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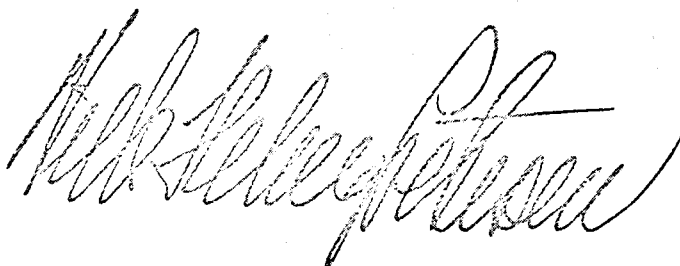
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COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMUNICATION FROM THE COMMISSION**

**Services of General Interest in Europe**

# COMMUNICATION FROM THE COMMISSION

## Services of General Interest in Europe

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## EXECUTIVE SUMMARY

Services of general interest are a key element in the European model of society. The new Article 16 in the EC Treaty now confirms their place among the shared values of the Union and their role in promoting social and territorial cohesion. These services also contribute to the overall competitiveness of the European economy and are provided in the context of continuously evolving markets and technologies. The globalisation of trade, the completion of the internal market and rapid technological change bring about increasing pressure to open new sectors to competition. It is against this background that the European Council of Lisbon requested the Commission to update its Communication of 1996 on services of general interest in Europe.

It is above all the responsibility of public authorities at the appropriate local, regional or national level and in full transparency to define the missions of services of general interest and the way they will be fulfilled. The Community will ensure in the application of the Treaty rules and with the instruments at its disposal that the performance of such services, in terms of quality and prices, responds best to the needs of their users and of citizens at large.

In some sectors, whose dimension and network structure, give them a natural European dimension, Community action has already been taken. The Communication provides currently available information on the positive impact of this action on the availability, quality and affordability of services of general interest in the sectors concerned.

The experience gained so far also confirms the full compatibility of the Treaty rules on competition and the internal market with high standards in the provision of services of general interest. In certain circumstances, in particular where market forces alone do not result in a satisfactory provision of services, public authorities may entrust certain operators of services with obligations of general interest and where necessary grant them special or exclusive rights and/or devise a funding mechanism for their provision.

Member States and the operators concerned need legal certainty. The Communication clarifies both the scope and criteria of application of internal market and competition rules. First of all, such rules apply only inasmuch as activities concerned are economic activities that affect trade between Member States. Where the rules apply, compatibility with those rules is based on three principles:

- Neutrality with regard to the public or private ownership of companies;
- Member States' freedom to define services of general interest, subject to control for manifest error;
- Proportionality requiring that restrictions of competition and limitations of the freedoms of the Single Market do not exceed what is necessary to guarantee effective fulfilment of the mission.

As the context continues to evolve and the Commission gains further experience in the application of internal market and competition rules, it will provide further clarification.

The Communication also gives perspectives on how, building upon Article 16, the Community in partnership with local, regional and national authorities can develop a proactive policy at European level to ensure that all the citizens of Europe have access to the best services.

## 1. INTRODUCTION

1. In 1996 the Commission presented a Communication on services of general interest in Europe<sup>1</sup>. In that Communication, the Commission stressed the importance of missions of general interest in order to attain the fundamental objectives of the European Union. It advocated that a reference be inserted in this sense in the EC Treaty. The definitions of terms,<sup>2</sup> the views and the objectives laid down in the 1996 communication on the future role of these services in the context of the Single Market remain valid today. This Communication updates that of 1996.
2. Since the adoption of the first Communication, a number of developments have occurred. As suggested by the Commission, the Amsterdam Treaty introduced a reference to the role of services of general interest. The new Article 16 of EC Treaty recognises the fundamental character of the values underpinning such services and the need for the Community to take into account their function in devising and implementing all its policies, placing it among the Principles of the Treaty:

*“Without prejudice to Article 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well 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.”*

3. The 1996 communication stated that, from the point of view of the Commission, far from being incompatible, services of general economic interest, internal market and Community competition policy were complementary in the pursuit of the fundamental objectives of the Treaty. Their interplay must benefit individual citizens and society as a whole.
4. Since 1996, markets, technology and user needs have continued to develop apace. Experience has been gained with those sectors that were then in the process of liberalisation under the Single Market programme. Further liberalisation occurred at Community level, while securing and in some cases improving the level of quality and protection for users. As the internal market deepened, new issues have arisen relating to the delimitation of certain services that were previously supplied primarily on a non-competitive basis, but which now elicit, or may elicit, competitors. Moreover, technological developments and in particular the advent of the Information Society lead to the conclusion that the territorial approach to some of these services is outdated and that they should be considered from a cross-border perspective.

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<sup>1</sup> OJ C 281/3 of 26.09.1996.

<sup>2</sup> See Annexe II.

5. In spite of the positive effects of liberalisation, concerns have continued to be expressed concerning services of general interest and the Community action. Linked to changes in technology and the overall regulatory environment as well as evolving consumer demand, a concern exists on the part of citizens that the quality of services of general interest might suffer. Building on this concern, traditional providers and the public authorities that support them claim that the application of Community law could jeopardise the structures for the provision of such services, which have proved their worth over a long period, and with them the quality of services to the public. Competing providers in the private sector on the contrary claim that existing arrangements give an unfair advantage to the organisation entrusted by the public authorities with the provision of such services and infringe Community law.
6. Against that background and at the request of the European Council of Lisbon, reiterated by that of Feira, the Commission has undertaken to update its Communication of 1996. The objective is twofold:
  - to provide further clarification on the respective roles of different levels of public authorities and of the competition and internal market provisions applied to services of general interest in order to respond to the request for greater legal certainty on the part of operators. Of special concern is the field of application of the rules on State aid.
  - to further develop the European framework relating to the good functioning of services of general interest, in which local, regional and national authorities as well as the Community have their role to play, in line with Article 16 EC Treaty.
7. The Communication is organised in several sections. In Section 2 the Commission sets out its views on the mission fulfilled by services of general interest. Section 3 provides clarification on the application of competition and Single Market rules to services of general interest. Section 4 presents some preliminary results from experience with the application of the universal service principle in sectors liberalised under the Single Market Programme. Further information on the situation of individual sectors is provided in Annexe I. Section 5 provides orientation for further action to enhance the quality and efficient provision of services of general interest as a key element in the European model of society.

## 2. THE MISSION OF SERVICES OF GENERAL INTEREST

8. At the heart of Community policy on services of general interest lies the interest of citizens. Services of general interest make an important contribution to the overall competitiveness of European industry and to economic, social and territorial cohesion. As users of these services, European citizens have come to expect high quality services at affordable prices. It is thus users and their requirements that are the main focus of public action in this domain. The Community protects the objectives of general interest and the mission of serving the public.
9. In order to fulfil their mission, it is necessary for the relevant public authorities to act in full *transparency*, by stipulating with some precision the needs of users for which services of general interest are being established, who is in charge of setting up and enforcing the relevant obligations and how these obligations are going to be fulfilled. Action at appropriate level, Community, national, regional or local level needs to be taken to establish criteria for services of general interest. Such action must be mutually supportive and coherent.
10. The needs of users should be defined widely. Those of consumers clearly play an important role. For consumers, a guarantee of universal access, high quality and affordability constitute the basis of their needs. Enterprises, and in particular, small and medium sized enterprises, are also major users of services of general interest, whose needs must be met. Citizens concerns are also of a wider nature, such as :
  - that for a high level of environment protection;
  - specific needs of certain categories of the population, such as the handicapped and those on low incomes;
  - complete territorial coverage of essential services in remote or inaccessible areas.
11. A number of principles can help define users' requirements for services of general interest. These principles include:
  - clear definition of basic obligations to ensure good quality service provision, high levels of public health and physical safety of services;
  - full transparency e.g. on tariffs, terms and conditions of contracts, choice and financing of providers;
  - choice of service and where appropriate, choice of supplier and effective competition between suppliers;
  - existence, where justified, of regulatory bodies independent of operators and redress in the form of complaint handling and dispute settlement mechanisms;

They may also include representation and active participation of users in the definition of services and choice of forms of payment.

12. Suppliers of services of general interest also play an important role and through their long experience in meeting the needs of users have much to contribute to the further development of such services. They therefore require adequate consultation alongside that of users<sup>3</sup>. However, when organising consultation, public authorities need to clearly separate the needs of users from those of suppliers.
13. Public authorities are faced with the question of how to ensure that the missions they assign to services of general interest are executed according to a high standard of quality and in the most efficient manner. There are several ways in which such missions can be fulfilled. The choice will be made taking into account in particular:
  - technical and economic characteristics of the service in question;
  - the specific requirements of users;
  - cultural and historical specificity in the member state concerned.

The choice of different means for different services – or even for the same service where circumstances vary from a Member State to another or within a Member State- should therefore not be seen as contradictory, but on the contrary as an essential feature of effectiveness.

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<sup>3</sup> The ETUC and the CEEP have proposed a Charter of Services of general interest which represents an important contribution to the current debate on the future of services of general interest.

### 3. SERVICES OF GENERAL INTEREST AND THE SINGLE MARKET

14. Services of general economic interest are different from ordinary services in that public authorities consider that they need to be provided even where the market may not have sufficient incentives to do so. This is not to deny that in many cases the market will be the best mechanism for providing such services. Many basic requirements, such as for food, clothing, shelter, are provided exclusively or overwhelmingly by the market. However, if the public authorities consider that certain services are in the general interest and market forces may not result in a satisfactory provision, they can lay down a number of specific service provisions to meet these needs in the form of service of general interest obligations. The fulfilment of these obligations may trigger, albeit not necessarily, the granting of special or exclusive rights, or the provision for specific funding mechanisms. The definition of a specific mission of general interest and the attendant service required to fulfil that mission need not imply any specific method of service provision. The classical case is the universal service obligation<sup>4</sup>, i.e., the obligation to provide a certain service throughout the territory at affordable tariffs and on similar quality conditions, irrespective of the profitability of individual operations.
15. Public authorities may decide to apply general interest obligations on all operators on a market or, in some cases, to designate one or a limited number of operators with specific obligations, without granting special or exclusive rights. In this way, the greatest competition is allowed and users retain maximum freedom with regard to choice of service provider. Where only one or a limited number of all operators competing in a certain market are charged with public service obligations while the others are not, it may be appropriate to involve all operators active in that market in the financing of the net extra costs of the service of general interest by a system of additional charges or a public service fund. In this case, it is important that the share borne by any undertaking should be proportionate to its activity on the market and be clearly separated from other charges that it may bear in the normal exercise of its activities.
16. Today, public voice telephony, for example, is provided throughout the Community under universal service obligations defined in Community legislation, notwithstanding the complete liberalisation of the telecom sector in 1998. Indeed, the decisions taken in the early 1990's in favour of gradual liberalisation were themselves a reflection of market and technological developments, which meant that retaining special and exclusive rights in the sector was no longer an effective and proportionate means of securing the revenue needed by operators to provide universal service. Within a competitive market, the Community framework allowed Member States to put in place mechanisms to share the costs of providing universal service as defined at

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<sup>4</sup> The notion of universal service and that of public service obligation have been acknowledged by the case law of the Court (Case C-320/91 *Corbeau* [1993]; Case C-393/92 *Almelo* [1994]) and developed in Community legislation for those services, for which a common regulatory framework has been put in place to achieve a single European market (see below, Section 4).

Community level. However most Member States have in fact not found it necessary to activate such schemes, given the relatively low costs involved.

17. However, certain services of general interest do not lend themselves to a plurality of providers, for instance where only one single provider can be economically viable. In these circumstances, public authorities will usually grant exclusive and special rights for providing the service of general interest by awarding concessions for limited periods through tendering procedures. Competition at the moment of the award of the tender is meant to ensure that the missions assigned to a service of general interest are met at least public cost.
18. Where neither of the first two options allows for satisfactory fulfilment of the mission of general interest, it may be necessary to combine entrustment of one single operator or a limited number of operators with the particular public service task, with granting or maintaining special or exclusive rights in favour of that single operator or group of operators. In this situation, as well as in the above-described situation where exclusive rights have been granted subject to a tendering procedure, public authorities may ensure appropriate funding enabling the entrusted operators to perform the particular public service task assigned to them.
19. Observing the EC Treaty provisions and in particular those on competition and the internal market is fully compatible with ensuring the provision of services of general interest. Article 86 of the Treaty, and in particular Article 86(2), is the central provision for reconciling the Community objectives including those of competition and internal market freedoms on the one hand, with the effective fulfilment of the mission of general economic interest entrusted by public authorities on the other hand. This Article reads:
  1. *"In the case of public undertakings or undertakings to which Member States grant special or exclusive rights, Member States shall neither enact or maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided in Article 12 and Articles 81 to 89.*
  2. *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interest of the Community.*
  3. *The Commission shall ensure the application of the provisions of this Article, and shall, where necessary, address appropriate directives or decisions to Member States."*

20. To understand how these provisions affect the arrangements made by the public authorities to ensure that certain services are provided to the public, it is useful to articulate three principles that underlie the application of Art. 86. They are: neutrality, freedom to define, and proportionality.
21. Neutrality as regards the public or private ownership of companies, is guaranteed by Article 295 of the EC Treaty. On the one hand, the Commission does not question whether undertakings responsible for providing general interest services should be public or private. Therefore, it does not require privatisation of public undertakings. On the other hand, the rules of the Treaty and in particular competition and internal market rules apply regardless of the ownership of an undertaking (public or private).
22. Member States' freedom to define means that Member States are primarily responsible for defining what they regard as services of general economic interest on the basis of the specific features of the activities. This definition can only be subject to control for manifest error. They may grant special or exclusive rights that are necessary to the undertakings entrusted with their operation, regulate their activities and, where appropriate, fund them. In areas that are not specifically covered by Community regulation Member States enjoy a wide margin for shaping their policies, which can only be subject to control for manifest error. Whether a service is to be regarded as a service of general interest and how it should be operated are issues that are first and foremost decided locally. The role of the Commission is to ensure that the means employed are compatible with Community law. However, in every case, for the exception provided for by Article 86 (2) to apply, the public service mission needs to be clearly defined and must be explicitly entrusted through an act of public authority (including contracts)<sup>5</sup>. This obligation is necessary to ensure legal certainty as well as transparency vis-à-vis the citizens and is indispensable for the Commission to carry out its proportionality assessment.
23. Proportionality under Article 86(2) implies that the means used to fulfil the general interest mission shall not create unnecessary distortions of trade. Specifically, it has to be ensured that any restrictions to the rules of the EC Treaty, and in particular, restrictions of competition and limitations of the freedoms of the internal market do not exceed what is necessary to guarantee effective fulfilment of the mission. The performance of the service of general economic interest must be ensured and the entrusted undertakings must be able to carry the specific burden and the net extra costs of the particular task assigned to them. The Commission exercises this control of proportionality, subject to the judicial review of the Court of Justice, in a way that is reasonable and realistic, as illustrated by the use it actually makes of the decision-making powers conferred to it by Article 86(3)<sup>6</sup>.

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<sup>5</sup> Case C-159/94 *EDF* [1997].

<sup>6</sup> See the Commission's annual reports on competition policy.

24. The principles formulated in Article 86 allow for a flexible and context-sensitive balance that takes account of the Member States' different circumstances and objectives as well as the technical constraints that may vary from one sector to another.
25. Experience provides a sufficiently large typology, concerning the specific ways of reconciling the requirements of general interest and those of competition and internal market<sup>7</sup>. As described above Member States have several options for ensuring the provision of services of general interest, ranging from opening up the market to competition over imposing public service obligations up to conferring exclusive or special rights to a single operator or a limited number of operators, with or without provision of funding.
26. Concerning the particular issue of funding, the European Court of First Instance recently decided that compensation granted by the State to an undertaking for the performance of general interest duties constitutes State aid within the meaning of Article 87(1) EC Treaty<sup>8</sup>. In so far as it does not benefit from the exemptions foreseen in Article 73 or 87, it may, however, be compatible with the EC Treaty on the basis of Article 86(2). This is the case where all conditions of this provision are fulfilled and, in particular, the compensation does not exceed the net extra costs of the particular task entrusted to the undertaking. The Commission considers that whenever the compensation is fixed for an appropriate period following an open, transparent and non-discriminating procedure, there is the presumption that such aid is compatible with the State aid rules of the Treaty<sup>9</sup>.
27. Even before delimiting the extent of the derogation from competition and internal market rules afforded by Article 86, it is worth assessing whether such Community rules apply at all. In making this assessment, one should bear in mind three considerations: the distinction between economic and non-economic activities, the effect on trade between Member States and the Community policy towards cases of minor importance.
28. The conditions of Article 86 refer to services of general economic interest. In general, internal market and competition rules, do not apply to non-economic activities and therefore have no impact on services of general interest to the extent to which these services constitute non-economic activities. This means in the first place that matters which are intrinsically prerogatives of the State (such as ensuring internal and external security, the administration of justice, the conduct of foreign relations and other exercises of official authority) are excluded from the application of competition and internal market rules. Therefore, Article 86 and its conditions do not come into play. The European

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<sup>7</sup> As an example for the compatibility of funding public service broadcasting with competition law on the basis of Article 86(2) see Commission Decision of 24.2.1999 in case NN 70/98 *Kinderkanal and Phoenix* OJ 1999 C 238/3, and Commission Decision of 29.9.1999 in case NN 88/98 *BBC News 24* OJ 2000 C 78/6.

<sup>8</sup> Case T-106/95 *FFSA* [1997]; case T-46/97 *SIC* [2000]; case C-174/97P *FFSA*. [1998].

<sup>9</sup> For an application of the same principle, see the draft regulation on land transport COM(7) 2000/9 of 26 July 2000 and the directive on transparency Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC, OJ L193 of 29.7.2000.

Court of Justice has held, for example, that an organism controlling and supervising the air space and collecting charges for the use of its air navigation system<sup>10</sup>, or a private law body carrying out anti-pollution surveillance in a sea port<sup>11</sup>, exercise powers which are typically those of a public authority and which are not of an economic nature.

29. In the second place, services such as national education and compulsory basic social security schemes are also excluded from the application of competition and internal market rules. With regard to the former, the European Court of Justice ruled that the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duty towards its own population in the social, cultural and educational fields.<sup>12</sup> With regard to the latter, the European Court of Justice held that organisations charged with the management of State-imposed social security schemes, such as compulsory sickness insurance, which are based on the principle of solidarity, non-profit making and where the benefits paid are not proportional to the amount of the compulsory contributions, fulfil an exclusively social function and do not exercise an economic activity<sup>13</sup>.
30. More generally, according to the case law of the Court of Justice<sup>14</sup>, many activities conducted by organisations performing largely social functions, which are not profit-oriented and which are not meant to engage in industrial or commercial activity, will normally be excluded from the Community competition and internal market rules. This takes into account several non-economic activities of organisations such as trade unions, political parties, churches and religious societies, consumer associations, learned societies, charities as well as relief and aid organisations. However, whenever such organisation, in performing a general interest task, engages in economic activities, application of Community rules to these economic activities will be guided by the principles in this Communication respecting in particular the social and cultural environment in which the relevant activities take place. Moreover, where Community law would apply to these activities, the Commission will also examine, in the light of a more general reflection on the use of its discretionary powers, whether the interests of the Community require to proceed with regard to these cases, subject to its legal obligations established in the EC Treaty.
31. It should also be pointed out that Community competition law only applies where the conduct in question is liable to affect trade between Member States. Likewise, the rules in the Treaty establishing the freedom to provide services do not apply when all the aspects of such activities are confined within a single Member State.

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<sup>10</sup> Case C-364/92 *SAT/EUROCONTROL* [1994].

<sup>11</sup> Case C-343/95 *Diego Cali* [1997].

<sup>12</sup> Case 263/86 *Humbel* [1988].

<sup>13</sup> Cases C-159/91 and C-160/91 *Poucet* [1993].

<sup>14</sup> Case C-109/92 *Wirth* [1993].

32. Concerning antitrust rules (Article 81 and 82 EC Treaty), an activity which affects the market only insignificantly – and this may be the case of a number of services of general interest of local character - will normally not affect trade between Member States and therefore will not be subject to the Community rules<sup>15</sup>. Reference should also be made to the policy of not pursuing under the Community competition rules, cases of minor importance, which the Commission has explained in detail<sup>16</sup>. Again, many local services are likely to be considered cases of minor importance and therefore the Commission will not have to pursue alleged violations of antitrust rules in this context.
33. As for the assessment under the State aid rules of the EC Treaty, it is true that the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected. However, under settled case-law, the criterion of trade being affected is only met if the recipient undertaking carries on an economic activity involving trade between Member States. The Commission also sets ceilings, under which it considers that State aid rules do not apply<sup>17</sup>. As a result, many local services are likely to be excluded from the scope of State aid rules.
34. Moreover, public funding for services of general economic interest that may be liable to affect trade must be examined in the light of the specific provisions on State aid in the Treaty to see whether it is nevertheless permissible. Besides the exception provided for by Article 86(2) explained above, a number of specific exemptions from the ban on State aid are available. Of particular interest are, for instance, the derogations provided under Article 73 for aid to transport and under Article 87(3)(d) for aid to promote culture and heritage conservation<sup>18</sup>. Conditions for compatibility under Article 87(3) have been laid down in

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<sup>15</sup> According to the European Court of Justice (Cases C-215/96 and C-216/96 *Bagnasco* [1999]), there is effect on trade between Member States where it is possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the conduct in question may have an influence on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market in all the Member States. In establishing these criteria, reference must be made to the position and the importance of the parties on the relevant market.

<sup>16</sup> Notice concerning agreements of minor importance falling outside Art.81(1), OJ 1997 C 372/13.

<sup>17</sup> Notice on the *de minimis* rule for State aid, OJ C 68, 6.3.1996, p. 9, to be succeeded by a *de minimis* Regulation in State aid, draft published in OJ C 89, 28.3.2000, p. 6.

<sup>18</sup> In order to be able to benefit from the derogation to the general prohibition of State aid laid down in Art. 87 (3) (d), the aid must be used for cultural purposes, e. g. film production. See for instance the Commission decision of 29 July 1998 not to raise objections to the French support scheme for the production of films (N 3/98, OJ 1998 C 279) and the subsequent decisions not to raise objections to the support schemes for the production of films in Germany (Bund) (N 4/1998, Decision of 21.4.1999, OJ 1999 C 272/4), Ireland (N 237/2000, Decision of 28.6.2000, not yet published in the OJ), The Netherlands (N 486/1997, Decision of 25.11.1998, OJ 1999 C 120/2) and Sweden (N 748/1999, Decision of 2.2.2000, OJ 2000 C 134/3). As can be seen from these decisions, Art. 87 (3) (d) allows to grant aid to film production according to the specific circumstances in each Member States, and notably for the flexibility in the assessment of aid to difficult and low budget films. Pending the outcome of the review of the support schemes in other Member State, the Commission will assess the need for a more precise framework. This will be done in close consultation with the Member States (see the Commission Communication of 14 December 1999 on 'The principles and guidelines for the Community's audio-visual policy in the digital age', COM (1999) 657 final).

frameworks or guidelines such as those for State aids for small and medium sized enterprises<sup>19</sup> (SMEs), undertakings in deprived urban areas<sup>20</sup>, employment<sup>21</sup> and training<sup>22</sup>, national regional aid<sup>23</sup>, environmental protection<sup>24</sup> and research and development<sup>25</sup>.

35. The principles laid down in this Communication apply to any economic sector. For example, following a request of the European Council, the Commission adopted in 1998 a Report to the Council of Ministers on services of general economic interest in the banking sector<sup>26</sup>, based on a questionnaire addressed to all Member States. The result of the Commission's investigation was that a number of Member States consider that certain credit institutions fulfil specific tasks that constitute services of general economic interest. These tasks comprise mainly the promotion of small and medium sized enterprises, the granting or guaranteeing of export credits, social housing loans, municipal financing, financing of infrastructure projects and regional development. Two Member States consider the supplying by a certain group of credit institutions of a comprehensive financial infrastructure providing territorial coverage as indicated in para. 10 as being a service of general economic interest. The Report concludes that the compatibility of each of these systems and tasks with Article 86 (2) of the EC Treaty has to be examined on a case to case basis.
36. Finally, as technologies and markets evolve, public authorities and operators are progressively faced with new uncertainties regarding the application of EC law to their activities. The Commission will therefore continue to reflect on the best use it can make of the instruments at its disposal to increase legal certainty. Once it will have gained experience in dealing with new situations arising in the field of services of general interest, the Commission will endeavour to further clarify the scope of the application and the criteria for compatibility with EC rules. This will be done, in conformity with established practice, in close consultation with Member States. Instruments for doing so include communications, guidelines and block exemption regulations.

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<sup>19</sup> Guidelines on State aid for SMEs, OJ C 213, 23.7.1996, p.4 ; to be succeeded by a block exemption. Regulation for State aid to SMEs, draft published in OJ C 89, 28.3.2000, p.15.

<sup>20</sup> Guidelines on State aid for undertakings in deprived urban areas, OJ C 146, 14.5.1997, p.6.

<sup>21</sup> Guidelines on aid to employment, OJ C 334, 12.12.1995, p. 4.

<sup>22</sup> Framework on training aid, OJ C 343, 11.11.98, p. 10; to be succeeded by a block exemption Regulation for State aid for training, draft published in OJ C 89, 28.3.2000.

<sup>23</sup> Guidelines on national regional aid, OJ C 74, 10.3.1998, p. 9.

<sup>24</sup> Community guidelines on State aid for environmental protection, OJ C 72, 10.3.1994, p. 3.

<sup>25</sup> Community framework for State aid for research and development, OJ C 45, 17.2.1996, p. 5.

<sup>26</sup> Report of the European Commission to the Council of Ministers, 'Services of general economic interest in the banking sector', adopted by the Commission on 17 June 1998 and presented to the ECOFIN Council on 23 November 1998.

#### **4. EXPERIENCE WITH THE LIBERALISATION OF CERTAIN SERVICES OF GENERAL INTEREST**

37. At the time of the 1996 Communication, liberalisation of the markets for several major services of general interest had been decided under the Single Market Programme, but it was too early to judge what the effects in terms of quality, price and availability of services might be. In certain sectors, particularly telecommunications, this is no longer the case. Generally, however, availability of good quality, timely data on key dimensions with which to evaluate experience in these services is still lacking. The most comprehensive information relates to telecommunications followed by air transport. With respect to energy considerable data exist regarding price levels, and the Commission has now launched a study, building on the work already undertaken by Eurostat to constantly monitor "competition indicators", a number of factors indicating the real level of competition on the market. Furthermore, the Commission has now received replies by Member States regarding public service levels and objectives in the gas and electricity sectors, and on this basis is preparing a Communication that will serve as a benchmarking tool to maintain and increase public service standards to the higher level.
38. On the basis of currently available information, liberalisation of services under the Single Market Programme appears to have had a positive impact on the availability, quality and affordability of services of general interest. However, this does not mean that such services are necessarily functioning satisfactorily. Other factors come in to play, such as the price of equipment required for connection, congestion or various anti-competitive practices which have not yet been adequately addressed or the lack of effective redress mechanisms for users when services do not function properly. As a result, the full benefits of liberalisation have yet to be reaped for all sections of society and all parts of the Community.
39. Universal service, in particular the definition of specific universal service obligations is a key accompaniment to market liberalisation of service sectors such as telecommunications in the European Union. The definition and guarantee of universal service ensures that the continuous accessibility and quality of established services is maintained for all users and consumers during the process of passing from monopoly provision to openly competitive markets. Universal service, within an environment of open and competitive telecommunications markets, is defined as the minimum set of services of specified quality to which all users and consumers have access in the light of specific national conditions, at an affordable price. These provisions set the starting point for competition-driven improvements in service quality and price.
- #### **4.1. Telecommunications**
40. Universal service as currently defined in Community telecommunication legislation includes the provision of voice telephony, fax and voice band data transmission via modems (i.e. access to the Internet). Users must have access at a fixed location to international and national calls, as well as emergency services. The definition also covers the provision of operator assistance,

directory services, public pay phones and special facilities for customers with disabilities or with special social needs. It does not cover mobile telephony or broadband access to the Internet.

41. Concerning voice telephony, according to a recent study<sup>27</sup> 96% of European households have voice telephony access at home. Just over half of the remaining households either are not interested or have alternative means of access. Less than 2% do not have access to voice telephony for financial reasons. Since the beginning of 1998, all consumers have profited from significant price reductions: in the first year alone, prices went down by 40% for international, 30% for long-distance and 30% for regional calls; however, local calls have seen no major price decreases. On average, over the period 1997-1999, prices have decreased by more than 40% for residential consumers.
42. Competition has boosted the development of mobile telephony. Penetration rates have gone up since liberalisation from 11% to 48% of the population. Low income households are more likely to rely exclusively on mobile telephony than high income ones (6% of households compared to 2%) even though the overall rate of usage rises with income. This shows that, for substantial numbers of low income households, mobile telephones constitute an acceptable alternative to fixed telephony, even in the absence of universal service obligations.
43. As Internet access via third generation mobile telephony and Internet over TV will break the dependency on computers (33% of EU households) to obtain Internet access, penetration rates are expected to grow extremely rapidly over the next five years.
44. Rural subscribers do not appear to be disadvantaged in terms of the spatial distribution of essential services. Overall, rural households have in fact more telephone equipment than households in metropolitan areas. It appears that income has much more influence on services than does rural/urban distinctions..

#### **4.2. Transport**

45. The process of gradual market opening for air transport was completed by 1 July 1998. In its Communication adopted last year, the Commission assessed the consequences of ten years of liberalisation.<sup>28</sup> Liberalisation of air transport has led to an increase in the number of carriers from 132 in 1993 to 164 in 1998. The market share of incumbent national carriers has been declining steadily and the number of routes with more than two operators has trebled since 1992. An increasingly large number of promotional fares have increased the range of attractive fares for users. Flexible fares in contrast have kept on increasing. They are twice the level of promotional ones.
46. The degree of competition on a route has a substantial impact on the price of air transport. The level of fares decreases when a market passes from monopoly to duopoly or towards more than two carriers. The price reduction for business

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<sup>27</sup> Gallup Europe, Report: 'The situation of telecommunications services in the regions of the European Union', April 2000.

<sup>28</sup> COM(1999) 182 final of 20 July 1999.

fares from monopoly towards three or more carrier routes is 10%, that for full economy fares 17% and for promotional fares 24%.

47. A number of factors retard or diminish the impact of liberalisation. Access to slots and limitations on airport capacity represent a real problem for new entrants. Loyalty schemes such as frequent flier programmes favour airlines with large networks, which offer passengers greater chances to accumulate and use FFP points. This discriminates particularly against cost effective, small-scale airlines. The high cost and low quality of ground handling services adds a fixed cost element which diminishes the ability of new entrants to compete on price. Finally, congestion and poor use of available air space means that the quality of service suffers and delays become more frequent.
48. Through the imposition of public service obligations, some of these difficulties may be overcome. Choice of the route and standards imposed are subject to control of the Commission. Since 1993, public service obligations have been imposed on more than one hundred routes within the Community, mainly in France, Ireland and Portugal but also in Sweden, Germany, Italy and the United Kingdom. But this represents only a very low percentage of the total air traffic of the Community.
49. Driven by market developments, the provision of passenger services in the rail and road sectors are undergoing important changes at present. Several operators have started to play an active role in other Member States. In parallel, Member States have started to open home markets to competition. Harmonisation of a basic level of competition and minimum requirements for transparency when awarding service contracts were considered necessary to guarantee high levels of quality. The Commission has proposed a new framework<sup>29</sup>, which will ensure that public transport operators are under competitive pressure to offer passengers better services, keep costs under control and ensure the highest safety level.

#### **4.3. Energy**

50. Compared with telecommunications or air transport, much less information is available on the impact of energy liberalisation on services of general interest. The opening to competition of the electricity and gas sectors is indeed too recent to draw operational conclusions. In most countries with the exception of Belgium, Denmark and Ireland households have benefited from a reduction in price between July 1996 and January 2000 averaging 5.2% in the EU. Small enterprises have benefited from larger reductions averaging 7.9%, albeit with substantial increases in Denmark and Greece.

#### **4.4. The appreciation of services of general interest by consumers**

51. As part of the Eurobarometer series of polls of public opinion<sup>30</sup>, a number of questions were asked to the households surveyed concerning their opinion about a number of services of general interest. The survey complements the more

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<sup>29</sup> COM 2000 /9 of 26 July 2000.

<sup>30</sup> Eurobarometer N° 53 of July 2000, 'The Europeans and Services of General Interest'.

detailed data available for telecommunications from the residential report presented above. The results are of interest because they enable a comparison to be made across different types of service. However, no indication of how services have developed over time is possible. Substantial differences in the nature of responses between Member States would seem to indicate that expectations concerning services constitute an important determinant of the perceived level of satisfaction. For this reason comparisons between the different types of services are probably more illuminating than the absolute values of responses.

52. Consumer satisfaction on a number of dimensions (access, price, quality, information available, terms and conditions, complaints) was measured individually for a fixed basket of services, composed of telephony, electricity, gas and water supply, postal services, urban transport and inter-city rail services. Both access and take up of the different services varied considerably. For instance nearly 13% do not have access to gas. Even nearly 7% claimed to have no access to inter-city rail services and nearly 5% to local transport services. Electricity, the post and water supply were the services most nearly of truly universal availability. Based on the reply "not applicable" to subsequent questions, it would appear that the actual take up of services follows quite closely physical availability.
53. In terms of price, postal services received the most positive rating, followed by public utilities. Even so substantial dissatisfaction with the current level of prices can be deduced from the fact that over 30% of respondents considered them to be unfair or excessive in every case. Telephony and long distance rail services elicited the most unfavourable response. Quality ratings for services are generally good with the exception of transport and to a lesser extent postal services. Combining the appreciation of price with quality, long distance rail services clearly do not appear to be performing well. Consumers consider public utilities (electricity, gas and water) to best meet their expectations, with communications and local transport more mixed. Treatment of complaints receive also a very low level of satisfaction, deduced from the fact that for every service measured, over 45% of respondents considered the treatment to have been either badly or very badly.

## 5. A EUROPEAN PERSPECTIVE

54. The Community's aims remain: supporting the competitiveness of the European economy in increasingly open world markets; contributing to a high level of consumer protection and confidence by among others giving consumers more choice, better quality and lower prices, strengthening economic, social and territorial cohesion. General interest services have a key role to play in achieving these aims. Efficient services are a major determinant in the location of production activities, on account of the benefits both for the firms using them and the workers living in the area. The existence of a network of services of general interest is an essential element of social cohesion; conversely, the disappearance of such services is a telling sign of the desertification of a rural area or the degradation of a town. The Community is committed to maintaining the function of these services intact, while improving their efficiency.
55. In pursuing these aims, the Community takes due account of the principle of subsidiarity. Respect of this principle, in particular Member States' freedom to define what constitutes a service of general interest, requires a careful examination of the appropriate roles of the different levels of government in the regulation of such services. The Commission will further elaborate its position on the subject in the context of the forthcoming White Paper on Governance.
56. The new Article 16 of the Treaty explicitly recognises the economic, social and territorial cohesion role of services of general economic interest and envisages a Community duty to facilitate the achievement of their mission. The importance of these provisions was brought out by the Heads of State or Government at their summit in Lisbon in March 2000<sup>31</sup>:
- "The European Council considers it essential that, in the framework of the internal market and of a knowledge-based economy, full account is taken of the Treaty provisions relating to services of general economic interest, and to the undertakings entrusted with operating such services."*
57. Both this political statement and the changes currently under way point to the need for a pro-active stance on general interest services, which incorporates and goes beyond the approach based on the Single Market. In this vein, the Commission, in partnership with the national, regional and local levels, will continue to promote a European perspective on general interest services for the benefit of citizens on three fronts: by making the most of market opening; by strengthening European co-ordination and solidarity; and by developing other Community contributions in support of services of general interest.

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<sup>31</sup> Lisbon European Council, 23-24 March 2000, Conclusions of the Presidency, SN 100/00, point 19.

## 5.1. Making the most of market opening

58. The opening up of markets for economic services, notably networked services, and the corresponding introduction of universal or public service obligations, need to be pursued in accordance with the characteristics of each sector, including the degree of market integration already achieved. The common objective is to benefit Europe's citizens through the development of a competitive single market. This objective was strongly reaffirmed by The European Council of Lisbon, which called for an acceleration of liberalisation in the areas of gas, electricity, transport and postal services and asked the Commission to prepare a progress report and appropriate proposals for its meeting in the Spring of 2001.
59. The Commission will continue to pursue the following principles in its policy of opening up markets:
- using evaluation tools to assess the operation, performance and competitiveness of general interest services, so that the regulation can be adapted in line with technological changes (which increase the cross-border possibilities of providing services within the Internal Market), new consumer needs and new public interest demands. The Broad Economic Policy Guidelines together with the Report on their implementation and the annual Commission Communication on 'Economic Reform - Report on the functioning of product and capital markets' (Cardiff Report)<sup>32</sup> provide the framework for, among other things, assessing on a regular basis the functioning of services of general economic interest in the single market. For specific sectors, notably telecommunications, reviews of regulatory reform and its effects are made available on a regular basis<sup>33</sup>; the practice of periodic reviews could be usefully generalised to all sectors for which a common framework exists at Community level<sup>34</sup>;

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<sup>32</sup> COM(1999) 10 of 20 January 1999, COM(2000) 26 of 26 January 2000.

<sup>33</sup> 'Fifth Report on the Implementation of the Telecommunications Regulatory Package', COM(99) 537 of 11 November 1999.

<sup>34</sup> The Commission is currently preparing a review of regulatory reform and service standards in the gas and electricity industries.

- maintaining a step-by-step approach based on evaluation of reform and consultation with the various parties concerned, including consumers. The Commission will continue to follow the practice of preparing for changes in the regulatory framework through the issue of Green Papers<sup>35</sup> accompanied or complemented by further stages of public consultation<sup>36</sup>;
  - enforcing transparency in the operation of the suppliers of services of general economic interest, be they public or private, notably as regards possible distortions of competition. The Commission Directive amending the so-called Transparency Directive<sup>37</sup> aims at enforcing such transparency by extending the rules on separation of accounts, currently applicable to specific sectors, to any undertaking that enjoys a special or exclusive right granted by a Member State pursuant to Article 86(1) of the Treaty, or that is entrusted with the operation of a service of general economic interest pursuant to Article 86(2) of the Treaty and receives State aid in any form whatsoever, including any grant, support or compensation, in relation to such service and which carries on other activities.
60. If the European economy is to make the most of the opportunities afforded by the opening of the markets, it is important that the decisions on the Commission's pending proposals should be taken as soon as possible. The Commission expects the new regulatory framework for telecommunications, based on its proposals for a framework Directive and four specific Directives<sup>38</sup>, to be adopted in the course of 2001, in accordance with the timetable set by the European Council in Lisbon<sup>39</sup> for the completion of the internal market. The Commission is also counting on the Council and the European Parliament to adopt as soon as possible its proposals on postal services and transport<sup>40</sup>.
61. Following the same reasoning, and in particular to ensure that public and private operators are put on an equal footing, the Commission has submitted a

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<sup>35</sup> Examples of Green Papers include: 'The citizens' network: Fulfilling the potential of public passenger transport in Europe', COM(1995) 601; 'Towards fair and efficient pricing in transport - Policy options for internalising the external cost of transport in the European Union', COM(1995) 691; 'Green Paper on a numbering policy for telecommunications services in Europe' COM(1996) 590; 'Green Paper on the convergence of the telecommunications, media and information-technology sectors, and the implications for regulation - Towards an information-society approach', COM(1997) 623.

<sup>36</sup> See, for example, the Communication on 'The public consultation on the draft notice on the application of the competition rules to the postal sector and in particular on the assessment of certain State measures relating to postal services', COM(1996) 480 following the Commission Green Paper on 'The development of the single market for postal services', COM(1991) 476; the Communication on 'The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework', COM(2000) 239.

<sup>37</sup> Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC, OJ L 193 of 29.7.2000, p. 75.

<sup>38</sup> See Annexe I

<sup>39</sup> Lisbon European Council, 23-24 March 2000, Conclusions of the Presidency, SN 100/00, point 17.

<sup>40</sup> COM(2000) 319 of 30 May 2000 and Annexe I on transport.

proposal<sup>41</sup> allowing, inter alia, to exempt from the scope of Directive 93/38/EEC those sectors or services to which it applies (water, energy, transport and telecommunications) which, in a given Member State, operate in conditions of effective competition, after the relevant activity has been effectively liberalized according to relevant EC legislation. The telecommunications liberalization has already had an impact on the application of procurement rules. By virtue of specific provisions in Directive 93/38/EEC, the Commission stated in a Communication<sup>42</sup> that it regards most of the services in this field within the EU to be exempted (with some exceptions) from the scope of Directive 93/38/EEC.

## **5.2. Strengthening European co-ordination and solidarity**

62. Increasing European integration in certain sectors suggests a parallel increase in European co-ordination for monitoring the activities of regulators and operators. The appropriate institutional arrangements will vary depending on the degree of market integration achieved and the potential failures to be addressed, including in the performance of existing national regulators.
63. In order to facilitate the evaluation of services of general economic interest the Commission could envisage an examination of the results achieved overall in the Member States in the operation of these services and the effectiveness of the regulatory frameworks. Such an examination should take into particular account the interactions between different infrastructure networks, and the objectives of both economic efficiency, consumer protection and economic, social and territorial cohesion.
64. The special place of services of general economic interest in the shared values of the Union, recognised by Article 16 of the Treaty, calls for a parallel recognition of the link between access to services of general interest and European citizenship. While Member States retain ample freedom as to means by which the objectives of solidarity served by services of general interest are to be accomplished, a core common concept of such general interest may be necessary to sustain allegiance to the Union. The Commission considers the provisions on access to services of general economic interest in the draft Charter of Fundamental rights as an important step in this direction.

## **5.3. Other Community contributions in support of services of general interest**

65. The Community involvement with services of general interest goes beyond developing the Single Market, including providing for instruments to ensure standards of quality, the co-ordination of regulators and the evaluation of operations. Other Community policy instruments and actions share the same objectives of consumer protection, economic, social and territorial cohesion and help services of general economic interest in fulfilling their mission. Such contributions are meant to enhance, and by no means replace, the national,

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<sup>41</sup> Proposal for a Directive of the European Parliament and of the Council co-ordinating the procedure of entities operating in the water, energy and transport sectors, COM(2000)276, 10 May 2000.

<sup>42</sup> OJ C 156 of 03.06.99, p. 3-4.

regional and local roles in their respective fields. Specific developments since the 1996 Communication on services of general interest include:

- the adoption, by the Commission and the Member States, of a European Spatial Development Perspective setting out the framework and the key policy options for the development of the European territory;
- the implementation of the trans-European networks programme, in line with the commitments made by the Heads of States or Government and the sectoral guidelines adopted by the Council and the European Parliament. A revision of the guidelines for the transport networks is expected to further advance the achievement of the objectives in that area;
- the initiative for the creation a European Research Area to improve the co-ordination between national and Community policies<sup>43</sup>, including aspects on the "territorialisation" of research and electronic networks;
- the adoption, by the Commission of the 1999-2001 Action Plan on Consumer Policy, establishing as a priority the area of services of general interest;
- the e-Europe action plan for an information society for all aimed at accelerating the uptake of digital technologies across Europe. To this purpose, the action plan focuses on affordable access, the development of the necessary skills and on measures to stimulate Internet use (such as eLearning, eHealth, eGovernment).

66. Horizontal consumer protection legislation also applies to all services of general interest. This horizontal legislation deals with issues of basic consumer protection such as unfair contract terms, distance selling, etc. However, there is a need to develop effective and non-discriminatory enforcement of horizontal and sectoral consumer legislation across the EU. This will require a systematic effort by all concerned including closer administrative co-operation between Member States, national regulatory authorities, service providers and consumer representatives.

67. In the context of the World Trade Organisation, and more particularly the General Agreement on Trade in Services, the Community is also committed to maintain its services of general economic interest. It should be noted that the GATS Agreement preserves WTO Members' sovereign right to regulate economic and non-economic activities within their territory and to guarantee the achievement of legitimate public objectives. Thus, even in areas where commitments have been entered into, countries have the possibility to maintain the quality standards and the social objectives which are at the basis of their system. This being said, the legitimate right for Members to establish an adequate regulatory framework to ensure an effective functioning of the services sector must not be used as an inappropriate barrier to trade.

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<sup>43</sup> 'Towards a European research area', COM(2000) 6 of 18 January 2000.

68. General interest services linked to the function of welfare and social protection are a matter of national or regional responsibility. Nevertheless, there is a recognised role for the Community in promoting co-operation and co-ordination in these areas. A particular concern of the Commission is promoting the co-operation by Member States in matters related to the reform of social protection. Following the endorsement by the Council of the Communication on the modernisation of social protection<sup>44</sup> and the mandate from the European Council of Lisbon to the High-Level Group on social protection, the Commission will develop its activities in monitoring reform and animating the debate on policies as a means toward establishing a European consensus in this area.

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<sup>44</sup> 'A concerted strategy for modernising social protection', COM(1999) 347 of 14 July 1999.

## ANNEXE I: STATE OF PLAY FOR INDIVIDUAL SECTORS

Certain services of general interest have been subject to market opening through the application of Single Market legislation and EU competition policy. This section reviews developments in sectors subject to Community rules. It does not cover the entire range of services of general interest. In particular non-economic services are excluded<sup>45</sup>.

### Electronic communications

Since 1990, the European Commission has progressively put in place a comprehensive regulatory framework for the liberalisation of the telecommunications market. By allowing competition to thrive, this policy has had a major impact on the development of the market, contributing to the emergence of a strong communication sector in Europe, and allowing consumers and business users to take advantage of greater choice, lower prices and innovative services and applications.

The provisions of the existing framework liberalised all telecommunications services and networks from January 1998. This has transformed a sector traditionally characterised by State monopolies into a dynamic industry ready to take full advantage of the global market.

Underpinning the resulting regulatory framework has been the political objective of promoting growth, employment creation and competitiveness, protecting the interests of consumers, ensuring a wide choice of providers and services for all users and fostering innovation, competitive prices and quality of service.

The regulatory framework put in place for the 1998 liberalisation has been reviewed in the light of market and technological developments and the experience of the implementation process. Many areas of the EU telecommunications market remain dominated by incumbent operators in Member States, notwithstanding a growing number of operators and service providers. The Review provides an opportunity to re-assess existing regulation, to ensure that it reinforces the development of competition and consumer choice, and to continue to safeguard objectives of general interest. To this end the new framework, which would be effective from 1<sup>st</sup> January 2002, proposes five new directives<sup>46</sup> including one which specially addresses services of general public interest, namely "universal service and users' rights relating to electronic communications networks and services".

Universal service obligations, which the Community has asked Member States to impose on operators, ensure the provision of a wide range of basic services. The current regulatory framework on universal service requires that a defined minimum set of services of specified quality are available to all users, independent of their geographical location, at an affordable price. The legislation goes into detail on the services covered, the process for designating operators with specific obligations where this is necessary and the framework for the

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<sup>45</sup> See §28-30.

<sup>46</sup> See <<http://www.ispo.cec.be/infosoc/telecompolicy/review99/Welcome.html>>

financing of any net costs relating to these service obligations by market actors. This approach to universal service is maintained in the proposed new directive.

The evidence from Member States is that this balancing of universal service obligations alongside the continuing opening up of the market has encouraged operators to take a dynamic view of the notion of universal service. Whilst the formal legislative framework effectively provides minimum guaranteed provision, the competitive process has encouraged undertakings to offer new tariff packages and contract terms which further enhance the services which consumers can expect as standard throughout the Community. This is already evident in the provision of mobile communications services which are not subject to specific universal service obligations but where extensive competition has produced rapid service innovation including the widespread provision of pre-paid service options to users. The latest survey evidence<sup>47</sup> in the Community shows that significant proportions of residential users are now opting for mobile telephone service only (in place of fixed line service) and that, if anything, lower income households are as likely or more likely to have mobile only subscriptions as are higher income households.

### **Postal services**

The existing regulatory framework<sup>48</sup> has opened approx. 3% of the European market for postal services (i.e. items of correspondence weighing more than 350gr or priced more than 5 times the basic tariff). Seven Member States (e.g. Denmark, Germany, Finland, Italy, Netherlands, Sweden, Spain) have gone further in some respects in the market opening than required by the postal Directive.

On 30 May 2000, the European Commission adopted a new proposal for a Directive proposing to further open on average 20% of the market for postal services in 2003 (i.e. full market opening of the express mail and outgoing cross-border mail, weight/price limits decreased to 50gr and 2.5 times the basic tariff for all other items of correspondence). It also expands existing consumer protection rights with regards to redress and complaint handling mechanisms to include all postal service providers and not only public service ones.

The existing Directive defines a "universal service" as one accessible to all users "involving the permanent provision of a postal service of a specified quality at all points of the Member States territory at affordable prices for users". Moreover, the postal Directive defines more specifically a minimum universal service involving daily clearance and delivery (at least 5 days a week) of postal items up to 2kg and packages up to 10 kg as well as registered and insured items. The Member States have to ensure that cross-border packages up to 20kg are delivered and are free to expand the minimum domestic universal service in order to include packages weighing up to 20kg. Finally, the postal Directive also defined European standards for quality of service for the cross-border mail of the "fastest delivery category" available. A national regulatory authority, independent of the postal operators, is in charge of ensuring compliance with the obligations of the Directive.

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<sup>47</sup> Commission studies, 'The situation of telecommunications services in the regions of the EU', April 2000, undertaken by EOS Gallup.

<sup>48</sup> EC Directive 97/67 O.J. L15, 21.1.1998, p. 14.

For non-reserved services which are outside the scope of the universal service, Member States can introduce general authorisation procedures to the extent necessary to guarantee compliance with essential requirements. For non-reserved services which are within the scope of the universal service, Member States may introduce individual licences, to the extent necessary to guarantee compliance with essential requirements and to safeguard the universal service. Member States can also award licenses to alternative operators to provide the universal service in particular geographic areas. Finally, a compensation fund can be established in order to ensure that the universal service is safeguarded in case the universal service obligations create an unfair financial burden for the universal service providers.

Experience so far has shown that the universal service is maintained throughout the Union, including in the seven Member States that have gone further in some respects in the market opening than required by the postal Directive. Overall, Postal operators including universal service providers are more efficient and the services have improved compared with several years ago (e.g. range of services, quality of service for both domestic and cross-border mail). A good example of such an improvement is the quality of service for cross-border priority mail that have improved from 84% delivery in D+3 to 91% delivery in D+3 over the period 1997 to 1999.

The postal sector is likely to evolve quite rapidly over the coming years because the development of electronic mail can replace traditional mail to a certain extent, automation of mail processing allows productivity to increase and the need to develop new or improved services (e-commerce will require efficient logistics networks to deliver goods and services throughout the Union). The evolutive character of universal service will allow access to all users of those services.

## **Transport**

### **1. Liberalisation**

The Treaty reflects the specific challenges faced in opening transport market to Community wide competition, by creating, in Article 70, the Common Transport Policy. In so doing, the Member States recognised the fact that the creation of Internal transport markets, liberalisation, and the attainment of public service objectives are all central parts of what is, in fact, an integrated policy approach. Thus, the Community has taken a gradual approach to liberalising transport markets, in order to ensure that security standards are met, and to guarantee essential public service objectives. Considerable progress has been made in opening markets to EU-wide competition:

#### Air transport:

The process of gradual opening up of the markets started in 1987 and was finalised by the 'Third Aviation package'<sup>49</sup> entering into force in 1993. The package fully liberalised intra-

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<sup>49</sup> Council Regulation (EEC) 2407/92 of 23 July 1992 on licensing of air carriers, Council Regulation (EEC) No 2409/92 of 23 July 1992 on access for Community carriers to intra-Community air routes, Council Regulation (EEC) 2409/92 of 23 July 1992 on fares and rates for air services.

Community traffic by 1 April 1997 when air carriers were permitted cabotage rights in a Member State, in which the company was not established.

Ground handling of airport services has been liberalised for airline self handling by Community legislation from 1996<sup>50</sup> for airports with more than 1 million passengers a year as of 1 January 1998. Third party handling is liberalised since 1 January 1999 (3 million passengers, further step 2 million passengers as of 1 January 2001).

#### Maritime transport:

Liberalisation is complete in international transport as between Member States. Community legislation<sup>51</sup> liberalised maritime cabotage services as of 1 January 1993. Temporary exemptions were granted to France, Italy, Spain, Portugal and Greece. The last sector to have been liberalised in these Member States has been that of island cabotage services, which became open on 1 January 1999 with the exception of two sectors in Greece which enjoy an additional temporary exemption until 1 January 2004. In the port sector future Community legislation will undertake to tackle the problem of market access and financing.

#### Road transport:

Community competition has first been introduced in 1969 through a system of Community quotas for international journeys. In 1992 this system was replaced by Community authorisation<sup>52</sup> allowing access to the EU markets under objective quality criteria. Community legislation led to a complete abolition of any quantitative restrictions on the provision of cabotage services by 1 July 1998<sup>53</sup>.

Access to the international market for the carriage of persons has been liberalised since 1 June 1992<sup>54</sup>. The respective regulation lays down market access conditions for each type of road passenger transport service (occasional, regular, shuttle and special regular services). Cabotage rights, except for national regular services, were introduced by two regulations<sup>55</sup> and grant free access under an authorisation system since 1 January 1996.

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<sup>50</sup> Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling at Community airports (OJ L272, 25.10.1996, p. 36).

<sup>51</sup> Council Regulation (EEC) 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within a Member State (maritime cabotage).

<sup>52</sup> Council Regulation abolishing quantitative restrictions on access to the market in the international carriage of goods by road (EEC) 881/92 (OJ L95/1, 9.4.1992).

<sup>53</sup> Council Regulation (EEC) 4059/89 (OJ L390/3, 30.12.1989), Council Regulation (EEC) 3118/93 (OJ L 279, 12.11.1993, p.1.).

<sup>54</sup> Council Regulation (EEC) 684/92 of 16 March 1992 on common rules for the international carriage of passengers by coach and bus (OJ L 74/1, 20.3.1992).

<sup>55</sup> Council Regulation (EEC) 2454/92 of 23 July 1992 laying down the conditions under which non-resident carriers may operate national road passenger transport services within a Member State (OJ L 251/1, 29.8.1992) replaced by Council Regulation (EEC)12/98 of 11 December 1997 laying down the conditions under which non-resident carriers may operate national road passenger transport services within a Member State (OJ L 4/10, 8.1.1998).

The market for providing combined transport services (rigid definition, intending to avoid that transport by road becomes the major leg of a combined transport journey) has now been fully liberalised since 1 July 1993<sup>56</sup>.

#### Inland waterways:

Historically, national systems of "chartering by rotation" have existed. Community legislation<sup>57</sup> now required Member States to abolish such systems from 1 January 2000 from which time contracts in the field of national and international inland waterway transport in the Community are to be freely concluded and prices freely negotiated.

#### Rail transport:

It became clear that existing Community legislation on market access and the organisational and financial structure of railway companies as well as on licensing and allocation of tracks were too vague to be effective. The Commission has responded with a package of proposals<sup>58</sup> to strengthen these elements. It extends the licensing rules to all railway undertakings in the Community and establishes clear and extensive rules and processes for setting charges and allocation of capacity. And most important it opens access for goods transport to the core Community railway net. The package was adopted by the Commission in July 1998 and is forwarded to the Council for adoption in early 2001.

## **2. General principles for public service instruments**

In all cases of liberalisation introduced by Community legislation, a high level of transport services in the general interest was safeguarded in practice. The legislation provided for instruments to be applied when minimum standards of quality have to be ensured. Intense competition in the air and maritime industries has not endangered the provision of services meeting public needs as Member States have adopted appropriate safeguard measures.

It is clear that a key element in this process has been the adoption of a series of measures and policies that ensure that essential public service standard, are maintained and improved within the context of this gradual market opening, notably with respect to the following:

- Guaranteeing service on non-profitable routes. When liberalisation takes place, it is often necessary to take measures to ensure the continued service of routes that are not profitable. This can be done in two ways. First, through direct subsidy, available to all carriers operating the route on a non-discriminatory basis. Second, through the award of exclusive rights to operate a service, with or without compensation.

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<sup>56</sup> Council Directive 92/106/EEC on the establishment of common rules for certain types of combined transport of goods between Member States (OJ L 368/38, 17.12.1992).

<sup>57</sup> Council Directive 96/75/EEC of 19 November 1996 (OJ L 304/12, 27.11.1996).

<sup>58</sup> COM (1998) 480 final, adopted by the Commission on 22 July 1998, OJ C321/6, 20.10.98, and amended proposal COM(1999) 616 final, adopted by the Commission on 25 November 1999; Proposal for a Council directive amending Directive 91/440/EEC on the development of the Community's railways; Proposal for a Council directive amending Directive 95/18/EC on the licensing of railway undertakings; Proposal for a Council directive relating to the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification.

Examples of such awards concern services feeding airports or ports of islands or remote regions. These arrangements ensure the essential mobility for residents as well as businesses situated in such areas and allow the supply of necessary goods.

In many circumstances, such arrangements require approval under the state aid rules. The Commission has, in such cases, consistently accepted such schemes, providing that they are designed in a manner least likely to distort trade and competition and are reasonably necessary in the case in question. For example, if exclusive rights are put out to open non-discriminatory tender, they are viewed as, in principle, compatible with the Treaty.

- Guaranteeing continued minimum service standards on any given route. When opening markets to competition it is often necessary in the transport sector to ensure that service standards do not fall, as companies may sacrifice quality and regularity for cost reduction. This can be contrary to public service objectives. To cover this, Member States typically have recourse to minimum access conditions for the grant of an operating license, applied in a non-discriminatory manner to all potential entrants. Access by sea, between islands and the EU mainland is often ensured through certain minimum requirements on regularity, capacity and pricing for services for passengers and for goods. Direct subsidies may have to be made available to balance incremental costs caused by such conditions. Those subsidies would for example reduce the ticket price per passenger or per goods carried. They are supposed to be granted to all operators of the same route on a non-discriminatory basis.

The application of these principles in practice can for example, be seen in the air and inland transport sectors.

### **3. Examples from transport sectors**

#### ***Air transport***

The aviation sector is an excellent example of how a full liberalisation process can be compatible with the maintenance of public service obligations. This liberalisation was accompanied by the right for Member States to impose a public service obligation when it considers that this route is vital for the economic development of the region in which the airport is located. This may concern routes serving an airport a peripheral or development region in its territory or on a thin route to any regional airport in its territory. The standards imposed under the public service obligation may concern prices, the number of seats offered, frequencies etc., where a similar level of service would not be provided if air carriers were solely considering their commercial interest. Choice of the route and standards imposed are subject to the control of the Commission.

Once a public service obligation is imposed on a route, the access to this route remains opened to any air carrier under the constraint of respecting the public service obligation. However, if nobody is willing to operate on the route because it is not commercially interesting, Member States may limit access to the route to only one air carrier for a period of maximum three years. In this case the right to operate such services is offered by public tender at Community level.

Apart from the possibility of imposing public service obligations, Member States may also give aid of a social character. Spain, Portugal and France have used this way of subsidising non viable routes. This approach may be combined with the imposition of a public service obligation guaranteeing a level of service on the route concerned. The aid has a social character if it covers only specific categories of passengers travelling on the route, like children or handicapped people. In the case of underprivileged regions like islands, the aid may cover the entire population of the region in question.

These two types of system for maintaining minimum service standards on non commercial routes have so far proved to be quite satisfactory in air transport.

### *Inland transport*

Harmonisation of a basic level of competition and minimum requirements for transparency when awarding service contracts are considered necessary to guaranty high levels of quality. The Commission has adopted a draft regulation on public services in passenger transport<sup>59</sup>, which will ensure that public transport operators are under competitive pressure to offer passengers better services, keep costs under control and ensure the highest safety level. It also establishes an explicit obligation for transport authorities to pursue adequate services in order to protect quality, integration of services and interests of the employees. Efficient public transport is considered as playing an essential role in beating congestion and cleaning up the environment.

### **Energy**

The electricity Directive<sup>60</sup> requires Member States to open up a minimum of 30 % of domestic demand to EU-wide competition in 2000, the gas Directive<sup>61</sup> requires a 20 % minimum market opening. In creating an open and competitive internal gas and electricity market, the Community has taken a gradual approach. The first liberalisation Directives in these sectors had to be implemented by Member States by February 1999<sup>6263</sup> and August 2000<sup>64</sup> respectively. This approach was taken to enable industry to adapt to the change, and to ensure that necessary measures can be taken to ensure the maintenance and increase of services of general interest in these areas.

Although the two Directives reflect the particular differences of the sectors concerned, they both follow similar approaches; introducing phased minimum opening levels of liberalisation of demand<sup>65</sup>, requiring non-discriminatory third party access to networks and essential facilities such as gas storage, requiring unbundling measures for transmission and distribution facilities, and requiring effective regulation to prevent discrimination.

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<sup>59</sup> COM (7) 2000 /9 of 26 July 2000.

<sup>60</sup> Directive 96/92/EC concerning common rules for the internal market in electricity.

<sup>61</sup> Directive 98/30/EC concerning common rules for the internal market for the natural gas.

<sup>62</sup> Belgium and Ireland had one additional year , Greece two.

<sup>63</sup> Directive 96/92/EC concerning common rules for the internal market in electricity.

<sup>64</sup> Directive 98/30/EC concerning common rules for the internal market for the natural gas.

<sup>65</sup> Regarding electricity, Member States had to open 28 % of demand in 1999, among to 35 % by 2003. Regarding Gas, Member States had to open a minimum of 20% of demand in 2000, among to 28 % in 2003.

In fact, however, liberalisation has progressed much more quickly across the Community than either required by the Directives, or expected. Around 65 % of electricity demand and 80 % of total European gas demand is already fully open to EU-wide competition, and, in most Member States, it has been decided to move to complete liberalisation within the next few years<sup>66</sup>. Furthermore, whilst the Directives provided choices for Member States in their implementation, for example with respect to types of third party access and unbundling methods, almost all Member States, both with respect to gas and electricity, have chosen approaches widely accepted as being most likely to develop effective competition.

Evidently, public service issues are central to the liberalisation of these markets. Indeed, in many respects the guaranteed supply of electricity at reasonable prices to all EU customers, and where connected gas, is one of the most essential public services. Both Directives, therefore, provide a number of provisions and safeguards to ensure that essential public service objectives, such as guaranteeing security of supply, universal connection to the electricity grid at reasonable prices, and protection of vulnerable citizens from disconnection, are safeguarded. In a liberalised market, these objectives are met through the setting of strict license conditions on market operators.

The maintenance of the highest possible standards throughout the Community in these areas has therefore been, and will remain, an essential precondition for liberalisation. For this reason, both the gas and electricity Directives provide for the possibility for Member States to take the necessary measures to ensure that services of general interest are maintained, and that service standards are maintained and improved.

The following mechanisms to ensure the proper provision of services of general interest are becoming increasing the norm throughout Europe:

– Network security and reliability:

the transmission and distribution grids remain<sup>67</sup> monopoly operators. As such the situation is substantially unchanged pre and post-liberalisation. Member States remain free to entrust the management and operation of this task to a public company<sup>68</sup>, or to a private company. In both cases, Member States commonly provide for independent review and control of standards either by an independent regulator, or by Government. Network security and reliability has been and continues to be high in Europe, and is unaffected by liberalisation.

– Security of supply:

Under the Directives, Member States remain free to take the measures necessary, as they always have been, to ensure the security of supply of electricity and gas. Any measures taken must, however, be necessary to meet the objectives in question, and

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<sup>66</sup> With respect to electricity, for example, UK, FIN, SW, D have already opened 100 % of demand. B, NL, DK, ES will completely open up their demand in the medium term.

<sup>67</sup> With the exception of certain overlaps of the gas networks, notably in Germany.

<sup>68</sup> Some countries, such as Spain, are in the process of bringing into public ownership the transmission network.

may not be discriminatory in nature. Member States may, for example, specify the fuel for new electricity generation in the event that reliance on one source becomes excessive, or may take measures to ensure an adequate variety in the source of gas supplies.

- Right to be connected to the grid:

Only with respect to electricity is the right to be connected commonly viewed as necessary by Member States. In this case the Directive specifically provides that "Member States may impose on distribution companies an obligation to supply customers located in a given area. The tariff for such supplies may be regulated, for instance to ensure equal treatment to customers concerned". Where final consumers are liberalised, owners of the distribution grid can remain obliged to provide universal connection. It is then for each Member States to decide whether they wish to make it a license condition for companies selling electricity to final clients that they be obliged to supply all similar customers within a given area at identical prices.

- Special consumer protection:

as electricity and gas are essential services, special provisions are necessary to ensure that vulnerable members of society are not disconnected from supply. Where markets fully are liberalised, public service standards are maintained through minimum license conditions. If these conditions are not be met, the license to supply electricity or gas would be withdrawn.

- Service standards:

it is clearly in the public interest to ensure that service standards related to the supply of electricity and gas, such as the speed with which requests for connection are met and repairs are effected, the accuracy of billing and the quality of other customer services, are the highest possible, and continually improving. It is vital that these standards are maintained and increased in a liberalised market. Where liberalisation - particularly at the domestic level - has taken place, experience indicates that such standards increase, for two reasons. First, the grant of a license to sell electricity is always made subject to conditions. Some of the conditions provide minimum service standards. National regulators, year-by-year, increase and expand these standards. Second, as service standards represent one important area upon which companies compete, competition leads to their improvements. This results in standards increasing above those minimum levels set by regulators or governments.

Thus, the legislative framework within which the progressive liberalisation of the electricity and gas industry is taking place in Europe has the dual objective of lowering prices and maintaining and even increasing services of public interest. Experience clearly demonstrates that with, where necessary, appropriate regulatory measures in place, such services of public interest can not only be maintained, but increased in a competitive market place. Indeed, whilst the Directives provide<sup>69</sup> for

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<sup>69</sup> Article 3(2) of both Directives.

the possibility to derogate from their requirements if no other less restrictive way can be found to achieve legitimate public service objectives, no Member State has in fact found it necessary to do so.

Of course, in order to achieve the objectives mentioned above, active monitoring and, where necessary, regulation is necessary. Whilst many of these issues are left to subsidiarity - it is for example for each Member State to determine the level of protection given from disconnection - the Commission's objective is to ensure the highest levels of all forms of services of general public interest throughout the Community.

### **Radio and Television**

Private television services have developed mainly since the 1980s, establishing the current public/private dual system of broadcasting. The need for a coexistence of public service and private commercial broadcasting is recognised and supported by both the Member States and the Community. At present, the television and radio sector is liberalised at Community level.

The broadcast media play a central role in the functioning of modern democratic societies, in particular in the development and transmission of social values. Therefore, the broadcasting sector has, since its inception, been subject to specific regulation in the general interest. This regulation has been based on common values, such as freedom of expression and the right of reply, pluralism, protection of copyright, promotion of cultural and linguistic diversity, protection of minors and of human dignity, consumer protection.

Regulation to ensure that these values are respected is enacted first and foremost by the Member States in conformity with EC law. The Protocol on the system of public broadcasting in the Member States, which was annexed to the Treaty establishing the European Community by the Treaty of Amsterdam, recognises the role and the importance of public service broadcasting and confirms that the Member States are competent to define and organise the public service remit and its financing, provided that this does not affect the trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the public service remit shall be taken into account.

At Community level, the "Television without Frontiers" Directive establishes a legal framework ensuring the freedom to provide television broadcasting services in the internal market, taking due account of the relevant general interest. However, the transposition of the amended "Television without Frontiers" Directive has yet to be completed by all Member States. In addition, the competition rules of the Treaty establishing the European Community entrust the Commission with the task of preventing anti-competitive behaviour to the detriment of the consumers, notably the abuse of dominant positions and, on the basis of merger control, the creation of oligopolistic or monopolistic market structures.

It is for the Member States, in conformity with EC law, to decide whether they want to establish a system of public service broadcasting, to define its exact remit and to decide on the modalities of its financing. Due to the nature of their funding, public service broadcasters may become subject to the state aid rules of the EC Treaty. The Commission must notably ensure

that public funding of public service broadcasters is proportional to the public service remit as defined by the Member State concerned, i.e. in particular that any State-granted compensation does not exceed the net extra costs of the particular task assigned to the public service broadcaster in question.

The funding by Member States of public service broadcasters has been the subject of a number of complaints to the Commission by private commercial broadcasters, notably about the presence of public service broadcasters on the advertising market<sup>70</sup>. It is worth noting that the problems raised by these complaints relate in general to the implementation of financing schemes that include advertising revenues and public funding. The choice of the financing scheme falls within the competence of the Member State, and there can be no objection in principle to the choice of a dual financing scheme (combining public funds and advertising revenue) rather than a single funding scheme (solely public funds) as long as competition in the relevant markets (e.g. advertising, acquisition and/or sale of programmes) is not affected to an extent which is contrary to the Community interest. The Commission intends to conclude its analysis of the pending complaints in the coming months. In doing so, it will closely consult with the Member States.

The Commission considers that the digital revolution does not call into question the need for audio-visual policy to identify relevant general interests and, where necessary, to protect them through the regulatory process. Technological developments, however, call for ongoing evaluation of the means and methods used, in order to ensure that they continue to be proportionate to the objectives to be achieved.

Whilst the means of distribution (and notably whether point to multipoint or point to point) clearly remains crucial, some new types of service may also require other factors to be taken into consideration when assessing the necessity and proportionality of any regulatory approach (e.g. encryption or "in the clear").

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See the Commission's 'XXIXth Report on Competition Policy (1999)', pp. 89 and ff.

## **ANNEXE II: DEFINITION OF TERMS**

### **Services of general interest**

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

### **Services of general economic interest**

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

### **Public service**

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

### **Universal service**

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