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CONSEIL DES COMMUNES ET REGIONS D'EUROPE

## **SERVICES OF GENERAL INTEREST:**

## **PUBLIC INTEREST, DEMOCRATIC CHOICE**

***Response of the Council of European Municipalities and Regions  
to the Commission's Green Paper on Services of General Interest***

*September 2003*

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## Introduction

1. The Council of European Municipalities and Regions (CEMR) welcomes the publication of the Commission's Green Paper on Services of General Interest (SGI) as a vital contribution to the ongoing debate about the role of SGIs and in a modern Europe, the proper relationship in this context between the roles and responsibilities of the public and private sectors, and the appropriate role and limitations of European-level regulation.
2. We welcome in particular the recognition that Services of General Interest are part of the values shared by all European societies and form an essential element of the European model of society. We share the Green Paper's view that the role of SGIs is essential for increasing the quality of life for citizens, and for overcoming social exclusion and isolation.
3. However, as set out in the next section (philosophy of SGIs), we have serious concerns about the way some of the key issues are framed in the Green Paper. If the overall philosophy is wrong or one-sided – as we believe is the case in vital respects - the conclusions reached will be invalid.
4. CEMR brings together local and regional governments, through their national associations, from over 30 countries. Across Europe, local and regional governments are democratically elected by their citizens; their role and responsibility is to take decisions for the well-being of those citizens, based on their democratic mandates. Our members reflect a diversity of political views, including on issues such as how far it is desirable to tender out services for which they are responsible.
5. However, we are united in support of some common principles. We believe in the role of democratic local and regional governments as community leaders and service providers, accountable to their citizens. We believe in local self-government and subsidiarity – a subsidiarity that applies to all levels or spheres of government. We believe in particular in the value of high quality, cost-effective services, provided (directly or indirectly) by democratic authorities for the benefit of their citizens.
6. We emphasize that many local and regional governments have elected to tender out important services, as a policy choice taken by them. This has often, though not always, led to positive results for the authority and the services in question in terms of cost and quality. Many others believe that in-house services are often the better solution, in terms of quality, democratic control and continuity/security of service. As an organization, CEMR does not seek to impose a view,

or value judgment, on the respective merits of providing services in-house, or via external providers (whether in the public, private or community sectors). What is the “right” path to take, on these issues, depends on local decisions, made democratically on the basis of local circumstances and judgments, in relation to specific services.

7. Therefore, our starting-point is that the decisions on tendering and choice of provider, in relation to local and regional Services of General Interest, are for local and regional elected politicians to take. In recent years, however, local and regional governments across Europe have become increasingly concerned at the drift towards redefining such services as Services of General Economic Interest, and thus opening them to the potential impact of European competition and state aids laws, and to potential requirements, generated by the Commission, to liberalize categories of local or regional services.
8. We believe that the creation of a new European Constitution provides the opportunity to take stock, and to assert a new commitment on the part of the EU to promote the role of Services of General Interest as vital to a modern European society. The publication of the Green Paper on SGIs – almost simultaneously with the presentation of the draft Constitution - also provides a moment for the Commission and other institutions to consider the need to provide, in practice, a better protection for SGIs, and to emphasize that EU competition law should deal with truly European issues, and not seek to deal with public services of purely local or regional character. The principles of subsidiarity and proportionality lead, on any fair interpretation, to this conclusion.

## **The Philosophy of SGIs**

9. As early as paragraph 4 of the Green Paper, we find a crucial statement of philosophy, or ideology, with which CEMR has to take issue. The paragraph rightly asserts that “services of general interest are at the core of the political debate”. But instead of presenting that debate in a fair and objective manner, the paper continues by taking sides in the debate – without putting the opposing case. The paragraph continues as follows:

“Indeed they [SGIs] touch on the central question of the role public authorities play in a market economy, in ensuring, on the one hand, the smooth functioning of the market and compliance with the rules of the game by all actors and, on the other hand, safeguarding the general interest, in particular the satisfaction of citizens’ essential needs and the preservation of public goods *where the market fails.*” [our emphasis].

Paragraph 22 contains similar formulations:

*“The market usually ensures optimum allocation of resources for the benefit of society at large. However, some services of general interest are not fully satisfied by markets alone because their market price is too high for consumers with low purchasing power or because the cost of providing these services could not be covered by market price. Therefore, it has always been the core responsibility of public authorities to ensure that such basic and qualitative needs are satisfied and that services of general interest are preserved wherever market forces cannot achieve this. To date, the crucial importance of this responsibility has not changed.”* [again, our emphasis]

10. Many of our members would challenge these formulations, which relegate public services to the role of “provider of last resort” in cases of market failure or the inability of market forces to deliver. First, the market does *not* usually ensure the optimum allocation of resources for the benefit of society at large in many important areas, such as health, education, libraries, public housing, social services, whatever its merits in other arenas. In some of these fields, the market caters for a small part of the overall population. To reach the large majority, or those most in need, the public sector has to provide the service, directly or through subsidy to external providers.
11. Second, there is a counter view – at least as valid – that inverts this logic, and asserts that it is the positive role of public authorities to provide for the essential needs and basic human rights of citizens, while taking into account the secondary role of the market and private sector. Take each of the competences referred to in paragraph 8 above – these were from the outset provided by public authorities not because of a sense of market failure, but because human rights, human dignity, and the public interest, required that they were provided for all citizens. That remains the case today, even if in some domains there is more room for involving the private or other sectors.
12. The Green Paper’s underlying assumption that, wherever possible, the market provides a better provision shows itself in other ways. Paragraph 23 asserts that

“what has changed is the way in which public authorities fulfil their obligations towards the citizens.... In Europe, a number of services of general interest have traditionally been provided by public authorities themselves. Nowadays, public authorities increasingly entrust the provision of such services to public or

private undertakings or to [PPPs] and limit themselves to defining public objectives, monitoring, regulating and, where necessary, financing those services.”

And paragraph 24 continues:

“This development should not mean that public authorities renounce their responsibility to ensure that objectives of general interest are implemented. By means of appropriate regulatory instruments public authorities should have the capacity to shape national, regional or local policies in the area of services of general interest and to ensure their implementation. However, this development from self-provision towards the provision through separate entities has made the organisation, the cost and financing of these services more transparent. This is reflected in a broader debate and in stronger democratic control of the ways in which services of general interest are provided.”

13. Although not made explicit, there are some key implicit assumptions here. First, the trend towards provision through other “entities”, though correct in fact, masks the fact that an enormous number and range of services are still *provided* directly, in particular by local and regional authorities. It is far from the case that the role of local and regional government is limited to defining objectives, monitoring, regulating and “if necessary” financing services. In other words, the Green Paper gives the impression that the trend towards externalisation is both desirable and inevitable, without considering the arguments for and against such a view. While externalising can make the cost of services more transparent, this can also be achieved for internal services through public accountancy means. Moreover, it is always vital to remember (for an externalised service) that the costs of the client side (defining service, monitoring, evaluating, tendering) all have to be added in to get an accurate overall cost.
14. We do not all share the Green Paper’s perspective that the results of liberalisation to date have been overwhelmingly positive. Crises in some energy and rail services provide some recent examples of the downside. Moreover, the picture at local and regional levels is mixed. There are many examples where tendering and externalisation are seen to have produced positive results for those authorities who have chosen this path. But equally, there are many examples of tendered services being no more efficient, and there are cases where the private sector has had to give up a contract in mid-term due to financial and/or service problems in delivery. Moreover, tendering does not provide the “level playing-field” of the Green Paper’s image, since private sector bidders are free to tender (if they have the

resources) on the basis of a “loss-leader” bid, in the knowledge that once the public sector “competitor” (who by definition cannot underbid the actual cost) has lost and been dismantled, it is very difficult to reconstruct it thereafter. This can lead, and has led, to the establishment of virtual monopolies for some private sector companies in some sectors.

15. In summary (and we have not here the space to complete an analysis of all the ideological assumptions in the Green Paper), we conclude that the logic of the Green Paper runs as follows:

- SGIs are important, perhaps increasingly so, as Europe develops
- Public authorities should provide vital services themselves in cases of market failure, or where market forces, which normally ensure optimum allocation of resources for the benefit of society, cannot achieve this.
- The traditional role of public authorities as direct service providers has developed towards provision through separate entities, and this is desirable for reasons of transparency.
- Therefore, the role of public authorities should in future be limited to defining public objectives, monitoring, regulating and if necessary financing services.

16. In response, the position of CEMR is as follows:

- We agree that the role of SGIs is becoming increasingly important.
- We do not agree that local and regional governments should only provide services in cases of market failure or where market forces cannot provide the service. The roles of the public and private sector are both important, but the public sector cannot be relegated (in terms of our main competences) to a secondary role vis a vis the market.
- CEMR further agrees that there has been a trend towards the provision of many services, or parts of services, to separate entities; but across Europe, with few exceptions (the contested experience of Compulsory Competitive Tendering (CCT) in the UK for example), this has been done on a voluntary basis, within a local or regional democratic system of political choices.
- However, this is far from universal as practice, and does not represent any general agreement that the role of local and regional government as direct provider, wherever appropriate, is out-dated or wrong in principle. On the contrary, there are many reasons why many authorities, with support from their electorates, choose to provide services themselves, directly or through legal entities established by them for the purpose.

- Accordingly, the Green Paper should have set the scene in a more balanced way that gives greater weight to the right of democratic choice as to the provider of services, as well as to other issues of regulation etc. This all the more important in the case of local and regional services, where the principles of subsidiarity and proportionality all argue for minimum European-level regulation.

## **The definition of SGIs**

17. It is vital for local and regional governments to know which services come within the definition of SGIs, and in particular SGEIs. The Green Paper rightly points out that “terminological differences, semantic confusion and different traditions in the Member States have led to many misunderstandings in the discussions at European level.” Moreover, as stated, there is no Treaty definition to fall back upon. Indeed the term “Services of General Interest” as such does not appear in the Treaty – only the term “Services of General Economic Interest” (SGEIs).

18. Paragraph 17 tries to provide a definition in this way:

“...in Community practice there is broad agreement that the term refers to services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion.”

If we try to unpack this definition, there are three aspects:

- The service must be of an economic nature (see below for our concerns on this point)
- The Member State/European Community subjects the service to specific public service obligations
- This is done by virtue of a general interest criterion.

19. It is fairly clear (at least in principle), in the case where the provider is a legal entity separate from or independent of the public authority, what constitutes a public service obligation. Indeed, paragraph 20 makes this clear:

“The term public service obligation...refers to specific requirements that are imposed by public authorities on the provider of the service in order to ensure that certain public interest objectives are met, for instance, in the matter of air, rail and road transport and energy.”

It is however less clear what the phrase “by virtue of a general interest criterion” adds to this definition, and the Green Paper does not develop this aspect.

20. The Green Paper proposes the following definition of a Service of General Interest (as against SGEIs) at paragraph 16:

“.[it] covers both market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations.”

We assume - but this is not clear – that the reference to services “classed” as being of general interest has the same meaning or effect as (for SGEIs) services being subject to a public interest “criterion”.

21. We would argue that the whole language and definition of SGIs and SGEIs makes sense in relation to services provided by external providers, but it is far less clear to what extent the terms relate to services provided in-house by local and regional governments. With an external provider, it makes sense to talk of imposing public service obligations, and to classify services as being of general interest. When local or regional governments provide services themselves for their citizens, they set service and quality standards and budgets, but do not normally “class” those services as being of general interest (perhaps this is too obvious to state!), and they only can be said to impose public service obligations on themselves, if one deems the setting of the service specification (within a legal competence) as being the imposition of the obligation.
22. Yet it is clear from the general text of the Green Paper that in-house services are intended to be included in the meaning of the terms, and this is made explicit in Section 4 on Good Governance. Paragraph 79 provides:

“As far as the participation of the state in the provision of services of general interest is concerned, it is for the public authorities to decide whether they provide these services directly through their own administration or whether they entrust the service to a third party (public or private entity).”

And paragraph 80 continues:

“However, providers of services of general economic interest, including in-house service providers, are undertakings and therefore subject to the competition provisions of the Treaty. Decisions to awards special or exclusive rights to in-house service providers, or to favour them in other ways, can amount

to an infringement of the Treaty....Case law shows that this is true, in particular, where the public service requirements to be fulfilled by the service provider are not properly specified, where the service provider is manifestly unable to meet the demand, or where there is an alternative way of fulfilling the requirements that would have a less detrimental effect on competition."

23. But if in-house public services are to be included in the definition of SGIs, then a proper definition is required which makes clear which services are, or are not, covered by the definition. Local and regional governments provide a diverse range of services, many but not all of which are of a universal character (i.e. for the whole population, if they wish to use them).
24. For example, there are many local government services that are aimed at, and provided for, certain sections of the population. They are by definition not universal, save in the sense that anyone who falls into the relevant category (e.g. children in need, people with disabilities) may be eligible to use them, if they fulfil the defined needs criteria. Are such targeted services SGIs or something else? Put another way, are all public services provided by local and regional government deemed to be SGIs, or only some? If all, why not say so more clearly? If not all, where is the dividing line?
25. We would suggest that the problems of terminology arises from the attempt to "read across" from the large network industries (which have been the main focal point (till now) at European level in looking at SGIs) to the enormously diverse range of public services, or publicly subsidised services, in other fields.
26. In conclusion on this point, we believe that clearer definitions are needed for the terms SGI and SGEI, to make clear to what extent they apply to public services provided by local and regional governments. We do not think that the Commission should shy away from using the term "public services" in this context – it does not have the ambiguity attributed to the singular term "public service". The citizen knows what are public services; he or she may be much less clear what is a Service of General Economic Interest!

## **The problem of economic and non-economic services**

27. The points about definitions which we raised in the last section are not just academic ones. They are about the climate of growing legal uncertainty faced by local and regional governments across Europe about the future impact of European law and jurisprudence in relation to SGIs, competition law and state aids law (though we welcome the

recent clarification, in the Altmark case, that public subsidy for defined public obligations does not involve state aids).

28. Central to this concern is the creeping extension of what constitutes an economic, as against a non-economic, service. Section 2.3 of the Green Paper highlights the problems effectively, and recognizes that the distinction has in many cases become "blurred". The importance of the distinction is borne out by paragraph 80 of the Green Paper (cited above), in particular the first sentence which we recall states:

"However, providers of services of general economic interest, including in-house service providers, are undertakings and therefore subject to the competition provisions of the Treaty."

29. What concerns us, across Europe, is that more and more services are being considered to be "economic" in nature, and accordingly, if a public authority provides such a service, for social rather than profit motives, it is nonetheless open to being defined as an SGEL, not an SGI. This growth in the range of "economic" services is due largely to the parallel growth in the number of private sector companies offering services in public-related service domains.
30. For example, "health" services are considered to be potentially "economic", because (as is the case) there is a "market" in certain health services. But there is also a "market" for education services, e.g. through fee-paying private schools, and there are even (in the UK) companies that offer to provide the whole of a local authority's education service.
31. This trend means that there is, using current definitions, no logical basis from which to defend Services of General Interest, however social their purpose, because in virtually every field, there is now some "market" in operation. And since there is a growing trend towards transparency in accountancy for public services, there is a sense in which all public services are becoming increasingly "economic", since "economic" does not mean the same as "commercial" or "operating in a market".
32. It is time to get back to first principles. Most universal public services - in particular those provided by local and regional government - are, in their essence, Services of General Interest, not Services of General Economic Interest. They are Services provided for the General (Public) Interest, not for the General *Economic* Interest. [Of course, social welfare services are, in an important sense, of economic interest, e.g. an effective public health service promotes national economic well-being. But that is not the sense in which the current debate on SGEIs is framed.]

33. Where there is a "market" in operation, in most cases it is a modest add-on to the basic universal public service (private health, private education etc.), or it only exists because of public subsidy (the public authority pays the private sector to perform the task). This is a very different situation from the case of a substantially commercial service (such as modern telecommunications), on which public service obligations need to be imposed. The legal regime needs to recognize and respect these profound differences in role and content.
34. Yet as things stand, the opposite is the case. The trend towards defining services as "economic" not only means that such services are subject, in general terms, to European competition law, but also means that the European "level" may seek, in an open-ended way, to impose Compulsory Competitive Tendering via new liberalisation programmes. Moreover, as Paragraph 80 of the Green Paper (cited above) demonstrates, European competition law can be extraordinarily far-reaching and intrusive, e.g. the statement that it may apply to in-house providers "where there is an alternative way of fulfilling the requirements that would have a less detrimental effect on competition."

### **CEMR's proposals - the principles**

35. We welcome the recognition in the Green Paper (paragraph 11) that

"The European Union respects this diversity and the roles of national, regional and local authorities in ensuring the well-being of their citizens and in guaranteeing democratic choices regarding, among other things, the level of service quality."

For reasons already touched on, we see the issue of provider, as likewise being one of "democratic choice" for local and regional governments to determine. Moreover, Section 2.1 of the Green Paper, "What kind of subsidiarity?" does not adequately analyse the issues of what should be done by the European institutions at European level, and what should be done at national, regional and local levels. As we have seen, paragraph 31 states that

"It is primarily for the competent national, regional and local authorities to define, organise, finance and monitor services of general interest."

It also states that

"Services of general interest linked to the function of welfare and social protection are clearly a matter of national, regional and

local responsibilities. Nevertheless, there is a recognised role for the Community in promoting co-operation and co-ordination in these areas."

However, there is a need to define more clearly the principles that underlie these statements, in particular given the drift from SGIs to SGEIs.

36. We propose that a much stronger role be assigned to the concept of *subsidiarity* in all issues relating to Services of General Interest. Given that the Union does not have sole competence in the area of SGIs, the Union should only act if and insofar as the objectives of the proposed action cannot be sufficiently achieved at national level - including, in the draft European Constitution's new formula - at regional or local level.
37. We also believe that the principles of proportionality, local self-government and proximity must all play an important role in determining what role the EU should play in relation to SGIs.
38. *Proportionality* is particularly important in this context. It means that the content and form of EU action must be proportionate to the object to be achieved, and must not exceed what is necessary to achieve the Union's objectives. *Local self-government* (now referred to in Article 5 of the draft Constitution) is defined in the Council of Europe's European Charter of Local Self-Government, signed by all Member States and ratified by almost all. In essence, it is for local governments to decide on how, within their competences, to provide local services. And *proximity*, in the sense that decisions should be taken as closely to the citizen as practicable.
39. We believe that, taking these principles separately or together, the conclusion is straightforward. There is no case for EU action to regulate SGIs provided at local or regional level. It is not for the European "level" to intervene in relation decisions on whether services should be provided in-house, tendered, or privatised. These decisions should remain at local or regional level, where elected representatives are in the best position to judge the merits, on behalf of and informed by their citizens and electors. European competition law is, we believe, not appropriate for dealing with public services provided within a defined local or regional territory, and aimed wholly or mainly at serving the local or regional population. The recent Altmark ECJ decision does not, in our view, contradict this conclusion.

## **CEMR's proposals - changing law and practice**

40. The above principles mean that, in our view, there is no case for the Commission seeking to regulate local or regional services, e.g. by compulsory competitive tendering (liberalisation) proposals. But we recognize that the present law is unsatisfactory, and needs to be changed if greater legal security is to be achieved.
41. First, we believe that the objectives of the Treaties should include an express reference to public services and SGIs. We made recommendations to this effect to the Convention, but at this stage the draft Constitution does not reflect our (or many similar) proposals. CEMR proposed the following objective:

"to respect and promote the role and value of high quality public services and services of general interest, as a vital means of ensuring that the human rights and essential needs of citizens are met, and that proper social protection is afforded."

This differs from Question 1's formulation, which refers to the Community having an objective to "develop" high quality SGIs. We believe that the word "develop" is too strong, since it is not the Community's role to substitute itself for those responsible for the provision and development of SGIs.

42. We have also made proposals for a possible redraft of Article 16, to strengthen the role of SGEIs; and in particular, we have proposed a new Treaty provision to define and limit the scope of Article 86(2):

"The provisions of Article 86(2) shall not prejudice the powers of regional and local public authorities, in conformity with the Member States' legislation, to decide democratically on the best means of providing services of general economic interest that operate wholly or mainly within their respective territory or for the benefit of their respective citizens."

43. However, we are conscious that we cannot, having regard to the terms of the draft European Constitution, limit ourselves to changes in the existing Treaties or the adoption of a new European Constitution. We need practical steps to halt the drift from SGIs to SGEIs, in particular at local and regional levels.
44. In this regard, we must record that our member associations, though unanimous in the end to be achieved, have differing views on the tactical means to be used for this purpose. A minority of our members favour the adoption of a European framework directive that would lay

down the general principles that should apply to all SGEIs - in particular those identified in the Green Paper (universal service, continuity, quality, affordability, user protection). These members believe that such values and principles must have the same importance and legal weight as the principles which regulate the internal market. A majority of our members, however, do not believe that a legal basis is appropriate at this stage, at least in relation to SGEIs provided by local and regional governments. They do however consider that non-binding Guidelines might help to provide a greater degree of clarity, including the above principles.

45. Such Guidelines could also help to clarify the borderline between commercial SGEIs and non-commercial SGIs. As indicated above, we believe that all public services that are not primarily commercial in their purpose should be excluded from the category of SGEI. The existence of private operators in the field is, or should be, irrelevant to defining a service as an SGI or SGEI. We do not think a long exhaustive list of services would be helpful. One possible formulation could be:

"Services provided (directly or through an external entity) by local or regional authorities in the general public interest, and mainly for social or environmental rather than commercial purposes, are not considered to be Services of General Economic Interest. This is irrespective of whether there are commercial operators willing to provide such services, or aspects of such services."

46. In addition, we believe that the Guidelines could clarify that services provided by a local or regional authority within their territory and mainly for their local population will not, prima facie, have a significant effect on cross-border trade. Although any decision on breaches of European competition law is ultimately for the courts, we believe that such a general Guideline would be helpful in setting the "tone" of the debate.
47. Furthermore, with regard to the related issue of state aids, we welcome the Altmark case conclusion that public subsidy for public service requirements does not constitute state aid. Nonetheless, we still believe that it would be helpful to have a block exemption from the state aid rules for such subsidy for local and regional government services. This would reduce legal uncertainty in this field and avoid the potentially heavy administrative requirements that could fall on both local and regional authorities and the Commission.
48. We have also been concerned about the impact of the GATS (WTO) negotiations on EU and national legal systems in relation to SGIs and public services. This is not the arena to go into detail, but for the

record, CEMR opposes international agreements or decisions to liberalise public services provided by local and regional governments. The reasons we have set out in this response, for limiting the EU's own role, apply a fortiori to these international negotiations.

49. Finally, but importantly, we emphasize our support for *voluntary* bench-marking and comparisons, at European level, of SGIs. We believe in high quality public services - indeed this is our main objective - and local and regional authorities increasingly face similar issues, problems and challenges. We would be pleased to work with the Commission on relevant bench-marking approaches. We also contend that, in evaluating services, it is essential not to limit one's approach to economic factors. The social and environmental aspects are also important components. We are concerned that current proposed changes to the EU's public tendering regime could restrict public authorities from being able to take relevant social and environmental factors into account.

### **The Green Paper's questions**

50. This response has dealt, at least by necessary implication, with many of the specific questions posed in the Green Paper. However, for ease of reference, and to add a few aspects on matters not directly addressed so far, we attach an Annex giving our brief responses.

### **Concluding remarks**

51. For over 50 years, CEMR has promoted a strong, integrated Europe based on the principles of local and regional self-government. We have in recent months supported the work of the European Convention to this end, and have welcomed the recognition of the local and regional dimension in the draft Constitution. We are convinced that the future Union needs to have the support of citizens across Europe, and it needs to respond to them.
52. In this response to the Green Paper, we have argued strongly against the imposition through European law of compulsory competitive tendering of public services and services of general interest provided by elected local and regional governments. We emphasize that this is not out of any lack of commitment to the aims of European construction and integration. On the contrary, it is precisely because we believe that the successful future of the Union depends on there being a proper system of multi-level governance, in which each sphere or level of government is accorded its proper place and responsibilities.

53. For us, local and regional democracy are essential components of European democracy and governance. The Commission and indeed all of the Union's institutions need to be careful not to seek to intrude into what are properly the responsibilities of other democratic spheres of government. The essence of local and regional democracy is that citizens elect their representatives, who are accountable to them. Local and regional services are at the heart of this issue of democratic accountability. We cannot build a popular united Europe without respecting Europe's grassroots democracy and diversity.

## **ANNEX**

### **SGIs: CEMR'S RESPONSES TO QUESTIONS POSED BY THE GREEN PAPER**

The following sets out CEMR's responses to the questions submitted in the Green Paper which are of relevance for local and regional services. Please note that responses are not provided to all questions.

### **What kind of subsidiarity?**

(1) *(a) Should the development of high-quality services of general interest be included in the objectives of the Community? (b) Should the Community be given additional legal powers in the area of services of general economic and non-economic interest?*

(a) CEMR has proposed that one of the objectives of the Union should be "to respect and promote the role and value of high quality public services and services of general interest, as a vital means of ensuring that the human rights and essential needs of citizens are met, and that proper social protection is afforded."

We are not convinced that the "development" of SGIs should be included as an objective, as it is not the Community's role to substitute itself for those responsible for the provision and development of SGIs.

(b) In accordance with the principles of subsidiarity, proportionality and local self-government, we believe that, as far as SGIs and SGEIs delivered at the local and regional level are concerned, the answer should be no.

(2) *(a) Is there a need for clarifying how responsibilities are shared between the Community level and administrations in the Member States? (b) Is there a need for clarifying the concept of services without effect on trade between Member States? (c) If so, how should this be done?*

(a) We agree that there is a need for some clarification as regards where responsibilities lie. However, we believe that the principle of subsidiarity and proportionality should be at the core of all considerations as regards the responsibilities at Community level for Services of General Economic Interest. Subsidiarity in this context obviously includes the local and regional levels. The principle of proportionality is equally applicable in this context.

(b) Yes, there is a need to clarify in particular that the provision by local and regional authorities of SGEIs does not affect trade between Member States in any significant or relevant way that could justify the intervention of European competition law.

(c) Such a clarification could be achieved through an amendment to the Treaty, although guidelines could also contribute to providing greater legal certainty.

(3) *Are there services (other than the large network industries mentioned in para. 32 for which a Community regulatory framework should be established?*

We do not consider that any Community regulatory framework should be established for services provided by local and regional authorities. In accordance with the principles of subsidiarity, proportionality, proximity and local self-government, Community law should not oblige local or regional governments to tender out Services of General Interest provided by them within their territory to serve, wholly or mainly, their local populations. These are democratic choices in which the EU should not have the power to intervene.

In particular, the fact that some market exists or is developed in relation to a specific type of SGI should not justify the compulsory liberalization of that service at Community level. As emphasized in our submission, there is an urgent need to redefine and clarify the borderline between SGIs and SGEIs. However, where a local or regional authority decides to tender out an SGEI, it must of course apply the relevant procurement rules and principles.

### **Sector-specific legislation and general legal framework**

*(5) Is a general Community framework for services of general interest desirable? What would be its added value compared to existing sectoral legislation? Which sectors and which issues and rights should be covered? Which instrument should be used (e.g. directive, regulation, recommendation, communication, guidelines, inter-institutional agreement)?*

A majority of CEMR member associations oppose a legally binding framework for Services of General Interest. CEMR supports a non-binding instrument, possibly in the form of guidelines, provided that its purpose is to clarify the concept of Services of General Economic Interest and to limit the ambit of SGEIs to truly commercial services, and not to services whose primary purpose is social or environmental (even if there are private sector operators in the relevant field of activity).

A minority of our members favour a Framework Directive, provided that this is for the purpose only of clarifying the key principles of general interest, as a counterbalance to, and limitation of, the rules on competition.

## **Economic and non-economic services**

*(7) Is it necessary to further specify the criteria used to determine whether a service is of an economic or a non-economic nature? Should the situation of non-for-profit organisations and of organisations performing largely social functions be further clarified?*

Yes, there is a clear need to clarify the criteria that are used to determine whether a service of general interest is economic or not, in particular with a view to limiting the growing trend to consider SGIs as “economic”. CEMR believes that it is not sufficient or appropriate to base such a classification mainly on the existence or not of private operators willing to provide a particular service in another Member State. The nature of the service itself must be considered, and in particular its social or environmental character.

*(8) What should be the Community's role regarding non-economic services of general interest?*

CEMR believes that the Community should not have legal competences as regards non-economic services of general interest. We believe that the Commission could play a role, on a voluntary basis, in working with local and regional government so as to promote good practice and benchmarking.

## **A common set of obligations**

*(9) Are there other requirements that should be included in a common concept of services of general interest? How effective are the existing requirements effective in terms of achieving the objectives of social and territorial cohesion?*

We believe that local and regional services need to be treated in a different way from pan-European SGEIs. Whatever the merits of a Community framework for pan-European SGEIs, local and regional services should only be subject to guidelines at Community level, with the concepts of Universal Service, Continuity, Quality of Service, Affordability, etc. set out as principles rather than requirements. Furthermore, CEMR believes that the Green paper does not sufficiently address the need to provide specific support for disadvantaged groups as one of the principles underpinning SGIs.

*(10) Should all or some of these requirements be extended to services to which they currently do not apply?*

As mentioned above, by definition, these principles should not apply to local and regional services, although guidelines and benchmarking could be used at Community level.

## **Definition of Obligations and Choice of Organisation**

(18) (a) Are you aware of any cases in which Community rules have unduly restricted the way services of general interest are organised or public service obligations are defined at national, regional or local level? (b) Are you aware of any cases in which the way services of general interest are organised or public service obligations are defined at national, regional or local level constitutes a disproportionate obstacle to the completion of the internal market?

(a) Currently there is no specific Community legislation regulating services of general interest delivered at the local or regional level. We therefore cannot provide any concrete evidence in this respect. However, the Commission's proposal for a Regulation on public service obligations in passenger transport would (if pursued) have a considerable impact on the way public transport services are organized at the local and regional level, as it would impose compulsory tendering for all local and regional public transport services, thus restricting local and regional government's democratic choice in organising their services. This is at the heart of our concerns – that over the coming years, more and more compulsory competitive tendering will be imposed by the EU on local and regional governments, thus diminishing the scope of local and regional democracy.

We should point out that some existing Community rules and legislation have however had indirect effects on SGIs delivered at local and regional level. EU public procurement legislation considerably restricts the freedom of choice of local and regional authorities in relation to tendering and tender evaluation. Under current law, it is very difficult for an authority to justify awarding a contract on the basis of relevant but non-economic considerations – i.e. relevant environmental or social factors. The Helsinki Bus case provides a good illustration of this difficulty – the contracting authority was taken to court for non-compliance with the Public Procurement Directives because it chose a more expensive bidder that offered more environmentally "friendly" buses. Although, in this case, the Court ruled in favour of Helsinki, thus making it clear that criteria that are not narrowly economic can be used when awarding a tender, this may no longer be the case in the future. This is because the Commission and Council are seeking to amend the directives to ensure that it is not possible to take into account criteria that are not narrowly economic.

Although it can be argued that the public procurement directives do not affect the way public services obligations are defined, they can, as we have pointed out above, affect the quality and choice of the service provided.

(b) No, we know of no cases in which the way SGIs are organized or public service obligations defined, at regional or local level have constituted any disproportionate obstacle to the completion of the internal market. Indeed,

we do not believe that there could, in any normal circumstances, be any such case in respect of purely local or regional services.

*(19) Should service-specific public service obligations be harmonised further at Community level? For which services?*

No, there should be no harmonization for local and regional government services.

Public service obligations should only be set out at Community level for pan-European SGEIs.

*(20) Should there be an enhanced exchange of best practice and benchmarking on questions concerning the organisation of services of general interest across the Union? Who should be involved and which sectors should be addressed?*

Yes, CEMR believes that, on a voluntary basis, exchange of best practice and benchmarking could be promoted and developed at EU level.

## **Financing**

*(22) Should a specific way of financing be preferred from the point of view of transparency, accountability, efficiency, redistributive effects or competition? If so, should the Community take appropriate measures?*

It is not a Community competence to decide on the means of financing local and regional services of general interest. In accordance with the principle of subsidiarity, it is up to the relevant authority to take such decisions.

*(23) Are there sectors and/or circumstances in which market entry in the form of “cream-skimming” may be inefficient and contrary to the public interest?*

We are not clear what exactly is meant by market entry in the form of “cream-skimming” as there is no explicit reference to this in the Green Paper. However we wish to put forward two points in this respect:

Market entry in the form of “cherry-picking” is generally found in the case of deregulated services. The results in these circumstances are generally negative in terms of efficiency, quality of the service and the fulfillment of public service obligations. Operators end up competing for the most profitable sections of the network, and the local authority has to tender out for those parts of the network, which are not profitable. Local authorities’ experience of public transport bus deregulation in the UK provides one key example; this resulted in a decrease in quality of service and an increase in

prices. The environmental impact was also negative because the system was inefficient (many buses running in the most profitable areas) and because bus usage fell dramatically (alongside an increase in private vehicle use).

Another circumstance where market entry can be contrary to the public interest can be found in the case of 'loss-leader' bids. In existing tendering experience at local and regional level, one significant problem encountered has been the ability of some private sector companies to submit 'loss-leader' bids, which have the effect of forcing the public sector "competitor" (who by definition cannot underbid the actual cost) out of the market in the first tendering round. This can lead, and has led, to the establishment of virtual monopolies for some private sector companies in some sectors. It involves the opposite of a level playing-field.

## **Evaluation**

*(25) How should the evaluation of the performance of services of general interest be organised at Community level? Which institutional arrangements should be chosen?*

CEMR believes that only pan-European SGEIs that are already subject to Community regulation should be subject to an evaluation of their performance at EU level, taking into account economic, social and environmental factors in a balanced way. For all other SGIs, evaluations of their performance are the responsibility of the relevant authority at national, regional or local level. As mentioned above, exchange of experience and benchmarking at European level should be promoted on a voluntary basis. The Open Method of Coordination could be envisaged in this respect.

*(26) Which aspects should be covered by Community evaluation processes? What should be the criteria for Community evaluations? Which services of general interest should be included in an evaluation at Community level?*

As mentioned above, only pan-European SGEIs that are already subject to Community regulation should be subject to an evaluation of their performance at EU level. If, contrary to our proposals, formal Community evaluations were to take place in relation to SGEIs provided by local and regional governments, CEMR believes that Community evaluations should be as comprehensive as possible taking into account economic, social and environmental considerations in a balanced way. In its response to the Commission's "methodological note for the horizontal evaluation of services of general economic interest" (COM(2002)331), CEMR had already urged the Commission to develop appropriate indicators relating to the environmental and social dimension of SGEIs, and to strive to collect

sufficient data on the environmental and social impacts of Community regulation on SGEIs so as to achieve fully comprehensive assessments.

### **Trade Policy**

*(29) Is there any specific development at European Community internal level that deserves particular attention when dealing with services of general interest in international trade negotiations? Please specify.*

There is great concern within local and regional government across the EU, about the possible consequences of current negotiations within the framework of GATS, in terms of compulsory liberalization of SGIs delivered at local and regional level. CEMR therefore urges the Commission to take full account of these concerns in its position within the GATS negotiations, and not to negotiate within the GATS framework in relation to services for which local and regional government in the EU are responsible.

### **Development Co-operation**

*(30) How can the Community best support and promote investment in the essential services needed in developing countries in the framework of its development co-operation policy?*

CEMR believes that capacity-building at local level is of vital importance for essential service delivery in developing countries. This is increasingly recognized by the UN, the World Bank, etc. Local governments also have a key role to play in ensuring delivery of the Millennium Development Goals. Accordingly we have proposed that the EU development cooperation policy should target local government as a sector. Local authorities in the EU already play a significant role working with our counterparts in the South, but to date EU development policy has not taken this sufficiently into account.