

A critique of the EC green paper on Services of General Interest

by

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1 Introduction

1.1 General

The relationship between public services (or services of general interest – SGI¹) and the treaty of the European Union (EU) has become an increasingly important issue. There are two general issues, both of which also concern the role of democratic politics in the EU:

- whether public services, provided through national and local democratic mechanisms, have equal or greater priority within their sectors than the competition principles of the EU internal market
- the issue of subsidiarity: whether EU law and policies should override or supplement national or local decision-making on public services.

The green paper² is the contribution of the European Commission (EC – or Commission) on these issues. Despite making a number of important points, the Green Paper fails to deal with the fundamental questions at stake. This is partly due to its unwillingness to recognise conflicts between the internal market and competition on the one hand, and the delivery of public services on the other. It is also partly due to deliberate self-limitation, because the Commission has chosen not to draft a new directive as requested, but to offer a paper which asks a series of questions.

This paper offers a critical review of how the green paper deals with the issues. In conclusion, it suggests that the paper, together with other recent initiatives, indicate that the Commission wishes to extend the liberalisation of the internal market further into public services, and that it is willing to use both the internal market and competition rules of the EU, and the GATS negotiations of the WTO, in order to do so, even where these cause conflicts with states' preferred policies on public services.

1.2 Inconclusive structure

The paper is 29 pages long, with five main parts plus an introduction and an “*operational conclusion*” (part 6, para 107), which consists of nothing except an invitation to all interested parties to submit comments and answers to questions. The paper has an annex, “Public service obligations and instruments of Community policy in the area of services of general economic interest”, also covering 29 pages. The function of the annex is not at all clear.³ The paper says that it (para 13): “*sets out public service obligations in more detail, as derived from existing sector-specific legislation and the policy instruments available to ensure compliance with these obligation*”. But the first section of the Annex, on obligations, merely covers the same ground as the paper itself, both referring to general issues and to specific elements in the with identical subheads to the main elements (universal service, continuity, quality of service, affordability, user and consumer protection – all covered in 3.1, and again in the Annex A I.1). The second section of the Annex covers policy instruments which it says ensure ‘compliance’ with these general obligations - regulation, financing, evaluation and ‘trade policy’ (which is in effect a discussion of the impact of GATS). However, ‘financing’ and ‘trade policy’ cannot really be described as instruments to ensure compliance with general obligations of SGI – their role in the annex is to constrain the operation of SGI within the limitations on state aid and the framework of the internal market and GATS.

1.3 “Inherent conflicts” between public services and the internal market

The failure of the paper to recognise conflicts between the internal market rules and public services is its most striking omission. These conflicts have arisen because of the continued development of the internal market and competition policies of the EU. These have had increasingly significant impact on the structure of SGI in member states, through four main mechanisms:

- liberalisation directives prohibiting integrated public sector monopolies – for example in energy, postal services, and rail;
- legal challenges to the funding of public services, for example public transport, based on the treaty's restrictions on state aid;
- legal challenges to direct provision of services by public authorities, or to restriction on provision of services within a country (for example healthcare), based on competition rules;

- liberalisation of trade in services (GATS) at the WTO, where the EC may enter negotiations which can lead to services, for example water, being opened to private competition on behalf of member states.

These conflicts have caused widespread concern and debate, in the European Parliament, in the meetings of the EU council of ministers, at national level, amongst interest groups, researchers, the general public – and in the debates on the proposed new constitution.⁴

Healthcare, for example, have been affected in unforeseen ways by court rulings under EU competition law. Although healthcare systems are said in the treaty to be clearly a national responsibility, the EU treaty has created a complex set of relationships. There are specific EU-level responsibilities for occupational health and safety, medical qualifications, and public health – but as complementary to national systems.

Other parts of EU law affect healthcare systems, however. The availability of cross-border care, regulated under most national health systems, has been the subject of court cases under the ‘free movement of goods and services’; health care providers may be subject to competition law; the pharmaceutical industry is subject to the internal market, while the price of pharmaceuticals is a key element in national health systems; the role of health insurance schemes is affected by the EU insurance directive.⁵

The impact of these overlaps was the subject of a research project, funded by the EC itself.⁶ It concluded that there was a contradiction between EU internal market and healthcare provisions, but that the two were inextricably intertwined: *“in political terms, there appears to be a contradiction between the purpose of the single European Market (SEM) and the manner in which statements in article 152 are widely interpreted...”* [the principle of subsidiarity of health services]. *“the relationships between health servicesand the SEM are intertwined in such a complex manner that it is virtually impossible to separate them”*. It concludes: *“the basic policy choice at European level concerns how best to resolve the inherent conflicts between the SEM and health policy”*.⁷

The green paper, by contrast, cannot even start to discuss how these “inherent conflicts” might be resolved, since it is not prepared to acknowledge the existence of such contradictions. The nearest it gets to doing so is when it acknowledges that the EC has not given priority to securing public services for citizens, because it is taking *“specific direct measures to enforce Community rules in the areas of competition and State aid. This could give the impression of an imbalance in Community action that could ultimately affect its credibility”* (para 33). This is correct in identifying an imbalance, but it is more than a problem of image – it is a real imbalance in the treaty, the directives concerning services of general economic interest (SGEI), and, now, in the Commission’s approach to the question of a draft directive.

The Commission’s wish to avoid recognising conflict perhaps underlies one of the questions the paper says it raises: *“any measures that could contribute to increasing legal certainty and to ensuring a coherent and harmonious link between the objective of maintaining high-quality services of general interest and rigorous application of competition and internal market rules”* (para 13) . This search for a ‘coherent and harmonious link’ may be doomed to failure if there are fundamental contradictions between the objectives of public services and internal market rules.

1.4 Part of wider series of initiatives

This green paper should not be seen in isolation. Since the end of 2002, various directorates of the European Commission have produced initiatives which are intended to extend the use the role of the private sector in public services, especially water. In addition to the green paper, the initiatives include:

- A report on the scope for introducing competition into water services was commissioned by the European Commission (EC) and published at the end of 2002, by DG Competition. It finds little evidence of how competition could benefit the sector, but nevertheless encourages more PPPs.⁸
- An EC *Guide to Successful Public-Private Partnerships* was produced by DG Regio in March 2003 specifically in the context of the ISPA programme, to make its funds more easily available to private sector projects. In is in effect a guide on how to push through PPPs, and in the process collect ISPA grant money, not a guide on how to make best decisions on infrastructure projects.⁹

- The EC's DG Markt published the EU "Internal Market Strategy Priorities 2003 – 2006", in May 2003¹⁰. The paper identified services of general interest, and water in particular, as sectors where the DG wants to open more of the market to private sector operators. Commissioner Bolkestein had already said in a November 2002 speech that he wants to open the water sector to competition.¹¹
- The EC's trade section, DG Trade, handles the EU's negotiations in the World Trade Organisation's (WTO) general agreement on trade in services (GATS). DG Trade has made two sets of proposals concerning water: first, to redefine environmental services, so that water is covered by GATS; and second, requests to many countries to open their water services. These requests were unofficially leaked, and have been published along with a critique.¹²
- An 'EU Water Initiative' (EUWI), a combined initiative from DGs Development, Research, Environment and External Relations, was launched in 2002 at the WSSD in Johannesburg, as an EU contribution to the objectives of sustainable water management, water security, and the millennium goal targets for extending water supply and sanitation.¹³ EUWI partly aims to support the business activities of EU multinational companies by providing aid and subsidies to reduce or remove the risks they have experienced in developing countries. This was developed in close consultation with the companies¹⁴.
- The EC has promised to issue a paper on PPPs in Europe before the end of 2003. This is expected to set out EC thinking on the question of tendering of activities assigned to companies owned by public authorities. It will also concern the rules on concessions: a previous "draft Commission interpretative Communication on concessions under Community law on public contracts" was issued in 2001.¹⁵

2 Why public services matter

2.1 The central notion of "public services"

The green paper is reluctant even to acknowledge the concept of "*public services*", which it rejects as being 'less precise' than the notions of SGI and SGEI (para 19). This is unconvincing. The paper itself uses it as the more central concept when it defines SGEI as covering "*any economic activity subject to public service obligations*" (para 17); it correctly states that the term SGI is not in the treaty, but is extrapolated from SGEI, which is in the treaty (para 16). The paper itself also uses the phrase "public service" throughout when describing broadcasting and when describing the obligations inserted in directives as "public service obligations". The notion of 'public service' is commonly used elsewhere to explain the more awkward concepts of SGEI or SGI - for example by the European Parliament in explaining the Citizen's Charter right of access to SGEI – "the phrase SGEI applies to the provision of public services...for the population as a whole"¹⁶ – and it is used in EC regulations.¹⁷

The green paper correctly declines to define public services by a list of services. It points out that the boundary of economic activity changes over time for various reasons, and so "*it would neither be feasible nor desirable to provide a definitive a priori list of all services of general interest that are to be considered «non-economic»*" (para 45) .

2.2 Why do public services matter?

The green paper makes a number of interesting contributions towards identifying why public services are important.

It opens by referring to shared values, the quality of life, economic development, rights and democratic governance: "*They are a part of the values shared by all European societies and form an essential element of the European model of society. Their role is essential for increasing quality of life for all citizens and for overcoming social exclusion and isolation. ... the efficiency and quality of these services is a factor for competitiveness and greater cohesion, in particular in terms of attracting investment in less-favoured regions...also a condition for the smooth functioning of the Single Market and for further economic integrationthese services are a pillar of European citizenship, forming some of the rights enjoyed by European citizens and providing an opportunity for dialogue with public authorities within the context of good governance*" (paras 2-4)

Later, the notion of ‘public interest’ is used in explaining that the concept of universal service “*has allowed public interest requirements to be addressed in various domains, such as economic efficiency, technological progress, environmental protection, transparency and accountability, consumer rights and specific measures regarding disability, age or education. The concept has also contributed to reducing the levels of disparity in living conditions and opportunities in the Member States.*” (para 53) It treats this ‘general interest’ as the fundamental reason why the state has to deal with ‘market failure’: “*...it has always been the core responsibility of public authorities to ensure that such basic collective and qualitative needs are satisfied and that services of general interest are preserved wherever market forces cannot achieve this*”.

The paper also refers to a specific notion of a ‘European general interest’: “*These industries have a clear Community-wide dimension and present a strong case for developing a concept of European general interest.*” (2.1, para 32). The reference here to “*a concept of European general interest*” has been used by the EC at least since its communication on SGI in 1996¹⁸, to refer to these sectors where liberalisation directives have been accompanied by clauses on public service obligations.

Finally, the section of the annexe on evaluation contains an interesting acknowledgement that a technical report from the Commission cannot substitute for or summarise the politics of a public debate on SGI: “*the Commission cannot encompass, summarise and present a consolidated view representing all the often diverging views of the different interested parties on the performance of services of general interest*” . However, this paper then simply repeats the identical fine words used in its evaluation paper in 2002 about public participation, as proposed by the parliament (annex, paras A72 and A73: see also evaluation paper, 3.1.d¹⁹). This green paper, like the evaluation paper itself, contains no proposals that would make these aspirations a reality:²⁰ but the paper as a whole would be greatly improved if similar democratic principles were also applied to the discussions on GATS, liberalisation, and regulation.

These fundamental points could serve as a working description of why public services matter. They could then be set alongside a similar statement of reasons why competition and the internal market matter; and it would then be possible to discuss how to assign relative priority to these sets of principles in cases of conflict.

But the paper does not do this. It does hint at the conflict involved in the role of the state in a market economy: “*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*”(para 4). But it then continues by describing the creation of the internal market and the later liberalisation of SGEI, and the benevolent effect of these liberalisations, and so *being liberalised* becomes a key function and a core virtue of public services.

3 Some critical issues in the paper

3.1 Ignoring the European Parliament request for a framework directive

A preliminary point is that Commission has not done what it was asked to do. The paper notes that: “The European Parliament suggested the Commission should present a proposal for a framework directive on services of general interest and the Council also asked the Commission to look into this question” (para 9). The paper does not however offer a draft framework directive. Instead, it says that it will ‘launch a debate’, on four issues, (para 12) only one of which concerns “a possible framework directive”. The paper gives no reason for mentioning, and then ignoring, explicit requests from both the parliament and the council.

The Commission has previously acted in the same way to ignore or revise specific requests from the parliament and the council of ministers concerning public services. The evaluation paper of 2002 ignored significant parts of a request for evaluation of all SGI by the Nice council, and a request from the parliament for evaluation of the impact of liberalisation.²¹ A draft commentary from the European parliament notes with exasperation: “*To date, the Commission has postponed and delayed its response to the repeated requests of the Council and Parliament. Its shilly-shallying on the issue of state aid and the mediocre quality of its communication on horizontal evaluation pose problems.*”

Instead, the green paper states that it will deal with four issues, without explaining where they come from (para 12):

- “*the scope of possible Community action that implements the Treaty in full respect of the principle of subsidiarity*” (discussed in part 2.2 of the paper, paras 38-42)
- “*the principles that could be included in a possible framework directive or another general instrument concerning services of general interest and the added value of such an instrument*” (discussed in section 3)
- “*the definition of good governance in the area of organisation, regulation, financing and evaluation of services of general interest in order to ensure greater competitiveness of the economy and efficient and equitable access of all persons to high-quality services that are satisfying their needs*” (discussed in section 4)
- “*any measures that could contribute to increasing legal certainty and to ensuring a coherent and harmonious link between the objective of maintaining high-quality services of general interest and rigorous application of competition and internal market rules*” (see above).

The fourth issue seems a heartfelt wish rather than a realistic policy issue – the wish to find that competition and the internal market will of themselves be sufficient to generate good SGI, through a metaphysical ‘coherent and harmonious link’. This question does not seem to be discussed anywhere in the paper - section 5 of the paper, where it might be expected, is concerned with trade and development policies and globalisation, mainly GATS.²²

The rest of the paper does not however reach any specific conclusions on these issues, but asks questions in relation to them.

3.2 Subsidiarity

3.2.1 Conflicts with subsidiarity

The paper acknowledges the Amsterdam treaty’s recognition of SGI as amongst the EU’s ‘shared values’, referring to the ‘European model of society’, and recognises the diversity of practice in member states and regions: “*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*” (para 11).

But this recognition needs to be offset against the fact that the EC currently treats the internal market as taking priority over SGI decisions. This sense of priorities cannot be described as a particularly European value, rather a shared value of global and continental trading zones: the same priority of trade ahead of public services can be seen in for example NAFTA, and globally in the GATS provisions of the WTO.

The EC’s current practice also restricts the rights to make democratic choices. One clear example is the electricity directive, which as the paper itself says later prohibits any member state from deciding against liberalisation. This is a much greater restriction on democratic decisions than exists in the USA, for example: following the California energy crisis, most US states froze or reversed their plans to liberalise electricity markets. In Australia, too, individual states were allowed to make their own decisions about liberalisation and privatisation – having seen the experience of Victoria, the state which pioneered liberalisation and privatisation, the other states decided against it. But no EU country can legally take such a decision without being in breach of the Electricity Directives which impose an EU-wide prohibition on vertically integrated public sector systems. This restriction on democratic decision even extends to accession states before they are even members, as they are required to adopt the *acquis communautaire* of existing EU legislation.

The paper correctly points out that “*The Treaty does not mention the functioning of services of general interest as a Community objective and does not assign specific positive powers to the Community in the area of services of general interest.*” (para 29) . It then acknowledges that states, regions and local councils are responsible for arranging SGI; but the community has “*competencies in areas that are relevant for SGI, such as : the internal market...*”; and then adds that “*The competencies and responsibilities conferred by the*

Treaty provide the Community with a whole range of means of action to ensure that every person in the European Union has access to high-quality services of general interest.” (para31).

The next paragraph adds a restatement of state, regional and local responsibility for SGI but adds that: *“Nevertheless, there is a recognised role for the Community in promoting co-operation and co-ordination in these areas. A particular concern for the Commission is promoting the co-operation by Member States in matters related to the modernisation of social protection systems.” (para 31)*

3.3 Internal Market : overstated benefits of liberalisation of SGEI

3.3.1 Misleading and excessive claims on liberalisation

The green paper gives a misleadingly harmonious picture of the history of the creation of the liberalisation directives. It claims that *“At the same time, the Community has adopted a comprehensive regulatory framework for these services which specifies public service obligations at European level and includes aspects such as universal service, consumer and user rights and health and safety concerns.” (2.1, para 32).*

This is an historically incorrect account. There was lengthy and acute period of disagreement between the EC, industry, unions, member states and the parliament as a result of which the Commission was reluctantly persuaded to address service issues in order to get agreement to the liberalisation directives. The electricity directive for example only mentions these obligations in a dismissive and restrictive manner, as an option available to states: *“Having full regard to the relevant provisions of the Treaty, in particular Article 90, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations..... Such obligations must be clearly defined, transparent, non-discriminatory and verifiable...” (Electricity Directive Article 3, section 2).* There was not a systematic programme of comprehensive regulation specifying public service obligations.

The paper also makes excessive claims for liberalisation, in respect of its developmental role and its effect on prices and services. For example: *“Liberalisation stimulated the modernisation, interconnection and integration of these sectors [telecoms, post, transport and energy]. It increased the number of competitors and led to price reductions, especially in those sectors and countries that liberalised earlier... For consumers in the lowest income brackets, for example, the percentage of personal income needed to buy a standard basket of telephone calls or a standard volume of electricity consumption has fallen in most Member States between 1996 and 2002.” (paras 5, 6)*

These sweeping claims are contentious and there is contrary evidence. On modernisation, for example, public sector agencies like EdF in France or Stockholm Vatten in Sweden have played very important roles in modernising and integrating their sectors, without liberalisation; the liberalisation of railways in the UK has represented a backward step in interconnection and integration; and the development of European networks has been partly driven by public sector strategies of the EC itself.

In electricity, contrary to the Green paper’s assertion that low income consumers have benefited relation to competition and price changes, there is persistent evidence for over a decade that all domestic consumers have fared worse under liberalisation than they do without it. The fall in electricity prices in the early 1990s was 12.5% greater for domestic consumers in countries which did not liberalise, than in the UK, which did – the beneficiaries of competition were large volume business consumers²³; a recent report by the National Audit Office in the UK pointed out that, while large business consumers had experienced a fall of 19% in their prices, most domestic consumers had failed to obtain any benefit at all if they had not switched suppliers²⁴; and a critical review of over a decade’s experience of electricity privatisation and liberalisation in the UK concluded: *“The introduction of retail competition for small electricity consumers has been an economic disaster for small consumers in the UK”*.²⁵

Para 5 more cautiously claims that “*there is, based on the available information, no evidence supporting the thesis that liberalisation has had a negative impact on their overall performance, at least as far as affordability and the provision of universal service are concerned*”: and it claims that the EC has always promoted “controlled” liberalisation to protect the general interest. (this claim of ‘controlled’ liberalisation is also used in the context of GATs discussions by Commissioner Lamy).

Again, this can be challenged. In electricity, the successive bankruptcies of UK electricity generators TXU, British Energy and AES-Drax, accompanied by the concentration of generation in 4 or 5 vertically integrated groups is hardly a success story for liberalisation. There is also strong evidence that rail liberalisation has worsened performance in the UK, with a series of crashes attributable to precisely to the fragmented structure introduced by liberalisation²⁶: yet the EC is pushing forwards as fast as possible with introducing similar liberalisation of railways elsewhere in Europe – the recent DG Markt strategy paper said “*The Council and Parliament should rapidly adopt the “second railway package”The Commission will rapidly bring forward proposals for passenger transport market opening in order to complete the Internal Market in the railway sector.*”²⁷

3.3.2 No evidence for claims concerning employment

Para 6 offers a further unsupported generalisation, this time concerning employment: “*Initial fears that market opening would have a negative impact on employment levels or on the provision of services of general economic interest have so far proved unfounded. Market opening has generally made services more affordable.*”

This is not true in electricity, for example, where 300,000 jobs have been lost in Europe in the last decade,²⁸ much of it attributable to liberalisation and responses to it such as outsourcing of work; and both the UK and Sweden, early liberalisers in electricity, have had to warn major companies about cartel behaviour forcing prices up.²⁹ The job loss has cascaded into other sectors as well, where a drop in demand for co-gen caused by liberalisation has led to the loss of about 10,000 jobs at ABB, for example.³⁰

The final sentence of this paragraph (para 6) claims that liberalisation of the network industries has created nearly 1 million new jobs in the EU. However it is not easy to find the evidence for this claim. The paper refers to the DG paper on 10 years of the internal market³¹, which itself refers (slightly incorrectly) to the edition of European Economy containing the ‘EU Economy 2002’³². But there is no sign of such a claim in that paper. Presumably the claim would be based on the supposed lowering of input prices for industries – which European Economy 2002 estimates as being half a percentage point for the business sector - making them more competitive and so theoretically increasing output and employing more people, but (a) any such gain would have to be offset against job losses in the industries themselves (b) to the extent that price cuts for businesses have been accompanied by domestic prices higher than might have been the case under a unified regime, there is a further loss of jobs from loss of consumer demand to be offset.

There is a reference to the employment effects of network industries in an earlier issue of European Economy³³ This in turn is based on a 1997 consultants’ report for the Commission, which forecast, in telecoms, a net loss of 160,000-200,000 jobs up to the year 2000, but forecast that liberalisation would ‘create or maintain’ 1.3 million jobs by 2005.³⁴

3.4 A template for liberalisation

The paper effectively discusses the possibility of a services directive in paragraphs 37-41. It does so by suggesting that there could be an attempt to generalise from the existing public service obligations in various sector directives in SGEI (para 38-39): “*A general instrument could set out, clarify and consolidate the objectives and principles common to all or several types of services of general interest...*”. This could be used as a template for further sectoral directives: “*thus simplifying and consolidating the internal market in this field*”, and extended beyond the existing set of SGEI by amending the treaty: “*If Community legislation [in other] sectors is considered desirable, an amendment of the Treaty might be the best way of providing an appropriate legal basis.*” (para 40).

Such a directive would not be a framework for SGI or public services, but a framework for their liberalisation. This suggestion of creating a ‘template’ for further future liberalisations is effectively the opposite of what was intended by the requests to the Commission to draft a directive - the objective and reason for those requests was to give EU status to the objectives of SGI themselves, not to extend liberalisation even further.

3.5 Procurement: does corporatisation mean compulsory tendering?

The green paper reiterates the usual acknowledgement that the treaty requires neutrality on the question of public or private ownership, and reiterates that states can decide for themselves whether to provide services through an in-house body or via a third party (para 79).

This fails to reflect yet another area of tension between EC law and public services organisation, this time the tendering requirements of the procurement directives. It seemed clear that a public authority could first decide whether to carry out a function itself – the EU’s neutrality protecting this right - and, if it decided to outsource it, it would be required to invite tenders through a competitive and transparent procedure., but the authorities’ freedom to choose seemed primary.

However, there has been a series of court cases , originating from private companies’ understandable desire to be offered as much business as possible. At the same time, partly in response to national and EU-level restrictions on borrowing, public bodies have been creating more ‘corporatised’, arms-length bodies, owned by one or more public authorities but operating with greater degree of financial and managerial independence than do traditional municipal departments. The result has been ECJ decisions with varying implications: a report for DG Competition refers to a number of rulings, including the BFI case in 1998 where the ECJ ruled that the state may require a public service to be delivered by an organisation over which it exercises control or decisive influence, and so does not have to tender such services³⁵; other cases imply uncertainty where corporatised utilities have formal independence.³⁶

The green paper however takes an extreme position, claiming in effect that existing EU law means that inhouse operations are economic undertakings and therefore subject to competition requirements - and therefore they are in breach of the Treaty’s requirement for competition unless tenders being invited from other (private) bidders. It refers to three ECJ cases (from 1989, 1991, and 1999) and reads: *“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 award special or exclusive rights to in-house service providers, or to favour them in other ways, can amount to an infringement of the Treaty, despite the partial protection offered by Article 86. 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;¹ where the service provider is manifestly unable to meet the demand;² or where there is an alternative way of fulfilling the requirements that would have a less detrimental effect on competition³.”* (para 80).

This would effectively impose the same regime as the Thatcher compulsory tendering regime in the UK which lasted from 1984 to 1997, which required health authorities and later municipalities to invite private tenders before assigning work to an in-house operator. The consequences of these initiatives on employment were dramatic: up to 40% of jobs lost in health services tendering, a worsening of pay and conditions, and an increase in casualisation and insecurity.³⁷

3.6 GATS: trading SGI for business abroad

The paper gives a remarkably prominent place to the negotiations at the World Trade Organisation (WTO) on the General Agreement on Trade in Services (GATS). In the main body of the paper, these are discussed under the heading of ‘globalisation’. In the Annex, the ‘international dimension’ of GATS is one of the four key ‘policy instruments’ (along with regulation, evaluation and financing), and over 4 pages are devoted to outlining the relevance of GATS for SGI in EU countries.

¹ See the Court’s judgment in *Silver Line Reisebüro* (C-66/86, judgment of 11.4.89)

² See the Court’s judgment in *Höfner* (C-41/90, judgment of 23.4.91)

³ See the Court’s judgment in *Vlaamse Televisie Maatschappij* (T-266/97, judgment of 8.7.99)

The paper agrees³⁸ that SGI are not excluded as such from the GATS, and so the countries of the EU may have to liberalise the relevant public services as a result of trade negotiations: *“For those services of general interest that are not excluded from the scope of the GATS, the degree of openness that countries offer is not set automatically and must be the subject of negotiations.”* (para A78).³⁹ The extent to which SGI are liberalised may become determined as part of a bargain in the GATS negotiations on trade, conducted on behalf of all EU member states by the Commission’s trade directorate - the restructuring of a public service may thus become the negotiated price for obtaining a concession in trade practices which creates valuable new business opportunities abroad for EU-based companies.

At this point the Commission could be expected to note that this process has serious implications for SGI which are not envisaged or dealt with under the present law of the EU, and make suggestions. For example, one possibility would be for the treaty to clarify that no trade agreement could be reached by the EU on behalf of member states that restricted member states ability to organise public services in the public interest; or that EU trade negotiators should be required to ensure that the public services of member states were not constrained as the result of any negotiations. But the Green paper does not even note the problem, and offers no suggestions at all. Instead, it treats the GATS as one of the four key ‘policy instruments’ on SGI, implying that the results of negotiations under GATS are to be part of the framework within which SGI in Europe have to operate.

3.7 Financing public services – solidarity or market distortion?

The green paper displays the real contradictions over the question of financing public services, but without resolving them. Whereas for public services to work best, principles of solidarity, equality and risk-sharing are of primary importance, for markets, such mechanisms are seen as public subsidies which risk distorting the level playing field for competing companies – the danger outlawed by the state aid provisions of the treaty.

Thus the green paper makes a welcome acknowledgement of the importance of solidarity criteria for structuring the financing of a public service. It makes the interesting observation that *“Other relevant criteria for selecting a financing mechanism, such as its efficiency or its redistributive effects, are currently not taken into account in Community legislation. Neither have the effects of the selected mechanism on the long-term investment of providers of services and infrastructure and on security of supply been specifically considered”* (para 91) and then asks whether the EC *“should take measures in favour of specific financing mechanisms”* (para 92).

The annex makes a similar argument: *“the criteria and the consequences of solidarity-based financing of social security schemes should be clarified at Community level”* (A62), while noting that the competition requirements mean that *“Other relevant criteria for choosing a financing mechanism, such as efficiency, accountability or its redistributive effects, are not taken into account”*. It then announces that the Commission will launch a debate on *“whether these criteria could lead to the conclusion that specific financing mechanisms should be preferred and whether the Community should take measures in favour of specific financing mechanisms”* (para A63.).

This is a real policy issue for public services and such debates should certainly be developed.

However, the problem is that the Commission currently has no competence to deal with such a question - except through the treaty’s reference to state aid in the context of competition. The main body of the green paper also notes the need for subsidies and solidarity principles (paras 86 and 87) but the idea of a debate on the solidarity criteria does not appear. Instead, it reiterates a plan *“to establish a Community framework for state aid granted for services of general economic interest, and then, if and to the extent justified by the experience gained with the application of this framework, adopt a block exemption regulation in the area of services of general economic interest. Work on guidelines on the application of state aid rules to services of general economic interest is currently underway”* (para 88).

The conflict between the solidarity principles and the ‘state aid’ approach is thus presented, but it is neither acknowledged nor discussed. By implication, the project on state aid rules has priority. It is clear that the EC is frustrated that states have too much exemption for SGI – reinforced by a recent ECJ decision, which ruled

that subsidies to transport operators are not caught by the treaty provisions against state aid, on the basis of four simple criteria for exempting such subsidies⁴⁰. The EC by contrast wants to acquire the authority to limit in advance the legitimate use of state aid, as part of the project to harmonise public services with internal market rules.

4 Final comments: public services and arms dealing

4.1 Failure to deliver

The green paper fails to deliver what the Commission was asked to do. What it does deliver is a further demonstration that the Commission would prefer to believe that the development and extension of the internal market will also, ipso facto, produce the best results for the public services of Europe. Other recent initiatives from the commission – from DG Competition on water, DG Internal Market on the next 3 years, DG Regio on PPPs in accession countries, and DG Trade on GATS, all make clear that the Commission is actively seeking to extend EU-wide principles of liberalisation further into public services.

There remain the clear policy needs which prompted the requests from the parliament and the Council: to address the purposes and subsidiarity of public services and SGI in a way which does not subordinate them to the programme of the internal market. This will still involve:

- the need for to draft a framework directive and/or amendments to the treaty (or constitution), which would provide an EU-level legitimacy for public services,
- reviewing and developing a coherent EU-level policy on the role of the Commission in certain sectors, such as healthcare, where there exist piecemeal remits (not policies on liberalisation of the sector, but policies on healthcare and the EC role)
- suspending other EC initiatives to extend liberalisation into new sectors, such as water, until the parliament and council have decided on a way forward for the framework for public services.

4.2 The new constitution: some amendments

A number of proposals for addressing the fundamental contradiction have been advanced, especially in the context of the proposed new constitution. Article III-6 of the draft sets out a revised version of the existing reference in the treaty, which has the merit of referring to “*services to which all in the Union attribute value*”, proposes that they should be implemented according to “*principles and conditions, in particular economic and financial*” and then that “*European laws shall define these principles and Conditions*”. None of this however changes the subordination of public services to the internal market and the principles of competition. Various amendments have been proposed to this article, some of which seek to give public services higher status and to remove subordination to the competition principles, for example: “given the place occupied by services of general economic and social interest to which all in the Union attribute value as well as their role in promoting economic, social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Constitution, shall ensure that such services operate on the basis of the principles of universality, accessibility, affordability and continuity and on conditions which enable them to fulfil their missions.”⁴¹

Other approaches propose exemption from internal market rules in the treaty for specific services, such as social services: “*essential services for national education, public health, those related to social security (compulsory and traditional schemes), and non-profit making cultural, social and charity services should not be subject to the rules governing the internal market and competition*” (proposed in a draft response from the European Parliament⁴²). A similar approach has been suggested, during the debates in the constitutional convention, to protect these services from the liberalisation pressures of GATS by requiring unanimous agreement between all member states on any international trade agreements covering some services: “*special provisions should apply whenever these international agreements related to transport, culture, education, health or social services*” (as proposed by the French government⁴³).

Another approach is to build on the references that exist in the treaty at present to some services – e.g. health - and develop a broader and more coherent policy at EU level: a view taken by some recent research papers on healthcare in the EU.⁴⁴

Finally, the most obvious solution is highlighted by Article 256 of the treaty (Article III-342 of the draft constitution), which provides general exemption from other EU rules for manufacture and trade in arms: *'any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material'*.⁴⁵ If arms dealing can be given such privileged status, so can public services.

5 Annexe: Provisions in Treaty

Article 2 of the treaty includes a general commitment to *'the strengthening of economic and social cohesion'*, together with the specific but limited undertaking to make *'a contribution'* to a high level of health protection, and again *'a contribution'* to education and training.⁴⁶

Article 5 says that these, and other public services not featuring in stated EU objectives,⁴⁷ are covered by the principle of subsidiarity: *'In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'*⁴⁸

Article 16 provides a more positive commitment: *'given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States shall take care that such services operate on the basis of principles and conditions which enable them to fulfill their missions'*.⁴⁹ This does not commit states or the EU to any particular services or any particular scale or level of provision, but simply to making them work effectively, and even this commitment is *'without prejudice to Articles 73, 86 and 87'*.

Articles 86 states that for public undertakings concerned with services of general interest, member states *'shall neither enact nor maintain in force any measure contrary to' the Treaty, especially the competition rules.... insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'*.

Article 87 imposes a blanket limitation on state aid to undertakings *'in any form whatsoever which distorts or threatens to distort competition'*, but mentions three categories of aid which *'shall be'* compatible with the market: *'aid having a social character, granted to individual consumers'*, aid for natural disasters and for former east Germany; and five categories which *'may be compatible'* – economic development, projects of European interest, economic activity, cultural support, and other.⁵⁰ (article 73 in effect adds another, transport: – aid for transport which is necessary *'for the discharge of certain obligations inherent in the concept of a public service'*)

Article 256 provides general exemption to arms manufacture, in: *'any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material'*.⁵¹

¹ This paper uses the terms public services and “services of general interest (SGI)” interchangeably. The EC dislikes the term public services but, like others, uses the notion of public service to define SGI.

² Green Paper On Services Of General Interest COM(2003) 270 Final
[Europa.Eu.Int/Comm/Secretariat_General/Services_General_Interest/Docs/Com_2003_270_Fi_En.Pdf](http://europa.eu.int/Comm/Secretariat_General/Services_General_Interest/Docs/Com_2003_270_Fi_En.Pdf)

³ It is possible that the Annex originated as a draft answer to the question on a framework directive.

⁴ See Draft Treaty establishing a Constitution for Europe (18.07.2003) <http://european-convention.eu.int/DraftTreaty.asp?lang=EN>, proposed amendments at <http://european-convention.eu.int/amendemTrait.asp?lang=EN>, and the discussions and papers at http://europa.eu.int/futurum/index_en.htm.

⁵ For an overview of the relations between EU laws and healthcare systems, see Jane Lethbridge: “Are Health Systems National?”. April 2002. <http://www.psiru.org/reports/2002-04-H-national.doc>

⁶ “The European Union and Health Services” Paton et al. European Health Management Association 2002
<http://www.tu-berlin.de/fak8/ifg/mig/pdf-dateien/2002/EU&HealthServices/EU&HealthServices1.pdf>

⁷ Ibid, Summary, section 2.1, 5.2

⁸ http://europa.eu.int/comm/competition/publications/studies/water_sector_report.pdf

⁹ http://europa.eu.int/comm/regional_policy/sources/docgener/guides/ppp/ppp_en.pdf

¹⁰ http://www.europa.eu.int/comm/internal_market/en/update/strategy/index.htm

¹¹ europa.eu.int/comm/internal_market/en/update/strategy/index.htm

¹² <http://www.wdm.org.uk/campaign/gats109leaks.htm>

¹³ http://europa.eu.int/comm/research/water-initiative/index_en.html

¹⁴ <http://www.corporateeurope.org/water/infobrief6.htm>

¹⁵ http://europa.eu.int/comm/internal_market/en/publproc/general/concen.htm

¹⁶ AFSJ - Charter of Fundamental Rights - **ARTICLE 36**

http://www.euoparl.eu.int/comparl/libe/elsj/charter/art36/default_en.htm

¹⁷ For example Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport

¹⁸ Bulletin EU 9-1996 General interest services (1/1) General interest services *I.3.4*. Commission communication on services of general interest in Europe. **Reference:** Commission opinion on the Intergovernmental Conference: COM(96) 90; Bull. 1/2-1996, points [1.1](#) and [2.2.1](#)
<http://europa.eu.int/abc/doc/off/bull/en/9609/p103004.htm>

¹⁹ “A Methodological Note for the Horizontal Evaluation of Services of General Economic Interest COM(2002) 331 final http://europa.eu.int/comm/economy_finance/publications/structural_policies/2002/com_2002_331_en.pdf, section 3.1.d

²⁰ For a PSIRU/CPS critique of this see [Critique of the EC paper on Horizontal Evaluation of SGI](#) September 2002

²¹ See “A Methodological Note for the Horizontal Evaluation of Services of General Economic Interest COM(2002) 331 final http://europa.eu.int/comm/economy_finance/publications/structural_policies/2002/com_2002_331_en.pdf

For a PSIRU critique of this see [Critique of the EC paper on Horizontal Evaluation of SGI](#) September 2002

²² There is in fact one clear link between competition and the internal market on the one hand, and public services on the other, is the procurement legislation which requires contracts issued by public authorities to be tendered openly throughout the EU and transparently evaluated.

²³ Jean-Michel Glachant “Le Nouveau système électrique britannique: quels traitements des clienteles et des factuers de production?” in CIRIEC, Cox, H. (Ed), “Service publics, missions publiques et régulation dans l’Union Européenne”, Pedone, Paris 1997.

²⁴ NAO press release “The New Electricity Trading Arrangements in England and Wales”

<http://www.nao.gov.uk/pn/02-03/0203624.htm>

²⁵ Steve Thomas “Why retail electricity competition is bad for small consumers: British experience” September 2002

<http://www.psiru.org/reports/2002-09-E-UKRetailElec.doc>

²⁶ See Press Association May 28, 2003 Potters Bar: 'No Evidence Of Sabotage Or Vandalism'

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²⁸ EPSU estimate

²⁹

³⁰ EPSU

³¹ “The Internal Market – Ten Years without Frontiers”

http://europa.eu.int/comm/internal_market/10years/docs/workingdoc/workingdoc_en.pdf

³² “**The EU Economy. 2002 Review**”

http://europa.eu.int/comm/economy_finance/publications/european_economy/the_eu_economy_review2002_en.htm

³³ European Economy No 4 1999 LIBERALISATION OF NETWORK INDUSTRIES - Economic implications and main policy issues. http://europa.eu.int/comm/economy_finance/publications/european_economy/1999/eers0499en.pdf

“4.5. Impact on employment It is extremely difficult to measure the impact of liberalisation on employment.

Employment is of course influenced by many other factors than regulation and indeed by technological progress.

Furthermore, liberalisation will not only affect employment in the telecommunications sector but also obviously have effects throughout the economy. Though the impact on other sectors is likely to be dominant it is extremely difficult to estimate. In addition, the short-run and long-run impacts are likely to be quite different. As liberalisation has taken place fairly recently in most countries, the evidence of the long-term effects are of course limited. This part discusses the results of projections made by BIPE (1997) of the consequences for employment over the period 2000–05 of rapid or slow liberalisation. The BIPE study makes a thorough inventory of the mechanisms through which liberalisation can influence employment and contains useful observations on the implications of liberalisation for the organisation of the sector, management methods, training, etc. However, it must be emphasised that the estimates have to be treated with much caution because of the limitations of the model used and the difficulty of defining the counterfactual. According to the study, the employment impact will depend on the following factors:

- The extent to which redundancies at the incumbent will be offset by jobs in new entrants.
- The level of productivity of service providers.
- The importance of telecom manufacturing in the country.
- The impact on the rest of the economy depending on the corporate investment multiplier and the impact on household revenues.

The study suggests that liberalisation of telecommunications services will accelerate the diffusion of telecom and lead to price reductions, which will have positive effects on the economy. Lay-offs in the incumbent companies will continue throughout Europe even in countries where liberalisation began early. New operators and service providers will create employment but this will not be enough to offset the redundancies in incumbents. The study estimates that until the year 2000 between 160 000 and 220 000 jobs will be lost in the incumbent operators in the EU as a consequence of liberalisation. This corresponds to the British experience,

where BT — since liberalisation — has laid off 120 000 employees, while new entrants (including CellNet) have only created 40 000 jobs. However, the study estimates that in the long term, liberalisation of European telecom will create or maintain 1.3 million jobs by 2005 throughout the economy. Within the telecom sector rapid liberalisation is forecast to create 93 000 jobs by 2005, whereas slower liberalisation would reduce that number substantially. While incumbents will continue to reduce their staff in both scenarios, new entrants in the sector and in other parts of the economy will create new jobs. In all countries except Ireland ⁽¹⁾ (see Table 14), liberalisation is expected to increase employment. Furthermore, in most countries rapid liberalisation is expected to create more employment impact than slow liberalisation. This is, however, not the case in Belgium and Italy. In these two countries, the lay-off of employees in the incumbent operator is expected to be so much larger in the case of rapid liberalisation than under slower liberalisation that job creation elsewhere will not be enough to offset this impact. Consequently, the overall positive employment impact is larger under slower liberalisation. Nearly all job creation will take place in other sectors than telecom because the telecom sector will become a locomotive for many other sectors. Price reductions will boost purchasing power in all sectors. However, sectors taking part in the information society, exploiting electronic commerce, business consulting, research and development, etc. are likely to benefit the most. In addition, the macroeconomic stimulus which will result from this increase in demand will have further beneficial effects on the employment. The study points out that the employment impact will depend critically on the ability to restructure and adapt traditional telecom operators and the handling of renewal of skills including training policies and the social dialogue in these operators. *Part A Liberalisation of network industries: Economic implications and main policy issues* ⁽¹⁾ In Ireland, the reduction in jobs of the incumbent will not be offset by job creation elsewhere in a slow liberalisation scenario.”

³⁴ BIPE Conseil: ‘Effects on employment of the liberalisation of the telecommunications sector’, study prepared for the European Commission, January 1997. of the telecommunications regulatory package’, COM(1998) 594, 25.11.1998.

³⁵ C-360/96, Gemeente Arnhem and Gemeente Rheden v BFI Holding BV, [1998] ECR I-6821, para. 52; referenced in “Study On The Application Of The Competition Rules To The Water Sector In The European Community” December 2002. Prepared By WRC And Ecologic For The European Commission - Competition Directorate General Study Contract No. Comp/2002/E3/Si2.334052
http://europa.eu.int/comm/competition/publications/studies/water_sector_report.pdf

³⁶ On the relations between the Arnhem case and the Teckal case (ECJ C-107/98, 18th Nov 1999) which ruled on the relative independence of decision-making being a key test, see presentation by Kurt Weltzien of Thommessen Krefting Greve Lund at http://www.jur.uib.no/ansatte/jprkk/UND%5CUND_2002%5CK_Weltzien_on_in-house_services.ppt

³⁷ Contracting culture: from CCT to PPPs The private provision of public services and its impact on employment relations by Sanjiv Sachdev. November 2001. <http://www.unison.org.uk/acrobat/12080.pdf>

³⁸ See Markus Krajewski : Public Services and Trade Liberalization: Mapping the Legal Framework. Journal of International Economic Law Volume 6, Issue 2, July 2003: pp. 341-367

³⁹ The paper (para 101) and the annexe (paras A86-A90) states that in the GATS negotiations the EU has already offered binding commitments in respect of some SGI (telecommunications, private education, environmental services and health and social transport. It claims that these commitments are in respect of services which are “*already open to competition*” and that these commitments have so far had no impact on the way in which services of general interest are regulated or financed.

⁴⁰ Judgment of the Court of Justice in Case C-280/00: Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH 24 July 2003 PRESS RELEASE No 64/03 the court rules that financial support which merely represents compensation for public service obligations imposed by the member states does not have the characteristics of state aid

⁴¹ Proposed by Proinsias De Rossa: see <http://european-convention.eu.int/Docs/Treaty/pdf/810/global810.pdf>

⁴² DRAFT REPORT on the Green Paper on services of general interest (2003/0000(INI)) Committee on Economic and Monetary Affairs Rapporteur: Philippe A.R. Herzog 18 June 2003
<http://www4.europarl.eu.int/registre/recherche/NoticeDetaillee.cfm?docid=36633&doclang=EN>

⁴³ Suggested by Pascale Andreani, French government, during: Convention 09/07: final session and final requests: Debate on cultural exception <http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT%2BPRESS%2BBI-20030710-1%2B0%2BDOC%2BXML%2BV0//EN&LEVEL=2&NAV=S#SECTION1>. However, these proposals fail to provide general protection of all SGI, however (such as post, or water, for example) and fail to provide generalisable principles for deciding what should be excluded.

⁴⁴ As suggested both by Paton et al and by Lethbridge.

⁴⁵ Consolidated Treaty Art 256: see Annexe II for full text

⁴⁶ Consolidated Treaty Art 3, p and q: see Annexe II for full text

⁴⁷ There are some areas where the EU objectives have a specific effect on the provision of public services, most notably the commitment to an environmental policy, whose standards have required the considerable improvement of water, sanitation and pollution control services. And the Treaty of Amsterdam explicitly obliges the European Community to take into account the high level of health protection in all policies thus obliging the European Community to take into account health considerations also in other sectoral policies.

⁴⁸ *Consolidated Treaty Art 5: see Annexe II for full text*

⁴⁹ *Consolidated Treaty Art 16: see Annexe II for full text*

⁵⁰ *Consolidated Treaty Art 87: see Annexe II for full text*

⁵¹ *Consolidated Treaty Art 256: see Annexe II for full text*