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Companion document to the final report on the single market review

**Services of general interest, including social services of general interest:
a new European commitment**

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1. INTRODUCTION

The agreement by Heads of State and Government of a Protocol on services of general interest is a decisive step towards establishing a transparent and reliable EU framework applicable to these services. The future Treaties will also include a revised Article 16 (new Article 14) stressing the joint responsibility of the Union and the Member States and establishing a new basis for the EU to take action if necessary.

These new provisions build on a decade of debate about the responsibilities of the EU and about whether or not the EU should adopt an overarching framework for services of general interest. This debate has helped to generate converging views on the role and approach of the EU with regard to services of general interest, in particular following the 2004 Commission's White Paper¹ and the 2006 opinion of the Parliament². A broad agreement has emerged on the need to ensure legal certainty and consistency across EU policies, while respecting the diversity of sectors and situations. There is also broad recognition of the need to improve general awareness and understanding of EU rules. By spelling out the role of the Union, the Protocol closes this debate by bringing more clarity and certainty of EU rules.

This Communication presents the Commission's conclusions from this debate, in particular in the light of the Parliament's resolution and the Reform Treaty. It also draws on the public consultation on social services of general interest initiated in 2006.

2. THE ROLE OF THE EU: ENSURING COMMON RULES WHILE RESPECTING DIVERSITY

Services of general interest cover a broad range of activities, from the large network industries such as energy, telecommunications, transport, audiovisual broadcasting and postal services, to education, water supply, waste management, health and social services. These services are essential for the daily life of citizens and enterprises, and reflect Europe's model of society. They play a major role in ensuring social, economic and territorial cohesion throughout the Union and are vital for the sustainable development of the EU in terms of higher levels of employment, social inclusion and economic growth.

Although their scope and organisation vary significantly according to histories and cultures of state intervention, they can be defined as the services, both economic and non-economic, which the public authorities classify as being of general interest and subject to specific public service obligations. This means that it is essentially the responsibility of public authorities, at the relevant level, to decide on the nature and scope of a service of general interest. Public authorities can decide to carry out the services themselves or they can decide to entrust them to other entities, which can be public or private, and can act for-profit or not for-profit.

¹ The 2004 White Paper (COM(2004)374 of 12 May 2004) was built on previous consultations and Communications, in particular the Commission's 2003 Green Paper (COM(2003)270 of 21 May 2003), two Communications in 2001 (COM(2001) 598, 17.10.2001 and "Services of general interest in Europe", OJ C 17, 19.1.2001) and the first Communication on this subject of 1996 ("Services of general interest in Europe", OJ 1996 / C 281 of 26 September 1996).

² The resolution of the European Parliament (A6-0275/2006 of 26 September 2006) completed the large round of consultation of EU institutions and stakeholders initiated by the 2004 White Paper. The resolution supports the underlying principles and priority actions set out in the White Paper. It states that it is not possible to define services of general interest uniformly and does not call for a single horizontal legislative framework, but calls on the EU and the Commission in particular to continue acting in various domains and sectors so as to achieve greater clarity and consistency of EU rules, while fully respecting the principle of subsidiarity. The European Economic and Social Committee and the Committee of the Regions have also given their opinions (CESE/2005/121 of 9 February 2005, CESE/2006/xxx of 6 July 2006 and CDR/2004/327 of 23 February 2005).

At the same time, providers of these services must respect the rules laid down in the EC Treaty and in secondary EU law where these are applicable. Moreover, given their EU dimension, a number of network industries which perform services of general interest are now subject to sector-specific EU directives. In partnership with national, regional and local authorities, the EU therefore has a role to play in framing the principles and conditions for the operation of a wide range of services. This shared responsibility is reflected in Article 16 of the EC Treaty (new Article 14) and in the envisaged Protocol on services of general interest.

2.1. The scope of EU action

In accordance with the principles of subsidiarity and proportionality, the EU intervenes within the competences entrusted to it by the Treaty and to the extent necessary. Its action respects the diversity of situations in the Member States and the roles of national, regional and local authorities in ensuring the well-being of their citizens and in promoting social cohesion, while guaranteeing democratic choices regarding, among other things, the level of service quality.

For the first time, the Protocol introduces the notion of services of general interest in primary EU law whereas the current EC Treaty only refers to services of general *economic* interest. As things stand, two sets of services of general interest can be distinguished for illustrative purposes, in terms of how they are governed by EU rules:

- *Services of general economic interest*: the provision and organisation of these services are subject to internal market and competition rules of the EC Treaty since their activities are economic in nature and in so far as they may affect trade between Member States. In the case of large network industries having a clear European-wide dimension, such as telecommunications, electricity, gas, transport and postal service, the services are regulated by a specific EU legislative framework. Similarly, certain aspects of public service broadcasting are covered by specific EU legislation, such as the "television without frontier" directive. Other services of general economic interest, such as those in the area of waste management, water supply or waste water treatment, are not subject to a self-standing regulatory regime at EU level. but specific Community rules such as environmental and consumer protection legislation may apply to certain aspects of the provision of the service.
- *Non-economic services*: these services, for instance traditional state prerogatives such as police, justice and essential social security schemes, as well as services without effect on trade, are not subject to specific EU legislation, nor are they covered by the internal market and competition rules of the Treaty. In any event, these services are covered by general principles of Community law, such as the principle of non-discrimination.

The question of how to distinguish between economic and non-economic services has often been raised. The answer cannot be given *a priori* and requires a case-by-case analysis: the reality of these services is often specific and differs widely from one Member State to another, and indeed from one local authority to another; the ways in which they are provided are constantly evolving as a response to new economic, social and institutional developments, such as shift in consumer demands, technological change, the modernisation of public administrations and the devolution of responsibilities to the local level.

In the area of competition law, according to the Court of Justice, it is not the sector or the status of an entity carrying out a service (e.g. whether the body is a public undertaking, private undertaking, association of undertakings or part of the administration of the State), nor the way in which it is funded, which determines whether its activities are deemed economic or non-economic; it is the nature of the activity itself. To make the distinction, the Court relies on a set of criteria related to the conditions of functioning of the service under consideration,

such as the existence of a market, state prerogatives or obligations of solidarity. In practice, this means that a single entity may well be engaged in both economic and non-economic activities. For example, the Court has ruled that a given entity may be engaged on the one hand in administrative activities which are not economic, such as police tasks, and on the other hand in purely commercial activities³. An entity can also be engaged in non-economic activities where it behaves like a charity fund and at the same time compete with other operators for another part of its activity by performing financial or real estate operations, even on a not-for-profit basis⁴. According to this functional approach, each activity has therefore to be analysed separately⁵. Undertakings entrusted with a service of general economic interest are, by definition, fulfilling an economic activity.

For a given service to qualify as an economic activity under the internal market rules (free movement of services and freedom of establishment), the essential characteristic of a service is that it must be provided for remuneration. The service does not, however, necessarily have to be paid by those for whom it is performed. Again, the economic nature of a service does not depend on the legal status at national level of the provider of the service (such as a non-profit making body) or on the special nature of certain activities (such as health services).

In short, the scope of application of the internal market and competition rules does not depend on national legal classifications or funding arrangements, but on the practical effects that the activities engaged in may have on the functioning of the single market in relation to the legitimate pursuit of general interest missions.

As part of this general approach, the situation of social services has been the subject of discussion in recent years. Although their functions and organisations vary a great deal, social services are covered by the general rules applicable to services of general interest. They can be of an economic or non-economic nature depending on the activity under consideration. Although there is no uniform definition, the 2006 Communication identified two broad types of social services: firstly, statutory and complementary social security schemes, organised in various ways (mutual or occupational organisations), covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability; secondly, other services provided directly to the person such as social assistance services, employment and training services, social housing or long-term care. These services are typically organised at a local level and are heavily dependent on public funding.

2.2. *The approach: meeting public interest objectives in a single market*

If a service of general interest is regarded as economic, it is subject to internal market and competition rules. This may lead to questions as to whether the full application of these rules is compatible with the pursuit of the specific missions of general interest assigned to the service. At the level of the Treaty, these situations are addressed by Article 86(2). This provides that services of general economic interest are subject to the application of Treaty rules, but where the application of these rules obstructs the performance, in law or in fact, of the particular tasks of general interest assigned to them, these services may benefit from a derogation from the provisions of the Treaty, provided certain conditions are satisfied, notably as regards the proportionality of the compensation provided to undertakings entrusted with the operation of those services. This approach, derived from the Treaty, is the one guiding the

3 Case C-82/01 *Aéroports de Paris* [2002]

4 Case C-222/04 *Cassa di Risparmio di Firenze* [2006]

5 Case C-118/85 *Commission v Italy* [1987]. Compare also Cases C-205/03 *P. Fenin* [2006] and T-155/04- *Selex* [2006] for a situation where different activities could not be analysed separately.

action of the Commission when it is required to take a position on specific issues. It is also the approach developed in the case law of the Court of Justice⁶.

As highlighted in its 2004 White Paper, the Commission considers that the objectives of developing high-quality, accessible and affordable services of general economic interest and of an open and competitive internal market are compatible and should be mutually supportive. Experiences, for instance in the telecommunications and transport sectors, or at a local level (e.g. awarding public service contracts), show that markets which are open to competition contribute to improving the efficiency, affordability and choice of services on offer.

The capacity to combine the provision of services of general interest with the development of a European single market is particularly well illustrated by the series of sector-specific policies developed since the early 1990s for network industries such as telecommunications, energy, transport and postal services, which today represent more than 7% of the GDP and 5% of total employment in the EU. The gradual opening up of these sectors to competition went hand in hand with the definition of a number of public service obligations for each sector, covering aspects such as universal service, consumer and user rights and health and safety concerns. These sectoral frameworks also specify the scope of public policy intervention in regulating these networks, with particular reference to the role of national regulatory authorities. These sector-specific frameworks are in the process of being modernised in the light of technological developments or global challenges, such as climate change, and because of successive enlargements which have created more diversity in the Member States' approach to services of general interest.

The pursuit of public interest objectives by services of general interest is also taken into account in the Services Directive⁷. Non-economic services of general interest are not covered by the Services Directive. Services of general economic interest fall within the scope of the Services Directive to the extent they are not covered by sector-specific exclusions (such as healthcare services, certain social services or transport services). For all other services of general economic interest, the provisions of the Directive aiming at facilitating the freedom of establishment will allow Member States to take account of their specificities. Furthermore, the provisions on "freedom to provide services" set out in Article 16 of the Directive do not apply.

2.3. *The particular situation of social services*

The Commission initiated in April 2006 a broad consultation with the Member States, service providers and users to take better account of the nature of these services across the EU and to assess stakeholders' experience with the application of Community rules⁸.

The consultation highlighted the importance of social services, as well as their role in the fulfilment of basic EU objectives such as the achievement of social, economic and territorial cohesion, a high level of employment, social inclusion and economic growth.

6 Case C-320/91, Corbeau, [1993], ECR I-2533, case C-393/92, Almelo [1994] ECR I-1477, joined cases C-157/94 - C-160/94, Commission v. Netherlands, [1997], ECR I-5699, Commission v. Italy [1997], ECR I-5789, Commission v. France [1997], ECR I-5815, Commission v. Spain [1997], ECR I-5851

7 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the Internal Market.

8 COM(2006)177 of 26 April 2006. The consultation process included the launch of a questionnaire by the Social Protection Committee, the preparation of a consultant study on social services of general interest and a report by a group of legal experts.

These services are often meant to achieve a number of specific aims: they are person-oriented services, designed to respond to vital human needs, in particular the needs of users in vulnerable position; they provide protection from general as well as specific risks of life and assist in personal challenges or crises; they are also provided to families, support their role in caring for both young and old family members, as well as for people with disabilities, and compensate possible failings within the families; they are key instruments for the safeguard of fundamental human rights and human dignity; they play a preventive and socially cohesive role, which is addressed to the whole population; they contribute to non-discrimination, to gender equality, to human health protection, to improving living standards and quality of life and to ensuring the creation of equal opportunities for all, therefore enhancing the capacity of individuals to fully participate in the society.

These aims are also reflected in the ways in which these services are organised, delivered and financed: in order to address the multiple needs of people as individuals, the service must be comprehensive and personalised; they often require a personal relationship based on trust between the recipient and the service provider; the definition and delivery of a service must take into account the diversity of users; when responding to the needs of vulnerable users, the service is often characterised by an asymmetric relationship between providers and beneficiaries which is different from a commercial supplier / consumer relationship; as these services are often rooted in (local) cultural traditions and are part of a historical legacy, proximity guarantees a higher quality of and an equal access to services across the territory of the Member States; services are generally driven by the principle of solidarity and are highly dependent on public financing, so as to ensure equality of access, independent of wealth or income; voluntary workers often take part, thereby expressing citizenship capacity and contributing to social inclusion, the social cohesion of local communities and intergenerational solidarity.

These services are all engaged in an important modernisation process to better respond to new challenges such as changing needs of European citizens and the impact of ageing, while at the same time facing financial constraints. This process has often resulted in profound changes in the way in which these services are delivered, organised and financed, such as the emergence of new areas of action, the recourse to outsourcing of services previously provided directly by public authorities and an increasing devolution of competences to the local level.

The combined effect of these changes is that an increasing number of activities performed daily by social services are now falling under the scope of EC law, in particular state aid and public procurement rules. This new situation has raised questions about the application of EC rules, with the consultation showing that a number of stakeholders from the sector have difficulty in understanding and applying the rules. Local authorities and providers in particular may lack awareness and information about EU rules, which can lead to misunderstandings and misapplication of rules on the ground.

As outlined below, this Communication provides important clarifications on services of general interest, including social services. Furthermore, the Commission is committed to assisting the modernisation process in which social services are engaged by better explaining the EU rules applicable as well as by assisting the development of quality and efficient social services in the Member States, whilst fully respecting the principle of subsidiarity and the responsibilities of national, regional and local authorities. It adopted in 2005 a simplification of its state aid rules which in practice exempts from notification the vast majority of services performed at the local level.

2.4. *The particular situation of health services*

Health services are also part of the wider framework on services of general interest. Article 152 of the Treaty makes clear that Community action in the field of health services must respect the responsibilities of the Member States for the organisation, financing and delivery of health services and medical care. In parallel to the work on social services, the Commission has recently held an open consultation regarding Community action and possible difficulties with the application of EC law⁹. The Council conclusions of June 2006 represented a step forward in the identification of common values and principles shared across the European Union.

3. THE PROTOCOL: A COHERENT FRAMEWORK FOR EU ACTION

The Protocol to the Reform Treaty agreed by Heads of State and Government provides a coherent framework that will guide EU action and serves as a reference for all levels of governance. By clarifying the principles and setting out the common values underpinning EU policies, it gives visibility, transparency and clarity to the EU approach applicable to services of general interest. The Protocol concludes the discussion on the need for a horizontal framework, which was the main subject of debate previously.

Protocol on services of general interest

According to the conclusions of the June 2007 European Council, the following Protocol will be annexed to the Treaties:

"The High Contracting Parties,

Wishing to emphasise the importance of services of general interest

Have agreed upon the following interpretative provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the Union:

Article 1

The shared values of the Union in respect of services of general economic interest within the meaning of Article 16 EC Treaty include in particular:

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users;*
- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;*
- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights;*

Article 2

The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.

The Protocol builds on, and re-asserts, a number of more operational principles guiding the work of EU institutions, and in particular that of the Commission, such as:

- *The role and the wide discretion of national, regional and local authorities in operating services of general economic interest as closely as possible to the needs of the users:*

⁹ See SEC(2006)1195 of 26 September 2006.

Services of general economic interest should be responsive and delivered as closely as possible to citizens and businesses. The action of the EU should respect the principles of subsidiarity and proportionality. The competent authorities of the Member States are free to define what they consider to be services of general economic interest and have broad discretion to decide how to organise, regulate and finance these services, in accordance with EU law and within the limits of manifest error. In particular, the competition rules and the internal market rules do not apply to non-economic activities.

- *Respecting the diversity of services, situations, and needs and preferences of users:* Differences between various services of general economic interest and the different needs and preferences of citizens, users and consumers resulting from different economic, social, geographical, cultural and physical situations should be respected. Due account should be taken of the diversity that characterises such services, the situations in which they are provided, the characteristics of service providers and the need for flexibility to adapt services to various needs: this is particularly relevant in the case of social services. Relevant regulation should be regularly updated to cover new developments over time, such as technological innovation.
- *Achieving a high level of quality, safety and affordability:* Promoting the development of high-quality, safe and affordable services of general economic interest is an essential objective of the action of the EU. This encompasses access to services, including cross-border services; the value for money and financial affordability of services, including special schemes for people on low incomes and with special needs, which is particularly important in the case of social services; physical safety, reliability and continuity; high quality and choice; transparency and access to information from providers and regulators. Where it is appropriate for the EU to act, EU sector-specific rules should establish norms and standards to ensure the quality, security and safety of products and services for consumers and users in general, as well as all persons involved in their production.
- *Ensuring equal treatment and promoting universal access:* Access to services of general economic interest is recognised as a right in the EU Charter on Fundamental Rights. This includes ensuring equal treatment between women and men and combating all forms of discrimination in accessing services of general economic interest. Where an EU sector-specific rule is based on the concept of universal service, it should establish the right of everyone to access certain services considered as essential and impose obligations on service providers to offer defined services according to specified conditions, including complete territorial coverage and at an affordable price. Universal service provides for a minimum set of rights and obligations, which as a general rule can be further developed at national level. It is a dynamic concept, which needs to be updated regularly sector by sector. Promoting access throughout the territory of the Union is essential for the promotion of territorial cohesion in the EU, as mentioned above in the case of social services. Territories with a geographical or natural handicap such as outermost regions, islands, mountains, sparsely populated areas and external borders, often face challenges in terms of access to services of general interest, due to the remoteness from major markets or the increased cost for connection. These specific needs must be taken into account.
- *Upholding user rights:* Citizens, consumer and user rights should be specified, promoted and upheld. The capacity of consumers and users, including vulnerable or disabled persons; to take up their rights, especially their right of access, often requires the existence of independent regulators with appropriate staff and clearly defined powers and duties. These include powers of sanction, in particular the ability to monitor the transposition and enforcement of universal service provisions. These also require provisions for the representation and active participation of consumers and users in the definition and

evaluation of services, the availability of appropriate redress and compensation mechanisms, and the existence of a review clause allowing requirements to be adapted over time to reflect new social, technological and economic developments. Regulators should also monitor market developments and provide data for evaluation purposes.

- *Non-economic services*: These services are not subject to a specific EU legislation, nor are they covered by the internal market and competition rules of the Treaty. These services are nevertheless covered by general principles of Community law, such as the principle of non-discrimination.

Pending the entry into force of the new Reform Treaty, which will give the envisaged Protocol and the new Article 14 (ex-article 16) their legal effect, the Commission intends to use the Protocol and principles as a benchmark to check the consistency and proportionality of EU policies and initiatives.

4. MOVING FORWARD

On the basis of the Protocol, and in line with Parliament's approach, the Commission will continue to consolidate the EU framework applicable to services of general interest, including for social and health services, providing concrete solutions for concrete problems where they exist. With progress made, attention should increasingly concentrate on the good transposition and application of EU rules, with greater emphasis on dissemination of information and exchange of practices, monitoring of enforcement, evaluation of performance and of benefits for the end users. The Commission envisages a mix of sector-specific and issue-specific actions along the following three axes:

4.1. Providing legal guidance on cross-cutting issues

The Commission is aware that the application of Community law to services of general economic interest may raise complex legal issues and that a number of legal clarifications or explanations about EU rules are regularly sought in the various areas. In the field of social services, as indicated below, the Commission intends to publish immediately its position on the legal questions raised during the consultation about the application of EU law.

An interactive assistance service

The Commission will shortly put in place a dedicated and interactive assistance service at the disposal of citizens, service providers, public authorities and all stakeholders where they can send questions concerning the application of EU law, starting with questions most often raised in the context of the consultation on social services. The Commission will place its answers to these questions on its website. It expects that this tool could assist in particular actors at local and regional levels to develop a good understanding of the legal position of the commission on the relevant EU provisions and that over time all relevant questions arising in practice will be covered in a hands-on, user-friendly way.

Moreover, the Commission has announced the creation of a "single market assistance service" to help citizens, business and practitioners find answers to their questions. In this context, the Commission is committed to facilitating access to information on the EU rules applicable to services of general interest, to enable users and practitioners, in particular in the field of social services, to obtain quickly answers to practical questions, explanations and interpretations.

In the field of state aid, the decision and the framework on state aid in the form of public service compensation adopted in 2005 (often referred to as the "Altmark package") has already made a significant contribution to the simplification of rules applicable, in accordance with better regulation principles. These texts fully respect the wide freedom of Member States

to define tasks of services of general economic interest. They enable Member States to secure these missions through an act of entrustment, and to compensate all net costs incurred by the companies charged with such services. In this context, separation of accounts enables to achieve transparency and avoid any overcompensation. Moreover, compensations for services that fulfil these conditions are fully exempted from notification, as long as their amount is lower than EUR 30 million per year, or even without limits in the field of social housing and hospitals. The Commission will evaluate and report on the application of the package on state aid by the end of 2009 and consider whether to update it in this context.

In the field of public-private partnerships and concessions, a number of issues are pending and/or emerging. The Commission will present shortly an interpretative Communication on institutionalised public-private partnerships with a view to clarifying the rules applicable. Based on the results of an impact assessment, the Commission is also considering further steps in 2008 to clarify the rules applicable to concessions. Requests have also been made to better explain the rules applicable to public procurement following the entry into force of the new directives in January 2006. The toolbox presented above should provide greater clarity.

4.2 Modernising and developing sector-specific policies

The Commission is committed to pursuing and developing its sectoral approach by proposing, where appropriate, sector-specific initiatives which take account of the specific requirements and situations of each sector, and reflect the principles set out in the envisaged Protocol. A number of sector-specific frameworks applicable to network industries are already in place at EU level. However, in a dynamic and constantly evolving single market, they may require updating in the years to come.

In particular, the Commission will:

- *in the field of energy*: follow up on the measures to ensure the completion of the internal energy market proposed in September 2007, as well as on the draft European Charter on the rights of energy consumers;
- *in the field of transport*: follow up its proposal of July 2006 to modernise the single market legislation for aviation; monitor the implementation of the "third railway package" and the revised regulation on public passenger transport services now agreement has been reached;
- *in the field of e-communications*: review the regulatory framework applicable to electronic communications (including fixed phones, mobile and broadband) and publish a Green Paper on the future universal service in electronic communications;
- *in the field of postal services*: assist Member States in the transposition of the directive for the completion of the EU postal internal market;
- *in the field of health services*: plans to bring forward proposals setting out a framework for safe, high-quality, and efficient healthcare services;
- *in the field of social services*: develop the actions outlined in the box.

A strategy for [Supporting the quality of social services across the EU

Social services are often confronted with similar challenges to deliver a modern and quality service. The European Social Fund provides direct financial support to a number of services. The open method of coordination on social protection and inclusion sets a policy framework for the pursuit of reforms and the exchange of good practices. Based on this experience, the Commission will develop, with the help of the Social Protection Committee, a methodology to set, monitor and evaluate quality standards. Through the PROGRESS programme, it will also support cross-European bottom-up initiatives aimed at developing voluntary quality standards and exchange of experience. It will also

develop a dedicated bi-annual report to follow up from the consultation and serve as an exchange tool with stakeholders.

4.3. Monitoring and evaluation

The Commission considers it important, for the quality and transparency of the decision-making process, to regularly conduct in-depth evaluation and to disclose its methodology and results, so that they are open to scrutiny. This is usually done on a sector-by-sector basis.

The new market monitoring tools presented in the final report on the single market review, such as the establishment of a consumer scoreboard, are a step forward in the evaluation of performances. The bi-annual report on social services will also be instrumental in reviewing the situation in this particular field.

Since the publication of the 2004 White Paper, progress has been made in developing a cross-sectoral evaluation of network industries at EU level. This methodology is being reviewed and the Commission will present its proposals for improvement in 2008.

A specific request has been made to the Commission to present to Parliament a comprehensive analysis of the effects of "liberalisation" to date. The Commission will perform this analysis in the context of its 2008 evaluation report of network services.

The Commission will also review progress with the application of the envisaged Protocol, once the new Treaty has entered into force.

5. CONCLUSION

At this important stage of development of the EU, pending the ratification of the future reform Treaty, it is crucial to ensure that there is a shared vision of the initiatives to be pursued to achieve concrete results for Europeans. This is the approach underpinning the Citizens' Agenda¹⁰ put forward by the Commission.

The action of the EU with regard to services of general interest, including social and health services, is essentially pragmatic. It reflects the division of competences between the different levels of governance in the EU. It respects the diversity and specificities of these services. Where sector-specific frameworks have been established, it is because there is a clear European added value. These frameworks are regularly revised to reflect new economic, social and technological developments. The application of EU law is monitored in accordance with the EC Treaty and regularly reviewed to take account of new realities. In areas which could be perceived as problematic, active consultation has taken place or is ongoing to identify and solve pending or emerging issues.

The discussions triggered by the 2004 White Paper have been particularly helpful in bringing about a clearer understanding of the role and approach of the EU with regard to services of general interest. The debate which followed and the views of the other European institutions have shown that, despite differences of opinion, there is a broad agreement on a number of principles guiding EU action. The experience of sector-specific frameworks has also provided a practical basis for identifying key principles that can be applied to services of general interest throughout Europe.

The Protocol and revised Article 16 of the Treaty build on this discussion and experience, and mark a new European commitment. Ten years after the first Communication at EU level,

¹⁰ COM(2006)211 of 10 May 2006.

three years after the White Paper, they reflect the broad consensus across the EU about the role and responsibilities of the EU. Now that the EU framework has been consolidated by the Protocol, it is time to conclude the debate, and to focus on implementation. On this basis, together with action at national, regional and local level, the Commission is determined to help ensure clarity, coherence and publicity of EU rules, so that services of general interest can fulfil their missions and contribute to a better quality of life for European citizens.

ANNEX. PROGRESS SINCE THE 2004 WHITE PAPER

The first Communication of the Commission in 1996¹¹ initiated a reflection about the role the EU could play in ensuring the provision of high-quality services of general interest. The Commission's White Paper¹² of 2004 highlighted the main elements of an EU approach, clarifying key principles of EU action and setting out areas for further work. This annex presents recent, on-going or planned EU initiatives in the following areas:

(1) Respecting diversity in a coherent framework

In its White Paper, the Commission announced that it would re-examine the feasibility of and the need for a framework law for services of general interest. The present Communication responds to this undertaking.

In the meantime, the issue of services of general interest has featured prominently in the discussion on the directive on services in the internal market. This directive was adopted on 12 December 2006. The aim of the so-called "services directive" is to facilitate the freedom of establishment and the freedom to provide services across the EU. Already in the original Commission's proposal, it was made clear that the directive did not cover non-economic services of general interest. Furthermore, it provided a number of exceptions for services of general economic interest. The European Parliament, followed by the Council and the Commission, provided further clarification to the effect that, while non-economic services are indeed excluded, services of general economic interest are in principle covered by the directive. However, telecommunications, transport services, healthcare services, certain social services and audiovisual services are explicitly excluded from its scope (article 2). The directive also provides that the specific rules in Article 16 on the free movement of services does not apply to services of general economic interest provided in another Member State (article 17), in particular postal services, water supply, electricity and waste management. Member States have to transpose the directive by the end of 2009.

(2) Clarification and simplification of the state aid rules

The funding of services of general economic interest must comply with state aid rules set out at EU level. The application of state aid rules for the financing of services of general economic interest has been clarified in July 2005 when the Commission, building on the case law of the European Court of Justice, adopted its "SGEI Package"¹³. Its aim was to clarify and simplify the legal framework for the compensation of public service obligations which constitute state aid, according to the Altmark criteria¹⁴, and to reduce the administrative burden related to such state aid notifications. As a result, the SGEI Decision allowed legal certainty and continuity in the organisation and finance of public service missions especially at a local level, and at the same time the SGEI Framework gave a solid and clarified basis on which Member states as well as SGEI providers could anticipate the Commission's assessment regarding compensation schemes that should be notified in order to be declared compatible with the Treaty state aid rules. As mentioned above, Member States can grant compensation for SGEI without notifying it to the Commission for public services up to € 30

11 Communication "Services of general interest in Europe", OJ 1996 / C 281 of 26 September 1996.

12 COM(2004)374 of 12 May 2004.

13 Also referred to as the "Altmark package", it includes besides an amendment to the Transparency Directive the following texts adopted on 28.11.2005: Commission Decision on the application of Article 86(2) 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 (OJ L 312, 29.11.2005, p. 67-73) and Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4-7).

14 Case C-280/00, Altmark, [2003], ECR I-7747.

million per year and for hospitals and social housing without limits, provided the necessary safeguards are in place. Member States are responsible for ensuring the respect of the principles and requirements set out in the "SGEI Package" and the Commission is determined to monitor its impact on the ground, either when the allocated compensations are exempted from notification, or when their compatibility is assessed by the Commission on the basis of the SGEI Framework.

These measures allow companies to receive public support to cover all the net costs incurred, including where appropriate a reasonable profit, in carrying out public service tasks as clearly defined and entrusted to them by public authorities, within official acts, whilst ensuring that there is no over-compensation liable to distort competition. The SGEI package constitutes a safe tool for Member states and public service providers to organize and provide such services in a transparent and predictable manner, perfectly compatible with Community rules. Showing absolute respect to the national traditions related to the organisation of public services within the different Member States, the requirements related to an act of entrustment and the safeguards avoiding overcompensation and transparent accountability, can guarantee the legal certainty in this field.

The funding of services of general economic interest must comply with state aid rules set out at EU level. The application of state aid rules for the financing of services of general economic interest has been clarified in July 2005 when the Commission, building on the case law of the European Court of Justice, adopted its "Altmark Package" Its aim was to clarify and simplify the legal framework for the compensation of public service obligation and to reduce the administrative burden related to state aid notifications. As a result, Member States will be able to grant compensation to small-scale public services, hospitals and social housing without notifying the Commission, provided the necessary safeguards are in place. Member States are responsible for ensuring the respect of the principles and requirements set out in the "Altmark Package" and the Commission is determined to monitor its impact on the ground.

These measures recognise that companies can receive public support to cover all costs incurred, including where appropriate a reasonable profit, in carrying out public service tasks as clearly defined and entrusted to them by public authorities, whilst ensuring that there is no over-compensation liable to distort competition.

In the specific field of public broadcasting, the Commission has adopted in 2001 a Communication on the application of state aid rules to public broadcasting¹⁵, in order to explain how the state aid rules apply to the funding of public service broadcasters. As for other SGEI fields, this text allows for a full coverage of net costs occurred by public broadcasting tasks without interfering with other markets related to these activities.

(3) A clear and transparent framework for the selection of providers of services

The White Paper identified a number of possible issues raised by the increasing use of public-private partnerships (PPPs) and concessions. PPPs are forms of cooperation between public authorities and businesses, which aim to carry out infrastructure projects or provide services for the public. These arrangements, which typically involve complex legal and financial arrangements among private operators and public authorities, have been developed in several areas of the public sector and are increasingly used within the EU, in particular in transport, public health, public safety, waste management and water distribution.

15 OJ C 320 , 15/11/2001, p. 5

The Commission launched a wide consultation of stakeholders in 2004 and reported in November 2005¹⁶. The consultation highlighted the need to clarify how EU rules should apply to the choice of private partners in "institutionalised PPPs", which are public service undertakings held jointly by both a public and a private partner. The Commission is also committed to assessing whether to propose a legislative initiative on "concessions", in order to clarify both the definition and the rules applicable to their award.

(4) Recognising fully the general interest in social and health services

In its White Paper, the Commission announced its intention 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. The Commission put forward the following initiatives.

As regards social services, the Commission adopted a Communication¹⁷ aimed at taking better account of the characteristics of these services and reducing possible areas of legal uncertainty. A consultation process has been launched and a study is being carried out on the specific characteristics of social services. The opinion of the Parliament on this subject and work of the Social Protection Committee will be important inputs. A first (two-yearly) report on social services will soon be presented, which should serve as a monitoring and dialogue tool in order to follow the modernisation in this sector and provide elements of legal clarifications where appropriate.

Following the "High Level Process of Reflection on patient mobility and healthcare developments in the European Union" in 2003¹⁸, the Commission launched a consultation¹⁹ on the issues to be addressed through Community action on health services, and the appropriate tools to be used for different aspects. The Commission will present its ideas for further initiatives to reinforce cooperation between Member States and provide greater certainty over the application of Community law to health services and healthcare later in 2007.

(5) Assessing the results and evaluating performance

Since 2001, the Commission has published every year an evaluation report on the performance of network industries - telecommunications, electricity, gas, transport and postal services - providing services of general economic interest.

These reports are based on the methodology²⁰ previously adopted by the Commission. It gives a general overview of the functioning of the industries concerned, focussing in particular on the compatibility of market outcomes with the social and economic objectives of the European Union. Results have been discussed widely, for instance with the European Economic and Social Committee. The latest edition²¹ is published alongside this Communication. The Commission is currently revising the methodology used to assess the performance of these services and will present the next steps in the course of 2007. As part of the sixth research framework programme, the Commission is also financing a number of relevant projects under the topic "privatisation and public policy in different contexts".

(6) Reviewing sectoral policies

16 COM(2005)569 of 17 November 2005.

17 COM(2006)177 of 26 April 2006.

18 See http://ec.europa.eu/health/ph_overview/keydocs_overview_en.htm.

19 SEC(2006) 1195/4 of 26 September 2006.

20 COM(2002)331 of xxx June 2002.

21 SEC(2006)xxx of yyy November 2006.

The Commission is active in monitoring and updating sector-specific regulatory frameworks in place at EU level. In the *energy sector*, the Commission adopted a Green Paper on a European strategy for sustainable, competitive and secure energy²² setting out first initial guidelines and launching a public consultation. It presented a new "energy package" early in January 2007, including a Strategic EU Energy Review, paving the way for the adoption of a prioritised action plan by the European Council. As part of the package, the Commission published an evaluation of progress made in the realisation of a single European energy market, as well as results from an enquiry into the functioning of the gas and electricity markets. The Commission adopted a package of follow-up measures in September 2007 addressing notably public service standards and consumer rights.

In the *electronic communications sector*, the Commission launched a public consultation in 2006 on policy options for updating the EU regulatory framework for electronic communications (dating from 2002), which applies to telecommunications as well as to all other communications transmitted electronically irrespective of the specific technology involved (wireless or fixed, data or voice, Internet-based or circuit switched, broadcast or personal). It will build on this consultation to update the regulatory framework in the light of technological and market developments. The Commission also intends to publish a Green Paper on the future of universal service, to launch a wide ranging policy debate on the role and concept of universal service in the rapidly changing e-communications environment.

In the *transport sector*, the Commission recently provided a mid-term review of its 2001-2010 White Paper on transport²³. It supported the deal reached by Parliament and the Council on the new regulation on public services in land transport for passengers, and is working for its adoption later in 2007²⁴. This regulation will provide legal certainty for services of general economic interest in public passenger transport by rail and bus. It will follow up its proposal of July 2006 to modernise the single market legislation for aviation. It will monitor the implementation of the "third railway package" once it is agreed.

In the *postal sector*, building on the review of experience to date and previous commitments of the EU, the Commission adopted a proposal for a revised directive on postal services in October 2006²⁵, confirming that the internal market for postal services should be fully in place by 2009. Discussion has started with Parliament and the Council and has made a significant step forward with the first reading in the European Parliament on the 11th July 2007 and the political agreement reached in the Council on 1st of October 2007.

Moreover, the EU has been active in the field of *audiovisual policy*²⁶, as well as in the field of *water and waste management*, through its environmental policy.

The EU also supports financially the development and functioning of a number of sectors and services between and across the Member States, for instance through the Structural Funds and the Trans-European Networks. It has also recently taken on new responsibilities in promoting Europe-wide services of general interest, such as the European satellite navigation system GALILEO as well as in developing common standards to facilitate the functioning of major networks at EU level, in particular through the work of European agencies, such as the European railway agency or the European aviation and maritime safety agencies.

22 COM(2006)105 of 8 March 2006.

23 COM(2006)314 of 22 June 2006.

24 COM(2005)319 of 20 July 2005.

25 COM(2006)xxx of 18 October 2006.

26 In December 2005, the Commission adopted a legislative proposal for the revision of the "Television without Frontiers" Directive. See COM(2005) 646 of 13 December 2005.

(7) Reflecting our internal policies in our international trade policy

Since the White Paper, the Commission has continued to take due account of the EU's internal regulatory framework on services of general interest in the World Trade Organisation (WTO) General Agreement on Trade in Services (GATS) negotiations. This was reflected in the revised services offer submitted by the EU in June 2005. At the beginning of 2006, the EU joined other WTO members in submitting multilateral requests in several sectors, but did not participate in any request addressing audiovisual and cultural services, education services, health services or water for human use.

The EU also concluded a series of negotiations enabling the Members States that had joined the EU since 1995 to modify their trade commitments under the GATS, notably to ensure that services in sectors such as education, health, culture and audiovisual would enjoy the same guarantees throughout the EU. The EU has been the first member of the WTO to invoke such procedures and complete the negotiations to modify existing commitments, and a similar process will be undertaken in the future for the accession of Romania and Bulgaria to the EU.

The Commission is committed to continuing to ensure that EU trade policy is consistent with the EU internal framework for services of general interest in upcoming negotiations, including at bilateral level. In particular, bilateral agreements concluded by the EU will specify, like the GATS, that the Parties retain the right to regulate and to introduce new regulations to meet legitimate policy objectives.

(8) Promoting services of general interest in development cooperation

The 2004 White Paper stressed the importance of assisting developing countries in creating a sound regulatory and institutional framework for the promotion of investment in and access to services of general interest. In August 2006, the Commission launched a new "Governance Initiative" in the context of the partnership with the ACP countries and Africa. The Governance Initiative is essentially a new incentive mechanism that will give ACP partner countries access to additional funding on condition that they commit themselves to achieving concrete results in the area of governance including aspects related to the investment in and access to services of general interest. A sum of €2.7 billion from the 10th European Development Fund will be reserved for such incentives. Moreover, the use of targets in terms of access to health and education as a condition for financial support provides an incentive to promote access in these specific services.