



**COUNCIL OF EUROPEAN MUNICIPALITIES AND REGIONS
CONSEIL DES COMMUNES ET REGIONS D'EUROPE**

CEMR Response to the Commission's White Paper on Services of General Interest

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CEMR Response
to the Communication from the Commission to the European
Parliament, the Council, the European Economic and Social
Committee and the Committee of the Regions

White Paper on Services of General Interest

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Introductory comment

1. CEMR welcomes the European Commission's White Paper on Services of General Interest, which takes into account the result of the consultation of the Green Paper.
2. We also welcome that the Commission published the White Paper as a contribution to the ongoing discussion and that it does not intend to conclude the debate at this stage.
3. CEMR would like to propose to have a broad political debate about all the elements identified by the Commission. It is important to have a clear vision of the role of public services in Europe and in the member states. Local and regional governments should be strongly involved in this debate.
4. As far as a European approach of services of general interest is concerned, we want to stress that the principle of subsidiarity and the right of local self-government, guaranteed in some Member States by constitutional law, and in many others by law or longstanding practice, need to be taken into account.
5. In this context, we want to draw attention to article 6 (3) of the EU Treaty, which states that the Union respects the national identities of the member states and we believe that this recognition is essential. The statement finds further clarification in article I-5 of the European Constitution which emphasises that regional and local self-government are key aspects of national identities.
6. As already expressed in our response to the Green Paper on Services of General Interest, we believe that the distinction between Services of General Economic Interest (SGEIs) and Services of General Interest (SGIs) is vital, since it determines which services are, and are not, within the purview of the European Treaty rules on competition.
7. This distinction between SGIs and SGEIs is not reflected in the White Paper, whereas the European Commission distinguished in its Green Paper on SGIs between (1) services of general economic interest provided by large network industries, (2) other services of general economic interest and (3) non-economic services and services without effect on trade. This distinction acknowledges that there is a major difference between the different kinds of services. The European Parliament, in its resolution of 14 January 2004 on the Green Paper on SGIs, also considered this distinction appropriate and – with reference to the principle of subsidiarity - considers European legislation not appropriate for the third case.
8. In this regard, we note that the Commission intends to focus on the large network industries that have a clear Europe-wide dimension. We believe this emphasises the importance of the above distinctions, and the need to avoid action at European level in relation to purely local services.

On the content of the White Paper, CEMR would like to make the following comments:

2. A shared responsibility of public authority in the Union

2.1 An essential component of the European model

9. We welcome in particular the recognition that Services of General Interest are one of the pillars of the European model of society and that they remain essential for ensuring social and territorial cohesion and for the competitiveness of the European economy.
10. We understand that the European Commission, in line with the principles set out in Article 16 of the European Treaty and in Article 36 of the Charter of Fundamental Rights, has a specific role to play as far as the services of general economic interest are concerned.

2.3 A shared responsibility of the Union and its Member States

11. CEMR agrees to the Commission's opinion that it is primarily for the relevant national, regional and local authorities to define, finance and monitor services of general interest. We also share the comments on the Green Paper, which the European Commission has received, that it is not necessary to bestow the Community with additional powers in the area of services of general interest.
12. The European Constitution will provide a legal basis for the European Commission to propose Community action in the field of services of general economic interest (Art. III-166). Once again this underlines the need for a sensible distinction between SGIs and SGEIs.
13. Since the European Commission itself does not repeat its distinction provided in the Green Paper, we assume that it would classify most services to be of economic interest. For CEMR's part recent case law of the ECJ has tended to go beyond what we consider a common sense and reasonable definition of "economic", with a risk that many purely local services of a social, environmental and cultural character are being potentially sucked into an inappropriate framework of European competition law. This is why we feel there is an urgent need to clarify the existing position as between SGIs and SGEIs, and to consider the way to rectify the present unsatisfactory situation.
14. We also believe that the principle of proportionality needs to be kept in mind when dealing with SGIs at European level. Any European action must be proportionate to the object to be achieved, and must not exceed what is necessary to achieve the Union's objectives.
15. CEMR notes the European Commission's statement that the provision of services of general interest can be organised in cooperation with the private sector or can be entrusted to private or public undertakings. However we are concerned that the Commission in the further debate on the provision of these services only concentrates on the role of public authorities to define the public service obligations, to regulate

the market and to control of the operator. Their role as provider is not recognised in the White Paper and not taken into account in the further argumentation.

3. Guiding principles of the Commission's approach

3.1 Enabling public authorities to operate close to the citizens

16. As far as the guiding principles of the Commission's approach are concerned, CEMR agrees with the conclusion of the consultation: "the services of general interest should be organised and regulated as closely as possible to the citizens and that the principle of subsidiarity must be strictly respected."
17. In general we believe that it is not for the EU to intervene in the decision on how a service is provided. 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.
18. The Commission will therefore need to justify on each individual initiative that it has fully taken this consideration into account. Again, we want to refer to the need to respect local and regional self-government and to the principles of subsidiarity and proportionality as laid down in the European Treaties and the Constitution.
19. We welcome the statement that the Commission intends to concentrate on the large network industries that have a clear Europe-wide dimension. This supports CEMR's opinion that there is a need for a clear dividing line between SGIs and SGEIs. SGIs with purely local character do not distort or have hardly any disturbing effect on the internal market and therefore need to be treated differently than those who are competing at European level. Therefore it seems necessary to agree on a European framework that regulates the different treatment of these respective services.

3.2 Achieving public service objectives within competitive open markets

20. The White Paper praises the positive effects of the liberalisation of certain services, which it contends has led to an increase in efficiency, affordability and quality. However, we think that an in depth evaluation should be commissioned on the basis of a mid-term or even long-term perspective. Experiences outside Europe (e.g. USA, Canada) could be taken into account in order to get a fuller picture of the effects of the liberalisation. The European Parliament, in its resolution on the Green Paper, suggests considering "the impact on employment, users' needs, safety, the environment, and social and territorial cohesion, before initiating new phases of liberalisation". CEMR supports this suggestion.
21. We agree that Community law has an impact on SGEIs and that article 86 (2) addresses the cases, which are exempted from the application of the European competition law. However there remains uncertainty

on what provisions by local and regional authorities of SGEIs do not affect trade between Member States in a significant or relevant way and therefore are fully compatible with the European competition law.

22. As far as public service compensation is concerned, the Commission's proposals of the so-called 'Monti-package' provide a practical (though not conceptual) basis on how to deal with them in the near future. CEMR has adopted a separate response on the Commission's text.¹ We think however that it needs a broader debate on the important issue of publicly financed services and want to invite the Commission to start a dialogue with the public authorities concerned. CEMR and its member associations are willing to commit themselves to a constructive cooperation with the Commission.
23. The Commission's proposals only concern those cases where the criteria of the Altmark ruling are not met; as long as the criteria of the Altmark ruling are fulfilled, financial compensation does not constitute state aid and is therefore not subject for the application of articles 87 and 88 of the Treaty. However, there remains legal uncertainty for public authorities on interpretation of the Altmark ruling and its impact on the application of the competition rules. We understand (though it is not clearly stated in the White Paper) that the Commission intends to issue its understanding of the interpretation of the fourth Altmark condition. We welcome this but strongly urge the Commission to consult local and regional government on this interpretation at a formative stage, with a view to reaching a consensual understanding on this key issue.

Ensuring cohesion and universal access

24. The principle of universality is generally accepted; however it needs a more differentiated approach in order to distinguish between those services, which are essential and therefore available to all citizens, and others, which are precisely targeted to specific groups with specific needs. This distinction deserves a more in-depth consideration.
25. CEMR supports the requirement that all citizens should have access to affordable high-quality services. However we question the Commission's concept of universal services as being always the right instrument to ensure the provision of SGIs to the citizens.
26. The Commission states that this concept has developed into a major and indispensable pillar of the Community's policy on SGEIs. The Commission describes this concept in its Green Paper, where it is given as a good example from the networking industries (e.g. telecommunications, electricity and postal services). Obligations were imposed on the respective industries in order to provide a defined service at specified conditions to every citizen. In order to ensure the implementation, national regulators had to be established, which were

¹ CEMR response to the "Monti-package" on rules governing compensation for public service obligations

facing a complex and demanding task. This concept seems useful for the great networking industries; but the extent of its applicability to other SGIs needs to be further examined.

Ensuring consumer and user rights

27. In order to ensure the representation and the participation of consumers and to guarantee the users' rights in the definition and the evaluation of services, the Commission states that it needs independent regulators with clearly defined powers and duties, which should also include provisions for the representation and participation of consumers. Even though we understand that the consumers and the users rights are important to be taken into account when it comes to the definition of services of general interest, CEMR would like to refer to the broader public authorities' responsibility, which includes as well other needs like e.g. more vulnerable citizens who usually don't express their views via consumer and user interest groups or environmental and social aspects.

Monitoring and evaluating the performance

28. As far as monitoring and evaluation of public service performance is concerned, wide ranges of respective measures have been introduced in local and regional authorities in recent years. Citizens' demands as well as financial restraints are leading to a continuing process of modernisation of the public administration at local and regional level. There is a wealth of examples of citizens' participation in the decision-making process at local level. We believe therefore that local and regional government are demonstrating their adaptability to changing needs and circumstances.

Respecting diversity of services and situations

29. We fully agree the Commission's statement, that within the European Union, there are differences between various SGIs and the different needs and preferences of the citizens, according to their economic, social, geographical or cultural situations. We support the statement of the European Parliament in its resolution on the Green Paper, that "they display very different characteristics from one Member State to another."

Increasing transparency

30. We agree to the Commission's objective that transparency is a key factor in public policies regarding services of general interest. Transparency has become an accepted and exercised principle in public authorities. Decisions are discussed and taken in public sessions of the respective legislative body where public control is provided by politicians and the media.

Providing legal certainty

31. CEMR welcomes the Commission's intention to make a continuous effort to improve legal certainty regarding the application of Community law, since legal certainty still is a requirement for local authorities. We are however very concerned that the European Court of Justice (ECJ) establishes case law that, in our view, sometimes gives insufficient consideration to the role and task of local and regional authorities.
32. As indicated above, there are still areas where the principle of legal certainty has not been achieved even to a reasonable degree – the SGI / SGEI distinction for example, and also the state aids / public compensation boundary.

4. New orientations for a coherent policy

4.1 Respecting diversity in a coherent framework

33. The Commission's announcement to launch a review of the situation of services of general interest and submit a report before the end of 2005 is of great interest to local and regional authorities. CEMR hopes that they will be consulted in the preparatory phase and would like, together with its member associations, to provide input. We also hope that the report will be published and be subject to a debate, involving all actors concerned.
34. We note that the Commission intends to re-examine the issue whether there is a need for a framework directive on SGIs when the European Constitution will be in force. Until then, there should be a general and well-informed political debate about the future of public services at European level. It is vital to have a clear vision of the role of public services in European society and within the member states. Local and regional governments should be strongly involved in this debate. This should not exclude the possibility of some helpful legislative action in the meantime, e.g. to clarify the distinction between SGIs and SGEIs.

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

35. This chapter concerns the so-called "Monti-package" and CEMR has submitted a separate response to the respective Commission's proposals.
36. In this response we have at several points highlighted the need for a clearer distinction between SGIs and SGEIs. We therefore cautiously welcome the statement that the Commission will also provide "a further clarification of the distinction between economic and non-economic activities". However we request that the Commission enter into a dialogue with local and regional government on this question before unilaterally issuing this clarification.

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

37. CEMR has responded in detail to the Green Paper on PPPs. In the light of the “Stadt Halle” case we consider however that the present law is unbalanced in its application to local and regional authorities’ companies in which there is a small private sector minority holding. As we argued in our response to the Green Paper, the application of the inhouse rule (as provided in the Teckal case) should equally apply to local / regional controlled companies operating purely within their localities.

4.4 Recognising fully the general interest in social and health services

38. As far as the announced initiative is concerned, CEMR will respond to it at the appropriate time, e.g. the Communication on social and health services, the evaluation on SGEIs and the assessment of the water sector.

39. However, our starting point is that the large majority of public social and health services provided on a non-profit basis by local and regional government are not, or at least should not in principle be, considered as services of general economic interest, but rather as services of general interest.

Conclusion

40. The White Paper helpfully puts forward a range of proposals to deal with a series of important questions, and CEMR welcomes this. On the other hand, the White Paper could not and does not provide a clear conceptual and structured framework for, nor a complete picture of, public services and services of general interest across Europe.

41. We would like to appeal to the Member States and the European institutions to engage in a far more rigorous and wide ranging political debate on the future of public services. This debate should not only focus on economic and competition aspects of the respective services, but also social and environmental aspects as well as their wider impact on society.

42. CEMR and its member associations are willing to contribute to this debate, which should also ensure the citizens’ participation.

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