceptical countries: these countries, neutral or relatively open-minded about the principles, in fact appear not to be in favour of any progress. Germany is in this group. These countries are very

26 The United Kingdom does not believe that universal service should apply to the railways.

sensitive to the issue of subsidiarity and fear that a Community legal framework, which would bring competition rules with it, might sound the death knell for local or neighbourhood services of general interest.

2.3.3 The Herzog report and beyond

It all began on 15 January 2003, when the EP Committee on Economic and Monetary Affairs appointed the Frenchman Philippe Herzog (EUL) to draft an own initiative report on the Green Paper on SGIs (European Parliament, 2003). An entire year would be devoted to hundreds of contacts, meetings and an in-depth study which permitted numerous parties to express their views. The report was discussed for the first time in the parliamentary committee on 1 and 7 October 2003. It argues in favour of a framework directive on SGIs, requests that the Union should lay down a definition and common principles, and re-establishes the balance in competition law. A systematic attack ([27]) on the Herzog report was conducted by the German "shadow rapporteurs" ([28]), Werner Langen (CDU), author of the report on SGIs in November 2001, Alexander Radwan (CSU) for the EPP and Bernard Rapkay for the PES. A debate between France and Germany crystallised the arguments between advocates of a Community framework for SGIs (to put it concisely), and those who prefer to abide by subsidiarity and the existing legal framework. In response to concerns in Germany and Austria (expressed by the EPP Member of the European Parliament, Othmar Karas), Philippe Herzog strengthened the capacity of free local and regional administration in his report and reduced the Commission's powers of initiative under Article 86(3). He argues that internal market and competition rules must be adjusted. Moreover, he tones down aspirations for the creation of European network regulation. A further airing took place on 15 December in the Economic and Monetary Committee to finalise opinions, whereupon the dossier was forwarded to the plenary session in Strasbourg. MEPs again changed their minds, dismantling certain points of agreement reached in parliamentary

27 See André Ferron's account (Ferron, 2003).

28 Shadow rapporteurs are appointed by analogy with shadow cabinets in the United Kingdom. They are MEPs appointed by each political group to monitor reports, submit amendments and organise voting.

committee and adopting some Commission amendments rejected in December 2003. On 14 January 2004, during the plenary session, the Parliament voted on Philippe Herzog's report: 383 in favour to 123 against with 13 abstentions. Though the final resolution was adopted by a large majority, the fact that there were many amendments adopted with very slim majorities throws the political differences into perspective. So what were the key factors in the vote?

Definition of services of general interest. During the course of a very close vote (266 in favour, 255 against and 16 abstentions), the European Parliament said "yes" to common principles, and "no" to a common definition, but backed a sectoral approach. The EP recognised that "*it is neither possible nor relevant to draw up common definitions of services of general interest, or of the public-service obligations resulting from them*". It added however that the European Union "*must lay down common principles, including the following: universality and equality of access, continuity, security and adaptability; quality, efficiency and affordability, transparency, protection of less-well off social groups, protection of users, consumers and the environment, and citizen participation, taking into account circumstances which are specific to each sector*".

Legal framework. During the debate, Mr Herzog recommended a framework directive not as "*legislation for legislation's sake*" but because services of general interest should be given a "*positive status, and no longer simply exist as derogations"*, a status that "*market forces and competition rules must respect"*. And in conclusion: "*in wishing for a framework directive, we are merely reiterating a request made in the Langen report adopted in November 2001"*. On this point, the plenary session (470 votes for, 59 against and 9 abstentions – PES amendment) recalls "*the basis of the consensus reached by the EP in its resolution of 13 November 2001 (Langen report) and renews its call for a legal framework which must be established under the co-decision procedure, in full respect of the subsidiarity principle, once the rules relating to the internal market and competition have been implemented"*. In preferring a "legal framework and co-decision" to a "framework directive", the European Parliament has delivered an ambiguous message. Some, particularly Philippe Herzog, feel that the message is positive because the phrase used by the Parliament has, he believes, all the characteristics of a framework directive. Others feel that the wording used is likely seriously to hamper the end result. On the other hand, those who advocate maintaining the *status quo* are celebrating their victory, because they

believe they have warded off the danger of a framework directive by going back on the measures agreed in the Langen report.

By 472 votes in favour to 42 against with 21 abstentions (PES amendment), the European Parliament calls on "*the Commission to present a follow-up, by April 2004 at the latest, in order to draw the lessons from the Green Paper consultations and to clearly define its position on a possible legal framework*". On this precise issue, Commissioner Pascal Lamy believes that it would be "*premature to draw conclusions"*. He has nevertheless promised that the Commission will submit "*political conclusions before the end of the legislature"* but adds: "*Naturally, it will be necessary to choose (…) between different options"*. The EP refuses any reference to the "framework directive" and to the new Article III-6 proposed by the Convention. On the other hand, the Parliament invites the Commission not to have recourse to Article 86(3) of the EC Treaty which empowers it to legislate without reference to the Council and the European Parliament.

Role of SGIs. According to the Parliament, "*services of general interest must guarantee citizens equality of access and treatment, security of supply, continuity and high quality at affordable prices or, where the social situation makes it necessary, free of charge*" (EUL/NGL amendment).

Evaluation of liberalisation. By 290 votes in favour to 233 against with 6 abstentions (EUL/NGL amendment), the plenary held that bearing in mind "*problems encountered with liberalisation in certain sectors, taking as an example the rail transport sector in Great Britain, it is necessary to assess, on the basis of a pluralist, open approach, the impact on employment, users' needs, safety, the environment, and social and territorial cohesion, before initiating new phases of liberalisation*". By a tiny majority (266 in favour to 261 against with 5 abstentions – Greens/ALE), the plenary held that "*the liberalisation of key public services and the introduction of competition has, in some cases, delivered major benefits to consumers in terms of innovation, quality, choice and lower prices; in other cases the very existence of public services has been jeopardised by the rule of the market mechanism*". The need for an evaluation of SGEIs, violently rejected in December 2003, was confirmed. The impact of liberalisation on SGIs must be assessed before any further opening to competition.

Sectoral regulations. The plenary wished to clarify certain points on the sensitive issue of sectoral regulations. Thus, by 265 votes in favour to 249 against with 11 abstentions (EUL *et al.* amendment), the European

Parliament "*rejects efforts to make water and waste-disposal services subject to single market sectoral directives; (…) calls, however, without the need to go as far as liberalisation, for water supply to be "modernised" by bringing to bear economic principles in accordance with quality and environmental standards and the need for efficiency*". Likewise, the EP considered, by 266 votes in favour to 233 against with 21 abstentions (Green/ALE amendment), that, whilst "*water and waste services should not be subject to Community sectoral directives*", the Union "*should keep its full responsibility for these sectors as regards quality and environmental protection standards*". On the other hand, non-economic SGIs (education, health, social housing, social services and to a lesser extent the media) are excluded from the scope of competition rules.

What conclusion should we draw from the vote? Interpretations vary from one political grouping to the next. The rapporteur, Philippe Herzog, expressed satisfaction at the outcome of the vote: "a*n acceptable last-minute compromise enabled us to remain faithful to the spirit of the previous EP resolution (2001), which in particular provided for a legislative act and a democratic evaluation procedure*". It is not surprising, therefore, that the rapporteur should have voted in favour of the resolution. The Socialist and Green Groups, which voted against the resolution, made a different analysis. The PES Parliamentary Group referred to "*an ambivalent result"*, whilst the French Socialist Pervenche Berès stated that "*the general tone of the vote confirms the hegemony of competition law over services of general interest and vindicates an entirely market-oriented approach"*. The Belgian Green MEP Pierre Jonckheer perceived "*an alliance of opposites"* between those who wish to see unbridled competition and are hostile to the framework directive and to any criticism of liberalisation, and the supporters of subsidiarity, who are very attached to the definition, operating rules and financing of local SGIs. All the essential improvements to the resolution were only possible thanks to whole-hearted backing from the PES, the Greens and the EUL Group, against the EPP and the Liberal Group. The support of the French, Belgian and Luxembourg MEPs tipped the balance in the right direction. The vote on the refusal to allow the Commission to have recourse to Article 86(3) permitting it to legislate alone on competition rules was symptomatic. Endorsement by 95% of the Left would have been insufficient to obtain approval for this amendment: 212 votes against 244; crucial support came from 28 EPP, 6 Liberals and 7 EDD (French hunters). Parliament therefore

delivered an equivocal and contradictory message, the result of a compromise adopted under pressure of circumstances between differing or even opposing points of view. At the end of the day, it is likely to be concluded that the resolution lacks internal coherence, despite the fact that there have been various improvements. It is regrettable that two major advances – political and institutional – which lent structure to the Herzog report, were set aside by the final vote:

a) the reference to Article III-6, a promising starting point since it provides for European legislation, was dismissed. From this point of view, the signal sent by the European Parliament to the Intergovernmental Conference, the Heads of State and Government and the Commission, is not promising;

b) the framework directive, which had actually been given the green light at the vote on the Langen report in 2001, is not mentioned as such, which constitutes a step backwards on the part of the European Parliament.

The Commission will make use of the European Parliament vote, the summary of contributions received, and the many meetings held on both a formal and an informal basis, to take a policy decision as to the follow-up to the Green Paper. What conclusions will the Commission draw? Even though it is too early to answer this question, there are two possible avenues: a White Paper ([29]) or a communication on SGIs ([30]). The text would have to offer various alternatives, be relatively short and political in nature. The Commission's response will be available in Spring 2004.

Conclusion

At a time when the European Union is readying itself to welcome ten new members, the prevailing feeling with regard to services of general interest is one of resignation or even fatalism. Liberalisation and its

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[29] This is the avenue suggested by Pascal Lamy during his speech to the European Parliament's plenary session, at the time of the vote on the Herzog report, 14 January 2004.

[30] This Communication would follow on from the two other Communications of 1996 and 2000.

accompanying procession of privatisations, mergers and acquisitions moves inexorably onwards, with hardly a hitch. Is this a good or a bad thing? Opinion is divided on the subject. 2003 has been a productive year. A certain number of interesting steps forward have been taken by the Court of Justice, such as the Altmark ruling on interpreting the notion of "financial compensation" to cover public service obligations. Responses to the Green Paper have confirmed a split amongst the Member States which had been apparent for several years. They have, however, shown that a majority of players do support the specific characteristics of SGIs. Moreover, they have provided an opportunity to gauge the importance of local and neighbourhood services. The vote on the Herzog report on the Green Paper delivered an equivocal verdict but did nevertheless mark a degree of progress (the evaluation of SGIs and the legal framework involving co-decision). The general tendency denotes a neoliberal groundswell, with the watchwords being competition, deregulation and a rolling-back of the State. Yesterday, telecommunications; today, energy, postal services and the railways. And what about tomorrow? The way in which local public services are managed is being thoroughly called into question by the Commission (See in particular Durviaux and Thirion, 2004). In 2005, water and waste-water management will be on the agenda of the new Commission and the new European Parliament. But some people are already publicly mooting the opening to competition of sectors such as education, culture and health. They appear to believe that everything should governed by the market. This warning is probably the most important thing to be noted from the events of 2003 – and also the most worrying.

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