

*The Royal Ministry of Trade and Industry*

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**Norwegian comments to the Green Paper on Services of General Interest**

Reference is made to the Green Paper on Services of General Interest (COM(2003)270 final) of 21 May 2003.

Please find attached Norwegian comments regarding some of the questions raised in the Green Paper. We regret not keeping the deadline set in the Green Paper for submitting comments to the questions, but hope our input non the less will be of relevance for the further process.

We are looking forward to take part in future discussions on these issues.

Yours sincerely,

Morten Berg (b.a.)  
Director General

Randi Wilhelmsen  
Deputy Director General

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Postal address	Office address	Telephone	Nærings- og	Our officer
PO Box 8014 Dep	Einar Gerhardsens plass 1	+47 22 24 90 90	handelsøkonomisk	Per S. Nestande
0030 Oslo		Vat no.	avdeling	+47 22 24 05 25
		972 417 890	Telefax	
			+47 22 24 05 05	

## **NORWEGIAN COMMENTS TO THE GREEN PAPER ON SERVICES OF GENERAL INTEREST (COM(2003)270 FINAL)**

### *Introduction*

As a participant in the Internal Market, Norway welcomes this opportunity to take part in the discussion on services of general interest (SGI). COM(2003)270 raises a number of important issues. To increase the awareness of the issues discussed, the Communication was sent on a public hearing in Norway to all ministries as well as to a number of other authorities and organizations.

Taking into account the input received from the hearing, we would like to comment on some of the issues discussed in the green paper.

### *The role of the authorities in production of SGI*

While there is no universal definition of SGI, such services may be described as basic services necessary for a well-functioning society. In our view the national authorities have a right and an obligation to ensure that citizens have access to certain services that are agreed to be fundamental, and to ensure that these services are delivered according to specific conditions, including covering certain geographical areas. Common for a number of SGI is the demand or expectation for continuous and inexpensive delivery to citizens. By use of appropriate instruments, public authorities should have freedom to shape national, regional or local policy for SGI and to ensure that the policy is implemented. It is important to take into account that the distribution and production of certain SGI in remote or densely populated areas may call for special regulatory measures. This could be paying providers for distributing certain services in areas where it is not profitable to operate on commercial terms.

SGI have to a great extent been subject to public control or state ownership. The rationale for this has often been claims that certain markets are natural monopolies or that social or strategic concerns must be secured. Internationalisation, technological development and increasing complexity in economies have changed the basis for regulation and ownership. Moreover, it is acknowledged that the risk of regulation failure may be larger than the risk of market failure. The organisation, costs and financing of SGI have become more transparent and the focus on effective use of resources is stronger.

Regulatory reforms have taken place in Norway and other countries. Public monopolies have been abolished and detailed regulations are replaced by a general focus on framework conditions for actors competing in markets. To the extent that the public sector is involved in both production and regulation of a service, it is essential to distinguish clearly between these two functions.

In order to achieve increased effectiveness from exposing services to competition, it is important that private or public actors actually exist and are prepared to take part in real

competition. A flexible and user-friendly regulation, which also considers possible need for transition periods, may be important for lowering practical barriers for changing policy in this area. Moreover, it is pivotal that the authorities have the necessary skills to act as professional buyers. Knowledge about the legal framework is fundamental. Administrative routines related to procurements must not create unnecessary barriers for participating in call for tenders and thereby lead to reduced competition. It is likewise important that tender specifications are of high quality and describe all relevant requirements in order to avoid diverging interpretations between providers and buyers about what is actually expected.

The geographical size of markets has increased. Markets that used to be local may have developed into regional or national markets and markets are increasingly going beyond country borders. This has increased competition, and competition from foreign actors may also be a substitute for inadequate national competition. To obtain effective competition, minimum requirements may be called for at the community level within some sectors. However, member states are very different i.a. in population density and size. These differences call for possibilities of having national or local solutions for organisation as well as financing of these services.

Competition is increasingly used as a policy instrument in various sectors, but it is important to ensure political commitment if competition is to be introduced into new sectors. Likewise consumer interests and workers' rights must be taken duly into account throughout a liberalisation process. Many sectors have traditionally been dominated by one actor. Hence, it is important to involve competition authorities in the process of liberalisation in order to facilitate effective competition. To this end, the tasks of the regulating and competition authorities must be co-ordinated.

In the hearing, concerns were expressed that in tenders buyers may have to accept offers that are obviously too low to cover the costs of producing a service at the agreed quality level. It would be useful if the Commission could elaborate on the legal state regarding this matter in future reports on SGI.

#### *What kind of subsidiarity?*

Developments over the last few years indicate that the existing rules do not limit the ability of states and local communities to perform their tasks or stand in the way of the desired liberalisation and further quality improvements in these areas. The improvements in SGI in terms of choice, quality and competitiveness have developed within the existing legal framework. Hence, changing the existing rules could disturb the existing balance between social objectives and competitiveness.

None of the consulted bodies mentioned any specific institutional needs not taken care of by the present rules. However, if such needs are identified in any sectors, strengthened administrative co-operation between national regulatory authorities seems like a good first step.

#### *The EEA Agreement*

The Agreement on the European Economic Area (EEA) is the basis for the Norwegian participation in the Internal Market. While many SGI are of great importance also to the well-functioning of the Internal Market, a number of the issues raised in the green paper are not directly applicable to Norway as a non-member of the EU.

Norway notes with interest the question in the Green Paper on the feasibility of including the development of high-quality services of general interest in the objectives of the Community, and the possibility of giving the Community additional legal powers in this area. It is of course solely for the Member States of the Community to decide on the need for amendments to the Treaty establishing the European Community. Yet we would add to this debate that changes in this regard could have consequences for the good functioning of the EEA Agreement.

It should be recalled that the primary objective of the EEA Agreement is to establish a dynamic and homogeneous EEA, based on common rules and equal conditions of competition. As new Treaty provisions establishing legal powers for the Community in the field of general services would not correspond to similar provisions in the EEA Agreement, it is not certain how the principle of homogeneity would be upheld in this field. Norway would therefore recommend a careful review of what effect possible changes made to the Treaty regarding services of general interest could have on the good functioning of the EEA Agreement.

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

A general Community framework directive could possibly be to the detriment of consumer interests and competitiveness if it hinders a dynamic development. Moreover, such a legal framework would most likely be too narrow to cover all services and at the same time too general to be of real guidance to any sector. Hence, a general Community framework for SGI does not seem desirable. However, there may be a scope for comparing and analysing how rights and obligations are regulated in various sectors. In this regard, exchange of experiences from various sectors may be valuable. Moreover, an analysis of techniques and strategies for regulation in different sectors may be useful.

Insofar as specific rules are considered necessary for individual sectors, such rules are already laid down in the relevant directives. However, it may be useful to consider whether rules in some sectors need to be reviewed. In the hearing, it was claimed that the health sector is presently indirectly regulated by rules covering other sectors. Even though no specific examples were mentioned, there may be a scope for reviewing and clarifying applicable rules in this sector, taking into account the member states' right to regulate national health policy.

#### *Economic and non-economic SGI*

Internationalisation, technological development and increasing complexity in economies have changed the basis of regulation and ownership, and the liberalisation of public services acts to shift perceptions and dividing lines. As mentioned above, it is also important to keep in mind that the concept of non-economic activities is constantly evolving. This development seems to be adequately safeguarded within the existing legal framework. New rules could prove to be to the detriment of this positive development. Hence, we do not think it desirable to try to identify and list specific sectors as being economic or non-economic. However, we think it may be useful to establish certain criteria that can be used to distinguish between the two categories.

#### *Security of supply concerns*

In the feedback from the Norwegian hearing reference was made to the potential conflict between security of supply in the society and increased use of market mechanisms. Moreover, it was recalled that since the ability to deliver the service during an emergency situation could be reduced, due to the use of market mechanism, it might call for a certain national level of production or storage.

#### *Media pluralism*

The need for Community action to ensure media pluralism was under thorough debate in 1992, following the Commission's publication of a Green Paper on this particular question. As noted in the Green Paper, cf. para. 74, no initiative on community regulation of media pluralism was taken. Norway considers media pluralism to be an important objective for a democratic society. Despite developments since 1992, i.a. the globalisation and concentration of ownership of the media and the evolution of electronic media, the protection of media pluralism should continue to be a task for the Member States. Both different regulatory traditions as well as market conditions vary considerably within the EEA-states. Norway therefore considers the Member States to be best equipped to ensure media pluralism through appropriate and effective legal regulation.

In the light of these circumstances, Norway does not consider it appropriate to establish concrete measures at Community level in order to protect pluralism. Community legislation must, however, ensure room for member state regulation to ensure media pluralism, cf. i.a. Article 10 of the European Convention on Human Rights.

### *Financing*

Norway welcomes the Commission's initiative to enhance legal certainty and transparency with regard to financing of services of general economic interest and state aid. The legal uncertainty today raises difficulties both for the member states and for the undertakings performing services of general economic interest. The European Court of Justice (ECJ) ruled in the judgement *Ferring* that where the amount of compensation does not exceed what is necessary to perform the service of general economic interest, the compensation is not regarded as state aid. On 24 July 2003, ECJ confirmed this view in the ruling in *Altmark* (C-280/00). We appreciate the view clarified in the *Altmark* judgement and do not find it necessary to comment further on the legal status of such compensation.

Still, the *Altmark* case has stipulated four criteria for such compensation to escape the classification as state aid:

- The recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined.
- The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
- The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit.
- Where the undertaking is not chosen in a public procurement procedure, the level of compensation must be determined on the basis of an analysis of the costs taking into account the receipts and a reasonable profit from discharging the obligations.

We would appreciate if the Commission could clarify how it interprets these four criteria.

### *Measuring and evaluations*

A feasible approach may be to work on standards for definitions and indicators used for measuring and evaluations. The work from i.a. OECD in this field may be a basis for future work. Benchmarking and quality indicators may also be a good alternative or supplement to detailed regulation. Moreover, this would leave it to each country to decide how to best solve a task taking into account local interests and needs.