ECOS-019

Brussels, 16 December 2003

OPINION

of the

Committee of the Regions

of 20 November 2003

on the

Green Paper on services of general interest

COM(2003) 270 final

The Committee of the Regions,

Having regard to the Green Paper *on services of general interest* (COM(2003) 270 final),

Having regard to the decision of the European Commission of 22 May 2003 to consult it on this subject, under the first paragraph of Article 265 of the Treaty establishing the European Community,

Having regard to the decision of its President of 23 January 2003 to instruct its Commission

for Economic and Social Policy to draw up an opinion on this subject,

Having regard to Article 36 of the European Charter of Fundamental Rights concerning access to services of general economic interest,

Having regard to Article 16 of the Treaty establishing the European Community concerning services of general economic interest, as well as Articles 2, 5, 73, 81, 86, 87, 88 and 295 of the same Treaty,

Having regard to Article III-6 of the draft European Constitution,

Having regard to its opinion on *the Commission's Communication on Services of General Interest in Europe* (CdR 470/2000 fin)[1],

Having regard to its draft opinion (CdR 149/2003 rev. 1) adopted on 22 September 2003 by the Commission for Economic and Social Policy (rapporteur: **Ms Tove Larsen**, Mayor of Rødekro (DK/PES),

adopted the following opinion at its 52nd plenary session on 19 and 20 November 2003 (session of 20 November)

1. **The Committee of the Regions' comments**

The Committee of the Regions

1. **welcomes** the Commission Green Paper on services of general interest. The Green Paper is important because it helps to underline the importance of SGIs for welfare and social development in the EU. Like the Commission, the CoR is concerned with how the EU can best contribute to ensuring that citizens enjoy high-quality services at low cost;

2. **sees** the drafting of a new European constitution as a good opportunity to highlight the vital importance of SGIs for a modern European society. The publication of the Green Paper on services of general interest gives the Commission and other institutions pause to consider the necessity and options for taking greater account of the public interest when organising SGIs. For the CoR, it is an opportunity to emphasise the importance of recognising the specific nature of SGIs in discussions on the subject;

3. **notes** that the Commission has chosen to adopt an interrogative approach, which aptly demonstrates how wide-ranging and complex a field this is. The Green Paper raises many relevant questions which help to broaden the scope of the debate, but unfortunately the Green Paper only comes up with a limited number of informed answers or proposed solutions. The overriding impression

is that the Commission is using the opportunity to collect data which could have been gathered in the process of drawing up the Green Paper;

4. **feels** there is a lack of clarity in the Commission's positions and outlook on this subject. The CoR would like to have seen some clearer expressions of the Commission's stance as a contribution to the debate on the future of SGIs, inter alia whether SGIs should be given greater prominence in the Treaty;

5. since the final outcome of the Convention's work and of the intergovernmental conference is not yet known, **feels** that it is questionable whether there is any point in responding to the Green Paper before the legal basis for SGIs has been decided upon. The absence of a legal basis makes it difficult and in some cases impossible to answer the questions in any meaningful way.

2. **<u>The Committee of the Regions' recommendations</u>**

1. **What kind of subsidiarity?**

The Committee of the Regions

1. **is pleased** to note that the Commission recognises the central role of local and regional authorities in defining, organising, financing and monitoring SGIs;

2. **considers** that local or regional authorities, which are closest to the citizens concerned, are best placed to judge the type, method and quality of SGIs to be implemented taking account of the particular characteristics of the population groups concerned;

3. **regards** it as very important that the public authority which is responsible for SGIs is free to decide whether to provide the service itself, in conjunction with other authorities or to choose other solutions, including private-sector options. The subsidiarity principle – both horizontal and vertical - should be recognised fully such that local and regional authorities are as a matter of principle free to decide how to provide such services. Basing that decision on local circumstances ensures the best possible solution for the citizens and the community;

4. however, the scope and substance of vertical and horizontal subsidiarity **depends** on the legislative framework governing SGIs;

5. the function and value of public service for the European social model do not have a particularly prominent place in the Treaty. Treaty Article 16 does recognise the role and value of services of general economic interest, but it defers to Articles 73, 86 and 87, i.e. the rules on free competition and state aid, for the principles and conditions of their operation. However, the Committee of the Regions **feels** that some activities pertaining to services of general interest cannot be covered solely by competition law and market rules;

6. the final position and status of SGIs in the new constitutional treaty is not yet known. The CoR **opinion is** therefore based on two different scenarios – with and without a change in the primary-law basis for SGIs in the Treaty.

2. **Scenario 1: Change in the primary-law basis for services of general interest in the Treaty**

The Committee of the Regions

1. the Committee of the Regions recommends that general interest provisions be enshrined in the Treaty to provide a basis for regulating the SGI sector in the EU, while at the same time clearly stating that it is the task of the Member States and their subnational authorities to lay down the actual principles and conditions for the provision of SGIs;

2. **believes** that the mission of SGIs should be included among the EU's basic objectives on an equal footing with the implementation of the internal market and observance of the subsidiarity principle. Thus, implementing the internal market and safeguarding the public interest will be two objectives which supplement joint European efforts to reinforce the EU's economic, social and territorial cohesion;

3. **recommends** maintaining legal recognition of SGIs in the Treaty, subject to the clarification made in point 2.2.1, thus recognising that the mission of SGIs is to be defined primarily by the Member States;

4. **feels** that a number of provisions, which are common to all sectors, can be incorporated into the Treaty as an overarching legal framework. This will create the basis for a better balance between competition provisions, general social provisions and those concerning individual citizens. Accordingly, the CoR would like to see the following provisions incorporated into Treaty Article 16:

- All citizens shall have equal access to services, insofar as this is economically viable
- There shall be a high degree of security of supply, if it is economically viable
- Market suppliers shall ensure adequate capacity in the case of market deficiency
- Services shall be of a high standard
- The subsidiarity principle has an essential role to play in this area, inter alia with regard to which services are classed as SGIs, who is to provide them and how they are to be organised and funded;

5. **believes** that, as a matter of principle, all citizens should have equal access to SGIs insofar as this is economically viable. Failure to provide citizens with essential SGIs may, for instance, have serious health implications and remains one of the principal reasons why families, especially young families, move elsewhere. Access to such services

should, in principle, be the same for everyone, but with some variation depending on regional or local conditions and the physical framework (the distances involved, population density etc.) may affect the actual content and format of the service. Providing equal, across-the-board access to services also implies that the authorities must be in a position to set the price, based on a uniform principle of solidarity under which no-one, or the fewest people possible, are deprived of such services for economic reasons. Likewise, the authorities should be able to even out costs within the individual sectors, thereby making for enhanced regional or social cohesion. When services are managed by other bodies, the authorities must use notices of tender and contracts to ensure equality of access, security of provision and complete territorial cover;

6. **feels** there should be a high level of security of supply. Security of supply may be defined as the obligation on service suppliers to ensure continued, uninterrupted service provision. People's perception of quality is closely tied to reliable, uninterrupted service provision. Citizens/users would, for instance, be inconvenienced by water, gas or power cuts, and disruption to services such as sewage disposal or refuse collection. The concept of security should include the key consideration of risk prevention, and in particular of reducing the risk of high-impact, although rare, events (such as the recent power cut in North America and the abnormally high mortality rate among the elderly as a result of inadequate care provision during the very high summer temperatures);

7. **believes** that it is primarily the responsibility of service providers to guarantee adequate capacity in cases of market deficiency. When the market does not provide the required services for citizens, it may be necessary for the public authorities themselves to provide adequate capacity. The market is only keen to build capacity where economic considerations make it attractive to do so. Many of the installations required to provide the public and industry with SGIs need considerable investment with long depreciation periods (of up to 30 years). Examples include waste incineration and sewage treatment. Such an investment profile is only rarely attractive to private investors. Lack of adequate capacity may lead to service cuts and higher prices;

8. **feels** that services must be of a high standard. In fact, to warrant its remit, the public sector must be in a position to provide a high standard of public services. In that connection, it must be stressed that the idea of quality also covers general social considerations, including, for instance, environmental performance, occupational health and safety and consumer protection. Narrow microeconomic considerations will not always be able to ensure that these issues are adequately addressed. Within an overall framework, the authorities responsible for service delivery must be able to take action in the field of service quality. Everyday service providers generate the ideas for improving the way in which the various functions are discharged. Under the quality approach, each public service needs to adopt a charter, code or regulation defining users' entitlements in terms of the services to be provided, the amount

and quality of service, quality controls, complaints, information etc. Users must be actively involved in defining optimum service quality; using instruments for measuring customer satisfaction can contribute to this;

9. **believes** that the organisational structure should, in principle, be decided freely. In matters pertaining to the delivery of SGIs, public authorities should be free to choose – and experiment with – appropriate operational models. It is crucial that, in consultation with citizens/users, local and regional authorities are able to gain some insight into possible supply bottlenecks, difficulties in relation to price-setting and environmental problems, and can decide on the action needed to rise to these local challenges;

10. with an amendment to the Treaty, general social provisions will be given maximum "legal weight" as far as the EU Court of Justice is concerned. By amending the Treaty, the courts – and the Commission, when it draws up proposals for the new rules – will **strike** a better balance between competition provisions, general social provisions and those concerning individual citizens.

3. **Scenario 2: The provisions on services of general interest in the Treaty remain unchanged**

The Committee of the Regions

1. **believes** it is possible that provisions on services of general interest may be only partly incorporated into the Treaty, or indeed not at all. If this were to be the case, there would be a need for other ways of balancing out the competition provisions;

2. **notes** that, in point 41, the Commission indicates a number of ways of consolidating common objectives and principles for SGIs. These could either be set out in a legislative instrument (i.e. a directive or a regulation) or in a non-binding legislative instrument (e.g. a recommendation, communication, guidelines or inter-institutional agreement);

3. the main interest, as well as the debate, has focused on the possibility of a framework directive. Below, the CoR **gives** some thoughts on the possibilities and limitations of a framework directive, as well as ideas on what the content of a possible framework directive should and should not be;

4. point 40 of the Green Paper **considers** the legal basis for a possible framework directive. From this it emerges that Article 16 does not provide a legal base for the adoption of a specific instrument, including a framework directive. Treaty Article 95 on harmonisation for the internal market could be used, but a framework instrument based on

this provision would have to be limited to services of general *economic* interest having an effect on intra-Community trade. It could not be used to regulate services of a non-economic nature or economic services with a limited effect on trade (e.g. water, waste water and heating);

5. **feels**, however, that the provisions of Treaty Article 95 are in any case unsuitable as a basis for regulation of SGIs. This is because directives pursuant to these provisions must necessarily have as their overarching objective to increase cross-border trade, to create an internal market. But competition (including across borders) cannot be an end in itself as far as SGIs are concerned. Insofar as competition leads to one or more of the prime considerations outlined above being undermined, it results in the task being performed less effectively.

6. the regulation on the freedom to **provide** services within maritime transport (concerning inter alia putting ferry routes out to tender) and the electricity liberalisation directive illustrate the difficulties associated with applying internal market rules to SGIs;

7. the requirement imposed by the EU to put all ferry routes out to tender, regardless of their size, has had negative economic and administrative consequences for local and regional authorities. As a result of the EU requirement, small publicly supported ferry routes were put out to tender. Serving small islands and outlying areas is inherently uneconomical, and such services are often set up and run with public funding support. In most cases, the invitations to tender produced only one bidder, namely the company that had operated the route before. In cases where a competitor did come forward, the bid was typically more expensive. The **invitation to tender** did not result in better services – rather, local and regional authorities were obliged to employ considerable economic and administrative resources to carry out the procurement process, including drawing up tender details etc;

8. the other example is liberalisation of the electricity market, which has not so far resulted in generally lower prices. On the contrary, it has led to greater price fluctuations. When liberalisation is completed throughout the EU by 2007 at the latest, it will bring individual citizens considerable uncertainty about the "going rate" for electricity, which cannot be in the citizens' interest;

9. although Treaty Article 95 **requires** the Commission's proposals concerning health, safety, environmental protection and consumer protection to take as a base a high level of protection, this does not alter the fact that it is unsuitable as a basis for regulating SGIs.

4. **Good governance**

The Committee of the Regions

1. **notes** section 4 of the Green Paper entitled "Good governance: organisation, financing and evaluation". The section immediately seems spurious, in that everyone agrees on the need for good governance. The question is merely who should define what "good governance" is? Should that be done at EU, national or regional/local level?;

2. the Member States and regional and local authorities currently **enjoy** considerable degrees of freedom to organise and administer SGIs. If a framework directive on SGIs is drawn up, the CoR does not think that it should lay down new principles or guidelines for good governance;

3. **considers** that a framework directive which contains principles and guidelines on the organisation, financing and evaluation of SGIs must not seek to:

- extend the EU's powers to the detriment of the Member States or local authorities;
- extend the field of entitlement to competition to the detriment of general-interest remits;
- educe the freedom of choice of the Member States and of their local authorities in the way they manage SGIs.

The CoR is opposed to any arrangements or measures by the EU which curtail regional and local self-government and exercise the power to define services of general interest. On the contrary, it is important that any framework directive gives the Member States the necessary flexibility on the matter. In particular, it must be ensured that they retain the freedom to decide themselves whether a service of general interest is to be provided by state-owned companies or institutions or by private, third-party operators;

4. whether such a framework directive covers all SGIs (requiring an amendment to the Treaty) or tries to limit itself to services of general *economic* interest, it will have to be very general to cater for the different characteristics of a wide range of sectors, as pointed out in point 40 of the Green Paper. There are big differences between the organisation and operation of, for example, telecommunications, water supply or waste management. The CoR therefore **feels** that a framework directive will not go any appreciable way towards creating legal clarity on the relation between SGIs and competition and state aid rules. Legal clarity would anyway be ensured by means of sector-specific legislation or adjustments to the rules on state aid. If the EU insists on trying to create greater legal clarity by means of a framework directive, it risks introducing more detailed regulations, which may have unintended consequences for some sectors. The consequences may be far greater standardisation both within sectors and between sectors. The framework directive may therefore have far greater consequences and cause far greater problems than sector-specific regulation;

5. **consi` ders** that sector-specific access to organisation, financing and evaluation is a better guarantee that Community legislation only deals with services which, as a result of their scale and structural interconnection, are of Community-wide importance, but not those which are only of local or regional interest.

5. **Clarification of definitions and non-economic services**

1. as the Commission itself points out in the Green Paper, it is difficult to **distinguish** between services of an economic nature and those of a non-economic nature. A number of services can easily be classified as economic, e.g. electricity, gas and heating provision. Others can clearly be categorised as non-economic, e.g. education and social services;

2. however, there **is general agreement** that a distinction between services of an economic nature and those of a non-economic nature is difficult to draw, partly because of the constantly evolving nature of services and the inherent flexibility the term has, and partly because it can always be argued that all services are in some way economic in nature. Whether a service is subject to the EU's competition rules cannot, in the CoR's view, be determined merely on the basis of its economic or non-economic nature, but must also be judged on the basis of the political objectives involved. For example, the guiding principle for public hospitals is not the market, but meeting citizens' need for health services in line with national, regional and local health policy;

3. the CoR **agrees** with the Commission that the categories involved are not static and may evolve over time. There will also be services which are perceived as economic in one country and as non-economic in another;

4. there **are two alternatives** to the lack of clarity arising from the impossibility of making an exhaustive categorisation. One is to draw up positive lists of individual categories. This could mean a static legal situation with no scope for change in particular areas, the emergence of new areas (e.g. in the IT infrastructure field) or areas which can be both non-economic and economic depending on the given situation;

5. the other **alternative is** to abandon the distinction between the two categories. However, this is not a viable route as the distinction has major implications for how the provisions of the Treaty are applied. Non-economic services are not covered by the Treaty's internal market rules, competition rules or state-aid rules, and can therefore be said to have a kind of special status. Common rules for all SGIs would entail greater regulation of these areas than at present. In any case, the Commission should clearly set that services provided directly or through an external entity by local and regional authorities in the general public interest, and mainly for social or environmental purposes rather than commercial purposes, are not considered to be Services of General Economic Interest;

6. the principle of vertical and horizontal subsidiarity is particularly relevant in these areas, where it is a question of delivering core services of great importance to EU citizens and where the degrees of freedom with regard to how that is achieved from country to county and within countries – at the level of individual local and regional authorities – should be as large as possible;

7. the CoR therefore **feels** that the lack of legal clarity surrounding the definitions cannot be resolved with positive lists or by abandoning the distinction between economic and non-economic SGIs. Resolving the lack of legal clarity through regulation presupposes that there are simple answers to the questions raised, which is not the case in this very complex field. New rulings on definitions will just raise new questions. The Committee believes, however, that, where the proceeds of goods or services sold in the general interest on the relevant market are merely sufficient to help cover cost, it may certainly be concluded that the activity in question is non-economic;

8. in point 45 of its Green Paper, the Commission rightly highlights the difficulty of drawing up an a priori list of services that are to be considered to be "non-economic". In judgments of the European courts and decisions of the Commission, "typical" non-economic activities (such as the activities of state schools, compulsory social insurance schemes and organisations which perform social functions but which are not meant to engage in industrial or commercial activity) have however been recognised as non-economic activities. The provision of such a list, by way of providing assistance, is feasible; this measure would make a considerable contribution towards establishing legal certainty;

9. the CoR therefore **feels** that there should be no move away from the arrangement whereby more detailed categorisation is left to the Member States in accordance with the subsidiarity principle, as outlined in the Commission's original communication on the subject.

6. **Exchange of best practice and benchmarking**

1. should there be a better procedure for exchanging best practice and benchmarking on questions of organising SGIs across the EU? Who should be involved and which sectors covered?;

2. as the Commission itself **acknowledges** in the Green Paper, the characteristics of SGIs differ considerably across the EU. But this should not deter the Commission, the Member States and regional and local authorities from looking into how the exchange of best practice and benchmarking in areas regulated by the Community can help to achieve systematic improvements in quality. It is important that benchmarking is used correctly to provide inspiration and the opportunity to learn from the best;

3. with regard to who should be involved in the consultation procedure on exchanging and benchmarking best practice, the CoR would **refer** the Commission to the guidelines which appeared in the White Paper on the guidelines for new forms of governance in the EU. These state that the Commission recognises that local and regional authorities have a key role to play with regard to the consultation procedure so as to ensure more effective interaction between local and regional authorities and the EU. In addition, assessment should be carried on many levels. Services of general economic interest involve a wide range of actors with differing interests who exchange information with each other in varying degrees. Assessment bodies must therefore be pluralist, specialised and act independently from the decision-making and implementing institutions. They must be open to all actors and address their expectations, aspirations and interests.

7. **Financing services of general interest, including state aid**

1. the use of different forms of financing in different sectors illustrates very well why it is difficult to introduce common legislation on a particular method of financing across all sectors. However, the CoR **considers** that secure long-term financing of public service obligations must be guaranteed: the public authorities must take responsibility for the resultant constraints for service operators compared with a situation where they act on purely commercial grounds; such compensation may take various forms and must enable operators to adapt to the objectives defined;

2. the CoR **welcomes** the recent Altmark Trans judgement of the Court of Justice dated 24 July 2003 (case C-280/00). In this judgement the court stipulates that State intervention is not deemed to be State aid within the meaning of the EC Treaty where the public subsidy represents compensation for the discharge of public service obligations by the recipient undertaking. The Court nevertheless subjects this exemption from the provisions on State aid to four technical conditions;

3. the liberalisation of sectors such as water, waste water, refuse and heating is also under discussion. However these sectors do not operate in the same way as the energy sector and are not submitted to the same specifications. They do not only differ from the energy sector in terms of environmental prerequisites but also in terms of infrastructure. For example, electricity can be transported over long distances/national borders, while heating and water are not conveyed in large-scale national/international networks. This constitutes a natural limitation on selling heating and water to a wider market. It follows that, in many countries, these services are organised and operated by local and regional authorities with a high level, or 100%, user funding and some form of mutually supportive pricing so that all citizens get the same service, wherever they live (town/country). These are some arguments why the Committee of the Regions **opposes** sector specific internal market directives as regards water and refuse services, where local and regional authorities have a central role to play. The EU is however

competent to harmonize quality standards and economic principles according to environmental law and aiming at economic and social efficiency;

4. transport is an example of a sector where public subsidies are provided for large-scale infrastructure investment such as roads, bridges, etc. Operating subsidies are also given to public transport where it would be impossible to break even without them. It is characteristic of the transport sector that investment and operating expenses are so high that user funding is insufficient. Subsidies are needed to keep transport prices affordable;

5. in the light of these examples, it is the CoR's **view** that each sector is so different in terms of a series of key parameters (organisation, ownership, the geographic dependence of the commodity, decision-making structure of the sector) that common EU rules on financing across sectors would be difficult to draw.

8. **Concluding remarks**

1. the CoR **feels** that the debate on the future of SGIs is of key importance for welfare and social development in the EU. With this opinion the CoR has sought to highlight the need for an amendment to the Treaty to ensure a more even balance between competition provisions, general social provisions and those concerning the individual citizen;

2. the CoR **has also sought** to point out some of the options and limitations which the present Treaty offers for drawing up a framework directive on SGIs. Against this background, the CoR feels it is necessary to await the forthcoming constitutional treaty before taking a final position on the question of a framework directive;

3. in conclusion, the CoR **would urge** the Commission to enter into an in-depth and systematic dialogue with the CoR and associations representing local and regional authorities in the EU on these authorities' experience of organising and operating SGIs. Drawing on accumulated experience is an important prerequisite for a sophisticated and balanced debate on how the task of delivering SGIs can be discharged in the best possible way.

Brussels, 20 November 2003

The President of the Committee of the Regions

The Acting Secretary-General of the Committee of the Regions

Albert Bore **Gerhard Stahl**

[1] OJ C 19, 22.1.2002, p. 8

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