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The Application of EU-rules to Social

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The Application of EU- rules to Social Services of General Interest

Summary

■ At its meeting on 29 March 2011 the Social Protection Committee renewed the mandate for the work of the Informal Working Group (IWG) on the Application of EU rules to Social Services of General Interest (SSGI) and specified the tasks on the working group as the following:

- analysis of the new Guide prepared by the Commission services on state aid, internal market and public procurement rules;
- follow-up to the Third SSGI Forum;
- on-going debate on state aid and public procurement rules.

The following Member States participated in the activities of the IWG: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Italy, Lithuania, Malta, Poland, Portugal, Slovenia, Norway, and Sweden.

The IWG met seven times in Brussels and organised two seminars where the other EU institutions, advisory bodies and stakeholders were invited.

Within the IWG and notably for this report, no formal positions were adopted. The goal was to raise awareness and to develop a common and better understanding of the issues raised. The objective was to build a common knowledge on the EU rules belonging to the internal market policies (state aid, freedom of services, freedom of establishment, and public procurement) applicable to SSGI among the members.

The methodology used to prepare the report is based on the debates during the meetings and on the contributions of the members and of the external partners as well as on the discussions and feedback at the seminars which were organized by the working group.

Key words

Social policy, social protection, social services, state aid, public procurement, internal market, EU rules

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Informal Working Group of the Social Protection Committee on the application of EU rules to SSGI

A report by the working group

Social Protection[1] and Internal Market Regulation: Evaluation & Perspectives on the application of EU rules to SSGI

Note from the Chair of the group:
This report was approved by the members of the informal working group, except for the Commission, in a written procedure by the 16th of September 2013. The Commission retained its reservations concerning the text. The report contains a number of footnotes expressing the views of the Commission:
1, 4, 6, 10, 11, 13, 14, 16, 17, 18, 19, 21, 23, 26, 37, 45, 53, 189, 191, and 194.
The report from the informal group was forwarded to the Social Protection Committee which discussed the topic at its meeting on 20.02.2014.

FOREWORD OF THE CHAIR AND THE VICE-CHAIR

The debate on the relationship between welfare services and the EU law has intensified during the last 10 years. Social services and social security have been conceptually included in the category of services of general interest. Consequently, the general legal framework concerning the market regulation at the EU level has been brought into the social policy sector and the provision of social services has been put under the existing legal basis, although the legal framework was originally developed for totally different kinds of markets for goods and services.

The working group on SSGI was set up 10 years ago under the Social Protection Committee as an ad hoc group of legal specialists interested in the subject. The informal working group has mainly focused on capacity building and problem analysis of technical and legal issues around the application of the EU rules to SSGI. However, we cannot close our eyes to the fact that more fundamental principles underlie the debate on the application of the EU rules to social services of general interest; for instance if we need internal markets for social services, or to which extent social services, in particular, should be treated differently from other services or services of general interest? Opinions on these issues certainly vary, which is unavoidably reflected in the discussions as well as in the positions taken by different parties.

In the discussions within the working group, we have noticed that two different approaches are often confronted: a wide social policy approach and a strict legal approach. The expertise which can surpass the theoretical and practical barriers between these two approaches is scarce. It has made the work extremely challenging. Introducing social impact assessment was an attempt to create a link between the practice of social services on the ground and the theoretical presumptions reflected in the legal framework and implemented by the rules. From the point of view of policy choices, more comprehensive analyses are needed in order to prove and verify the real impact of measures taken in order to make the legal framework better/more compatible with the mission and objectives of social services. At this point the conceptual linkage between the smooth functioning of the internal market and the national priorities attached to the systems of social services is vague and underdeveloped.

The two major aims of the informal working group were to clarify further the application of EU rules to social services of general interest and to identify problems when applying the rules to them. We sincerely hope that this report will cast light on both issues. At the same time the report aggregates the work done by the working group during its two-year mandate. The report is based on the texts and describing examples provided by the members of the working group as individual experts representing their countries and by experts from the Commission as well as on articles by external key note speakers at the seminars organized by the working group. Furthermore, the main arguments and viewpoints which were raised during the discussions at the seminars and at the meetings are referred to in this report. We are grateful to all who have taken part in the work for their valuable contributions. Nevertheless, the challenging work has not been accomplished yet. Some proposals for how to proceed with the work are provided in the conclusions and in other parts of the reports. We hope that the insights of the report will provide an input to the future work addressing the multifaceted relationship between EU rules and social services of general interest.

Markus Seppelin
Chair of the IWG

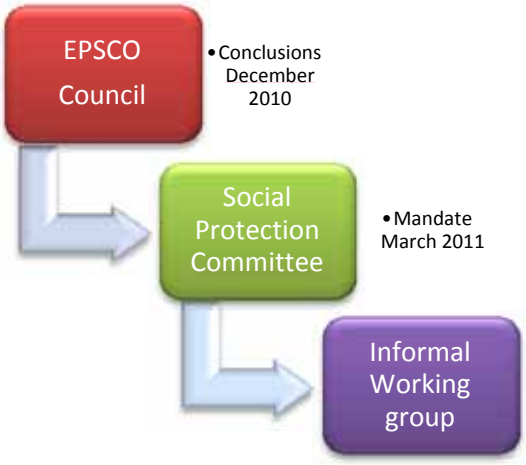
Muriel Rabau
Vice-chair of the IWG

INTRODUCTION

In order to comply with the Council's conclusions of December 2010[2], the Social Protection Committee (SPC) revived in March 2011 the activities of the Informal Working Group on the application of EU rules to Social Services of General Interest (SSGI), hereafter the IWG.

The Council underlined "the need to further assess the interaction between the internal market and social services of general interest […]". It then invited the Member States "to identify any problems encountered by social services of general interest in the application of European legislation […]" and the Commission "to further clarify and assess the application of EU rules to social services of general interest, in order to enhance their legal certainty […]".

The IWG has already been working for many years. It is not an institutionalised group, but an informal working group, gathering the experts of those Member States willing to participate, which has to work ad hoc under a concrete mandate given by the SPC.



At its meeting on 29 March 2011 the SPC renewed the mandate for the work of the IWG (see **Annex 1**) and specified the tasks on the working group as the following:

- analysis of the new Guide prepared by the Commission services on state aid, internal market and public procurement rules;
- follow-up to the Third SSGI Forum;
- on-going debate on state aid and public procurement rules.

The mandate highlighted the need to work with other institutions and partners, in line with the Council Conclusions of December 2010 which invited the SPC "while carrying out its work on SSGI […] notably through the Informal Working Group […] to ensure regular contacts with the European Parliament and the European Union advisory bodies, as well as with all relevant organisations and stakeholders (e.g. social partners and NGOs) […]".

The following Member States participated in the activities of the IWG: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Italy, Lithuania, Malta, Poland, Portugal, Slovenia, Norway, and Sweden.

…

The IWG met seven times in Brussels and organised two seminars where the other EU institutions, advisory bodies and stakeholders were invited.

Within the IWG and notably for this report, no formal positions were adopted. The goal was to raise awareness and to develop a common and better understanding of the issues raised. Within the IWG, the first objective was to build a common knowledge on the EU rules belonging to the internal market policies (state aid, freedom of services, freedom of establishment, and public procurement) applicable to SSGI among the members. The level of awareness on the rules was very different, due among others to the high turnover among participants and to the difficulty to find the right expertise both on social issues and EU rules. The fragmentation of social policy issues among several Ministries, several regional and local entities does not make work any easier.

SSGI is a concept developed at EU level in the Commissions' Communications of 20063 and 2007 embracing on one side social security schemes (statutory and complementary), and on the other side social services directly delivered to the person. These two categories represent a large part of the social protection in Member States[4].

The methodology used to prepare the report is based on the debates during the meetings and on the contributions of the members and of the external partners as well as on the seminars which were organised.

A bottom-up approach was used: it is important to begin to build a knowledge on SSGI as such in the Member States (where the expertise and the knowledge of the members are the focus) and analyse the application of the EU rules (where the Commission has a high expertise) to the concrete situations. This is the objective of **Chapter 1**, which is based on content contributions of the members. Two meetings of the group were dedicated to the situation of social services in interaction with the EU rules in the Member States, going beyond a classical "law school" approach.

Chapter 2 presents the debate on state aid, public procurement and internal market rules which took place at the seminars. The work that the IWG carried out on the Commission's *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*[5] is presented in **Chapter 3.**

Additionally we asked members and stakeholders for their feedback and comments on the way the IWG had carried out its activities and on need of future work on this topic through an evaluation form. The issues tackled are the clarity of the rules, the organisation of the next SSGI Forum, and feedback on the work of the informal group. This has been summarised in **Chapter 4**.

The **conclusions** aim to give some specific and constructive ideas and recommendations for the future process and content when discussing SSGI.

CHAPTER 1 – SSGI IN MEMBER STATES

Section 1 – General remarks

As stated in the introduction, the approach applied by the IWG for the drafting of this report was a bottom-up one: starting from the situation in the Member States with descriptions of how SSGI are organised and how they "interact" with the EU rules.

This first chapter is based on contributions from the members: oral presentations and short papers which are attached hereafter (***Section 1***). It should be noted that these contributions were prepared by the experts participating in the IWG and cannot be considered as official positions of Member States. These papers were prepared according to instructions of general nature sent to the experts (**Annex X**).

These contributions are useful as they provide insights and questions for a deeper analysis of the application of the EU rules to these SSGI applied on a specific market and on the role of **market-type mechanisms**[6] in the field of social protection. For the three sets of EU rules under our scrutiny (public procurement, state aids, and freedom of establishment and freedom to provide

services), the main notion is the *economic activity* which is to say it simply "the exchange of good and services" on a market[7].

The large extent of the concept of economic activity leads to the application of the EU rules also to the social sector. In other words, if there is the presence of a market, then the EU rules apply.

A short analysis of the common and diverse features and problems is also included (***Section 2***).

All the contributions are annexed to the report (see p. X)

From the papers describing the way social services are organised in different Member States, it becomes evident that it is a challenging task to identify problems encountered by the public authorities when applying the EU rules to the organisation and financing of SSGI, often done at the local level. There might be several reasons for that. The way SSGI (social services delivered to the persons and social security systems) are organised and provided varies a lot among the Member States and consequently the reactions to requirements of EU law and EU level regulation are also different. One possible explanation is that the concrete decisions concerning the provision of social services are made not always near or in proximity to central government structures. Awareness is sometimes lacking at the national level about the problems faced in concrete situations at the local level. Furthermore lack of knowledge of the contents of the EU rules might explain as well a perception that there are no major problems or confrontations between the EU rules and the overall organisation of social services. The ignorance of existing case law relevant for the report is also problematic. More generally, the level of awareness regarding the issue seems to vary a lot among the members of the IWG, despite that there is a clear responsibility of central authorities in spreading the knowledge of rules.

Some common features	Some divergent features
- local planning, delivery, decision making and evaluation of SSGI - lack of corresponding concepts and legal terms at the national level - need for capacity building - multiplicity of service providers and provision schemes - marginal cross-border activities	- types of service providers and provision schemes - sources of funding of the SSGI - role of national and regional governments - method and amount of state intervention (direct/indirect state aid, e.g. tax privileges) - role/share of the market in SSGI provision

Section 2– Analysis

1. Diversity in the provision of social services

One issue important to stress is the variety of the different ways to provide social services of general interest in the Member States. This diversity could cause also problems in identifying when the EU rules apply. In other words, due to the great variety of the contexts, modes and contents of social services, the borderlines between different functions and types of activities become diffused in terms of the categorisations required by the EU rules.[8]

2. Local delivery of social services

Except for social security schemes[9], almost all the papers state that social services are provided at regional or local level. This is due to the subsidiarity and democratic principles in order to guarantee that affordable and need oriented services are delivered in close proximity with the citizens.

As stated before, this local nature of social services leads also to the difficulty to identify "where are the problems" in applying EU rules. Receiving feedback is sometimes demanding because of the division of competences within the Member States.

3. Market Concepts[10]

Among the different contributions, it could be said that the market concepts are not central or even not always relevant to SSGI. The central divide between existence and non-existence of market in EU internal market rules (such as state aids or public procurement rules) seems to be quite absent in the institutional landscape of social services in Member States. The contributions seem to indicate that certain rules do not apply because of the way the services are organised (no outsourcing, triangular relation…)[11].

It should be noted that the ideal type of a market mechanism is essentially based on an interaction between buyers and sellers of a particular commodity or a specific service. Supply and demand determine the quantity and the price of the goods by influencing each other reciprocally, until equilibrium is reached. Especially in the case of SSGI this necessary balance in the interplay of supply and demand is disrupted or suboptimal. The "basic assumption" of a functioning market does not apply therefore for SSGI.

Therefore, some authors of country-specific descriptions refer to the fact that the "market" of social services is imperfect with many market failures, even if there is outsourcing in the provision of social services. The perception of several contributors reinforced the idea of "non-functioning markets" or quasi-markets in the field of SSGI[12].

One of the reasons for this could be that social protection as such has been built on market failures: "*It was because free markets generally failed to guarantee adequate level of protection for the population as a whole that state intervention had been seen to be necessary.*"[13]. This issue is really an important point because it seems that the underlying ***principle*** in the EU rules is that market allocation is the most efficient way to provide a service[14]. But in the field of social policies,[15] it is far from the case because several conditions of a functioning market are not met (e.g. information asymmetries, non-competitive markets, public goods).

In other words, the justification of the EU level regulation on these issues is based on the presumption that the public action or support might distort the competition in the internal market[16]. ***Derogations***[17] are also possible according to the EU rules, and give more flexibility recognising the facts that markets are not always functional, in the case of SGEI, and that state interventions are needed for a general interest purpose. This is why EU state aid rules provide for the possibility to intervene on these failures by imposing a public service obligation.

The notion of "economic activities" which is very important to apply EU rules does not seem to be well-known and at least not well "translated" in national realities.

The notion and the role of competition[18] are not addressed in all the contributions. Moreover, it seems that cooperation between actorsin the provision of social services is very frequent among Member States[19]. The provision of social services is often delivered by public bodies or delegated to non-profit actors[20].

Nevertheless, there are some trends in encouraging competition among service providers notably with systems based on freedom of choice of the user. Competition is also more present when public procurement rules are applied (see Point 5.).

There are some challenging questions regarding the financing of social services and the compatibility with the state aids or public service compensations rules. Until now, it seems there are very few reflections on this issue for social services of "economic nature" at the national level. At the EU level, state aids are forbidden in principle. There might be derogation for the financing of services of general interest in so far as there is no cross-subsidisation[21]. Cross-subsidisations may occur if the public money given to an entity (public or private) did not serve the general objective assigned to this entity. Cross-subsidisation can distort competition among providers

delivering the same services. These EU concerns (avoid cross-subsidisation and avoid distortion of competition) were not reflected in the contributions. EU rules allow for the financing of social services of general interest in line with the Altmark jurisprudence and with the Almunia package[22]. The important question is whether these rules are applied and to what extent "easily" applied in the social sectors.

EU dimension of Market[23] (Cross-border provision)

According to several contributions[24], it seems that there is no or very little cross-border provision of social services. "Cross-border" provisions may exist but are really considered as marginal. State aid rules apply if trade between Member States is at least potentially affected while public procurement rules apply if there is cross-border interest. In their absence, neither public procurement, nor state aid rules apply.

Nevertheless, it has to be said that it is not because there is no cross-border or transnational provision of social services, that EU rules do not apply, because of the potential affectation on trade. EU rules have been applied for example in a purely regional situation where private providers were challenging the financing of public providers for hospitals, regarding the compliance of the Monti-Kroes package[25]. This is due to the fact that, as far as state aid rules are concerned, there could still be "an effect on trade" if providers established in another Member State could be interested to provide the service.

4. Application of Public Procurement Rules[26]

Public procurement rules become gradually more and more predominant in the provision of social services[27]. This is partly due to the legal certainty that these rules can provide in place of other financing mechanisms[28]. Applying state aid regulation on public service compensation is also considered to be less secure than public procurement[29]. A closer reading of the decision and communications leads to the application of both sets of the EU rules. The unclear link between both set of rules haver persistently been criticised[30].

Some experts suggest to analyse some "side effects" of the application of the public procurement, such as endangering the continuity of the services[31], or decreasing diversity of the actors[32] (e.g.: reducing them to a single business model)[33]. It was also added that public procurement law can restrict the freedom of choice and can endanger the robustness and sustainability of social infrastructures[34].

More information would be needed on the cost efficiency of the application of public procurement rules to social services, taking into account externalities, or the "transaction costs"[35] required for a correct application of the rules.

Some members[36] expressed the view that public procurement rules do not apply to some social services because of the way they are organised (no outsourcing or not an economic activity[37]) or they are not an appropriate instrument for the provision of social services[38]. Simplified procedures[39] have been implemented in Lithuania.

Moreover, **alternatives** to public procurement were also quoted or presented in many Member States: triangular relationships between local authority, service provider and user[40], licences or insurance contracts[41], public funding programmes[42], subventions schemes[43], and freedom of choice[44]. At the moment, there is still no certainty if public *funding programmes* and *subventions schemes* are really alternatives to public procurements and as such really compatible with EU rules[45]. An invitation has been expressed towards the Commission by the Council to provide "*more information on existing alternatives to public procurement procedures when Member States choose to outsource the provision of social services of general interest, notably through the*

exchange of best practices among Member States"[46]. The Commission replied to this invitation by adding a Q&A on alternatives to public procurement rules to the 2010 Guide.

Some concerns have been expressed regarding the original proposal[47] of PPR by several members[48] regarding the threshold[49], the extension of administrative burden[50] or the extension of scope to compulsory social security systems[51].

5. The role of not for profit providers

Not for profit providers, including voluntary welfare associations, social economy actors, and charities, are important players in the field of social services according to several contributions[52]. However, during the debate in the IWG it was noted that for-profit providers are increasingly present in the provision of social services.

In principle the EU rules are the same for all players, both profit and not for profit providers even if they are not playing exactly the "same game" — taking into account very divergent aims of non-profit and purely for-profit actors. More research on what is the equal level playing field is needed, and to assess the impact on not for profit providers

"*Member States are currently in the process of transposing Community legislation concerning public procurement, state aid and service provision in the internal market into national legislation. It is clear that the application of Community rules on competition, state aid and public procurement on social and health services of general interest presents a range of challenges for service providers and commissioners. Internal Market policy is the area where the EU has the greatest impact on the voluntary sector, and it is generally not seen as a positive* one *by the voluntary sector, as the internal market policy is believed to inhibit the activities of the sector in a number of ways. In many instances, it seems that the negative effects of internal market rules are related to the lack of clarity regarding the application of these rules, and the narrow interpretation of EC law by public authorities (or 'anticipatory obedience')."* [53]

Some fears have been expressed[54] regarding that the role of the non-profit sector will decline, due to the fact that their specificities are not recognised by the rules. However, there has been no discussion regarding suggestions on how to change these rules. It has also to be said that the increasing participation of for-profit providers can partly be explained by the political choices of the Member States. Due to many reasons it was not possible to be investigated comprehensively by the group[55].

In the new proposal for Public Procurement Directive, the specificities of the third sector organisations seem to have been addressed in the latest discussions.

Moreover, it has also been said that after the incorporation of the economic activities of NGOs it is more problematic to involve volunteers or to promote direct user engagement in the delivery of services[56].

7. Other issues raised in the contributions[57]

There are several other issues raised in the contributions. The following ones have been suggested to be added as particularly interesting for our purposes. The reader can always consult each contribution in the annex of this report. The fact that SSGI are covered in **different definitions** spread across different policy fields in EU documents makes it difficult to find a common understanding. Indeed the scope of application with the exceptions is quite different across the different set of EU rules.

Some difficulties have been pointed out about how to take into account the **social added value** of SSGI or the Social Return On Investment. For example, for the calculation of compensation in

the state aid set of EU rules, the added value of SSGI is influenced by the society in which they are delivered (social infrastructures, civil society, community engagement,…) and this added value cannot be easily calculated in order to detect an alleged overcompensation[58].

A **lack of understanding** at national level results also of an uneven "qualification" at the national level of social services, some being organised in such a way as being economic in certain areas and non-economic in others. Therefore, public authorities are not always aware that certain ways of organising SSGI will trigger the fact that these services will be considered as economic[59].

The "**cherry picking**" phenomenon has also been underlined[60]: "*the tendency of private operators to cherry pick the most profitable customers at the expense of the more costly and complex cases"*.

Even if it is not entirely related to EU law as such, two contributions[61] made positive remarks on the European quality framework on social services adopted in 2010 by the SPC. At the same time, one member[62] expressed there exist sufficient guidelines in this area and that further regulation is not needed at the EU level[6364].

CHAPTER 2 – THE EU RULES APPLYING TO SSGI: THE DEBATE WITHIN THE IWG

As stated in the introduction, one of the objectives of the IWG was to build common knowledge and raise awareness of public authorities, service providers and users, and other stakeholders, on the EU rules at stake and on the way they apply to social services. Therefore, the IWG organised two seminars on the EU rules applying to SSGI. As the mandate that the IWG had received from the SPC[65], in line with the Council Conclusions of December 2010[66], which asked the IWG to "ensure regular contacts with the European Parliament and the European Union advisory bodies, as well as with all relevant organisations and stakeholders (e.g. social partners and NGOs)", MEPs, representatives of the Committee of the Regions and of the European Economic and Social Committee, social partners and various NGOs were invited to both seminars. The seminars were thus attended by representatives from Eurocities, the Social Platform, Social Services Europe, Social Economy Europe, REVES, AGE, Union Sociale pour l'Habitat, SOLIDAR, the European Disability Forum, EAPN, CECODHAS, Eurodiaconia, COFACE, FEANTSA, EASPD, ENSIE, NHS, the Council of European Municipalities and Regions, and the European Social Insurance Platform. Unfortunately, no MEP could participate.

The first seminar aimed at presenting the key concepts relevant for the understanding and application of the rules, whereas the second seminar provided a detailed explanation of the rules themselves.

The format of the seminars consisted of a keynote presentation by well-known experts (Koen Lenaerts[67] in the first seminar, and Stéphane Rodrigues[68] in the second), followed by the reactions from discussants (Stéphane Rodrigues in the first seminar, and Carsten Zatschler[69] in the second) and the debate with the other participants.

In both seminars, the questions of the participants were prepared in small groups according to the "world café" method, an approach which consists on debating issues in small groups. This method promotes the participation of all in the exchanges and ensures an effective dialogue. The discussions in groups were led by a facilitator. A rapporteur was chosen by each group to make a presentation of the discussions in the plenary session and launch the debate.

The papers of the experts are annexed to the report.

This chapter presents a brief summary of the main messages conveyed by the experts during the seminars and reflects the issues raised during the debates. No concrete conclusions were drawn from the seminars as they mainly aimed at exchanging views and providing clarification on the rules.

Highlights from the experts' presentations

K. Lenaerts noted that the term “Social Services of General Interest” does neither appear in the Treaties, nor in secondary law but only in soft-law documents. Instead the terms “Services of General Interest” (SGI), “Services of General Economic Interest” (SGEI) and “non-economic services of general interest” (NESGI) can be found in primary and secondary law (notably, as far as primary law is concerned, in Articles 14 and 106(2) of the TFEU and in Protocol 26). This implies that it is the Court of Justice (ECJ) that has to define the concepts which appear in the Treaties while SSGI can be defined by the EU legislator and by national authorities.

The definition of SGI can be examined under two competing models. From a more “liberal” perspective, SGI are seen as derogations to the EU competition rules and therefore, as all derogations, the concepts which appear in the Treaty have to be interpreted in a restrictive way, to avoid attempts by the Member States to circumvent the obligations imposed by the Treaties leading to the fragmentation of the internal market. The other approach considers SGI as a symbol of the European social model; therefore the rules should be interpreted more broadly to protect the social value. At the EU level, there does not seem to be a need to choose between both views as long as a fair balance between the general interest and the relevant internal market rules can be found.

Protocol 26 refers to SGI as a general concept that comprises SGEI and NESGI, the difference between the two being the qualification of the activity carried out as economic or not. The question whether an activity is economic or not shall be answered in relation to each type of EU rules. If an activity is based on the principle of solidarity, as far as competition rules, and therefore also state aid rules, are concerned, then the SGI does not involve an economic activity and can be qualified as a NESGI. Competition rules will therefore not apply to these services. Nevertheless this would not exclude that the same activity can fall in the field of application of internal market rules, as long as the provision of the service, even if based on the principle of solidarity, is done “for remuneration". Member States can impose restrictions to the freedom to provide services insofar as these restrictions are justified and proportionate. Social concerns are considered as an overriding reason of general interest that could justify the restriction.

While S. Rodrigues expressed concern for the fact that the Court can come to two different conclusions on the economic nature of an activity according to the set of rules at stake, K. Lenaerts highlighted that the application of internal market rules to a service which is considered as non-economic within the field of competition rules (and therefore outside the remit of the application of these rules) is in the interest of the user as it will give him/her the opportunity to take advantage of the internal market.

In this context, K. Lenaerts also noted that the control of the application of the EU rules to social services triggers the “protection of the social objectives” of a given service as it will check the abuse of those service providers that pretend to have social objectives just as a pretext to avoid the application of the EU rules.

The current EU law and case law does not provide for a clear and precise definition of SGEI even if common features can be drawn such as the economic nature of the services, the imposition of public services obligations, the universal nature, the continuity and affordability, the universal coverage and the focus on user and consumer protection. K. Lenaerts reported that the lack of definition of the SGEI in EU law is considered by some scholars as positive as SGEI are evolving over time and need to be flexible to respect the diversity of organisation of Member States.

Interestingly K. Lenaerts provided an example of the equilibrium to be found in this field and referred to the exemption of notification for a large number of social services in the 2011 state aid decision within the new Altmark Package[70]: he sees such derogation as an example of the application of Article 9 of the TFEU which calls for a balance between social objectives and other EU policies, *in casu* state aid.

S. Rodrigues presented in detail the different sets of rules that apply to SSGI. He particularly insisted on state aid rules and the reforms that took place in 2011 with the adoption of the new SGEI Package. S. Rodrigues also underlined that the new package obliges the Member States to be more transparent in their decision making process. This will also imply that the Commission will have to be more rigorous in its controls[71]. C. Zatschler recalled the competence of the Member States to define what constitutes a SSGI according to their cultural and historical background. The role of the Commission and of the European Court of Justice in the definition of a SSGI is limited to check the manifest error.

On public procurement rules, S. Rodrigues stressed that, even if social services and health services fall in the field of application of the Public Procurement Directive, they benefit of a very light regime. The Commission proposal for a new Public Procurement Directive also foresees a specific regime for social services based on the limited cross-border interest that these services have.

Debates and issues raised during the seminars

The debate in both seminars showed that public authorities are concerned about maintaining the models of organisation and financing of SSGI while ensuring that it complies with EU rules. Indeed, public authorities seem more and more aware that EU rules apply to SSGI, even though understanding and appropriation of the rules still seems very limited, in particular among local public authorities and service providers. Some participants suggested exchanging best practices on the way the rules can be applied. Questions from the audience were also related to whom (the Commission or the Member States) should be responsible to ensure that the rules are understood at national, regional and local levels.

Some concepts, which might seem evident for legal experts, are still not fully grasped by public authorities and stakeholders. The difference between economic and non-economic activities seems to be a source of misunderstanding, some participants pointing to the incoherence and confusion of qualifying the same activity as economic within the remit of internal market rules and non-economic as far as competition rules are concerned.[72] Doubts were voiced on the concepts of "in-house provision" and notably on the percentage of activities that the in-house entity can provide to clients other than the controlling authority.

Discussion showed that some public authorities do not feel confident in deciding which one between the different legal instruments composing the State aid package is to be applied to their case, probably because of the lack of understanding of the scope and objectives of each instrument. Some participants also reported the difficulty to determine the level of compensation and the unclear link between state aid and public procurement rules. It seems that these legal uncertainties might encourage the use of procedures or approaches that seems to ensure a greater level of legal certainty but might fail to fully deliver in terms of fulfilment of social objectives, quality of the provided service or access of disadvantaged users. Examples are public contracts awarded only on the basis of the lowest price or voucher systems.

Public authorities still have questions on their margin of discretion when defining, organising and financing SSGI. It was recalled that until now, while there are some pending cases, there has been no clash between the Court or the Commission and the national authorities on the definition of a service as being of general interest in the social sector. [73]

Concerns were also raised by participants on the risk of "cherry picking" by private service providers that attract users with "good" risks, leaving the "bad" risks for public organisations and thus endangering the financial balance of the latest. Therefore some participants seemed quite sceptical about opening up the provision of social services to competition and at the same time, despite well-established case law[74], felt doubtful about the possibility of granting special or exclusive rights to service providers.

CHAPTER 3 – THE WORK OF THE IWG ON THE COMMISSION GUIDE

The IWG has conducted an analysis of the 2010 Commission Guide to the application of the European Union rules on state aid, public procurement and internal market to services of general interest (SGEI), and in particular to social services of general interests (SSGI)[75] (hereafter the 2010 Guide). This analysis had been requested to the IWG by the SPC which had identified among the tasks to be carried out in 2010 an "analysis of the new Guide prepared by the Commission services on state aid, internal market and public procurement rules".[76]

The analysis was conducted through a questionnaire sent to the Member States in March 2012 (See Annex XX). Member States could send their contributions till the end of April 2012 and additional comments were received till November 2012.

The questionnaire was composed of a set of seven questions concerning the following issues:

- general comments on the 2010 Guide;
- communication by the Member States or by the Commission on the 2010 Guide / awareness by stakeholders and public authorities;
- specific comments and suggestions on the contents of the 2010 Guide / new issues that should be added to it.

Fourteen Member States replied to the questionnaire (**BE, DE, EE, CY, LV, LT, LU, HU, AT, PL, SI, SK, FI, UK**) and one EFTA country (**NO**). The contributions received do not only come from the members of the IWG, as the questionnaire was sent to all the Member States through the SPC.

The aim of the analytical work carried out by the IWG was to provide feedback on the use of the Guide, as well as to influence the revision process of the 2010 Guide that the Commission services had undertaken between 2012 and 2013. An updated version of the 2010 Guide[77] was published on 18 February 2013 (and slightly amended on 29 April 2013) taking on board the changes that occurred with the adoption of the new state aid Package in 2011[78].

This new version (hereafter the 2013 Guide) takes into account comments and suggestions by the Member States, provided through the IWG questionnaire, as well as issues raised by Member States, by organisation representing service users and providers and by other stakeholders in the IWG meetings, seminars, conferences and other events, and the questions received by the Commission services through the Interactive Information Service (IIS)[79].

As announced in its introduction, the 2013 Guide will be updated to take into account the results of the on-going revision of the EU Public Procurements rules.

It is worth recalling that the IWG had conducted the same analytical exercise on the predecessors of the 2010 Guide, and the Frequently-asked questions' documents (FAQs) published by the Commission services in 2007[80], which offered guidance on state aid and public procurement.

The report presents below, following the structure of the questionnaire, the replies of the Member States to the IWG questionnaire and highlights how their comments and suggestions were taken on board in the 2013 Guide.

General comments on the 2010 Guide

Generally, the 2010 Guide is perceived as a useful instrument by the respondents as it helps understanding the rules and provides public authorities with concrete guidance when they organise and finance social services. It also clarifies the terminology used at the EU level. However **CY** and **FI** indicate that the terminology remains rather complex for people less familiar with the EU jargon.

One Member State (UK) states it "had few significant problems [possibly] because [it] seeks to meet commercial best practice standards …".

While some (**CY**, **HU**) seem to appreciate the Q&As (Questions and Answers) format of the Guide, others (**AT, SK** and **FI**) considered that this structure was sometimes difficult to follow and **AT** and **FI** suggested to add a keyword index. **BE** suggested to make an interactive version of the Guide. The 2013 Guide is still organised in a Q&A format but has a simplified structure as the questions have a continuous numbering from 1 to 237. Moreover, the 2013 Guide provides more straightforward answers.

While some Member States find the 2010 Guide too long and complex (**BE, EE, SK, FI**), others (**EE** and **FI**) indicated that it would be useful to add in the introduction a more in-depth explanation of the rules.[81] Moreover, **BE, AT** and **FI** asked to add concrete examples and a diagram of the procedures. The 2013 Guide responds to these requests as several examples have been added, taken from more recent case law as well as from the decision practice of the Commission. To Guide the public authorities in applying the Package, an analysis tree was added giving the logical steps that a public authority should go through when designing a compensation scheme for the provision of a social service of general interest.[82]

BE also complained that the 2010 Guide is not binding for the Commission as an institution.

Nearly all respondents requested a regular update of the Guide. In the 2013 Guide, the State aid chapter (Chapter 3 of the new version) has been entirely reviewed to integrate the changes that took place with the adoption of the 2011 state aid Package. It is structured following the different documents of the 2011 state aid Package and gives a clear presentation of the different legal instruments.

Awareness about the 2010 Guide among public authorities and service providers

Members States were asked to answer the following questions:

- *Is the Guide widely known to public authorities and service providers in your Member State?*
- *Do you suggest any initiatives that the Commission should take to make the Guide more widely known or more accessible?*
- *What feedback on the Guide have you received from public authorities, the service providers or from other stakeholders?*

Frome the replies received it appears that the level of awareness of the 2010 Guide among public authorities, especially among local ones, is not very high. The Guide was spread by the ministries in some Member States through their websites (**BE**, **EE**, **AT**, **PL**, **SK**, **NO, FI**) or sent directly to other administrations at national and/or regional level (**BE**, **LT**, **LU**, **AT**, **SI**) as well as to stakeholders (**LU**, **AT**, **SI**). **DE** indicated that the Guide was also available on the intranet of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth.

Various Member States (**BE**, **DE**, **EE**, **CY**, **LT**, **LV**, **HU**, **AT**, **SI**, **UK** and **NO**) reported a limited or no feedback on the 2010 Guide from public authorities, stakeholders and service providers. **BE** and **EE** coordinated the answer to the questionnaire between different public authorities and stakeholders. **CY** indicates that the main difficulty is transposing EU rules into national or local law. **HU** and **FI** also flagged the poor quality of the translation. The 2013 Guide was published in all official languages and is accessible on line.[83]

BE reported that it had organised specific seminars for the social economy enterprises and for local public authorities where the 2010 Guide was used as a complementary source of information. **SI** also used the Guide in trainings and indicated that it organised specific meetings between ministries to raise awareness on the document. Several Member States mentioned information

initiatives developed by national public authorities or stakeholders. **FI** and **NO** developed or will develop specific guides. **DE** invites interested parties to also consult specific guides issued by stakeholders. **SK** envisages setting up an informal coordination network of stakeholders to promote exchange of information and experience related to the subject of SSGI.

BE and **LT** indicated that the Guide should be more widely circulated through internet, e.g. put on more easily accessible webpages of the Commission's website. **BE**, **CY** and **UK** also indicated that the dissemination could be done through specific focal points like national networks or European networks, e.g. Europe Direct information centres, or through the social partners. Thematic seminars also seem to be an interesting way to raise awareness (**BE**, **LT**, **PL**, **SK**). **UK** also mentioned that the Guide could be disseminated through articles in professional journals and trade papers.

Comments and suggestions on the contents of the 2010 Guide / new issues that should be added to it

Member States were asked to reply to the two questions concerning, on the one hand, comments and suggestions on the contents of the 2010 Guide and, on the other, new issues that should be added to it, structuring their answers according to the six core sections of the Guide:

- *Section 2: the concepts;*
- *Section 3: the application of state aid rules to SGEI and in particular to SSGI;*
- *Section 4: the application to SSGI of the rules on public procurement;*
- *Section 5: the simultaneous application of the state aid rules and the rules on public contracts and services concessions to SGEI;*
- *Section 6: the application to SGEI, and SSGI in particular, of the Treaty rules on the internal market (freedom of establishment and freedom to provide services);*
- *Section 7: the application of the Services Directive to SGEI and, in particular, to SSGI.*

Eleven of the 15 respondents (**BE, DE, EE, CY, LT, AT, PL, PT, SK, FI** and **NO**) replied at least partially to these two questions. Their answers are presented below following the structure of the two questions, which mirrors the structure of the 2010 Guide.

Section 2: the concepts

The section on concepts is generally welcomed. Nevertheless, **BE**, **CY** and **FI** indicated that the concepts still seemed quite abstract and difficult to incorporate into the national context.

AT, **DE** and **LT** underlined the need to emphasise even more the primary competence of Member States in defining SGEI. Q&A 4 of the 2013 Guide provides a clear answer to this issue, stating that the public authorities have a "*considerable discretion when it comes to defining what they regard as services of general interest*".

CY requested more concrete examples to help public authorities define SSGI.

Some Member States called for additional clarification on the difference between "economic" and "non-economic" activities (**BE**, **LT** and **SK)** and the notion of "market" (**BE** and **PL**). The box listing non-economic activities in the 2013 Guide has been enriched with clearer examples (including childcare in Norway and public hospitals in Spain).[84] On the notion of "market", the existing answers have been revised and redrafted to take into account the guidance given in the communication adopted within the new state aid Package.[85]

Section 3: State aid rules

As for the section of the 2010 Guide which covers state aid rules, several Member States indicated that it was too early for them to provide comments and suggest new issues to be added as the new set of rules had been adopted too recently (December 2011).
Further clarification was asked for on various notions:

- the "impact on trade between Member States" for local services (**FI**): guidance is provided in Q&A 36 of the 2013 Guide. Moreover Q&A 38 has been enriched with additional examples, one particularly related to social services on mental health care units in Portugal;

- "services for work integration" (**FI**): an explanation of the scope of this concept is given in Q&As 99 and 100;

- "ancillary activities of hospitals" (**DE**, **FI**): guidance has been provided in Q&A 92 on the scope of the definition of ancillary services for hospitals;

- "significant investment" (**DE**): an explanation of the concept of "significant investment" is given in Q&A 101. Q&A 102 provides further guidance on the duration of an entrustment in cases where a significant investment is required and needs to be amortised for a longer period;

- "typical well-run undertaking" (**BE, EE**, **SK**, **FI**,): the Q&A explaining the 4th Altmark criterion has not been redrafted but Q&A 110 gives the differences between the conditions of the Altmark judgment and the conditions laid down in the decision;

- the "net avoided cost methodology" (**FI**): an explanation of the rationale to introduce this methodology within the Framework and when to apply it is provided in Q&A 171;

- the act of entrustment (**BE**, **FI**): the section on the act of entrustment has been enriched with revised and additional Q&As. Q&A 59 specifically refers to the case when a service provider develops a service that would not be in response to a public demand, an issue on which **BE** and **FI** asked for clarifications;

- the principle of "selectivity" (**DE**, **FI**).

BE, **EE** and **FI** also requested more detailed guidance on the methodologies for the calculation of the public services compensation. This part of the 2013 Guide has been redrafted to take into account the new rules of the 2011 state aid Package.

BE, **CY** and **FI** indicated that more examples should be provided, more specifically on Court judgments directly related to SSGI (**AT**). Additional examples were added where relevant to the 2013 Guide. Typical examples can also be found in the 3rd Biennial Report on Social Services of General Interest published by the Commission services on 20 February 2013.[86]

BE asked also for clearer guidance on the cumulation between the general *de minimis* regulation[87] and the SGEI *de minimis* regulation.[88] To provide guidance on this issue, a specific Q&A[89] was added to the 2013 Guide. Moreover, the section on the compensation covered by the *de minimis* regulations has been added to the 2013 Guide to explain the aim of the new regulation and the difference between the two regulations.

Finally, **BE** asked for clarification on the application of state aid rules to the funding granted through the ESF and the ERDF. This issue was further developed in the 2013 Guide.[90]

Section 4: public procurement rules

Some respondents (**BE**, **EE**, **FI** and **NO**) asked for additional clarifications on concepts such as "in-house" (**EE**), the "cross-border interest" (**BE**, **EE**, **FI**), "services concession" (**NO**) as well as the procedures such as the amendment of contracts[91] (**EE**) and the possibility to reserve public procurements to non-profit organisations (**NO**). **BE** asked to add references to more recent case laws whereas **SK** asked for additional examples to be added to this section.

Some general comments were made on the use of public procurement procedures in the provision of social services. **NO** raises the issue that the needs of users are not sufficiently taken into consideration through public procurement procedures and that public procurement can have negative effects on service continuity and the evolution of the needs of the users; moreover, **NO** indicates that the use of quality criteria is quite difficult to evaluate.[92] **BE** asked for more information on alternatives to public procurements as stated in the annex of the 2010 Council Conclusions which invites the Commission to clarify and provide more information on the existing alternatives to public procurement procedures.[93]

As mentioned previously, the Commission services will take these comments into consideration when they will update the 2013 Guide once the Directives on public procurement and on concessions will be adopted. This was also requested by EE, CY and FI.

Section 5: simultaneous application of state aid and public procurement rules

BE, **SK** and **FI** asked for further clarification on the link between public procurement and state aid and in particular on the circumstances when it is required to simultaneously apply both state aid and public procurement rules. The combination of the rules is seen as quite complex for stakeholders (**NO**). **DE**, **FI** and **NO** asked for more clarification on the exceptions to the application of public procurement rules. This issue is explained in Chapter 5 of the 2013 Guide which might be updated when the new public procurement rules are adopted. In the 2013 Guide three Q&As on this issue (Q&As 113, 114 and 188) have also been added to Chapter 3 on state aid rules.

Sections 6 and 7: the Treaty rules on the internal market (freedom of establishment and freedom to provide services) and the Services Directive

Very few comments were made on these two sections. **BE**, **DE**, **LT** and **FI** asked for a clarification of the services that were not covered by the Services Directive and **SK** asked for a clarification of the notion of cross-border provision. **BE** referred to the Council Conclusions of 2010 which asked the Commission to "study and assess potential questions which could arise around social services of general interest and the freedom to provide services and the right of establishment".

BE suggested that new issues should be presented in the Guide such as the definition of social services in the external trade policies and the collaboration between several partners in the provision of services of general interest.

Finally, the activity carried out by the IWG on these issues was very effective: the issues that the Member States have raised when relying to the IWG questionnaire have largely been taken into account in the revision of the 2010 Guide. The comments on public procurement and concession rules and on the internal market rules will undoubtedly also influence the future revisions of the Guide.

One issue which, however, should deserve further attention is how to raise awareness on the Guide and promote its utilisation and, thus, a correct application of the rules by the public authorities in the Member States.

CHAPTER 4 – EVALUATION & PERSPECTIVES

Section 1 - Process

This fourth chapter is the outcome of the feedback received from the members and from the stakeholders on the evaluation form sent in December 2012 (**Annex 1**). The issues tackled are the clarity of the application of the rules on state aid, internal market and public procurement to SSGI, the organisation of the next SSGI Forum, and the feedback from the members on the activities of the IWG.

The purpose of this chapter is to draw perspectives for the future of the work on this complex issue of SSGI.

We received 14 contributions from the following members: Austria, Belgium, Czech Republic, Denmark, Finland, France, Italia, Lithuania, Poland, Portugal, Slovenia, Norway, Sweden, and Estonia.

The stakeholders having made a contribution were the following: the Social Platform, Age Platform, Caritas Europe, REVES, Business Europe, and FEANTSA.

By doing so, the working group has realised its mandate about a contribution on the "follow-up to the Third Forum" and the contacts "with the European Parliament and the European Union advisory bodies, as well as with all relevant organisations and stakeholders (e.g. social partners and NGOs)".

Feedback was received in different ways, covering lots of details in some cases. This chapter tries to summarise the contributions and does not necessarily always reflect all the details given in the contributions. Tackling concerns and expressing new ideas in a constructive way have helped significantly the mutual learning process.

Section 2 - Content[94]

1. Clarity on how to apply the EU rules

a) Clarity or not?

The first question deals with the clarity of the current European legal framework applicable to SSGI.

According to the answers received, nine members[95] considered that there is **not** enough clarity on how to apply EU rules to social services in national contexts.

The many administrative levels involved in national contexts are also given as an explanation for the difficulties of coordination or awareness on this issue. The fact that the European concepts are considered as problematic or improper to be used in the social sector was also advanced by two experts[96]: more oriented market logic in the European regulations and general interest in the national ones. The use of public procurement has also been considered as problematic[97] or not appropriate[98], and some guidance has been requested on this issue[99]. The difficulty to identify which social services are affected by EU rules is also pointed to[100] or the dispersion of social services among various public authorities[101]. Support to local authorities through support materials, and help in legal questions should also be promoted[102]. Member States should also be a good example for their local authorities[103].

For five members[104], there is **enough** clarity; however, for some respondents[105], open questions remain because of the ruling process of the Court of Justice itself[106], or by the fact that local situations are not reported well enough on the national level[107].

Four **stakeholders** (Social Platform, Age Platform, Caritas Europe and REVES) consider there is not enough clarity on how to apply the current set of rules, whereas Business Europe and FEANTSA believe there is enough clarity.

Other interesting points were raised from the consultations.

The fact that legislation on SSGI is built on exemptions or exceptions to the various set of EU rules brings legal uncertainty as interpreted in a narrow sense[108]. The clarity to know if and how to apply EU rules is not always clear regarding social services for older people which evolve very rapidly[109]. To be certain that the new approaches to these social services are compatible with EU rules is not so easy for the promoters of these services.

The Social Platform and FEANTSA acknowledge that progress has been achieved on the recognition of the specific characteristics of SSGI in recent legislation concerning public procurement, state aid and concessions.
For the Social Platform, two main problems still remain:

- Firstly, there are different concepts and definitions in the different sets of EU rules. A unique legislation on the basis of Article 14 of the TFEU and Protocol 26 would create legal certainty and coherence.
- Secondly, there is no clarity about the compatibility of modalities and rules on the provision of social services developed in Member States (including the notion of grant / subvention; quasi in-house) and EU laws that are applicable to social services.

The whole issue of the application of the EU rules remains difficult for local and regional authorities[110].

It was also commented that it would be difficult to define SSGI that are a primary competence of MS and local authorities, that the general interest is defined quite differently by MS, and that clarifications should be brought through guidance and collaboration between Member States[111].

b) Problems identified in practice and workable solutions

The questionnaire allowed the members to raise the problems they are facing in the application of the EU rules to the provision of social services. From the contributions, two categories of concerns exist which are of course interrelated: one regarding the ***application*** of the EU rules, and the other on the ***design*** of these rules applicable to SSGI.

The clarifications brought over the years were appreciated[112]. However, several members proposed solutions that, according to them, would enhance the understanding and the application of the rules in the national context.

The two tables below summarise the contributions.

	Type of concerns[113]	SOLUTIONS suggested in concreto	Suggested by the experts of
Application of the EU rules	Different aspects regarding Commission "explanation documents"[114]	The Guide needs more explanation, concrete definitions and criteria to help Member States understand when and how to apply it.	Portugal
		While respecting the confidentiality of the data exchanged (no public connection), one could consider seeking an answer from the Commission on a specific compensation case that could be viewed as an official position (based on the old letters in antitrust policy; these could be "Altmark orientation letters''). This idea was already expressed at the preparatory seminar of the 3rd Forum http://www.socialsecurity.fgov.be/eu/docs/agenda/26-27_10_10_ssig_aides_etat_en.pdf	Belgium
		Faster update of the Guide as public authorities cannot wait over a year to get concrete answers to the application of the new set of rules, especially if they have 2 years to comply with the legislation, even for existing legislation.	Belgium
	Lack of knowledge should be reduced by Seminars & Trainings	• Share practices of Member States, how they applied the rules, what problems they had to solve during the process of implementation. • Twinning Programmes between Commission and Member States such as Officials "on the spot", i.e. in social institutions or entities, dealing with social projects during an appropriate period of time (suggested name for such exchanges: "Back to Social Reality") • Training Programmes financed by the Commission for social services' managers on how to understand and apply EU rules (see as a model: Training of National Judges in EU Competition Law and judicial cooperation financed by the Annual Work Programme 2013 Civil Justice)	Czech Republic Belgium

	Type of CONCERNS	TYPE of SOLUTIONS	Specific SOLUTIONS	Suggested by the experts of
Design of the EU rules	Clarity of the EU rules	Legal clarifications	• Need of legal clarification: common rules, concepts are needed, the boundary between SGEI and SGNEI is not clear	Lithuania, Estonia (economic, not economic)
			• Need of specific legal framework adapted specifically to SSGI	Lithuania, Estonia
			• Need of more information on the various forms of provision of services (in-house, public-private partnership, inter-municipal cooperation, authorisation schemes, compensation or subsidy, regulated competition and the user's choice, etc.).	Lithuania
			• the cost efficiency (and administrative cost especially) of the application of the EU rules to social services, should be taken into account in the design of the EU rules	Lithuania, Estonia
			• A Commission communication on how to articulate EU public procurement rules and EU State aids rules	Belgium
	Lack of definition	Specific definition	In order to be able to give guidance on the SSGI from the point of view of EU state aid regulation, there should be a clear and more specific definition of SSGI.	Finland
	Treaty provisions aspects	Analysis and existing mechanisms	A public consultation on the interpretation/implementation of Article 9 of the TFEU (which impact on the application of EU rules to SSGI?) The scope of Article 9 of the TFEU: may such a new provision imply a reconsideration of the pertinence of the current EU rules applying to social services, and not only for future proposals from the Commission? The Better Regulation Mechanism, as ruled by the Inter-Institutional Agreement of 2003, which may imply a debate on how the application of EU rules to social services is complying with the principle of proportionality (Article 5.4 of the TEFU). See also the new Commission communication of December 2012 on "EU Regulatory Fitness".	Belgium

a) Problems encountered at national level and possible initiatives from Member States

Since the organisation, financing and design of many social services are set at regional and local level, a kind of "missing link" exists between the European and central governments on one side and the regional and local authorities on the other side.

One should take also into consideration the organisation of the Member States and the autonomy of regions and local authorities who are not obliged to report to the national authorities on how they organise the service provision. Nevertheless the application of EU law is still a responsibility of the national authorities, drawing attention to the competencies of different levels within Member States.

Therefore, in order to take into account this situation the following question has been asked to the members: *"What initiatives could Member States take to help regional and local public authorities better understand and apply EU rules?"*

Initiatives that Members States could take to help regional and local public authorities better understand and apply EU rules.

Type of initiatives	Specific initiatives	Proposed by the experts of
"Tools"	Continuing with the existing EU tools.	Austria
	Shared number of actions and interventions with the Central Ministries, Regions and Municipalities for the management of social services/services of general economic interest (SGEI), addressing the European rules on state aid, internal market and public procurement, in order to give a clear presentation of the rules applying to SSGI.	Italy
Initiate a more systematic approach & methodology	• With the help of the Commission, a specific and scientific approach with a clear methodology and objectives has to be developed. As already proposed during the working group, the starting points have to be the social services themselves or the possible themes challenged by the EU rules within SSGI. Instead of speaking of "state aids", the topics "financing of social institutions" or "governance of social institutions" have to be clearly announced and tackled. Instead of speaking about freedom to provide services in general terms, the topics "authorisations schemes within social services" and "conditions to provide social services" have to be treated. The social institutions in charge of providing these services have to be consulted in these kind of "programmes".	Belgium

	• Identification of markets within social services for the crucial distinction of economic and non-economic activity is also a core question to be tackled.	
Seminars	Seminars, examples of the best practices, case studies, etc.	Czech Republic
	Regular symposiums and training dedicated to the successive reforms.	France
	Specific seminars and specific meetings.	Portugal
Website - Vademecum	The use of various tools with respect to information on the rules, including a vademecum and a website.	Denmark
	Publication of a Guide for local services focusing on the management of social services/services of general economic interest (SGEI), addressing the European rules on state aid, internal market and public procurement, in order to give a clear presentation of the rules applying. Local services are very concerned on how to secure the public procurement.	France
	A more user-friendly version of the Commission´s Guide, online information.	Portugal
Consultations & Communications	More communication and consultations on the relevant topic. In particular, going through the EU legislation during the preparations of different actions should be stressed. The clarification of the whole picture is also very important. Nevertheless the role of national authorities is limited because they are not in a position to interpret the rules in the last level; they are not able to give any definite answers to complex questions emerging from the local level actors.	Finland
Guidance	Promote guidelines, support materials, dedicate participants in working groups, etc.	Lithuania
Cooperation	There are different institutions of cooperation between government and local authorities (e.g. Government and self-government Joint Committee) and between government and non-profit organisations (Public Utility Council). Office of Competition and Consumer Protection and Public Procurement Office provide a wide range of information and advisory activities. E.g.: at the moment the Office of Competition and Consumer Protection developed a wide range of consultations with involved ministries on the effects of the new package.	Poland

Other interesting points were raised by stakeholders on the initiatives at the national level[115]:

- Create a high level group to exchange on the challenges of social protection and social security and how those challenges could be better met at the EU level.

- The idea of the creation of "a one point information desk" within Member States where regional and local public authorities and other stakeholders would be able to get a clear answer to their specific questions[116].

- The creation of an indicative non-binding register of social services, which specifies, for each form of organisation, the economic and non-economic nature of the activity.

- The organisation of training activities for regional, local public authorities and service providers to better understand and apply EU rules[117].

- The exchange of information and good practices in the implementation of EU rules (e.g. public procurement: implementation of social considerations, how to measure quality, how to ensure continuity, users' involvement, etc.; state aid: how to draft a mandate, how to calculate compensation, how to classify a service as economic or non-economic)[118] and facilitating a network of local authorities[119].

- A possible action to be taken could be to create an "alliance" between the EU level[120] (and included the SPC) and intermediary bodies that might have better access to the local and regional level in order to improve the knowledge and understanding of EU rules applying to SSGI. This alliance should benefit from a kind of acknowledgment from the EU level.

2. The organisation of the next Forum on SSGI: still a shared idea

Since 2007, three Forums on Social Services of General Interest (SSGI) have been organised; in Lisbon (2007), in Paris (2008) and in Brussels (2010)[121]. These Forums were High Level EU conferences organised by the respective Presidencies of the Council, with the support from the Commission and financed from the EU budget. They have involved EU institutions, national, regional and local authorities as well as relevant stakeholders.

These Conferences have given an opportunity for public authorities, stakeholders and institutions to voice concerns about the issues related to the provision of social services and the application of EU rules.

The Commission Communication of December 2011[122] acknowledges that the Forums have been "essential in sharing information and promoting dialogue and better understanding of the rules among stakeholders", and recalled the organisation of the next forum in 2013[123].

Therefore, one question of the questionnaire invited the members and the stakeholders to express their interest in having a next forum, the subjects which could be tackled within the forum, and the approach and methods that should be applied to the organisation of this type of conference.

At this time, the question which presidency will take up the initiative to organise the next forum is not yet solved.

a) ***The interest of having the next forum***

Those who expressed his/her view on this point[124] showed interest in having a next forum.

According to some reactions, organising a forum feeds to a continued process of discussions[125].

b) **Subjects to be tackled**

Some of the suggested topics were the application of public procurements rules and of the state aids package, as well as the quality framework. These have already been discussed in previous editions of the forum.

Beside these issues, several other issues were proposed by the members and stakeholders, including also new perspectives on the discussed ones:

- **the legal ones[126]**:

The members:

- Identification of bottlenecks in EU regulation regarding social services[127];
- Implementation of the rules in Member States, obstacles and solutions[128];
- Economic and non-economic activity, trace the limits of the non-economic sphere to obtain a better definition, set the scope[129];
- Applying competition and market regulation to the provision of SSGI[130];
- Is the EU law favouring market logics in the social sector? If this is the case, is this suitable? Are the rules stimulating profit providers' appetites in the social sectors? Added value of economic regulation applicable to SSGI[131].

- What is the level of application of the EU rules in the different Member States[132];
- The results of the last forum on SSGI – overview of progress[133];
- Creating of special legal base for SSGI – systematisation of existing rules and documents related to SSGI in one document or some special documents[134];
- Concession directive[135];
- the new SGEI package and the Altmark judgment; how should they be applied preferably in concrete examples;
- "collateral" effects of the rules and how can they be tackled. For e.g. the length of the act of entrustment. The Commission argues that it is better to have a short term act of entrustment as a public authority can change more frequently than a service provider. Nevertheless, what are the effects on the long-term employment of the workers of these services (long-term contracts) especially in sectors with precarious working conditions. Beyond the working conditions, it is also the continuity of the service for the beneficiaries which is really at stake[136];
- the new legislation[137]*;*
- define non-economic sphere and examples how Member States could help local authorities better understanding and applying EU rules with a clarification of the legal aspects for SSGI[138];
- legal framework: current situation and prospects[139].

***The stakeholders*:**

- update on how EU rules apply to SSGI using clear examples to help raise awareness and a more coherent understanding across the EU[140];
- Developing a regulation based on Article 14 of the TFEU, Protocol 26 and Article 36 of the EU Charter on fundamental rights on the key principles and conditions (economic and fiscal, but also the values mentioned in Protocol 26) to provide, commission and fund social services, by guaranteeing universal access, quality, affordability, accessibility, territorial availability[141];
- analysis of real problems (because there are grey areas) and dissemination of competences[142],

- **other than legal**:

The members:

- freedom of decision and action of the Member States; differences and similarities between Member States in how to organise and provide social services[143];
- the context of new developments in the field of social innovation and social entrepreneurship[144];
- How to improve or at least how to maintain the quality of social services?[145]
- Markets and quasi-markets in the social sectors[146].
- What is the added value of a European approach on social services? A peer review approach on social services? How can we ensure the fundamental role of SSGI to be pursued? How can we guarantee the accessibility to social and health services of high quality?[147]
- a reflection should be started on a more policy-oriented approach in line with the recommendations set in the AGS (2012 and 2013) and recommendations issued (sporadically) to Member States to ensure a better access to social and care services. This would also give a more positive approach of the issue and "bring back together" the public authorities with the application of EU rules and maybe alleviate the fear of applying them wrongly[148].
- Quality framework of SSGI[149].
- Taking into account the social objectives of the EU, but looking at the impact of the economic rules on them, how can we ensure a balance?[150]

The stakeholders:

- *Politically burning topics: measuring the social impact[151];*
- *how to implement the social investment package[152];*
- *employment in the social sector, impact of austerity measures[153];*

- *How can we improve the interaction between local authorities and non-profit organisations in the provision of social services?[154]*
- *The role of social services in social market economy and the Exchange of experiences between EU Member States on the challenges they face in this respect[155];*
- *social services as part of an EU social agenda (not internal market agenda)- using a different EU starting point[156];*
- *unlocking the employment potential of social serivces and tackling the worsening work conditions[157];*
- *structural funds and social services/social economy[158];*
- *social service innovation (rather than social policy/product innovation)[159].*

c) **Methods and organisation**

Six ***members[160]*** suggested on having workshops where concrete situations are analysed in order to see where there are the "problems" in the provision of SSGI. Legal lessons are considered to be relevant[161]. External expert presentations are also required[162]. Preparation of such a conference is of course essential in order to give accurate information to the audience for example in a form of a manual[163].

The ***stakeholders*** expressed also their views on the preferable methods and organisation. Emphasis has been put on the preparation with a fair representation of both public and non-profit sector, as well as social partners[164]. Concrete case studies have been also a request[165]. Enough time to raise questions and publicy available documents are also required[166]. The necessity to involve all Member States not only at national level, but also at regional and local levels is also a request from previous debates[167]. An interesting point was the fact that this was also considered as a good moment to get in touch with members

of the Social Protection Committee[168]. On the form of the forum, "a mix between polical forum and a learning seminar"[169] was proposed, or the exchange of best practices[170], was also an intersting idea.

3. Evaluations of the group's work

a) working methods

The feedback requested was about the arrangements of the meetings, seminars, interaction, dialogue between different parties, the use of the cloud computing system, etc.

Generally speaking, the members appreciated the working methods applied. The presentation made by the members was a positive contribution to the group's work.

Interaction and active participation of the members might be improved in the future. The low participation could partially be explained by the fact that the knowledge of the experts coming from the social departments about the internal market rules (including state aids) is probably weak. In this sense, it could be said that the IWG was in an intense learning process to all the members involved. Profound knowledge of both the social sector and the legal framework is required from the members in order to make the group function optimally. The turnover of the staff in the Member State is also a point to be taken into account. In this sense, the method suggested by the Chair to present the reality of social services (where the knowledge of the members is high) by "confronting" it to the EU rules was interesting[171]. The seminars have contributed to the knowledge of the members, but still more efforts have to be made to improve the level of knowledge and awareness. In this sense, revealing "real problems" or tricky issues in the application of the rules seems to be a very challenging mission if the awareness of the rules or the "right way" to apply them is not even present…

The **cloud computing** (a workspace where to put all the documents) has faced some "tricky moments" but was generally considered as an efficient tool of collaboration, even if it could have been used more and in a more systematic way to improve participation. It is a good way to have all the information on one site / platform and could enable lively debate among the members between the meetings.
It was also suggested that conclusions and decisions should come out of every discussion[172].

b) relevance of the issues discussed

The topics discussed were those present in the mandate[173] of the IWG and were considered relevant.
The reasons for the **difficulty** to effectively discuss these topics might be the different level of competencies or cross-competencies (social and economic law) required. **Quality** is a topic in which several members[174] have expressed their interest and which have of course a strong link with the legal issues: regulation of quality of SSGI (especially long-term care services), and regulation of accessibility of SSGI.
Discussing national **realities of social services**, how national authorities are increasingly diversifying the ways in which social services are organised, provided and financed, was also considered relevant.

c) relevance of the studies / questionnaires referred to (specify the study)

The work of the IWG was supported by various reports, papers and studies.

The Progress financed study published by the Commission in 2011[175] on four types of social services (long-term care, childcare, social housing and employment services), which was presented by the authors in one of the meetings, was considered useful[176] as it provided a multifaceted picture on the organisation of social services in some Member States. It was also considered as a basis for a deeper analysis, and a starting point to assess the pertinence of some EU rules[177] (e.g. public procurement rules not so widely used in some of the fields analysed, or public compensation). Some criticism was made[178] on the limited coverage of social services or limited number of Member States (20 on the organisational/legal aspects, 10 on quality issues) which do not have a global picture of social services across the EU or to assess the overall performance of the SSGI in achieving their general interest goals and objectives.

Legal papers, such as those annexed to the present report were considered useful[179]. Other studies, conducted with the support of the Commission, were suggested[180] as topical for the work of the working group such as *the European Commission, Liberalisation and privatisation in the EU, Services of general interest and the roles of the public sector*[181], and *Introduction: EU law, Governance and Social Policy*[182]. Nevertheless, the large quantity of different documents and legal acts related to the SSGI issues disrupts effective practical work[183].

The questionnaire on the applicability of the Guide was also considered as a good opportunity for the members to express doubts and uncertainties about the use of the EU rules applicable to SSGI[184].

d) asked contributions of the members (presentations, papers, opinions)

The Chair gave the members concrete assignments in order to present the situation of SSGI in their own countries.

The mutual learning process based on the different presentation was considered useful and adding value to the work of the IWG. It could constitute the very beginning of a methodology to assess the difficulties and common problems faced by the several authorities in applying EU rules to SSGI. This could help to provide possible solutions to the problems identified. This was considered also a good practice to involve the participants in the discussions.

Improvements were also suggested such as short summariesand how to ensure that available material could be more effectively disseminated[185]. Due to the large variety of topics and MS positions and interests, it was considered to be difficult to have sound debates[186]. It has also been pointed out that countries' presentations should be prepared with indication whether public procurement mechanism or rather "entrustment acts" are in use[187]. The level of compliance regarding the application of EU rules to SSGI was also pointed out as a problem[188].

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Conclusions

This chapter makes a synthesis of what kind of conclusions could be drawn regarding the outcome of the work of the working group. It clarifies what has been learnt on the application of the EU rules to SSGI in the working group until now.

This has led us to a few concluding observations with specific recommendations for the content of the work and process to be pursued. We identified several key points and for some there are divergent interpretations and room for further debates. The identification of these bottlenecksscould be considered as added value to the work carried out by the IWG and could prove to be a really interesting basis for further work, especially for the organisers of the next SSGI Forum.

1. Observations

Diversity is a predominant characteristic of SSGI in the different Member States and common features are therefore not easy to detect on the basis of which one can draw clear conclusions and make recommendations. We agree that this diversity of the various organisations of SSGI has to be respected in the future as well according to the subsidiarity principle[189], and in line with the Treaties and in particular with Protocol 26. Preference of one type of organisation of SSGI has to be avoided[190]. It is said that promoting one single model is not the objective of EU level regulation[191]. However, we still have scarce knowledge about the outcome of the application of the EU rules on the diversity of the modes of provision of SSGI. As the provision of SSGI in MS will constantly evolve in the future we have to address possible new problems faced by providers in general *and provide a better exchange of knowledge including case studies about the application of the EU rules.* ***Silo's expertise,*** *meaning that the various expertise are not interconnected,* was underlined as a negative factor to raise awareness about the EU rules applied to SSGI. There is clearly a lack of cross-cutting expertise on social, legal and economic spheres in various national, regional and local authorities when applying the EU rules to SSGI. "Cross-fertilisation" discussions should be promoted among different experts from Member States: experts on state aid, public procurement and internal market rules and experts from social protection should have more fruitful and structured discussions on the interactions of their topics. To create shared understanding of these cross-sectoral issues takes time. The SPC could promote specific topic meetings, also with representatives of civil society.

On the Commission side, there is still a demand to receive feedback in order to know the effects or impacts of the EU rules on SSGI[192]. Moreover, the same applies normally to the national level / central government level because the effects of the rules on the service performance are recognised best at the local level where the services are delivered.

It seems also that **there are flaws in the implementation** or in the application of the EU rules. We still have a blurred picture on whether the EU rules are always applied when it is required. If a set of rules is found to be difficult to apply in practice due to several possible factors, there is a tendency to avoid it by looking for completely different solutions. That might result even in neglecting the existing possibilities to support social services of general interest in compliance with the EU rules. Therefore, the administrative burden involved in any legally binding procedures should not be ignored in efforts to promote the compliance with the rules.

2. Process recommendations

For the future work on these issues, other working methods have been suggested than the current SPC IWG. The extra added value at the European level would be exchange of experiences on a practical level.

A peer review approach with a clear and practical subject or case studies to be tackled has received support from several members. These case studies could for example be focused on practical solutions where EU rules have been successfully implemented in line with the social objectives. An online working platform where experts can share practices and remind each other of important texts to be followed and analysed was also suggested and supported by the group.

The exercise of clarification is of permanent character, because of the constantly evolving jurisprudence (e.g. the notion of economic activity), the complexity and the multiplicity of the EU rules as well as the perceived difficulty to apply them to the social sector. A "gap" or a missing link between the local (municipal) and the national level was highlighted. The direct application of EU rules at the local level was frequently referred to as a problem and it might require simplified models to be elaborated in cooperation between the national authorities and the EU.

Continuing with the existing tools, such as the Guide or the Interactive Information Service, and making better use of them were also suggested. The exchange of describing problems and receiving answers from competent authorities — as used within the past years — could be continued and also be promoted.

In particular the terminology used should be made easier to understand for decision makers at the national and local level. It would be desirable to make an evaluation of the new version of the Guide — integrating new provisions for public procurement and concessions.

Even if the working group was mainly dealing with legal questions, it has to be stressed that beyond these questions, very often, political questions are at stake. Such questions have to be more explicit in order to raise awareness about the contents of the rules among administrations, experts and politicians.

E.g[193].:

- Instead of speaking about state aids, financing of SSGI have to be clearly addressed;
- instead of speaking about public procurement and social services, the choice of service providers has to be addressed;
- "authorisation schemes compatible with EU legislation" look more interesting than the "service directive" and "social services".

Specific attention should be paid to the terminology used when one is working on SSGI. SSGI are covering a lot of services which often do not have the same meanings, coverage, or organisations. The lack of common terminology is not a new issue in the field of EU social policies and is of particular relevance to SSGI. Although some improvements have been achieved there are still issues left concerning terms and concepts used within the SSGI field.

3. Recommendations for the substance matters to be dealt with

It has proved to be hard to reach any consensus on the nature of the EU rules and the ultimate aims they pursue. More work has to be carried out on the market aspects of the EU rules. At the origins, the EU rules belonging to the competition and internal market policies were not focusing on the social services and social security (SSGI) as such, but apply — with their derogations and exceptions — to all sectors. Because of the extended interpretation of what is an economic activity[194], the social

sector is nowadays also included. Moreover, there is an evolution in the organisation of SSGI with the involvement of private, and for-profit providers. Therefore, the outsourcing of the provision of these services to external providers has also triggered the application of EU rules on state aid, public procurement and internal market. A deeper analysis on the use of public procurement for SSGI should give the global picture to assess and measure this trend.

If the EU rules are on the one hand — originally — market centred[195], on the other hand they are not applicable to SSGI earmarked as non-economic. Even if the EU rules apply, there are derogations, exceptions from general rules or principles laid down by the EU Treaty.

There are divergent views on, whether these exemptions give enough "room for manoeuvre" to the organisation of SSGI (e.g. the choice of the most appropriate service provider) or safeguard sufficiently the public interests involved in the service provision, or treat neutrally for-profit vs not-for-profit actors.

We still lack information on the extent to which the different set of rules are applied in different countries. For example in the field of state aids/competition rules, the question to know if there is a market or not in a certain field of social services remains unclear. However, the existence of the market is a crucial factor in determining the economic / non-economic nature of the activity. Moreover this crucial question can receive several interpretations. The question whether a broad interpretation of a market in Member State A can have a consequence in Member State B is not solved either.

In order to further improve the application of the EU rules to SSGI in the future, an assessment of them could also be carried out taking into account the different quality criteria set for smarter/better regulation. Attention should be given in particular to the administrative burden and to implementation costs, overlaps of sets of rules, impact assessment on social services, achievement of expected benefits at minimum cost based on evidence and the respect of principles of subsidiarity and proportionality[196].

The *better balance* between social policy aims on one side and economic and efficiency considerations on the other side, has also received different interpretations in the working group. According to some the applicable rules tend to favour economic goals (such as competition), for others the rules are seen as neutral, and for still others the rules are protective of social objectives. More evidence on these opinions is, however, needed. The idea of the complementarity of these goals was also expressed, taking into account also the value for paid taxes also at national level[197]. The bases of equal treatment of for profit providers and not for profit providers should also be better investigated in the future.

These challenging questions are of course complex issues both at the crossroads of solidarity and economy, of national and EU competencies, but are nevertheless interesting and they are crucial to be analysed and tackled in order to measure and decide on the future evolutions and developments of SSGI, being at "the heart of the European Social Model".

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Annexes

Members’ State contributions
Experts’ contributions
Template of the Evalation form

SOURCE MATERIALS

[1] The experts of the Commission do not agree with mentioning « social protection » in the title of the Report of the Informal Working Group (IWG). They argue that the IWG has received a mandate to deal with the application of EU rules to social services of general interest. This has been the exclusive focus of the IWG's activities. The provision of social services represents just one type of intervention within the scope of "social protection". This is a much broader concept as it covers not only the provision of social services but also cash benefits such as pensions, unemployment benefits and money transfers for people with disabilities, families, etc. as well as goods provided directly to people in need (wheelchairs for PwD, furniture provided to the poor …).

The application of EU rules to social protection in general raises issues that have never been discussed in the IWG as they were well beyond the mandate received by the IWG; they also concern EU rules which are not those at stake when discussing social services (e.g. pensions and non-discrimination).There is also a part of the social protection which is provided by the employers and this too was not in the mandate of the WG and has not been dealt with within the IWG.

The Commission services therefore insists on avoiding the utilisation of the term "social protection" in the title and in the text of the report.".

[2] Council Conclusions "Social Services of General Interest: at the heart of the European social model", 3053rd EMPLOYMENT, SOCIAL POLICY, HEALTH and CONSUMER AFFAIRS Council meeting Brussels, 6 December 2010

[3] COMMUNICATION FROM THE COMMISSION, COM(2006) 177 final, Implementing the Community Lisbon programme: Social services of general interest in the European Union, {SEC(2006) 516}: "*What do we mean by social services in the European Union? In addition to health services, which are not covered by this communication, we find two main categories of social services: statutory and complementary social security schemes, organised in various ways (mutual or occupational organisations), covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability – other essential services provided directly to the person. These services that play a preventive and social cohesion role consist of customised assistance to facilitate social inclusion and safeguard fundamental rights. They comprise, first of all, assistance for persons faced by personal challenges or crises (such as debt, unemployment, drug addiction or family breakdown). Secondly, they include activities to ensure that the persons concerned are able to completely reintegrate into society (rehabilitation, language training for immigrants) and, in particular, the labour market (occupational training and reintegration). These services complement and support the role of families in caring for the youngest and oldest members of society in particular. Thirdly, these services include activities to integrate persons with long-term health or disability problems. Fourthly, they also include social housing, providing housing for disadvantaged citizens or socially less advantaged groups. Certain services can obviously include all of these four dimensions.*" available on the following link: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0177:FIN:EN:PDF

[4] According to the Commission services the following text should be added here "*Social protection however also covers cash benefits and reimbursement as well as the provision of goods*." to clarify the only partial overlapping between the notion of social protection and the notion of social services.

[5] SEC(2010) 1545 final of 7 December 2010. This Guide has in the meantime been updated and a new version has been published on 15 February 2013 (SWD(2013) 53 final)

[6] The following definition can be given: "Market-type mechanisms are defined as "encompassing all arrangements where at least one significant characteristic of markets is present." In the area of service provision, the prime instruments include outsourcing (contracting out), public private partnerships (PPPs) and vouchers." See Market-type Mechanisms and the Provision of Public Services by Jón R. Blöndal, ISSN 1608-7143, OECD JOURNAL ON BUDGETING, Volume 5 – No 1, OECD 2005.

The European Commission's experts do not agree with the fact that the report calls EU rules applying to social services "economic rules" and "market-type mechanisms" and presents them as belonging to a market logic which is imposed to the social sector and aims at changing its nature/is dangerous. This is in their opinion not correct:

- *State aids rules applying to social services do not aim at promoting competition in the provision of a given social service or at protecting competitors providing the same social service. As explained in the Guide of the Commission services on the application of EU rules to social services (hereafter, the Commission services' Guide) financing in a correct way a social service provider does not give the right to another provider to receive the same or equal financing. The purpose of State aid rules applying to Services of General Economic Interest (SGEI) including Social Services of General Interest (SSG) is to avoid cross-subsidisation, i.e. that money that should have been spent for financing a service in the public interest is instead used to finance other activities in other markets and distort competition in those markets. Moreover, State aid rules applying to SSGI recognise that missions of general interest can be financed. They aim at ensuring that the financing is really targeted to the general interest objectives. One can therefore say, as Judge Lenaerts, that State aid rules applying to SGEI protect the objective of general interest – the social objective for SSGI ! - from the risk that public resources are instead allocated to commercial activities;*
- *EU Public procurement rules do not have to apply to SSGI in all circumstances. They apply only if a public authority decides to "buy" a service against remuneration. It is the fact that the public authority has already chosen the market logic (deciding to outsource the service to external providers) that triggers the application of the EU Public Procurement rules. Even when outsourcing the public authorities can use alternative models and not just procurements. And when procuring, they do not have to choose the most economic service provider without taking into account the quality of the service;*
- *Internal market rules are protecting not only the providers but also the users of social services as they allow the users to take advantage of the offer of services in other MSs.*

Moreover, according to the Commission services EU rules applying to SSGI take into account the specificities of these services:

- *State aid rules offer an exemption from the obligation of notifying to the Commission State aid to social services;*
- *A much lighter EU Public Procurement regime apply to procurement of social services;*
- *Social objectives can justify restriction to freedom of establishment and freedom to provide services.*

Even the contributions received by the Social Platform and by FEANTSA state that progress has been achieved in the EU rules as far as the recognition of the specificities of SSGI is concerned.". The European Commission's experts propose an alternative text "The set of rules discussed in the IWG are related to State aid, internal market and public procurement. These rules apply whenever the activity performed by the service provider is of an economic nature". [6] [6]

8

[9] Which are very often absent in the debates at EU levels despite the fact that SSGI encompasses also social security systems. See Commission Communication already mentioned and quoted in Footnote 2.

[10] According to the Commission services, this title and the contents of this sub-section aim at presenting EU rules applying to social services as belonging to a market logic which is unfamiliar to social services and not appropriate for their provision.

[11] The experts of the European Commission note that EU rules do not impose one single "market oriented" model for financing social services. For instance Public Authorities do not have to outsource the provision of the services and to apply EU Public Procurement rules. Even when outsourcing they can use alternative models and not just procurements. And when procuring, they do not have to choose the more economic service provider. The contributions seem to indicate that certain rules do not apply because of the way the services are organised (no outsourcing, triangular relation…)".

[12] AT, DE, BE, FI. Of course EU rules on state aid applying to social services provide for the possibility to intervene on these failures by imposing a public service obligation according to set procedures.

[13] Hartley DEAN, Social Policy, Short Introductions, Polity Press 2012, Second Edition, p. 116.

According to the experts of the European Commission the report should build on the positions expressed in the contributions of the MS experts and not on external sources. We should present

analysis that is exchanged by all the experts in the IWG and avoid quoting external sources and analysis that have not been discussed inside the group.

[14] According to the experts of the European Commission the idea that the application of EU rules to SSGI is related to the "principle in the EU rules that market allocation is the most efficient way to provide social services" is not clearly explained. EU rules do not assume that market allocation is always efficient; otherwise they would not include provisions for SSGIs to be funded or provided by the State. State aid rules applying to social services allow for financing of these services within a general interest logic.

[15] Julian LE GRAND, RAY V. F. ROBINSON, The Economics of Social Problems: The Market Versus the State; 1984, MAC MILLAN EDUCATION LTD, p. 265

[16] The experts of the European Commission note that, differently from what is stated in the sentence, the ratio of State aid rules applying to SGEI is that there is a market failure and that public service obligation are imposed."

[17] The Commission services note that it is too restrictive and biased to present in the report just as "derogations" the specific rules applying to social services that the Council and the European Parliament have adopted in the field of public procurement and internal market and that the Commission has adopted in the field of State aid. These rules take into account the specificities of these services. In particular:

- only two out of the 84 articles of the EU Public Procurement Directive (Directive 2004/18/EC of 31 March 2004) apply to the procurement of social services, thus offering to public authorities a wider flexibility for the procurement of social services;
- the Almunia package on State aid, which sets out the rules for the financing of services of general interest, grants preferential treatment to social services whose financing is notably exempt from the obligation of notification to the Commission.

The Commission services have therefore suggested to redraft this part of the text so as to indicate that some members of the IWG have expressed the view that the existing EU rules applying to social services are to be considered as "derogations" to the main sets of rules and others participants have pointed out to the fact that the EU legislator has taken into account the specificities of social services notably by establishing specific rules in the area of State aid, internal market and public procurement. This will reflect better the diversities of opinions expressed in the IWG. Opinions recognising the progresses made in the EU legal framework and the fact that the new rules take into account the specificities of social services were expressed notably by SE and MT experts as well as by the Social Platform and FEANTSA.

[18] The experts of the European Commission note that State aids rules applying to social services are not about promoting competition in the provision of a given social service or protecting competitors providing the same social service. As explained in the in the Commission services' Guide financing in a correct way a provider of social services does not give the right to another provider to receive the same/equal financing. The purpose of State aids rules applying to SGEI is to avoid cross-subsidisation, i.e. that money that should have been spent for financing a service in the public interest is instead used to finance other activities in other markets and distort competition in those markets.".

[19] The Commission services note that EU Public Procurement rules facilitate certain forms of cooperation among public authorities by excluding them from their field of application. This exclusions have already been recognised by the Court (and explained in the Commission services' Guide) and are currently being codified in the new Public Procurement Directives that will be adopted in January 2015 following a Commission proposal of December 2011.

[20] Also called in Germany or Austria "self-administration", Fr in its contribution in the various types of interventions: delegation of public service, in house. Finland stressing the importance of the NGO sector.

[21] According to the Commission services this paragraph is misleading as it states that "At the EU level, state aids are forbidden in principle" and that "There might be derogation for the financing of services of general interest in so far as there is no cross-subsidisation" mentioning only at the end that "EU rules allow for the financing of social services of general interest in line with the Altmark jurisprudence and with the Almunia package" adding just afterwards "The important question is whether these rules are applied and to what extent "easily" applied in the social sectors". The report should have clearly explained that in 2005 the Commission adopted a first package (Monti-Kroes package) clarifying how State aid rules apply to social services, updated in 2011 (Almunia package). The report should also have explained that ample guidance on how to apply this package is provided in the Commission services' Guide.

[22] For more details on the way the Altmark jurisprudence and the Almunia package apply, see Guide [ADD reference to ALTMARK jurisprudence to Almunia package and to the Guide]

[23] According to the Commission services, this title and the contents of this sub-section aim at presenting EU rules applying to social services as belonging to a market logic which is unfamiliar to social services and not appropriate for their provision.

[24] DE, BE, PT, FR

[25] Case T-137/10 Coordination bruxelloise d'institutions sociales et de santé (CBI) v. Commission, not yet reported, concerning Commission decision C(2009)8120 of 28 December 2009, on the funding granted by the Belgian authorities to the public hospitals belonging to the IRIS network in the Région Bruxelles-Capitale, by way of compensation for hospital and non-hospital services they provide in the form of services of general economic interest (NN 54/09), OJ 2010 C 74/1

[26] The Commission services suggest to start this section by reminding that only two articles of the Public Procurement Directive currently in force apply to social services.

[27] See the following papers: FI, BE, FR, NO in its presentation, DE for the promotion of employment.

[28] Belgium, France, Finland, Austria.

[29] See also a paper published in the European State aid Law Review on this issue highlighting the same trend, Karl-Heinz Lambertz and Matthieu Hornung State Aid Rules on Services of General Economic Interest: For the Committee of the Regions, the Glass is half-full, EStAL 2, 2012:

"In addition, rules badly applied risk resulting in litigation and in repayment of aid granted. In case of doubt, a public authority may be tempted not to grant funding (State aid) or to hide behind well-known and legally uncontested procedures, which is the case regarding tenders. Therefore, in recent years, public procurement has become an automatism in some fields of activities such as health or the social sector. However, this goes against an association-based approach in these fields because associations often lack the capacity to participate in tenders and because tenders do not or hardly take into account non-market relevant aspects such as social innovation."

[30] DE, FI, BE. See also in Chapter 3. The Guide explains this link in Chapter 5, highlighting that State aid rules have different aims and scope, and both have to be complied with when setting up SSGI *According to the Commission services "State aids and Public procurement are not alternative"*.

[31] BE, FI, Norway in its presentation

[32] Finland

[33] How to avoid these "side effects" is explained in the Guide.

[34] DE

24 FI

[36] PT, DE

[37] However, according to the Commission, the concept of economic activity is not pertinent as far as public procurement rules are concerned.

[38] AT

[39] It should be noted that the Directives establish limited rules or a light regime for social services. Transparency and non-discrimination principles apply to procurement of social and health services when there is a certain cross-border interest.

[40] DE

[41] PT

[42] PT, SL

[43] BE

[44] DK

[45] The Commission services do not agree with the statement that "there is still no certainty if public funding programmes and subventions schemes are really alternatives to public procurements and as such really compatible with EU rule". Public funding programmes and subventions schemes can be compatible with EU rules insofar as they comply with applicable State aid rules. Moreover, when public procurement rules apply, the selection of the provider to be funded shall be done in compliance with public procurement rules.

[46] Council Conclusions "Social Services of General Interest: at the heart of the European social model", 3053rd EMPLOYMENT, SOCIAL POLICY, HEALTH and CONSUMER AFFAIRS, Council meeting Brussels, 6 December 2010

[47] Please consider that the positions expressed are reflecting positions on the original proposal. On-going negotiations and amendments may have changed positions.

[48] DE, FR, AT.

[49] FR, AT

[50] DE

[51] BE in a specific paper discussed at the SPC

[52] BE, AT, DE, FI, PT, FR

[53] VOLUNTEERING IN THE EUROPEAN UNION , Educational, Audiovisual & Culture Executive Agency (EAC-EA) , Directorate General Education and Culture (DG EAC) , Final Report submitted by GHK, 17 February 2010, http://ec.europa.eu/citizenship/pdf/doc1018_en.pdf .

According to the experts of the European Commission, it is not clear which processes of transpositions are referred to in this paragraph. State aid rules have changed in 2011. While in disagreement with the choice of adding in the IWG report texts from external sources not discussed in the IWG, the Commission services were also wondering why the recommendations drawn by the study were not also quoted. The Commission services note also that the study has a scope which is much larger than social services: moreover it is specifically focused on sport organisations.

[54] FR, BE, FI

[55]

[56] FI

[57]

[58] DE

[59] FR

[60] FI, and to some extent PT.

[61] AT, DE.

[62] DE

[63] “

[64]

[65] SPC/1102/3

[66] See Council conclusions adopted on 6 December 2010 on *“Social services of General Interest (SSGI): at the heart of the European Social Model”* (Council doc. 17566/10).

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[68] Stéphane Rodrigues is a Professor at the Université Paris I (Panthéon-Sorbonne) and is partner in a Brussels law firm.

[69] Carsten Zatschler is Legal Secretary at the Court of Justice of the European Union.

[70] See Chapter 3.

[71] S. Rodrigues referred to the Court decision of 7 November 2012 on the Brussels hospitals (Case T-137/10, *Coordination bruxelloise d’institutions sociales et de santé (CBI)*).

[72] On this point see above the opinion of K. Lenaerts.

[73] See cases of manifest error listed in Q&A 7 of the 2013 Guide (p. 24).

[74] Cases C-320/91 *Corbeau* (1993).

[75] SEC(2010) 1545 of 7 December 2010.

[76] See SPC/1102/3 *2011 Activities of the SPC Informal Working Group on the Application of EU rules to SSGI*.

[77] SWD(2013) 53 final/2 of 29 April 2013.

[78] The new State aid Package, often known as Almunia package, is composed of:
(i) the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11 January 2012, p. 4), which clarifies the basic concepts of State aid relevant for SGEI;
(ii) the Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11 January 2012, p. 3), which defines the conditions under which financing for a SGEI (the ‘public service compensation’) is compatible with the internal market and does not need to be notified to the Commission;

(iii) the European Union framework for State aid in the form of public service compensation (2011) (OJ C 8, 11 January 2012, p. 15), which sets out the rules the Commission will use when assessing SGEI compensation that is not exempted from notification by the Decision. All such compensation has to be notified to the Commission that will then decide on its compatibility with the internal market;
(iv) the Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest (OJ L 114, 26 April 2012, p. 8), which provides that SGEI compensation which amounts to less than EUR 500 000 per undertaking over three fiscal years does not fall under State aid scrutiny.

[79] The IIS put in place by the Commission services in January 2008 answers questions from citizens, public authorities, service users, service providers and other stakeholders. It is accessible on the following webpage: http://ec.europa.eu/services_general_interest/registration/form_en.htm.

[80] SEC (2007) 1514 and SEC(2007) 1516 of 20 November 2007.

[81] The work done in the IWG as reflected in this report was a good occasion to raise awareness and foster knowledge on the EU rules applicable to SSGI.

[82] See Q&A 20 of the 2013 Guide. The analysis tree can also be found through the following link: http://ec.europa.eu/competition/state_aid/overview/analysis_tree_en.pdf.

[83] http://ec.europa.eu/competition/state_aid/overview/public_services_en.html.

[84] See box in Q&A 27.

[85] See Footnote 78 above.

[86] SWD (2013) 40 final.

[87] Commission Regulation No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379/5 of 28 December 2006.

[88] Quoted in Footnote 78 above.

[89] See Q&A 78.

[90] See Q&As 189 and 196.

[91] See Q&As 58 and 205 of the 2013 Guide.

[92] However, as stated in the 3rd Biennial Report on p. 20, "*public authorities can also, at various stages of the public procurement procedures, introduce requirements concerning the quality, continuity and comprehensiveness of the service in question*". See also Q&As 203 to 209 which explain how to draft specifications so as that (i) the awarded service responds to the changing needs of the users and can be adapted to changing circumstances; (ii) quality requirements are included in the award; (iii) the freedom of choice of the users is preserved; and (iv) the familiarity with the local context or the non-profit nature of the provider are taken into account.

[93] See on this issue Q&A 216.

[94]

[95] BE, FI, FR, EE, IT, LT, PT, NO, SV

[96] BE, FI

[97] FI

[98] PL

[99] NO, FI

[100] IT

[101] PT

[102] EE

[103] EE

[104] AT, PL, SI, DK, CZ

[105] AT, PL, SE

[106] PL, SV: "Clarifications will come over time with new jurisprudence".

[107] AT

[108] CARITAS Europe.

[109] AGE EUROPE

[110] REVES

[111] Business Europe
[112] BE, AT, PT, SV
[113]
[114]
[115]

[116] AGE PLATFORM
[117] The Social Platform
[118] The Social Platform, FEANTSA
[119] FEANTSA
[120] REVES
[121] You will find materials on the previous forum (3rd forum in Brussels) on these links: Summary report of the 3rd Forum on SSGI in English, French and Dutch: EN : http://www.socialsecurity.fgov.be/docs/nl/news/ssgi_summary_report.pdf
FR: http://www.socialsecurity.fgov.be/flipping-book/SSIG-FR/files/pmo_forum-fr_03.pdf

Materials, documents, pics and videos available:
http://www.socialsecurity.fgov.be/eu/en/agenda/26-27_10_10.asp
[122] Brussels, 20 December 2011 Commission's Communication of 20 December 2011, A Quality Framework for Services of General Interest in Europe, COM(2011) 900 final, available on http://ec.europa.eu/commission_2010-2014/president/news/speeches-statements/pdf/20111220_1_en.pdf
[123] Quoted in Footnote 3 above [ENSURE UPDATE]. Accessible in: *http://ec.europa.eu/commission_2010-2014/president/news/speeches-statements/pdf/20111220_1_en.pdf*
[124] AT, BE, CZ, DK, FI, FR, EE, LT, NO, SV. For the Stakeholders : Caritas Europe, Age Platform, Social Platform, FEANTSA, REVES.
[125] BE, Caritas Europe.
[126] Some of them could also be considered as policy orientations
[127] BE
[128] CZ
[129] LT
[130] FI
[131] BE
[132] BE
[133] LT
[134] LT
[135] NO
[136] BE
[137] DK
[138] EE
[139] PT
[140] Age Platform
[141] The Social Platform
[142] REVES
[143] PT
[144] AT
[145] FR
[146] BE
[147] BE
[148] BE
[149] SI

[150] BE
[151] The Social Platform
[152] The Social Platform
[153] The Social Platform
[154] CARITAS EUROPE
[155] CARITAS EUROPE
[156] FEANTSA
[157] FEANTSA
[158] FEANTSA
[159] FEANTSA
[160] AT, BE, CZ, FI, PT, SI
[161] Caritas, FR, NO and CZ
[162] PT
[163] PL
[164] CARITAS EUROPE
[165] AGE Platform, SOCIAL Platform
[166] AGE Platform
[167] SOCIAL Platform
[168] CARITAS Europe
[169] REVES
[170] SOCIAL Platform
[171] BE
[172] EE
[173] These were the following: the analysis of the new guide prepared by the Commission services on State aid, internal market and public procurement rules; the follow-up to the Third SSGI Forum; the on-going debate on State aid and public procurement rules.
[174] LT, BE, FR, SI, EE
[175] Study on Social Services of General Interest, Final report, 2011,carried out on behalf of the Employment, Social Affairs and Inclusion Directorate General of the European Commission (contract VC/2009/0184).
[176] BE, PT, SI and FI
[177] BE
[178] BE, FI
[179] PL, PT
[180] BE
[181] http://bookshop.europa.eu/en/liberalisation-and-privatisation-in-the-eu-pbKI3111333/
[182] Barbier, Jean Claude (2012), in: Barbier, Jean-Claude (ed.) EU Law, Governance and Social Policy, European Integration online Papers (EIoP), Special Mini-Issue 1, Vol. 16, http://eiop.or.at/eiop/pdf/2012-SpecIssue-1_Introduction.pdf
[183] LT
[184] SI
[185] FI
[186] LT
[187] PL;
[188] BE
[189] According to the experts of the Commission:" The subsidiarity principle is irrelevant in this context as social policies are Member states' competence".
[190]
[191] According to the Commission services there is not just one model of organisation and financing of social services which complies with the applicable EU rules: instead different modes of organisation can all be in line with EU rules. Examples of different modes of organisation compatible with EU rules are direct

provision, financing of in-house provider, concessions, outsourcing through Public Procurement, triangular models…"

[192] The Commission services suggests to add a sentence referring to the fact that the Commission encourages Member States, regional/local public authorities as well as service providers and users to identify clearly the problems related to the application of EU rules to social services.

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[194] According to the experts of the European Commission "The change which triggered the application of the rules is not a jurisprudential evolution of the notion of economic activity but the fact that in the past social services were often organised in ways which did not imply that an economic activity was performed

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[197] In other words, making sure taxpayers money goes to the "right services" and that these services are well run, thus getting "value for money", or to prevent leakage of taxpayers money from their intended target to other services that do not benefit the taxpayers at all.

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DEFINING THE CONCEPT OF 'SERVICES OF GENERAL INTEREST' IN LIGHT OF THE 'CHECKS AND BALANCES' SET OUT IN THE EU TREATIES

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Abstract. *This article aims to shed some light on the concepts embedded in the expressions 'services of general interest' ('SGI'), 'services of general economic interest' ('SGEI'), 'non-economic services of general interest' ('NSGI') and 'social services of general interest' ('SSGI'). It is submitted that the expression 'SGI' conveys a general concept which comprises both SGEI and NSGI. SGEI may be distinguished from NSGI in that only the former involve an economic activity. In contrast to SGI, SGEI and NSGI, the expression 'SSGI' is nowhere to be found in primary EU law. This means that it is for the EU legislator and, as the case may be, for the Member States to define such expression. Furthermore, this article supports the contention that a definition of the principles and conditions underpinning the operation of SGI must be capable of adapting to changing times and social perceptions, whilst being respectful of the vertical and horizontal allocation of powers set out in the Treaties. Vertically, a definition of SGI must not impinge upon the powers retained by the Member States. In the absence of harmonisation, it is for the Member States to define the services they consider to be of general interest, unless they commit a manifest error of assessment. In the presence of*

* All opinions expressed herein are personal to the author.

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EU harmonising measures, the margin of discretion enjoyed by the Member States is, if still existent, narrowed down, given that national authorities are required to comply with the objectives pursued by the EU legislator. Horizontally, a definition of SGI must not encroach upon the prerogatives of the Commission in the realm of competition law. Moreover, in light of Article 9 TFEU and secondary EU legislation, the specific features of SSGI must be taken into consideration when determining the compatibility with EU State aid rules of public service compensation awarded to the providers of those services. An EU conceptual framework for the SGI must thus be the result of a constructive dialogue between the different levels of governance, as well as of a balanced solution among different policy areas in relation to which the EU enjoys competences.

Keywods: *services of general interest, vertical and horizontal allocation of powers in the European Union.*

Introduction

Stakeholders have often complained that the debate on services of general interest ('SGI') suffers from a lack of clarity on terminology.[1] This is due to the fact that the expressions 'SGI' and 'services of general economic interest' ('SGEI') are not defined in the Treaties.[2] In addition, the expressions 'SGI', 'SGEI' and 'social services of general interest' ('SSGI') are often used interchangeably and inaccurately.[3] In this regard, the purpose of the present contribution is thus to shed some light on those basic concepts. Before proceeding to examine each one of them, I would like to make two general observations.

Unlike the expressions 'SGI' and 'SGEI', the expression 'SSGI' is nowhere to be found in the Treaties.[4] Articles 14 TFEU and 106(2) TFEU only focus on SGEI. The same applies to Article 36 of the Charter which lays down the right to access to SGEI. For its part, Protocol (No 26) on SGI contains the expressions 'SGI', 'SGEI' and 'non-economic services of general interest' ('NSGI'). But no mention is made to SSGI. The

1 See Commission Communication, 'Quality Framework for Services of General Interest in Europe', of 20 December 2011, COM (2011) 900 final ('the 2011 Commission Communication'), at 3.

2 See e.g. Rodrigues, S. The application to services of general economic interest, notably to social services of general interest, of the EU rules related to state aids, public procurement and the internal market. One year after the Commission's Guide - SEC(2010)1545 final. *European Journal of Social Law.* 2011, 4: 255.

3 See the 2011 Commission Communication, *supra* note 1, at 3.

4 Communication from the Commission - Implementing the Community Lisbon programme - Social services of general interest in the European Union {SEC(2006) 516}, COM/2006/0177, at 4 ('under [EU] law, social services do not constitute a legally distinct category of service within [SGI]'). In the same way, see van de Gronden, J. W. Social Services of General Interest and EU law. In: Szyszczak, E.; Davies, J.; Andenæs, M.; Bekkedal, T. (eds.) *Developments in Services of General Interest.* The Hague: Springer, 2011, p. 125 (who argues that '[t]he term SSGI is used only in policy documents of the Commission and not in primary and secondary EU law').

latter is a concept coined by the political institutions of the EU and of the Member States. This difference is by no means irrelevant. Since the expressions 'SGI', 'SGEI' and 'NSGI' are set out in EU provisions of constitutional ranking, it is for the European Court of Justice (the 'ECJ') to define the concepts embedded therein. By contrast, when defining what is to be understood by SSGI, one must turn to the EU legislator and, where appropriate, to national authorities. Needless to say, the definition of SSGI provided for by the political institutions of the EU and of the Member States must be consistent with primary EU law as interpreted by the ECJ.

Moreover, SGI may be examined under two competing socio-economic models.[5] On the one hand, from an ordoliberal perspective, SGI may be seen as derogation from the Treaty provisions on competition. Supporters of that model argue that, just as any derogation from the substantive law of the EU, the concept of 'SGI' is to be interpreted restrictively. Otherwise, Member States would be encouraged to qualify certain activities as SGI in order to circumvent the obligations imposed on them by the Treaty provisions. Accordingly, a broad reading of the expression 'SGI' would adversely affect interstate trade and would eventually lead to the fragmentation of the internal market. On the other hand, SGI may be seen as the symbol of the European social model,[6] according to which Member States try to counter market forces which, in the absence of any public control, would prevent certain groups – for example, persons facing financial and economic difficulties or who are geographically isolated – from having access to SGI. For some Member States, SGI are part and parcel of their national identity the protection of which is guaranteed by the Treaties, notably by Article 4(2) TEU. In accordance with this second socio-economic model, EU institutions must strive to protect SGI from any threat which may impair their proper functioning.

The EU must, however, not really choose between those two competing socio-economic models, as the role of SGI in the EU legal order is being defined by striking a fair balance between the general interest pursued by such services and the effectiveness of the relevant Treaty provisions governing the internal market.

A constructive debate on SGI must therefore be open to nuances. It is only by striking the said balance that one may portray the role of SGI in the EU legal order accurately. When interpreting primary EU law, it will be for the ECJ to set out the basic elements that must be included in such balance. When the EU legislator has adopted measures, the ECJ will interpret and apply them in ways consistent with that same balance.

1. Services of General Interest: A general Category

Only in Protocol (No 26) reference is made to the expression 'SGI'. This Protocol contains three different concepts. First, as its title shows, it serves to stress the importance

5 Lenaerts, K.; Gutiérrez-Fons, J. A. « Le rôle du juge de l'Union dans l'interprétation des articles 14 et 106, paragraphe 2, TFUE » *Revue Concurrences.* 2011, 4: 7.

6 Karayigit, M. T. The Notion of Services of General Economic Interest Revisited. *European Public Law.* 2009, 15: 575.

of SGI. Second, Article 1 provides some clarifications regarding Article 14 TFEU. It lists, in a non-exhaustive fashion, the values underpinning the principles and conditions governing the operation of SGEI. Finally, Article 2 states that '[t]he provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise [NSGI]'.

In light of a systematic interpretation of Protocol (No 26), it seems that the expression 'SGI' conveys a 'general' concept which comprises both SGEI and NSGI. This is actually how the Commission understands the expression 'SGI'.[7]

Moreover, in relation to the vertical allocation of powers between the Union and its Member States, the distinction between SGEI and NSGI is of crucial importance. Whilst in relation to SGEI, the Union shares competences with the Member States, national measures relating to the provision, commission and organisation of NSGI fall outside the scope of application of EU competition law. This does not mean, however, that no other Treaty provisions may apply to NSGI. As explained below, Member States must comply with the Treaty provisions on free movement and EU citizenship.

2. Drawing the Distinction between SGEI and NSGI

The distinguishing feature as between SGEI and NSGI lies in the fact that the former always involve an economic activity. The Treaty provisions on competition only apply to 'undertakings' which are defined as natural or legal persons who carry out an economic activity, i.e. 'any activity consisting in offering goods and services on a given market'.[8] However, if a SGI operates exclusively under the principle of solidarity and is subject to public control, or that service is linked to the exercise of State prerogatives and to the fulfilment of State responsibility towards the population,[9] then such a SGI does not involve an 'economic activity' within the meaning of competition law.[10] That SGI will be qualified as a NSGI and thus, the Treaty provisions on competition will not

7 See the 2011 Commission Communication, *supra* note 1, at 3 ('SGI are services that public authorities of the Member States classify as being of general interest and, therefore, subject to specific public service obligations […]. The term covers both economic activities […] and non-economic services. The latter are not subject to specific EU legislation and are not covered by the internal market and competition rules of the Treaty. Some aspects of how these services are organised may be subject to other general Treaty rules, such as the principle of non-discrimination').

8 See Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36; Joined Cases C-180/98 to C-184/98 *Pavlov and Others*, paragraph 75.

9 Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 30, concerning the control and supervision of air space, and Case C-343/95 *Diego Calì & Figli* [1997] ECR I-1547, paragraphs 22–23, concerning anti-pollution surveillance of the maritime environment.

10 See, in the same vein, Communication from the Commission of 11 January 2012 on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, [2012] OJ C 8/4 ('the 2012 Commission Communication'), paragraph 16, which, in light of the case-law of the ECJ, provides the following examples of activities involving 'the exercise of public authority': '(a) the army or the police; (b) air navigation safety and control; (c) maritime traffic control and safety; (d) anti-pollution surveillance; and (e) the organisation, financing and enforcement of prison sentences'.

apply. In the field of social security and health care,[11] this can be seen in cases such as *Poucet et Pistre*,[12] *FENIN*,[13] *AOK Bundesverband*[14] and, more recently, in *Kattner Stahlbau*.[15]

However, the question whether an activity has an economic nature is not answered in the same way as to all Treaty provisions to be applied to the case at hand. Thus, the freedom to provide services, enshrined in Article 49 TFEU, covers all services which are 'normally provided for remuneration',[16] but services may still 'be provided for remuneration' if they involve an activity based on the principle of solidarity. Indeed, Article 49 TFEU applies even if the service is not paid for by those benefiting from it.[17] It follows that the principle of solidarity underpinning NSGI excludes the application of the Treaty provisions on competition, but not those on free movement and EU citizenship.

2.1. NSGI and the Treaty Provisions on Free Movement

Sickness insurance schemes normally operate under the principle of solidarity: the contributions made by healthy members of such a scheme are used to fund medical treatment provided to members in need of healthcare. Alternatively, solidarity may also take place where a Member State funds its national healthcare system by having recourse to the general budget. This means that patients do not pay for medical treatment themselves. Instead, they receive 'benefits in kind'. For both types of regimes, the ECJ has held that Article 49 TFEU applies.[18] In so doing, it rejected the thesis according to which, just as state education,[19] hospital services were 'special' and did not constitute

11 See the 2012 Commission Communication, *supra* note 10, paragraphs 21 et seq., which states that public hospitals that are 'directly funded from social security contributions and other State resources and provide their services free of charge to affiliated persons on the basis of universal coverage' are not 'undertakings' for the purposes of the Treaty provisions on competition law. By contrast, 'services which independent doctors and other private practitioners provide for remuneration at their own risk are to be regarded as an economic activity. The same principles would apply as regards independent pharmacies'.

12 Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637.

13 Case C-205/03P *FENIN v Commission* [2006] ECR I-6295.

14 Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493.

15 C-350/07 *Kattner Stahlbau* [2009] ECR I-1513.

16 See e.g. Case C-159/90 *Society for the Protection of Unborn Children Ireland v Grogan* [1991] ECR 1-4685.

17 See Case C-352/85 *Bond van Adverteerders and Others* [1988] ECR 2085.

18 See e.g. Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraphs 44–46; Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, paragraph 100, and Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 92.

19 Neither the Treaty provisions on free movement nor those on competition law apply to State educational services which form part of the national educational system, are mainly or entirely funded by the State and are under State supervision, since they do not have an economic nature. The fact that private operators can provide similar services is not relevant in that respect. See e.g. Case 263/86 *Humbel* [1988] ECR 5365; and Case E-5/07, *Kindergarten*, judgment of the EFTA Court of 21 February 2008 (holding that

an economic activity for the purposes of application of the freedom to provide services. In its view, there is an 'economic link' owing to the fact that cross-border patients have to advance the payment for the medical services he or she receives in the host Member State. The fact that those patients then get reimbursed by the Member State of affiliation is not sufficient to call into question that link.[20]

In order to guarantee the stability of national healthcare systems, affiliation to an insurance scheme is often compulsory and the number of healthcare providers is limited. This means that an insured person may only receive medical treatment from professionals who have concluded contractual agreements with or form part of that scheme. Often, if a patient wishes to receive medical treatment from professionals other than those belonging to the insurance scheme, he or she must request a prior authorisation. In this regard, the ECJ has consistently held that a system of prior authorisation deters 'the patients concerned from applying to providers of hospital services established in another Member State and constitutes, both for those patients and for service providers, an obstacle to the freedom to provide services'.[21] However, it is legitimate for the Member State of affiliation to restrict the freedom to provide services, if such restriction is necessary to counter 'the risk of seriously undermining the financial balance of a social security system'.[22] Likewise, the objective of maintaining a balanced medical and hospital service open to all is an overriding reason in the general interest capable of justifying an obstacle to the freedom to provide services.[23] Moreover, any restriction to the freedom to provide services must comply with the principle of proportionality, i.e. it must not exceed what is objectively necessary for that purpose, meaning that the same result may not be achieved by less restrictive rules.

Accordingly, even if the Treaty provisions on competition are not applicable to NSGI, the Treaty provisions on free movement may still apply to those services. Article 2 of Protocol (No 26) must thus be interpreted in this vein. Whilst it is for the legislation of each Member State to determine, in particular, the conditions concerning the requirement to be insured with a social security scheme and, consequently, the method

public kindergartens in Norway do not involve economic activity). However, see the 2012 Commission Communication, *supra* note 10, paragraph 28, which states that a distinction should be drawn between publicly funded education and 'services financed predominantly by parents or pupils or commercial revenues. For example, commercial enterprises offering higher education financed entirely by students clearly fall within the latter category. In certain Member States public institutions can also offer educational services which, due to their nature, financing structure and the existence of competing private organisations, are to be regarded as economic'. Moreover, the fact that neither the Treaty provisions on free movement nor those on competition law apply to State educational services does not rule out the application of other Treaty provisions, notably Articles 18, 19, and 20 TFEU. See, e.g., Case 293/83 *Gravier v City of Liège* [1985] ECR 593 and Case C-73/08 *Bressol* [2010] ECR I- 2735.

20 *Müller-Fauré and van Riet*, *supra* note 18, paragraph 89, and *Watts*, *supra* note 18, paragraph 89.

21 *Smits and Peerbooms*, *supra* note 18, paragraph 69, and *Müller-Fauré and van Riet*, *supra* note 18, paragraph 44, and *Watts*, *supra* note 18, paragraph 98.

22 *Smits and Peerbooms*, *supra* note 18, paragraph 72, and *Müller-Fauré and van Riet*, *supra* note 18, paragraph 73, and *Watts*, *supra* note 18, paragraph 103.

23 *Smits and Peerbooms*, *supra* note 18, paragraph 73, and *Müller-Fauré and van Riet*, *supra* note 18, paragraph 67, and *Watts*, *supra* note 18, paragraph 104.

of financing that scheme, the Member States must nevertheless comply with [EU] law when exercising those powers.[24] The ruling of the ECJ in *Kattner Stahlbau* illustrates this point. [25]

2.2. Kattner Stahlbau: an Example

In *Kattner Stahlbau*, Kattner, a private limited company active in steel construction and the manufacture of staircases and balconies, decided to cancel its compulsory affiliation to Maschinenbau- und Metall- Berufsgenossenschaft (Employers' liability insurance association in the mechanical engineering and metal sector, 'MMB'). However, MMB informed Kattner that cancelling the affiliation was legally impossible. Kattner challenged that decision, arguing that compulsory affiliation to MMB was contrary to the freedom to provide services as it was prevented from entering into a contract with a Danish insurance company prepared to insure it against accidents at work, occupational diseases and accidents on the way to and from work, on the same terms as MMB. It also alleged that MMB's position as exclusive provider was in breach of ex Articles 81 EC and 82 EC (now Articles 101 TFEU and 102 TFEU), i.e. the Treaty provisions on competition.

At the outset, the ECJ examined whether the latter provisions were applicable to MMB, i.e. whether MMB was an 'undertaking' within the meaning of Articles 101 TFEU and 102 TFEU. In this regard, it pointed out that the insurance scheme at issue in the main proceedings operated under the principle of solidarity.[26] First, it was financed by contributions the rate of which was not systematically proportionate to the risk insured.[27] Second, the members of the scheme at issue constituted a 'risk community reflecting the risks incurred in that branch of industry'.[28] This meant that readjustment mechanisms were put in place where a member of that scheme had significantly exceeded the average expenditure of all the members. Finally, 'the value of the benefits paid by employers'

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24 See e.g. *Kattner Stahlbau*, *supra* note 15, paragraph 74 (referring to *Smits and Peerbooms*, *supra* note 18, paragraph 46).

25 See also Case C-355/00 *Freskot* [2002] ECR I-5263 (where the ECJ examined the compatibility of a Greek social security scheme in agriculture which imposed a compulsory insurance against damage caused by natural risks, with the freedom of establishment).

26 See the 2012 Commission Communication, *supra* note 10, paragraphs 18 *et seq*., which lists, in a non-exhaustive fashion, the factors that may be relevant when determining whether a social security scheme is governed by the principle of solidarity, namely '(a) whether affiliation with the scheme is compulsory; (b) whether the scheme pursues an exclusively social purpose; (c) whether the scheme is non-profit; (d) whether the benefits are independent of the contributions made; (e) whether the benefits paid are not necessarily proportionate to the earnings of the person insured; and (f) whether the scheme is supervised by the State'. In the same way, the Commission considers that the following factors may be relevant when determining whether a social security scheme involves an economic activity: '(a) optional membership; (b) the principle of capitalisation (dependency of entitlements on the contributions paid and the financial results of the scheme); (c) their profit-making nature; and (d) the provision of entitlements which are supplementary to those under a basic scheme'. If a scheme combines 'features of both categories, [then] the classification of the scheme depends on an analysis of different elements and their respective importance'.

27 *Kattner Stahlbau*, *supra* note 15, paragraph 44.

28 *Ibid.*, paragraph 47.

liability insurance associations such as MMB is not necessarily proportionate to the insured person's earnings'.[29] As to the supervision by the State, the ECJ found that the degree of latitude enjoyed by MMB was strictly delimited by German law, given that the German legislator had laid down the factors that must be taken into account in calculating the contributions payable under the scheme at issue, as well as an exhaustive list of benefits that could be provided under that scheme.[30] Hence, the ECJ ruled that MMB operated in accordance with the principle of solidarity and under State control. MMB could not therefore be considered as an undertaking for the purposes of the Treaty provisions on competition.

However, the ECJ found that such scheme restricted the freedom to receive services of undertakings that are covered by it, as it prevented those undertakings from approaching providers of insurance services established in Member States other than the Member State in which they are affiliated.[31]

As to the justification of the restriction, the compulsory affiliation to the statutory insurance scheme at issue sought to ensure the financial equilibrium of one of the traditional branches of social security, in this case, insurance against accidents at work and occupational diseases. That objective, the ECJ recalled, constituted an overriding reason in the general interest protected by EU law.[32] As to the principle of proportionality, the ECJ observed that a compulsory affiliation scheme such as that of MMB was apt to ensure the financial equilibrium of a branch of social security. By grouping together all undertakings covered by that scheme within risk communities, that scheme was able to operate in accordance with the principle of solidarity. As to whether the compulsory affiliation scheme went beyond what was necessary to attain the objective pursued, the ECJ left this determination to the national court, making, nonetheless, two observations. First, it found that the statutory insurance scheme at issue did not preclude undertakings covered by it from taking out supplementary insurance with private insurance companies. Second, and most importantly, such scheme sought to avoid 'cream skimming': the ECJ observed that, in the absence of a compulsory affiliation, private insurance would focus on attracting customers with 'good' risks, 'leav[ing] employers' liability insurance associations such as MMB with an increasing share of 'bad' risks, thereby increasing the cost of benefits, particularly for undertakings with older employees engaged in dangerous activities; those associations could no longer offer pensions at an acceptable cost to such undertakings. Such a situation would arise particularly in a case where […] the statutory insurance scheme at issue, inasmuch as it applies the principle of solidarity, is characterised, in particular, by the absence of a strictly proportionate link between contributions and risks insured'.[33]

Thus, *Kattner Stahlbau* shows that the scope of application of the Treaty provisions on free movement is broader than that of the Treaty provisions on competition. As van

29 *Kattner Stahlbau*, *supra* note 15, paragraph 55.

30 *Ibid.*, paragraph 62.

31 *Ibid.*, paragraph 83.

32 *Ibid.*, paragraph 85.

33 *Ibid.*, paragraph 90.

de Gronden observes, free movement law is 'capable of breaking open social security schemes, whereas the role of competition law is limited in this respect'.[34]

3. Services of General Economic Interest

3.1. General observations

Article 14 TFEU provides that, without prejudice to the competence of the Member States, the Council and the European Parliament shall adopt in accordance with the ordinary legislative procedure regulations defining the principles and conditions which enable SGEI to fulfil their mission. Those regulations shall also set the conditions to provide, to commission, and to fund such services. Introduced by the Lisbon Treaty, the last sentence of Article 14 TFEU thus provides a new legal basis by virtue of which the EU legislator may put in place a general conceptual framework for SGEI.

For its part, Article 106(2) TFEU provides that undertakings entrusted with the operation of SGEI 'shall be subject to the rules contained in the Treaties, in particular to the rules on competition law, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'. In order to guarantee the proper functioning of a SGEI, Article 106(2) TFEU allows Member States to derogate from 'the rules contained in the Treaties'. Arguably, such derogation is not limited to the Treaty provisions on competition so that Article 106(2) TFEU may also be relied upon by Member States in order to derogate from other Treaty provisions such as those on free movement.[35] Indeed, the case-law of the ECJ reveals that Article 106(2)

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34 van de Gronden, J. W., *supra* note 4, p. 138.

35 In favour of such a reading, see Buendía Sierra, J. L. *Exclusive rights and State monopolies under EU law.* Oxford: OUP, 1999; Hatzopoulos, V. Recent Developments of the Case Law of the ECJ in the Field of Services. *Common Market Law Review.* 2000, 37: 80–81, and Szyszczak, E. *The regulation of the State in competitive markets in the EU.* Oxford: Hart Publishing, 2007, p. 217. However, see Bekkedal, T. Article 106 TFEU is Dead. Long live Article 106 TFEU! In: Szyszczak, E.; Davies, J.; Andenæs, M.; Bekkedal, T., *supra* note 4, p. 61–102 (who argues that Article 106(2) TFEU may not operate as a derogation from the Treaty provisions on free movement. The reasons are twofold. First, he posits that Article 106(2) TFEU appears to allow derogations from free movement which pursue economic objectives. Nevertheless, this is at odds with the line of case-law according to which such derogations are not permitted under free movement law. Second, the principle of proportionality does not operate in the same way under Article 106(2) TFEU as under the Treaty provisions on free movement. Under Article 106(2) TFEU, the ECJ applies a 'soft version' of the principle of proportionality. Conversely, in the realm of free movement law, the ECJ applies a 'strict version' of that principle. In addition, he argues that, to date, there is no example in the case-law of the ECJ where a justification to a restriction on free movement has been grounded in Article 106(2) TFEU alone. However, T. Bekkedal seems to obviate the fact that justifications based on financial considerations have been occasionally qualified as overriding reasons in the general interest protected by EU law. For example, see *Watts*, *supra* note 18, paragraph 71 (where the ECJ held that it was legitimate for Member States to plan and rationalise 'efforts in the vital healthcare sector so as to avoid the problems of hospital overcapacity, imbalance in the supply of hospital medical care and logistical and financial wastage'). In addition, in the context of free movement law, the ECJ also applies a 'soft version' of the principle of proportionality where EU law does not require Member States to attain the same level of protection. In the absence of a protectionist intent, the ECJ favours 'value diversity'. See e.g. Joined

TFEU has been applied in cases involving free movement matters.[36] In addition, when applying that Treaty provision, the ECJ is called upon to strike a balance between, on the one hand, guaranteeing the effectiveness of EU (competition) law and, on the other hand, safeguarding the general interest pursued by national authorities. Stated simply, Article 106(2) TFEU must be read in light of the principle of proportionality.

In addition to those two Treaty provisions, Article 36 of the Charter sets out the right to access to SGEI. It states that '[t]he Union recognises and respects access to [SGEI] as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union'.

Although Articles 14 TFEU, 106 TFEU and Article 36 of the Charter refer to the expression 'SGEI', they fail to define it. In the same way, there is no general definition of SGEI in secondary EU legislation.[37] The EU legislator has instead opted for 'sector-specific definitions' of SGEI in the fields which have been subject to harmonisation.[38]

It follows that, as EU law currently stands,[39] there is no uniform criterion laying down a clear and precise regulatory definition of SGEI.[40] For some scholars, the absence of a general definition of SGEI may be explained by the fact that those services have a dynamic and evolving nature.[41] In this regard, W. Sauter argues that '[p]erceptions of what such services comprise, or what they do not, vary between time and place […] Because the concept of SGEI is a fluid one, providing a list of such services merely serves by way of example'.[42] Despite that conceptual vacuum, he posits that one may

Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629, paragraph 68 (where the ECJ ruled that 'the fact that one Member State imposes more stringent rules than another in relation to the protection of public health does not mean that those rules are incompatible with the Treaty provisions on the fundamental freedoms').

36 See e.g. Case C-157/94 *Commission v the Netherlands* [1997] ECR I-5699; Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949.

37 But see the 2011 Commission Communication, *supra* note 1, at 3 (where the Commission provides the following general definition of SGEI: 'SGEI are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention. The [public service obligation] is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission.')

38 Lenaerts, K.; Gutiérrez-Fons, J. A., *supra* note 5, p. 6.

39 See Case T-289/03 *BUPA v Commission* [2008] ECR II-81, paragraph 165 ('[i]t must be made clear that in [EU] law and for the purposes of applying the [FEU] Treaty competition rules, there is no clear and precise regulatory definition of the concept of an SGEI mission and no established legal concept definitively fixing the conditions that must be satisfied before a Member State can properly invoke the existence and protection of an SGEI mission, either within the meaning of the first *Altmark* condition or within the meaning of Article [106(2) TFEU]').

40 Karayigit, M. T., *supra* note 6, p. 577.

41 See, in this vein, the 2012 Commission Communication, *supra* note 10, paragraph 12 (holding that '[t]he economic nature of certain services can therefore differ from one Member State to another. Moreover, due to political choice or economic developments, the classification of a given service can change over time. What is not a market activity today may turn into one in the future, and vice versa').

42 Sauter, W. Services of general economic interest and universal service in EU law. *European Law Review.* 2008, 33: 167.

infer from soft-law, sector-specific EU legislation, the case-law of the ECJ and that of the European General Court (the 'EGC') some features shared by all SGEI. In his view, those common features are the economic nature of the services provided, the imposition of public service obligations,[43] their universal nature, their continuity and affordability, their universal coverage, as well as their focus on user and consumer protection.[44]

For example, the following services have been qualified as SGEI: the services provided by network industries (such as energy, telecommunications),[45] postal services, public emergency services,[46] water supply, waste management, public service broadcasting,[47] sectoral pension schemes,[48] and mooring services for vessels in ports.[49]

4. Providing a Definition of SGEI Consistent with the 'Checks and Balances' Set out in the Treaties

If, in accordance with Article 14 TFEU, the EU legislator ever decides to provide a general definition of SGEI, such a definition would have to incorporate the principles and conditions listed in Protocol (No 26).[50] It would also have to be compatible with Article

43 See the 2012 Commission Communication, *supra* note 10, paragraph 48. Referring to Case C-205/99 *Analir* [2001] ECR I-1271, paragraph 71, the Commission considers that 'it would not be appropriate to attach specific public service obligations to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions [...] As for the question of whether a service can be provided by the market, the Commission's assessment is limited to checking whether the Member State has made a manifest error'.

44 Sauter, W., *supra* note 42, p. 175–176.

45 In relation to network industries, it is worth noting that the qualification of a service as a SGEI may depend on the market circumstances of the case at hand. For example, the Commission opines that 'in areas where private investors have already invested in broadband network infrastructure (or are in the process of expanding further their network infrastructure) and are already providing competitive broadband services with adequate coverage, setting up parallel broadband infrastructure should not be considered as a SGEI. In contrast, where investors are not in a position to provide adequate broadband coverage, SGEI compensation may be granted under certain conditions'. See the 2012 Commission Communication, *supra* note 10, paragraph 49.

46 See e.g. C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, and Case C-160/08 *Commission v Germany* [2010] ECR I-3713.

47 See e.g. Joined Cases T-568/08 and T573/08 *M6 v Commission* [2010] ECR II-3397 (confirmed by Case C-451/10P *TF1 v Commission*, order of 9 June 2011, not yet reported).

48 See e.g. Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 98 – 111.

49 See e.g. *Corsica Ferries France*, *supra* note 36.

50 See Article 1 of Protocol (No 26) which states: '[t]he shared values of the Union in respect of [SGEI] within the meaning of Article 14 [TFEU] include in particular:
— the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
— the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
— a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.'

36 of the Charter in so far as it must guarantee access to SGEI. Most importantly, such a general definition must comply with the principle of conferral and with the principle of institutional balance.

4.1. The Vertical Allocation of Powers

The principle of conferral guarantees that, when interpreting the expression 'SGEI', the ECJ and, as the case may be, the EU legislator must respect the competences retained by the Member States. In *Olsen v Commission*, the EGC held that 'Member States have wide discretion to define what they regard as [SGEI]. Hence, the definition of such services by a Member State can be questioned by the Commission only in the event of manifest error'.[51] In the same way, in *BUPA v Commission*, the EGC added that 'the Member State has a wide discretion not only when defining a [SGEI] mission but also when determining the compensation for the costs, which calls for an assessment of complex economic facts'.[52] In this regard, the EGC held that the Commission's review powers are limited 'to ascertaining whether, first, the system is founded on economic and factual premises which are manifestly erroneous and whether, second, the system is manifestly inappropriate for achieving the objectives pursued' and 'whether there has been a manifest error in the exercise of the wide discretion of the Member State as regards the way of ensuring that the SGEI mission may be achieved under economically acceptable conditions'.[53] By way of example, such an error may take place where activities such as advertising or sponsoring are qualified as SGEI.[54]

Moreover, Article 14 TFEU states that, when laying down the general principles and conditions underpinning the operation of SGEI, the EU legislator must comply with Article 4(2) TEU, which states that '[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities'. Introduced by the Lisbon Treaty, the reference to Article 4(2) TEU provides the constitutional basis for the margin of discretion enjoyed by the Member States. Neither the ECJ nor the EU legislator are entitled to second-guess the determinations made by national authorities as to whether a service is of general interest, unless the latter commit a manifest error of assessment.

However, the margin of discretion enjoyed by the Member States when defining a SGEI is narrowed down where the EU legislator has harmonised a given field.[55] This can

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51 See Case T-17/02 *Olsen v Commission* [2005] ECR II-2031, paragraph 216 (confirmed by order of the ECJ Case C-320/05P *Olsen v Commission* [2007] ECR I-131).

52 *See BUPA v Commission*, *supra* note 39, paragraph 214.

53 *Ibid*., paragraphs 266–268. See also the 2012 Commission Communication, *supra* note 10, paragraph 46.

54 See Rodrigues, S., *supra* note 2, p. 257. See also Communication from the Commission on the application of State aid rules to public service broadcasting [2009] OJ C 257/1, at 8 (holding that the following economic activities may not qualify as SGEI: 'advertising, e-commerce, teleshopping, the use of premium rate numbers in prize games, sponsoring or merchandising').

55 See Case C-206/98 *Commission v Belgium* [2000] ECR I-3509, paragraph 45. See also the 2012 Commission Communication, *supra* note 10, paragraph 46 (which states that '[w]here specific Union rules exist, the Member States' discretion is further bound by those rules, without prejudice to the Commission's duty to carry out an assessment of whether the SGEI has been correctly defined for the purpose of State aid control'). See also Buendía Sierra, J. L.; Muñoz de Juan, M. Some Legal Reflections on the Almunia

be seen in the context of Article 106(2) TFEU. In the absence of harmonising measures, the ECJ applies a 'soft' version of the principle of proportionality. This is illustrated by cases such as *Corbeau*,[56] *Almelo*[57] and *Ambulanz Glöckner*,[58] where the ECJ found that the monopoly granted to the undertaking entrusted with the operation of a SGEI complied with the Treaty provisions on competition, in spite of the fact that the scope of such monopoly went beyond that of the SGI. By contrast, where the EU legislator has adopted harmonising measures, the ECJ applies a rather 'strict' version of the principle of proportionality. This means that national authorities must comply with the objectives pursued by the EU legislative framework. Any derogation from that framework, if possible, must be subject to strict conditions. This point is illustrated by the ruling of the ECJ in *Federutility and Others*.[59]

In that case, the ECJ was asked to interpret Directive 2003/55,[60] which 'is designed progressively to achieve a total liberalisation of the market for natural gas in the context of which, in particular, all suppliers may freely deliver their products to all consumers'.[61] As of 1 July 2007, Directive 2003/55 provides that the price for the supply of natural gas must be determined solely by the operation of supply and demand. However, Article 3(2) contains an exception to that principle: Member States are allowed to impose 'public service obligations' on undertakings operating in the gas sector, which may in particular concern the 'price of supply'. Thus, the question was, in essence, to what extent a Member State may rely on Article 3(2) of Directive 2003/55 with a view to imposing on undertakings operating in the gas sector public service obligations in order, in particular, to ensure that the price of the supply of natural gas to final consumers was maintained at a reasonable level. At the outset, the ECJ pointed out that Article 3(2) enables the Member States to accommodate two competing interests. On the one hand, Directive 2003/55 pursues to establish a 'competitive market in natural gas'. On the other hand, Directive 2003/55 also seeks to reassure the Member States that liberalisation of the natural gas market would not be carried out to the detriment of consumers. Accordingly, when having recourse to Article 3(2) of Directive 2003/55, national authorities must strive to accommodate those two competing interests pursued by the EU legislator. Next, the ECJ proceeded to lay down some detailed guidelines as to how that balance had to be struck, i.e. the way in which the principle of proportionality was to be applied. 'First, such an intervention must be limited in duration to what is strictly necessary in order to achieve its objective, in order, in particular, not to render permanent a measure which, by its very nature, constitutes an obstacle to the realisation

Package. *European State Aid Quarterly*. 2012, 2(Supplement): 70 (who argue that 'Member States cannot define the concept of SGEI where this has already been done through EU harmonization measures').

56 Case C-320/91 *Corbeau* [1993] ECR I-2533.

57 Case C-393/92 *Almelo* [1994] ECR I-1477.

58 Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089.

59 Case C-265/08 *Federutility and Others* [2010] ECR I-3377.

60 Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ [2003] L176/57.

61 *Federutility and Others*, *supra* note 59, paragraph 18.

of an operational internal market in gas […] Secondly, the method of intervention used must not go beyond what is necessary to achieve the objective which is being pursued in the general economic interest […] Thirdly, the requirement of proportionality must also be assessed with regard to the scope *ratione personae* of the measure, and, more particularly, its beneficiaries'.[62] Finally, the ECJ held that public service obligations be clearly defined, transparent, non discriminatory and verifiable, and that they guarantee equal access for EU gas companies to consumers.'

5. The Horizontal Allocation of Powers

Article 14 TFEU states that a general definition of SGEI must be adopted 'without prejudice [….] to Articles 93, 106 and 107 [TFEU]'. In other words, reliance on that Treaty provision must comply with the powers of the Commission in the realm of competition law. For example, such a general definition of SGEI could not encroach upon the powers granted to the Commission when determining whether public service compensation granted to an undertaking entrusted with the operation of a SGEI constitutes aid and, if so, is compatible with the internal market.[63] In turn, when enforcing EU competition law, the Commission must pay due respect to the principles and conditions laid down in secondary EU legislation on the basis of which SGEI must operate. A joint reading of the relevant Treaty provisions would thus suggest that the Commission is to operate as follows.

In the absence of EU harmonisation measures, the Commission must limit itself to controlling whether there is a manifest error of assessment in qualifying an economic activity as a SGEI. Next, it will proceed to apply the four cumulative criteria laid down in *Altmark*[64] for public service compensation granted to an undertaking entrusted with the operation of a SGEI not to constitute aid so that the prior notification obligation laid down in Article 108(3) TFEU does not apply. Those cumulative criteria are the following: First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation must not 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. Finally,

62 *Federutility and Others*, *supra* note 59, paragraphs 33–43.

63 See, in this regard, Buendía Sierra, J. L.; Muñoz de Juan, M., *supra* note 55, p. 69 (who argue that 'despite the fact that the Treaty of Lisbon introduced a possible new legal basis, nothing in the Treaty forces the Commission to use Article 14 TFEU. In fact, the main rules governing SGEIs were not modified with Lisbon. Indeed, Article 14 TFEU starts by recalling that the promotion of public services must be guaranteed "*without prejudice of Article 93, 106 and 107 of the Treaty*". As a consequence, rules on State aid remain applicable for the compensation of SGEIs. This is maybe one of the reasons why [in relation to the new SGEI package, below n 73] the Commission did not choose to make the proposal under Article 14 TFEU but instead relied on its powers conferred by Article 106(3) TFEU').

64 Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

where the undertaking that is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical undertaking, well-run and adequately provided with the relevant means, would have incurred. If one or more of the *Altmark* criteria are not met, then public service compensation constitutes State aid and is subject to Articles 93, 106, 107 and 108 TFEU.[65]

6. Social Services of General Interest

As mentioned above, the expression 'SSGI' is nowhere to be found in primary EU law.[66] It is thus for the EU legislator and, as the case may be, for national authorities to define the concept embedded in that expression. Of course, in so doing, they must respect the definitions of 'SGI', 'SGEI' and 'NSGI' laid down in the Treaties, Protocol (No 26) and Article 36 of the Charter.

In this regard, in its 2011 Communication, the Commission states that SSGI may include 'social security schemes covering the main risks of life and a range of other essential services provided directly to the person that play a preventive and socially cohesive/inclusive role'.[67]

Since the social nature of a SGI is not sufficient in itself to classify that service as non-economic,[68] a distinction should be drawn between 'non-economic SSGI' and 'social SGEI'. As mentioned above, whilst the Treaty provisions on competition do not apply to SSGI being NSGI, they do so in relation to social SGEI. The question is then whether the adjective 'social' brings an added value to the concepts of 'NSGI' and to that of 'SGEI'. In my view, the reply should be in the affirmative.

It is worth noting that the Lisbon Treaty has introduced a number of provisions, which aim to highlight the 'social aspects' of the European integration project.[69] For the purposes of our study, it is worth examining Article 9 TFEU in some detail. The latter states that '[i]n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high

65 See e.g. Case T-354/05 *TF1 v Commission* [2009] ECR II-471.

66 Sinnaeve, A. What's New in SGEI in 2012? – An Overview of the Commission's SGEI Package. *European State Aid Quarterly*. 2012, 2: 354 (who points out that '[t]he main difficulty has been the lack of an established definition of "social" services').

67 See the 2011 Commission Communication, *supra* note 1, at 4.

68 See Rodrigues, S., *supra* note 2, p. 256 ('[t]he main relevant criteria to pave the way towards an exception or an exclusion of the EU rules is not the social nature of the service, but the economic or non-economic nature of such service').

69 See e.g. Article 3(3) TEU which states that the Union 'shall work for […] a highly competitive social market economy, aiming at full employment and social progress'. See also Title IV of the Charter, entitled 'Solidarity' (see Articles 27–38).

level of education, training and protection of human health'. Compared to its predecessor (ex Article 127(2) EC), Article 9 TFEU goes beyond macroeconomic employment issues. In *de Santos Palhota*, AG Cruz Villalón qualified that provision as 'a "cross-cutting" social protection clause'.[70] The Advocate General relied on that provision (as well as on Article 31 of the Charter) with a view to arguing that '[a]s a result of the entry into force of the Lisbon Treaty, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly. In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom, still less an unwritten exception inferred from case-law. To the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law's regarding it as something exceptional and, therefore, as warranting a strict interpretation. That view, […] is expressed in practical terms by applying the principle of proportionality'.[71]

In relation to SSGI being NSGI, if the ECJ were to follow the interpretation of Article 9 TFEU put forward by AG Cruz Villalón, the compatibility of a SSGI with the Treaty provisions on free movement would not be examined under a strict version of the principle of proportionality. On the contrary, in the absence of discriminatory State measures, the general interest pursued by the SSGI in question and the right to free movement would stand on an equal footing.

As to social SGEI, the interpretation put forward by AG Cruz Villalón suggests that, when applying the *Altmark* criteria, the Commission may not 'tilt' the balance in favour of the Treaty provisions on competition, but is required to follow a more 'balanced' approach. Indeed, Article 9 TFEU is a horizontal Treaty provision which is addressed to the 'Union' as a whole, and not only to the EU legislator. This means that when the Commission 'implements' EU competition policy, it must bear in mind 'the social dimension of EU integration'. In the Commission's own words, social SGEI 'have specific characteristics that need to be taken into consideration'.[72]

That might explain why when adopting the 'New SGEI Package'[73] – in particular its Decision on the application of Article 106(2) TFEU to State aid in the form of public

70 See Opinion of AG Cruz Villalón in Case C-515/08 *de Santos Palhota and Others*, judgment of 7 of October 2010, n.y.r., paragraph 51.

71 *Ibid*., paragraph 53.

72 See Recital 11 of Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, [2012] OJ L 7/3.

73 The new SGEI package is composed of four different legal instruments, namely a new Communication, *supra* note 10, a revised Decision, *supra* note 72, a revised Framework (Communication from the Commission — European Union framework for State aid in the form of public service compensation, [2012] OJ C8/15), and a new *de minimis* Regulation (Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European

service compensation granted to certain undertakings entrusted with the operation of SGEI (the '2011 Commission Decision')[74] – the Commission placed 'greater emphasis on social SGEI'.[75] It is worth recalling that, if one or more of the *Altmark* criteria are not met, then public service compensation constitutes State aid. However, if that public service compensation falls within the scope of application of the 2011 Commission Decision, it is deemed compatible with the internal market and exempted from the prior notification obligation provided for in Article 108(3) TFEU.[76] In order for public service compensation to fall within the scope of the 2011 Commission Decision the social SGEI at issue must be clearly identified; the undertaking benefiting from the public service compensation must have been specifically entrusted with the operation of that service; and there must be no overcompensation.[77]

The threshold for the application of the 2011 Commission Decision to SGEI in general has been reduced. For example, whilst the 2005 Commission Decision was applicable to annual compensation for the service in question of less than EUR 30 million, the 2011 Commission Decision covers 'compensation not exceeding an annual amount of EUR 15 million for the provision of [SGEI] in areas other than transport and transport infrastructure'.[78] However, in relation to social SGEI,[79] no economic threshold is laid down in the 2011 Commission Decision.[80]

Additionally, compared to the 2005 Commission Decision,[81] the 2011 Commission Decision has expanded the type of social SGEI which are covered by that exemption.[82] Whilst the 2005 Decision was limited to 'public service compensation granted to

Union to *de minimis* aid granted to undertakings providing services of general economic interest, [2012] OJ L 114/ 8). The purpose of the new SGEI Package is twofold: it seeks to clarify some basic concepts relating to SGEI, whilst promoting a diversified, flexible and proportionate approach. See generally Kamaris, G. The reform of EU state aid rules for services of general economic interest in times of austerity. *European Law Review*. 2012, 33: 55, and Sinnaeve, A., *supra* note 66.

74 See *supra* note 72.

75 See Géradin, D. Editorial: The New SGEI Package. *Journal of Competition Law & Practice*. 2012, 3: 2.

76 Article 3 of the 2011 Commission Decision states: 'State aid in the form of public service compensation that meets the conditions laid down in this Decision shall be compatible with the internal market and shall be exempt from the prior notification obligation provided for in Article 108(3) [TFEU] provided that it also complies with the requirements flowing from the Treaty or from sectoral Union legislation'.

77 The added value of the 2011 Commission Decision lies in the fact that it aims to facilitate the application of the third and fourth criteria laid down in *Altmark*. See Kamaris, G., *supra* note 73, p 59. For example, Article 5 thereof lists the efficiency factors that must be taken into account when awarding public service compensation to the undertaking entrusted with the operation of a SGEI.

78 See Article 2(a) of the 2011 Commission Decision.

79 See Articles 2(b) and 2(c) of the 2011 Commission Decision.

80 See Recital 11 of the 2011 Commission Decision ('undertakings in charge of social services […] should also benefit from the exemption from notification provided for in this Decision, even if the amount of compensation they receive exceeds the general compensation threshold laid down in this Decision').

81 Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, [2005] OJ L312/67.

82 See Sinnaeve, A., *supra* note 66, p. 355; and Righini, E. The Reform of the State Aid Rules on Financing of Public Services Paving the Way towards a Clearer, Simpler and more diversified Framework. *European State Aid Quarterly*. 2012, 2(Supplement): 13.

hospitals and social housing undertakings carrying out activities qualified as [SGEI] by the Member State concerned', Article 2(c) of the 2011 Commission Decision also covers 'compensation for the provision of [SGEI] meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups'.[83] For Sinnaeve, the notion of 'care and social inclusion of vulnerable groups' is flexible and broad enough to catch any residual type of social services not explicitly mentioned in Article 2(c) of the 2011 Commission Decision, such as services addressing the needs of refugees, immigrants, disabled persons or drug addicts. Accordingly, she takes the view that 'Member States will in future be able to benefit from the exemption for most, if not all, social services'.[84]

Moreover, if State aid in the form of public service compensation does not meet the conditions set out in the 2011 Commission Decision, then prior notification is required. When examining the compatibility of such aid with the internal market, the Commission is obliged to take into account Article 9 TFEU. For example, the derogation contained in Article 107(2)(a) TFEU must be interpreted in light of Article 9 TFEU.

In summary, when determining whether public service compensation constitutes State aid and, if so, whether it is compatible with the internal market, one must take into account Article 9 TFEU which is a horizontal social protection clause. Deference to that Treaty provision must thus take place at all stages of the Commission's assessment, i.e. when interpreting the four cumulative criteria laid down in *Altmark*, when interpreting its 2011 Decision, and when interpreting the derogations from State aid rules set out in Article 107 TFEU.

Concluding Remarks

Shedding some light on the expressions 'SGI', 'SGEI', 'NSGI' and 'SSGI' is not an easy task. The reasons are twofold. First, as mentioned above, SGI have a dynamic and evolving nature. A definition of the principles and conditions underpinning the operation of SGI must be capable of adapting to changing times and social perceptions. Second, a definition of SGI must be respectful of the vertical and horizontal allocation of powers. Vertically, a definition of SGI must not impinge upon the powers retained by the Member States. In the absence of harmonisation, it is for the Member States to define the services they consider to be of general interest, unless they commit a manifest error. In the presence of EU harmonising measures, the margin of discretion enjoyed by the Member States is, if still existent, narrowed down, given that national authorities are required to comply with the objectives pursued by the EU legislator. Horizontally, a definition of SGI must not encroach upon the prerogatives of the Commission in the realm of competition law. An EU conceptual framework for the SGI must thus be the

83 See Rodrigues, S., *supra* note 2, p. 266.

84 Sinnaeve, A., *supra* note 66, p. 355.

result of a constructive dialogue between the different levels of governance, as well as of a balanced solution among different policy areas in relation to which the EU enjoys competences.

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TERMINO „VISUOTINĖS SVARBOS PASLAUGOS“ APIBRĖŽIMAS PER EUROPOS SĄJUNGOS SUTARTYSE ĮTVIRTINTO „STABDŽIŲ IR ATSVARŲ“ PRINCIPO PRIZMĘ

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Santrauka. *Straipsnyje siekiama atskleisti tokių terminų kaip „visuotinės svarbos paslaugos“* (*SGI*), *„visuotinės ekonominės svarbos paslaugos“* (*SGEI*), *„visuotinės svarbos ne ekonominio pobūdžio paslaugos“* (*NSGI*) *ir „visuotinės svarbos socialinės paslaugos“* (*SSGI*) *sampratą. Terminas „visuotinės svarbos paslaugos“ atspindi bendrą koncepciją, apimančią tiek ekonominio, tiek ne ekonominio pobūdžio visuotinės svarbos paslaugas. Skirtingai nei pirmieji trys minėti terminai, Europos Sąjungos pirminėje teisėje nėra vartojamas terminas „visuotinės svarbos socialinės paslaugos“. Tai reiškia, kad paliekama ES teisės aktų leidėjui arba valstybėms narėms apibrėžti šio termino reikšmę. Be to, šiame straipsnyje laikomasi pozicijos, kad principų ir sąlygų, būtinų „visuotinės svarbos paslaugų“ veikimui, samprata turi sugebėti prisitaikyti prie besikeičiančių aplinkybių ir socialinių iššūkių, bet kartu išlaikyti pagarbą vertikaliam ir horizontaliam įgaliojimų pasiskirstymui, kuris įtvirtintas ES Sutartyse. Vertikaliai „visuotinės svarbos paslaugų“ apibrėžimas neturi kėsintis į valstybėms narėms išlikusias teises. Kai nėra bendro suderinimo, valstybėms narėms paliekama teisė apibrėžti visuotinės svarbos paslaugų ratą, nebent jos daro akivaizdžią vertinimo klaidą. Taikant ES harmonizavimo priemones, valstybių narių diskrecijos teisė yra susiaurinama, atsižvelgiant, kad nacionalinės valdžios institucijos turi laikytis ES teisės aktų leidėjo nustatytų tikslų. Horizontaliai „visuotinės svarbos paslaugų“ apibrėžimas neturi kėsintis į Komisijos išimtines teises konkurencijos teisės srityje. Be to, remiantis Sutarties dėl Europos Sąjungos veikimo 9 straipsniu bei ES antrinės teisės aktais, turi būti atsižvelgiama į „visuotinės svarbos socialinių paslaugų“ specifiką, nustatant suderinamumą su ES valstybių pagalbos taisyklėmis dėl kompensacijų už teikiamas viešas paslaugas. ES konceptualus pagrindas „visuotinės svarbos paslaugų“ įgyvendinimui turi būti parengtas, atsižvelgiant į konstruktyvų skirtingų valdymo lygių dialogą, taip pat į subalansuotus sprendimus įvairiose politikos srityse, kuriose ES turi kompetenciją.*

Reikšminiai žodžiai: *„visuotinės svarbos paslaugos“, vertikalus ir horizontalus įgaliojimų pasiskirstymas Europos Sąjungoje.*

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ANNEX 2

Report to the attention of DG *Employment, Social Affairs and Inclusion* of the European Commission

Analysis of EU Rules Applying to Social Services[1]

Stéphane Rodrigues[2]

The Treaty establishing a European Economic Community (EEC), signed in Rome on 25 March 1957, laid the foundations for economic integration and chose a common market (called "Internal Market" since the European Single Act of 1986) to give substance to such economic integration.

In accordance with settled case-law from the European Court of Justice (hereinafter "the ECJ" or "the Court"), the concept of a common market "*involves the elimination of all obstacles to intra*-[EU] *trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market*"[3].

Article 3.3 of the Treaty on the European Union (TEU), as amended by the Lisbon Treaty of 13 December 2007, entered into force on 1st December 2009, confirms this objective as follows:

> *"The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment (…)".*

The new reference made to a "*highly competitive social market economy*" reveals that the European Union is not pursuing a pure liberal agenda. Economic integration, as original goal of the European construction, is now completed and balanced by human and social objectives as well as by sustainable development considerations.

Article 2 of the TEU reflects this human and social dimension of the EU as follows:

> *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".*

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[1] The information contained in this publication does not necessarily reflect the position or opinion of the European Commission.
[2] Sorbonne Law School – University Paris 1 – International and EU Law Research Institute (IREDIES).
[3] See Case 15/81, Gaston Schull [1982] ECR 1410.

And Article 3.3 TEU, respectively in its second and third paragraph, insists on the mandate given to the EU in combatting "social exclusion and discrimination" and in promoting "social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child", as well as "economic, social and territorial cohesion, and solidarity among Member States".

To give substance to these goals, the Treaty of Lisbon (2007) has introduced within the Treaty on the functioning of the European Union (TFEU) several provisions "having general application". Special attention must be paid to two of them:

- Article 9 TFEU: *"In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health"*.

- Article 14 TFEU: "*Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and 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 Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.*

This latter provision is an important one to understanding the *ratio legis* of the current application of EU law to Social Services. Article 14 TFEU is the result of a step-by-step evolution of the EU Treaties regarding the role recognized to services of general (economic) interest (hereinafter "SG(E)I") in contributing to EU objectives.

The concept of SGEI has been introduced in the Rome Treaty in Article 90, paragraph 2, EEC, then after re-numbered Article 86-2 EC and currently Article 106.2 TFEU, which states as follows:

> *"Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union"*.

As construed by the European Court of Justice, that provision "In allowing derogations to be made from the general rules of the Treaty on certain conditions (…) seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common Market"[4]. One may say, twenty years on, that SGEIs may be used as well as an instrument of

[4] See Case C-202/88, *France v. Commission* [1991] ECR I-1259, paragragh 12.

social policy. The recent emergence of the concept of Social Services of General Interest (SSGI) in the EU soft-law[5] may be considered as a confirmation of such interpretation[6].

The Amsterdam Treaty (1997) introduced a new provision on SGEIs: Article 16 EC, now Article 14 TFEU, was a significant step to take into consideration the role of public services as an obligation and not as derogation any more[7].

The Lisbon Treaty is completing this evolution by transforming that provision into a new legal basis for the EU legislature to adopt regulations in the field of SGEIs (last sentence added); by introducing a new Protocol on Services of General Interest[8] and by giving legal binding force to the EU Charter of Fundamental Rights, including, inter alia, Article 36 related to access to SGEIs.

Considering this new holistic approach resulting from the Lisbon Treaty, the EU Council has underlined « *the need to further assess the interaction between the internal market and social services of general interest in view of the social aims of the European Union, without prejudice of the powers of the Member States, in order to supply quality services meeting users' specific needs* »[9]. Such an interaction relies on two essential freedoms: free movement of factors of production (I) and free competition (II).

To that regard, Free Movement and Competition Rules may be considered as complementary tools to shaping the Internal Market, by stimulating economic activity with a view to ensuring both an optimum allocation of resources and maximum consumer welfare, and by pursuing general social goals, in particular in terms of cohesion and of quality of service[10].

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[5] See Commission Communication related to SSGI on 26 April 2006 (COM(2006) 177 final) and Commission Communication on "*Services of general interest, including social services of general interest: a new European commitment":* COM(2007)725 on 20 November 2007 and Communication "A Quality Framework for Services of General Interest" in Europe, COM(2011) 900 of 20 December 2011.

[6] See also SEC (2010) 1545 final of 7 December 2010, hereinafter « The SGEI Guide ». The present Report will make, when necessary, some reference to this Guide, in order not to repeat what it has already addressed but to give an overview of the *rationale* of EU rules applying to Social Services and to insist on some fundamental issues and on some recent legislative changes or proposals since 2010. For a critical analysis of the SGEI Guide: RODRIGUES, in *European Journal of Social Law*, n°4, December 2011, pp. 254-267.

[7] See ROSS, 'Article 16 E.C. and services of general interest: from derogation to obligation?', (2000) 25, *European Law Review*, 22-38.

[8] See Protocol N° 26 attached to TEU and TFEU: Article 1: *"The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular: — the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users; — the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations; — a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights."* - Article 2: *"The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest"*.

[9] See EPSCO Council Conclusions of 6/7 December 2010, « *Social Services of General Interest: at the heart of the European Social Model* », paragraph 19.

[10] See ALBORS-LLORENS, "Competition Policy and the shaping of the Single Market", in BARNARD and SCOTT (ed.), *The Law of the Single European Market. Unpacking the Premises*, Hart Publishing, 2002, p. 311.

I – Free Movement rules and Social Services

Article 26.2 TFEU states that the Internal Market shall comprise "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties". This free movement provision, with a potentially very wide scope, acts as "a driving force" in the creation of the Internal Market[11].

As far as the present Report is focusing on Social Services, the sole EU rules related on free movement of services will be examined, as exposed by the TFEU (A) and as put in practice by the EU legislature with some directives like those ones on Public Procurement and the Services' Directive (B).

A. Right of Establishment and Freedom to Provide Services in Primary law: the basic rules

Free movement of services includes two rights: the right of establishment (articles 49 to 55 TFEU) and the freedom to provide services (articles 56 to 62 TFEU). The distinction is due to the fact that freedom of establishment is corresponding to a permanent activity of a national of a Member State in the territory of another Member State, while freedom to provide services implies that a national of a Member State is temporarily pursuing his activity in the territory of another Member State[12].

However, there is a common *ratio* for both these provisions, i.e. prohibiting restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State (article 49 TFEU) and on the freedom to provide services within the Union in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended (article 56 TFEU).

However, these freedoms are not absolute or unconditional. They may suffer exceptions. Some derogations are indeed possible on the basis of the derogating provisions of Article 51 TFEU (i.e. for activities which in that State are connected, even occasionally, with the exercise of official authority) and of Article 52 TFEU (i.e. restrictions justified on grounds of public policy, public security or public health), as well as on the basis of other non-economic and public-interest requirements or '*overriding reason in the general interest*', as developed by the case-law of the European Court of justice and which may include social objectives.

For the purpose of the present Report related on the application of EU rules to social services, three key concepts need to be scrutinized: the concept of services (i); the concept of restriction (ii) and the concept of overriding reason in the general interest (iii).

(i) Concept of services

Services are not defined in detail in the TFEU, even if Article 57 TFEU states as follows:

> *« Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.*

[11] See SNELL, *Goods and Services in EC Law. A Study of the Relationship Between the Freedoms*, Oxford University Press, 2002, p. 34.
[12] On such a distinction : see Case C-55/94 *Gebhard* [1995] ECR I-4165.

« 'Services' shall in particular include:
(a) activities of an industrial character;
(b) activities of a commercial character;
(c) activities of craftsmen;
(d) activities of the professions. »

It stems from this provision that a service may be considered as an economic activity (i.e. "*any activity consisting in offering goods or services on a given market")*[13] when it « *normally* » yields a « *remuneration* ». Consequently, as some authors pointed out, "*services which are normally remunerated, but sporadically provided free of charge, are not excluded*"[14].

Indeed, according to settled case-law, « *the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question* »[15]. Accordingly, « *the pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity within the meaning of Article 2 of the* [EC] *Treaty* »[16].

However, the Court also held that « *the work performed must be genuine and effective and not such as to be regarded as purely marginal and ancillary* »[17] and that economic activities may fall within the scope of Article 50 of the Treaty « *even if some of those services are not paid for by those for whom they are performed* »[18].

This latter position is particularly relevant regarding the application of Articles 49-56 TFEU to social or health services when they do not necessarily have to be paid for by the person for whom they are performed. It's why, for example, the Court held that « *the fact that hospital medical treatment is financed directly by the sickness insurance funds on the basis of agreements and pre-set scales of fees is not in any event such as to remove such treatment from the sphere of services within the meaning of Article* [50] *of the Treaty* »[19].

Last, but not least, the qualification of service does not depend either on the national definition (e.g. non-market services) given to it (insofar the EU concept is an autonomous one) or either on the legal status of the provider, which may be public or private and for-profit or not-for-profit. Answering to a preliminary ruling related to the application of EU law to national legislation prohibiting the holding of certain lotteries in a Member State, the Court held that : *« Although in many Member States the law provides that the profits made by a lottery may be used only for certain purposes, in particular in the public interest, or may even be required to be paid into the*

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[13] Pursuant to definition given by the Court within the scope of EU competition rules: see Part II *infra* and notably Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7, and Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36.
[14] See LENAERTS and VAN NUFFEL, *Constitutional Law of the European Union*, 2nd edition, 2005, p. 227.
[15] See Case 263/86, *Humbel* [1988] ECR 5365, paragraph 17.
[16] See Case 13/76 *Donà* v *Mantero* [1976] ECR 1333, paragraph 12, and Case 196/87 *Steymann* v *Staatssecretaris van Justitie* [1988] ECR 6159, paragraph 10. One may note that even though neither Article 2 of TEU and of TFEU make a reference to 'economic activities' anymore, this concept is still an effective one to construe the notion of service, as well as the notion of undertaking for the implementation of the EU competition rules : see *infra*.
[17] See *Steymann*, paragraph 13.
[18] See Case 352/85 *Bond van Adverteerders (B.V.A.) and Others* v *Netherlands State* [1988] ECR 2085, paragraph 16.
[19] See Case C-157/99 *Geraets-Smits and Peerbooms* [2001] E.C.R. I-5473, paragraph 56.

State budget, the rules on the allocation of profits do not alter the nature of the activity in question or deprive it of its economic character »[20].

As explained by the SGEI Guide, « in order to determine whether a given service constitutes an economic activity subject to the Treaty rules on the internal market (…), a case-by-case examination must be made of all the characteristics of the activity in question, particularly of the way the service is provided, organized and financed in the Member State concerned »[21].

As to date, the ECJ has regarded several social services as services within the meaning of the free movement rules[22], notably social care for elderly people[23], social security scheme[24] (including retirement pension scheme)[25] and social housing[26].

(ii) Concept of restriction

The original substance of the free movement of services was and is still the prohibition of any discrimination for the providers outside of the Member State from which they are nationals. This is a variation of the principle of equal treatment as stated respectively in Article 49, second paragraph, and Article 50, last paragraph, of the TFEU:

- Article 49, second paragraph: *« Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital ».*

- Article 50, last paragraph: « *Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals* ».

However, the ECJ case-law gave to the principle of free movement another dimension beyond the non-discrimination principle : « (…) *the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services* »[27].

Consequently, any measure prohibiting, impeding or rendering less advantageous the activities of a provider of services or the possibility for a recipient (in another Member State) to benefit from such services must be considered as infringing the EU Internal Market rules.

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[20] See Case C-275/92 *Schindler* [1994] E.C.R. I-1039, paragraph 35.
[21] See under Section 6.2 of the SGEI Guide.
[22] See also other examples, *infra*, regarding the non-economic qualification within the scope of EU competition rules.
[23] See Case C-70/95 *Sodemare* [1997] ECR I-3395.
[24] See Case C-355/00, *Freskot* [2003] ECR I-5263 and Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513.
[25] See Case C-271/09, *Commission v Poland*, not yet published.
[26] See Case C-567/07, *Sint Servatius* [2009] ECR I-9021.
[27] See leading case: Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12.

(iii) Concept of overriding reason in the general interest

The Court has identified some social objectives as 'overriding reasons of general interest' allowing the Member States to justify restrictions on the free movement provisions. It has been so held in order to protect workers against social dumping[28], to preserve the financial balance of a social security system[29] or to guarantee the provision of a service of general interest[30].

These social-oriented derogations are accepted by the Court pursuant to a case-by-case approach and under a strict control of proportionality[31]. That is to say, as explained by the SGEI Guide, that any national restrictive measure must be "*suitable for guaranteeing the achievement of one or more legitimate objectives invoked by that Member State and must not go beyond what is necessary to achieve those objectives*" [32].

B. Right of Establishment and Freedom to Provide Services in Secondary law : the Public Procurement rules and the Services' Directive

The implementation of EU Treaty rules (primary law) may be completed or reinforced by the adoption of EU acts (secondary law). Two important examples illustrate such a possibility: the Public Procurement Directives (B1) and the Services' Directive (B2).

B.1. Public Procurement rules and Social Services

As the Court has held, the purpose of coordinating at EU level the procedures for the award of public contracts is « to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State »[33]. Stated differently, the Public Procurement or Public Contracts EU Directives[34] are instruments adopted in order to facilitate and to give substance to Articles 49 and 56 TFEU in the area of public contracts.

Consequently, the contracting entities concluding such contracts (whatever covered by the specific scope of application of the Public Contracts Directives) are bound to comply with the fundamental rules of the Treaty, in

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[28] See Case C-49/98, *Finalarte* [2001] ECR I-7831.
[29] See Case C-158/96, *Kohll* [1998] ECR I-1931.
[30] See Joined Cases C-282/04 and C-283/04, *Commission v. Netherlands* [2006] ECR-I 9141, paragraph 38.
[31] See the leading case: Case 33/74 *Van Binsbergen* [1974] ECR 1299.
[32] See section 6.5 of the SGEI Guide.
[33] See Case C-360/96 *Gemeente Arnhem, Gemeente Rbeden* v *BFI Holding* [1998] ECR I-6821, paragraph 41.
[34] See **Directive 2004/17/EC** of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (*OJ L 134, 30.4.2004, p. 1–113)* + **Directive 2004/18/EC** of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114–240) + **Directive 2009/81/EC** of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security (OJ L 216, 20.8.2009, p. 76–136). These texts are currently under a proposal of revision (COM(2011)895 and 896 final of 20.12.2011), along with a proposal for a directive on the award of concession contracts (COM(2011)897 final of 20.12.2011).

general, and the principle of non-discrimination on the ground of nationality, in particular[35]. That general principle of EU law implies an equal treatment of economic operators from any Member State by the contracting authorities, and, more particularly, « *an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with* »[36].

Pursuant to case-law, such an obligation of transparency which is imposed on the contracting authority consists « in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed »[37].

To that purpose, the Directives set up some rules on advertising and transparency (e.g. publication of notices, information obligations, etc.), as well as some rules on the conduct of the award procedure (choice of the participants, selection criteria of the candidates, etc.).

Regarding the application of these Directives to Social Services, it must be bore in mind that the definition of a public contract is the following one: "contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive"[38].

Pursuant to settled case-law, the pecuniary nature of the contract means that "the contracting authority which has concluded a public (…) contract receives a service pursuant to that contract in return for consideration"[39]. In a more recent case, the Court explains that such a service "must be of direct economic benefit to the contracting authority"[40]. This is not the case when a public authority is exercising some regulatory powers (e.g. urban planning powers), insofar as it is not the purpose of such an exercise, "intended to give effect to the public interest, to obtain a contractual service or immediate economic benefit for the contracting authority"[41].

Anyway, the concept of public contract may cover the provision of some social services, as it is confirmed by Annex II attached to the Directive 2004/18/EC (which lists the services covered by the notion of public service contracts): item 25 of this Annex is explicitly related to "Health and Social Services".

However, two elements must be taken into consideration: first, the provision of some social services may be excluded from the scope of the Directive 2004/18/EC (B.1.1°); secondly, within the scope of application of the Directive 2004/18/EC social services benefit from a special regime (B.1.2°).

B.1.1° - *Exclusion from the scope of application of Directive 2004/18/EC*

Two categories of exceptions must be distinguished, depending on their source, either from the Directive itself (i) or from case-law (ii). However, exclusion from the Directive does not mean in all circumstances exclusion

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[35] See first paragraph of Article 18 TFEU: "*Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited"*.
[36] See Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31.
[37] See Case C-324/98 *Telaustria Verlags GmbH* [2000] ECR I-745, paragraph 62.
[38] See Article 1.2 (a) of the Directive 2004/18/EC, hereafter "the Directive".
[39] See Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 77, and Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 45.
[40] See Case C-451/08 *Helmut Müller* [2010] ECR I-2773, paragraph 49.
[41] *Ibidem*, paragraphs 57-58.

from the field of application of the EU general rules and in particular of the Treaty principles of transparency and non-discrimination (iii).

(i) Legislative exclusions

The Directive sets up two categories of exclusions by imposing thresholds amounts to be applicable and by explicitly excluding some public contracts from its scope of application.

➢ Thresholds amounts for public contracts

Pursuant to Article 7 of the Directive, only public contracts which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than specific thresholds must be awarded in accordance with the rules set up by the Directive. Concerning the provision of services, these thresholds are the following ones, as from 1st January 2012[42]:

- EUR 130 000, for service contracts awarded by contracting authorities considered as central government authorities (see Annex IV of the Directive);

- EUR 200 000, for service contracts awarded by contracting authorities other than those considered as central government authorities, i.e. local or regional authorities.

The Proposal Reform of Directive 2004/18/EC will not change the principle of the thresholds, as well as the rules governing mixed procurement (i.e. contracts consisting of services and/or supplies and/or works) and the methods for calculating the estimated value of procurement[43].

However, it will introduce a new threshold of EUR 500 000 for public contracts for social and other specific services. These services are listed in Annex XVI of the proposal directive and their scope will be more explicitly named by comparison with the current Annex II B of the Directive 2004/18/EC which refers to "other services" (see also *infra*, regarding the specific regime for social services): the annex lists not only « *Health and social services* », but also « *Administrative educational, healthcare and cultural services* », « *Compulsory social security services* » and « *Benefit services* »[44].

Regarding the proposal for a directive on the award of concession contracts, the threshold would be EUR 5 000 000[45].

➢ Excluded contracts

Section 3 of the Directive provide for some excluded contracts from its scope of application. Regarding social services, one may pay attention to the following exclusions:

[42] See Regulation (EU) N°1251/2011 of the Commission of 30 November 2011, OJ L 319, 2.12.2011, pp. 43-44.
[43] See Articles 3, 4 and 5 of the proposal COM(2011)896.
[44] See also Annex X of the proposal of directive on the award of concession contracts.
[45] See Article 5 of the proposal COM(2011)897.

- **Employment contracts**[46]. Such an exclusion is maintained by the proposal for a new public procurement directive[47].

- **Service concessions**[48]: i.e. contracts of the same type as a public service contracts "*except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment*"[49]. This legislative definition has been completed by case-law. The Court held that "*the fact that the supplier does not receive consideration directly from the contracting authority, but is entitled to collect payment under private law from third parties, is sufficient for that contract to be categorized as a 'service concession' (…) where the supplier assumes all, or at least a significant share, of the operating risk faced by the contracting authority, even if that risk is, from the outset, very limited on account of the detailed rules of public law governing that service*"[50].

This specific exclusion is currently under revision with a proposal to set up a specific directive on the award of concessions, with the view to integrate and consolidate the current case-law. Under the new text, a 'service concession' would be defined as "*a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities or contracting entities and having as their object the provision of services (…) where the consideration for the services to be provided consists either solely in the right to exploit the services that are subject of the contract or in that right together with payment*"[51].

The proposal gives also more precision on the notion of "right to exploit the services", by explaining that it "shall imply the transfer to the concessionaire of the substantial operating risk" and that "the concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession"[52]. That economic risk may consist in either of the risk related to the use of the works or the demand for the provision of the service or the risk related to the availability of the infrastructure provided by the concessionaire or used for the provision of services to users.

Consequently, the service concession contract would not be an exception in itself anymore. However, it will be submitted to a specific regime, different and more flexible that the current regime for the other public contracts, notably in terms of publications and transparency and of conduct of the procedure to choose the participants and to award the contract (see also *infra*, on the specific regime for social services).

- **Service contracts awarded on the basis of an exclusive right**[53]: the Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty[54]. Pursuant to Directive

[46] See Article 16(e) of the Directive.
[47] See Article 10(e) of the proposal COM(2011)896.
[48] See Article 17 of the Directive.
[49] See definition given by Article 1.4 of the Directive.
[50] See Case C-206/08 *Eurawasser* [2009] ECR I-8377, paragraph 80.
[51] See Article 2.1 (7) of the proposal COM(2011)897.
[52] See Article 2.2 of the proposal COM(2011)897.
[53] See Article 18 of the Directive.
[54] See also the non-discrimination clause stated by Article 3 of the Directive: "*Where a contracting authority grants special or exclusive rights to carry out a public service activity to an entity other than such a contracting authority, the act by which that right is granted shall provide that, in respect of the supply contracts which it*

2004/17/EC (i.e. the Utilities Directive), exclusive rights mean "*rights which arise from a grant made by the competent authorities of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities (…) to one (…) entit(y), and which substantially affects the ability of other undertakings to carry out such activity on the same territory under substantially equivalent conditions*"[55].

In addition to these excluded contracts, attention must be paid also to what the Directive calls the **reserved contracts**. Article 19 states that "*Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programs where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions*". Such a special arrangement may be potentially often used to provide social services and would be extended by the reform of the directives[56] to "*economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers*". Besides, the share of disabled or disadvantaged workers in those workshops, economic operators or programmes, will be reduced to more than 30% (instead of 50%, i.e. "most of"). A similar provision will be introduced in the new directive on the award of concession contracts[57].

(ii) Case-law exclusions

The ECJ case-law has developed two main exclusions: in-house situations and horizontal cooperation.

- **In-house situation**:

In-house situations are excluded from the scope of application of the Directive insofar as there is no contract, i.e. no agreement between two separate persons. According to settled case-law, this is the case where two conditions are met, i.e. where the local or public authority exercises over the person concerned "*a control which is similar to that which it exercises over its own departments* [= first condition] *and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities* [= second condition]"[58].

Regarding the first condition, relating to the control, the Court held that "where a number of public authorities own a concessionaire to which they entrust the performance of one of their public service tasks, the control which those public authorities exercise over that entity may be exercised jointly"[59].

Regarding the second condition relating to the essential part of the entity's activities, it may be met if account is taken of the activities which that entity carries out with all the authorities which control it[60]. The Court has recently given more precision holding that "where, in their capacity as contracting authority, a number of public authorities jointly establish an entity with responsibility for carrying out their public service mission, or where a

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awards to third parties as part of its activities, the entity concerned must comply with the principle of non-discrimination on the basis of nationality".

[55] See Article 2(3) of Directive 2004/17/EC.

[56] See Article 17 of the proposal COM(2011)896.

[57] See Article 20 of the proposal COM(2011)897.

[58] See the leading case: Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50.

[59] See Case C-324/07, *Coditel Brabant SA* [2008] ECR I-8457, paragraph 50.

[60] See, Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraphs 70 and 71, and Case C-295/05 *Asemfo* [2007] ECR I-2999 paragraph 62.

public authority subscribes to such an entity, the condition established by the case-law of the Court to the effect that, in order to be exempted from their obligation to initiate a public tendering procedure in accordance with the rules of EU law, those authorities must jointly exercise over that entity control similar to the control they exercise over their own departments, is fulfilled where each of those authorities not only holds capital in that entity, but also plays a role in its managing bodies"[61].

However, "where a contracting authority intends to conclude a contract for pecuniary interest relating to services (…) with a company legally distinct from it, in whose capital it has a holding together with one or more private undertakings, the public award procedures laid down by [the] directive must always be applied"[62].

The main reason for such a restrictive interpretation prohibiting any private participation to the capital to consider an in-house situation is that, in the Court's opinion, the relationship between a public authority which is a contracting authority and its own departments "is governed by considerations and requirements proper to the pursuit of objectives in the public interest", while any private capital investment in an undertaking "follows considerations proper to private interests and pursues objectives of a different kind"[63].

In order to take into consideration such case-law derogation, the on-going reform of the Public contracts directives is intended to introduce a specific provision related to in-house situation, both in the current 2004 Directives and in the proposal for a directive on the award of contract concession. The texts proposed by the Commission will go a little bit further than the current case-law conditions by being more precise on the second condition related to the essential part of activities carried out and by consolidating as a third condition the absence of private participation, as follows (we underline)[64]:

> *"Article 11 – Relations between public authorities*
>
> *"1. A contract awarded by a contracting authority to another legal person shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:*
> *(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments.*
> *(b) at least 90 % of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;*
> *(c) there is no private participation in the controlled legal person.*
>
> *A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person.*
> *2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract.*
> *3. A contracting authority, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a public contract without applying this Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:*

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[61] See ECJ judgement of 29 November 2012 in Joined Cases C-182/11 and C-183/11, *Econord SpA*, not yet published, paragraph 33.
[62] See Case C-26/03 *Stadt Halle* [2005] ECR I- 1, paragraph 52.
[63] *Ibidem*, paragraph 50.
[64] The directive on the award of concession contracts would include the same provision: see Article 15.1 to 15.3 of the proposal COM (2011)897.

(a) the contracting authorities exercise jointly over the legal person a control which is similar to that which they exercise over their own departments;
(b) at least 90 % of the activities of that legal person are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;
(c) there is no private participation in the controlled legal person.
For the purposes of point (a), contracting authorities shall be deemed to jointly control a legal person where the following cumulative conditions are fulfilled:
(a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities;
(b) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person;
(c) the controlled legal person does not pursue any interests which are distinct from that of the public authorities affiliated to it;
(d) the controlled legal person does not draw any gains other than the reimbursement of actual costs from the public contracts with the contracting authorities."

It should be noted that the third condition related to the absence of private participation in the controlled person may be discussed, considering the fact that case-law is focusing on relations between such a controlled person and a "*contracting authority*", not solely a public authority as expressed in the title of Article 11[65]. Consequently, in our opinion, a private company eligible to the qualification of "*contracting authority*" may benefit from the in-house exception. This would be the case, for example, for private companies providing social housing services, in accordance with ECJ case-law[66].

Hence, the condition related to the absence of private participation might not be applicable to such situations, in order to comply both with the general principle of equal treatment between public and private undertakings (see Article 106§1 TFEU)[67] and with the EU rule of neutrality regarding the system of property ownership (see Article 345 TFEU)[68].

- **Horizontal cooperation:**

Considering that "a public authority has the possibility of performing the public interest tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments"[69] and that such a possibility for public authorities to use their own resources to perform the public interest tasks conferred on them "may be exercised in cooperation with other public authorities"[70], the Court held that a contract is excluded from the scope of the Directive where it may be analyzed as "the culmination of a process of inter-municipal cooperation between the parties" and that it contains requirements to ensure that the public service task is carried out[71] and where the contract in question was

[65] See Recital N°14 of the proposal COM (2011) 896 : « *There is considerable legal uncertainty as to how far cooperation between public authorities should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted divergently between Member States and even between contracting authorities. It is therefore necessary to clarify in what cases contracts concluded between contracting authorities are not subject to the application of public procurement rules (…)".*
[66] See Case C-237/99 *Commission v. France* [2001] ECR I-939, paragraph 60.
[67] See *infra*, in section II on competition rules.
[68] Article 345 TFEU: « *The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership".* On this provision: AKKERMANS and RAMAEKERS, "Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations", in *European Law Journal*, Issue 3, 2010, pp. 292-314.
[69] See Case *Stadt Halle*, paragraph 48.
[70] See Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 65.
[71] See leading case: Case C-480/06 *Commission v. Germany* [2009] ECR I-4747, paragraph 38.

concluded "solely by public authorities, without the participation of any private party, and does not provide for or prejudice the award of any contracts" that may be necessary in respect of the performance of the public service task[72].

More recently, the Grand Chamber of the ECJ confirmed that "European Union public procurement law precludes national legislation which authorizes the conclusion, without an invitation to tender, of a contract by which public entities establish cooperation among each other where – this being for the referring court to establish – the purpose of such a contract is not to ensure that a public task that those entities all have to perform is carried out, where that contract is not governed solely by considerations and requirements relating to the pursuit of objectives in the public interest or where it is such as to place a private provider of services in a position of advantage vis-à-vis his competitors"[73].

Even though such exclusion is based only on two rulings from the ECJ, in order to enhance legal certainty the Commission has proposed to integrate and consolidate it in its reform of the public contracts directives of December 2011[74], as follows:

> *"Article 11 – Relations between public authorities*
>
> *(…)*
>
> *"4. An agreement concluded between two or more contracting authorities shall not be deemed to be a public contract within the meaning of Article 2(6) of this Directive where the following cumulative conditions are fulfilled:*
>
> *(a) the agreement establishes a genuine cooperation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;*
> *(b) the agreement is governed only by considerations relating to the public interest;*
> *(c) the participating contracting authorities do not perform on the open market more than 10 % in terms of turnover of the activities which are relevant in the context of the agreement;*
> *(d) the agreement does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;*
> *(e) there is no private participation in any of the contracting authorities involved.*
>
> *« (…)".*

The same debate may take place as for the in-house exception regarding the possibility for a private company to be qualified as "contracting authority", i.e. to benefit from this new exception on horizontal public service cooperation.

(iii) Consistent application of the EU general rules

Exclusion provided for by the Directive or by the Court does not mean exclusion from all EU rules. It is consistent case-law that the award of public contracts outside the scope of the Directive is to remain subject to

[72] *Ibidem*, paragraph 44.
[73] See ECJ judgement of 19 December 2012, in Case C-159/11, *Azienda Sanitaria Locale di Lecce a.o.*, not yet published, paragraph 40.
[74] As well as in the proposal for a directive on the award of concession contracts: see Article 15.4.

the fundamental rules of EU law, and in particular to the principles laid down by the Treaty on the right of establishment and the freedom to provide services[75].

However, a distinction has to be made, depending on the source of exclusion.

Regarding the case-law exclusions, the Court seems to impose to public authorities to comply with the principle of equality of treatment: in its *Hambourg* case, the Court insisted on the fact that "*cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned (…) is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors*"[76]. The issue is not so clear concerning the in-house exclusion. However, we do consider that such an exception is the consequence of the interpretation of the notion of contract, within the scope of the Directives and so is to be submitted, at least, to the same regime than that of exclusions provided for by the Directives themselves.

Regarding these exclusions, the principles of equal treatment and of non-discrimination on the ground of nationality and the consequent obligation of transparency are applicable only in the event that the contracts are "*of certain cross-border interest*"[77], i.e. where these contracts were of certain interest to an undertaking located in a different Member State to that of the relevant contracting authority, and that that undertaking was unable to express its interest in that contract because it did not have access to adequate information before the contract was awarded[78].

As explained by the SGEI Guide, such situations may correspond to contracts with a very modest value for the provision of social services on a specific market segment where it is unlikely that economic operators from other Member States will be potentially interested in providing the services in question[79].

It seems that this *de minimis* approach has inspired the proposal for a new directive on public contracts and the introduction of the EUR 500 000 threshold for social services, as referred to above. Indeed, the Commission refers to a kind of presumption of absence of cross-border interest under such a threshold, as explained as follows (we underline):

> *"The evaluation on the impact and effectiveness of EU public procurement legislation has shown that social, health and education services have <u>specific characteristics</u> which make them inappropriate for the application of the regular procedures for the award of public service contracts. These services are typically provided within a specific context that varies widely between Member States due to different administrative, organizational and cultural circumstances. <u>The services have, by their very nature, only a very limited cross-border dimension.</u> Member States should therefore have large discretion to organize the choice of service providers. The proposal takes account of this by providing a specific regime for public contracts for these services, with a higher threshold of EUR 500 000 and imposing only the respect of basic principles of transparency and equal treatment. A quantitative analysis of the*

[75] See Case C-92/00 *HI* [2002] ECR I-5553, paragraph 42.
[76] See Case C-480/06, *op. cit.*, paragraph 47.
[77] See Case C-507/03 *Commission v. Ireland* [2007] ECR I- 9777, paragraph 29.
[78] *Ibidem*, paragraph 32.
[79] See under Section 4.2.2 of the SGEI Guide.

> *values of contracts for the relevant services awarded to economic operators from abroad has shown that contracts below this value have typically no cross-border interest"* [80].

One may assume that such consideration justify also the special regime awarded to social services both under the current directives and under the proposals to reform them[81].

B.1.2° - *Special regime for social services under Directive 2004/18/EC*

Pursuant to Article 21 of the Directive 2004/18/EC, contracts which have as their object services listed in Annex II B, as for social services, are not subject to all the rules provided for by the Directive[82]. Indeed, they shall be subject solely to the specific rules governing technical specifications[83] and to the obligation for the contracting authorities which have awarded a public contract to send a notice of the results of the award procedure no later than 48 days after the award of the contract[84]. On top of those requirements the Treaty principles of equal treatment and of non-discrimination on the ground of nationality and the consequent obligation of transparency must be complied with.

The reform of the public procurement directives will confirm this specific regime for social services both in the new framework directive on public procurement[85] and in the new directive on the award of concession contracts[86].

The reasons for such a specific treatment are clearly exposed in Recital 11 of the proposal for a directive on public procurement as follows (we underline):

> *"Other categories of services continue by their very nature to have a limited crossborder dimension, namely what are known as services to the person, such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for these services, with a higher threshold of EUR 500 000. Services to the person with values below this threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for transborder projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee17. Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination".*

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[80] See Section 5(2) of the Explanatory Memorandum and Recital (11) of COM (2011) 896.
[81] See *infra* by reference to Recital 11 of the proposal for a directive on public procurement.
[82] See SGEI Guide, under questions 4.2.4 to 4.2.6, 4.2.8 to 4.2.11, 4.2.13 to 4.2.15, and 4.2.17.
[83] See Article 23 of the Directive.
[84] See Article 35(4) of the Directive.
[85] See Articles 74 to 76 of the proposal COM (2011) 896.
[86] See Article 17 of the proposal COM (2011) 897.

Consequently, the reform insists on the "*specificities*" of the social services to be taken into account by the contracting authorities. It's why Member States will be imposed to "*ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation*"[87].

Moreover, Member States will be invited to consider the possibility to provide "*that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service*"[88]. This latter provision is echoing the invitation made by the EU Council in its conclusions on SSGI of December 2010, asking to the Commission "*to clarify and to provide more information on (…) the use of the contract award criterion of the most economically advantageous tender instead of the lowest price for the award of social services contracts, when public procurement procedures are organized for supplying social services of general interest*"[89].

B.2. The Services' Directive and Social Services

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (hereafter "the Services Directive")[90] has been adopted in order to "*facilitate the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services*"[91], both by consolidating and integrating ECJ case-law, notably the three-tier test of non-discrimination, necessity and proportionality for any national measure related to access and/or exercise of an activity service[92] and by imposing to Member States administrative simplification (e.g. points of single contacts) and cooperation (e.g. mutual assistance and alert mechanism) as well as an efficient policy on quality of services[93].

Regarding the necessity test, the Services Directive confirms that the need for an authorization scheme[94], which is potentially a restriction to right of establishment, must be justified by an overriding reason relating to the public interest[95], including preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; combating fraud (including social fraud) and, more broadly speaking, "*social policy objectives*"[96].

Regarding the scope of application, the Services Directive shall not apply to a different string of activities, notably to "*non-economic services of general interest*" (NESGI)[97] and to "*social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognized as such by the State*"[98].

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[87] See Article 76.1 of the proposal COM (2011) 896.
[88] See Article 76.2 of the proposal COM (2011) 896.
[89] See Point 3(a) of the Annex related to Paragraph 25 of the ESPCO Conclusions of 6/7 December 2010 on "*Social Services of General Interest: at the heart of the European Social Model".*
[90] OJ L 376, 27.12.2006, p. 36–68.
[91] See Article 1.1 of the Services Directive.
[92] See Chapters III and IV of the Services Directive.
[93] See Chapters II, V and VI of the Services Directive.
[94] See SGEI Guide under question 7.3.
[95] See Article 9.1(b) of the Services Directive.
[96] See Article 4(8) of the Services Directive.
[97] See Article 2.2 (a) of the Services Directive.
[98] See Article 2.2 (j) of the Services Directive.

Concerning the exclusion of NESGI, one may refer to the above developments on the concept of economic activity, and the potential application of this exclusion to some social services. Should a social service may be qualified of SGEI, the Services Directive shall not affect how such a SGEI is defined, organized and financed[99].

Concerning the specific exclusion of three categories of social services, one may refer to the *Handbook on the implementation of the Services Directive*, published in 2007 by DG Internal Market of the European Commission. It stems from this Handbook, the following precisions:

- The notion of "*charities recognised as such by the State*" includes churches and church organizations which serve charitable and benevolent purposes. In our opinion, this category may be an open one, not necessarily limited to church entities, in so far as other organizations may also pursue charitable activities in the social field[100].

- The social services referred to in Article 2.2 (j) are not excluded if they are provided by other types of providers, for example private operators acting without a mandate from the State. For instance childcare which is provided by private nannies or other childcare services (such as summer camps) provided by private operators are not excluded from the scope of application of the Services Directive[101].

- Social services relating to the support of families and persons who are permanently or temporarily in a state of need because of their insufficient family income or total or partial lack of independence and for those who risk being marginalized, such as services concerning care for elderly people or services to the unemployed, are excluded from the scope of application of the Services Directive only to the extent that they are provided by any of the providers mentioned above (i.e. the State itself, providers mandated by the State or charities recognized as such by the State). Thus, for instance, private household support services are services not excluded from the Services Directive and have to be covered by the implementing measures.

Besides, it is important to stress that should some social services be excluded from the scope of the Services Directive, the general EU Treaties rules are still applicable to them (except for those social services qualified as non-economic activities), notably the general principle of non-discrimination and the principles of free movement and free competition[102]. It's why, for instance, equality of treatment implies that public contracts cannot be reserved for specific categories of undertaking, such as non-profit organizations, regardless of the type of services involved, including social services[103].

However, it stems from case-law that "*a Member State may, in the exercise of the powers it retains to organize its social security system, consider that a social welfare system (…) necessarily implies, with a view to attaining its objectives, that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making*" [104]. Moreover, the Court held that "*the fact that it is impossible for profit-making companies automatically to participate in the running of a statutory social welfare system of a Member State by concluding a contract which entitles them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature is not liable to place profit-*

[99] See Article 1.3 of the Services Directive.
[100] See also supporting this opinion: answer given to question 7.10 in the SGEI Guide.
[101] See question 7.10 in the SGEI Guide.
[102] See question 6.4 of the SGEI Guide.
[103] See questions 4.2.10 and 6.6 of the SGEI Guide.
[104] See Case C-70/95 *Sodemare SA* v *Regione Lombardia* [1997] ECR I-3395, paragraph 32.

making companies from other Member States in a less favorable factual or legal situation than profit-making companies in the Member State in which they are established"[105].

Last, but not least, special attention must be paid to Article 17(1) of the Services Directive which states that Article 16 relating to freedom to provide services and to the three-tier test of non-discrimination, necessity and proportionality, does not apply to SGEI which are provided in another Member State,

II – Competition rules and Social Services

Protocol N°27 on the Internal Market and Competition, as annexed both to the TEU and the TFEU, explains that "the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted".

Consequently, Article 119 TFEU provides that: "For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition" (we underline).

To ensure that competition within the Internal Market is not subjected to distortion, prohibitions were stipulated for both undertakings and Member States (A). Those prohibitions require to defining a certain number of concepts, which find specific application within the area of social services (B).

For the purpose of the present Report, it must be noted that Article 106 paragraph 1 TFEU states that:

> *"In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109."*

This paragraph tends to weaken the difference that could be made between public and private undertakings. Indeed, it states that provisions related to competition (namely articles 101 to 109 TFEU) apply to the latest and so does article 18 TFEU which prohibits discrimination on the grounds of nationality. Such provision was designed to avoid temptation by the Member States to circumvent competition rules via public undertakings.

A. Prohibitions under Competition rules

Prohibitions for undertakings shall be distinguished from prohibitions related to State Aids.

A1. Prohibitions for Undertakings (articles 101 and 102 TFEU)

[105] *Ibidem*, paragraph 33.

As far as undertakings are concerned (see *infra*, about the concept), pursuant to articles 101 and 102 TFEU, certain forms of collusive or coordinated conducts between undertakings are deemed incompatible with the internal market and so is the abuse of a dominant position in a market.

- Article 101 TFEU, paragraphs 1 and 2 read as follows:

> "*1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:*
> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
> *(b) limit or control production, markets, technical development, or investment;*
> *(c) share markets or sources of supply;*
> *(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
> *(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*
> *2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void*."

Then, pursuant to article 101 TFEU, such collusive conduct necessarily implies two or more undertakings.

There are three main criterion to be met:

- 1/ A specific conduct or practice: three categories of conducts or practices between undertakings may be concerned:
  - Agreements between undertakings, defined as: "*a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention*"[106]. Such agreements may be concluded formally, orally or be tacit and may be vertical (i.e. between different levels of the chain of production) or horizontal.
  - Decisions by associations of undertakings, i.e. collective or representative bodies, such as trade associations.
  - Concerted practices, which are the most difficult conducts to prove since it is defined as any "*form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition*"[107]. However, it does not include mere exchange of information.

Article 101 TFEU gives a certain number of examples of prohibited effects but the list is not exhaustive.

- 2/ Such conducts must affect trade between Member States: The effect may be actual or even potential. The former must be foreseeable with a sufficient degree of probability on the basis of

106 ECJ, 6 January 2004, *Bayer*, joined cases C-2/01 P and C-3/01 P, ECR I-23.
107 ECJ, 14 July 1972, *Dyestuffs*, 48/69 ECR I-619, 661-663.

objective factors[108]. Moreover, this condition does not exclude agreements of undertakings in on Member State as long as they reinforce the compartmentalization of the market, where the market is susceptible to imports or where the market is incorporated in a broader one which is subject to inter-State trade. Finally, the effect must be appreciable.

- 3/ The object or the effect of such conducts must amount to prevent, restrict or distort competition: The object only concerns the aim pursued by the agreement. The effect of such conducts is appreciated by the "*de minimis*" rule[109]. Article 101 (1) TFEU does not apply if (a) in case of horizontal agreements, the threshold of 10% of aggregate market share owned by the concerned undertakings is not reached and (b) in case of vertical agreements, the threshold of 15% of aggregate market share owned by the concerned undertakings is not reached.

Article 101 TFEU also provides for the sanction of agreements or decisions which are deemed to be void.

Eventually, this prohibition knows exceptions which can take the form of an individual exemption or a block exemption. The former is assessed on a case-by-case basis by the Commission. The latter is granted by regulations from the Council or the Commission for certain groups of agreements within some specific areas[110].

- Article 102 TFEU is related to abuse of dominant position. This provision provides that:

"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

There are three decisive elements as to whether article 102 TFEU is applicable:

- There must be a dominant position: such a position is appreciated regarding the power of the undertaking in the relevant market. The latter is a necessary precondition[111] for an alleged abuse.

  - The relevant market may be defined in terms of products and/or geography and/or time:

108 ECJ, 13 July 2006, *Manfredi*, joined cases C-295/04 to C-298/04, ECR I-6619.
109 See Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) [EC] (*de minimis*), in OJ 2001 C 368, p. 13. However, as the ECJ held recently, such a notice is of non-binding nature, for both the competition authorities and the courts of the Member States: see judgement of 13 December 2012, in Case C-226/11, *Expedia Inc*., not yet published, paragraph 24.
110 E.g. Research and development (Regulation 1217/2010/EU), Technology transfer (Regulation 772/2004/EC), Insurance (Regulation 267/2010/EU)...
111 CFI, 6 July 2000, *Volkswagen*, T-62/98, ECR II-2707.

- The product market is defined with regard to the substitutability of demand and supply. For instance, it will be taken into account cans for different sectors of the market instead of only cans for fish and meat[112] or only bananas instead of bananas and other table fruits[113].

- Geographically speaking, the market must be an area within the internal market where the product is marketed and where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking to be evaluated.

- Finally, the temporal market condition applies to certain products whose production is limited in time (e.g. the selling period of the World Cup football tickets[114]).

➢ The dominance of the undertaking in this market: the ECJ defined it as: "*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers*."[115] Various factors are taken into account to determine whether such a dominance exists: financial resources of the undertaking, technical and commercial advantages (e.g. IP rights, well-known brand name), barriers making it difficult to enter the market… But the most relevant factor is the relative market shares held by the undertaking: this factor leads to a rebuttable presumption of dominance if the concerned undertaking owns more than 50% of the market shares. If this threshold is not reached, the other abovementioned factors may be used to determine the dominance.

- The dominant position must be abused: Dominance itself is not prohibited by EU law but such a position carries an obligation of responsibility for the concerned undertaking not to distort competition in the internal market[116]. The abuse is defined as follows by the ECJ: "*An objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.*"[117] Two main categories of blameworthy conducts under EU law can be drawn: exploitative abuses (unfair conditions on consumers) and exclusionary abuses (exclusion of competitors).

- The abuse of the dominant position must affect trade between Member States: this condition is appreciated similarly as it is within the scope of article 101 TFEU (cf. *supra*).

Eventually, contrary to article 101 TFEU, the prohibition provided by article 102 TFEU is absolute. There is no exemption procedure. However, objective justifications may prevent the conduct from being said abusive. Therefore, there is an abuse only when there is no objective commercial, industrial or organizational reason for the concerned undertaking to behave this way.

112 ECJ, 21 February 1973, *Continental Can*, 6-72, ECR 215.
113 ECJ, 14 February 1978, *United brands*, 27/76, ECR 207.
114 Commission decision, 2000, *1998 Football World Cup*, N°2000/12/EC, OJ L 5/55.
115 ECJ, 13 February 1979, *Hoffmann-Laroche*, 85/76, ECR 461.
116 ECJ, 9 November 1983, *Michelin*, 322/81, ECR 3461.
117 See *Hoffmann-Laroche* Case.

In order to prevent situations likely to be considered as abuse of dominant position, the EU legislature has adopted some rules to controlling concentrations between undertakings. This is the purpose of the Council Regulation (EC) No 139/2004 of 20 January 2004 ("the EU Merger Regulation", repealing a first set of rules dated of 1989)[118]. Any project of concentration (i.e. mergers, acquisitions and full-function joint ventures) with a certain EU dimension (i.e., combined aggregate world-wide turnover > EUR 5,000 million and aggregate EU-wide turnover of each or at least two of the undertakings > EUR 250 million), must be notified to the Commission which will authorize it or not (under or not some conditions).

At our knowledge, the EU Merger Regulation has never been applied to concentrations involving undertakings providing social services.

A2. Prohibitions for Member States: the State Aid rules (articles 107 to 109 TFEU)

We saw that articles 101 and 102 TFEU impose prohibitions to undertakings. However, they are not the only actors to be limited in their course of action.

Indeed, Article 107§1 TFEU states a general incompatibility test on some State aid and reads as follows:

> *"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."*

There are three decisive elements as to whether an action of a Member State falls within the scope of this provision:

- The existence of a State aid: It is a very broad notion (see *infra*, §B2.)
- This aid must affect trade between Member States. Therefore, aids that are only local or regional and have no cross-border effects are not caught.
- This aid must distort or threaten to distort competition. This concept is interpreted widely. To assess whether there is a distortion, the ECJ compares the actual competitive environment with what would be the potential competitive environment without the State intervention.

These last two conditions are analysed by the Commission in order to show that the aid is liable to strengthen the position of its beneficiary compared to other undertakings operating in the same line of trade. However, in the area of State aid, this analysis is less thorough than in the area of articles 101 and 102 TFEU.

Paragraphs 2 and 3 of article 107 TFEU, paragraph 2 of article 106 TFEU (see *infra*) and article 93 TFEU (transport sector) provide for exceptions to this incompatibility test on State aid. The ECJ also provided exceptions (see *infra*, compensation for public service obligations and purely social activities) to the ban of State aid affecting the inter-Member States trade.

118 OJ L 24, 29.1.2004, p. 1–22.

B. Concepts involved under Competition rules: what about Social Services?

It appears that certain concepts are fundamental for the application of competition rules at the EU level. Those key concepts, such as "undertaking", "economic activity" or "State aid", are common to all those rules. Their definition is not given by the treaties but is supplemented by the case-law of the European Court of Justice or the decisions taken by the Commission. It must be bore in mind that those definitions are specific to the EU scheme and thus any national attempt to adopt their own concept is irrelevant. Besides, regarding the purpose of the present Report, it must be explained how these definitions are applied to Services of General Economic Interest (hereinafter, "SGEI").

B1. Concepts of 'Undertaking' and of 'Economic Activity' applied to Social Services

The definition of the concept of "undertaking", as settled by EU law, is fundamental insofar as it is used by articles 101, 102 and 107 TFEU.

There is no definition of this concept within the Treaties. Then, the ECJ had to define it. Traditionally, an undertaking is "*every entity engaged in an economic activity, regardless of the legal status and the way in which it is financed.*"[119] Therefore, it can be said to be "functional and activity-related"[120].

Thus, under EU law, it appears that the concept of "economic activity" is also relevant since it is the criterion for defining an undertaking and thus the application of competition rules depends on it.

The settled case-law's definition of the concept of "economic activity" is also broad and functional. Such an activity must consist in offering goods or services on a given market[121]. In this respect too, any national definition is irrelevant[122], the EU definition is an autonomous concept based on observations of real economic behaviour, regardless of any other qualification. It is an expression of the supremacy of EU law over national laws. The functional aspect of this definition leads to analyse every activity individually and independently from surrounding activities.

As far as Member States are concerned, this criterion of "*offering goods and services on a given market*" is similarly applied to their activities. Therefore, in the first place, it must be wondered whether the given activity falls within the State's public remit (i.e. exercise of state prerogative such as police, army, public safety…). If it does not, then the criterion of offering goods or services on a market is applied. Since the case law does not require any particular legal form or independence, it is not relevant whether the body carrying the activity at stake has a legal personality or is separated from that of the State[123].

An intention to make a profit is not required. Therefore, charitable organizations can be considered as undertaking engaged in an economic activity under the EU definition, as well as individual persons carrying a professional activity. The Court has also held recently that whether or not an activity is economic in nature "does not depend on (…) the profitability of that activity"[124].

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119 ECJ, 23 April 1991, *Höfner and Elser*, C-41/90, ECR I-1979.
120 KOENIG, SCHREIBER and DENNIS, *European Competition Law in a Nutshell*, lexxion, 2011, p. 13.
121 ECJ, 19 February 2002, *Wouters*, C-309/99, ECR I-1577, paragraph 42
122 See *Höfner* Case.
123 ECJ, 27 October 1993, *Decoster*, C-69/91, ECR I-5335
124 See ECJ judgement of 19 December 2012, in Case C-288/11 P, *Mitteldeutsche Flughafen AG*, not yet published, paragraph 50.

It has been underlined[125] that instead of giving the aforementioned positive definition of the concept of "economic activity", it may have sometimes seemed easier to define it negatively, i.e. by excluding certain activities. Indeed, since the relevant criterion is to offer goods or services on a market, it results that the mere purchase of goods or services is not sufficient to amount to an "economic activity". Therefore, the ECJ stated that the nature of the activity of purchasing shall be determined by the subsequent use of the goods purchased[126]. For instance, the purchase of goods solely for the purposes of private consumption does not amount to "economic activity".

As far as exclusions are concerned, the ECJ also excluded from the scope of the realm of "economic activity" activities having exclusively social objectives[127]. Indeed, the ECJ considered that services, such as sickness funds or social security systems, could not be said to undertake an economic activity. It did so with regard to certain criteria (see *infra*). Therefore, pursuant to the *Höfner* case definition of undertakings subject to articles 101 and 102 TFEU, such social services were not caught by those provisions.

The ECJ settled criteria in order to determine what activity has to be considered as exclusively social, and therefore as not of economic nature. Some criteria are considered as irrelevant in so far as they could be met by bodies carrying an "economic activity". At best, they can be used as indications. Those are:

- The non-profit objective[128].
- The gratuitousness of the goods or services offered.
- The legal status of the entity engaged in the activity.
- The compulsory characteristic of the activity.

On the other hand, some criteria have been said to demonstrate the existence of an activity with exclusively social objectives. Those are:

- The use of a redistributive methodology (principle of solidarity) rather than a profit methodology (principle of capitalization). In other words, the received benefits shall not be linked to the actual level of contributions[129] or earnings.
- The determination by law of the level of contributions and of the benefits.
- The operators do not enter into competition with each other or with private institutions.
- The affiliation to the scheme is compulsory[130].
- The scheme is supervised by the State[131].

These criteria were summed up within the "Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest".[132]

125 See DRIGUEZ, *Droit social et droit de la concurrence*, Bruylant 2006, § 175.
126 ECJ, 18 June 1998, *Commission / Italy*, C-35/96, ECR I-3851
127 ECJ, 17 February 1993, *Poucet and Pistre*, joined cases C-159/91 and C-160/91, ECR I-637
128 ECJ, 29 October 1980, *Van Landewick*, joined cases 209 to 215/78, ECR I-3125
129 ECJ, 16 November 1995, *Fédération française des sociétés d'assurance (FFSA)*, C-244/94, ECR I-4013, I-4015
130 ECJ, 17 February 1993, *Poucet and Pistre*, joined cases C-159/91 and C-160/91, ECR I-637
131 ECJ, 22 January 2002, *Cisal and INAIL*, C218/00, ECR I-691
132 See in particular article 2.1.3 of the Communication, 11 January 2012.

B2. Concept of State Aid

We saw that State aid was prohibited insofar as it affects trade between Member States and is likely to distort competition. Under article 107, paragraph 1, TFEU, the concept of State aid involves:

- An advantage in any form whatsoever given to an undertaking (see definition, *supra*): subsidies, grants, compensation for burdens imposed by the State or, on the contrary, provision of goods or services without adequate remuneration, foregoing the recovery of sums due to the State, preferential terms and tariffs, tax reductions, State guarantees, capital injections. However, the market economy investor principle means that there is no State aid if the State behaves under market conditions and terms, i.e. likewise a private investor. Furthermore, the *de minimis* rule also applies in this context and small amounts of aid (under EUR 200.000 over the course of three tax years) are excluded from the scope of article 107 TFEU[133].

- This advantage must be granted by a State or through State resources (the aid is a burden for the State): it can be granted directly or indirectly (through private or public bodies established by the State to administer the aid[134]).

- It must be granted in a selective manner: There must be an advantage for the beneficiary of the aid, compared to the situation of undertakings under the same legal and factual conditions[135]. The relevant criterion, in this regard, is whether the aid is directed at supporting the entire economy indiscriminately or at supporting certain undertakings or even an entire industry.

The interpretation of the selective advantage criterion has lead the Court to combine it with the application of Article 106, paragraph 2 TFEU where aids are granted to undertakings entrusted with the operation of SGEI (see, *infra*). To that regard, in its Altmark case, the ECJ ruled that compensation for public services obligations do not amount to State aid if four conditions are met[136]:

- It is a genuine public service: the recipient undertaking is actually in charge of a public service and its obligations are clearly defined[137].
- The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
- The amount of the compensation does not exceed what is actually necessary to cover the costs incurred by the public service obligations (a reasonable profit for discharging those obligations can be taken into account)[138].
- When the undertaking is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing the service at stake at the least cost to the community, the cost analysis to be carried in order to determine the level of compensation must demonstrate that a typical undertaking, well-run and adequately provided with the necessary means so as to be able to meet the necessary public service requirements, would have incurred the same costs [139].

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[133] See Regulation N°1998/2006/EC.
[134] ECJ, 2 February 1988, *Kwekerij Gebroeders van der Kooy*, joined cases 67, 68 and 70/85, ECR 219.
[135] See ECJ, 2 July 1974, *Commission v Italy*, 173-73, ECR 709.
[136] ECJ, 24 July 2003, *Altmark Trans GmbH*, C-280/00, ECR I-7747
[137] CFI, 2 February 2008, *BUPA*, T-289/03, ECR II-81
[138] See *BUPA* Case.
[139] See *BUPA* Case.

The Altmark case reflects a significant change in the application of State aids' rules to SGEI, by privileging a compensatory approach linked to the qualification of State aid itself. The traditional approach was based on the following reasoning: any subvention to an undertaking performing a SGEI is a State aid within the scope of Article 107 TFEU, but may be considered as compatible with the Internal Market should conditions of Article 106.2 TFEU (see *infra*, as a general exception to EU rules) be met[140]. The new Altmark test identifies public service compensation which is not State aid. However, its four cumulative conditions are, in fact, often difficult to be met, notably the fourth condition, in absence of public procurement procedure to select the undertaking to be in charge of the SGEI.

For this reason, the Commission has decided to adopt in November 2005 a set of rules often known as **Altmark package** (or Monti-Kroes Package) in order to identify and make secure situations where the fourth Altmark criterion is not met: in such circumstances, the public service compensation must be considered as a State aid but, should it fulfills the conditions set by the package, it is deemed to be compatible with the internal market. This set of rules was as follows:

- A Commission decision[141] based on article 86, paragraph 3, of the EC Treaty (now, article 106, paragraph 3, TFEU) that specifies the conditions under which State aid in the form of public service compensation is compatible with the internal market. The main aim was to ensure legal certainty for SGEI providers. The decision declared some SGEI compatible with the internal market and exempted from the obligation of prior notification to the Commission. These exemptions only concerned:

    - annual compensation below EUR 30 million for undertakings with an average annual turnover of less than EUR 100 million;
    - compensation for hospitals and social housing;
    - compensation for air or maritime links to islands;
    - compensation for airports and ports - average annual traffic not more than 1 million (airports) or 300 000 (ports) passengers.

Moreover, some requirements were set out regarding the compensation granted by the State to the providers of SGEI:

- operation of the SGEI shall be entrusted to the undertaking concerned by way of one or more acts;
- the compensation shall not exceed the costs incurred by the SGEI and a reasonable profit;
- such costs must be calculated on the basis of the generally accepted cost accounting principles;
- Member States must carry out regular checks to make sure that there is no overcompensation;
- In such a case, mechanisms of repayment must be established.

[140] See Case T- 106/95, *Fédération française des sociétés d'assurances (FFSA) e.a.*, [1997] ECR .II-229.
[141] Commission Decision 2005/842/EC of 28.11.2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest

- A Community framework for State aid in the form of public service compensation[142]: applicable to public service compensation granted to undertakings in connection with activities subject to the rules of the EU Treaty, (with the exception of the transport sector, and the public service broadcasting sector covered by the Communication from the Commission on the application of State aid rules to public service broadcasting). This text spelled out the conditions under which public service compensation which constitutes State aid and is not covered by the decision (as it does not comply with the thresholds set in the Decision) can be found compatible with the common market pursuant to ex-Article 86(2) EC.

- A revision of the Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, which imposes to undertakings carrying on both SGEI activities and pure commercial activities to establish separate and reliable accounts relating to such different activities[143].

This "Altmark Package (I)" has been the object of less than twenty Commission decisions. It is interesting to emphasis that in a recent case, the General Court has insisted on the duty for the Commission to check that any condition established in its decision 2005/842/EC is met but also on the obligation for Member States to be the most clear and transparent as possible in establishing the SGEI mission and the calculation's parameters of the compensation[144].

The "Altmark Package" has been reformed recently, on 20 December 2011 by the so-called "Almunia Package" and completed in April 2012 with a *de minimis* Regulation.

So, the **Almunia package** (or the "new SGEI package") contains:

- a Communication on the application of the EU State aid rules to compensation granted for the provision of SGEI [145]: the aim is to clarify some basic concepts, for instance the notions of economic activity, of SGEI-SSGI[146], of State aid,… One may insist on the concept of "*effect on trade*": the Communication confirms what already pointed out in the SGEI's Guide, i.e. that activities presenting "*a purely local character*" are likely to not affect trade between Member States. So it has been concluded in several cases related to swimming pools to be used predominantly by the local population, local hospitals aimed exclusively at the local population, local museums unlikely to attract cross-border visitors and local cultural events, whose potential audience is restricted locally[147]. This pragmatic position is

[142] OJ C 297, 29.11.2005, p. 4–7.

[143] This directive has been codified by the **Commission Directive 2006/111/EC** of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17–25.

[144] See GC judgement of 7 November 2012, in Case T-137/10, *Coordination bruxelloise d'institutions sociales et de santé (CBI),* not yet reported, concerning the decision of the Commission of 28 October 2009 declaring compatible with the common market on the basis of ex-Article 86(2) EC unlawful State aid granted by Belgium to certain public hospitals in the *Région de Bruxelles-Capitale* (Region of Brussels - Capital).

[145] OJ C8, 11.01.2012, p. 4-14.

[146] The communication confirms that the social nature of a service is not sufficient in itself to classify is as non-economic and that a vast range of activities is concerned (social security schemes and essential services provided directly to the person).

[147] See Paragraph 40 of the Commission Communication, with the references to the relevant Commission Decisions and Cases, already analyzed under section 3.1.12 of the SGEI's Guide.

particularly relevant to social services and to justify also the *de minimis* approach in terms of amounts of State aid (see *infra*), as well as the concept of "*cross-border interest*" regarding the implementation of public procurement rules (see *supra*).

- a Commission Decision on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI [148] : like the former one adopted in 2005, this decision sets out the conditions under which State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI is compatible with the internal market and exempt from the requirement of notification laid down in Article 108(3) of the Treaty. Five categories of compensation are concerned:

  - compensation not exceeding an annual amount of EUR 15 million[149] for the provision of SGEI in areas other than transport and transport infrastructure;

  - compensation for the provision of services of general economic interest by hospitals providing medical care, including, where applicable, emergency services;

  - compensation for the provision of SGEI "*meeting social needs*" as regards health and long term care, childcare, access to and reintegration into the labor market, social housing and the care and social inclusion of vulnerable groups[150];

  - compensation for the provision of SGEI as regards air or maritime links to islands on which the average annual traffic during the 2 financial years preceding that in which the service of general economic interest was assigned does not exceed 300000 passengers; and

  - compensation for the provision of SGEI as regards airports and ports for which the average annual traffic during the 2 financial years preceding that in which the service of general economic interest was assigned does not exceed 200000 passengers, in the case of airports, and 300000 passengers, in the case of ports.

  Several conditions have to be met in order to establish compatibility and justify exemption from notification:

  - **Need for an entrustment act** which shall include, in particular, the content and duration of the public service obligations[151]; the undertaking and, where applicable, the territory concerned; the nature of any exclusive or special rights assigned to the undertaking by the granting authority; a description of the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation; the arrangements for avoiding and recovering any overcompensation; and (this is a new procedural requirement) a reference to the decision.

[148] **Commission Decision N° 2012/21/EU**, OJ L7, 11.01.2012, p. 3-10.
[149] Rather than EUR 30 million in the former decision.
[150] The reference to « *essential social needs* », adopted in the first draft of the Commission Decision in September 2011, has been drop out.
[151] Pursuant to Article 2.2, this duration may not exceed 10 years to comply with the Decision. Where the period of entrustment exceeds 10 years, the Decision only applies "*to the extent that a significant investment is required from the service provider that needs to be amortized over a longer period in accordance with generally accepted accounting principles*", e.g. in the case of social housing (see Recital N°12 of the Decision).

- **Absence of over-compensation**: the amount of compensation shall not exceed what is necessary to cover the net cost incurred in discharging the public service obligations, including a reasonable profit. The costs to be taken into consideration shall comprise all the costs incurred in operating the SGEI and be calculated on the basis of generally accepted cost accounting principles (as listed in Article 5 of the decision). The new decision gives also more precision on the notion of "*reasonable profit*, by referring to "*the rate of return on capital that would be required by a typical undertaking considering whether or not to provide the SGEI*" for the whole period of entrustment, taking into account the level of risk and by considering that, except by reasons of specific circumstances, "*a rate of return on capital that does not exceed the relevant swap rate plus a premium of 100 basis points shall be regarded as reasonable in any event*".

- **Control of over-compensation**: Member States shall ensure that the undertaking does not receive overcompensation, by carrying out regular checks and, at least, every 3 years during the period of entrustment and at the end of that period. The undertaking has to repay any overcompensation received.

- **Transparency and reporting**: for compensation above EUR 15 million granted to an undertaking which also has activities outside the scope of the SGEI, the Member State concerned shall publish on the Internet or by other appropriate means the entrustment act (or a summary) and the amounts of aid granted to the undertaking on a yearly basis. The Member States shall keep available, during the period of entrustment and for at least 10 years from the end of the period of entrustment, all the information necessary to determine whether the compensation granted is compatible with the decision. Last, but not least, each Member State shall submit a report on the implementation of this Decision to the Commission every 2 years, as from June 2014.

o A revised EU Framework for State Aid in the form of public service compensation[152]: it establishes conditions to be met by State aids falling outside the scope of Decision 2012/21/EU to be declared compatible with Article 106(2) of the Treaty if it is necessary for the operation of the SGEI concerned and does not affect the development of trade to such an extent as to be contrary to the interests of the Union. These conditions are the following ones:

- **Existence of a genuine SGEI** as referred to in Article 106.2 TFEU: the Commission insists on the fact that Member States cannot attach specific public service obligations to services that are already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions. As for the question of whether a service can be provided by the market, the Commission's assessment is limited to checking whether the Member State's definition is vitiated by a manifest error, unless provisions of Union law provide a stricter standard. The new EU Framework adds for a new procedural requirement by requesting from Member States to "*show that they have given proper consideration to the public service needs supported by way of a public consultation or other appropriate instruments to take the interests of users and*

[152] Commission Communication in OJ C8, 11.01.2012, p. 15-22.

providers into account"[153]. This does not apply where it is clear that a new consultation will not bring any significant added value to a recent consultation.

- **Need for an entrustment act** specifying the public service obligations and the methods of calculating compensation, as well as the duration of the period of entrustment which should be justified "*by reference to objective criteria such as the need to amortize non-transferable fixed assets*". In principle, the duration of the period of entrustment should not exceed "*the period required for the depreciation of the most significant assets required to provide the SGEI*"[154].

- **Compliance with the Directive 2006/111/EC** (see *supra*)[155] **and with Union public procurement rules**[156].

- **Absence of discrimination,** i.e. where an authority assigns the provision of the same SGEI to several undertakings, the compensation should be calculated on the basis of the same method in respect of each undertaking[157].

- **Absence of overcompensation:** amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit. Similar notions (like revenue, reasonable profit, etc.) have to be taken into consideration than those within the scope of Decision 2012/21/EU, as explained above. However, the EU Framework give more precision on the way to establish that amount of compensation, i.e. on the basis of either the expected costs and revenues, or the costs and revenues actually incurred, or a combination of the two, depending on the efficiency incentives that the Member State wishes to provide from the outset[158]. Two main methodologies are defined: the net avoided cost methodology and the methodology based on cost allocation.

- **Absence of affectation of the development of trade** to an extent contrary to the interests of the Union: to comply with this condition derived from Article 106.2 TFEU itself, the EU Framework provides for the possibility to impose additional

[153] See Paragraph 14 of the EU Framework. However, pursuant to Paragraph 61, this requirement is not applicable to compensations listed in Article 2(1) of the 2012/21/EU Decision, so including compensation for the provision of SSGI as referred to in that provision.
[154] See Paragraph 17 of the EU Framework.
[155] See also paragraph 44: « *Where an undertaking carries out activities falling both inside and outside the scope of the SGEI, the internal accounts must show separately the costs and revenues associated with the SGEI and those of the other services*".
[156] However, pursuant to Paragraph 61, this requirement is not applicable to compensations listed in Article 2(1) of the 2012/21/EU Decision, so including compensation for the provision of SSGI as referred to in that provision.
[157] However, pursuant to Paragraph 61, this requirement is not applicable to compensations listed in Article 2(1) of the 2012/21/EU Decision, so including compensation for the provision of SSGI as referred to in that provision.

[158] In accordance with paragraphs 40 and 41 of the EU Framework, Member States, in devising the method of compensation, must introduce incentives for the efficient provision of SGEI of a high standard, unless they can duly justify that it is not feasible or appropriate to do so. [158] However, pursuant to Paragraph 61, this requirement is not applicable to compensations listed in Article 2(1) of the 2012/21/EU Decision, so including compensation for the provision of SSGI as referred to in that provision.

requirements or requesting commitments from the Member States[159], where serious competition distortions would be detected, e.g. where the entrustment either has a duration which cannot be justified by reference to objective criteria or bundles a series of tasks (typically subject to separate entrustments with no loss of social benefit and no additional costs in terms of efficiency and effectiveness in the provision of the services). The EU Framework refers also to the situation where a Member State entrusts a public service provider, without a competitive selection procedure, with the task of providing an SGEI in a non-reserved market where very similar services are already being provided or can be expected to be provided in the near future in the absence of the SGEI[160].

- **Transparency, reporting and evaluation:** for each SGEI compensation falling within the scope of the EU Framework, the Member State concerned must publish on the internet or by other appropriate means the results of the public consultation or other appropriate instruments referred to above[161]; the content and duration of the public service obligations; the undertaking and, where applicable, the territory concerned; the amounts of aid granted to the undertaking on a yearly basis. Member States shall also report to the Commission on the compliance with the EU Framework every two years, as from June 2014.

Last, but not least, the Commission proposes as appropriate measures for the purposes of Article 108(1) TFEU that Member States publish the list of existing aid schemes regarding public service compensation which have to be brought into line with the EU Framework by 31 January 2013, and that they bring those aid schemes into line with this Communication by 31 January 2014[162].

- A *de minimis* Regulation specific to SGEI. This Regulation was adopted a few months after the rest of the package, on 25 April 2012[163]. The main provision aims at exempting from EU State aid rules aid of up to EUR 500.000 per undertaking over a three-year period granted as compensation for the provision of SGEI. This threshold is higher than the general *de minimis* threshold of EUR 200 000 (over three year) pursuant to Regulation (EC) N°1998/2006[164], still applicable for State aid in any other sectors (except some specific ones, e.g. transport, fisheries and agricultural sectors). The new Regulation provides for a non-rebuttable assumption that such low compensations cannot affect trade between Member States or competition within the internal market[165].

[159] [159] However, pursuant to Paragraph 61, these additional requirements are not applicable to compensations listed in Article 2(1) of the 2012/21/EU Decision, so including compensation for the provision of SSGI as referred to in that provision.
[160] See also others situations referred to in Paragraphs 57 and 58.
[161] [161] However, pursuant to Paragraph 61, this publication is not required for compensations listed in Article 2(1) of the 2012/21/EU Decision, so including compensation for the provision of SSGI referred to in that provision.
[162] See Paragraphs 70-71 : Member States had to confirm to the Commission by 29 February 2012 that they agreed to the appropriate measures proposed. In the absence of any reply, the Member State concerned was deemed not to agree.
[163] **Commission Regulation (EU) No 360/2012** of 25 April 2012 on the application of Articles 107 and 108 of the TFEU to *de minimis* aid granted to undertakings providing SGEI, in OJ L 114, 26.4.2012, pp. 8-13.
[164] See Commission Regulation of 15 December 2006, in OJ L 379, 28.12.2006, p. 5.
[165] See Recital (4) of the Regulation (EU) N°360/2012.

B3. General Exception for Services of General Economic Interest (article 106§2 TFEU).

The Altmark Package is a specific application to State aids' rules of a more general exception provided by Article 106.2 TFEU (see introduction), which establishes a limitation regarding the application of any EU rule, including competition rules to, notably, the SGEI. Indeed, these rules apply insofar as they do not obstruct the performance of these particular tasks. They apply conditionally. The exception is then granted with regard to the nature of the tasks assigned to those services. However, this exception shall not lead to affect the trade between Member States to such an extent that would be contrary to the interests of the Union. Therefore, it appears that the exception contains itself a limitation.

In the first place, the definition of the concept of SGEI is of paramount importance since the favor granted by article 106, paragraph 2, TFEU depends on it. It must be noted that Member States have a large discretion regarding the content to be given to the content of such services, i.e. to define what should be classified as being in the general economic interest (e.g. postal, transport, energy services). The ECJ only controls if such a discretionary power has been abused (control of the manifest error)[166].

However, the entity in charge of such a service must have been entrusted by a State to do so by an act of public authority (e.g. legislation, grant of a concession).

To benefit from article 106, paragraph 2 TFEU derogation, an undertaking must provide a SGEI. Such a concept must be defined in two steps:

- Services of economic interest:

As explained above, the notion of services is defined by article 57 TFEU as "*normally provided for remuneration […] where such services do not relate to the freedoms of movement of goods, capital and persons*; and insofar as the concept of economic activity is a broad one, so is the concept of service of economic interest.

Besides, it was noted that only few activities contain absolutely no element of an economic character. Therefore, in this regard, the scope of application of article 106, paragraph 2 is quite broad as well. It generally applies to fulfill charitable, public welfare-related, social and cultural purposes. For instance, environmental protection in the area of waste disposal[167] or the universal supply of gas and electricity at the lowest cost and in a socially responsible manner[168] was said to be economic services by the ECJ.

- Services of general interest:

The service provided must be in the interest of the public. The ECJ defined such a criterion as follows: "services which operate on the behalf of all users throughout the territory of the Member State concerned […] irrespective of the specific situations or the degree of economic profitability of each individual operation"[169]. More generally, SGEI must be of direct benefit to the public.

[166] ECJ, 21 September 1999, *Albany International*, C-67/96, ECR I-5751.
[167] ECJ, 23 May 2000, *FFAD*, C-209/98
[168] ECJ, 23 October 1997, *Commission v. France* (*EDF-GDF)*, C-159/94, ECR I-5815
[169] CFI, 11 July 1996, *Métropole Télévision*, joined cases T-528/93, T-542/93, T-543/93 and T-546/93, ECR II-649.

Once it has been established that a service is of general economic interest, the exemption solely applies if the assigned tasks are obstructed by the application of EU competition rules[170]. Such an obstruction can be of legal origin or factual. The hindrance is legal when the carrying of the SGEI would be in breach of a EU law. It would be factual if the application of such EU competition rules would make it financially impossible. The criterion to assess financial feasibility is the "*economically acceptable conditions*" one[171]. The assessment must be objective and not subjective, i.e. the ECJ, on a case-by case analysis, considers whether it would be possible to carry the service while observing the EU law but not whether this particular undertaking is able to do so.

On the other hand, such an exemption shall not be of such an extent that it would be contrary to the interests of the Union. In this context, the concept of trade between Member States is not interpreted as it is in the context articles 101 and 102 TFEU. Rather, it involves considering the diverging interests of, on one hand, the Union and, on the other hand, the Member States. Therefore, the priority is the Union's objective to settle an internal market. That is the criterion to assess this last condition of application of article 106, paragraph 2, TFEU.

Last, but not least, Article 106, paragraph 2, TFEU, must be also taken into consideration by reference to others EU provisions. First of all, in accordance with Article 14 TFEU (as enlightened by Protocol n°26 on SGI) and Article 36 of the Charter of fundamental rights, whose respective scope has been explained above.

Secondly, in accordance with the Free Movement rules, and in particular with the directives on public procurement[172]: such interrelation between the two set of rules is illustrated by the Altmark test and the Altmark package. Indeed, we saw that where public procurement rules applied to select the undertaking to be entrust with the operation of a SGEI, the 4th criteria of the Altmark case might be satisfied and that the public service compensation would not be considered as a State aid (should the three others conditions are met). We saw also that within the scope of the Almunia Package, compliance with public procurement rules is required as condition of compatibility of the State aid in the form of public service compensation.

III – Conclusive remarks related to the new EU special treatment of Social Services

It stems from the overview of the application of EU law to social services that the specificities of such services are more and more taken into account to justify some adaptations to EU rules (A.). This special treatment must be confirmed and strengthened by a more united and inter-related approach between free movement and competition rules (B.).

A. The specificities of social services are now taken into account by EU law

In its White Paper on SGI of 2004, the Commission seemed to be in favor of "*a systematic approach in order to identify and recognize the specific characteristics*" of SSGI[173]. But a systematic approach is not necessarily a specific one. It's why the 2006 Communication on SSGI[174] has just identified some common and specific "*organizational characteristics*" for SSGI, without calling for a systematic adaptation or derogation to EU rules. However things are changing. The Almunia Package and the proposal for reforming public procurement directives contribute to this evolution.

[170] ECJ, 19 May 1993, *Corbeau*, C-320/91, ECR I-2533.
[171] ECJ, 10 February 2000, *Deutsche Post*, joined cases C-147/97 and 148/97, ECR I-3271.
[172] On this issue, see Section 5 of the SGEI Guide.
[173] See COM (2004) 374 final, 12 May 2004.
[174] See COM (2006) 177 final, 26 April 2006.

Concerning the Almunia Package, as explained above, the new rules related to State aid in the form of public service compensation have integrated the specificity of SSGI defined as SGEI "*meeting social needs*" by including them within the scope of the Decision 2012/21/EU, i.e. by exempting them from the requirement of notification laid down in Article 108(3) TFEU. But also by exempting them from various requirements set up by the EU Framework on State aids in the form of public service compensation which cannot fall within the scope of the Decision[175].

Regarding the reform of EU public procurement rules, as also pointed out above, the will to take into account the specificity of the social services is maybe more manifest, by setting up a high threshold (EUR 500 000) under which the directive shall not apply and by establishing a specific regime above this threshold (i.e. imposing only the observance of basic principles of transparency and equal treatment and highlighting the importance of ensuring "*quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation"*).

The question is now whether these two sets of provisions will pave the way or not to other adaptation of EU rules applicable to social services and which ones. At this stage, we do think that the main concerns for SSGI have been addressed but that clarification is still needed on the concept of SSGI in itself, which will suppose a more united approach by EU law.

B. The treatment of social services by EU law needs a more united approach

As we saw, the concept of "economic activity" is both a key one to apply EU law to social services and a difficult one to define, involving some diverging ways of applying the free movement and competition rules to them. Two examples may illustrate such a divergence.

The first example is related to the treatment by EU law of compulsory affiliation to complementary schemes: they may be considered not in line with the free movement of rules but complying with the competition rules. Indeed the Court held:

- on one hand, that the fact that a national legislation concerns only the financing of a branch of social security (e.g. insurance against accidents at work and occupational diseases), by providing for compulsory affiliation of undertakings covered by the scheme at issue to the employers' liability insurance associations entrusted by the law with providing such insurance, does not exclude the application of the EU Treaty rules, in particular those relating to freedom to provide services[176]

- and, on the other hand, that a decision taken by organizations representing employers and workers in a given sector, in the context of a collective agreement, to set up in that sector a single pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make affiliation to that fund compulsory for all workers in that sector does not fall within the scope of EU competition provisions[177].

[175] See Paragraph 61 of the EU Framework, by reference to Article 2(1) of the Decision.
[176] See Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 35 and the above-mentioned *Kattner Stahlbau* Case, paragraphs 75-76..
[177] See the above-mentioned *Brentjens* Case, paragraph 62.

The second example is about health cares in hospital: the Spanish national health system has not been considered by the Court as offering an economic activity within the ambit of competition rules[178] while the Court held that hospital medical treatment may fall in the sphere of services within the meaning of free movement rules[179].

Besides, as pointed out by some authors, "the Court has not produced a workable 'bright line' to distinguish when State activity is caught by the Internal Market and competition rules of the [EU treaties] and when State activity is 'non-economic' and remains outside the reach of [EU] law"[180].

According to another author, "The key to reconciling these conflicting findings may be the concept of SGEI"[181], in the way that the exception of Article 106(2) TFEU would give more leeway for Member States to regulate SGEI than the traditional free movement exceptions do.
Indeed, one may admit that the overriding reasons in the public interest which may justify restrictions to freedom of movement are restrictively construed by the Court as exception to fundamental principles and submitted to a strict control of necessity and proportionality, while the reference to a SGEI may not be considered anymore only as an exception but as corresponding to a specific system entrusted in the common values of the EU (see Article 14 TFEU and Article 36 CFREU) and making a balance between the achievement of the Internal Market and the competences of Member States to organize and finance their SGEI (see Protocol n°26).

Regarding the social field, that may look a reasonable option, should Member States accept to model their social services, or, at least, their essential ones, i.e. regarded by them to be of special interest for their citizens, constituting economic activities as SGEI[182]. However, such an option does not totally set aside the necessity to have a clear definition of the concept of SGEI itself and a more united approach between the different sets of EU rules.

Attention may be paid to the on-going and progressive evolution of the relationship between public procurement and State aid rules, in order to contribute to such a united approach[183]. Even if "the State aid rules and the rules on public contracts and concessions have different aims and scope"[184], there is a need of convergence between these two categories of rules, as pointed out by the Commission in its Green Paper on the modernization of EU public procurement policy[185]. Indeed, in order to guarantee purchases at the best price, consistency between EU public procurement policy and the rules in the field of State aid is required for making sure that "no undue economic advantage is conferred on economic operators through the award of public contracts".

A key concept to ensure more convergence in the specific area of social services as SGEI might be the concept of quality. Even if it is not explicitly presented to that purpose, the fact is that quality of service is the current leitmotiv of the Commission policy towards public services. Indeed, the last Commission communication of this

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[178] See CFI, Case T-310/99 *FENIN* [2003] ECR II-357, paragraph 39: "*It is not disputed in the present case that the SNS, managed by the ministries and other organizations (…), operates according to the principle of solidarity in that it is funded from social security contributions and other State funding and in that it provides services free of charge to its members on the basis of universal cover. In managing the SNS, these organizations do not, therefore, act as undertakings."*
[179] See the above mentioned *Smits and Peerbooms* Case.
[180] See SZYSZCZAK and CYGAN, *Understanding EU Law*, Sweet&Maxwell, 2005, page 129.
[181] See VAN DE GRONDEN, "Social Services of General Interest and EU Law", in SZYSZCZAK, DAVIES, ANDENAES and BEKKEDAL (eds), *Developments in Services of General Interest*, T.M.C. Asser Press & Springer, 2011, p. 150.
[182] *Ibid.*, p. 151.
[183] On this topic: SÁNCHEZ GRAELLS, *Public Procurement and the EU Competition Rules*, Hart Publishing, 2011.
[184] See under question n°5.2 of the SGEI Guide.
[185] See COM (2011) 15 final of 27 January 2011, "*Towards a more efficient European Procurement Market*".

topic, untitled: *"A Quality Framework for Services of General Interest in Europe"*[186], is focusing on the example of SSGI to promote quality, making reference to the adoption, in October 2010, by the EU's Social Protection Committee, of a voluntary European Quality Framework (VEQF) for social services[187]. The fact is that such an initiative contributes to develop a common understanding of the quality of these services within the EU and wants to be flexible enough to be applied to a variety of social services in the national, regional and local context in all Member States.

But is a non-binding framework sufficient to ensure both unity in the implementation of EU rules and legal certainty for Member States (i.e. for the providers of SSGI and their users)? A first step might be made with the future new directive on public procurement which intends to make sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the VEQF. Then would it be a relevant model to draft a binding EU instrument, notably an EU regulation based on Article 14 TFEU? This is an issue which may be considered as now open to debate.

Brussels, December 2012.

[186] See COM (2011) 900 final, 20 December 2011.
[187] See SPC/2010/10/8 final, 6 October 2010.

ANNEX 3

The Social Protection Committee
Informal Group on the application of the RULES to SSGI

Name of the respondent:

Evaluation form - Feedback and suggestions on future work

1. Clarity of the EU legal framework applicable to SSGI (State aid, internal market and public procurement rules)

   A great number of measures have already been taken in order to enhance awareness on the application of EU rules (State aid, internal market and public procurement rules) to SSGI, to better adapt these rules to the specific characteristics of SSGI and to facilitate a better understanding and implementation of these rules by the public authorities in the Member States *(2006[1], 2007[2] and 2011[3] Commission Communications, 2008[4] and 2010[5] Council Conclusions, Seminars, 1st, 2nd and 3rd SSGI Forums, 2007 Commission FAQs[6], Interactive Information Service[7], the 2008[8] and 2010[9] biennial reports, the 2010 Commission Guide[10], activities of the SPC, including the 2008 SPC report and its operational conclusions[11]….).*

Considering the work already done, is there in your opinion already enough clarity as to how to apply the EU rules to social services in national contexts?

☐ *Yes*

☐ *No*

Please justify shortly your answer (in general terms) referring to either workable solutions or problems identified in practice.

What initiatives could Member States take to help regional and local public authorities better understanding and applying EU rules?

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[1] Communication on social services of general interest "Implementing the Community Lisbon programme: Social services of general interest in the European Union", COM(2006) 177, of 26 April 2006.
[2] Communication on "Services of general interest, including social services of general interest: a new European commitment", COM(2007) 725 final of 20 November 2007.
[3] Communication "A Quality Framework for Services of General Interest in Europe", COM(2011) 900 of 20 December 2011.
[4] 16062/08/
[5] 17566/10/ available on http://www.socialsecurity.fgov.be/eu/docs/agenda/06-07_12_10_conclusions_ssgi_en.pdf
[6] SEC(2007)1514 and SEC (2007)1516 of 20 November 2007.
[7] This service is accessible on the following webpage: http://ec.europa.eu/services_general_interest/registration/form_en.htm
[8] Biennial Report on social services of general interest, SEC(2008) 2179 of 2 July 2008
[9] Second Biennial Report on social services of general interest, SEC(2010) 1284 of 22 October 2010
[10] SEC(2010) 1545 final of 7.12.2010.
[11] SPC 2008/17.

The next Forum on SSGI

Since 2007, three Forums on Social Services of General Interest have been organised; in Lisbon 2007, in Paris 2008 and in Brussels 2010. These Forums were High Level EU conferences organised by the Presidency of the Council and co-financed by the Commission. They have involved EU institutions and stakeholders.

The Commission communication of December 2011 recalls the organisation of the next forum in 2013[12].

Please express your views on

a. *the interest in having the next Forum*

b. *subjects to be tackled*

c. *the approach and methods to be applied to its implementation*

You will find materials on the previous forum (3rd forum in Brussels) on these links:

- *Summary report of the 3rd Forum on SSGI*

EN : http://www.socialsecurity.fgov.be/docs/nl/news/ssqi_summary_report.pdf
FR : http://www.socialsecurity.fgov.be/flipping-book/SSIG-FR/files/pmo_forum-fr_03.pdf

- *Materials:* http://www.socialsecurity.fgov.be/eu/en/agenda/26-27_10_10.asp

[12] Quoted in footnote **Virhe. Kirjanmerkkiä ei ole määritetty.** above. Accessible in: http://ec.europa.eu/commission_2010-2014/president/news/speeches-statements/pdf/20111220_1_en.pdf

2. Evaluations of the work carried by the Group

*Please, give **feedback on** the work of the informal working group up to now focussing in particular on:*

a) working methods (arrangements of the meetings, seminars, interaction / dialogue between different parties, the use of the Huddle Workspace etc.)

b) relevance of the issues discussed (very relevant - not so relevant; specify the issue)

c) relevance of the studies / questionnaires referred to (specify the study)

d) asked contributions of the members (presentations, papers, opinions)

*To be returned to manuel.paolillo@minsoc.fed.be by **31st January 2013**.*

ANNEX 4

Social Services of General Interest – The Case of Malta

1. Introduction

'Services of general interest' (SGIs) are those services that are provided in the interest of the public and are of direct benefit to the public while 'Services of general economic interest' (SGEI) are economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention. The concept of 'Social Services of General Interest' (SSGIs) on the other hand is not defined in the Treaty and is hence left up to each Member State to define.

SSGIs remain restrained in a 'grey' area with regards the conditions of application of Community Law, on the border between economic and non-economic activities, due to the fact that unlike economic activities, non-economic activities fall outside the application of the competition and internal market rules of the Treaty.

The following presents the situation in Malta regarding the provision will of Social Services of General Interest.

2. Interaction between different sets of Rules

Guaranteeing uniformity between the rules on public procurement, State aid and freedom of movement will ensure that SSGIs will conform to all the applicable rules. It is the existence of the effect on trade between Member States that makes SSGIs subject to such rules.

Application of Public Procurement Rules

Compliance with public procurement rules must be ensured in the case of cross border provision of social services. Such rules do not require public authorities to outsource SSGIs; therefore authorities are free to decide whether to provide the services themselves, directly or in-house. Given that SSGIs are subject only to a few of the provisions in Directive 2004/18/EC, the public authorities may choose the procedure they consider the most appropriate for the specific service in question, provided that the procedure chosen is in line with EU principles such as transparency and non-discrimination.

Compliance with purely local public procurement rules could indirectly lead to unlawful discrimination against economic operators from other Member States interested in providing the SSGI. Such compliance may also result in restricting the public authorities' choice to a small number of local operators and consequently diminishing the beneficial effect on Europe-wide competition. However certain requirements relating to the local context may be acceptable if they can be justified by the particularities of the service to be provided and are strictly related to the performance of the contract.

Following public procurement rules ensures that there is no unfair economic advantage being granted to the service provider, thereby reducing but not eliminating the presence of State aid.

Malta follows public procurement rules when procuring all social services. This ensures good governance, transparency, value for money for the service obtained from the market, and provides equal opportunities for different market players.

Application of State aid Rules

Although the EU only has limited powers in the field of social policy, competition rules affect the way social services are offered in Member States. As a result of this, social services cannot escape from the

applicability of the provisions on State aid. However, the provisions of significant social services should be protected from adverse effects that may result from the application of market rules.

Member States are to decide on the manner and level of financing of the SSGI that they implement in accordance with EU rules. Therefore, since public funding is the main resource for social services, there is the possibility that such measures would give rise to State aid. As was held in Poucet and Pistre, if the activities concerned are exclusively social, i.e. the principle of solidarity is predominant, then they are likely not to be regarded as economic and will hence not involve State aid. Such a scheme must however be operated on a redistributive basis, the rates must be determined by law and the benefits must also be determined by national legislation.

Even though public procurement rules and State aid rules have different aims and scopes, there is the need of convergence so as not to create any undue economic advantage for an economic operator through the award of public contracts. A clear link between public procurement and State aid rules ensures the appropriate compliance of SSGIs to such rules.

Free movement rules

SSGIs of an economic nature are also bound to respect the internal market rules. Restriction on free movement may be justifiable in certain social services schemes e.g. because the service pursues an objective of social policy, as is in the case of care for the elderly.

3. State of Affairs in Malta

The concepts of SGEIs, SGIs and SSGIs are not defined in Maltese legislation; however reference is made to the general concept of Public Services. The provision of social services in Malta is mostly determined by central Government, and the benefits are framed in national legislation in such a way so as to apply equally to all operators. Local authorities provide social services either directly or by contracting external providers. There are also private providers who offer their services independently.

The Social Security Act (CAP 318 of the Laws of Malta) provides for two basic social security schemes, namely the contributory scheme, and the non-contributory scheme. The Contributory Scheme is a system where a person pays a weekly contribution, a 'pay as you earn' system. This includes pensions and other benefits. On the other hand, the Non-Contributory Scheme is based on a financial means-test of the person claiming the benefit.

In 2012, total expenditure on social security benefits amounted to €782.6 million, reflecting an increase of €54.6 million when compared to 2011 figures.

Comparative Social Security Benefits (January-December)[1]

Description	Jan-Dec 2010	Jan-Dec 2011	Jan-Dec 2012
	€ thousands		
Contributory Benefits	562,437	561,161	604,939
Non-Contributory Benefits	168,915	166,834	177,620
Total Social Security Benefits	731,351	727,995	782,559
GDP at Current Market Prices	6,316,652	6,556,327	6,755,851
Total Benefits as a % of GDP	11.6	11.1	11.6

[1] NSO – National Statistics Office – Malta, News Release 063/2013, 2 April 2013.

4. Specific Social Services

The following section focuses on three specific social services offered in Malta: education, health care and social housing schemes.

Education

Article 43(1) of the Education Act (CAP 327 of the Laws of Malta) establishes that it is the duty of the State to provide for the primary education of the children of Maltese citizens who are of compulsory school age, i.e. between the ages of 5 and 15. The State may also provide childcare centres and kindergarten for infants between the age of 0 and 5 years.

Article 44 of the said Act also provides for the State's duty to provide for the secondary education of the children of Maltese citizens being children who have completed their primary education.

Education provided by State schools and public providers of further or higher education is offered to Maltese citizens without any fee being charged. Stipends are also payable to students who continue with their education after having completed their secondary education, as established in Article 126(3) of the Education Act.

Health care

The public health care system provides a comprehensive list of health services to all entitled persons. No user charges or co-payments apply but a few services including elective dental services, optical services and coverage of certain formulary medicines are means-tested. This social service is funded through taxation and national insurance contributions. Comprehensive primary health care services are offered through health care centres and clinics found across the Maltese Islands. A number of other private hospitals, clinics and other facilities provide private health care. Care in these private facilities is funded by private insurance or out-of-pocket payments. Secondary and tertiary care is mainly provided by specialised public health centres of varying size and function. The main acute general services are provided by one new main teaching hospital incorporating all specialised, ambulatory, inpatient care and intensive care services. Malta has become almost self-sufficient in terms of providing most tertiary care. Patients are sent overseas for highly specialised care required for rare diseases.Further to the above mentioned services, certain population groups are also entitled to free medicines on an out-patients basis. Irrespective of income, entitled persons have access to those medicinal products listed on the Government Formulary List, which are prescribed for a particular disease or condition listed in the Social Security Act. Maltese citizens are also offered the Pharmacy of your Choice Scheme. The fundamental aim of this scheme is to facilitate a more comfortable and equitable access to the Government's free pharmaceutical service (mentioned above), by shifting this service from the Health Centres' pharmacies to any community pharmacy of the patients' own choice.

Social housing Schemes

The provision of housing and housing assistance is granted to individuals that are in particularly severe need. Registration on waiting lists is based on income ceilings and priority is given to particular target groups and according to their housing conditions.

Social housing schemes are directly supported by public resources through the Housing Authority, which is established under the Housing Authority Act (CAP 261 of the Laws of Malta). The Authority has been developing, promoting and financing the development of housing estates and other residential accommodation in efforts to generally improve housing conditions in Malta. It provides various schemes and initiatives targeting those most vulnerable and in need of its assistance.

The Housing Authority is currently working on a new policy and schemes are being reviewed in order to provide the best service to the country.

5. The latest SGEI package

In December 2011 the European Commission adopted a revised package of State aid rules for the assessment of public compensation for SGEIs. This package shows that the specificities of such services are increasingly being taken into account so as to ensure adaptation to EU rules. Malta welcomes the improvements brought about by the latest SGEI package, particularly the widening of the scope of what qualifies as an SGEI.

The most common query related to SSGIs is based on the fact that such services are of a purely local nature. It is highly unlikely that economic operators from other Member States would be interested in providing the service in question, especially when the contracts for the provision of the social service on a specific market are of a very modest value, as for example in situations involving social solidarity with vulnerable members of society.

6. Concluding remarks

The Services outlined above provided by Malta under the national education system which implements the National Curriculum Framework, free health care services under the National Health Service and social housing schemes, are non-economic activities of a purely social nature. By organising such systems, Malta is fulfilling its duties towards its own population in the educational and social fields by carrying out its public functions.

The area of SSGI remains an area of particular interest and as it continues to evolve will require further guidance and clarification on their treatment under EU rules. The role and classification of not for profit providers of social services remain of particular interest and necessity given the role of such organizations in the provision of social services. Official documentation, such as the Commission '*Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest further articulation in documentation'* (SWD (2013) 53 final/2) are most welcome. The Guide in particular provides guidance and additional clarity to Member States in their application of EU rules to Social Services of General Interest.

ANNEX 5

The EU rules and the provision of social services in Germany

German contribution to the report 'EU Economic Rules & Social Protection'

1) Concepts used in a national context

- In German law, the public service obligation derives from the so-called '**welfare state principle'** set forth in the German constitution: 'Germany is a democratic and social Federation**'.** At the national and municipal level, it is provided for in social security law, tax law, budget law and municipal law and implemented by the local authorities.

- **Welfare associations** take a significant part in fulfilling this requirement.
  They work in ***close cooperation / partnership*** with the public authorities – they work autonomously and are entitled to design social services as they deem it necessary. In doing so, they take users' needs as their guiding principle.
  In certain areas (e.g. elderly care) German social law even prescribes ***primacy*** of private providers; in these cases public authorities have to ensure that social services are available but shall only provide by themselves for these services if a private provider, non-profit or for-profit, is not at hand.

- Contributions by private providers are also reflected by many **individual initiatives** of private associations ('start-ups in social business**'**), as, for example, debt counselling, family support, help for people with HIV/AIDS and the palliative and hospice care.

- In Germany, many social services function within the so-called '**triangular relationship'**.[1] This 'triangular relationship**'** ensures the efficiency and quality of social services and is laid down in a number of German social law provisions. Germany welcomes the voluntary quality framework for social services adopted by the SPC, esp. the development of local service provision schemes in cooperation between public and private actors, but rejects any further action in this field at EU level because of the purely national competence of the Member States.

- Legal examples of cooperation / partnership and private primacy in providing SSGI (quoting the German Social Security Code (Sozialgesetzbuch, SGB)):

  - Art. 17 SGB II – close cooperation between employment agencies and other actors of local labour market
  - Art. 4 SGB XII – close ***cooperation*** between public authorities and non-profit providers in the area of social assistance
  - Art. 3 and Art. 4 SGB VIII – ***partnership*** between public authorities and non-profit providers in the area of youth assistance
  - Art. 11 SGB XI - ***primacy*** of private providers in the area of elderly care

[1] Service provider, public authority and user/beneficiary are linked by legally binding agreements on performance and quality of a social service provision, remuneration, user participation etc. Every service provider who wants to start a social service to satisfy a demand and at the same time fulfils quality standards and quantitative requirements can enter an agreement (on performance, quality and remuneration) with the public authority responsible for the supply with services of general interest. The agreement is comparable to a license in order to provide a service and get paid by the public authority (cost carrier) in accordance to the number of clients who have (freely) chosen the service. Since every provider who is interested in providing a social service and who meets the requirements established by the local authority can enter an agreement this mechanism of a 'triangular relationship**'** meets European principles of transparency, equal treatment and non-discrimination.

- Many services, which are covered by the term SSGI, are characterized by self-administration (e.g. statutory accident and health insurance, as well as statutory pension schemes).

- Regarding the interaction of the economically oriented EU concept of internal market harmonization/liberalization and social issues, see sub points 4 and 7

2) Application of public procurement rules

Important aspects concerning public procurement law

- Public procurement law has been conceived to create a legal framework for non-discriminating accessibility, transparent procedures and equal treatment for all interested bidders regarding public tender procedures as well as for the efficient use of public funds.

- In Germany the legal construction in German social law of the 'triangular relationship' offers a well-functioning solution for the diversity and plurality of service providers and for the guarantee of freedom of choice for the users. The existing system of the 'triangular relationship' with its right of free choice by the users meets the needs of users, of funding public authorities and service providers in an adequate and efficient way as well as the EU law principles of equal treatment, non-discrimination and transparency. In this respect the competition model of the 'triangular relationship' is compatible with the Internal Market rules of the EU and leaves no room for the application of public procurement procedures.

Current aspects about public procurement

- On the basis of current law, social services are classified as so-called 'B' services meaning that, pursuant to Art. 35 (4) of Directive 2004/18/EC, there is merely an obligation to provide notice of the results of the awarding procedure (ex post). Before the backdrop of the negotiations on the reform of the EU public procurement law from a German perspective it is important, that the new rules will not lead to more bureaucracy and costs and will leave room for the application of existing practices of the member states.

3) Application of the state aid rules

Important aspects concerning state aid

- In general the **special financial support** by the state for SSGI is recognised by the EU.

- It is also recognized by European primary law (e.g. protocol No. 26 of the TFEU) that national authorities have a wide discretionary power on the definition of SGEIs.

Current aspects about state aid

- Providers of SSGI are rather **satisfied with the new regulation system ('Almunia package')**

- Exemption for social services seems to be comprehensive but:
  - feasibility has not improved (citing of the relevant rules in the act of entrustment is necessary)
  - act of entrustment: validity for a period of ten years is sometimes not easy to handle

- SGEI de minimis regulation: clarification of requirements for the 'mini' entrustment act foreseen for SGEI de minimis aid would be welcomed.

Some key points

Act of entrustment / mandates

From the German perspective there are **two different public** '**mandates'** in state aid law and in public procurement law:

The **act of entrustment** in state aid law is not a public mandate which instructs the social service provider how to run a service.

The entrustment results from concrete **agreements on provision, quality and remuneration**. These are negotiated between the public authority and the providers. In this relationship, the providers are autonomous and they fulfil their own tasks.

- The act of entrustment in state aid law fits into the German system as far as provision, quality and remuneration agreements are considered as a legal act.

On the other hand, the **public mandate in public procurement law** doesn't fit into the system of Social law in Germany because of the service provision follows the requirement of the 'triangular relationship **'**: This 'triangular relationship**'** means that the user chooses the provider like on a market after the provider has first been 'licensed" by the public authority. Thus, in a first phase competition takes already place between different providers, while they compete and negotiate to conclude agreements with the public authority.

Mechanisms to avoid overcompensation

- SSGI are value-based and fulfil tasks overlapping with social requirements.
- Staff in the social sector does not only work with persons who are vulnerable or in need. Staff also puts emphasis on mobilising civil society and in developing community life/neighbourhoods, implements objectives of social policies like solidarity and equal opportunities, contributes to the creation of social relations and networks, enhances voluntary work and civil commitment.
- Evidently, SSGI fulfil a complex set of objectives bearing many more implications than a service in the narrow sense. The whole range of effects of social work listed above cannot be put into a relation to costs. These effects are not measurable, but they are worthwhile to be funded by public means.
- Generally speaking, providers of SSGI apply normal accounting rules and obey the EU/SGEI requirements for separate accounting of SGEI and other activities, as far as they are applicable.

4) Testing the Market?

- *Before* getting to market (testing) issues, it has to be considered, that a **sound demarcation** between commercial/market-oriented services on the one hand and social services on the other is crucial, as liberalization and (harmonizing) internal market rules tend to be put against social rules by the EU.
- This demarcation has to fully **consider the specific qualities of social services**: Different from other services, social services generally are person-centred, they have a focus on integrating people into society and/or implementing their fundamental social rights. They operate along the principle of solidarity and inclusion. They often generate redistributive effects and promote social justice. Often they are also characterized by voluntary participation and self-administration as an expression of active citizenship. Further, social services are subject to special organizational conditions, which differ from other services. Social services are committed to a common good and a social added value for society/community (with their functions of compensation, participation, activation, and innovation). They strengthen social cohesion and have a social purpose. Social Service providers do not calculate like for profit investors. They are very often obliged to the General Interest. In addition they operate with a long-time approach with regard to problem-solving. Finally, most social services are strongly rooted in cultural, national, regional and/or local traditions (they are 'socially embedded**'**).

- The welfare principle therefore puts social services into the **realm of the social sector**, which takes care of people, who do not belong to the market system. The social sector thus differs substantially from the market economy and its (harmonization/liberalization) rules.

- It is therefore important to choose not only a functional approach or a market-oriented approach, but a **material and substantive method**, that is based on a synopsis of the above mentioned criteria and primarily on the nature and purpose of social services. Particular importance has to be assigned to the fact, that the relevant provisions in the TFEU and the Service Directive make no distinction based on whether social services stem from the private or the public sector.

- Beyond this, a market in the social sector is a regulated market with limited customer sovereignty (asymmetry).

5) Cross-border trade effect

- In general, social services are provided **on local or regional level**; therefore there are only few cross-border trade effects.

- Transnational (non-profit) service provision exists in specific cases, usually connected to specific needs (care in Spain) and local partners – not as a business strategy.

6) Interaction between different set of rules

- State aid rules have to be clear as far as the act of entrustment and the public mandate are concerned. There mustn't be any form of mandatory relationship between a public authority and an organisation of the statutory welfare associations receiving public grants, because these organisations act autonomous. However, the act of entrustment has to imply a certain obligation for the organisation receiving public grants , because it has to fulfil a task of general economic interest. This requires some kind of flexibility in order to make an act of entrustment feasible.

- Concerning the 4th Altmark criterion requiring a tender - as one option – we have the logical situation that the 'triangular relationship**'** in German social law replaces a due procedure of public procurement. Acknowledging alternative models of free choice etc. means also meeting the 4th Altmark criterion.

- Regarding the interaction of the economically oriented EU concept of internal market harmonization/liberalization and social issues, see sub points 4 and 7.

7) Social concerns and requests of providers of SSGI

- High importance of a **sound and strong leeway of the Member States in creating the character of a (S)SGEI**. Regarding the regulation of social services, the EU has only very limited powers. Otherwise the Member States would be bound to considerations of the Commission concerning social needs of the people at the local, regional and national level. But diversity in terms of different social needs, mentality and culture can only be guaranteed, if Member States keep being responsible for social services.

- In this context, it should be mentioned, that the German Federal Constitutional Court ruled that Member States must not lose their ability to self-responsible political and social organization of living conditions. (Ruling of the Bundesverfassungsgericht, 2 BvE 2/08 from 30.6.2009, para. 226, 249 ff.)

- There are tendencies, which indicate, that - in absence of harmonization rules in the social field, (mostly/purely economic) **Internal Market rules and competencies are applied to SSGI**. This fact raises concerns, as thereby an EU-wide undesirable harmonisation beyond the EU Treaty regime (bypassing the respective Treaty arrangements) could take place without considering the above

mentioned specifics. Particularly, social services are basically not subject to the harmonization principle, are not market-oriented and have specific features (see above sub point 4). This circumstance shall be better reflected and considered in the future than it has been done up until now.

- In the light of many material and national specifics of social services (see above sub point 4), the latter cannot be submitted without differentiation to quite broad and/or very economical rules regarding market liberalization. These specifics alongside the very limited power of the EU regarding social services justify as a general rule an **exemption of social services from the scope rsp. the applicability of market liberalization rules**.

  With regard to the application of public procurement procedures to the social sector, which implies the possibility for public authorities to choose an offer of a social organisation by only considering the lowest price some concerns have been raised in the welfare sector.

- The EU is going to introduce additional rules in public procurement law. General procedures of the member states of authorising service providers should be exempted.

- Concerning the relevance of state aid law for social services, it‘s necessary that all national authorities apply this law thoroughly and feel responsible for the correct way of entrusting providers etc. Further requests:
  - consideration of the local character of most social services
  - recognition of the exemption of cross-border trade effects in general

Berlin, 2.09.2013

ANNEX 5

Social services system in the Czech republic (CR)

The legal framework for the social services system is Act no. 108/2006 Coll., on Social Services and Decree No. 505/2006 Coll. The basic principle of financing the systém is the multi-resource financing (it consist of several resources – care allowance, users´ payment, state, regional and municipal subsidies, health insurance, ESF fund and others, like private endownment, donations etc.). The government's long-term strategic intention is to position the social services and healthcare services system so that it becomes sustainable in the long-term from the perspective of public budgets and which is able to adapt to changes, while ensuring availability of the required quality and efficient care to all citizens.

A key step is the continuation of the reform focused on promotion of availability of social services by means of an effective and transparent management environment, networking and distribution and monitoring of financial funds invested from public funds to social services. One of the partial outputs of the reform will be a model map for monitoring social phenomena relating to social vulnerability or exclusion.The *Act on Long-term Medical and Social Care*, which is being prepared, will regulate the provision of social and medical services to people in need of combined medical and social care. Such services shall be provided in home environment, in outpatient and inpatient centres.

The concept of promotion of transformation of residential social services to other types of social services provided in the user's natural community and promoting social inclusion of the user in the society is implemented by means of a pilot project *"Promotion of transformation of social services"*, focused on transformation of institutional social care services for people with disabilities and people suffering from a mental disorder co-financed from the ESF. Result of this project may be also applied appropriately to the care for older people.

The project *"Promotion of processes in social services*", which is implemented in the period of 2010 to 2015, is focused on promotion of availability of social services to their users by means of effective and transparent management environment, networking and distribution and monitoring of financial funds invested from public funds to social services. Results of this project will become the basis for measures to be implemented in the financing system of social services in order to ensure sustainability of such system.

One of the outputs of the project mentioned is the Legal Analysis. There are four segments of LA – Analysis of the primary law, Analysis of the impact of judgments a attitudes of CJEU, Analysis of transposition of directives into legal rules of CZE and assessment of the impact into social services financing policy, Recommendation for conception and legislative activity in the field of social services and its financing policy. In nine chapters it shows detailed analysis of legal rules of CZE in social services and the financing of the system in the relation to the community law in the field of social services of general interest.

This output help Ministry to start the process of creating and implementing outputs of improving the way of the financing and set more accurate criteria for the system of social services cost calculation but not omitting their specificity. The first step is to create the mechanism of the balance payment to ensure that the government subsidies to the providers of social services are reasonable, based on the same rules, which are public, transparent and creating the healthy environment in the field. The mechanism should be in order from the year 2014.

Modifications of the social services system will continue in 2013 in order to set up in a right mix of system management subsidiarity both with regard to the creation of the necessary service network and its functioning. The modifications will also include a solution for medical care provided in social institutions and social services provided in medical facilities. The government supports steps leading to optimizing number of beds in hospitals and social services facilities, which will reflect specific regional needs and which will also ensure, within the framework of public expenditure, available and quality social and healthcare services.

Social economy in the Czech republic

The Czech concept of social enterprises is broad with great emphasis on economic and social objectives (business and social missions) that should be in balance. Most of the existing social enterprises in the CR are focused on the employment of disadvantaged people (the so-called integration social enterprises). Many of them have the status of sheltered workshops that employ people with disabilities. In addition to the above mentioned integration social enterprises in the Czech Republic there are also social enterprises that provide charitable services in the field of social inclusion and community development activities including the environmentally-oriented (green) enterprises or enterprises selling fair trade products. Nongovernmental organizations run a social business (or would like to begin with) in their complementary activities in order to use profits to fund their core charitable activities / mission.

Most of the existing social enterprises engage persons with disabilities, which is influenced by tradition and relatively clearly defined subsidies from employment services and status of this type of disadvantage compared to other types. But there are also businesses that employ Roma, young people leaving orphanages, homeless people, people with drug history, etc. Social enterprises in the CR take different legal forms - it depends on specific conditions, the type of services, products or access to the founders.

There is no legal definition of social enterprises, though some factual and technical requirements have to be fulfilled while asking for start-up grants or development phase (scaling-up) grants from the ESF and the ERDF global grants (e.g. at least 40% of disadvantaged employees, over 51% of profit to be reinvested, principles of local development, empowerment of employees). The eligible applicants are enterprises or self-employed individuals. These forms of business legal entities are eligible: limited liability company, joint stock company, limited partnership, cooperative, public company and business legal entity operating under the authority pursuant to special legislation. The applicants may also be some nongovernmental organizations - non-profit societies and registered religious legal persons.

The structure of financial instruments for funding social enterprises in the Czech Republic is not as rich as in other countries. The reason is a slow development of social economy and a small number of social enterprises as well as long-time conservatism and limited interest in this topic amongst politicians. Most financial instruments and mechanisms (being used by social enterprises) are primarily designed for small and medium-sized enterprises. Only 2 instruments directly aimed at social enterprises were identified.

The first one is the Global grant “Social economy”, HRE OP, ESF, the non-investment grant for social enterprises, provided from the Human Resources and Employment Operational Programme (HRE OP, ESF). It is focused on payment of selected costs associated with activities as marketing, wages and other costs related to employment of disadvantaged people (social and health insurance) etc. It creates the support of social integration through employment or self-employment of socially excluded people and support of local development, support of start-ups - new social enterprises or new disadvantaged individual entrepreneurs.

The range of the support is from CZK 100,000 (some EUR 4,000) up to EUR 200,000 - the maximum amount of support is defined by the de minimis limit.

The second instrument is the Global grant “Investment support of social economy” and is provided from the Integrated operational programme (ERDF). The mission is an initiation of economic activities that will be long-term income source of own social enterprise and using local material and human resources, to create jobs for people from disadvantaged social groups.

The range of the support goes from CZK 300,000 (some EUR 12,000) up to EUR 200,000 - the maximum amount of support is again defined by the de minimis regime.

A subsidy is available up to 80% of eligible project costs, and these funds will be covered by 85% of ERDF and 15% of the state budget. The recipient will provide at least 20% of eligible project costs from his own (other) sources.

It is necessary to respect rules of sustainability, according to EU regulations. Funds are distributed only in the de minimis regime, which limits the possibility of immediate re-drawing.

ANNEX 7

Social services of general interest in Poland

Concepts used at national level

- notion of „Services of General Interest": does not appear In Polish legislation. Instead in different pieces of legislation notion of public services or public utility services (including social services) is used. The main task of these services is fulfillment of the needs of society.
- Public tasks can be realized by local authorities or other entities (incl. private companies). Public tasks can be entrusted to different entities. Act of entrustment is based on the contract of entrustment of public tasks.
- In-house provision in Polish law is clear in the situation when public authority provides services by its organizational entities. There are different judgments related to case when public tasks are entrusted to company established by local authority for this purpose.
- According to Polish law entrustment of public tasks to independent entities is based on the contract of granting subsidy from public budget or public procurement (buying services). Contract of granting subsidy must be concluded on the specific legal basis (e.g. Act on public benefit activity). In this case public procurement rules are excluded.
- Public benefit activity is performed only by non-profit organizations defined in law whose main purpose of activity is realization of public tasks listed in the Act, which have legal personality and do not belong to public finance sector as well as churches and other religious organizations.
- Since the non-profit organizations are generally entrusted to perform public tasks the selection of certain organization to perform the specific task is accomplish in an open bid tender.

Mandating performance of public tasks to the NPOs under Public Benefit Activity Act (PBAA procedure) vs. Public Procurement - What are the differences and why it should not be replaced?

1) PBAA procedure is competitive, but the possibility of taking part in the competition is limited to NPOs. There is no possibility to limit the possibility of taking part in public procurement procedure to NPOs (no such social clause)
2) As PBAA is addressed to NPOs it is more economic. There NPO which is chosen in the competition cannot achieve any profit because of this. Public body covers only listed costs, and in case of any savings NPO has to give back the rest of subsidy to the state or municipal budget. Moreover in many cases financial input of the NPO is required in the competition so it is cheap for the public authority to mandate public task under PBAA procedure but there is no threat of dumping prices. Why? – see points 3 -4.
3) In public procurement procedure there is a pure construction of civil law contract, and there is a civil law remuneration for a service bought from the entrepreneur. The remuneration is paid for the result only, and the public authority does not even see particular costs. In PBAA procedure there is no civil law remuneration but a public law subsidy for a designated purpose, and all the necessary costs are a part of agreement. Public body is entitled to control spending each penny (grosz) from the public subsidy as well as from financial input of the NPO at every stage of the procedure – from the stage of studying the offer in the competition to the stage of final report and even longer. At first stage (competition) public authority estimates if the table of costs in NPO's offer is reasonable. Than in case of signing a contract public authority may control all the documents. After terminating the task, not only results are controlled but it is also checked if all the necessary costs were covered and if it was a proper amount. In case of breach of the contract or if costs were cheaper than in contract part (or whole in case of serious breach) of the subsidy is given back.
4) As each single cost of a public task shall be settled with an invoice or other proper document, there is no risk of dumping prices, illegal employment, avoiding taxes and other breaches the law (sometimes tempting for public procurements mandatories, especially those which were chosen because of the cheapest price). The NPOs need to and want to act in transparent way!
5) Why else is PBAA procedure effective?

The possible models of covering costs

a)

PUBLIC TASK	
The costs	Covered from
A	The subsidy from a local authority
B	
C	

b)

The costs	Covered from:			
A	The subsidy from authority 1 (e.g. local authority)			
B		The financial input of the NPO		
C			Voluntary work	
D				The subsidy from authority 2 (e.g. the minister)

In public procurement procedure only model “a” is possible. In PBAA procedure structure of financing may be different, so it is easier for the authorities to ensure some of their public tasks in a cheaper way (isn’t it important during crisis?).

6) Local community may obtain social service of good quality for reasonably cheap price, often cheaper than in public procurement.
7) Taking into account the level of control that public authority has over performing public task (and spending public money!) in PBAA procedure - there would be only one alternative - creating extra in-house unit for the purpose of a particular task, employing workers by public agency itself. It still would be probably more expensive and less effective (the procedure of creating new institututional structure within public body lasts longer than PBAA competition).
8) Cooperation between public sector and the third sector increases social capital, that is not measurable, but still it is important (principle of subsidiarity in practice!).

ANNEX 8

SSGI IN LITHUANIA

SOCIAL SERVICES – the services aimed at providing assistance to a person (family) who, by reason of his age, disability, social problems, partially or completely lacks, has not acquired or has lost the abilities or possibilities to independently care for his private (family) life and to participate in society.

The objective of social services – to create conditions for a person (family) to develop or to enhance the abilities and possibilities to independently solve his social problems, maintain social relations with society as well as to assist in the overcoming of social exclusion.

The following persons are entitled to social services: citizens of the Republic of Lithuania; aliens, including stateless persons, holding a permanent or temporary residence permit in the Republic of Lithuania; other persons in the cases provided for in international treaties of the Republic of Lithuania.

Municipalities

- are directly responsible for
- organisation and planning of provision of social services
- determination of individual needs for social services
- supervision of social services
- Preparing and implementing municipal programs of disabled social integration
- Organising the primary health care (financed by Compulsory Health Insurance Fund)
- Granting target compensations for nursing or attendance (financed by State budget)
- Besides institutional social services establishments, municipalities have approximately 450 noninstitutional social services establishments:
    - temporary lodging houses
    - crisis centres
    - day centres
    - family support centres (services)
    - community centres

In 2010-2011

- About 760 establishments of different subordination providing social services
- Regular providing of social services to 91,200 persons with disability, elderly persons, children deprived of parental care, individuals and families at social risk, other persons
- 27,600 individuals and 4,800 families were provided with social services at home
- 161,400 persons used common social services (free catering, provision with essential items, personal hygiene products, transport services)
- 221 062 social assistance benefits recipients in 2011 (181 285 in 2010, 73 512 in 2009)

In 2010

- Infrastructure of social services was changed
- The key changes were related to the county reform
- Ministry of Social Security and Labour
    - coordinates the activities of social care institutions
    - carries out the analysis and evaluation of services provided by social care institutions (prices, staff composition, number of recipients of services, use of funds and fund demand)
    - provides methodical aid
    - organises referral of persons to social care institutions
    - examines residents' complaints regarding the referral, etc.

The Strategy for the Reorganisation of State Social Care Institutions

- not more than 4 persons should live in a room, and
- the capacity of a care institution should not exceed 300 places

Not all county governor administrations (being founders of social care institutions) have satisfied these requirements

- Due to the new requirements (approved on 01-09-2010),
- the target number of places in social care institutions for adults was reduced by 100,
- children and youth with disability – by 20,
- child social care institutions – by 29

Programme for the Modernisation of Infrastructure of Institutional Social Care Establishments 2011-2015

- only licensed social care institutions will have the right to provide social care (long-term, short-term and day social care):
- Institutional social care establishments
- day social care centres,
- crisis centres,
- lodging houses,
- psychosocial rehabilitation centres and institutions for drug addicts (day social care at home)

Conditions for Licensing

- compliance with social care standards
- with regard to individual needs and legitimate expectations, to ensure targeted assistance, based on mutual trust of workers and recipients, the guarantee of the human right to dignity, etc.
- Seeking to ensure life quality for the residents of social care homes and create the conditions for institutions to prepare for licensing,

the MSSL initiated the implementation of a measure aimed at the modernisation of infrastructure of institutional social services from the European Union Structural Funds

Social integration of disabled people

- Is organised by applying the principles of
  - equal rights, equal opportunities, discrimination prevention, destigmatisation, guaranteeing self-sufficiency and freedom of choice, accessibility, decentralisation
- The system of the social integration of the disabled comprises
  - the provision of medical, professional and social rehabilitation services
  - satisfaction of special needs by taking special assistance measures
  - support for the employment of the disabled
  - the provision of social support, granting and payment of pensions and benefits from the State Social Insurance Fund
  - granting and payment of benefits from the Compulsory Health Insurance Fund
  - provision of education services
  - ensuring of equal opportunities to participate in a cultural and sports life as well as other areas of public life

Types of Social Services: 1. Social services of general interest; 2. Special social services. Social services, as well as types of social services establishments are defined by a Catalogue of social services approved by the Government or an institution authorised by it.

Social Services of General Interest are provided to a person (family) whose abilities to independently care for his private (family) life and to participate in society may be developed or compensated for by the specific services provided without permanent assistance by specialists: information, counselling, mediation and representation, social and cultural services, organisation of transportation, organisation of catering, provision of necessary clothes and footwear, other services regarded as SSGI.

Special Social Services are provided to a person (family) in respect whereof social services of general interest are insufficient to develop or to compensate for the abilities to independently care for his private (family) life and to participate in society: social attendance; social care.

Social attendance means the totality of the services aimed at providing to a person (family) complex assistance not requiring permanent attendance by specialists. Assistance at home, development and maintenance of social skills, temporary lodging as well as other services are regarded as social attendance.

Social care means the totality of the services aimed at providing to a person (family) complex assistance requiring permanent attendance by specialists. Social care, according to its duration, is divided into day, short-term and long-term care.

Assistance in Cash: in the specific cases established by a municipality, where it is expedient to organise social services of general interest and social attendance in respect of a person (family) in cash, these services may be changed into a cash benefit – assistance in cash. The payment of assistance in cash is regulated by a description of the procedure for paying for social services as approved by the Government or an institution authorised by it.

Management of Social Services and Management Entities: the management of social services covers the planning and organisation of social services, division of competence, assessment, monitoring and control of the quality of social services at state and municipal levels. The main social services management institutions are: the Ministry of Social Security and Labour; municipalities.

Payment for Social Services: the amount to be paid for social services is established taking into consideration the type of the social services provided to a person (family) and the financial possibilities of the person (family) to pay for the social services. It may not exceed the amount of expenses on the social services provided to a person (family). The amount to be paid by a person (family) for social services is established by a municipality on the basis of a description of the procedure for paying for social services as approved by the Government or an institution authorised by it. Sources of payment shall be a person's (family's) income, property in money, funds of the person's adult children and other persons concerned intended to cover expenses on the social services provided to the person (family).

The amount to be paid for for Social Services: for short-term care – may not exceed 80 % of the person's income; for long-term care – taking into consideration person's income and property; the amount to be paid by an adult for long-term care may not exceed 80 % of the person's income, where the value of the person's property is lower than the ratio of property value as established by a municipality of his place of residence (where exceeds – the amount to be paid per month shall increase by 1 % calculated in respect of the property value; for long-term care in respect of a child with a disability may not exceed 80 % of his income; social care for a child deprived of parental care and child at social risk – free of charge. A person (family) who receives a social benefit or whose income (a family's average income per one family member) is less than two times the amount of state-supported income (€ 202) shall be provided social services and social attendance free of charge.

Social Services are financed from funds of the state and municipal budgets, funds of social services establishments, EU structural funds, foreign foundations, sponsorship (donations), person's (family's) payments for social services and other funds.

Besides institutional social services establishments, municipalities have approximately 450 noninstitutional social services establishments (temporary lodging houses, crisis centres, day centres, family support centres (services), community centres), which provide assistance to different social groups (persons released from places of imprisonment, victims of violence, children at social risk or children from families at social risk, persons with disabilities, elderly people, families, etc.).

LONG-TERM CARE (LCT)

There is a central system of LCT In Lithuania, which is supplemented on a municipal level. Lithuanian Government adopts long-term national programs, strategies, requirements and standards. Municipalities are directly responsible for organisation and planning of provision of social services, for determination of individual needs for social services, for supervision of social services. They prepare and implement municipal programs of disabled social integration, also organise the primary health care (financed by Compulsory Health Insurance Fund. Municipalities are also responsible for granting target compensations for nursing or attendance (financed by State budget). LTC is organised in day centres, home care centres, residential social care institutions and nursing or general hospitals. There is no single legal act regulating LTC. LTC for the persons in need is provided by through several branches: social services, target compensations for nursing or attendance and long term healthcare.

Long term healthcare: The Parliament of the Republic of Lithuania endorsed the Framework of Development of Health System of Republic of Lithuania in 2011-2020 years where the development of long-term care is foreseen. Long-term healthcare is provided irrespective of age, taking into consideration the health condition, the progress of disease and any complications. Long-term healthcare includes maintenance treatment, nursing and palliative care services.

Social services are granted for all residents in need. The need for social services is determined considering a combination of principles of co-operation, participation, complexity, accessibility, social justice, relevance, efficiency, comprehensiveness. This need is established on an individual basis according to the person's dependency and possibilities to develop or compensate for independence by means of the social services corresponding to the person's interests and needs. Social services are also

provided to children deprived of parental care, persons or families of social risk. Social services are provided by public or private providers. Persons have free choice of service provider.

SOCIAL HOUSING

Municipal apartments let at a rent fixed by the state represent social housing in the country. After the privatisation of the housing stock, only 3% remained as public social housing, which is now let for rent to particularly disadvantaged groups. Besides social rental housing, subsidies to mortgage loans are also given by the state to disabled families, orphans, families raising more than three children, and young families. Municipalities are the only providers of social housing in Lithuania. The construction and management of publicly owned housing is entirely financed by public funds. Rents in municipal social housing vary depending on location but on average they are lower than market rents are lower by tenfold. Social housing tenants include disadvantaged groups such as orphans, disabled, invalid children, retired couples, young families and families with many children.

STATE AID

On 1 June 2004 Seimas adopted the Law on Social Enterprises which made a base for establishing social enterprises, stipulated the conditions for legal persons seeking to obtain the status of social company and also defined the target groups persons who can be employed in that kind of company.

The aim of Social enterprises – by employing target groups of persons, who lost their professional and general capacity for work, are economically inactive or unable to compete in the labour market under equal conditions, to promote the return of these persons to the labour market, their social integration as well as to reduce social exclusion. The Law provides for the financial support by the State to Social enterprises in order to compensate additional expenses, related to employees', pertaining to the target groups, lesser work productivity, limited efficiency, etc.

Social enterprise may receive 3 types of State aid: partial salary and social security contributions compensation, work place establishment subsidy and training subsidy. Specific type of Social enterprises – Social enterprises of disabled persons – can receive additional financial support from the State: subsidy for the working environment arrangement to disabled persons, subsidy for additional administrative and transport expenses and subsidy for compensation of assistant.

Total amount of financial support to 1 Social enterprise over 3 years – not more than LTL 51.75 million (€ 15 million). Simplified Public Procurement procedures are applying for Social enterprises. The profit of the Social enterprises is taxed at the rate of 0 %, if: the number of employees (target groups) – not less than 40 % (during the tax period); an entity does not carry out the non-supported activities of Social enterprises *or* the income received from such activities – not more than 20 % of the total income (during the tax period); on the last day of the tax period, entities have the status of a Social enterprise.

ANNEX 9

Social services of general economic interest in Finland

The evolution of social services in Finland

There are several important historical factors that have influenced the organization and financing of social services in Finland. Amongst them worth mentioning is the strong autonomy of local government, i.e. municipalities, including their independent taxation right, the late development of the welfare state, modest resources of the state in the past, remote geographical position with large sparsely populated areas and scattered population as well as the influence of the Nordic welfare model.

In the recent development of social services the binding rules and governing principles of the European Union have played a role as well. They stem from the fundamental freedoms of internal market which have far-reaching effects on various policy fields. National traditions and arrangements can be ignored if and when they run into conflict with the EU rules. Therefore, the social services are under a totally new scrutiny where the spotlight is cast on the functioning of the market forces and the potential distortion of market competition.

Although public authorities still can decide whether they will provide social services themselves or whether they want to externalize the provision of such services to third parties, there are growing pressures to look for private sector entities to run the services and to fund new investments. The reasons for the development are manifold with clear reference to the EU-level policies and debate. For obvious reasons the discussion at the EU-level has focused on the market side of social services where the EU competence is strong. Benefiting from the use of the EU-wide markets is seen as an integral part of the modernization process of social services. The discussion how to make public service performance more effective and efficient without outsourcing the provision of the services has remained on the margins. The range of policy options has been reduced. Increasing the taxation level is not considered to be a realistic option any more. Tax competition in the circumstances of unlimited freedom of cross-border movements has led to a situation where governments are encouraged to lower fiscal burdens either to encourage the inflow of productive resources or to discourage the exodus of those resources. The EU has introduced a strict limitation to government budget deficit and government debt. Hence extending the share of public provision in social services has not been seriously on the agenda in Finland.

During the 20th century the public sector grew gradually in Finland, replacing partly the more traditional forms of mutual help and benevolent voluntary organizations. Nevertheless, one can still observe important remnants of the role played by non-public organizations in providing social services in the past. Many modern forms of social support were originally initiated by non-governmental organizations operating with their own private resources, including extensive volunteering. In the course of time support from the state to NGOs has increased, along with the efforts of the NGOs to create new ways of fund-raising. For instance Finland's Slot Machine Association was established by NGOs active in the social and health care sectors. Later on the government granted the Slot Machine Association a monopoly status in organizing certain kind of gambling games. The profit gained by the gambling business is even today allocated to the non-governmental sector.

Step by step the state aid for NGOs increased in compensation for the functions of general interest they fulfilled. Despite the fact that the municipalities have taken over many of the former functions of the NGOs in social service delivery, the non-governmental non-profit organizations still play a very important role in providing certain highly specialized services especially for the target group they represent. The users of the services are often also members of the organization. In that way the users can directly influence the profile of the services provided by their own member-based organizations.

The current trends in social services

In Finland municipalities are responsible for organising sufficient social services for their residents. Consequently, the main responsibility for providing social services is vested in the municipalities. The municipalities provide social services that are financed by tax revenues on a solidarity basis. The regulation of the provision of social services is highly decentralised, and the decisions on the mode of service provision are at the discretion of local authorities. According to the law on welfare services local authorities can

1) provide social and health care services by themselves or
2) purchase social welfare services from private service providers.

Direct public provision is still the most common way although the share of private provision of social services has increased since the 1990s. Private providers can be divided into two distinctive categories. The third sector service providers (NGOs) play a traditional role in certain areas of social services, but the share of the profit-seeking private companies is on the increase. Until now the role of the private provision has been considered as supplementary to the public services but there are indications that the situation is gradually changing. AA very recent phenomenon is the growing significance of the multinational companies replacing smaller service providers both in the public and the third sector. The background factors explaining the development point out to the increasing financial pressures on public services, economies of scale of big private service companies as well as incorporation of the economic activities of the NGOs, which is partly a consequence of applying public procurement and completion rules. Direct public support for the third sector social welfare service providers is shrinking in general.

Shares of public and private social and health care providers 2010 (%), services produced (year 2006)

	Municipalities and joint municipal authorities	State	Non-profit organisations	Business enterprises	Private total
Children in day care centres 31.12.	88,7 (87,9)	-	5,6 (6,8)	5,7 (5,3)	11,3 (12,1)
Institutions and professional family homes for children and young people, care days/year	30,1 (25,2)	2,4 (3,1)	21,0	54,3 (50,7)	67,5 (71,7)
* Institutions for children and young people, care days/year	35,8 (40,2)	3,4 (4,8)	19,5	45,3 (35,5)	60,7 (55,0)
* Professional family homes for children and young people, care days/year	16,3 (1,9)	(0,3)	0,4 (6,9)	83,2 (90,9)	83,7 (97,8)
Mother-and-baby-homes, care days/year	3,3 (0,9)	-	92,4 (97,5)	4,2 (1,6)	96,7 (99,1)
Shelters for battered family members, care days/year	21,1 (13,8)	-	75,1 (85,8)	3,7 (0,4)	78,9 (86,2)
Residential homes for older people, care days/year	88,6 (88,3)	-	8,4 (10,1)	3 (1,5)	11,4 (11,7)
Institutions for people with disabilities, care days/year	82,7 (83,4)	-	16 (16,1)	1,3 (0,5)	17,3 (16,6)
Service housing for older people, clients 31.12. total	48,3 (43,1)	-	28,6 (42,4)	23,1 (14,4)	51,7 (56,9)
*Service housing with 24-hour assistance for older people, clients 31.12.	45,1 (40,5)	-	28,1 (40,7)	26,8 (18,8)	54,9 (59,5)
Group housing services for people with disabilities, clients 31.12. total	53,1 (52,8)	-	19,9 (25,4)	27,1 (21,8)	46,9 (47,2)
* Staff also available at night	44,4 (43,2)	-	22,4 (29,5)	33,2 (27,3)	55,6 (56,8)
* No staff available at night	87,6 (85,2)	-	9,7 (11,6)	2,7 (3,2)	12,4 (14,8)

Housing services for people with mental disorders, clients 31.12.	9,3 (12,8)	-	21,7 (25,5)	69,1 (61,7)	90,7 (87,2)
Housing services for substance abusers, resident days/year	34,8 (31,0)	-	59 (67,7)	6,2 (1,3)	65,2 (69,0)
Overnight shelters, resident days/year	78,4 (81,1)	-	21,6 (18,8)	-	21,6 (18,9)
Detoxification centres, care days/year	56,8 (52,2)	-	42,2 (47,3)	1 (0,5)	43,2 (47,8)
Rehabilitation centres for substance abusers, care days/year	44,6 (31,8)	-	39,2 (57,5)	16,2 (10,7)	55,4 (68,2)
Inpatient health care, care days/year	94,2 (95,1)	1,6 (1,2)	-	-	4,2 (3,7)

The complexities of the application of the EU rules

The applied concepts

The national legislation does not recognise the EU concepts regarding social services and social services of general interest introduced by the EU[1]. Harmonization of the legal basis of different social protection systems in member states has not been the objective of EU integration. There is no definite answer which services are included in the notion of social services of general interest in Finland. In many cases it is very difficult to distinguish the economic and non-economic aspects of social services - they are more or less intermingled. No established principles and methods of interpretation are available in the national legislation which could be of help when pondering the borderline cases. Furthermore, certain characteristics of the Finnish social security system are very country-specific and do not fit well into the general EU framework, for instance the public support for NGOs through the Slot Machine Association[2] and the role of authorized private employee pension institutions.

The public responsibility for financing and organising social services has been the result of a political process that reflects the political will and the emerged needs of the population. The process of defining public responsibilities has not been based on the characteristics of the services– a fact that does not fit well with the requirements of any legal approach. The characteristics of SSGIs are inevitably rough and broad and leave room for interpretation. Uncertainty prevails as regards how much flexibility is compatible with and permitted by the EU Treaty and the EU rules.

Public procurement rules

The aim of the public procurement legislation is to further price-conscious provision of high-quality services. It is a good and useful instrument to be applied under conditions characterized by competitive, well-functioning markets. But public procurement procedures have also shortcomings. Tendering procedures are sometimes highly complex to use and do not necessarily lead to savings or services of a better quality. All possibilities provided by the law are scarcely used because of high learning and transaction costs. It is easy to determine price; quality is not easy to be determined, especially in regard to social services. Sometimes promoting cooperation would contribute more to an improved quality of services and reduction of total expenditure than efforts to increase competition. As a result of the strict procedures applied to public procurement the cooperation between public and non-profit sectors has become more formal and restricted. The consequences of procedural mistakes can turn out to be disproportionate, which easily leads to risk avoidance behavior by public authorities. Private companies can avail themselves of the opportunity of referring to infringement of the EU rules in their own interest, which does not serve the general interest, for instance by creating unnecessary delays.

[1] At present the government is examining the need to lay down provisions in national law on the procedure of granting state aid as reimbursement for carrying out public obligations according to the EU rules on services of general economic interest. The only reference to the concept of SGEI is found at the moment in the act on transparency of economic activities of certain kind of companies.

[2] Finland's Slot Machine Association is a non-profit public corporation owned and set up by NGOs. The State has guaranteed it a monopoly of certain gambling activities. The profits are distributed as government grants to NGOs promoting health and social welfare of the population.

There are no generally approved guidelines on how to prove that there is no market for certain services. Using public procurement procedures is the most reliable way, but sometimes a lighter method would be of use. In particular, it is extremely difficult to specify or prove cross-border trade effects. That leads to coincidental interpretations, and uncertainty prevails. Cross-border tenders in social services are scarce. Markets of social services are far away from optimal markets, but the rules do not reflect this explicitly enough. The rules are the same without taking sufficiently into consideration the defects in the functioning of the markets.

The relationship between public procurement rules and state aid rules remains obscure. How to choose a service provider in the case of SSGI is still very unclear, complicating the applicability of SGEI rules - it is not plain enough if it is possible to use some open and non-discriminatory selection procedure other than public procurement procedure which is laid down in public procurement laws. Many questions deserve more clarification, for example the public - public cooperation, PPP -arrangements, definition of in-house and independent units. The local authorities are increasingly uncertain about how to rationally organize the provision of some services together in a larger area in ways that are legal.

The discernible indirect effects of applying the State aid rules

The application of EU rules has affected the organization of social services of general interest in multiple ways. The EU State Aid rules have influenced funding, organizing and controlling the provision of social services in Finland.

The rules treat independent local authorities as a part of state administration. The trust in local democracy is called into question when obligations to report to higher administrative levels are increasing and when supervision and control mechanisms are tightened. Shrinking financial support to social activities might be a result of the fear to break or infringe the State Aid rules.

The non-profit organizations have lost their special position as recipients of state aid when running activities considered being of economic nature. The main funding agent, the Slot Machine Association (RAY), has withdrawn from funding those service activities of NGOs that are considered to be of economic nature. Activities of NGOs are increasingly regarded as economic, which means in practice also a higher taxation rate. Tax reliefs for non-profit organization are under constant scrutiny. This has led to a large-scale incorporation of the service part of the activities carried out by NGOs.

Separate companies established by NGOs for service production frequently start to operate as any other profit-seeking firm, losing their identity as organizations of general interest. The business corporations owned by NGOs provide their services in competitive markets like any other business company. Normally, public authorities tend to apply the public procurement procedure when they intend to purchase services for target groups. The direct link between the members and the service delivery is broken. After the incorporation of the economic activities of NGOs it is more problematic to involve volunteers or to promote direct user engagement in the delivery of services.

The new business entities owned by NGOs are legally and administratively separated from the parent non-governmental organization. Corporate acquisitions and buy-outs become easier to implement. The stability of the service delivery system may become more fragile. Especially difficult situations have arisen when an important service provider has faced a bankruptcy. This has put the care relationships and continuity of the service provision in danger. Still, the public sector is in principle responsible for the secure and uninterrupted delivery of services in all circumstances, without having the possibility to utilize direct means to interfere in the functioning of the markets when acute problems emerge. Replacement costs can be extremely high. Vulnerable people are very sensitive to the changes evoked by alteration of personnel or customary courses of action. The rules should be more responsive and flexible in that kind of situations. Finland considers it important that the Commission would clarify the criteria on support for undertakings in economic hardships during the process of modernization of the state aid rules.

The existence of municipally owned agencies or agencies owned by joint municipal authorities has been called into question on the grounds of the EU law. Municipal and joint municipal agencies are not independent legal persons but part of the organization of a municipality or a joint municipal authority. The municipality or joint municipal authority is thus liable for the obligations and responsibilities of its agencies. Municipal and joint municipal agencies have been entrusted with the provision of many services of general economic interest. They are run according to business principles. Because of the dependent

nature of these agencies on the local authorities they can avoid insolvency situations. That is considered to be a factor that can distort competition. Furthermore there are some differences how the municipally owned agencies are taxed. The offered solution for avoiding the infringement of the EU rules has been the incorporation of the municipally owned agencies, their conversion into independent business corporations, following the same line as in the case of NGOs' service activities.

These examples show that as a result of the application of EU rules, there is a pressure to streamline and harmonize the company types that are engaged in economic activities. At the same time the pluralism of possible organizational forms and business models is reduced. The examples show also the crucial importance of being able to draw the borderline between economic and non-economic activity, which remains a concern for many authorities as well as private operators in the area of social services. The application of the EU rules gives automatically more weight to the competition and efficiency aspects in the service performance – sometimes at the expense of safeguarding the continuity of service delivery and promoting users' involvement in the service performance.

Challenges faced in applying the EU rules to social services in Finland

The application of the EU rules regarding state aid, public procurement and internal market has had positive implications on some aspects of social service provision. The cost-consciousness has improved, the supply of the services has diversified and more attention has been paid to the effectiveness of the service provision as well as to the possibilities the private market can offer. The use of market mechanisms has become more wide-spread when outsourcing the services. There is no obligation in the rules to externalize the service production. Yet, outsourcing the service production versus keeping the production in-house cannot be always considered as a real option due to the decisions made in other policy fields. Quite often the driving force behind the outsourcing of social services has been the aim to reduce the public spending. We lack clear evidence on that. More research is needed. But still many complaints remain concerning the complexity of applying the rules, the loss of flexibility in the decisions concerning the desired way to support service providers and even the detrimental effect on the quality of the services caused by the mistakes made in the strict application of the complex set of rules.

Problems indentified when applying EU rules to social services of general interest

To sum up the challenges faced when using the regulatory framework interwoven by various sets of EU rules can be classified as follows:

1. Disregard of the mission of social services

Ambiguous concepts used in the legal framework leave a lot of room for interpretations, which increases legal uncertainly. The concepts adopted derive from a theoretical conceptualization of functioning of the markets and are rather alien to the real life situations where social services are delivered. The loose economically perceived concepts originally applied to very different contexts are imposed upon the established national legislation and do not fit well to the overall legal structure regulating the public domain of welfare services. The main concerns deal with questions such as whether there is a market or not, whether the activities are economic in nature or not, weather there is cross-border competition or not. No clear-cut answers can be provided and the final interpretation of the rules is done at a supranational level, far away from the communities where the decisions have to be made.

From the point of view of the mission of social services the economic considerations of the functioning of the internal markets are often regarded as secondary. However, the compliancy with the legal acts demands that attention should be paid in the first place to the competition aspects in the service markets. The rules regulating the competition are enacted at the highest level of the normative hierarchy – a fact that gives them primacy and predominance over any other legal or political concerns. The social mission should be judged on the basis of its possible effects on the smooth functioning of the markets. It is not difficult to see that value conflicts are unavoidable. The values of security, familiarity, permanence,

continuity, proximity, close personal relationships etc. are inseparable from the quality aspects of many social services. However, these values are not vital ingredients of competitive markets, and it is difficult to incorporate them into the rules. It has proved to be very challenging to avoid abrupt changes of service providers or changes in the customary course of action when relying on the market competition. Efficiency gains are often counterbalanced by losses of the quality of the social services experienced by the users or the workers in welfare service units.

2. Disregard of the imperfections of the markets

The rules are only vaguely adapted to the peculiarities of the markets where social services are provided. The market imperfections (uncertainty of demand, imperfect consumer information, capital market imperfections, locked-in situations, monopolies, externalities, lack of real choice as well as lack of the capacity to make rational choices) make it hard to achieve the promised goals of better quality and better cost effectiveness of the service provision. When applying the rules the promises become blurred and sometimes even counterproductive taking into consideration the transaction costs involved in the application of the rules. The complexity of the legal norms constitutes a cost factor that is seldom calculated in monetary terms. The larger the market failures the greater are the risks that the public money ends up in the hands of private profiteers. Speculative profits can easily undo the efficiency gains involved in using the market mechanisms. The rules should also hinder the tendency of private operators to cherry pick the most profitable customers at the expense of the more costly and more complex cases.

3. Disregard of the dissimilar premises of different types of actors in the markets

The rules are to be applied horizontally to all types of organizations operating in the market. The ignorance of the substantial differences in the organizational forms of economic actors generates a favorable playing field for certain type of businesses and reduces the public authorities' opportunities to compensate other forms of undertakings that are not ideally fitted to such ()competitive environment that the application of the rules presumes. Ultimately the pluralism of the types of service providers is in danger. Without any diversification of the treatment, all the players have to adapt to the same kind of business behavior as the mainstream profit maximizing businesses in order to succeed in the market competition.

4. Disregard of the local nature of the decisions that have to comply with the rules

Especially in the personal social services the rules influence activities and decisions that are very local in nature. The right application of the rules requires a high level of expertise in legal issues that is not always at disposal neither in small municipalities nor in small-scale undertakings. This gives an impetus to create larger centralized units that are better equipped to handle complex legal affairs. Consequently, the distance between the service users and the decision makers becomes wider. Training, education and capacity building can alleviate the problem but do not totally eliminate it. In unfavorable market conditions the supplier side can exercise more influence on the purchaser of the services than appropriate. That is a menace especially to small municipalities.

5. Disregard of the great variety of social services and the conditions under which they are produced

Despite the growing number of studies on social services of general interest in the EU, there are gaps that have not been under examination/investigation. The studies tend to simplify the reality in their focus on the most representative cases. The range of the countries studied is normally reduced to the most populous ones, reflecting a certain type of a welfare regime. The services included in the research represent the most important sectors of social services in terms of the number of clients or the total expenditure on the services.

However, the most problematic issues often emerge when applying the EU rules to atypical sectors of social services where the volumes are low but the importance of those services for the users is vital, since there are no real alternative ways to relieve the situation of a small target group. The same is true for small countries with limited numbers of providers of very specialized services as well as with very limited market potential. In those cases, the exit of one important actor from the provision of the service

in question can have unforeseen and dramatic consequences for the whole clientele of that particular service. Extra efforts are needed to maintain the expertise needed, to preserve the trust in the functioning of the overall system as well as to promote the cost containment. Especially vulnerable service sectors in that respect have been specialized services for sensory disabled people and other patient groups few in number, specialized psychiatric services, services for substance abusers etc. Short-term savings may lead to increased long-term costs. Sometimes granting state support to a private provider in order to avoid shutting down a service unit might help to overcome the immediate financial problems, which could be an economic solution in comparison to the costs involved in restructuring the whole system without any guarantees of more effective and better functioning services for the target group at issue.

In the framework of the modernisation initiative the Commission has promised to clarify and better explain the notion of State aid and the criterion of impact on cross-border trade and competition. A clarifying communication on these issues would be most helpful for the authorities of the member states when they assess the nature of different measures including state support. Illustrative examples of economic and non-economic activities in the field of social services should be provided in order to reduce the legal uncertainty linked to the application of the rules.

ANNEX 10

Subject: Contribution from France to the Final Report of the Social Protection Committee informal working group on the application of European Union rules to social services of general interest – SSGI in France.

Social services of general interest (SSGI) play a crucial role in society because they convey values of equality, inclusion and solidarity, they participate in the social and territorial cohesion, and have a stabilizing role both economically and socially, which mitigates the effects of economic crises. Their aim is to provide all citizens with access to essential services, recognized as a fundamental right within the meaning of Article 34 of the Charter of Fundamental Rights of the Union European. The priority given to the fight against poverty and social exclusion in the objectives of the Europe 2020 strategy, takes the quest for quality in the provision, accessibility, development and modernization of these services. This idea is also reflected in the Social Investment Package recently published by the Commission in February, 2013, or at the national level in the "Multi-year plan to fight against poverty and social inclusion" (*Plan pluriannuel de lutte contre la pauvreté et pour l'inclusion sociale*) where the issue of the use of these services or benefits is central.

However, the development of SSGI is suffering from apparent technical nature (legal, financial) of Community law. To apply European rules in the management of local public services and in particular their financing, one have to master EU concepts and specific notions, somehow different from those existing in national law.

1. – Concepts used in a national context

The main difficulty for the stakeholders lies in the translation of notions and concepts, stemming from the jurisprudence of the Court of Justice of the European Union (ECJ), or from the European regulations, in the local conditions of each country. Related concepts do exist however at the national level.

1.1 – Types of services

Public service

National law knows the concept of public service. Some activities are characterized by the legislator as activities of general interest, or as public or national interest, but there is no legal definition of what general interest or public service are.

The functional aspect of public service may still be defined as an activity of general interest supported by a public person or a private person under the control of a public authority. We distinguish public order services and public law services (defence, justice), those aimed at the social and health protection, those educational and cultural and those of an economic nature. The legal regime of public service is based on the principles of continuity, equal access and mutability (adaptability) of service.

Social services

Social and medico-social services and institutions are defined in Article L.312-1 of the Code of Social Action and Families (code de l'action sociale et des familles, CASF), as amended by the Law of January 2, 2002, covering social welfare institutions and services to the children, people with disabilities, the elderly and persons and families in need.

SSGI

French law does not know the concepts of services of general interest (SGI), social services of general interest (SSGI) or services of general economic interest (SGEI), but affirms the concept of "public service". It is recognized that SSGI include, in addition to childcare services and social housing services, social services defined in Article L.312-1 of Code of Social Action and Families.

Beyond the definition, French stakeholders demand a list of SGEI, to clearly define their scope. Although a clarification exercise was conducted through the Prime Minister's circular of 18 January

2010[1](following the Altmark and Monties-Kroes cases), the outline of the concept remains unclear. French authorities refuse to do so for the moment, SGEI are qualified on a case by case basis, in areas and territories that may vary.

1.2 - Types of interventions

Public procurement

A public procurement contract is a contract concluded for pecuniary interest between a contracting authority (public authority) and public or private operator, to meet the authority's needs for works, supplies or services. The public procurement legal regime requires public authorities to launch a call for tender before the selection of a contractor. Public procurement code requires compliance with the principles of freedom of access to public procurement, equal treatment of candidates and transparent procedures.

Delegation of public services ("délégation de services publics")

A public service delegation agreement is a contract by which a legal person of public law entrusts the management of a public service of its in charge to a public or private delegatee, whose remuneration is substantially related to the outcome when operating the service.

The legislative body of the community has first to decide management mode it will use, before choosing the contracting partner on the advice of the Selection Committee, and allowing the signature of the delegation.

Grant

The initiative may also come from an association or organization that submits to the public authority a project with a general interest purpose. After reviewing the application, the public authority may decide to support this project through a grant. This procedure is not a priori covered by public procurement or state aid rules. Depending on the amount and duration of the grant, a yearly or multiannual performance convention must be signed. The same project can receive several fundings.

In house

A public authority may decide to provide by itself a public service. It has several options, including the in house procedure. "In house" concept covers situations in which the provision of service is performed by a legally distinct entity. The control exercised by the public authority over the legally distinct entity must be similar to that which it exercises over its own departments, and the essential part of the activities of the legally distinct entity is carried out with the controlling public authority.

These contracts are excluded from the scope of the public procurement code. In addition, rules on state aid do not apply when there is not an economic activity. For example, the management of active solidarity income (revenu de solidarité active, RSA) by the municipal social action centre (centre communal d'action sociale, CCAS) is not an economic activity.

Act of entrustment ("mandat")

A legal definition does not exist in French law. Provided that they contain the necessary informations, the public contract, the delegation of public service agreement and the yearly or multiannual performance convention, can constitute an act of entrustment within the meaning of Community law (see the Decision 2012/21/UE and the Communication 2012/C8/03).

2. - Application of public procurement rules

In France, public procurement rules have been integrated by the relevant stakeholders. However the systematic use of public procurement procedures, which guarantee a degree of legal certainty, is at the expense of the possibilities offered by the regulations on state aid (see point 3).

Designated as non-priority services in Annex IIB of Directive on public procurement 2004/18/EC, social services are currently subject to a simplified procedure (definition of technical specifications and publication of contract award notice). This has resulted into national law by applying the socalled

[1] Circulaire du 18 janvier 2010 relative aux relations entre les pouvoirs publics et les associations: conventions d'objectifs et simplification des démarches relatives aux procédures d'agrément.

"adapted procedure" from Article 28 of the Public procurement code, which is a procedure for some of these services regardless of their amount, the terms of which are freely set by the contracting authority, subject only to the principles governing public procurement, namely the freedom of access, equal treatment of candidates and transparency.

The future of the treatment of social services in the context of public procurement is more uncertain when one considers the text under discussion. Indeed, the distinction between priority services / non-priority services is expected to disappear, and the proposed new text builds a specific regime for social services. Those whose value is less than EUR 500 000 would be excluded from the scope of the Directive. Above this amount the social services and other services listed in Annex XVI, would be subject to lighter regime in comparison with other services, but that appears as a new constraint regarding the obligation to publish a contract notice and an award notice.

The French authorities objected to this proposal because it has the effect of bringing within the scope of public procurement rules some sectors currently excluded, such as certain cultural services. Moreover, the proposed threshold of EUR 500 000 is restrictive given the realities of practice.

3. - Application of state aid rules

Despite the progress made by the Almunia-Barnier package towards the recognition of the specificities of social services, the concepts developed at European level are sometimes unsuited to local realities and practices.

As a reminder:

- either it is a non-economic service, the aid granted does not fall within the scope of state aid rules;
- or it is a small aid allocation (de minimis thresholds of EUR 200 000 or 500 000), it will be considered compatible and will not be subject of notification;
- or the aid will be of a much higher amount, but will be considered compatible and exempted from notification under the conditions stipulated by the Commission Decision of 2011. Those conditions are: a maximum term of entrustment, a preliminary calculation of compensation, and an absence of overcompensation.

In France, the most symptomatic examples of misunderstanding of European concepts are the issues of the act of entrustment and the calculation of the compensation.

3.1 – Act of entrustment

According to the European judicial construction, the local authority must explicitly qualify the service of general economic interest within the meaning of Article 106.2 of the Treaty, in an official and enforceable act: the act of entrustment.

Within the meaning of the Community law, the act of entrustment is the instrument by which the public authority entrust a company to provide a particular mission of public service. But in France, the law provides specific and various procedures to do so. A constituent of these procedures, taken separately, do not necessarily filled all the criteria characterizing an act of entrustment within the meaning of the Community law.

In France, the question arose about various procedures such as the approval (procédure d'agrément), authorization (procédure d'autorisation), declaration (procédure de déclaration) or empowerment (procédure d'habilitation) procedures of public and private bodies to perform a mission of public service. The difficulty of applying the community concepts is illustrated in these situations.

Several examples in the social and medico-social sector can illustrate this point:

- mandate within the meaning of the Community law, can be constitute by the administrative authorization for the creation or extension of social and medico-social establishments and services (établissements et services sociaux et médico-sociaux, ESSMS, Article L. 313-3 Code of Social Action and Families) issued by the chair of the General Council, when coupled with the entitlement to social assistance and authorization to provide care to the insured.
- however, the administrative authorization for the creation or extension of social and medico-social establishments and services does not constitute a mandate within the meaning of Community law. It is indeed a police decision that allows a corporation to operate an activity.

- the mayor of a municipality is entitled to entrust the management of a long-term care institution (Etablissements d'Hébergement pour Personnes Agées Dépendantes, EHPAD), to the institutions authorized by the chair of the General Council by a public service delegation agreement or a public procurement contract. It may constitute a mandate within the meaning of Community law if the document contains the particulars required.
- in some situations, the initiative comes from a NGO or a body of private law, which shall submit to the public authority a social service delivery project. Without tender or "act of entrustment", the NGO has been entrusted by the public authority with the mission of providing the service.

These examples highlight the challenge in meeting the requirements of the act of entrustment which is yet the only way to waive the rules on competition and state aid that govern the internal market. Failing that, the funding may be considered by the Commission and the ECJ as a state aid.

3.2 - Compensation

The amount of public service compensation cannot exceed what is necessary to cover the net costs incurred in the discharge of public service obligations, including a reasonable profit. The calculation of the compensation is based in part on an accumulation of vague notions.

For example, the concept of reasonable profit is defined as the rate of return required by a mediumsized company inquiring about the opportunity to provide the SGEI for the duration of the act of entrustment, taking into account the level of risk. Those concepts are not yet fully understood by local authorities.

Great difficulties of understanding and application are thus generated. To overcome the complexity of calculating compensation, communities often resort to the procedure of public procurement. This illustrates the difficulty of understanding European texts and jurisprudence. By lack of knowledge the use of public procurement procedures becomes systematic. Indeed, it is tempting to turn to procedures such as public procurement, which machineries are best known by authorities who can secure their relationships with companies or associations. This movement void of meaning and usefulness European rules which set up exemptions and light regimes for social services.

4. Interaction between different set of rules

More than interaction between the different set of rules, in France we are witnessing a massive use of public procurement, which remain the only legal procedure providing public authorities with a degree of legal certainty, to the detriment of rules giving flexibility when financing social services.

Local communities play a key role in the application of EU rules but not all of them have the same ease of appropriation (concepts and conditions), leading to an uneven qualification of SGEI, depending on the nature of the service concerned and the degree of mobilization of the actors. The difficulties encountered by the actors, led the French authorities to develop a "SGEI Management Handbook" for local authorities and central authorities, to provide a simplified and detailed presentation of European rules for state aid and to improve knowledge. It will be released soon. Other stakeholders have also recently published a practical guide to SSGI for mayors and elected local authorities[2].

5. Cross-border trade effect

Social services have by definition limited cross-border dimension. These services are typically provided in a particular context, which varies from one Member State to another, due to administrative, organizational and cultural differences.

The Commission by easing the rules on SGEI, through the specific de minimis regulation for SGEI n° 362/2012, adopted on April, 12 2012 (aid measures up to EUR 500,000 over ant period of three fiscal years per undertaking are outside the notion of state aid), took into account the low impact of these services on the European market and the low risk of distortion of competition.

[2] Guide pratique – Les services sociaux d'intérêt général (SSIG), Le courrier des maires et des élus locaux, February 2012.

6. Social concerns

Social services of general interest underline our system of social cohesion. Besides difficulties to fully grasp the EU rules governing social services, at national or local level, stakeholders have other concerns.
Expanding the scope of the public procurement Directive (Annex IIB in its current and Annex XVI in the project discussion), the new EU text on Concessions which will apply to social services that were not subject so far ... The texts currently under discussion do not undermine progress towards liberalization and an increased commercialization of the social sector, which does not bode a lower cost, or guarantee the quality or accessibility of social services. Our legal system is largely irrigated by the Community regulations which some see as a threat to our present social system. Some fear that in the short or medium term only sovereign missions (justice, police, defence ...) will be exempted from the free play of competition.

The French authorities will continue to support initiatives to make specificities of SSGI recognized in European rules or in Community sectoral legislation. The will also defend the competence of national and local authorities in the definition of SSGI missions and organization, to ensure that the specificities of these services are taken into account and to maintain a level of quality in the provision of it.

Social Cohesion General Director
Sabine FOURCADE

ANNEX 11

EU RULES AND THE PROVISION OF SOCIAL SERVICES IN REPUBLIC OF SLOVENIA
PERCEPTION OF THE NOTION OF SOCIAL SERVICES OF GENERAL INTEREST

As in most European countries, Slovenia does not have a single definition of social services of general interest. There is a very general definition of public services contained in the Act on Institutes which is regulating status issues of some institutions providing services in the field of education, culture, science, health, social care and other non-profit sectors. Public service is defined as service which is defined in the laws adopted by the National Assembly or in the acts of the local community, so that its permanent and continuous provision is provided in the interest of the state or local communities. Public services in Slovenia are carried out by institutions that are owned by the State or local authorities or private contractors implementing a concession contract. Special legislations for specific areas more precisely define the public service.

Public services within the social protection system are based on the principles of solidarity, universality, equal access and non-profit. Due to these features such services are significantly different from commercial services, which are subordinated to the logic of the market and its laws. These features of public service are essentially features that apply to social services of general interest in the European Union and can be defined in the following bullet points:

- services are implemented in the public interest (which must be clearly expressed in the legislation of the state or the local community);
- services are implemented as a non-profit (or cost price of services provided and controlled by the state or the local community, excess of revenue over expenditure shall be invested in development, the majority of services wholly or partly financed by the state or local community, for some, it is also necessary to provide the user contribution) ;
- services must be accessible to all who need them (the state and the local community are responsible for determining the network of providers);
- services are regulated by regulations of the State or local community (special regulations issued by the state or local communities determine their content, form, number of performers, their education and work methods and documentation used to), their funding is based on the principle of solidarity (to be exempted from all services regardless of the financial condition of some of the services a system of payments based on the census, the financial capacity of the individual are required for access to services).

SOCIAL SERVICES OF GENERAL ECONOMIC INTEREST IN SLOVENIA AND EU RULES

According to the Social Security Act (Official Gazette. RS, 3/07 -UPB, 114/06 – ZUTPG, 23/07 – pop. in 41/07 – pop.) two social services fall under the Decision of the Commission: **home care** and **institutional care for the elderly**. Both are in accordance with article 41 b of the Social Security Act and the Rules on standards and norms for social care services (Official Gazette. RS, 52/95, 19/99, 28/99, 19/99, 90/08) carried out by public institutions or concessionaires. The Rules on the methodology for pricing of social services (Official Gazette. RS. 87/06, 127/06, 8/07 in 51/08) applies to both public institutions and concessionaires and is setting out the general parameters (in some cases eligible costs) for the calculation of prices and features for individual services.

In accordance with the Regulations of the concessions in the area of social protection (Official Gazette. RS. 72/04 and 113/08), which determines their limited duration, the conditions for an exemption of the concession to provide those public services from the application of Commission Decision are satisfied. According to the SSA the Community of Social Institutions of Slovenia perform some other services in the public interest, such as the management of a single information system of providers and users of social care services, which are for some other reason (namely tariffs set independently of eligible costs)

not due to its application. Nor are social services provided by contractors selected through annual tendering procedures.

Social care service of **support of the family at home** is organized at the level of local communities. When calculating the price of this service the first step is to calculate the full costs of services. Municipalities are required to subsidize at least 50 percent. From the total cost of service in addition to municipal subsidies, subsidies of Republic of Slovenia for the purposes of active employment policies are also deducted. The difference between total costs and possible republican and municipal subsidy is the price of the service, calculated per unit, i.e. hour of service.

In 2007, the total costs of these services amounted to about 15.2 million euros, of which grants municipalities amounted to 7.6 million euros, 1.9 million euros subsidy from the State, user input and relatives more than 4.5 million euros and additional payments of municipalities for those users whose ability to pay did not allow to pay the service wholly or partially own 1.1 million euros. Republican and municipal subsidies and municipial additional payments show amounts of compensation within the meaning of Commission Decision.

Social care service of **institutional care** is organized at the national level. For its performance 60 public institutions were established and public tenders selected 25 private concessionaires. Duration of concessions is limited to 40 years and may be renewed.

The Rules on the methodology for pricing of social services prescribe specificities of the calculation of the price of this service. The eligible costs of standard services as well as the method of charging above standard living space are defined in details. The consent of the responsible Ministry is required for the admission of the prices and price changes of standard services, as proposed by the contractors, for additional services its consent is not required. As eligable costs there are specifically recognized the costs of labor, materials, depreciation and major repairs, but they are limited to a maximum height or with peer relationships. As an element of the price the cost of financing to compensate for the capital invested can be recognized. When calculating the price and management accounting is necessary to use the standard labor cost and the standard cost of materials, as prescribed by the responsible Minister.

ANNEX 12

SSGI in a Belgian Context: Selected Questions

This contribution is not a binding legal document representing the Belgian position. It is a contribution to thinking on SSGI issues in the context of the discussions in the European Social Protection Committee. This note is taken from a paper written for a presentation presented to the Working Group on 5 July 2012. Given the deadlines and the type of exercise to be carried out (3/4 pages maximum), this contribution could be a first step in a more detailed study to be conducted[1].

Contents

1. Introduction

The Belgian preparations for the informal working group of the European Social Protection Committee on the application of EU rules on work in Social Services of General Interest (referred to below as SSGI) have so far taken place as the need arose.

As the working group does not take formal decisions that are binding for Belgium , the process itself is informal too (mail slots, informal meetings) and comes in addition to the formal coordination of the Inter-ministerial Economic Committees on issues pertaining to the single market and State aids. This leads to a soft participatory process that eventually becomes some kind of "information point" for the administrative services concerned.

Timid feedback is beginning to come in, particularly on the question of State aids, as a more formal working group on State aids and compensation of public service has been set up.

[1] For any suggestions or remarks, please contact manuel.paolillo@minsoc.fed.be or muriel.rabau@minsoc.fed.be

In fact, several reasons explain the difficulties in discussions on these subjects. The fragmented social protection landscape in Belgium, due to the split of competences between the various levels of authority, does not facilitate the coordination task. The informal nature of discussions at European level does not favour participation at the national level, since the agents do not consider it as a priority and there are no decisions to be taken. Finally, the subjects under discussion considered in this subgroup are either extremely horizontal (organization of services, relations between authorities and service providers), or very technical, with overlapping social and economic competence (public supply contracts for social services, State aids and the compensation of public service), so that no one really feels in charge of the dossier or sufficiently skilled technically (or politically) to deal with these subjects.

In addition, a certain hesitation is perceptible in people in charge of these questions, since current practice is not 100% in compliance with all the requirements (of hard law or of soft law) set down at European level. Under these circumstances, administrative services tend to hide behind a smoke screen of confidentiality.

On these points, we feel that the subjects under discussion should be approached in a clearer manner by applying and announcing a methodology, and laying down working hypotheses. This would greatly facilitate work at national level.

The main difficulty encountered is the reference to the "market" concept (or the concept of an economic undertaking or activity) in European Union law (whether with regard to State aids, the service directive or public supply contracts) which in our opinion does not sufficiently correspond to the real social landscape of institutions in Belgium.

These are concepts developed and decided at European level for economic services of general interest; more specifically they refer to companies that are given missions in the general interest (we feel that there has been a real shift in these concepts), for which there can be national and international markets. These concepts get little attention as far as the social level is concerned. On the other hand it does seem that, market tools (particularly for public supply contracts) are being strongly encouraged[2] at the European level in recent years. In addition, it seems that for a few years, some public authorities have been using public supply contracts to outsource social services, drawing the supply of those services towards a more market-driven logic.

2. SSGI in Belgium

The concept of SSGI is not a usual one in Belgium. This concept currently has no legal existence, neither at European, nor at Belgian level[3]. This is a European expression used specifically in the European Commission Communications of 2006, 2007 and 2011 and in the two-yearly reports on SSGI.

Although there is no definition as such, the concept is used as a reference at European level to create categories and to treat social protection services in the broad sense: Social Security schemes (mandatory or optional) and all social services "provided" directly to persons (social housing, job-recovery, aid to the poor,...). Taken as a whole, this categorization could also be used for the social service landscape, for which little theory has been developed, and for social protection in Belgium, with the proviso that any categorization has its limits.

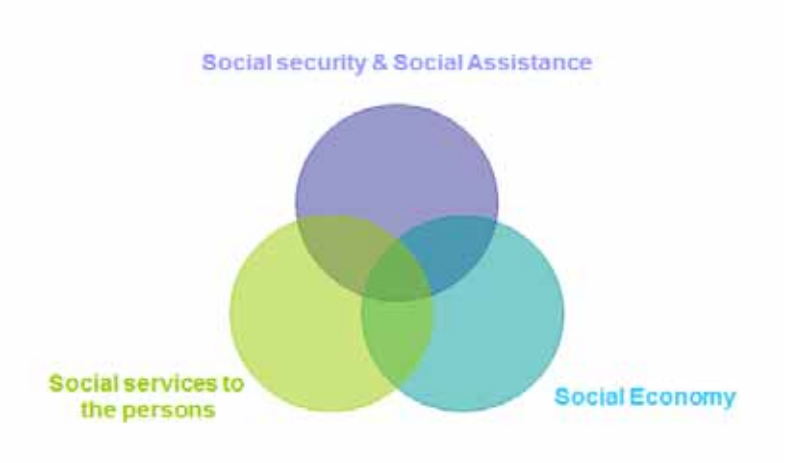
a) Social and Health Services

These cover a very large number of services, often front-line services that are open to the entire population or to major target groups in view of their features. It is fairly difficult to have an overview of all these services, given their specificities, and to accurately determine what is

[2] See in particular the application of the Almunia package on compensation of public service, or the integration of mandatory Social Security services in the scope of the proposal for a directive on public supply contracts in Annex 16.

[3] As concerns the legal grounds derived from the concept of SGEI and used for SSGI, see: *Comment et jusqu'où le Traité de Lisbonne peut-il servir de base légale en matière de services sociaux d'intérêt général*, Note by the Belgian Presidency in 2010, http://socialsecurity.fgov.be/eu/docs/agenda/26-27_10_10_traite_lisbonne.pdf

meant by social services (example: helping children with homework can also be considered a social service).
In any case, the following can be integrated: social housing sector, integration of disabled persons, provision of long-term care, hospitals, mental health centres, family planning centres, organizations providing training for jobless persons,...
The nature of the organizations providing this type of social services is diverse: they can be non-profit organizations, local and regional authorities, religious communities, and even commercial companies. Responsibilities for supervising this type of service by and large lies with the local, regional or community authorities. Several trends can be observed: "de-institutionalizing", "de-medicalizing", increasing recourse to the work of collective groups with growing user participation (Eurofound[4]).
On the whole, there seems to be a trend to create "partnerships" between the public sector and the associative sector in Belgium in the social field (LAVILLE and NYSSENS [5]).



b) Social Security & Social Assistance

Social protection in Belgium traditionally includes Social Security and social aid schemes.
Social Security[6]
If only the organizational or the "governance" aspects are concerned, it could be said that in Belgium, the management scheme consists of delegating public services to a series of public institutions (public Social Security institutions make up the primary network) as well as private or public institutions (the secondary Social Security network).
Today, for the primary network, this delegation of public service is organized both by legal texts where missions are clearly defined and by "performance agreements" signed between the competent ministry and the administrative service concerned.
For the secondary network, players in the field that are generally directly in contact with the population (payment of services, enrolment of persons, for example), must respect legal conditions to provide "missions in the general interest" or legal assignments if they benefit from public budgets. By and large these are given by means of approvals. Conditions concerning the nature of the operators, (usually a non-profit organization of some kind is required), bookkeeping and representation are also required by Belgian law.
Additional or supporting missions or activities are also provided by a series of players. At this time, the discussion on whether their activities are or are not of an economic nature is still open.
Social Assistance[7]
Social assistance, considered as the “last safety net” for the citizen, is a residual right, in the sense that the citizen must have exhausted all other rights to be entitled to it. It is granted subject to the condition of not benefiting from sufficient resources (determined by means of

[4] http://www.eurofound.europa.eu/areas/socialprotection/casestudies/belgium.htm
[5] Laville Jean-Louis and Nyssens Marthe, *Les services sociaux, entre associations, État et marché. L'aide aux personnes âgées*, Paris, La Découverte « Recherches/MAUSS », 2001.
[6] The public social insurance contributory scheme that targets ensuring access to healthcare and security of income in the event of social risks in old age, illness, incapacitation, occupational accidents, maternity or sudden disappearance of family support.
[7] Non-contributory scheme (for no consideration), social assistance is awarded in view of the needs of persons.

social surveys on income) and is granted at the local (municipal) level. Social aid or assistance can take many different forms given that there is a very large margin of manoeuvre left to the local authorities to meet the needs of needy persons[8].

c) Social Economy Service Providers

In Belgium, competence for the social economy is currently shared between the federal level, the Regions and the German-speaking Community. The social economy sector includes organizations that target providing added social value rather than maximizing profit. These initiatives and undertakings respect the following basic principles: priority of labour over capital, independent management, their final purpose being service to members, the community and stakeholders, a democratic decision-making process, sustainable development respecting the environment.

Proximity services have an important place among social economy initiatives, particularly by means of approval from the regional authorities. Certain services provided by the Public Social Assistance Centres (CPAS) intended for vulnerable groups also fall under the social economy, as do missions of mutual societies not included in mandatory Social Security.

One of the objectives targeted by social economy undertakings is the insertion or reintegration of persons whose integration on the labour market is difficult – this is also considered as a social service in the general interest.

3. « EU » Economic Rules

a) Concepts used in national context

Economic activity

It is interesting to try to harmonize or at least attempt a comparative analysis of the concepts of "economic activity" in the various States. The concept that comes closest in Belgian in commercial and administrative law is that of a commercial activity. The Commercial Code (Articles 2 and 3) defines a whole series of activities presumed to be commercial that do not include social services. The law on consumer protection of 1991 applies in the absence of a profit-seeking motive, in order to protect the consumer.

There is greater similarity to the concept of an economic activity in the "concept of commercial or industrial activity" that is used to apply labour law (the law of 16 March 1971 on labour) to employers covered by these activities. In this case, social services can be concerned by the law on labour insofar as they meet several criteria: the activity in question can be exercised by persons under private law and it is not a public service mission that is exclusively associated with public authority. The flexibility of the administrative jurisdictions in this field can be explained by concern to optimally protect workers (teleological interpretation)[9].

Non-Market services

The concept of non-market services has been used for more than 30 years in Belgium and includes the following features: non-profit, often benefiting from subsidies, and essentially present in the sectors of health, social action and culture.

By definition, the service sector does not function according to market logic. It represents about 15% of jobs in Belgium.

[8] https://www.socialsecurity.be/CMS/fr/citizen/displayThema/private_life/PRITH_5/PRITH_5_1.xml

[9] Laville Jean-Louis and Nyssens Marthe, *Les services sociaux, entre associations, État et marché. L'aide aux personnes âgées*, Paris, La Découverte « Recherches/MAUSS », 2001.

b) Public Procurement Rules

As concerns social services, as far as we know public supply contracts are used little in Belgium. In the study ordered by the European Commission on the organization of social services, it is interesting to note that public supply contracts are definitely not the preferred means of organizing the sector of social housing, long-term care, childcare or employment services in Belgium. The sector of social-professional integration does seem to be more concerned by the use of public supply contracts.

The use of public supply contracts seems to be a difficulty encountered by many social services for which continuity of public service (guarantee of service to social insured parties or citizens) applies.

If a social action service provider must be chosen, by and large this is done by means of accreditation systems or legal conditions ensuring the quality of the service. In addition, subsidy mechanisms are very detailed as concerns compliance with conditions.

However, there is considerable case law that targets changing the status from a public service contract to a subsidy, particularly if it appears that control of the content lies with the service provider rather than the public authority. Administrative departments consequently had to recall the differences between the instruments of subsidies and public supply contracts in their circulars. The definition of depletion of the public authority or the use of non-recoverable funds (for a cause in the general interest...) was used for a subsidy. The Court of Auditors also specifies the concept of a subsidy: *by its very nature, a subsidy consists of a financial intervention granted by a person under public law to encourage certain activities or operations.*

In addition, it should be noted that subsidies are highly regulated. They give rise to a precise and detailed audit of expenditures, resources and reimbursements -- which are often partial -- of costs, and do not allow for a profit, unlike public supply contracts.

Although there are very many players in the Social Security sector and one can talk about outsourcing, the rules for public supply contracts are not applied to award Social Security funds. In this sector, too, a system of accreditation is generally applied. Budget allocations are discussed at government level.

However, social considerations and public supply contracts have been promoted for several years in Belgium. For example, it is possible to promote employment of vulnerable persons by means of social clauses. In addition, markets can be reserved for sheltered workshops. Finally, certain public authorities, particularly in the field of renewal of social housing, use framework contracts. This makes it possible to choose two companies, particularly targeting reintegration of disadvantaged persons, to do occasional renewal work on apartments when they become vacant.

At this time, we can see a trend to open up to other players in the form of public supply contracts for the provision of very specific services which until now were provided by players in the social economy via a system of approvals.

c) State Aids

The first thought that comes to mind on the subject of State aids starts with a question of realism: if, as the Commission has underlined in its second two-yearly report, 90% of SSGI benefit from public finance for their operation... why deal with the question of this finance from the standpoint of State aids which, in principle, are prohibited?... To our way of thinking, this makes the possible analysis particularly restrictive, even if derogations do exist.

Sector screening is now going forward in the context of the Almunia package, but we observe that public authorities lack knowledge of European rules.

Constant references to regulations on State aids in the regulations for public supply contracts are particularly surprising, first in terms of coherence, and second in the institutional context

(almost total absence of the concept of a market, little use of public supply contracts for social services).

Recently, a judgment of the Court of Justice[10] was given in the hospital sector in Belgium where representatives of the private hospital sector questioned financing awarded to a public institution (IRIS hospitals). On reading the judgment, it seems that the Commission did not succeed in applying the regulation that it had decided itself on compensation of public services. It seems to us that cross-border interest or intra-Community exchanges are rarely present in the sector of SSGI. In fact, in the Conclusions of the Council in 2010 the Commission was asked to consider this question:[11]
"Invitations to the Commission:
1. without prejudice to the Commission's right of initiative, to further clarify the Interactive Information Service, particularly by means of the Commission Guide, and, if need be, other appropriate non legislative instruments, its views on:
…

b) the concept of a" certain cross-border interest " in the context of the application of public procurement rules to social services of general interest;

c) the concept of affecting trade between Member States in the field of the application of the rules on State aids to social services of general interest of economic nature; "

In addition, a recent decision of the Belgian Competition Council had to decide whether coordinating social economy associations for putting people back to work could be considered a restrictive trade practice... and consequently be prohibited under Article 101 TFEU[12].
The limited duration of the authorization of compensation (10 years) seems to be a focal point of concern for the social sector, particularly for the integration of handicapped persons.
The sector of the social economy generally uses different sources of financing (aids to small business, aids for social-professional integration, minimum income aids or ESF financing). The rules for cumulating aids are often complex and undertakings do not always have information on the type of aid awarded by the public authorities. Moreover, the undertakings and the public authorities also wonder about the rules on cumulating aids given the regulation on the minimum income of 2008 and the regulation on minimum SIEG. We also see that public authorities award similar financing but use different schemes, particularly because the legal framework has changed considerably in recent years. For example, in Wallonia integration undertakings are financed by a notification scheme, by the GBER in the Flemish Region and by rules for SIEG in the Brussels Region. For public authorities there are real difficulties in complying with the new schemes, particularly when the measures are revised. The complexity of the rules may encourage certain public authorities to use new minimum rules in order to be more certain of complying with the rules, rather than setting up complex systems for calculating compensation of services. One of the questions raised by the sector and the public authorities is the concept of terms of reference which is hard to reconcile with national legislations.

d) Services Directive

Long political and technical discussions were held at various levels of authority to transpose the services directive. Each level of authority transposed the service directive for social services in its own way (article 2.2 j)).
At the federal level, the transposition of this article was done very broadly for concepts that did not exist at national level (authorization of payments).

[10] T-137/10, Brussels Coordination of social and health institutions (CBI) vs. the European Commission.
[11] Council Conclusions: Social Services of General Interest: at the heart of the European social model», 3053rd EMPLOYMENT, SOCIAL POLICY HEALTH and CONSUMER AFFAIRS Council meeting Brussels, 6 December 2010 : http://socialsecurity.fgov.be/eu/docs/agenda/06-07_12_10_conclusions_ssgi_en.pdf
[12] Competition Council, Decision n° 2013-V/M-07 of 5 March 2013, Case CONC-V/M-12/0016, Comptoir de Russie SPRL/Régie du Travail pénitentiaire, Entente wallonne des Entreprises de Travail adapté ASBL, Fédération bruxelloise des Entreprises de Travail adapté ASBL and laamse Federatie van Beschutte Werkplaatsen VZW », published in the Belgian Official Journal of 3 April 2013;

For rest and health care homes, the Council of State (administrative jurisdictions giving opinions on draft regulations) asked for a review of conditions concerning authorizations to exercise this activity, in view of the services directive.
A case is currently pending before the Court of Justice on the question of whether senior citizen centres in Brussels do or do not fall under the definition of social services in the services directive, and consequently whether they must apply for approval or not.[13]

4. Markets in the social sector?

It is clear that markets also exist in the social sector. Still, an agreement must be found on the concept of what a market is, and on the segmentation of such a market. So a certain type of competition can exist between operators in the non-profit sector for certain types of services.

Independently of European law, a tendency to see the social sector presented as merchandise exists in Belgium, be it for hospitals or the social economy[14].

The technique of vouchers, which seems to be encouraged by the Commission[15] was used recently for cleaning, running household errands, ironing and occasional sewing jobs and for the transport of the elderly or persons with reduced mobility. If some of the services covered do not fall into the social service category, the focus of attention raised by the Belgian Court of Auditors in this very interesting assessment[16], called for prudence in using this type of technique (service vouchers).

Despite limited cross-border interest in the social sector (social policies are very strongly anchored in the territories), it would be good to know whether the primacy of European law accelerates this trend to "merchandization ". Measuring the impact (real and potential) of the value added of this type of European regulation is much needed today.

Impact on Social
The impact of European regulation on the social sector is hard to measure today, given that it is still little-known at national level.

As far as we can see, disputes will develop based on new arguments that can be drawn from European law both as concerns challenges of public financing (case of hospitals) and the choice of operators.

A shortcut is taken at times in order to "secure" outsourcing of services: in order to avoid the application of rules on State aids, there is a trend to conclude public supply contracts for services that were not subject to them before. As a result, how is it possible today to argue that the integration of vulnerable persons on the employment market is a non-economic activity?

Finally, if the structural funds condition the award of aids in compliance with the rules on compensation of public services, the administrative burden, that has already been regretted, is not likely to improve.

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[13] Case C-57/12, Fédération des maisons de repos privées de Belgique (Femarbel) ASBL versus the Commission communautaire commune. The conclusions of the Advocate General consider that these centres fall under the definition of social services. Consequently, conditions of approval should meet all the conditions of the services directive and not go beyond it.
http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30db9b15f6aae1a948d59cd189b2d0be17d2.e34KaxiLc3qMb40Rch0SaxuLax50?text=&docid=135003&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=788084

[14] On this subject, see the thoughts of UNIPSO, a platform for the non-market sector in Belgium: "Theoretically, the increase in competition should make it possible to improve efficiency of the market (correspondence of supply and demand). In fact, these mechanisms above all open the market to commercial companies with the risk of causing "merchandization" of the sector and a loss of the relational tie. Given the requirements of profitability, there is a risk that non-contractual aspects of services to the population are neglected and that the more solvent beneficiaries are preferred to the detriment of the poorer ones. Accessibility to quality services for all types of income will thus be jeopardized. An evolution towards a two track supply of services would be inevitable with on one hand, commercial services for the well-to-do and minimum public services for the disadvantaged". This text is available on line: http://www.ufenm.be/spip.php?rubrique125

[15] SWD(2012) 95 final, p.14 available at http://ec.europa.eu/social/BlobServlet?docId=7623&langId=en

[16] Report of the Court of Auditors 2009, Titre services: cout et gestion:
www.ccrek.be/Docs/2009_04_TitresServices.pdf

5. Perspectives & Reflections for the Future

Despite the fact that we are coming to the end of the work of the European Social Protection Committee, this is just the beginning. The approach initiated by the Chairman of the Group consisted of looking at the real situation of social services initially, and then questioning the application of European law -- and this approach should be encouraged. Too often, the work of the subgroup consisted of politely listening to legal presentations -- which were very interesting -- on European law and the market policies that it implements (public supply contracts, State aids, services directive).

Measuring social trends and instruments implemented by the Member States for their social services, and an in-depth analysis of market instruments in the social sector seem to be indispensable stages before continuing to maintain or deny that competition law will improve or jeopardize the efficiency of social services.

An annual peer review consisting of several targeted questions (like those on the market instruments) addressed to specific, targeted sectors should point to the work to be done next, if any.

It seems that, in the light of the work of the group, the Commission doctrine applicable to large social service networks (SIEG) should continue to show increased flexibility and envisage the pertinence of its application to services where the market aspect is relatively small. Measuring the impact of competition policies would also contribute to measuring whether this doctrine is the one that will ensure the most adequate social protection, fight against social exclusion and ensure a high level of education, training and protection of human health, in keeping with Article 9 of the TFEU.

Given the deliberations of the working group, it would be interesting, based on reality in the service field, to continue to consider potential clashes between economic regulations and the fundamental features of the services (accessibility, continuity of services,...).

ANNEX 13

Provision on social services in Denmark

Background

In Denmark, social services do not, in terms of their conception, differ that greatly from services of general interest, except that their target group is usually society's most resource-deficient people.

Local authorities are responsible for supplying social services while the enabling legislation is a Government responsibility. However, this legislation prescribes that the quality of the services in the Municipalities should be laid down in detail and monitored. Private players are assuming larger roles.

Social services are undergoing constant modernisation, notably with a view to meeting requirements for efficiency, improved quality, individual user considerations, etc.

Free choice of supplier - an example of organization of social services in Denmark

Since 2003 recipients of home care services have been entitled to free choice of supplier.

Per 1st of April 2013 a new legislation on the free choice of supplier of home care services has been adopted.

It is presumed that the new Act will release (Free up) resources since it gives the municipalities more flexibility in planning how to provide homecare services. The municipalities will gain additional opportunities for entering contracts with private suppliers of home care services and thereby be able to achieve more cost efficient solutions as to care of the elderly. .

It is still mandatory for the municipalities d to offer recipients of home care services the possibility of a free choice of supplier. According to the new legislation the municipalities must give recipients of home care services a choice between two or more suppliers. One of these suppliers may be the municipality itself.

To accomplish this commitment the municipality must as a minimum:

1) Make a contract with two or more suppliers and/or
2) Offer the recipient of home care services a "free choice voucher" which gives the recipient access to enter into agreements with a private company that supplies home care services. It is expected that this will give the recipients more freedom in planning their everyday life. p.

With the new Act the government has given the municipalities access to use all possibilities within the framework of competition law to make contracts with private suppliers of home care services.

The new law will not change the surveillance- duties of the municipalities or the municipalities' duty to prepare and publish Quality-standards

A local council must base quality requirements for providers of personal and practical assistance on the local authority's quality standards. The local authority's quality standards for home-help services should, i.a. describe the decisions made on the content, scope and performance of the service.

One objective of the quality standard is to ensure uniform decisions in the local authority so that citizens with similar needs are granted the same assistance. In addition, the quality standard should ensure that citizens know their rights.

In conclusion, the quality standard, including quality requirements to the provider, is a tool that could guarantee conformity between political goals, actual execution of powers and the activities of providers. According to the regulations, the local council must at least once a year draw up a quality standard and follow up on quality and control of services.

ANNEX 14

SSGI country report Austria

➢ Organisation of SSGI in Austria

SSGI are mainly provided in the area of social security and social services. Social security systems are mainly organised via self-administration (administration via representatives of the insured person or via the employer in particular concerning sickness, accident and pension), but also organised directly via public bodies. The services are financed in different ways ie public funding from the general budget, financing via special funds etc. The whole area of the statutory social security is based on a pay as you go system. All bodies involved in sickness accident and pensions are organised in an umbrella organisation. Benefits are paid out by public authorities or insurance bodies, which are again based on a self-administration.

Social services as such are mainly provided at local and regional level. Services provided are in the field of child care, residential homes and nursing homes, day care centres and community services (including services for vulnerable groups), residential and/or employment facilities for people with special needs and advice and support for people with special problems (and many more specific services).

All social services are subject to regular screenings and based on active involvement of clients. Constant attention is paid on improvements, in particular in the area of service orientation and consumer protection. Other focus points are improvement of quality, controlling and establishment of benchmarking and indicators.

Please note that the above is an extract from previous replies to the questionnaires distributed by the Commission in the past years only.

➢ Discussion process in Austria

Back in 2007 the then ministry of social affairs and consumer protection commissioned a study with the aim to investigate the possibilities of a legal framework for SSGI. Said study also took a look at the then current legal provisions relevant for SSGI (primary and secondary Union law). The study has been brought to commissioner Spidlas attention as well as to the SPC.

A conference of national experts and actors involved has been organised to strengthen the national discussion process in 2008.

All relevant stakeholders and parties involved are informed on a regular basis by the ministry of social affairs, employment and consumer protection, in particular concerning new developments (ie new guide 2013). In order to form a national position new documents issues by the commission are sent out for stakeholders and parties involved for comments.

➢ Regulatory Framework in provision of SSGI/ Types of service providers

Austria is a country organised as a Federal Republic with split competences between the federal and the Länder level. This is particular important in the field of SSGI.

As an example: In the field of long term care the federal level sets the legal framework for any kind of provision of services. Current developments can be found in the NSR from 2012 and NRPs. Concrete services are provided by the regions and/or at the community level.

The responsibility for the provision of SSGI lies principally within the competence of the Länder, local municipalities, cities and even boroughs. One of the main exception to this are measures concerning labour market policies. Despite the rather regional organisation of the public employment service the competence for the general labour market policy lies with the federal ministries.

Most of the services in Austria are provided by regional and local authorities at the respective level. Some, however, contract external providers. In addition to this private providers offer their services independently.

Since the responsibility lies within a smaller entity with the freedom to decide based on local necessities different models are currently in place. Each borough might have its own approach to SSGI, based on the relevant legal situation within the Land the borough is situated in.

In addition to this a so called §15 agreements (§15 Bundesverfassung) can be agreed on between the federal and the Länder level, ie provision of health services, child care services.

➢ Public Procurement Law

One basic assumption for the application of procurement law is the existence of a functional (competitive) market. The majority of SSGI covers tasks in the public interest and are therefore provided by the state itself or state owned and financed entities to a very large extent, which means that they are not provided within the context of a functional market. Consequently the procurement law is not applicable in these cases. The procurement law only plays a role, when social services are contracted out (“outsourced”) to private providers and the lighter regime for services mentioned in Annex II B of directive 2004/18/EC applies.

The proposal for a new directive on public procurement is coordinated and negotiated by the Federal Chancellery of Austria. The federal Ministry of Labour, Social Affairs and Consumer Protection positively remarked the fixing of the threshold amount for social and other specific services at € 750.000. However, the definition of social services persists to be rather unclear as services mentioned in Annex II B of the current Directive 2004/18/EC are not adequately included in Annex XVI of the discussed new public procurement directive.

As regards the proposal for a new directive on the award of concession contracts Austria maintains the position that there is no need for further legal acts in this area. The current rules guarantee a flexible award of social services, which is essential for maintaining high quality and customer orientation. It should be kept in mind that many social services are provided by voluntary welfare associations, which do not operate for profit. In such cases a “market price” cannot be established and therefore the rules for calculating the estimated value of a contract are not fit for purpose.

➢ Application of State Aid rules

In Austria the majority of SSGI are not only provided on a local and regional level, but also regulated on this level. The federal level itself does not have a lot of competences in this area.

➢ Perspectives and reflexions

A first discussion about SSGI started way back in noughties and has never stopped since. One of the milestones from the Austrian point of view was the conference held in Austria during the presidency (April 2006) with the emphasis on modernisation and dynamics within the sector. This conference brought together many national as well as international experts. Another important conference including all stakeholders was organised in 2008.

Because of the major interest in the topic of SSGI work has been carried out on EU level as well as on national level. Results provided by the SPC SSGI working group have proven useful in the day to day work. The voluntary quality framework, agreed on in November 2010, has been welcomed by all stakeholders involved.

The interactive information service established by the Commission in 2008 was another major improvement and contributed to a much better understanding. Misunderstandings have been addressed and the service has provided legal certainty in some areas. Nevertheless, there still seem to be some problems on a local or regional level. However, these problems are being dealt with on these levels and not reported to the national level.

One of the main issues related to SSGI on EU level are different definitions in secondary EU law. This seems to one of the sources for misunderstandings. Since definitions and references to SSGI are spread all over various regulations, directives, green books, white books etc. it seems more and more complicated to keep track and follow developments thoroughly.

ANNEX 15

Social Services of General Interest in Portugal

In Portugal, there is no clear legal notion of what is considered a service of general economic interest (SGEI) or a social service of general interest (SSGI). These concepts are not known to most public administration authorities. The most known concept is *"Public Services"*, activities of general interest under direct or indirect State's responsibility, because such activities, including economic, result in the satisfaction of collective needs and can not stay in the availability of private providers. The first reference to SGEI (water and sanitation, energy, telecommunications, postal, health, local and regional transport, education, broadcasting and television services) in the Portuguese framework dates back to 1999; all these sectors are framed by national regulatory authorities, that define their objectives of general interest, and are subject to procurement rules.

The Portuguese Public Contract Code regulates the mandatory procedures for public procurement and also defines the rules applicable to the execution of public contracts. The Portuguese model of electronic public procurement is unique in Europe. The project began in 1999 with university professors and later was joined by companies from the information technologies market. They developed a public procurement platform – *"Portal BASE"* - for central and local public administration – which is computer open, transparent and non discriminatory, aimed at dematerialization of public procurement procedures. The portal is a space for dialogue for those involved in a public contracting procedure, but also for the public in general. As a benchmark information space in matters relating to public procurement, the portal compiles in one place the most important information on public contracts signed, publishes, amongst other things, the launch of tender processes and other procurement procedures, the signing of contracts and any penalties applied for infractions of the Public Contract Code, disseminates technical contents and the relevant legislation, facilitates observation and awareness of public expenditure.

Portuguese SSGI can be grouped into two major types of services: social security schemes, and other services provided directly to the population. The services used daily by consumers, in particular education, health and other social services, are the responsibility of both central and local governmental authorities, private non-profit agencies and profit providers, these latter providing, mainly at high prices, long term care for the elderly and childcare. Generally, there is no cross-border provision.

The provision of social housing in Portugal has always been very limited and its nature and scope strongly depended on the political and social context of the Portuguese society and its evolution. Central authorities are responsible for developing legislation concerning social housing, and for financing its direct provision. Since 1999, providing social housing is one of the responsibilities of municipalities, with the scope to fight poverty and social exclusion. At the central level, social security authorities are also responsible for a residual number of social houses. Although there is not a national legal definition of social housing in Portugal, the term is widely used, and it is understood as *"housing which is neither produced nor traded as merchandise"*. Social housing includes the direct provision for the re-housing of families living in shanty towns, the direct provision for sale or for rent at a regulated price to persons/households below a certain family income, or defined as vulnerable, or the financial support for rehabilitation of houses for families within certain household income limits. It is intended for people in need, and it depends on whether or not they have a house, or of their housing conditions, their monthly income, or of special situations, in particular health status or physical or mental disability. Delivery of social housing by external providers is limited by regulations and criteria applied by the different public funding programs. There is no cross-border provision of social housing.

Long-term health care (or integrated care) includes convalescent care, rehabilitation and reintegration for all citizens who need them, such as chronically ill people in a situation of dependence, or people with incurable diseases. Interventions are integrated, both in health and social support, aimed at the global recovery, promoting independence and improving the functionality of the dependent person, through his rehabilitation. Health care had, until now, no relevant costs for citizens, but because of the economic crisis, social and health support services users, even families with economic difficulties, are obliged to make a small monetary contribution to the service, based on the user's income. There is a national network of integrated care, ensuring its provision through public and private units, hospital staff and home visits.

With regard to employment services, the national public mission is to promote the creation and quality of employment and fight unemployment through the implementation of active employment policies and vocational training; the central authorities develop work experience training programs, and support the creation of self-employment, including the use of unemployment benefits to create self-employment. Programs are aimed at the entire population, but there are programs specifically designed for immigrants, for people with disabilities and difficulties in access, maintenance and progression in employment, for people with economic needs and for the unemployed (social support to attend professional training courses); most programs are financed by EU and have no significant costs to users.

Social security is the responsibility of a public central institution integrated in the Ministry of Solidarity and Social Security, which manages the social security schemes, and the treatment, repair and recovery from illness or disability arising from occupational risks, in accordance with the principle of universality, which consists of all people's access to social protection provided by the system. The protection scheme for accidents at work is private - employers and workers celebrate insurance contracts with insurance companies; insurance is mandatory. Social welfare takes place through the provision of cash benefits, access to the national network of social services and programs that fight poverty, dysfunction, marginalization and social exclusion.

There are three types of social security schemes: a) **citizenship's social protection system**, in order to guarantee the basic rights of citizens and equality of opportunity, promoting well-being and social cohesion; it provides protection to vulnerable groups such as children, youth, disabled and elderly and other people facing economic or social difficulties, and benefits for the poorest, like social income or social pensions; **b) welfare system,** for all employees, which covers sickness, maternity, paternity and adoption, unemployment, occupational diseases, old age and death; the benefits are self-financing - beneficiaries and their employers are obliged to contribute; **c) complementary system:** supplementary professional schemes covering workers belonging to a company, a group of companies or others employed in an industry trade, as well as self-employed (as lawyers).

The national Ministry of Solidarity and Social Security is also responsible for the organization of institutions where children between 0 and 3 years old are cared for in a group-system. At regional level, the Social Security Centers have the responsibility of enabling the implementation of national policies in their regions. As regards kindergartens, for children aged 3, 4 and 5 years, the national Ministry of Education is responsible to ensure the pedagogic quality of the teaching. Also local authorities (municipalities) bear responsibility in their organization. The Ministries are responsible for funding. There is a public and a private network. The public network comprises all contexts set up by and working under central and local public administration. The private network comprises all other contexts run by private and cooperative schools, private institutions of social solidarity, charities, mutual trusts and other non-profit institutions providing care and education. They are supervised and inspected by the Ministry's inspectors. The majority of early childhood education and care services are outsourced in the sense that they are independently set up and provided but receive some form of state funding. A licensing procedure

is open to all institutions that fulfil the requirements needed (physical conditions, technical and human resources conditions) to work as service provider. Once licensed, a management agreement is concluded between the District Centers and the different institutions. The agreement includes the minimum norms regarding functioning, that has to be fulfilled by the service provider. Also, for private institutions which deliver services without public support, licensing is compulsory.

The Law mentions that in certain cases, the private institutions of social solidarity might be shut down. These situations occur when the institution presents serious deficiencies in the facilities, security, functioning, hygiene and comfort, which put at stake the user's rights or their quality of life. Once selected, external providers have the obligation to perform the service. Besides the accomplishment of the commitments assumed in the contract, the provider has to give all the data required by Social Security: for instance, the number of clients that each month benefits from the service. The Law that regulates the delivery of social services by private providers does not set any numerical limits on the providers which are active in the sector. The only limitations are dictated by local needs: that means whether the service is needed or not in the particular region where the institution proposes the creation of the service. There is no cross-border provision.

It is not mandatory that providers are non profit, but the services targeted to those in need are not normally of interest to the private sector. In the Portuguese framework, profit social providers can provide services for children and young people, for the elderly, for people with disabilities (occupational activity centers, residential homes, monitoring and animation services), for people with mental illness, or for other vulnerable groups: residences for people with HIV/AIDS, community integration services, or family and community support services, such as community centers and shelters. The decision to license the activity of profit social providers is within the competence of central public authorities. The granting of license to operate depends on their facilities, equipment and staff to develop appropriate activities.

Social security authorities pursue the objectives of social action through direct management of social institutions (the so-called integrated establishments), or by establishing agreements with private non-profit institutions of social solidarity. Agreements, only for non-profit private institutions, include management of State's social facilities, with no monetary compensation, and other forms of cooperation, such as social institutions providing social services in their own establishments, and receiving a sum for each social service and each user. The conclusion and maintenance of the agreements depend on the fulfillment of certain conditions, and they can be reviewed or terminated. In addition to financial support, it is also provided specific technical support through various programs and measures for investment in the creation or renovation of facilities of the non-profit sector. In the social security services area, the rules of public procurement generally don't apply, because the activity does not involve profit, or involves only enough ensuring sustainability of the institutions - providers are chosen directly by the State in accordance with criteria defined by law. The system is mainly financed by the State, using taxes and workers and employers contributions to the social security system - these services are not viewed as having *"economic nature"*.

Currently, in Portugal, there is a reform of social services as a result of the concerns about the economic crisis and the future financing of the system; this process is promoting a greater commitment between public authorities and civil society organizations, that are responsible for running most of the existing social services for children and elderly people, at low cost, or at no cost for the users.

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