Implementing the Community Lisbon programme

Social services of general interest in the European Union

European Commission

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European Commission
Directorate-General for Employment, Social Affairs and Equal Opportunities
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INTRODUCTION

Modernising social services is one of the most important issues facing Europe today: on the one hand, these services play a vital role in fostering social cohesion; on the other, their transformation and job-creation potential make them an integral part of the Lisbon Strategy. The conclusions of the European Council in March 2006 confirmed this, reiterating that the internal market for services must be made fully operational, while preserving the European social model.

This Communication is a follow-up to the White Paper on services of general interest[1], which announced a "systematic approach in order to identify and recognise the specific characteristics of social and health services of general interest and to clarify the framework in which they operate and can be modernised", as reiterated in the Social Agenda[2] and the Community Lisbon programme[3]. Following the vote in Parliament on the first reading of the proposal for a Directive on services in the internal market on 16 February 2006, the Commission excluded health services from the field of application of its amended proposal[4]. It undertook to present a specific initiative and is now giving thought to this subject[5]. Consequently, this Communication does not deal with these services. In its amended proposal for a Directive on services in the internal market the Commission excluded *"social services relating to social housing, childcare and support of families and persons in need"* from the scope of the Directive. It is now the responsibility of the European legislator to finalise the legislative process.

This Communication should be seen in the context of the shared responsibility of the Community and of the Member States for services of general economic interest, established by Article 16 of the EC Treaty. It is the result of close consultation[6] with the Member States and civil society organisations, which has allowed the Commission to conduct an initial survey of the issues at stake and the relevant questions. The Commission strongly wishes to pursue this open process of consultation and reflection through the following steps as set out in this Communication.

It should be remembered that the existing Community framework respects the subsidiarity principle. Member States are free to define what they mean by services of general economic interest, or in particular by social services of general interest. Within the Member States, the public authorities, at the appropriate level, define the obligations and missions of general interest of these services, and how they are to be organised. On the other hand, the Community framework requires Member States to take certain rules into account when they determine the arrangements for applying the objectives and principles they have established. This Communication is a further step in taking the specific nature of social services into account at European level and clarifying, to the extent that they are covered, the Community rules applicable to them.

1 COM(2004) 374, 12.5.2004.
2 COM(2005) 33, 9.2.2005.
3 SEC(2005) 981, 20.7.2005.
4 COM(2006) 160, 4.4.2006.
5 See Annual Policy Strategy for 2007, COM(2006) 122, 14.3.2006, p. 11.
6 The results can be found at: http://ec.europa.eu/comm/employment_social/social_protection/questionnaire_en.htm.

1. SOCIAL SERVICES – PILLARS OF EUROPEAN SOCIETY AND THE EUROPEAN ECONOMY

1.1. Social services in the European Union

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 socially cohesive 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 addition 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[7].

Although, under Community law, social services do not constitute a legally distinct category of service within services of general interest, the list above demonstrates their special role as pillars of the European society and economy, primarily as a result of their contribution to several essential values and objectives of the Community, such as achieving a high level of employment and social protection, a high level of human health protection, equality between men and women, and economic, social and territorial cohesion. Their value is also a function of the vital nature of the needs they are intended to cover, thus guaranteeing the application of fundamental rights such as the dignity and integrity of the person. It became clear during the consultation with Member States and civil society organisations that, as a result of these specific features - in the performance of their general interest role - social services often present in practice one or more of the organisational characteristics below[8]:

- they operate on the basis of the solidarity principle, which is required, in particular by the non-selection of risks or the absence, on an individual basis, of equivalence between contributions and benefits,

- they are comprehensive and personalised, integrating the response to differing needs in order to guarantee fundamental human rights and protect the most vulnerable,

- they are not for profit[9], address the most difficult situations and are often part of a historical legacy,

- they include the participation of voluntary workers, expression of citizenship capacity,

- they are strongly rooted in (local) cultural traditions. This often finds its expression in the proximity between the provider of the service and the beneficiary, enabling the taking into account of the specific needs of the latter,

- an asymmetric relationship between providers and beneficiaries that cannot be assimilated with a 'normal' supplier/consumer relationship and requires the participation of a financing third party.

7 Education and training, although they are services of general interest with a clear social function, are not covered by this Communication.
8 These criteria are the result of the survey mentioned above (see footnote 6).
9 In the Sodemare judgment, the Court took the view that a not-for-profit condition could be compatible with the principle of freedom of establishment.

1.2. A general trend towards modernisation and quality

Social services constitute a booming sector, in terms of both economic growth and job creation. They are also the subject of an intensive quest for quality and effectiveness[10]. All the Member States have embarked upon modernisation of their social services to tackle the tensions between universality, quality and financial sustainability. Although social services are organised very differently in the Member States, certain general aspects of this modernisation process can be seen:

- the introduction of benchmarking methods, quality assurance, and the involvement of users in administration,
- decentralisation of the organisation of these services to local or regional level,
- the outsourcing of public sector tasks to the private sector, with the public authorities becoming regulators, guardians of regulated competition and effective organisation at national, local or regional level,
- the development of public-private partnerships and the use of other forms of funding to complement public funding.

This more competitive environment and the taking into account of the specific needs of each person, even those that cannot be met, create a climate favourable to a "social economy", characterised by the importance of not-for-profit providers but faced with the need to be effective and transparent.

1.3. A Community framework that welcomes differences and is favourable to modernisation

Many financial and political Community initiatives and actions, including the social dialogue, are already supporting the development and modernisation of social services. From a financing point of view, the European Social Fund supports many projects concerned with the quality of services intended to foster social inclusion and integration through employment. Similarly, the ERDF has earmarked almost seven billion euro for social services and healthcare infrastructure in the EU25 during the period 2000-2006. Among the political initiatives, the open method of coordination has allowed the identification of good European practices for the quality and integration of services intended to combat poverty; it has applied directly since 2005 to long-term care services. The action programme for social inclusion encourages the exchange of good practices and transnational cooperation. Other fields of activity of the Union, in particular in the area of public finances, also provide support and a framework to the modernisation of social services.

The European involvement in the field of social services also has a basis in the application of Community law, as a result of the processes of opening up and diversification initiated by the Member States themselves, with the consequence that a growing proportion of social services in the European Union, until now managed directly by the public authorities, now come under the Community rules on the internal market and competition. This European involvement is, itself, a sign of the trend towards modernising social services, via greater transparency and greater effectiveness in organisation and financing. It urges better use of budgetary resources, limited in principle, earmarked for social policies and contributes to greater variety and higher quality of services.

At the same time, this new situation for those concerned has meant that the conditions for the application of certain Community rules need to be clarified[11].

10 See Annex 1.
11 This request for clarification was one of the main results of the consultation exercise.

2. THE APPLICATION OF THE COMMUNITY RULES IN THE AREA OF SOCIAL SERVICES – AN ONGOING LOGICAL APPROACH

2.1. Applying the subsidiarity principle and the distinction between economic and noneconomic services of general interest

In general, the case law of the Court of Justice ("the Court") indicates that the EC Treaty gives Member States the freedom to define missions of general interest and to establish the organisational principles of the services intended to accomplish them.

However, this freedom must be exercised transparently and without misusing the notion of general interest, and the Member States must take account of Community law when fixing the arrangements for implementing the objectives and principles they have laid down. For example, they must respect the principle of non-discrimination and the Community legislation on public contracts and concessions when organising a public service.

Moreover, when it comes to services of an economic nature, the compatibility of their organisational arrangements with other areas of Community law must be ensured (in particular freedom to provide services and freedom of establishment, and competition law).

In the field of competition law, the Court has established that any activity consisting of supplying goods and services in a given market by an undertaking constitutes an economic activity, regardless of the legal status of the undertaking and the way in which it is financed[12].

With regard to the freedom to provide services and freedom of establishment, the Court has ruled that services provided generally for payment must be considered as economic activities within the meaning of the Treaty. However, the Treaty does not require the service to be paid for directly by those benefiting from it[13]. It therefore follows that almost all services offered in the social field can be considered "economic activities" within the meaning of Articles 43 and 49 of the EC Treaty.

The public authorities and the operators in the field of social services of general interest perceive the constant evolution of Court jurisprudence, in particular for the notion of "economic activity" as a source of uncertainty. Whilst case law and Community legislation[14] have endeavoured to reduce this uncertainty or clarify its impact, they cannot do away with it completely.

2.2. Specific situations encountered today by the social services

To properly understand the specific conditions for the application of the Community framework to social services, this Communication deals with the most frequent situations.

2.2.1. Delegation

- Deciding whether to delegate a social mission in whole or in part

If the public authorities decide to delegate the mission to an external partner or to form a public-private partnership, Community law on public contracts and concessions may come into play.

In such cases, the public body delegating a social mission of general interest to an external organisation must, at the very least, respect the principles of transparency, equal treatment and proportionality. Moreover, in certain cases, the public contracts Directives impose more specific obligations. For example, Directive 2004/18/EC concerning, inter alia, public service contracts requires contracting authorities to establish technical specifications for contract documents such

12 See, for example, cases C-180/98 to C-184/98, Pavlov and others.
13 Case C-352/85, Bond van Adverteerders.
14 See Annex 2.

as contract notifications, specifications or complementary documents. Certain Member States and service providers have pointed out the difficulty of establishing in advance a precise description of the specifications for social services, which must be adaptable to the individual circumstances of persons in need.

To overcome this difficulty, technical specifications may be established on the basis of performances and functional requirements. This means that the contracting or awarding authorities may decide to define just the aims to be achieved by the service provider. This way of defining technical specifications should guarantee the necessary flexibility and, at the same time, sufficient precision to identify the subject of the contract.

- Management of a social service under a public-private partnership

Public-private partnerships (PPPs) are being used increasingly to provide social services of general interest.

In this context, the term "concessions" and the rules concerning their award, as well as the application of the provisions of public contracts relating to the creation of mixed capital entities whose objective is to provide a public service (institutionalised PPPs), should be clarified.

Significant clarifications on the distinction between "internal" and "third party" entities were brought by the Court of Justice's judgment in the Stadt Halle case[15]. According to this ruling, the procedures for awarding public contracts apply as soon as a public authority intends to conclude a contract for pecuniary interest with a legally distinct enterprise in whose capital it has a holding with one or more private enterprises.

2.2.2. Use of public financial compensation

A public authority may decide to pay compensation to an external body for the performance of a social mission of general interest. This financial compensation is intended to make up for any expenditure involved in accomplishing this mission which would not have been incurred by an enterprise operating solely according to market criteria. Following a judgment of the Court[16], the Commission[17] took a Decision pertaining to State aid which has already considerably simplified the requirements on financial compensation received by social service providers and provided the necessary legal certainty. This Decision established the thresholds and criteria in such a way that the compensation received by the vast majority of social services is automatically considered to be compatible with the competition rules and therefore exempt from the obligation of prior notification. Compensation will still have to be communicated to the Commission for the small number of social services which do not meet these thresholds and criteria[18].

However, these simplifications can apply only if the services in question have, in advance and by legal act, been attributed a mission of general interest. The Commission's decision therefore encourages Member States to make the missions they delegate to social services explicit, thus leading to transparency which is useful for everyone, both the services in question and their users.

2.2.3. Regulation of the market

Where private operators provide a social service, Member States may decide to support the operation of the market to ensure that certain objectives of general interest are met. In so doing, they must respect Community law, in particular the rules and general principles of the Treaty pertaining to the freedom to provide services and freedom of establishment. It should be remembered in this context that services excluded from the scope of the Directive on services in the internal market will continue to be subject to these rules and principles.

Freedom of establishment (Article 43 of the EC Treaty) allows an operator to perform an economic activity through a permanent base in another Member State for an indefinite period. This will often be the case for social services frequently requiring the use of infrastructure in practice (social housing, homes for elderly people).

15 Case C-26/03, judgment of 11.1.2005.
16 Case C-280/00, judgment of 24.7.2003, Altmark Trans.
17 OJ L 312 of 29.11.2005, pp. 67-73.
18 See Annex 2.

Freedom to provide services (Article 49 of the EC Treaty) means that an economic operator may provide services temporarily in another Member State without being established there. It also allows a consumer to use services offered by a provider established in another Member State. Articles 43 and 49 of the EC Treaty rule out not only discriminatory national rules but also any national rule applied indiscriminately to national and foreign operators which makes exercising these fundamental freedoms more difficult or less attractive. However, according to the case law of the Court, social policy objectives are overriding reasons based on the general interest which may justify the application of measures intended to regulate the market, such as the obligation to hold a permit in order to provide a social service. The Court ruled that such measures must be based on objective, non-discriminatory criteria which are known in advance so as to support the exercise of the national authorities' powers of appraisal. To be compatible with Community law, these measures must also be proportionate. Moreover, the opportunity for access to an adequate recourse has to be guaranteed[19].

2.2.4. Compatibility with the rules on access to the market

An analysis of these examples illustrates the flexibility in the application of the Treaty when it comes to recognising (in particular in the spirit of Article 86, paragraph 2) the inherent features of these services' missions of general interest. When the compatibility of the modalities of accomplishing a mission of general interest with the rules of access to the market is assessed, these specific features are therefore taken into account. The Community rules encourage the public authorities to be clear about the correspondence between the burdens or obligations associated with the mission and the restrictions on access to the market they consider necessary to allow these organisations to perform properly, beyond the definition of missions of general interest attributed to a social organisation.

19 See for instance the judgment of 20.2.2001, Case C-205/99, Analir.

3. BETTER MONITORING OF AND SUPPORT FOR SOCIAL SERVICES OF GENERAL INTEREST IN THE EUROPEAN UNION

3.1. In-depth consultation on the specificity characteristics

This Communication presents an open list of characteristics reflecting the specific nature of social services as services of general interest (see Section 1.1). In addition to the traditional criteria of the general interest (universality, transparency, continuity, accessibility, etc.) recognised for social service missions, these characteristics refer to the organisational conditions and modalities applying to them. They will constitute the starting point for a consultation by the Commission of all the actors concerned: Member States, service providers and users. This consultation will notably look at:

- the elements constituting these characteristics as well as their pertinence to gauge the specific features of social services of general interest;
- how they could be considered by the Member States when defining the general interest missions of social services and the arrangements for their organisation, so as to ensure a good institutionalised link with the Community framework;
- the experiences with the application of Community law in the field of social services of general interest and possible problems that are faced in this context;
- how the same (or other) characteristics could be considered by the Commission where it has to check subsequently and individually, the compatibility of the organisation modalities of social services with the applicable Community rules.

3.2. Monitoring the situation regarding social services of general interest in the European Union

In order to improve the reciprocal knowledge of operators and the European Commission of questions concerning the application of the Community rules to the development of social services and to deepen the exchange of information between operators and the European institutions, a monitoring and dialogue procedure in the form of biennial reports will be established.

The reports will come within the framework of other Community initiatives supporting the modernisation of social services, in particular the open method of coordination in the area of social protection and inclusion.

In early 2006, the Commission launched a study to collect the necessary information to draft the first biennial report. This information will concern the functioning of the sector, its socioeconomic importance, as well as the implications of the application of Community law. The results of the study are expected by mid 2007.

CONCLUSION

This Communication is a further step towards taking into account the specific nature of social services at European level. On this basis, the Commission will pursue its consultation with the Member States, service providers and users of services.

On the basis of this open process of consultation to which the Commission attaches a great deal of importance, the results of the ongoing study on social services and the work of the Social Protection Committee, the Commission will publish a first biennial report and reexamine the situation of social services of general interest or certain sectors among them in the light of Community law being applied. The aim is to take better account of the diversity of social services, as defined in Section 1.1. above, and to consider how the specific characteristics of social services of general interest can be used by both the Commission and the Member States in order to reduce the legal uncertainty inherent to situations where a case-by-case approach is needed. In the light of this experience, the Commission will decide how to follow up this process and identify the best approach to take, including giving consideration to the need and legal possibility for a legislative proposal.

ANNEXES

ANNEX 1. SOCIAL SERVICES: A DYNAMIC SECTOR OF THE EUROPEAN ECONOMIES

In preparing the Communication the Commission received reports on the national social services from Member States[1] which give a broad picture of the services under consideration. This Annex is based on this information and is complemented by quantitative material to describe the employment dynamics of the sector based on EU labour market statistics. The sector covers the following main service activities: financial services through social security and services to individuals through the provision of long-term care and social services. While, except for the basic social security schemes, these services are not considered to be part of government or public administration *stricto sensu*, public provision or at least public funding has a major role in most of these services.

Since in many statistical sources health and social services are not dealt with separately, data that are given in this Annex will also cover health services.

The Annex is structured in the following way: first, it considers the role of public policy for the development of social services, secondly it looks at the composition of the broad sector, thirdly it reviews recent trends in the sector and the way in which policy has responded to them and finally it reviews evidence on labour market trends in the sector. This is complemented by a box reviewing some of the socioeconomic drivers of structural change in the sector.

1. Role of the State and political determination of tasks

Public policy is decisive for these services as the Member States' reports underline that some of these services would not be provided at all without State action, notably those to people experiencing disadvantages, or that if these services were to be provided through the market alone this would be in a fairly different manner characterised by substantial inequality in access and coverage and possibly also in terms of quality.

Apparently, in all Member States public service obligations have been established to guarantee continuous and universal coverage in the whole territory and across the different social and income groups, as well as quality standards of delivery and affordability independent of income. A cost-price principle for the individual is rejected according to all the replies and therefore public resources are identified as the principal financial source.

For some of these services the reports highlight additional reasons for a major state role including huge and very long-term investments such as education and research in the health sector and the need to ensure commitments (retirement pension and long-term care) over the duration of a human life or even longer (survivors pension).

2. Social services in Member States

Social security

Social assistance (guaranteeing a minimum income) and family support is usually publicly provided. Social security covers the most fundamental risks for people including retirement, disability, work accident, health and, increasingly, long-term care, support for people with care responsibilities and unemployment. Social security is also publicly provided or by tri-or bi-partite institutions strictly regulated by law. Supplementary social security is generally provided for by non-public actors and in some countries, such as France and Belgium, mutual undertakings play an important role.

Personal social services

These services – in contrast to financial ones – are about personal support to facilitate peoples' inclusion in society. They encompass: first, help for people in

1 These descriptions can be consulted on: http://ec.europa.eu/employment_social/social_protection/answers_en.htm

mastering immediate life challenges or crises (such as lack of housing, indebtedness, unemployment, drug addiction, family breakdown); secondly, activities with a developmental purpose to ensure people have the skills necessary for full inclusion in society (rehabilitation, mentoring of ex-prisoners language training for immigrants) notably the labour market (training, professional rehabilitation) and, thirdly, services to ensure the inclusion of people with long-term needs such as disability and poor health. Some services may of course encompass all three dimensions of crisis support, personal development and long-term care and assistance. Given the specific nature of the activity one should add social housing as a fourth category although it serves all the three dimensions of helping people to integrate into society mentioned above. Even if education has a strong developmental purpose it is usually considered to be separate while childcare and many training activities are included. Most of the "personal social services" are provided for either by the public sector or by (voluntary) non-profit organisations. These non-profit organisations, which often depend to a significant extent on volunteer work and donations, are essential to maintain a high level of social services. Increasingly private undertakings are present in the field partially because private consumers start purchasing such services occasionally encouraged by public policy (private childcare) or because public authorities outsource activities.

3. Social services are in process of change

In response to changing needs and societal challenges social security is increasingly "activated" and turned into services to individuals (rehabilitation, job matching, adult learning, childcare) while new risks (e.g.; long-term dependency) create a demand for a new mix of social, training and health services and to promote prevention and healthy ageing. Indeed, these services undergo a continuous process of expansion and restructuring (see Graph 1).

Expansion and restructuring are closely related. The fundamental changes in our societies and in labour market participation have led not only to rising but also to more complex and diversified needs for social services, including health services. Less family support as a result of changing family structures and increased female participation in the labour market as well as more flexible labour markets requires more integrated and individualised services capable of addressing a variety of life issues in an integrated manner. More mobile people demand also more sophisticated, less bureaucratic services and request more choice and autonomy in provision. Ageing will in future articulate these trends markedly. This growing and changing demand puts pressure on the public provision and financing of these services. It also requires more and better-qualified staff.

4. Response of public authorities

Member States who are responsible for providing these services have reacted to the growing needs with three measures: broader use of non-profit organisations as providers, the partial "marketisation" of these services and a partial shifting of activities to non-public funding.

Role of non-profit organisations: Public authorities consider that non-profit providers are often better equipped to handle advice in difficult life situations and therefore to provide related services. Similarly the integrated provision of different services for specific groups may be better carried out by non-profit organisations with a strong cultural and ethical focus on supporting the disadvantaged. At the other end of the spectrum and going beyond the focus of this Communication non-profit structures are particularly well-placed to handle major activities such as housing or pension provision if social solidarity and user participation is to be at the heart of the activity. It is worth noting that in several Member States non-profit organisations handling activities of both types predate the formal constitution of state-run social services and have developed into "natural" partners of public authorities.

Opening to the market: The reports observe an increase in the use of external providers or the search for new sources of financing and increasing competition between providers. Member States consider that competition between providers can have a positive impact on service – not necessarily to save funds but improve quality and flexibility and provision. Market mechanisms, either through a regulated liberalisation or privatisation of a sector or through the introduction of some competition elements without opening it entirely to the "market" are used to a certain extent.

In general this does not concern the basic social security schemes (even if related tasks are sometimes outsourced). It is concentrated on health care/insurance, social housing and some types of personal social services aimed at particular groups of individuals like day care facilities or long-term care and childcare.

New sources of financing: On the one hand non-profit organisations are often seen as capable of mobilising resources not only in terms of money but also of human resources. On the other hand authorities are imposing co-financing instruments such as co-payments, user fees which link consumption of services and financing improving incentives for more rationale resource use.

5. Past and present employment trends in social services

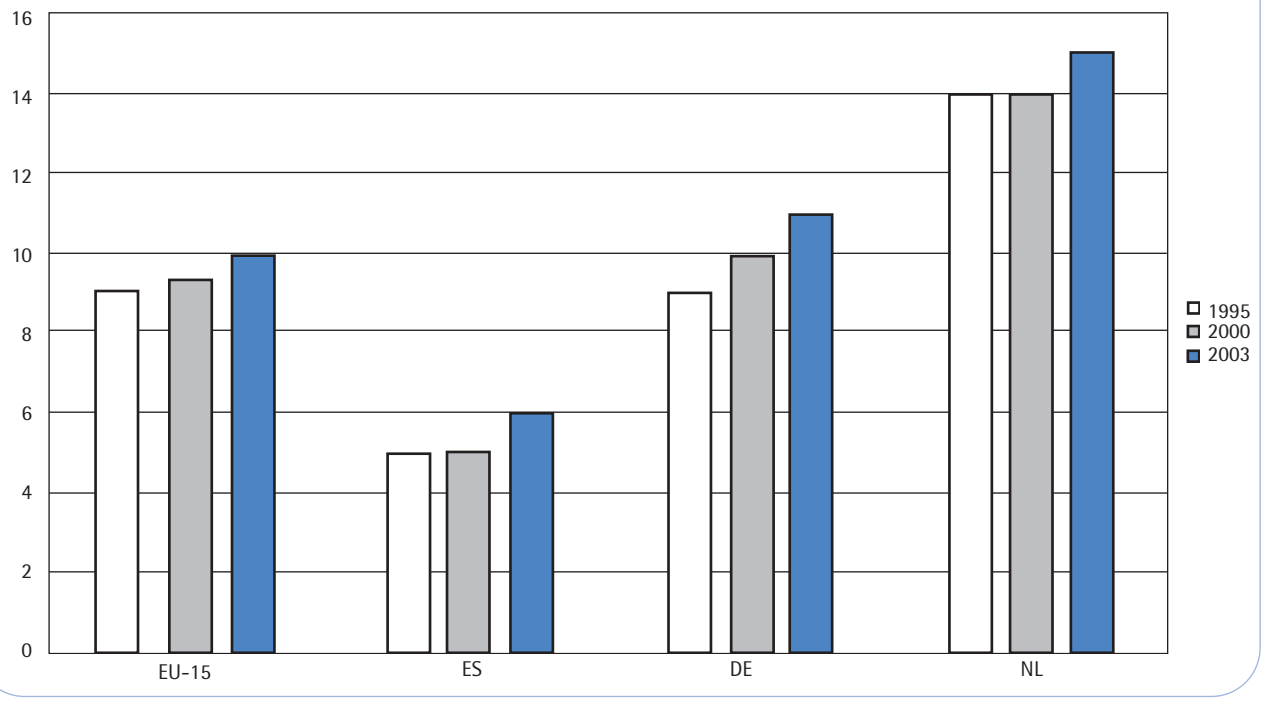
With the exception of social security, the sector is about services to individuals carried out by people and therefore employment-driven. As the services have expanded over the years, employment has increased continuously and recent adjustment pressures are also reflected in specific labour market patterns.

Continuous job creation and a substantial employment potential

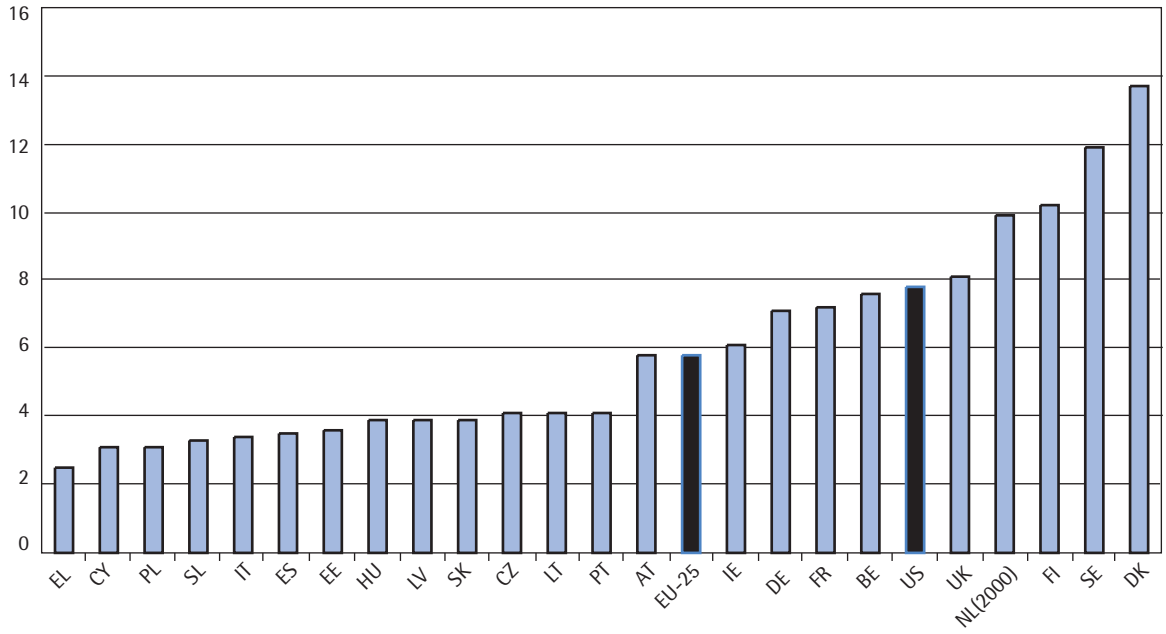
In the 1998-2003 period employment growth in the sector amounted in the EU 15 to 1.9% compared to total employment growth of 1.3%. The contribution of the sector to overall employment is rising. The share of health and social services in total employment in the EU-15 (Graph 1) has increased from 9% in 1995 to 10% in 2003.

The employment potential of the sector seems to be positive, as Graph 2 on employment rates in health and social services illustrates. In most new and southern Member States only 3-4 % of the population of working age are active in this sector, while in the Nordic countries and in the Netherlands this share has reached 10 % and more with western Europe (7%) at an intermediate level somewhat above the EU average of around 6% and the UK (8%) roughly equivalent to the level in the US of 7.8%. For the EU as a whole the employment gap to the US results roughly from lower employment in this sector.

Graph 1: Health and social sector share of total employment (in %)



Graph 2: Employment rates in health and social services in 2003 (in %)



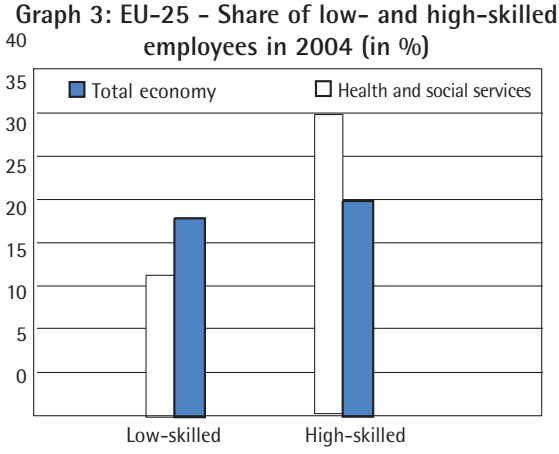
These wide employment differences lead to interesting questions about productivity and quality. On the one hand one would expect that when the southern and central and eastern European Member States grow fast, these services will need to expand to support mobilising labour supply and this may apply to the EU as a whole given ageing and shrinking working age population (see box at the end of this Annex). Similarly, one would expect that notably health services will expand as these economies catch up in income and wealth while the need for care services will increase everywhere due to ageing and societal change. On the other hand the comparatively high level of employment in the US does not necessarily need to reflect higher quality, notably in health, but may well be due to the more in-egalitarian market based organisation which is often said to lead to marked inefficiencies.

Little comparative information is available on the distribution of employment between health on the one hand and social services on the other. Estimates based on LFS information available suggests that from the 18 million about 12 million are employed in health and 6 million in various social services. Other related services such as compulsory social security activities and education may employ an other 1.5 million.

High shares of women and educated workers

Women made up 78% of those employed in the health and social sector in 2004 for EU-25 – well above the 44% of women employed in the total economy in 2004 in the EU-25. The sector employs proportionally highly educated workers (Graph 3) and belongs to the group of knowledge services. In fact, the share of highly educated people in the sector is 10 percentage points higher than in the total economy.

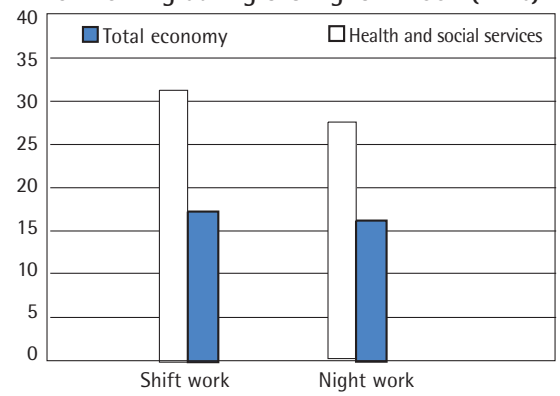
Graph 3: EU-25 - Share of low- and high-skilled employees in 2004 (in %)



Shift and night work above and wages below average

As the sector provides services to individuals non-standard working hours are more frequent. Compared to 17-18% of all employees, 28% of those employed in health and social services work during the night and 32% in shifts (Graph 4 on night and shift work compared to average) leading to substantial pressure on the workers in the sector.

Graph 4: EU-25 - Share of employees doing shift work or working during the night in 2004 (in %)



In contrast to the above-average educational levels and the higher share of non-standard working hours, gross hourly earnings are below the average in those countries for which data is available (see Chart 76 in Chapter 3 of Employment in Europe Report 2004). This is in line with the findings of many studies on the gender pay gap that sectors with high female shares in employment are characterised by wage penalties (see Chapter 1: Employment in Europe 2002). However, this results from a wide variety of working conditions and wage levels in health and social services. They comprise high-quality, high-wage employment but also many workers at low wages and in unstable employment as illustrated by a relatively high incidence of temporary contracts in most of the western European Member States.

Driving factors behind structural change and expansion in social services

1. Changes in societal structures

EU countries are undergoing fairly fundamental changes in societal structures in terms of household composition but also of life styles and mobility. Smaller families covering fewer generations in the same household, a rise in single households, a rapid increase in single parents and more geographical mobility have already led to higher demands for social and care services including childcare, different types of counselling and services to cope with recent forms of disadvantage. Ageing increases the share of people living in single households further.

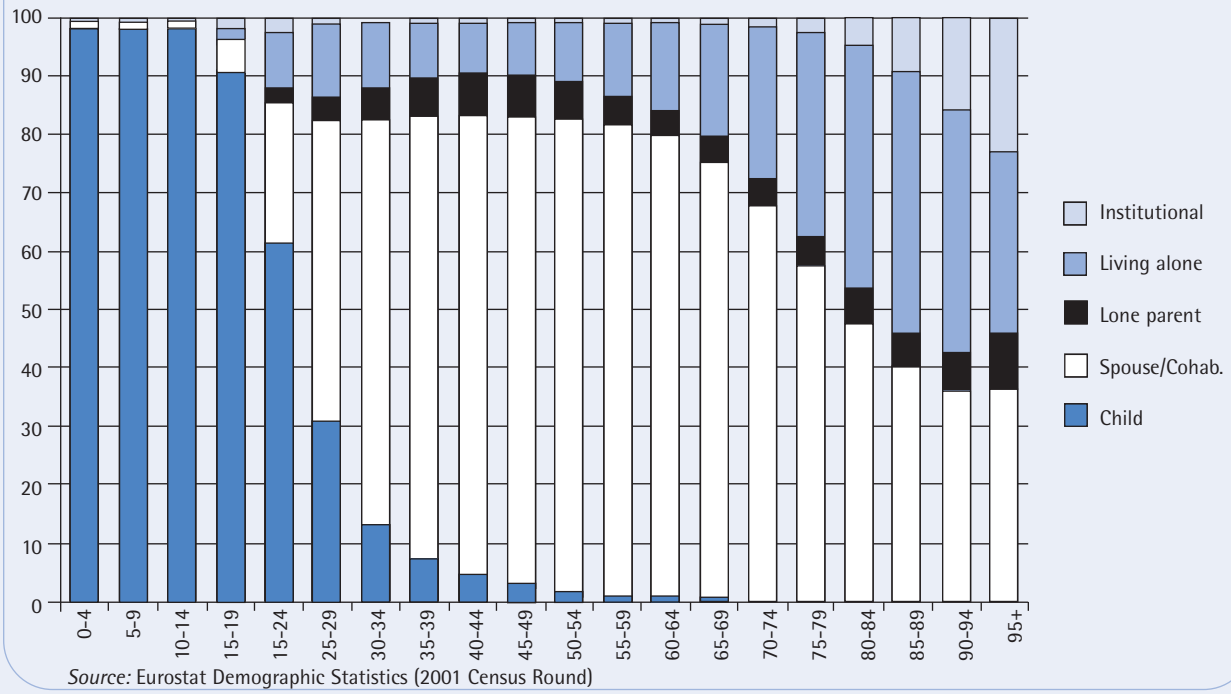
2. Changes in labour force participation and in labour market functioning

As illustrated by Graph 6, female participation is increasing in the long-run, compensating for declining participation in younger and older ages – a trend that is no longer sustainable. The rise in female participation needs to and is likely to continue while the declining participation of both sexes of older ages will need to be reversed dramatically. This has led to higher demands for care services for children and for the elderly. Changes in participation have also pushed up the demand for employment services, training, retraining and adult learning further exacerbated by structural changes in EU labour markets. More competitive labour markets and higher degrees of labour market flexibility resulting from more integrated EU economies and globalisation as well as technological change made support services for those who have difficulties to adapt even more necessary. Like in other cases this leads to both an increase in quantity of the services demanded and to a higher degree of complexity and sophistication.

3. Ageing

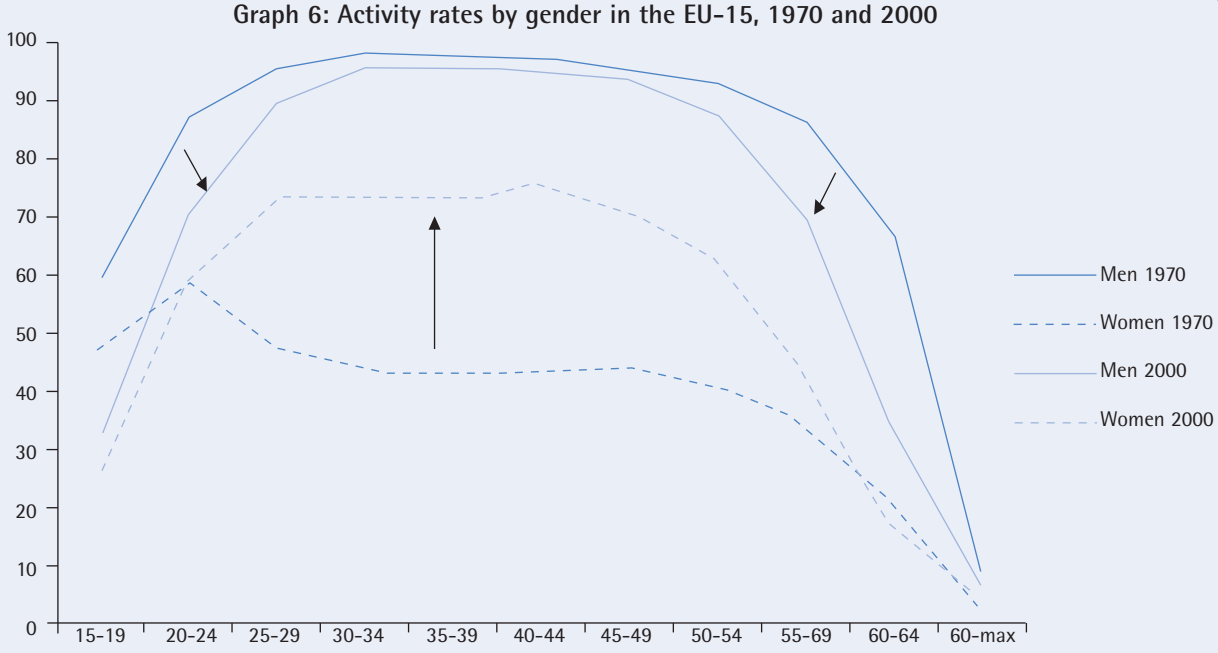
Demographic ageing as illustrated by Graph 7 is likely to have a strong impact on the demand for social and health services. While it is by no means certain to what extent future older generation will need a comparable amount of care to generations

Graph 5: Distribution of the population per age and household type (B1)



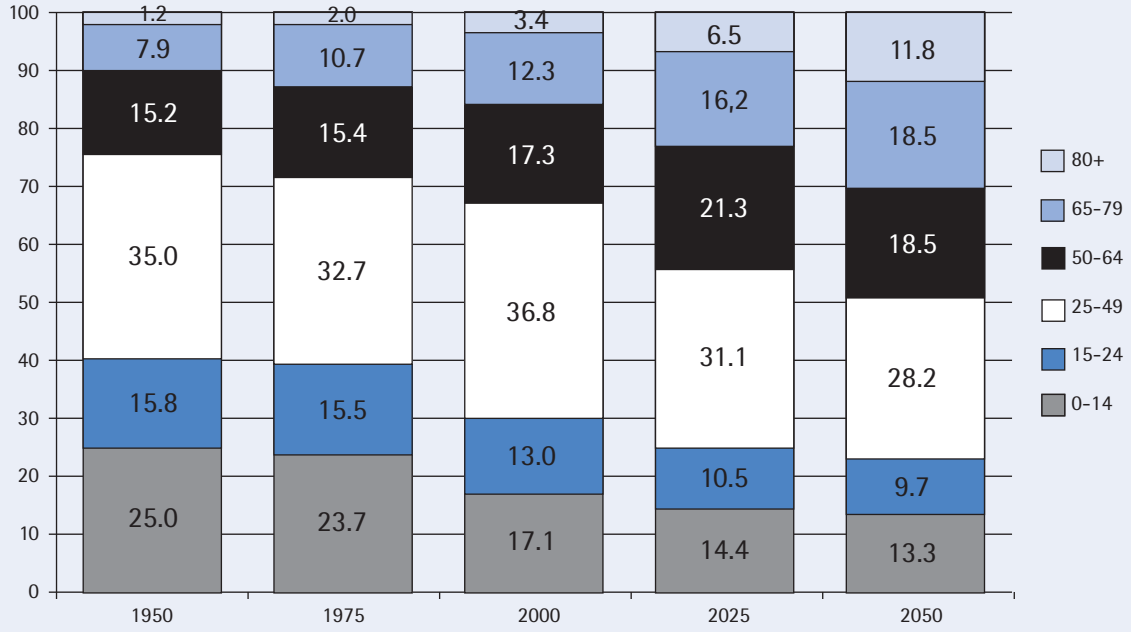
Source: Eurostat Demographic Statistics (2001 Census Round)

Graph 6: Activity rates by gender in the EU-15, 1970 and 2000



Source: OECD
Note: See also ILO, Economically Active Population Estimates and Projections: 1950-2010

Graph 7: Distribution of the population per age group in the EU-25 (1950-2050)



of similar age, today it is clear that an increase in the share of the age group of those over 80 years will increase demand for long-term care services. Moreover, the general rise in the share of people more mature ages will almost certainly impact not only on the quantity but also on the type of health and social care required, leading to more emphasis on personal care and on services such as rehabilitation and prevention and promotion of social activity.

ANNEX 2. SOCIAL SERVICES OF GENERAL INTEREST AND COMMUNITY LAW

Social service provision can take many different forms. Public authorities can carry them out themselves (e.g. parts of the social security system, health services, education) or they can be performed by other entities, either profit or non-profit.

For these social services to be considered as *social services of general interest*, the public authorities should recognise them as fulfilling a task or mission of general interest. This recognition is particularly important for those social services that fall under the competition rules. Only where the missions of these services have been clearly identified by the public authorities, it is possible to examine whether certain derogations from competition rules should be allowed in order for the missions to be fulfilled.

In cases where public authorities do not carry out the services themselves and consider that the fulfilling of the mission of general interest requires the provision of certain services and the general market for services may not result in that provision, they can lay down a number of specific service provisions to meet these needs in the form of service of general interest obligations. The fulfilment of these obligations may trigger, albeit not necessarily, certain authorisation regimes, the granting of special or exclusive rights, direct purchasing or the provision of specific funding mechanisms.

This Annex presents the state of the jurisprudence regarding the application of competition rules (state aid, anti-trust) and the internal market rules (freedom of establishment and freedom to provide services, public procurement) of the Treaty.

1. The central role of Article 86

Article 86 of the Treaty, and in particular Article 86(2), is the central provision for reconciling the Community objectives, including those of competition and internal market freedoms on the one hand, with the effective fulfilment of the mission of general economic interest entrusted by public authorities on the other hand. Three principles underlie the application of Article 86. They are: neutrality, freedom to define, and proportionality.

Neutrality

Article 295 of the EC Treaty guarantees neutrality as regards the public or private ownership of companies. The Commission does not question whether undertakings responsible for providing general interest services should be public or private. Therefore, contrary to what has sometimes been argued, it does not require privatisation of public undertakings. The principle of neutrality also means that the rules of the Treaty and in particular competition and internal market rules apply regardless of the ownership of an undertaking (public or private).

Freedom to define

Member States' freedom to define means that Member States are primarily responsible for defining what they regard as a mission of general interest on the basis of the specific features of the activities. Member States are also free to decide upon the organisation of the service, for example they may grant special or exclusive rights that are necessary to the undertakings entrusted with their operation, regulate their activities and, where appropriate, fund them. In areas like social services, which are not specifically covered by Community regulations, Member States enjoy a wide margin for shaping their policies, which can only be subject to control for manifest error. Whether a service is to be regarded as a service of general interest and how it should be operated are issues that are first and foremost decided within Member States. The role of the Commission is to ensure that the means employed are compatible with Community law. However, in every case, for the exception provided for by Article 86(2) to apply the public service mission needs to be clearly defined and must be explicitly entrusted through an act of public authority (including contracts).

Proportionality

Proportionality under Article 86(2) implies that it has to be ensured that any restrictions to the rules of the EC Treaty, and in particular, restrictions of competition and limitations of the freedoms of the internal market do not exceed what is necessary to guarantee effective fulfilment of the mission. The performance of the service of general economic interest must be ensured and the entrusted undertakings must be able to carry the specific burden and the net extra costs of the particular task assigned to them. The means used to fulfil the general interest mission shall thus not create unnecessary distortions of trade.

The application of these principles only comes into play when the services in question can be qualified as services of general *economic* interest. Section 1.1. will give an overview of what can be considered as services of general economic interest and to which extent social services fall within this category.

In Section 1.2. a description will then be given of a second important criterion that needs to be fulfilled in order for Article 86 to apply: there should be an effect on trade between the Member States.

1.1. The distinction between economic and noneconomic activities

1.1.1. Introduction

The distinction between services of an *economic* nature and services of a *noneconomic* nature is important because they are not subject to the same rules of the Treaty. For instance, provisions such as the principle of non-discrimination and the principle of free movement of persons apply with regard to the access to all kind of services. The public procurement rules apply to the goods, services or works acquired by public entities with a view to providing both services of an economic and noneconomic nature.

However, the competition and State aid rules of the Treaty only apply to economic activities (i.e. "services" carried out by "undertakings" in the sense of the competition rules). The rules on the freedom to provide services and the right of establishment apply only to providers of "services" which are economic

activities. Also, Article 16 of the Treaty refers only to services of general *economic* interest.

It is therefore essential to examine first of all what can be understood as an economic activity and how this concept has been applied to "social services".

Generally speaking, recent case law confirms that the concept of economic activity encompasses "an activity which consists in offering goods or services on a given market"[2].

It is in this context very important to note that "social" does not necessarily mean "noneconomic". The fact that the functioning is based on solidarity, that certain social objectives are pursued or the non-profit nature of the provider do not rule out that the activity in question is qualified as an *economic* activity. Some operators may agree to take aspects of solidarity into account in the light of other benefits they may obtain from intervening in the sector under consideration. Conversely, non-profit-making entities may compete with profit-making undertakings and may, therefore, constitute undertakings within the meaning of Article 87 of the EC Treaty. As a general rule, Community case law classifies as an undertaking any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed[3].

It should also be noted that an entity carrying out primarily noneconomic activities might be engaged in secondary activities of an economic nature. In such cases, classification as an undertaking within the meaning of the competition rules will be confined to the economic activities involved.

As a general rule, it is not possible to envisage compiling a list of activities that would not *a priori* be economic. The concept of economic activity is an evolving concept linked in part to the political choices of each Member State. Member States may decide to transfer to undertakings certain tasks traditionally regarded as falling within the sovereign powers of States. Member States may also create the conditions necessary to ensure the existence of a market for a product or service that would otherwise not exist. The result of such state intervention is that the activities in question become economic and fall within the scope of the competition and internal market rules. A list of activities that would not *a priori* be economic would, therefore, inevitably result in legal uncertainty, as it would never be up to date. The Court has dealt with this distinction through abundant case law, in relation to the specific purpose of each concerned field of Community law and the specific characteristics of the analysed activities. Also in the case of social services, the Court has given indications whether specific services would have to be considered as an economic activity or not.

Even if some social services could be regarded as a noneconomic activity, this does not imply an exemption from all the EC rules. So for example, whether or not a health insurance institution is an undertaking, it has to apply the public procurement provisions when it procures works, supplies or services[4]. Similarly, the fact that a provider of services to the contracting authority is not an undertaking does not mean that the public procurement rules will cease to apply.

Finally, it is necessary to clarify that the application of Article 86 to services of general economic interest, and thus to the "activity", does not have the effect of excluding the application of internal market rules to the selection of the entity conducting that activity. Thus, for example, although the legality of the attribution of exclusive rights concerning services of general interest may not be contested under public procurement rules, the procedure for the selection of the provider to whom such exclusive rights will be granted is not exempted, by virtue of Article 86, from these rules and must thus comply with the relevant principles of the Treaty (such as the freedom of establishment, freedom to provide services, equal treatment, non-discrimination, proportionality and transparency) and, where appropriate, with the relevant public procurement Directives.

1 These descriptions can be consulted on: http://ec.europa.eu/employment_social/social_protection/answers_en.htm
2 See amongst others Cases C-180/98 à C-184/98, Pavlov e.a.
3 See in particular Case C-41/90 Höfner and Elsner, and C-309/99, Wouters.
4 Case C-76/97, Tögel, concerning the provision of transport for sick persons.

1.1.2. The "economic – noneconomic" distinction in internal market and competition law

Competition law/State aid

As said above, the Treaty rules in the field of competition and State aid apply only to economic activities, namely "goods or services" provided by "undertakings" in the meaning of competition law. Generally, the Court has established that "any activity consisting in providing goods or services on a given market by an undertaking, independently of the statute of the latter and of its type of financing"[5] has to be regarded as economic activity in the context of competition law. Therefore as soon as a good or service is likely to be provided by private companies on a market, it normally is regarded as an economic activity from the point of view of competition law[6]. The fact that the activity in question is actually carried out by private companies in certain Member States can therefore show its economic character from the point of view of competition law.

In the case of social security, the Court established that the concept of "undertaking" does not cover the organisations contributing to the management of the public service of social security, which fulfil a function of an exclusively social nature and carry out an activity based on the principle of national solidarity, lacking any lucrative aim. This approach leads to different results according to each Member State's choices and therefore does not provide a uniform response for the entire Union on the economic nature or not of certain activities. It must be stressed that this approach has up to now been only applied to social security systems and only insofar as their financing is based on the principle of solidarity.

Rules related to the freedom to provide services and the freedom of establishment

Treaty rules regarding freedom to provide services and the freedom of establishment only apply to "services" within the meaning of the Treaty, namely services corresponding to an economic activity. Are regarded as "services" within the meaning of the Treaty, services which are normally subject to remuneration, insofar as they are not governed by provisions concerning free movement of goods, capital or persons. The Court established that the essential characteristic of remuneration resides in the fact that it constitutes the economic counterpart to the service in question, a counterpart which is defined normally between the provider and the service recipient. However, and this is particularly important in the case of social services, the Treaty does not require the service to be paid by those who benefit from it.

1.1.3. Social services: economic and noneconomic activities

Social protection systems: basic schemes

The Court has confirmed in several cases[7] that basic compulsory social security schemes resting on the principle of national solidarity do not constitute economic activities. The Court ruled for instance that the concept of undertaking in the sense of the competition rules "*does not include (...) organisations involved in the management of the public social security system, which fulfil an exclusively social function and perform an activity based on the principle of national solidarity which is entirely non-profit-making*[8]. It is interesting to note that these cases concerned the question, whether the compulsory membership in the systems was in breach of the EC competition rules. Recently the provision of benefits under a social security scheme (provision of pharmaceutical products by sickness insurance institutions) has been examined. Also in this respect the ECJ ruled that such institutions are not enterprises and do not provide economic services taking into account the specific nature of the scheme involved (for more details see below)[9].

The fact that the insured persons can choose themselves with which of the different insurance institutions they want to be insured does not create real competition and so cannot change the noneconomic nature of the service.

Social protection systems: supplementary schemes

Supplementary social security schemes can however constitute economic activities. The Court ruled for

5 For instance Cases C-180/98 to C-184/98, Pavlov, e.a.

6 Case C-41/90, Klaus Höfner and Fritz Elser against Macrotron GmbH.7 See in particular joined cases C-159/91 and C-160/91 Poucet and Pistre, and, case C-218/00, Cisa.

8 Poucet and Pistre.

9 Case C-264/01, C-306/01, C-354/01 and C-355/01, AOK Bundesverband e.a.

instance that "*a pension fund which has been entrusted with the management of a supplementary pension scheme, which has been set up by a collective agreement between organisations representing management and labour in a particular sector, membership of which has been made compulsory for all workers in that sector by the public authorities, which operates in accordance with the principle of capitalisation and which engages in an economic activity in competition with insurance companies [is to be considered an undertaking]. Neither the fact that the fund is non-profit-making nor the fact that it pursues a social objective is sufficient to deprive it of its status as an undertaking within the meaning of the competition rules of the Treaty*"[10].

Social care services

The field of social care services differs enormously from Member State to Member State. Up until now the Court has ruled only in relation to private enterprises operating homes for elderly and concluded that this activity constitutes an economic activity within the meaning of the Treaty[11]. Nevertheless it held that a legislation making admission of private operators of homes for the elderly to a social welfare system subject to the condition that the relevant operators were non-profit-making was compatible with the Treaty.

Employment: placement services

The Court ruled[12] that job placement services are economic activities and that the public institutions offering such services are undertakings. They are subject to the prohibition contained in Article 82 of the EC Treaty, so long as application of that provision does not obstruct the performance of the particular task assigned to them. A Member State which prohibits any activity as an intermediary between supply and demand on the employment market, whether as an employment agency or as an employment business, unless carried out by the public placement offices of the State, is in breach of Article 86(1) of the Treaty where it creates a situation in which those offices cannot avoid infringing Article 82 of the Treaty. That is the case, in particular, in the following circumstances:

- the public placement offices are clearly unable to satisfy demand on the market for all types of activity;
- the actual placement of employees by private companies is rendered impossible by the maintenance in force of statutory provisions under which such activities are prohibited and non-observance of that prohibition gives rise to penal and administrative sanctions; and
- the placement activities in question could extend to the nationals or to the territory of other Member States.

Education

Educational activities have been subject of several cases relating to the freedom to establish and to provide services. In two cases, the Court concluded that Article 49 of the Treaty did not apply. The first noted that "courses *taught in a technical institute which form part of the secondary education provided under the national education system cannot be regarded as services within the meaning of Article 59 of the EEC Treaty (now Article 49), properly construed*"[13]. The second stated that "*courses given in an establishment of higher education which is financed essentially out of public funds do not constitute services within the meaning of Article 60 of the EEC Treaty*" (now Article 50)[14]. Even the fact that the pupils or their parents have to pay (in some cases) study fees or other contributions towards the cost of education does not affect the nature of the activity.

By contrast, in a case concerning a company organising university courses for students against remuneration, the Court stated "*The organisation for remuneration of university courses is an economic activity falling within the chapter of the Treaty dealing with the right of establishment when that activity is carried out by a national of one Member State in another Member State on a stable and continuous basis from a principal or secondary establishment in the latter Member State*"[15].

Social Housing

Offering cheaper housing, through rent and construction loans, to certain consumers is to be considered as an economic activity. In a decision from 2001[16], the Commission has indicated that municipalities carrying out such activities are in doing so in competition with other operators in the housing market and therefore performing an economic activity.

10 In particular Case C-244/94, FFSA, Case C-67/96, Albany, joined Cases C-115/97 to C-117/97, Brentjen's handelsonderneming. and Case C-219/97, Drijvende bokken.
11 Case C-70/95, Sodemare.
12 Case C-41/90, Höfner and Elser,and C-55/96, Job Centre.13 Case C-263/86, Humble and Edel.
14 Case C-109/92, Wirth.
15 Case C-153/02, Neri.
16 State aid N 209/2001 – Ireland.

1.2. Affecting trade

It should also be pointed out that Community competition law (including Article 86) only applies where the conduct in question is liable to affect trade between Member States. As is the case for the notion whether an activity is of an economic or noneconomic nature, it is not possible to draw up an exhaustive list of services of general economic interest that would not affect trade between Member States.

In general, the decisions adopted by the Commission in this field show that there is a tendency to concentrate on cases that could have a significant impact on trade between Member States.

Concerning *anti-trust rules* (Articles 81 and 82 of the EC Treaty), an activity which affects the market only insignificantly – and this may be the case in a number of social services of general economic interest of a local character – will normally not affect trade between Member States and therefore will not be subject to the Community competition rules[17]. Nevertheless the question whether a concrete measure affects trade between Member States has to be decided on a case by case basis. In the past also one harbour[18] or one province[19] have been decided as being an important part of the common market which resulted in the applicability of the EC competition rules.

De minimis

Reference should also be made to the policy of not pursuing under the Community competition rules cases of minor importance. Agreements between undertakings that do not hold aggregated market shares of more than 10% (in the case of agreements between competitors) or above 15% (in the case of agreements between non-competitors) on any of the relevant markets affected, are not normally found to appreciably restrict competition within the meaning of Article 81 of the Treaty[20]. Many agreements between social service providers may in practice fulfil the conditions of the *de minimis* notice. However, it is important to keep in mind that the *de minimis* notice does not apply to so-called "hard-core" restrictions such as for example price-fixing agreements between competitors and the allocation of markets or customers.

Moreover, as for the assessment under the Community State aid rules, the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected[21]. Even if the recipient undertaking itself does not carry out an economic activity across borders, the aid provided might still affect trade. Whether a market is liberalised or not is one of the factors taken into account for analysing the effects on trade and competition.

The Commission also sets ceilings, under which it considers that State aid rules do not apply (*de minimis* rule) at all. As a result, many local social services are likely to be excluded from the scope of State aid rules[22].

Public funding for services of general economic interest that may be liable to affect trade must be examined in the light of the specific provisions on State aid in the Treaty to see whether it is nevertheless permissible. Besides the exception provided for by Article 86(2), a number of specific exemptions from the ban on State aid are available. Derogations are foreseen for aid to transport (Article 73) and aid to promote culture and heritage conservation. Conditions for compatibility under Article 87(3) have been laid down in frameworks or guidelines such as those for State aids in the field of employment[23], training[24], research and development[25] and small and medium-sized undertakings[26].

17 According to the ECJ (Cases C-215/96 and C-216/96, Bagnasco) there is effect on trade between Member States where it is possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the conduct in question may have an influence on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market in all the Member States. In establishing these criteria, reference must be made to the position and the importance of the parties on the relevant market.
18 Case C-179/90, Porto di Genova.
19 Ambulanz Glöckner, concerning ambulance services and transport of sick persons in a German province.
20 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) OJ 2001 C 368/13.
21 Case C-280/00, Altmark Trans.
22 Regulation (EC) 69/2001 of 12.01.2001 stipulates that aid granted to any one undertaking over any period of three years and not exceeding 100 000€ does not fall under Article 87(1) of the Treaty. This regulation is applicable to all sectors except for the transport sector and activities linked to the production, processing or marketing of products listed in Annex I of the Treaty.
23 Guidelines on aid to employment (OJ C 334, 12.12.1995, p. 4).
24 Commission Regulation (EC) No 68/2001 of 12.01.2001 on the application of Articles 87 and 88 of the EC Treaty to training aid.
25 Community framework for State aid for research and development (OJ C 45, 17.12.1996, p. 5).
26 Commission Regulation (EC) No 70/2001 of 12.01.2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises.

1.3. Further criteria in the field of State aid

The general applicability criteria of Article 87 (State aid) are apart from the fact that it has to concern an economic activity affecting trade, the notion of State resources and the imputability of the aid measure to the State. Usually State aids have to be notified to the Commission in advance and are contrary to EC competition rules unless one of the possible exemptions apply to them. Illegal State aids have to be paid back. As regards social services these rules are usually examined when the State intends to contribute directly or indirectly towards the cost of services of general economic interest.

1.3.1. State resources and the imputability of the aid measure to the State

The Court has recalled that only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 87(1) of the Treaty. The advantages granted through State resources can take numerous forms: direct subsidies, tax benefits etc. In particular, the Court has established that the expression "State resources" in Article 87(1) of the Treaty covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to a State aid measure are financial resources of public undertakings and are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources.

This means that when an undertaking carrying out social services of general economic interest is financed by means of resources allocated by a public undertaking and this financing is imputable to the State, the financing is liable to constitute State aid[27].

On the other hand, social services could not only be receivers of State aid but could also be obliged to grant State aids under the legal provisions they have to apply. So the ECJ has already declared general reductions of the employer's social security contributions for special economic sectors[28] or such special reductions for an enterprise in economic difficulties[29] as illegal State aid.

1.3.2. The "Altmark criteria"

In the case of Altmark Trans GmbH[30], the Court has established that public service compensation does not constitute State aid within the meaning of Article 87 of the EC Treaty provided that four additional criteria are met:

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, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 87(1) of the Treaty.

Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit.

Fourth, where the undertaking which 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 which a typical undertaking, well-run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

Where these four criteria are met, public service compensation does not constitute State aid, and Articles 87 and 88 of the Treaty do not apply. If the Member States do not respect these criteria and if the general

27 Case C-482/99, France/Commission (Stardust Marine).
28 Case C-75/97, Belgium/Commission (Maribel).
29 Case C-256/7, DMT.
30 Judgement of 24.07.2003 in Case C-280/00, Altmark Trans GmbH and Regierungspräsidium.

criteria for the applicability of Article 87(1) of the Treaty are met, public service compensation constitutes State aid that is subject to Articles 73, 86, 87 and 88 of the Treaty.

State aid in the form of public service compensation may prove necessary for undertakings entrusted with the operation of social services of general economic interest to operate on the basis of principles and under conditions that enable them to fulfil their missions. Such aid may be compatible with the Treaty under Article 86(2) under certain conditions.

Follow-up

In order to increase legal certainty the Commission recently adopted a Commission decision[31] that considers relatively small-scale public funding to undertakings entrusted with the operation of SGEI to be compatible with the common market under certain conditions. Likewise, such funding should also be exempt from the obligation of prior notification[32] as long as it is proportionate to the actual costs of the services, and certain thresholds are not exceeded. The Commission Decision applies the same principle for funding of SGEI provided by hospitals and social housing, irrespective of the amounts involved. In essence, the Commission hereby seeks to exempt compensation to local providers of SGEI from the obligation of prior notification. The thresholds have been set after consultations with Member States and the European Parliament. In addition, the Commission has adopted a Community framework setting out criteria for assessment of compensations for SGEI that exceeds the aforementioned thresholds.

The Commission also proposed an amendment to Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings in order to specify that this Directive is applicable to public service compensations, whatever the legal qualification of these under Article 87 of the Treaty.

2. Exclusive or special rights

The anti-trust rules of the Treaty prohibit restrictive agreements and concerted practices between undertakings and decisions by associations of undertakings which could affect trade between Member States (Article 81) as well as the abuse of a collective or single dominant position on a given market (Article 82). Articles 81 and 82 are therefore addressed to undertakings. However, the State may also be held responsible for an infringement of the EC competition rules, either on the basis of Article 10 combined with Article 81 and/or 82 of the Treaty or, in the case of undertakings that have been granted exclusive or special rights, on the basis of Article 86 in combination with Article 81 and/or 82 of the Treaty[33]. Liability of the undertaking concerned and the State may exist in parallel. However, where the behaviour of the undertaking concerned is imposed by the State, without the undertaking having a margin of manoeuvre, the undertaking may avoid liability (the state defence doctrine).

With regard to social services these rules mostly were questioned with regard to the possibility to provide compulsory coverage, to give special services exclusive rights, to lay down the conditions and prices of benefits and treatments for the persons affiliated to the scheme by law or by contracts between the service providers and the social services which also have to respect the criteria defined by the State.

In case undertakings that have been granted exclusive or special rights by the State are entrusted with the operation of services of general economic interest both the State (when held liable on the basis of Article 86(1) in combination with Article 81 and/or 82 of the Treaty) and the undertakings concerned (e.g. when held liable for a breach of Article 82 of the Treaty) may invoke the derogation of Article 86(2) of the Treaty. In this connection, the Court of Justice ruled[34] that Article 86(2) of the Treaty "permits the Member States to confer on undertakings to which they entrust the operation of services of general economic interest exclusive rights which may hinder the application of the rules of the Treaty on competition insofar as restrictions on competition, or even the exclusion of all competition, by other economic operators are necessary to ensure the performance of the particular tasks assigned to the undertakings possessed of the exclusive rights."

Such restrictions on competition can be justified only inasmuch as they are necessary for performing the public service task (proportionality test). In particular, the obligations should be clearly identified in order to assess

31 This Decision forms part of the so-called "Altmark-package".
32 The Commission services have estimated around 95% of public service compensations are not meeting all four "Altmark criteria" and therefore constitute illegal State aid in the absence of notification according to Article 88(3).
33 Case Sodemare.
34 See in particular Case C- 320/91, Corbeau.

the need for the rights granted. Restrictions going beyond what is necessary are liable to contravene Article 86(1), read in conjunction with Articles 81 and/or 82 of the Treaty. Similarly, the behaviour of undertakings benefiting from the exclusive or special rights remains subject to Articles 81 and 82 of the Treaty.

This principle has been applied in particular to *supplementary social security schemes*, like pension funds[35]. These funds, even when pursuing social goals, have to be considered as undertakings and therefore fall under the competition rules. However, the exclusive right of a pension fund to manage supplementary pensions in a given sector and the restriction of competition resulting from this may be justified under Article 86(2) of the Treaty as a measure necessary for the performance of a particular social task of general interest with which that fund has been entrusted.

3. Internal market: freedom of establishment, freedom to provide services

In order for an activity to fall within the scope of the internal market rules on freedom of establishment and freedom to provide services, it should be of an economic nature (as explained above) and furthermore, be provided for consideration. A service within the meaning of the Treaty will normally be provided for remuneration. According to the case law of the Court "the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question"[36], this means that there must be an economic counterpart. This doesn't mean however that those for whom the service is performed must necessarily pay the service. The essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question irrespective of how and by whom this consideration is financed.

In addition, it is settled case law that the provisions of the Treaty on freedom of establishment and freedom to provide services do not apply to activities which are confined in all respects within a single Member State. On the contrary, this means amongst others that these internal market provisions do apply when services are provided to nationals of a Member State on the territory of another Member State, irrespective of the place of establishment of the provider or recipient of the services[37].

However, the assessment of whether a situation or "activity" is confined in all respects within a single Member State has to be approached with caution, in view of the circumstances of the particular case. For example, in public procurement proceedings, the fact that all the parties involved are established in the same Member State and that the scope of the service to be provided is also limited to that Member State, does not mean that the situation or activity is confined only to that Member State. The interests of potential tenderers established in other Member States, who could have had tendered for the specific contract have to be taken into account. This means that the situation cannot be considered to be confined only to that Member State where the interests of potential tenderers have been prejudiced by, for example, omitting to advertise the tender at the EU level.

4. Public procurement

Member States are free to choose the way in which social services are performed. They may decide to provide these services themselves or to entrust their provision to third parties. EC public procurement rules come into play when public authorities decide to award such tasks to third parties.

If a public authority entrusts the provision of a social service to an undertaking by way of a contract for pecuniary interest it has in principle to follow the rules set out in Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

35 In particular Cases FFSA, Albany, Brentjen's handelonderneming and Drijvende bokken.
36 Case C-422/01, Ramstedt, and also Cases C-263/86, Humbel, C157, Smits and Peerebooms, C-136/00, Danner, and C-355/00, Freskot.
37 Wirth.

Public authorities enjoy, however, a considerable degree of discretion when awarding public contracts in the field of social services. In fact, according to Article 21 of Directive 2004/18/EC contracts that have as their object services listed in Annex II B, such as health and social services, are solely subject to the provisions on technical specifications and advertising of the award notice. None of the other detailed rules set out in Directive 2004/18/EC apply to public contracts for such services. Neither do the EC public procurement Directives apply to the award of service concessions, i.e. public contracts where the contractor bears much of the operational and financial risk inherent in the delivery of the service.

This does not however, mean that the award of public service contracts or service concessions, which remain outside the scope of Directive 2004/18/EC, in the field of social services is exempted from the application of EC law as such. In fact, all contracts by which a public body entrusts a third party with the provision of a work or service, whether covered by secondary legislation or not, must be examined in the light of the rules and principles of the EC Treaty, in particular the principles of transparency, equal treatment, proportionality and mutual recognition.

The principle of transparency means that, in the interest of any potential tenderer, an appropriate degree of publicity should be guaranteed permitting the opening-up of the service contract to competition and the monitoring of the impartiality of the award procedures. It is for the Member States to determine the appropriate degree of publicity in the light of objective criteria, such as the size and nature of the contracts in question and the potential interest from candidate-bidders. While a maximum degree of publicity must be encouraged, requirements may be more limited in the case of low-value contracts for which potential interest may be low. In the event of any dispute, it is for the Member State to justify the degree of publicity selected for a given contract.

The principle of equal treatment requires that all Community undertakings be able to bid for services under the same conditions. The conditions and criteria must be objective and applied in a transparent and non-discriminatory manner.

Further clarification

The Commission intends to provide further clarification on the award of public contracts, including in the field of social services, not covered by the EC public procurement Directives. A Commission interpretative Communication should explain the consequences to be drawn from ECJ jurisprudence on transparent advertising, carrying out fair and impartial award procedures and providing effective judicial protection. This Communication should be published in the first half of 2006.

Another initiative relevant for services of general economic interest, including social services, aims at providing more clarity on the application of public procurement law to the choice of private partners for Public-Private Partnerships (PPPs). These partnerships between public authorities and businesses are often formed to provide services, including social services, to the public. PPPs can take many different forms, including concession-type arrangements and so-called 'institutionalised' PPPs (i.e., public service undertakings jointly held by a public and a private partner). Following a large public consultation on this topic opened by the Green Paper on PPP, the Commission formulated political conclusions in a Communication published on 15 November 2005. It envisages the preparation in the course of 2006 of an interpretative document concerning institutionalised PPP and for 2007 a legislative initiative on concessions. The final decision relating to this latter legislative measure will depend on the result of an impact evaluation.

5. The field of insurance

The European Union, through its legislation, aims at creating a single market for insurance. The Directives on insurance include personal insurance, accident insurance, health, life and death but these provisions do not concern social security legislation. On the contrary, their exclusion is clearly enshrined in the Directives.

The third Directive on non-life insurance (92/49/EEC) specifies that when a Member State decides to delegate part of its social security role to private institutions it also has to ensure that any Community insurance company is entitled to compete for this business; in other words, the market cannot be closed to non-national companies.

However the Directive also recognises that a Member State which contracts out part of its Social Security arrangements to private insurance companies can frame the conditions in which this activity is to be carried out in order to guarantee the general interest. Thus, for example, a Member State can compel a provider of health insurance: to offer insurance cover without discrimination, offer insurance for life, offer uniform pricing by contract type, offer standard coverage conditions adhered to by all insurers to ensure the general interest and offer the possibility to require a loss compensation system. However, the imposition of these conditions is not (in principle) allowed for any extra insurance, which offers improvements to the basic cover required by law. Moreover, these conditions cannot harm price freedom (price competition between insurers has to remain possible). Similarly, the obligation for an insurer to provide benefits in kind can constitute an unjustified barrier for insurers from other Member States (who may have to enter into agreements with local hospitals in order to comply).

6. Trade policy

International trade agreements, within the framework of the World Trade Organisation (WTO) and often at a bilateral level, include provisions with regard to services that are not provided in the exercise of governmental authority (i.e. that are supplied on a commercial basis or in competition with one or more service suppliers)[38]. Such provisions concern the exchange of services and the conditions under which service suppliers can operate in foreign markets. Under the General Agreement on Trade in Services (GATS) each member freely determines the service sectors that it is prepared to open to foreign service providers (the so-called "bottom up-approach") and under what conditions. Furthermore, the GATS explicitly recognises the WTO members' sovereign right to regulate economic and noneconomic activities within their territory in pursuance of public policy objectives. With regard to the services covered by these agreements, each contracting party maintains the right to determine the specific obligations that can be imposed on the operators. Members fully retain the possibility of excluding from its GATS commitments sectors where it is feared that an opening to competition could threaten for example the availability, quality and affordability of such services. Thus, members can maintain the service as a (public or private) monopoly. The negotiations in the WTO framework have no direct or indirect influence on the decisions of Member States to privatise certain undertakings. Very important in this context is also that due to the scope of the GATS-Agreement public services are explicitly excluded from the scope of this Agreement if they are not provided for economic purposes or in concurrence with other service providers[39]. Such social SGI are therefore not affected by the GATS-Agreement.

In this context, the European Community has freely decided to undertake commitments in respect of certain services of economic interest already open to competition within the internal market. Through these commitments, foreign services suppliers are granted market access to the European Community under the same, or sometimes more restrictive, conditions as any European service supplier. Commitments undertaken in the WTO multilateral context (GATS commitments) or in a bilateral context have had no impact on the way in which services of general interest are regulated in Community law. They have also had no impact on the way in which they are financed. Indeed, the most far-reaching obligations in this respect have been assumed at bilateral level and are limited to territorial extension of the Community State aid regime.

Further negotiations in the areas of liberalisation of trade in services, as well as on disciplines on subsidies related to trade in services, are under way within the context of the Doha Development Agenda. The European Community is also negotiating bilateral trade agreements in the services sector. In this context, as in the past, the European Community approaches services of general interest with a view to ensuring full consistency between the internal Community regulatory framework and the obligations accepted by the Community and its Member States in the framework of international trade arrangements.

38 Article I (3) of the GATS-Framework Agreement.
39 In this context, reference should also be made to the Commission's Communication on the social dimension of globalisation (COM(2004) 383).

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