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COMMITTEE AND THE COMMITTEE OF THE REGIONS**

White Paper on services of general interest

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ANNEX

1. INTRODUCTION

In recent years, the role of the European Union in shaping the future of services of general interest¹ has been at the centre of the debate on the European model of society. Recognising the crucial importance of well-functioning, accessible, affordable and high-quality services of general interest for the quality of life of European citizens, the environment and the competitiveness of European enterprises, the European Commission adopted a Green Paper on services of general interest,² which launched a broad public consultation on how best to promote the provision of high-quality services of general interest in the European Union. The Green Paper invited comments on the overall role of the European Union in defining the public service objectives pursued by services of general interest and on the way these services are organised, financed and evaluated.

The debate launched by the Green Paper met with considerable interest and was welcomed by many interested parties. The Commission received close to 300 contributions from a wide variety of respondents, including many of the Member States³. Commission staff have prepared a Report on the public consultation which analyses the contributions submitted and provides background material to the present White Paper⁴.

In line with the request made by the European Parliament in its Resolution on the Green Paper of 14 January 2004⁵, the Commission draws its conclusions from the debate in the present White Paper.

The European Economic and Social Committee⁶ and the Committee of the Regions⁷ have also discussed the issues raised by the Green Paper and given their views.

In addition, services of general interest were also the subject of intense debate within the Convention on the future of Europe.

Finally, the Court of Justice has also examined various questions related to services of general economic interest, in particular with regard to their financing, and handed down a landmark decision on public service compensation⁸.

The debate has revealed considerable differences of views and perspectives. Nevertheless, a consensus seems to have emerged on the need to ensure the harmonious combination of market mechanisms and public service missions.

¹ See definition of terms in Annex 1

² COM(2003) 270, 21.5.2003

³ The full text of the contributions is available on the Commission's website at:

⁴ http://europa.eu.int/comm/secretariat_general/service_general_interest/comments/public_en.htm

⁵ Report on the public consultation on the Green Paper on services of general interest, Commission Staff Working Paper, SEC(2004) 326, 15.03.2004, available at:

⁶ http://europa.eu.int/comm/secretariat_general/service_general_interest

⁷ European Parliament Resolution on the Green Paper on services of general interest, 14.01.2004, (T5-0018/2004)

⁸ Opinion on the Green Paper on services of general interest, CESE 1607/2003, 11.12.2003

⁹ Opinion of the Committee of the Regions of 20 November 2003 on the Green Paper on services of general interest, CdR 149/2003 final

¹⁰ Judgment of 24 July 2003 in the case C-280/00 Altmark Trans

Services of general interest and the context in which they are provided, including the European Union itself, are constantly evolving and will continue to evolve. By submitting this White Paper, the Commission does not intend to conclude the debate that has developed at European level. Its aim is to make a contribution to the ongoing discussion and to take it further by defining the Union's role and a framework that allows these services to function properly.

The White Paper sets out the Commission's approach in developing a positive role for the European Union in fostering the development of high-quality services of general interest and presents the main elements of a strategy aimed at ensuring that all citizens and enterprises in the Union have access to high-quality and affordable services. The document focuses on just some of the key issues of the debate as it would be impossible to address all the issues raised during the public consultation. More specific issues will be addressed in the context of the relevant policies.

2. A SHARED RESPONSIBILITY OF PUBLIC AUTHORITY IN THE UNION

The public discussion on the Green Paper has shown that there is broad agreement on the importance of high-quality services of general interest for European societies. The division of tasks and powers between the Union and the Member States leads to a shared responsibility of the Union and the public authorities in the Member States but detailed definition of services to be provided and delivery of those services remain the responsibility of the Member States..

2.1. An essential component of the European model

The debate on the Green Paper has strongly confirmed the importance of services of general interest as one of the pillars of the European model of society. In spite of sometimes substantial differences in the views and perspectives of the various participants in the debate, the consultation has shown a broad consensus on the need to ensure the provision of high-quality and affordable services of general interest to all citizens and enterprises in the European Union. It has also confirmed the existence of a common concept of services of general interest in the Union. This concept reflects Community values and goals and is based on a set of common elements, including: universal service, continuity, quality of service, affordability, as well as user and consumer protection.

In the Union, services of general interest remain essential for ensuring social and territorial cohesion and for the competitiveness of the European economy. Citizens and businesses rightly expect to have access to affordable high-quality services of general interest throughout the European Union. For the citizens of the Union, this access is an essential component of European citizenship and necessary in order to allow them to fully enjoy their fundamental rights. For enterprises, the availability of high-quality services of general interest is an indispensable prerequisite for a competitive business environment. The provision of high quality, accessible and affordable services of general interest meeting the needs of consumers and enterprises is therefore an important element contributing to reach the strategic goal of the Union "to become the most competitive and dynamic knowledge-based

economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion⁹”.

As the Commission highlighted in the Green Paper, services of general interest have helped to achieve the Union’s objectives in a large number of Community policies. At the same time, Community policies have significantly contributed to improving the quality, choice and efficiency of a number of services of general interest.

In line with the principles set out in Article 16 of the Treaty¹⁰ and in Article 36 of the Charter of Fundamental Rights,¹¹ the Commission is committed to taking full account of the specific role of services of general interest in the policies and activities falling within its sphere of competence. It will aim to ensure that the European Union continues to make a positive contribution to the development of services of general interest as part of the European model, while respecting the diversity of traditions, structures and situations that exists in the Member States. In line with the principles of better regulation¹², the prior assessment of the impact of major initiatives¹³ as well as the regular evaluation of the relevant Community policies will assist in achieving this objective.

At this crucial point in the development of the Union, particular attention will have to be paid to developments in the new Member States and to their specific needs resulting in particular from the transformation of their economies during the last two decades.

2.2. A responsibility for public authorities

While the provision of services of general interest can be organised in cooperation with the private sector or be entrusted to private or public undertakings, the definition of public service obligations and missions remains a task for the public authorities at the relevant level. The relevant public authorities are also responsible for market regulation and for ensuring that operators accomplish the public service missions entrusted to them.

It was stressed in the consultation on the Green Paper that within the framework of a competitive internal market the relevant public authorities must retain the powers to ensure that defined public policy objectives are effectively being achieved and that democratic choices are respected, including with regard to the level of quality and the resulting costs. It is necessary for the relevant public authorities to have adequate instruments and expertise at their disposal. The existing sector-specific Community

⁹ Lisbon European Council of 23 and 24 March 2000, Presidency conclusions, paragraph 5. See http://europa.eu.int/comm/lisbon_strategy/intro_en.html for detail

¹⁰ Article 16 reads: “Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions”

¹¹ Article 36 reads: “The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union”

¹² European Governance: Better lawmaking, Communication from the Commission, COM(2002) 275 final, 5.6.2002

¹³ Commission Communication on Impact Assessment, COM(2002) 276, 5.6.2002

rules provide for specific legal instruments and powers that allow the authorities of the Member States to enforce public policy objectives. Above all, Member States should pay attention to the increasingly complex tasks of the regulatory authorities and provide them with all necessary instruments and resources.

2.3. A shared responsibility of the Union and its Member States

In its Green Paper, the Commission already stated that the Treaty provides the Community with a whole range of means to ensure that users have access to high-quality and affordable services of general interest in the European Union. Nevertheless, it is primarily for the relevant national, regional and local authorities to define, organise, finance and monitor services of general interest.

This shared responsibility is the concept underlying the provision of Article 16 of the EC Treaty that confers responsibility upon the Community and the Member States to ensure, each within their respective powers, that their policies enable operators of services of general economic interest to fulfil their missions. The right of the Member States to assign specific public service obligations to economic operators and to ensure compliance is also implicitly recognised in Article 86(2) of the EC Treaty¹⁴.

In the debate on the Green Paper there was broad agreement that it was not necessary to bestow the Community with additional powers in the area of services of general interest. In principle, the Commission agrees with this analysis. It is of the opinion that the powers currently conferred on the Community with regard to services of general interest are appropriate and sufficient in order to ensure that well-functioning services can be maintained and developed throughout the Union.

At the same time, the Commission welcomes the amendment of the provisions of the current Article 16 EC Treaty as proposed by the European Convention in Article III-6 of the draft Constitutional Treaty. Article III-6 reads:

“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.”

Once the Constitutional Treaty has entered into force, this provision will provide an additional legal basis for Community action in the field of services of general economic interest, within the powers of the Union and within the scope of application of the Constitution.

¹⁴ Article 86 (2) provides: “Undertakings entrusted with the operation of services of general economic interest ... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community”

3. Guiding principles of the Commission's approach

The Commission's approach is based on a number of principles which are reflected in the Community's sectoral policies and can be clarified on the basis of the results of the debate on the Green Paper:

3.1. Enabling public authorities to operate close to the citizens

In the consultation it was highlighted that services of general interest should be organised and regulated as closely as possible to the citizens and that the principle of subsidiarity must be strictly respected.

The Commission respects the essential role of the Member States and of regional and local authorities in the area of services of general interest. This role is reflected in the Community's policies on services of general interest, which are based on various degrees of action and the use of different instruments in line with the principle of subsidiarity.

As in the past, the Commission intends, whenever required, to make proposals for sector-specific regulation only in areas that, like the large network industries, have a clear Europe-wide dimension and present a strong case for defining a European concept of general interest. Such Community regulation defines, as a general rule, only a regulatory framework that can be implemented and specified by the Member States, taking into account country-specific situations.

3.2. Achieving public service objectives within competitive open markets

On the basis of the consultation, the Commission remains of the view that the objectives of an open and competitive internal market and of developing high-quality, accessible and affordable services of general interest are compatible. Indeed, the creation of an internal market has significantly contributed to an improvement in efficiency, making a number of services of general interest more affordable. In addition, it has led to an increase in choice of services offered, as it is particularly visible in the telecommunications and transport sectors¹⁵.

However, in certain situations, the achievement of a national public policy objective may need to be co-ordinated with certain Community objectives. At the level of the Treaty, these situations are addressed by Article 86(2), which provides that services of general economic interest are not subject to the application of Treaty rules to the extent that this is necessary to allow them to fulfil their general interest mission. This means that, under the EC Treaty and subject to the conditions set out in Article 86(2), the effective performance of a general interest task prevails, in case of tension, over the application of Treaty rules¹⁶. Thus, missions are protected rather than the way they are fulfilled. The Treaty provision therefore allows the reconciliation of the pursuit and achievement of public policy objectives with the competitive objectives

¹⁵ A detailed assessment will be provided in the forthcoming Commission staff working document "Evolution of the performance of network industries providing services of general interest – Report 2004"

¹⁶ The application of Article 86(2) is explained in detail in the Commission Communication on Services of general interest in Europe, OJ C 17, 19.1.2001, p. 4

of the European Union as a whole, in particular the need to ensure a level playing field for all providers and the best use of public money.

3.3. *Ensuring cohesion and universal access*

The access of all citizens and enterprises to affordable high-quality services of general interest throughout the territory of the Member States is essential for the promotion of social and territorial cohesion in the European Union, including the reduction of handicaps caused by the lack of accessibility of the outermost regions. The Commission is committed to promoting and improving an effective universal access to services of general interest across all its policies.

In this context, universal service is a key concept the Community has developed in order to ensure effective accessibility of essential services¹⁷. It establishes the right of everyone to access certain services considered as essential and imposes obligations on service providers to offer defined services according to specified conditions, including complete territorial coverage and at an affordable price. Universal service is a dynamic and flexible concept and has proven to be an effective safety net provision for those who could otherwise not buy essential services for themselves. It can be redefined periodically in order to be adapted to the social, economic and technological environment. The concept allows common principles to be defined at Community level and the implementation of these principles to be left to the Member States, thus making it possible to take account of specific situations in each country, in line with the principle of subsidiarity.

In the framework of its structural policies the Community helps to prevent vulnerable social groups or regions from being excluded from access to essential services¹⁸. The structural funds can be used to co-finance investments in network infrastructures, subject to certain criteria¹⁹. In addition, the Commission's policy in the area of trans-European networks is improving access to transport, energy and communications networks in the more remote areas and will assist in linking the new Member States with the infrastructure of the Fifteen, thus maintaining a high level of quality, security and safety. In its European Growth Initiative, the Commission has set out an ambitious programme for the implementation of priority cross-border projects in the area of transport, energy and broadband communications networks²⁰.

3.4. *Maintaining a high level of quality, security and safety*

The public consultation highlighted that it was crucial to ensure high levels of quality, security and safety. The Commission agrees that all citizens and users should be provided with services of general interest of a high quality. Also, the physical safety of consumers and users, of all persons involved in the production and provision of these services, and of the general public must be guaranteed, including

¹⁷ See Green Paper on services of general interest, COM(2003) 270, 21.5.2003, paragraphs 50 to 54

¹⁸ A new partnership for cohesion, Third report on economic and social cohesion, COM(2004) 107, 18.2.2004

¹⁹ See for instance, Commission Staff Working Paper: Guidelines on Criteria and Modalities of Implementation of Structural Funds in Support of Electronic Communications, SEC(2003) 895

²⁰ Communication from the Commission, A European Initiative for Growth, Investing in Networks and Knowledge for Growth and Jobs, Final Report to the European Council, 11.11.2003, COM(2003) 690 final

the protection against possible threats such as terrorist attacks and environmental catastrophes. Furthermore, the security of service provision, and in particular the security of supply, constitutes an essential requirement which needs to be reflected when defining service missions. The conditions under which services are supplied also have to provide operators with sufficient incentives to maintain adequate levels of long-term investment. Quality and security of supply entail an economic cost to society which should be sufficiently and transparently balanced against expected benefits.

In line with the Union's policy on sustainable development, due consideration has to be taken also of the role of services of general interest for the protection of the environment and of the specific characteristics of services of general interest directly related to the environmental field, such as the water and waste sectors.

The Commission takes full account of these requirements and will ensure that Community policies contribute to and facilitate maintaining quality, safety and security standards. It will monitor progress in particular in its regular evaluations and sectoral reports.

3.5. *Ensuring consumer and user rights*

The consultation on the Green Paper has shown that there is broad agreement that the provision of services of general interest must be organised in such a way that a high level of consumer and user rights is ensured. The Commission intends to base its policies on the principles identified in the Green Paper and in the Commission Communication on services of general interest in Europe of September 2000²¹.

These include in particular the access to services, including to cross-border services, throughout the territory of the Union and for all groups of the population, affordability of services, including special schemes for persons with low income, physical safety, security and reliability, continuity, high quality, choice, transparency and access to information from providers and regulators.

The implementation of these principles generally requires the existence of independent regulators with clearly defined powers and duties. These include powers of sanction (means to monitor the transposition and enforcement of universal service provisions) and should include provisions for the representation and active participation of consumers and users in the definition and the evaluation of services, the availability of appropriate redress and compensation mechanisms and the existence of an evolutionary clause allowing requirements to be adapted in accordance with changing user and consumer needs and concerns, and with changes in the economic and technological environment. Regulators should also monitor market developments and provide data for evaluation purposes.

3.6. *Monitoring and evaluating the performance*

On the basis of the public consultation, the Commission remains convinced that systematic evaluation and monitoring is a vital instrument for maintaining and developing high-quality, accessible, affordable and efficient services of general

²¹ COM(2000) 580, 20.9.2000, OJ C 17, 19.1.2001. See in particular paragraphs 8 to 13

interest in the European Union. The Commission recognises the particular responsibility of the Community institutions, with the help of data provided at national level, in the evaluation of services that are subject to a sector-specific regulatory framework established by the Community. However, an evaluation at Community level could be also considered in other areas if it can be established in specific cases that such an evaluation would create added value.

In line with the prevailing view expressed in the public consultation, the Commission considers that any evaluation should be multi-dimensional and cover all relevant legal, economic, social and environmental aspects. In any case, any evaluation will have to take due account of the specific characteristics of the sector evaluated and of the different situations that exist in the different Member States and their regions. It should be based on the periodic provision of comparable data by Member States and/or national regulators.

3.7. Respecting diversity of services and situations

The consultation has also highlighted the differences between various services of general interest and the different needs and preferences of users and consumers resulting from different economic, social, geographical or cultural situations. In addition, it was stressed that the personal nature of many social and health services leads to requirements that are significantly different from those in the network industries. As regards broadcasting, the importance of public service broadcasting for the democratic, social and cultural needs of each society must be taken into consideration²². The Commission supports these views.

Any Community policy in the area of services of general interest must take due account of the diversity that characterises different services of general interest and the situations in which they are provided. However, this does not mean that it is not necessary to ensure the consistency of the Community's approach across different sectors or that the development of common concepts that can be applied in several sectors cannot be useful.

In this context, it should be noted that the Commission proposal for a Directive on services in the Internal Market²³ only covers services that correspond to an economic activity. It does not cover non-economic services of general interest but only services of general economic interest. Furthermore, in this proposal, certain activities which may be considered by Member States as services of general economic interest are excluded from the scope of the proposal such as transport or are subject to derogations from the country of origin principle, such as postal services and electricity, gas and water distribution services. More important, the proposal does neither require the Member States to open up services of general economic interest to competition nor does it interfere with the way they are financed or organised.

3.8. Increasing transparency

The principle of transparency is a key concept for the development and implementation of public policies regarding services of general interest. It ensures

²² See also the Protocol on the system of public broadcasting in the Member States annexed to the EC Treaty by the Treaty of Amsterdam

²³ COM(2004) 2, 13.1.2004

that public authorities can exercise their responsibilities and that democratic choices can be made and are respected. The principle should apply to all aspects of the delivery process and cover the definition of public service missions, the organisation, financing and regulation of services, as well as their production and evaluation, including complaint-handling mechanisms.

The application of Community law has already contributed to improving the transparency of the provision of services of general interest in the Union. The Commission is committed to working towards further increasing the transparency of service provision in all its policies relating to services of general interest. Member States should also guarantee full transparency in the implementation of Community legislation and in other relevant national provisions.

3.9. Providing legal certainty

In the consultation on the Green Paper the point was made that in certain areas the application of Community rules to services of general interest was not sufficiently clear. The application of state aid rules to the financing of services of general interest and the rules on procurement and service concessions were frequently highlighted specifically. Also, the situation of social and health services was mentioned.

The Commission is aware that the application of Community law to services of general interest might raise complex issues. It will therefore make a continuous effort to improve legal certainty regarding the application of Community law to the provision of services of general interest, without prejudice to the case law of the European Court of Justice and the Court of First Instance. As set out below, it has already accomplished the modernisation of the existing public procurement rules and launched initiatives in the area of state aid and with regard to public-private partnerships²⁴.

4. NEW ORIENTATIONS FOR A COHERENT POLICY

4.1. Respecting diversity in a coherent framework

One of the key questions raised by the Green Paper concerned the need for a framework directive on services of general interest. The views expressed on the subject in the public consultation remained divided, a number of Member States and the European Parliament being sceptical on the issue. As a result, it remained doubtful whether a framework directive would be the most appropriate way forward at this stage. Furthermore, in the consultation, the added value of a horizontal framework as compared to the sector-specific approach followed so far has not been demonstrated.

The Commission therefore considers appropriate not to proceed to submitting a proposal at this point in time but to re-examine the issue at a later stage. As part of this examination, the Commission would subject any legislative proposals to a prior

²⁴ See sections 4.2 and 4.3 below

extended impact assessment of its economic, social and environmental implications²⁵.

As regards the calendar for such re-examination account may also be taken of the fact that the future entry into force of the Constitutional Treaty and of the proposed Article III-6 of the Constitution will bring another possible legal basis that would complement those already existing. The Commission considers appropriate to re-examine the issue once the Constitutional Treaty is in force.

For the time being, the Commission will, as a general rule, pursue and develop its sectoral approach by proposing, where necessary and appropriate, sector-specific rules that allow account to be taken of the specific requirements and situations in each sector. However, without prejudice to existing sector-specific Community rules, a horizontal approach will be considered with regard to a number of specific issues, such as consumers' interests, the monitoring and evaluation of services of general interest, the application of state aid rules to financial compensation or the use of structural funds for the support of services of general interest.

While the need for a framework instrument was an issue of considerable controversy, the necessity of ensuring the consistency and coherence of Community measures in the area of services of general interest was widely recognised in the public consultation. At the same time, it was stressed that it was essential for Community policies to respect and take account of the different characteristics of different services and of the diverse realities in the Member States.

The Commission will step up its efforts to ensure full consistency of the Community's policies in the area of services of general interest and will look at full coherence of its sectoral policies with regard to its general approach during the forthcoming reviews of the sectors concerned²⁶.

In addition, the Commission will review the situation of services of general interest in the European Union and the need for any horizontal measures in 2005. It intends to submit a report on its findings to the European Parliament, to the Council, to the European Economic and Social Committee and to the Committee of the Regions before the end of 2005.

The Commission

- **will re-examine the feasibility of and the need for a framework law for services of general interest on the entry into force of the Constitutional Treaty,**
- **will launch a review of the situation of services of general interest and submit a report before the end of 2005.**

The Member States

- **should pursue the modernisation of services of general interest at their level in order to ensure that all citizens have access to quality services adapted to their needs and requirements.**

²⁵

Commission Communication on Impact assessment, COM(2002) 276 final, 5.6.2002

²⁶

See Annex 2

4.2. Clarifying and simplifying the legal framework for the compensation of public service obligations

There are in particular two areas – financing and awarding of contracts - where the Member States' discretion to define and design the missions of services of general interest usually interact with Community law. The present section deals with financing. The issue of public procurement will be addressed in section 4.3.

The principle of the Member States' autonomy to make policy choices regarding services of general economic interest equally applies with regard to financing the latter. Indeed, Member States enjoy a wide margin of discretion when deciding whether and in what way to finance the provision of services of general economic interest. The financing mechanisms applied by Member States include direct financial support through the State budget, special or exclusive rights, contributions by market participants, tariff averaging and solidarity-based financing. As a general rule, Member States can choose which financing mechanism is used. In the absence of Community harmonisation, the main limit to this discretion is the requirement that such financing mechanism must not distort competition within the common market. It is for the Commission, as the guardian of the Treaty, to ensure that this rule is respected to the benefit of taxpayers and the economy at large.

However, the practical application of this rule is at times a complex matter. It has not always been clear, for example, under what conditions compensation for services of general economic interest would actually constitute state aid. Likewise, once the existence of state aid was established there might have been some uncertainty as to the conditions under which such aid could be considered compatible with the common market. And finally, the obligation under the Treaty to formally inform the Commission about plans to grant or alter aid creates an administrative burden which may be out of proportion for relatively modest amounts of aid.

The public consultation has confirmed the demand for greater legal certainty and predictability when it comes to the application of the state aid rules to public service compensation. This call was particularly strong at local level, concerning local services. It is true that the Court of Justice has recently set out a number of conditions under which compensation for services of general economic interest does not constitute state aid²⁷. But the need for increased legal certainty remains and it is for the Commission to bring about such certainty to the greatest extent possible. Therefore, the Commission proposes a number of initiatives.

The first proposed measure is a Commission decision that considers relatively small-scale public funding to undertakings entrusted with the operation of services of general economic interest to be compatible with the common market under certain conditions. Likewise, such funding should also be exempt from the obligation of prior notification, as long as it is proportionate to the actual costs of the services, and certain thresholds are not exceeded. The Commission proposes the same for funding of services of general economic interest provided by hospitals and social housing, irrespective of the amounts involved.

²⁷ Judgment of 24 July 2003 in the case C-280/00 *Altmark Trans* and judgment of 24 November 2003 in joined cases C-34/01 to 38/01 *Enirisorse SpA*

In essence, the Commission hereby seeks to exempt compensation to local providers of services of general economic interest from the obligation of prior notification. Once the thresholds are set in the light of the results of the currently ongoing consultation process, legal certainty for relatively small-scale public funding will be significantly increased.

In addition, the Commission also proposes to increase legal certainty for compensation for services of general economic interest which exceeds the above-mentioned thresholds – and thus will have to be notified to the Commission - by means of a Community framework that sets out the criteria for assessment of such compensation for services of general economic interest.

Furthermore, the Commission intends to amend Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings. The amendment will specify that the directive is applicable to public service compensations, whatever the legal qualification of these under Article 87 of the Treaty. Both the Commission decision and the Community framework will not be applicable to the transport sector²⁸.

Finally, the Commission plans to further clarify the conditions under which compensation can constitute state aid following the recent case law of the Court of Justice. As requested in a number of comments received in the public consultation on the Green Paper, this will also include a further clarification of the distinction between economic and non-economic activities²⁹.

Taken together, those measures that are elaborated on the basis of extensive consultations with interested parties are likely to ensure legal certainty and predictability for both operators and authorities to the greatest extent possible. The Commission will, moreover, continue its pragmatic approach when assessing compensation for public service obligations in order to ensure that high-quality, accessible and affordable services of general interest continue to be provided close to the citizens while respecting common basic rules.

²⁸ The decision may be applicable to certain maritime links to islands, on which annual traffic does not exceed a defined threshold

²⁹ For more detail see the Commission Communication on services of general interest in Europe, OJ C 17, 19.1.2001, p. 4 (paragraphs 28 to 30) and the Green Paper on services of general interest, COM(2003) 270, 21.5.2003, paragraphs 43 to 45

The Commission

- will adopt a Decision on the application of Article 86 of the Treaty to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest by July 2005,
- will adopt a Community framework for state aid in the form of public service compensation by July 2005,
- will adopt an amendment of Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings by July 2005,
- will further clarify under which conditions public service compensations may constitute state aid within the meaning of Article 87 (1) by July 2005.

The Member States

- should assist the Commission in applying the new legal framework, in particular by clearly defining public service obligations and by applying transparent rules on compensation.

4.3. Providing a clear and transparent framework for the selection of undertakings entrusted with a service of general interest

In principle, Member States have a wide margin to decide how to organise services of general interest. In the absence of Community harmonisation, the relevant public authorities in the Member States are in principle free to decide whether to provide a service of general interest themselves or whether to entrust its provision to another (public or private) entity³⁰. However, providers of services of general economic interest, including in-house service providers, are undertakings and therefore subject to the competition rules of the Treaty³¹. In practice, Member States increasingly use public-private schemes, including design-build-finance-operate contracts, concessions and the creation of mixed-economy companies to ensure the delivery of infrastructure projects or services of general interest.

In the public consultation, calls were made for clarity on a number of questions relating to the Community rules applicable to such schemes, and in particular on the scope and substance of the Community rules that public authorities may have to respect when they entrust a public service mission to another entity.

In order to clarify the rules applicable, the Community has undertaken an effort of simplification and clarification of the public procurement directives³². The new directives, adopted by the European Parliament and the Council last March, are due to be transposed by all Member States by January 2006 and should make it easier, for

³⁰ As regards local inland transport, the Commission has proposed legislation that would require Member States to use public service concessions. Cf. Amended proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway, OJ C 151 E, 25.6.2002, p. 146

³¹ For detail see Green Paper on services of general interest, COM(2003) 270, 21.5.2003, paragraphs 79 to 83

³² Directive 2004/18 of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17 of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1 and p. 114

all awarding authorities concerned, to comply with their obligations of transparency under the EC Treaty.

Furthermore, in order to establish whether Community legislation should be proposed in particular on the transparent award of service concessions by public authorities, and other forms of cooperation between the public and the private sector, the Commission has recently adopted a Green Paper on public-private partnerships in the European Union³³. This Green Paper launches a broad consultation on the procurement aspects of public-private partnerships.

The Commission

- **will conduct a public consultation on the Green Paper on the procurement aspects of public-private partnerships ,**
- **will submit, where appropriate, on the basis of the results of the public consultation, proposals before the end of 2004.**

The Member States

- **should ensure that the national frameworks for the award of public service contracts are based on transparent and non-discriminatory rules.**

4.4. Recognising fully the general interest in social and health services

The Green Paper on services of general interest raised a considerable interest from interested parties in the area of social services, including health services, long term care, social security, employment services, and social housing. Social services of general interest have a specific role to play as an integral part of the European model of society. Based on the principle of solidarity, social and health services of general interest are person-centred and ensure that citizens can effectively enjoy their fundamental rights and a high level of social protection, and they strengthen social and territorial cohesion. Their provision, development and modernisation is fully in line with the achievement of the objectives set at the Lisbon European Council of March 2000, and in particular with the goal of achieving a positive link between economic, social and employment policies. The public consultation has shown that providers of social services are ready to engage in a modernisation process in order to better respond to changing needs of European citizens. However, they also expressed a need for greater clarity and predictability necessary to ensure a smooth evolution of social services, including health services.

While in principle the definition of the missions and objectives of social and health services is a competence of the Member States, Community rules may have an impact on the instruments for their delivery and financing. A clear recognition of the distinction between missions and instruments should help to create more clarity with a view to the modernisation of these services in a context of evolving user needs while preserving their specific nature in terms of the particular requirements of, amongst others, solidarity, voluntary service and the inclusion of vulnerable groups of people. Clarifying this distinction will in particular assist Member States which use market-based systems to deliver social and health services to anticipate the possible impact of EU competition law on them. It will of course remain a matter of

³³ Green Paper on public-private partnerships and on Community law on public contracts and concessions, COM(2004) 327, 30.4.2004

political choice for Member States whether to use such systems or to provide services directly via tax funded state agencies.

The Commission is of the view that it is useful to develop a systematic approach in order to identify and recognise the specific characteristics of social and health services of general interest and to clarify the framework in which they operate and can be modernised. This approach will be set out in a Communication on social services of general interest, including health services, to be adopted in the course of 2005.

This Communication will take stock of the Community policies that are related to the provision of social and health services of general interest. It will also describe the ways social and health services are organised and function in the Member States. This description will be prepared in close co-operation with the Member States³⁴ and with organisations from civil society.

The Communication would also set out, in line with the Commission's general principles on evaluation, a mechanism for a regular assessment and evaluation of the national frameworks for the provision of social services of general interest. The existing open methods of coordination in the field of social inclusion and social protection could be used to this effect. The Commission has recently proposed an open method of coordination in the field of health care and long term care which would usefully contribute to the exchange of best practices in the field of health services and support the reforms undertaken in the field³⁵.

The Commission is currently also working on the follow-up to the high-level reflection process on patient mobility and health care developments and has adopted a Communication in April 2004³⁶ which recalls the principles of the case law of the European Court of Justice and sets out a range of initiatives on subjects such as sharing spare capacity and cooperating on cross-border care identifying and networking European centres of reference and coordinating assessment of new health technologies. The accompanying Decision establishes a new High Level Group to facilitate cooperation among Member States in this area.

The Commission

- **will submit a Communication on social and health services of general interest in the course of 2005.**
- **will facilitate cooperation among Member States on health services and medical care in order to contribute to ensuring a high level of health protection throughout the Union.**

Member States

- **should improve cooperation on health services and medical care in order to ensure a high level of health protection throughout the Union.**

³⁴ In particular with the Social Protection Committee and the newly established « High level group on health services and medical care »

³⁵ Communication of the Commission on Modernising social protection for the development of high-quality, accessible and sustainable health care and long-term care: support from the national strategies using the "open method of coordination", COM(2004) 304, 20.4.2004

³⁶ Communication from the Commission, Follow-up to the high-level reflection process on patient mobility and health care developments in the European Union, COM(2004) 301, 20.4.2004

4.5. Assessing the results and evaluating performance

The public consultation has confirmed the Commission's view that the evaluation of performance at Community as well as at national level is crucial for ensuring the development of high-quality, accessible and affordable services of general interest in a constantly evolving environment. Moreover, there was broad agreement among contributors that such evaluation should be based not only on criteria of economic efficiency but also on broader social, economic and environmental criteria.

In recent years, the Commission has indeed increased its evaluation efforts in the area of services of general interest. With regard to network industries, the Commission's evaluation strategy covers both sectoral and horizontal evaluations on a regular basis and involves the other European Union institutions and bodies as well as interested parties³⁷. Given that the Commission started to perform horizontal evaluations in 2001, and will submit in 2004 its first horizontal evaluation report that is fully based on the methodology presented in 2002, it appears appropriate to gather more experience with this process before reflecting on additional evaluation mechanisms.

At the same time, there is room for improving the involvement of all parties concerned. The Commission will therefore consider how to amend the current methodology and procedures so as to ensure that all interested parties, including public authorities, consumers, users, providers and employees, are fully involved. It will also examine the need for any amendments with regard to assessing the impact of liberalisation on citizens, enterprises and employees.

Better integration should be considered between the current evaluation efforts specifically focusing on services of general interest and the Commission's more wide-ranging reporting tools. This would ensure a broader and more comprehensive approach to evaluating services of general interest and could thus generate genuine added value without increasing reporting requirements and statistics for the Community, Member States, undertakings and indeed citizens themselves.

In this context the link between, on the one hand, the above-mentioned sectoral and horizontal evaluations and, on the other, the "Implementation Package" – consisting of the Broad Economic Policy Guidelines Implementation Report, the Joint Employment Report and the Implementation Report on the Internal Market Strategy and submitted together with the Report to the Spring European Council is important and should be maintained.

In addition, the evaluation of services of general interest could usefully be integrated into the analysis made regularly by the Commission of several Community policies. This could be relevant in particular in the area of social and health services.

On the basis of its experience with the application of its amended methodology, the Commission will review its evaluation mechanisms, including their scope, when evaluating its approach in 2006 as provided for in its Communication of 18 June 2002. This review will also look into the need for additional measures aiming at

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

improving the availability and quality of data, the exchange of information and best practices, and the participation of interested parties.

The Commission

- will submit its first horizontal evaluation on services of general interest on the basis of its evaluation methodology in 2004,
- will review its evaluation mechanisms for services of general interest in 2006.

Member States

- should assist the Commission in the development and application of evaluation mechanisms,
- should consider the development of evaluation instruments at national, regional and local level, where appropriate.

4.6. Reviewing sectoral policies

Currently, sector-specific regulation at Community level covers essentially the big network industries such as telecommunications, postal services, transport and energy, which have a clear trans-European dimension. In the Commission's view, the public consultation has confirmed this approach. As far as the water sector is concerned, the Commission will publish before the end of the year the results of the assessment it has undertaken³⁸.

The public consultation has confirmed the relevance and importance of the set of obligations on which current sector-specific Community legislation is based and which are set out in the Green Paper (universal service, continuity, quality of service, affordability, user and consumer protection, safety and security, access and interconnectivity). Where appropriate, on the basis of the sectoral reviews foreseen, the Commission will propose to adapt these obligations.

Concerning media pluralism, the public consultation highlighted that, in the light of the differences that exist across the Member States, the issue should be left to the Member States at this point in time. The Commission concurs and concludes that at present it would not be appropriate to submit a Community initiative on pluralism. At the same time, the Commission will continue to closely monitor the situation.

As regards the institutional framework for regulation, the need for closer co-operation between the Commission and the national regulatory authorities was frequently highlighted. The Commission intends to encourage the creation and development of close co-operation between regulators in the framework of the existing networks of regulatory authorities³⁹. Where appropriate, the Commission will make proposals with a view to strengthening the legal framework for this co-operation.

The Commission will take account of the positions set out above as well as any other results of the public consultation on the Green Paper in the reviews that are foreseen for the different sectors.

³⁸ Internal market strategy, Priorities 2003 - 2006, COM(2003)238, 7.5.2003

³⁹ See points 53 – 59 of the Annex to the Green Paper on services of general interest for details

The Commission

- will encourage the co-operation of national regulatory authorities on the basis of networks of regulators,
- will take into account the results of the public consultation on the Green Paper in the reviews already foreseen for the different sectors, in particular:
 - the review of the scope of universal service in electronic communications by July 2005
 - the review of the electronic communications package by July 2006
 - the review of the postal services directive by the end of 2006
 - the review of the internal market for electricity by 1 January 2006
 - the review of the internal market for gas by 1 January 2006
 - the review of the "Television without frontiers" directive at the beginning of 2005
 - the assessment of the water sector by the end of 2004.

(For more details see the non-exhaustive table in the Annex).

Member States

- should ensure that existing sector-specific legislation is fully transposed and applied,
- should provide national regulatory authorities with all necessary instruments and resources.
- should assist the Commission in encouraging closer co-operation within the framework of networks of regulators.

4.7. Reflecting our internal policies in our international trade policy

As the Commission has pointed out in the Green Paper, the Community commitments made in the context of the World Trade Organisation (WTO) or in the context of bilateral agreements, have been fully consistent with the internal market rules applying to these services and have not, to date, led to problems for the organisation, provision and financing of services of general interest in practice. The same applies to new commitments being offered in the framework of present negotiations.

The public consultation has shown that there is widespread desire to ensure the continued consistency between the internal Community regulatory framework and the obligations accepted by the Community and its Member States in the framework of international trade arrangements, in particular the WTO. There is a strong expectation that international trade agreements should not go beyond the positions agreed within the European Union.

In driving the Community's trade policy, the Commission is fully committed to ensure such consistency and counts on the support of the Member States and the European Parliament in this respect. To that effect, the Commission will continue to make full use of the institutional framework provided for by the Treaty (Articles 133 and 300) and to involve the European Parliament in the formulation of trade policy no matter its limited powers under that framework, while looking forward to the desired improvement of those powers under the draft Constitutional Treaty. The Commission will also continue to maintain a regular dialogue with civil society and to ensure the maximum degree of transparency in trade negotiations, of which the publication of the Community's initial offer in the present GATS negotiations is an example.

The Commission

- will continue to ensure that the positions taken by the Community in international trade negotiations are fully consistent with the EU's internal regulatory framework regarding services of general interest.

The Member States

- should work with the Commission in order to ensure that internal policy positions are fully reflected in our trade policy.

4.8. Promoting services of general interest in development co-operation

In the consultation on the Green Paper, the essential importance of basic services of general interest for the development of the poorest countries was widely recognised. It was highlighted that the absence of investment was a major obstacle to improving these services in the poorest countries. In line with the recommendations set out in the Commission Communication on the reform of state-owned enterprises in developing countries⁴⁰ the Commission intends to continue to assist in the creation of a sound regulatory and institutional framework in the developing countries as a key prerequisite for the promotion of investment in and access to finance for basic services of general interest.

The EU Initiatives on Water and Energy, launched at the World Summit on Sustainable Development have the objective to contribute to the achievement of the Millennium Development Goals through the provision of modern and affordable services to the poor. The initiatives involve Member States and stakeholders from civil society and the private sector, and is developed through a continued dialogue, based on the key principle of ownership, with partners in Africa and other regions, to initiate activities at national and regional levels. Both the Water and the Energy Initiative aim at institutional capacity building, cross-sectoral planning and market development, by means of targeted technical co-operation and an extended cooperation with financial institutions.

The Commission

- will assist developing countries in creating a sound regulatory and institutional framework as a key prerequisite for the promotion of investment in and access to finance for basic services of general interest.

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The Reform of State-Owned Enterprises in Developing Countries with focus on public utilities: The Need to Assess All the Options, Communication from the Commission, COM(2003) 326, 3.6.2003

ANNEX 1 Definition of Terms⁴¹

Terminological differences, semantic confusion and different traditions in the Member States have led to many misunderstandings in the discussion at European level. In the Member States different terms and definitions are used in the context of services of general interest, thus reflecting different historical, economic, cultural and political developments. Community terminology tries to take account of these differences.

Services of general interest

The term «*services of general interest*» cannot be found in the Treaty itself. It is derived in Community practice from the term «services of general economic interest», which is used in the Treaty. It is broader than the term «services of general economic interest» and covers both market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations.

Services of general economic interest

The term «*services of general economic interest*» is used in Articles 16 and 86(2) of the Treaty. It is not defined in the Treaty or in secondary legislation. However, in Community practice there is broad agreement that the term refers to services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion. The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications. However, the term also extends to any other economic activity subject to public service obligations.

Like the Green Paper, the White Paper focuses mainly, but not exclusively, on issues related to «services of general economic interest», as the Treaty itself focuses mainly on economic activities. The term «services of general interest» is used in the White Paper only where the text also refers to non-economic services or where it is not necessary to specify the economic or non-economic nature of the services concerned.

Public service

The terms «service of general interest» and «service of general economic interest» must not be confused with the term «*public service*». This term is less precise. It can have different meanings and can therefore lead to confusion. The term sometimes refers to the fact that a service is offered to the general public, it sometimes highlights that a service has been assigned a specific role in the public interest, and it sometimes refers to the ownership or status of the entity providing the service⁴². Therefore, this term will not be used in the White Paper.

⁴¹ These definitions are based on the definitions used in the Green Paper on services of general interest, COM(2003)270, 21.5.2004

⁴² There is often confusion between the term «public service» and the term «public sector». The term «public sector» covers all public administrations together with all enterprises controlled by public authorities

Public service obligations

The term «*public service obligations*» is used in the White Paper. It refers to specific requirements that are imposed by public authorities on the provider of the service in order to ensure that certain public interest objectives are met, for instance, in the matter of air, rail and road transport and energy. These obligations can be applied at Community, national or regional level.

Public undertaking

The term «*public undertaking*» is normally also used to define the ownership of the service provider. The Treaty provides for strict neutrality. It is irrelevant under Community law whether providers of services of general interest are public or private; they are subject to the same rights and obligations.

1. Importance of Services of general interest

- There is a broad consensus on the essential importance of services of general interest for European societies. It is also generally accepted that these services should be provided in a way that puts users first.
- No agreement exists concerning the relationship between services of general interest and market principles.

2. The role of the European Union

- While views differ on the need to amend the Treaty, there is broad agreement that the Community should not be given additional powers in the area of services of general interest.
- The responsibilities of the Community and the Member States seem to be clear. However, there are calls for the clarification of Community rules in some areas.
- Broad agreement exists that sector-specific regulation must not be extended to all services. However, for some services (water, waste, local public transport) diverging views are expressed as to whether a specific regulatory framework is desirable at Community level. The need to take account of specificities of sectors such as health is highlighted.
- There is a large consensus that there is no need for the creation of European regulatory authorities at this stage. Networks of national regulators co-ordinated at European level seem to be the preferred option.

3. Sector-specific legislation and general legal framework

- The views on the need for a general legislative framework remain divided. However, there is agreement on the continued need for sector-specific legislation.
- Many contributions highlight the benefits of existing sectoral policies. Others point out that liberalisation has had negative social and economic consequences.

4. Services of general economic interest and non-economic services

- Many contributors feel that the distinction is important. However, a number of contributions call for other criteria beyond the economic – non-economic distinction in order to create more legal certainty.
- While there is some interest in further clarification of the situation of organisations providing social services under Community law and in protecting non-economic services of general interest as part of the European social model, there is broad agreement that the Community should not be given additional powers in the area of non-economic services.

⁴³ The following points are based on the Commission Staff Working Paper, Report on the public consultation on the Green Paper on services of general interest, SEC (2004) 326, 15.3.2004

5. A common set of obligations

- Views are divided on the need and feasibility of establishing a common set of obligations at Community level. While some contributions stress the need to establish public service obligations sector-by-sector, other comments argue that a common concept is appropriate and necessary.
- There seems to be a broad consensus that regulation at Community level should establish principles and objectives, while Member States should be able to implement and specify the rules in line with the specific situations and needs existing at national and regional level.
- There is no agreement on the effective implementation of requirements in Community legislation or on the impact of these requirements on social and territorial cohesion. It is suggested that it is too early to form an opinion and that a more detailed assessment is necessary.
- Different views exist regarding the need to introduce additional obligations at Community level and the need to extend existing requirements to other services of general interest.

6. Sector-specific obligations

- There seems to be little support for the introduction at Community level of additional sector-specific obligations at this stage. However, it is suggested that the situation should be closely monitored with regard to the different sectors, in particular with regard to security of supply. There are also some calls for an improvement of access and interconnectivity in some sectors.
- No agreement exists with regard to the opening of the water sector at Community level.
- There is broad agreement that no specific Community measures should be taken on media pluralism at this stage and that the protection of pluralism should be left to the Member States.

7. Definition of obligations and choice of organisation

- Some contributions highlight problems resulting from the application, as perceived by respondents, of Community law, in particular in the areas of procurement and state aid. There is a call for clarification of the rules on concessions and public-private partnerships. Some comments also refer to situations where an obstacle to the completion of the internal market is created at national level.
- The comments largely agree that further harmonisation of public service obligations at Community level is not desirable.
- Many contributions express an interest in a flexible and non-bureaucratic exchange of best practice and benchmarking as regards the organisation of services of general interest.

8. Financing of services of general interest

- There is a firm call for clarification and simplification of the rules applying to the financing of services of general interest, in particular as regards state aid. The recent judgment of the ECJ in the Altmark case is seen as positive but not as sufficient.
- There is also a broad consensus that Member States must remain free to determine the most appropriate way of financing a service of general interest, provided competition is not unduly distorted.

9. The evaluation of services of general interest

- While there are different views on the **overall** importance of evaluation, there is a broad consensus that evaluation should be comprehensive and take account of political, social, economic and environmental criteria.
- No agreement exists as to the range of services to be subject to an evaluation or as regards the necessary procedural and institutional arrangements.

10. The international dimension

- There is a clear request to ensure that the positions taken by the Community in international trade negotiations are fully consistent with the EU's internal regulatory framework.
- A number of comments also call for more information and transparency as regards international trade negotiations.
- The crucial importance of basic essential services for the development of the poorest countries is widely recognised. Access to finance and the attraction of foreign investment are identified as the main problem.

ANNEX 3: OVERVIEW OF IMPORTANT SECTORAL REVIEWS

Electronic communications

- Review of the eEurope action plan by June 2004
- Review of the provisions on Cable TV networks of Commission Directive 2002/77/EC by the end of 2004
- Review of the scope of universal service under the Universal Service Directive 2002/22/EC by July 2005
- Review of the electronic communications package by July 2006

Postal Services

- Report on the application of the postal directive before the end of 2004, and then every two years
- Report by the end of 2006 based on a prospective study on the impact on universal service of full accomplishment of the internal postal market in 2009. Proposal confirming, if appropriate, the date of 2009 for full accomplishment of the internal postal market or determining any other step in the light of the study's conclusions

Electricity

- Annual Reports on the application of Directive 2003/54/EC, including every second year a report on public service obligations
- Detailed progress report on the creation of the internal market for electricity by 1 January 2006. Proposals to EP and Council, where appropriate, to guarantee high public service standards
- Report on the implementation of Regulation 1228/2003 on network access for crossborder exchanges in electricity by July 2006
- Proposals to EP and Council, where appropriate, to ensure full and effective independence of distribution system operators before 1 July 2007. When necessary, these proposals will also address issues of market dominance, market concentration and predatory or anti-competitive behaviour

Gas

- Annual Reports on the application of Directive 2003/55/EC, including every second year a report on public service obligations
- Detailed progress report on the creation of the internal market for gas by 1 January 2006. Proposals to EP and Council, where appropriate, to guarantee high public service standards
- Proposals to EP and Council, where appropriate, to ensure full and effective independence of distribution system operators before 1 July 2007. When necessary, these proposals will also address issues of market dominance, market concentration and predatory or anti-competitive behaviour

Water

- Presentation by the Commission of the results of its assessment of the water sector by the end of 2004

Transport

- 2004: Adoption by EP and Council of the second railways package currently in conciliation
- Adoption by EP and Council of the third railways package before the end of 2004
- Adoption by EP and Council of the proposed regulation on public service requirements and the award of public service contracts in passenger transport by rail, road, and inland waterway before the end of 2004

Broadcasting

- Report on the application of the “Television without frontiers” directive, if appropriate, accompanied by legislative proposals at the beginning of 2005