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**Social services  
between general interest orientation and market dynamics –  
An analysis of the role of enquiries of the Social Protection Committee  
to the development of the EU-level legal, policy and quality framework  
on social services of general interest**

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***Note to readers***

The following parts of the dissertation submitted on 15 August 2016 and published in 2018 by the LIT Verlag, Berlin – Münster – London – Wien – Zürich, had been submitted to the two supervisors at the Universität zu Köln, Prof. Frank Schulz-Nieswandt and Prof. Wolfgang Wessels, for their evaluation of the thesis. They have, however, been taken out from the book in order to keep it to a manageable format.

- Chapter 4: Own research – Sub-chapter 4.1: Analysis of SPC enquiry on SHSGI 2004 – Sub-section 4.1.3: Detailed analysis per question
- Chapter 4: Own research – Sub-chapter 4.2: Analysis of SPC enquiry on SSGI 2006 – Sub-section 4.2.3: Detailed analysis per question
- Annex 2: SHSGI/SSGI questionnaires addressed to Member States and to relevant stakeholders
- Annex 4: Table 1: Sources and data basis
- Annex 4: Table 2: Definitions and terminology
- Annex 4, Table 3: Analysis of replies of MS to SPC enquiry on SHSGI 2004
- Annex 4, Table 4: Analysis of replies of MS to SPC enquiry on SSGI 2006

## 4. Own analysis

### 4.1 Analysis of SPC enquiry on SHSGI 2004

#### *4.1.3 Detailed analysis per question*

Sub-section 4.1.3 comprises part 1 entitled “Analysis of replies to single questions or sections of the questionnaire” of Maucher 2005a. However, some adaptations have been made to fit it to the format of this publication<sup>1</sup>. The 15 questions of the SPC 2004 questionnaire are reproduced in Annex 2, Survey 1, but to facilitate the reading they have also been copied below (text in italics). The 15 questions were put under four headings to structure the enquiry: “Field 1 – Overview of the national SGI” for questions 1 to 3, “Field 2 – Definitions of social SGI” for questions 4 to 7, “Field 3 – Experience with EC internal market or competition rules” for questions 8 to 10 and finally “Field 4 – Further steps at European level” for questions 11 to 15. As the analysis of the replies follows the structure of the 15 questions of the 2004 SPC enquiry on SSGI, the author endeavoured to attribute the answers to one of them in cases when government replies were made by section or where they deal with an overarching aspect.

*1. What are the general characteristics of the national social SGI with regard to e.g. the following points?*

- *Organisation, design and structure (geographical, market structure, administrative level);*
- *financing (e.g. contributions, direct funding via government budget, payment of remuneration for the service, charity donations);*
- *service provider (e.g. state and local authorities, public enterprises, public-private partnership, voluntary non-profit organisations, role of volunteers, private enterprises);*
- *definition of tasks/obligations (what are these tasks/obligations and how are these laid down, i.e. contract, law or other);*
- *quality standards.*

The answers to question 1 on the general characteristics of the “national social SGI” (sic!) with regard to organisation, financing, service providers, definition of tasks and obligations and quality standards show a great diversity as to the institutional structures of the welfare states (in the broader sense) and the different sectors of SHSGI mentioned. SHSGI are characterised by

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<sup>1</sup> In the original text more detailed information on county-specific situations or examples provided by the Member States’ replies had been included in the format of notes (in total: 58) and in a smaller font below each of the 15 questions. In order to adapt the presentation of the analysis of the replies of the first SPC enquiry of 2004 to the one of the second SPC enquiry of 2006 these notes have to a larger part been integrated into or added after the original text, if of a more general importance or helpful to illustrate the MS’s replies. In some instances text elements have been moved compared to the initial publication or slightly adapted as to the wording to allow for a more consistent presentation of the analysis for the 2004 and the 2006 SPC enquiries. The remaining notes from Maucher 2005a, often those with country-specific information or examples provided by the national governments, were transformed into footnotes. No text, however, was added. Where English language mistakes in the original text have been spotted they were corrected. Non-English text is reproduced in italics. Text underlined or bold in the own publication of 2005 has not been retained, again to allow for a uniform layout for sub-chapters 3.1 and 3.2.

a diversity of multi-resource funding mechanisms and are provided by a broad variety of agencies in various legal frameworks (public; private) and legal forms (public entity; association; foundation; co-operative; mutual benefit society; for-profit company).

The replies differ considerably with regard to the number of sectors and sub-sectors of SHSGI distinguished or reported on. The answers also vary (largely) in view of the level of detail on which descriptions of the organisation, design and structure, financing, delivery, definition of tasks/obligations and quality standards of SHSGI are provided by MS' governments.

This broad range of replies results from the lack of a common understanding, i.e. a shared definition or concept, across the MS as to the object of the enquiry, namely SHSGI. This becomes obvious esp. under Q4, where no MS reports that a national definition of SHSGI exists, cf. below). It is, however, also to be attributed to non-consistent approaches/strategies chosen by the national governments in answering the SPC questionnaire: Whereas most MS provide (more or less comprehensive or detailed) descriptions of national systems or sectors they define as SHSGI (group 1), others explicitly focus on those SHSGI for which a lack of clarity as to the applicability of EU competition, state aid and/or internal market rules is being noticed or concentrate on those areas where they believe the impact of a single market in services will be felt strongest (group 2) (E, GB, NL).

- Countries under group 2 focus on complementary social insurance schemes, the health care system and social housing: E mentions four fields (1. complementary social protection schemes; 2. health care institutions and services; 3. social and socio-medical institutions and services; 4. social housing), whereas The NL (1. re-integration market/re-insertion into the labour market; 2. social housing and urban regeneration; 3. health care and welfare and youth care) refer to three sectors and GB explicitly mentions two (1. (private) pensions and 2. health care).
- Most MS falling under group 1 (explicitly or implicitly) list the sectors (and often sub-sectors, too) they consider as being part of SHSGI. On a first level, i.e. without taking into account possible further sub-categories here,
  - A distinguishes between three main types (1. social security, 2. health services and 3. other social services), as do EST (1. social protection – contributory and non-contributory schemes, 2. social welfare, 3. medical assistance), GR (1. social insurance system; 2. national system of health care and social care (including family support services); 3. system of employment and social integration, i.e. job placement for socially vulnerable groups (including housing services), and H (1. health services; 2. social services (including child welfare and family care services); 3. employment services). LV also mentions three fields (1. state social insurance benefits and pensions in 5 branches; 2. health care; 3. social services (including professional and social rehabilitation, social assistance/guaranteed minimum income) as does P (1. social security system, including the complementary system and social welfare system; 2. public employment service; 3. health services).
  - LT enumerates four types of SHSGI (1. health care services; 2. state social insurance; 3. services to promote social inclusion; 4. services to promote employment) as does S (1.

- national social security system; 2. supplementary social protection scheme (esp. occupational pensions); 3. social services (universal benefit system in cases where people need special assistance for various reasons; they also help vulnerable groups and provide care services for the elderly and disabled); 4. health and medical services).
- CY distinguishes between five types (1. statutory social protection schemes; 2. supplementary social protection schemes; 3. social welfare services; 4. health services; 5. services for persons with disabilities).
  - J draws up a list of six fields, however, in the reply it focuses on three of them (1. social assistance; 2. social services; 3. health/medical services). The reply of M also refers to 6 categories (1. social security system (contributory + non-contributory benefits); 2. social welfare services; 3. health services; 4. social housing; 5. employment services; 6. child care) as it is the case for PL (1. health care system (also drug addiction, alcoholic problems, mental health care, geriatric care, long-term care, palliative/hospital care); 2. educational system and higher education; 3. services provided by labour market institutions; 4. social housing; 5. services provided by non-profit organisations; 6. social care services).
  - D lists seven categories of social services including health-care services in the broader sense of the questionnaire (1. benefits of social insurance governed by Federal law (statutory health, long-term care, pensions, accident and unemployment insurance); 2. public welfare: social services of the Länder and local authorities (rural districts, cities and municipalities); 3. charitable social services in particular provided by independent welfare; 4. state and local authority investment promotion (hospitals, long-term care and facilities for disabled persons, day care facilities for children, social housing, emergency rescue services); 5. independent voluntary and self-help organisations; 6. private and commercial social services; 7. private insurance and pension benefits (health and long-term care, private old-age pensions, company pensions et al.) that are governed by social law). The same holds for IRL which enumerates seven fields: 1. social protection (comprising social insurance – including supplementary pensions –, social assistance, universal child benefit); 2. health services (including community care, nursing homes); 3. social housing, 4. childcare, 5. rural transport initiative (RTI), i.e. provision of transport services for elderly and mobility impaired, 6. community development programme (CDP), aiming to counter social exclusion, 7. local development social inclusion programme (LDSIP), aiming to counter disadvantage and promote equality and social and economic inclusion through the provision of funding and support to local Partnerships, Community Groups and Employment Pacts
  - L provides detailed information on eight sectors, the first six of them being personal social services, the remaining two being part of the statutory social protection scheme (in the broad sense): 1. services and institutions for elderly persons, i.a. mentioning the not means tested long-term care insurance; 2. services and institutions for handicapped persons; 3. services and institutions for children and young adolescents, including centres for socio-professional integration; 4. child-care services and institutions; 5. consultation and accommodation services for women and female adolescents; 6.

"guaranteed" social housing (*logement assuré*); 7. national social intervention/assistance service, providing non-economic services; 8. social assistance.

- SLO distinguishes nine fields of service provision, namely 1. services for disabled adults, 2. institutional care for people over 65, 3. home care for people over 65, 4. institutional care in training institutions for children, youth and people up to 26 years with physical and mental development disabilities; 5. care for disabled persons; 6. educational services and continued education; 7. social housing; 8. health care; 9. employment services.

Taking into account all 25 answers, the types of systems and services predominantly classified as SHSGI in all 25 MS include social insurance schemes, health (care) services, social welfare institutions and services, and social housing. All MS mention personal social services (esp. child-care services and institutions, institutions and services to elderly persons, to persons needing long-term care and to handicapped persons), even though they are "labelled" differently and attributed a different significance as with regard to their role as part of the social protection system). Several member states cover employment services (GR, LT, LV, NL, P, PL, SLO). Except for PL, all MS explicitly exclude education and professional training (both from the scope of the questionnaire and the concept of SHSGI). S mentions education in relation to responsibilities of municipalities (for the compulsory school system, most of upper secondary schooling, adult education and Swedish language courses for immigrants).

On the other hand, the joint analysis hints at several common points shared among (basically) all MS:

- Firstly, there seems to be a broad consensus as to the sectors which make up for the "core" of SHSGI, namely social insurance schemes, health (care) services, social welfare institutions and services, and social housing.
- Secondly, basically all MS have implemented (or are in the process of doing so) legally fixed quality standards for (most of the) SHSGI, as a rule on a sector-specific basis covering aspects such as qualification of personnel, infrastructure of premises, security norms, effectuation of tasks, and carer-user-ratios, which are monitored by public authorities.
- The reply of the CZ exemplifies an understanding of "service quality" broadly shared across MS by mentioning that – under the current National Action Plan on Social Inclusion (NAPIncl) – equal access to social services is ensured by promoting increased quality of social services at the national, regional and local level through the introduction of National Quality Standards which aim at the protection of human dignity and social inclusion, the development of services which enable users/patients/clients to remain within their natural environment and the provision of equal access to public resources for the social service providers which meet the quality standards.

Even though other aspects are pointed out (explicitly) only in some of the replies, nevertheless they seem to have a more general significance in view of further steps to recognise SHSGI at EU level.

- Several MS explicitly refer to the responsibilities of state agencies to guarantee a continuous, sufficient and affordable provision of SHSGI. In this context, B e.g. mentions the 3 instruments “planning”, “authorisation”, “financing”. B, E, I, IRL, LT, M also underline the importance of social and territorial planning in line with governmental policies (and – as it is demanded – unimpaired by Community law). L exemplifies the above-mentioned aspect for the field of child care, underlines the role of the government for a offer of services with good quality, with comparable geographical coverage and affordable for families at all levels of income and states that without government intervention, the offer would be limited to areas of dense population and would not be affordable for parents with low income<sup>2</sup>.
- Other MS mention core functions of personal social services (A, CZ), principles of social welfare or values of the health care system (EST).
  - As to the function of personal social services, A identifies their contribution to social cohesion and the realisation of social rights of citizens and recalls that they build on reliability, continuity and long-term responsibility.
  - The CZ defines “social service” as an “activity or set of activities providing assistance to persons in reduced social circumstances, i.e. assistance to persons who have lost their sustainability and protection against social exclusion, with an aim to enable them, to the maximum possible extent, to gear into the normal life of the community and to make normal use of other systems (such as housing, education, health care, employment services etc.)”.
  - EST enumerates four principles of social welfare: 1. observation of human rights; 2. responsibility or own and family members’ ability to cope with everyday life; 3. obligation to provide assistance if the potential for a person or family to economically cope is insufficient; 4. promotion of the ability of persons and families to cope economically. The reply also identifies four values of health care system: 1. equality, 2. correspondence to people's needs, 3. free choice, and 4. effectiveness
- The reply of E hints at close linkages between the legal framework (e.g. the social welfare/assistance and family code) and major objectives of e.g. personal social welfare and assistance services (such as quality of services for disadvantaged persons, equal territorial redistribution of supply, and cost management in a publicly funded sector).
- The CZ also links public services or SGI to the European Social Model (ESM) by conceptualising them as one of its principal pillars<sup>3</sup>.

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<sup>2</sup> The only geographically coherent network is composed by the day care-centres run by non-profit organisations, funded by the state and using infrastructures provided by the local administrations, which is the reason why they are to be found all over the country. Almost all facilities run by commercial companies are all concentrated in the greater Luxembourg-city area, the concentration of population and jobs reducing thus the entrepreneurial hazard for the providers.

<sup>3</sup> According to the reply of the CZ, defining public services or SGI as one principal pillar of the ESM, emphasis has to be placed on high quality, accessibility in terms of geographical distribution and price, adjustment to local public policy. Public services are services with a universal character which are established, organised or regulated by a public administration body to ensure that the service is provided in a way that may be considered necessary to satisfy the social needs while respecting the principle of subsidiarity.

- A few MS (A, CZ, D, DK, EST, FIN, S) underline the decisive role local territorial authorities play in supplying SHSGI and deciding about the form and agency to deliver them. Other MS (A, B), esp. those with a federal structure, also refer to the role of regional territorial authorities. Not surprisingly this aspect, as a rule, is put forward by MS which share a tradition of extended self-government competence/autonomy of municipalities, also laid down in national constitutional law.
  - DK mentions the interplay between national and local government regulations by emphasising the fact that districts, towns and communes act within an “enabling” national legislation.
  - FIN points to the fact that its constitution obliges public authorities to ensure that everyone obtains sufficient social and health services as separately laid down in specific legislation. The statutory responsibility for providing the public social and health services is vested in the local authorities (municipalities). In doing so, they can produce the services in the manner they want to – either by themselves or together with other local authorities or purchase services from non-governmental organisations or companies.
- The role of social NGOs as important agencies to realise general interest objectives in the social and health sector is also highlighted, e.g. by E<sup>4</sup>. The line of argumentation put forward is very similar to those developed in the replies by A, D, FIN, H, I, M, (P).
- Last but not least, some MS (B, CZ) hint to the specific character of the users/patients of SHSGI: In the reply of the CZ this is derived from the fact that for SHSGI emphasis has to be placed on high quality, accessibility in terms of geography and price, adjustment to local public policy. Service beneficiaries consequently cannot be defined simply as customers, clients or consumers; they must be perceived and addressed as the public consisting of citizens with specific social rights and needs. B points to the specific relationship between service provider and beneficiary respectively insured person.

*2. Please indicate whether and if so how these characteristics are likely to develop and change in the coming years. This with a view of the modernisation of these services (taking into account developing users' needs, quality standards and (financial) efficiency).*

MS report on a variety of already observable developments or implemented innovations as well as on currently planned reform projects or (probable) changes for the near future or. They can

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<sup>4</sup> According to the reply by E, social NGOs (*associations de solidarité*) have an important role to play in the sector of social and socio-medical institutions and services and more in general in the provision of services corresponding to social needs of the population. They mobilise and involve an important number of volunteers, too, and thereby bear testimony to civic commitment. Owing to their capacity of vigilance and their social activities in local communities close to the population/anchored in local neighbourhoods, they detect and depict social needs and problems. Social NGOs are defined as "developing agencies for the public interest" by a law of 02/02/2002 (*La Loi du 2 janvier 2002 portant rénovation de l'action sociale et médico-sociale énumère, parmi les acteurs nécessaires, les associations de solidarité, promues ainsi au rang de "développeur de l'intérêt général", au même titre que les acteurs publics et parapublics*). They also play an important role as agencies creating employment and promoting local development. Social NGOs realise projects in line with the realisation of public policies to support persons in difficult financial, social, familial situations, with specific needs due to age or handicap.

mainly be summarised under the headings “shifts in the role or organisational structure of the state”, “quality development and improvement”, “new forms of relationship between state agencies and private (not-for-profit or for-profit) providers of SHSGI”, “improvements of efficiency and effectiveness of measures and schemes/new managerial models” and “usage of market mechanisms”.

The reply of A provides a good example for the wide range of developments and changes mentioned: With regard to the field of personal social services, it names a) stronger focus on tools to improve efficiency (such as strengthening the users' orientation and consumer protection) and b) a greater role for quality management, controlling, the development of indicator systems and benchmarking. In this regard, the answer, however, emphasises the fact that both quality standards and demands cannot exclusively take into account price-related issues. Concerning the field of social security, without changing the general system parameters, new public-private partnerships (PPP) are considered probable, not least to make advantage of market-based provisions, too. Finally, with regard to probable future developments and changes in the health care sector the reply mentions firstly a shift in social planning, namely from locations and beds to cross-sector service delivery planning, secondly more weight for quality standards, and thirdly the implementation of interface management.

A shift in the role of the state – from direct provision to authorisation, regulation and supervision – is mentioned by several MS (e.g. CZ, (DK), FIN, M). This is, however, considered as a continuous process which will in the short- and middle-term neither fundamentally change the currently predominant “welfare mix” in a given MS nor the important role of local territorial authorities (especially in countries with a dominant state-run provision in the various fields of personal social services, as it is the case esp. in the Nordic countries and the eight new MS from Central and Eastern Europe). A diminishing share of service provision by state authorities can be counterbalanced by the provision through not-for-profit and for-profit agencies. The CZ expects, inter alia, an increase in the provision by NGOs, various other MS foresee an increase as to the shares offered by for-profit providers.

Several MS report on extended procedures of registration (CZ, DK, GR, I – under the term “accreditation”). Other MS point to changes related to the accomplishment of a process of decentralisation of tasks, competences and responsibilities, in I to the level of the regions, in the SK to the local level. Another aspect reported is the development of networks/inter-linkages (EST [including civil society organisations]) or platforms (L [platform of state agencies from national and local level on social housing]) and policy co-ordination within already working partnership arrangements (IRL [social partnership]). Finally, several MS indicate that they intend to increasingly use public-private partnership models (A, E, IRL, PL), albeit, as a rule, limited to selected sectors and or tasks (as social housing).

Other aspects linked to welfare state reform or to different levels or already operational infrastructure for SHSGI mentioned under Q2 are the implementation of new service types (LV, PL) or out-patient care services (CZ) and the establishment of new or comprehensively

reorganised schemes (as e.g. in case of the National Health Services (NHS) in CY or M or complementary social security schemes in P). Some MS will work on the improvement of conditions in health care (LV, PL) or caring services (E). Others intend to focus on quality development, improvement and assurance (A, DK, EST [as a consequence of structural changes], E, FIN, H [with the central goal of a better targeting of measures], I, L, LV) or announce steps to strengthen user participation and user friendliness of SHSGI (CZ, E, L, H, S).

The stronger use of market instruments related to the provision of SHSGI (cf. also and more in detail Q3) has already been mentioned as one trend above. Nevertheless, this approach is seemingly limited to public procurement procedures, the outsourcing of accessory services and modes of service provision, e.g. by means of voucher systems (which reflects a shift from subsidising social infrastructure to the promotion of individuals/persons, increasingly defined as “customers”, however, on regulated “social markets”). Or it is restricted to specific sectors (as elderly and long-term care in E, services and institutions for handicapped persons in L, family doctors in the CZ and CY, the construction of non-profit rental social housing also using private capital in IRL and SLO) in nearly all MS. In this regard, the NL can be considered as the perhaps most exceptional case (against the backdrop of far-reaching reforms started/reinforced back in 2002), whereas the reply of E represents an assessment shared by a majority of MS. It underlines that the usage of market mechanisms, especially related to the “core activities” of SHSGI, is not (yet) that wide-spread and that if market mechanisms are being applied this happens under certain conditions on quasi markets. It also emphasises that SHSGI are (and need to be) publicly regulated with regard to authorisation, price fixing and territorial planning.

*3. Are there examples of social SGI which use market mechanisms to fulfil their tasks; what could be learnt from these experiences?*

Nearly all MS indicate that they make use of market mechanisms related to the provision of SHSGI. They are mainly applied with respect to certain cases:

- PPP, i.e. task sharing with a strong public partner in view of generating public interest-related advantages/benefits (IRL)
- public procurement entailing a purchase or sub-contracting of services or equipment/tendering for services (A, B, FIN<sup>5</sup>, H, I, IRL, LV, P, PL, S)
- outsourcing of accessory services (as a rule), i.e. tasks not related to the core business or demanding a highly skilled labour force (A, H)
- introduction of accreditation mechanisms (*accreditamento*) for institutions providing social services (as regulative tool for market entry and service operation based on technical and professional standards and appropriate organisational structures) (I)<sup>6</sup>

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<sup>5</sup> In this regard, FIN supports the regulation of state aid as proposed in the so-called Monti package, especially with regard to social housing policy.

<sup>6</sup> Further on, the reply of I explains that the accreditation, based on contracts between the local territorial authority and for-profit as well as not-for-profit organisations is currently implemented on an always

- allowing for shares of a “social market” esp. in the field of health care services where users are able to pay for their expenses out of their pocket without any public assistance or where the services are not fully reimbursed by social insurance or social assistance payments
- establishment out-patient specialists or of commercial segments/services in the health sector (CZ, H, LV), in the latter case, however, operating based on modified market mechanisms
- introduction of elements of users’ choice of providers/professionals, such as doctors (A)
- voucher systems, i.e. benefits in kind which financially “enable” users and do not subsidise infrastructure (I)
- personal budgets (NL<sup>7</sup>)

The majority of MS, however, defines clear limits to the scope of market mechanisms and acknowledges full respect for quality standards (in the broad sense). They hereby take into account specific needs of the target groups of SHSGI. Therefore they recognise the necessity to regulate quasi markets, i.e. to establish control mechanisms in order to prevent users against negative selection/cherry picking by certain providers (A, FIN, SLO).

- The reply of E defines that – if applied – the market mechanisms can be characterised as regulated and coherent, governed by "specific rules" which aim at guaranteeing equal universal access for all citizens. Such "specific rules" which aim at guaranteeing equal universal access for all citizens e.g. exist in the field of health care institutions and services, organised on a quasi market, i.e. a regulated and restricted market due to the elements of authorisation, price fixing, territorial planning. The same holds for the institutions of the for-profit hospital sector, as one type of agency in a regulated system where the formation of prices is not done according to the rules of offer and demand.
- The reply of H underlines that even if certain market mechanisms come into play in form of competing service providers they are substantially distorted by the inclusive system of health insurance.
- M elaborates on experiences with commercial services in the fields of health care and elderly care. The reply highlights experience-based evidence according to which services provided by the private sector are very expensive and can only be afforded by certain segments of the population. Private health insurance tends to provide limited coverage and therefore cannot be seen as an equivalent of the NHS. The private sector therefore is described best as a supplementary system of funding and health care provision, which cannot replace the role of the public sector in this field.

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broader scale (still significant regional variations), replacing the traditional mechanism of authorisation (*autorizzazione alla erogazione dei servizi sanitari ed assistenziali*).

<sup>7</sup> The reply of the NL reports on an extension of personal budgets in the field of health care as well as welfare and youth care. The budgets are agreed upon for individuals who require long-term care, in view of empowering the client/patient. Previously, users could not pay their service providers directly but payments had to be made by the Dutch Social Insurance Bank. Now they can either opt for the latter system or act as normal employers and make the payments themselves. Clients always have the initial choice between benefits in kind or a personal budget (an option which, however, is not suitable for all users due to its administrative burden).

Market mechanisms are considered advantageous because they allow for a higher degree of flexibility (CY), because they facilitate a better response to users' needs (EST, LV) and cost effectiveness (LV, P). MS not least therefore have allowed for or even encouraged competition mainly in the following fields/sectors of SHSGI:

- home help/care services
- employment services
- social rehabilitation

The NL define market mechanisms as the predominant tool in the field of the re-integration /re-insertion into the labour market. In the sector of social housing and urban regeneration, market mechanisms are also vital elements for housing associations and agencies in the area of urban regeneration to fulfil their tasks. Housing associations are required to pursue a commercial sound policy and risk management, surplus resources must be used for the benefit of social housing.

No extensive experiences or frequent usage of competition mechanisms until this date are reported e.g. by the CZ or E.

Several MS also mention problems generated by the application of EU competition and state aid rules (e.g. DK). Referring to employment services, DK states that future block exemption regulations must support the MS' possibilities of realising flexible employment activities in accordance with the EU employment strategy. Potential negative effects are reported by other MS (A, E, S). The reply of S hints to the lack of an effect-oriented analysis/proof of better results of commercial services compared to non-commercial services up to date<sup>8</sup>. This statement is underlined by the reply of E and P (with regard to the system of protection against occupational diseases and work accidents, organised as private schemes, although integrated into the public/obligatory social security system).

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<sup>8</sup> It underlines the lack of knowledge about the consequences of opening up elderly care services to competition: factors other than the actual provider determine what users think about services – such as continuity, the way in which people are treated and their opportunities to influence the content and manner in which services are provided. Negative quality factors include e.g. changes in management. Until now no information has been available to substantiate any claim that opening up the market has led to lower costs in elderly care services. For the field of health and medical services studies show that differences as to the content and quality of these services cannot be linked to the form of ownership and management. Studies rather contain evidence that more important factors have been the way in which work is managed and organised, opportunities for specialisation, development of skills for staff and the staff turnover. The reply also mentions an additional risk: long-term investment in research and development is reduced in a health care system based on short-term contracts that do not clearly define this R&D element. Finally, current procurement procedures – with short contract periods and frequent changes in care providers – lead to poorer co-operation between care providers; short contract periods also involve the risk that the ability of care providers to provide good care on a continuous basis is impaired.

#### 4. Is there at national level a notion or definition of social SGI or social services generally?

Most replies clearly state that there is neither a definition of SGI (which consequently implies the lack of a definition of SHSGI, too) nor of social services in any legal document of the respective MS.

As to the first part of the question, this result was fairly “predictable”, given the fact that the concept of SGI (and then logically also the more specific notion of SHSGI) has been derived by EU institutions (Commission; ECJ) from the concept of SGEI, and this on the backdrop of the necessity to define the applicability of EU competition, state aid and internal market law and to delimit EU and MS’ competences as to SGEI (as mentioned in the reply of GB). It is therefore to no big surprise that such an “artificial” definition – which deals with the issue of SGEI from a specific angle – is not reflected in an identical manner at the level of even one single MS. Consequently, a majority of them mentions that neither a general national definition of SHSGI nor of social services exist and that it is therefore impossible to identify corresponding official concepts (A, B, CY, CZ, D, DK, E, EST, F, FIN, GB, GR, H, I, IRL, L, LT, LV, M, NL, P, PL, S, SK, SLO). While the CZ hints to the relative vagueness of definitions of SGI or SGEI in general, FIN cannot see a real added value in building on either concept.

The above-mentioned “finding”, however, does not exclude that elements of the “construct” SGI (or SGEI) are used in legal or political concepts closely linked to traditions of MS in order to define public interest missions or to justify obligations set by state authorities. The aspects/concepts mentioned in the White Paper SGI in relation to quality criteria of SGI, amongst others, correspond to the aspects/concepts recognised in many MS. In stating that there is no general definition (of neither SHSGI nor social services), however, that to the contrary sector-specific legislation does contain specifications, the reply of A therefore is to some extent illustrative.

- Some MS point to commonalities and differences in juxtaposing the concept of SGI to national concepts. MS obviously influenced by the French tradition in this regard mention that the term “SGI” functionally resembles the term “*service public*” (public service) as regards its function, because both define an activity in the general interest as acknowledged by a public authority and subject to specific public interest obligations. The difference, however, lies in the fact that activities labelled as “*service public*” can also be provided by non-state agencies, cf. e.g. the reply of B or I (but also LT or SLO).
- SLO explains that services, defined by law or decree of a community or a municipality, are performed as public services if their continuous and undisturbed performance is provided in the public interest by the State, a community or a municipality. Public services are performed by public institutions or by other legal or physical persons on the basis of concessions. Legislation which regulates different fields of “non-economic” or “social” activities, defines these services as public services in greater detail.
- The reply of E points to national legislation which defines a link between general interest and societal utility mission on the one hand and social and socio-medical services on the other, in the sense that the latter contributes to the realisation of the former. The social

welfare/assistance and family code (*code de l'action sociale et des familles*) contains an enumeration of six categories of general interest and societal utility missions (*missions d'intérêt général et d'utilité sociale; ces missions sont accomplies par des personnes physiques ou des institutions sociales et médico-sociales*" et ajoute que ces institutions sont "des personnes morales de droit public ou privé gestionnaires d'une manière permanente des établissements et services sociaux et médico-sociaux" également énumérés avec précision par le législateur).

Looking at the SPC questionnaire (as of 20 July 2004), the introductory remarks propose a rather broad concept of "social services" which does correspond to none of the terms "social protection", "social security" or "personal social services" as used in the MS. A considerable number of MS refer to national sector-specific (framework) legislation comprising direct or implicit definitions of the term "social services" (as e.g. H, L). Some MS inform about a national definition of "social services" (as e.g. the CZ, DK, I, LT, LV).

Contrary to what could be expected from the analysis of the replies to Q1 (replies which are rather often in line with the broader scope of the SPC questionnaire), the clear majority of descriptions or definitions reproduced by the MS under Q4, however, reveals a rather "narrow" understanding of the term "social services" in national legislation, with a focus seemingly on activities aiming at societal (re-)integration of socio-economically vulnerable persons.

- LV is the only MS which presents a precise "description" of the term "social service" by means of enumerating its elements: In the Law "On Social Services and Social Assistance" they are conceptualised as services of social care, social rehabilitation and social work, they include home care, services of day care centre, group homes (apartments), institutions of long-term social care and social rehabilitation, crisis centres, night shelters, service apartments for persons with serious functional disorders, specialised workshops, technical aids.
- The reply of S states that the term "social services" primarily refers to all services under the Social Services Act and related social care acts.
- The NL refer to definitions of social services as used in the field of welfare and youth care, e.g. "a (social) service is a result-directed activity (or sequence of activities) to realise one or more functions of a provision in the interest of one of more clients". Furthermore they mention that a service often is characterised by a systematic procedure.
- The reply of the CZ offers the following conceptualisation of "social service" as set out in the Social Services Bill: a social service is an activity or a set of activities providing assistance to persons in "reduced" social circumstances – i.e. assistance to persons who have lost their resources and protection against social exclusion – with an aim to enable them to take part in the normal life of the community and to make normal use of other systems (such as housing, education, health care, employment services etc.) to the maximum possible extent. This definition seems to match trends in the field of social inclusion with the concept of SGI. The same holds for LT, which presents a definition in the framework of the national anti-poverty strategy: in the Implementation Programme of the Poverty Reduction Strategy for the Years 2002-2004, one of four major aspects of poverty reduction was defined as "the

development of social services, the increase of their availability and quality". In this context "social services" are understood in a broader sense, also covering education and health care. EST mentions a definition in its Social Welfare Act focusing exclusively on personal social services in defining "social service" as a non-monetary benefit which contributes towards the ability of a person or family to cope in every daily life. LT intends to broaden the concept of "social services" as stipulated in the Law on Social Services: While in the current version the term "social services" denotes the provision of assistance to individuals in various non-monetary forms as well as in the form of care funds, the draft of the revised version holds that "social services" denotes the provision of assistance to individuals or families who are partially or completely deprived of independence due to age, disability or social problems and thus have only limited abilities to take care of his/her personal (family) life or participate in social life.

- M differentiates the term "social services" into two more precise notions according to its national classification, namely "social security services in cash and in kind" on the one hand and "social welfare services" on the other.
- The reply of DK sketches the purposes of social services according to the Act on Social Services: they offer counselling and support aimed at preventing social problems, a range of general services, which may also have preventive purposes and make allowances for needs ensuing from physical or mental impairment or special problems. E explains that the notion of social services can embrace a variety of social realities. They can be provided by different types of agencies, provide professional support for persons with specific needs in view of helping them to realise their (social) rights in order to resolve the problems they are confronted with. I perceives the social dimension of social services as mainly related to the aim to give effect to constitutional rights and to protect the most deprived/vulnerable groups of the population (*servizi sociali: tutte le attività relative alla predisposizione ed erogazione di servizi, gratuiti e a pagamento, destinate a rimuovere e superare le situazioni di bisogno e di difficoltà che la persona umana incontra nel corso della sua vita, escluse soltanto quelle assicurate dal sistema previdenziale e da quello sanitario, nonché quelle assicurate in sede di amministrazione della giustizia*). IRL states that while it would be difficult to define social services in an Irish context, there is a clear range of measures designed to improve social inclusion and address the needs of the less well off. P explains that – even though no definition exists – there are common ideas as to social welfare services: they are oriented towards the prevention and remedy of situations of lack of economic resources or other living conditions comprising at least one aspect of vulnerability which affect persons or groups and aiming at their integration/re-integration into society as well as to community development.
- The reply of E contains a reference to the quality guidelines already determined at the European level in the White Paper SGI (i.e. universality, continuity, accessibility, transparency, equal treatment, non-discrimination, guaranteed access to resources, and – particularly – solidarity) as elements to define the notion of social SGI and holds that two additional aspects – "quality" and "protection to the workers, users and consumers" – are also essential.

- GR presents a reference to the constitutional safeguard of "Greece as a social state of law" (art. 25.1), which additionally secures social rights. Therefore social services guarantee elementary basic rights. The same holds for I.

Some replies also delimit the scope of health services separately from the one of "social services".

- As to health services, the reply of the CZ states that, whereas it is not possible to give a definition of health SGI, a classification of health SGI can be provided.
- The reply of EST offers a definition of a health service (activities of health care professionals for prevention, diagnosis or treatment of diseases, injuries or intoxication in order to reduce the malaise of persons, prevent the deterioration of their state of health or development of the diseases, and restore their health).

5. *It has been argued that social SGI are different to other SGI – Do you agree with this? Is a more detailed analysis of these possible differences – especially in relation to networks industries – a way forward to gain more certainty?*

Quasi all 25 MS support the put forward the argument that SHSGI are different from other SGI.

- Only DK and The NL show reservations to stating such a "basic" and inherent difference.
  - The reply of The NL states that from a Dutch perspective there is no difference between social SGI and other SGI that is relevant in this respect. When a SGI is of economic interest, the EU competition and state aid rules are applicable, no matter whether or not the SGI is a social one. Nonetheless in the section on "health, social welfare and youth care" they also "acknowledge" sector-specific specificities.
  - The reply of DK "recognises" a difference as to the target group of SHSGI and to the aspect of solidarity. According to the Danish reply, social services do not differ that greatly from services of general interest, except that their target group is usually society's most resource-deficient people, and that, generally speaking, social services require high quality, continuous provision, affordability and often contain elements of social solidarity.
- The reply of E juxtaposes objectives and instruments of two types of SGI, SHSGI on the one hand, networks industries on the other. Social SGI have as their *raison d'être* the realisation of collective solidarity and social cohesion (*pour répondre à toutes les situations de fragilisation sociale susceptibles de porter atteinte à l'intégrité des personnes: maladie, incapacité de travail, vieillesse, handicap, exclusion sociale, maltraitance, difficultés familiales et de logement, difficultés liées à l'intégration pour les personnes étrangères*). networks industries pursue the aim of producing (probably) marketable services and to provide them under conditions set by price, service continuity, quality, availability, general accessibility within the framework of national and European regulation – a framework which "adds" a social dimension to their mission without "transforming" them already into social SGI because the foremost objective of networks industries is the production of collective goods. The same document also underlines that the general quality guidelines applicable to

networks industries have a significant impact on social SGI, too, but that social SGI are also geared towards additional principles – an opinion (explicitly or implicitly) shared by several other MS.

- The reply of H “brings in the state” in highlighting that SHSGI are of utmost importance, since ensuring the continuity, the quality, the regional coverage is the most important responsibility of the state towards its citizens.
- The same holds for the focus on governance in the reply of S, which stresses that SHSGI come under clear political control, priorities related to them must be set by politically elected representatives, who can be held accountable for their actions by citizens. It pleads for a clear distinction between public services paid for by consumers themselves (such as water and drainage, electricity, telephony, communications) and public services (at least to a dominant extent) paid for by municipalities and county councils, such as schools and health and social services.

According to the majority opinion, SHSGI – in several ways – have a particular character. They are distinguishable by additional objectives or functions compared to other SGI. SHSGI

- are a part of the social protection system
- guarantee access to entitlements and equal treatment, with the solidarity dimension as the probably most distinguishing factor, not only shaping the benefits, but also the management of social SGI (generally not-profit-making), regardless of their public or private provision (e.g. E, E)
- support the realisation of the general quality guidelines of SGI – such as universality, equal accessibility for all, affordability – and as other fundamental principles – such as solidarity, equity, human dignity, human rights, children’ rights (H)
- promote social cohesion, social justice, solidarity and fundamental human rights such as human dignity, equal opportunities, etc. (e.g. CY, FIN, H, I, SK), especially with regard to low-qualified persons and the underprivileged (B)
- protect persons and groups needing assistance (e.g. PL)
- are often intimate by nature, provided in a close personal contact (e.g. CZ). SHSGI have additional special connotations directly related to their characteristics, as in the case of health care e.g. the relationship doctor-patient, the principle of autonomy, the confidential character, the professional ethics (E). Socio-medical services are also to a large part negotiated with and co-produced by the beneficiary (E). In the delivery of social and health services personal interaction, respect for human values and valuations as well as a ethical dimension are highlighted (FIN). SHSGI focus on the individual case without disregarding the public interest.
- respond to social needs which may not be addressed by the market in an efficient and satisfactory manner (e.g. CY, E). As a consequence, other rules than market/competition rules have to be applied, too. Otherwise this would entail a real risk of undermining the fundamental rights of all citizens with regard to equal access to basic services (e.g. B). Also, the SHSGI must be capable of responding continuously and very sensitively to the individual and changing needs of each user by adapting to her/his current conditions (CZ)

- are used by the most vulnerable and disadvantaged people, i.e. those persons requiring adequate mechanisms of defence (e.g. CZ)
- are intertwined with both formal and informal networks existent within the respective local community, while an important role in their provision is played by families, friends, neighbours and other communities (CZ). The proximity/accessibility of the services vis-à-vis the users – an aspect closely linked to territorial planning for social and socio-medical institutions and services – also constitutes a characteristic trait (E).

Selected MS refer to (corresponding) features of their national social models” (B<sup>9</sup>) or underline that the aspects mentioned by them are also reflected in the ESM (E).

Implicitly referring to the distinction between SGEI and SGI and the functional approach of the ECJ based on the criteria of economic vs. non-economic nature of a service, the reply of GB does not favour an approach to disentangle a “social dimension” or to juxtapose “social dimension” and “economic dimension” in SHSGI in particular or SGI in general. Rather it is seen as useful to focus on the public interest dimension and on ensuring that public policy objectives are upheld. Even though not explicitly mentioned in the same way by other MS, this “strategy” might also be subscribed to by a number of them.

Some MS (such as e.g. D, E) also mention the role of organisations providing SHSGI. They point out that their proximity to persons and their knowledge of social realities also allows them to act as early-warning systems and agencies to propose new solutions to evolving social problems. SHSGI are privileged areas for civic involvement, be it at the decision-making level or by means of volunteering.

*6. In case you feel that social SGI are different to other SGI please indicate what could then be the elements for a description at European level of these specificities of social SGI's, taking into account the diversity of general interest missions related to social services in the Member States and the general principles?*

*Could the elements worked out in the “Key issues” of the Conference “Social Services of General Interest in the EU” (28 and 29 June 2004) be a good base for this description in the European context? Which elements have to be added; which have to be amended?*

Many MS consider SHSGI a key element of the ESM (e.g. A). Most agree that it is possible to identify aspects shared across the 25 MS as well as common principles for SHSGI. The reply of the CZ underlines that the writing of a special directive or other legislation at the European level seems suitable only to the extent of defining such common principles.

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<sup>9</sup> B states that the application of the internal market rules could create legal insecurity with regard to the social model in place there.

Various elements for a description of the cross-country specificities of SHSGI at the European level are mentioned. They refer to principles underlying SHSGI, their objectives, the aspect of their governance, and specific characteristics of their users. In detail, MS name

- the objectives of SHSGI which aim at the realisation of human dignity, solidarity, social rights, social cohesion and welfare, social capital, enforcement, consumer's participation, consumer protection (B, EST, M, P)
- the principle of (comprehensive) solidarity, based on enforceable individual rights (A, EST) and in line with the objectives of social cohesion (E)
- the principles of quality of social services, user participation, equal access for providers (including non-governmental not-for-profit organisations) (CZ)
- the link between vulnerability, service need and inability to pay for the service consumed (M)
- the principle of non-discrimination (E) and equal opportunities (EST)
- the predisposition to market failures, requiring that state agencies intervene (M)
- the specific relationship between service provider and beneficiary, which is not comparable to the relationship between the provider and consumer in a market (A, B)

Under Q6a reference is also made to initiatives to complete the internal market in underlining that they must not undermine the stipulations of the Constitutional Treaty (Art. III-122) or be opposed to the guarantee of quality, availability and affordability of social services (A, P). The reply of E bridges to issues of higher rates of employment. The reply of PL underlines that the aim of SHSGI consists in the fulfilment of public responsibilities based on the principle of general interest, solidarity, necessity of providing recipients with services of general interest and securing their high standards in the framework of national social protection systems.

Last, but not least, there are several remarks showing scepticism and reservation with regard to the exercise of defining elements for a description of the specificities of SHSGI at the European level.

- The reply of FIN recalls that before starting with the exercise mentioned above, firstly, it should be clarified for what purpose the concept and criteria of social services of general interest (SSGI) can be used.
- More principally, the reply of H expresses a strong doubt that the concept of social SGI can be effectively and appropriately discussed and, more particularly, treated at EU level. Following this line of thought, it recalls that organising, functioning, structuring and financing as well as implementing a national social system is inter-linked with the respective historical, political, social traditions, and the economic performance.
- The reply of LV pleads to enhance the responsibility of each MS in shaping, organising, financing of social services and ensuring the quality standards of social services taking into account the specificities of SHSGI mentioned under Q5 and the principle of subsidiary.
- A more comprehensive general critical statement is made by B. The reply strongly argues for not treating SHSGI separately from the other SGI, because all SGI comprise a social dimension. However, the focus has to be on the specific character of the users of SHSGI, who are beneficiaries, not clients. The reply underlines the danger of a fragmentation of social and health services into various markets, which might not allow for a coherent

planning and provision of a comprehensive and co-ordinated service offer (any longer). As to the service providers, the reply hints to inconsistencies between EU provisions which only consider the nature of the exercised activity, at the same time neglecting the statute of the operator and the Belgian reality. The first approach mentioned above does not take into consideration elements such as the non-profit objective or the internal democracy linked to the statutes and the functioning of numerous recognised social services such as the mutual insurance companies. The same line of thought is presented by E.

About half of the MS (A, D, E, I, IRL, L, LT, M, NL, P, PL, SLO) replied to the second part of the question, divided into two sub-questions: Could the elements worked out in the “Key issues” of the Conference “Social Services of General Interest in the EU” (28 and 29 June 2004) be a good base for this description in the European context? Which elements have to be added; which have to be amended?

- As a rule, the “Key issues” are considered a sound starting point or a first clarification to base a more detailed analysis on. A standard “formula” is that discussions at the June 2004 conference at Brussels have highlighted problematic aspects which need to be further developed.
- The only more specific replies are from E and IRL.
  - The reply of E highlights the fact that general interest/public benefit missions of a social character can also be realised by organisations active in the field of education, culture, sports, leisure time, civic commitment. To conclude, one can identify numerous interfaces when comparing the objectives of social SGI with those of non-social SGI, the mission of social protection being their cross-cutting characteristic.
  - The reply of IRL is more specific in stating that particularly the fourth paragraph listing specific characteristics of such services over four bullet points should be taken account of. It recommends, however, being cautious against the requirement that SHSGI involve “users’ participation in shaping, delivering and evaluating social services” (second bullet point). Although this may indeed be good practice a social service might not have such extensive input from users in the shaping of the service, and a decision on this is a matter of social policy, a national prerogative. The Irish government also pleads to be cautious about linking the social SGI to the concept of fundamental rights, as this is open to interpretation.

*7. Which of the different sectors outlined under Field 1 should have priority for the examination at European level?*

Answers to Q7 differ to a certain extent. Whereas several MS indicate clear preferences which aspects (A, CY, CZ), fields or sectors should be further examined at European level, several others are more hesitant to set priorities (e.g. E, EST, F, FIN, H, P), mainly due to still existing

uncertainties as to the objectives of activities related to SHSGI at European level<sup>10</sup>. Still others attribute the same priority to all sectors mentioned in the national reply (B) or are not able to reply due to the fact that no priority has been set at the national level (L).

There are also differences as to the priority issues identified:

- According to some MS, priority should be given to fields where backwash effects from EU competition law become more and more obvious, such as e.g. health insurance schemes/measures (A, GB<sup>11</sup>) or aspects of financing and provision, being closely related to competition and state aid issues (I).
- Without direct reference to this regulatory framework at EU level, CY and LV also mention a priority focus on health care and social care/welfare services.
- LT additionally lists services promoting employment and services promoting social integration, PL educational services.
- Other MS put interrelated issues such as the DSIM at the top of their list (IRL).
- IRL also underlines that aspects covered by Q1 (definition, organisation, financing, service provision, standards) should not be prioritised with due respect to the principle of subsidiarity.
- Finally, some MS inform about their major interests as to specific topics they would like to have discussed:
  - As to social services, the CZ enumerates possible topics for discussion, amongst them the 1) definition of SSGI, 2) specification of their specificity distinguishing them from the other SGI, 3) definition of general principles of SGI, as well as 4) definitions of tasks, commitments at both the European and national levels.
  - Instead of focusing on sectors, M prefers to concentrate the analysis at European level on aspects related to service delivery: priority should be given to service provision and definition of tasks/obligations as well as quality standards for social welfare services.

Only in a limited number of cases, MS provide information on the criteria they have chosen to name the priorities, as e.g. the CZ which mentions minimum standards in the field of public health and emergency health to be ensured due to the freedom of movement of EU citizens – in this case: patients – to other MS. The same holds for PL, which, generally, opts for a very limited regulation of SGI of non-economic character at EU level, however, with some standardisation in order to guarantee equal access to all EU citizens. E proposes to focus on complementary and statutory social protection schemes as the sector with the (already) highest “degree” of Europe-wide homogeneity compared to the other sectors of SHSGI.

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<sup>10</sup> E.g. E proposes a cautious step-by-step approach, by firstly establishing a catalogue of social SGI, and only then taking the next step based on the OMC. Social SGI other than complementary and statutory social protection schemes that could be given priority are more “ethereal” and complex, both regarding their contents and their personal implementation scope (*campo de aplicación personal*), and therefore should not be prioritised.

<sup>11</sup> More precisely, GB proposes to focus on an analysis of the role of SGI supporting a sustainable position/balance between internal market objectives on the one hand and MS' responsibilities and objectives in regulating health systems on the other. Additionally, the Communication on SHSGI should contain a clear explanation of the impact of SGI on health.

8. Please indicate for the services identified under question 7 with regard to the EC rules listed below (see also background document) whether:

- a. it is established (in case-law or by way of Community law) that these services fall outside the scope of these rules
- b. it is established (in case-law or by way of Community law) that these services are falling within the scope of these rules
- c. it is unclear if these rules apply to these services, there is a need for clarification ("grey zone")
  - Internal market rules;
  - Art. 81 and/or Art. 82 EC;
  - Art. 86 EC;
  - Art 87 EC;
  - Public procurement rules;
  - External trade negotiations.

As a starting point, several MS (A, D, E) refer to ECJ rulings which confirm the position that in general and considered as an entity the social protection system does not deliver SGEI and the respective institutions are no companies/enterprises and that thereby do not fall under EU competition, state aid and internal market regulations. P declares that the complementary social security system is subject to internal market rules as does E which underlines the applicability and transferability of the ECJ ruling Albany.

Having stated this,

- they consider it as being established with regard to Art. 81, Art. 82 EC and the public procurement rules that SHSGI fall within the scope of case-law by the ECJ or Community law (CY).
- A general obligation of tendering for social welfare services insofar as a market for services already exists is also undisputed (A).
- LT states that internal market rules as stipulated in Art. 81, 82 and 87 of the EC Treaty are applicable to health care services.
- E basically subscribes to this statement; however, it also mentions additional issues to be taken into account. The reply of E refers to ECJ rulings on free movement of patients which have conceptualised health care services as economic activities falling under the scope of the free movement of services. However, under certain constraints, esp. any impairment of the financial sustainability of social protection systems can be rejected with reference to a non-consideration of the general interest (*raison impérieuse d'intérêt général susceptible de justifier une entrave au principe de la libre prestation des services*), of public health concerns or of planning activities.
- GR mentions the provisions of Directive 2000/52/EC and L. 2992/2002 on keeping a separate account for the activities of economic nature/SGEI provided by social protection institutions relevant in the context of state aid control.

- PL mentions that in the field of employment services public aid rules (linked to creating new work places or the recruitment of disadvantaged employees, e.g. the disabled) applied to institutions which deal with employment are in accordance with common market rules.
- The SK holds the same for national public procurement rules (while implementing the Community competition rules) applied to services provided by the Agency for Temporary Employment or by the Agency for Supported Persons in the same sector.

Many MS show their interest in exchanging information and experience on grey zones with the aim of achieving more clarity. In this regard are mentioned

- the aspects
  - distinction between SGI and SHSGI (DK)
  - EU framework regulation for SGI (GR)
  - in-house provision (A, FIN)
  - MS' competence to define public interest missions/tasks and their form of execution (IRL)
  - MS' competence to define preferential treatment for each type of provider (I, twice, under Q8 and Q9)
- or different sectors of SHSGI, such as
  - health insurance and health services (A). PL demands to exempt this field from the application of EU law as do H and P with regard to the (future) Directive on Services in the Internal Market.
  - youth welfare services (A) and child-care services (IRL – with regard to state aid)
  - ambulant services (FIN) (cf. Q9)
  - social housing (IRL, NL)
  - elderly persons (L)
  - services of re-integration/reinsertion into the labour market (NL<sup>12</sup>)
  - education (PL)

Some of the aspects already mentioned above are put in a broader perspective in the replies of E, F, H, I, M and SLO:

- The reply of E is a rather comprehensive one, especially for the fields of personal social services and health services and social housing.
  - It states that as a rule, EU competition and internal market law is not applicable to personal social and health services, because these services are of a non-economic character. In certain cases, however, the EU competition and internal market rules are applicable under specific conditions. Therefore it seems useful to clarify the nature of certain activities (*il s'agit fréquemment d'activités qui, dépendantes massivement de financements publics et prenant en charge des personnes insolvables n'ont pas de*

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<sup>12</sup> The reply of The NL states that with regard to the affiliated provider model, municipalities and providers turn to the Ministry of Social Affairs and Employment with questions concerning a) procurement (in particular with respect to the ECJ rulings Teckal and Telaustria), b) state support (in particular with respect to the follow-up of ECJ ruling Altmark Trans (Art. 87 EC) and the application of the EC Regulation 2204/2004).

*viabilité économique; elles ne s'exercent pas sur un marché et n'affectent pas la concurrence dans la mesure où elles ne sont pas susceptibles de faire l'objet d'une initiative privée et n'améliorent pas la position concurrentielle de l'entité qui les assure).*

- Even though certain services can have a potentially economic character, they are to a high degree determined by general interest missions conferred to them by state agencies, as shown by the ECJ ruling Sodemare.
- The services' objectives cannot be achieved by falling back solely on competition mechanisms, rather a legal framework with restrictions is needed.
- Finally, most of the services are of small size, locally oriented and below a certain threshold of turn-over which therefore can be considered as compatible with EU competition law. In the field of social housing, the respective agencies fall under the scope of public procurement rules. Criteria set by the ECJ ruling Altmark Trans have contributed to advance the issue, given the fact that they shed light on the related difficulties, even though the proposed "solution" does not seem to be fully satisfactory, comprising imperfections which reflect the lack of a prior and in-depth analysis of the concept of social SGI.
- More generally, it highlights that the exemption of certain sectors from prior notification such as hospitals and social housing is welcomed by the French government. This can be explained by the fact that a regulation for the financing of social SGI cannot be dissociated/treated separately from the general framework applicable in order to achieve an appropriate balance between the respect for EU competition law and the promotion of social cohesion as the *raison d'être* of social SGI. Their effectiveness cannot be evaluated in financial/economic terms only, but also in view of their contribution to social and territorial cohesion often resulting from public interest missions conferred to them.
- The reply of I states that few experiences exist with regard to (potential) conflicts between national and European norms and refers to the ECJ rulings Sodemare (which allowed for state authorities to restrict the (partial) reimbursement of cost for the provision of services in the field of social assistance to NGOs) and INAIL (which ruled that INAIL was not to be qualified as an enterprise and that a legal monopoly for a branch of social security in conformity with EU law).
- Three replies mention other conflicts, possible contradictions or problems:
  - H mentions the general EU principle of non-discrimination, in this case based on nationality, in stating that foreign providers legally established in Hungary or providing services from other MS can offer their services as long as they meet the professional requirements laid down in Hungarian legislation. In doing so it points to contradictory regulations of the draft DSIM related to the freedom to provide services.
  - M highlights that for public health services there is currently a conflict between the Treaty and ECJ case-law: whilst both the Amsterdam Treaty as well the new EUCT clearly indicate that the funding and organisation of health services is a MS' competence, the ECJ has ruled that health services fall within the scope of internal market rules which – in turn – has created a certain tension and uncertainty. The country now waits for the outcome of the referral of a series of questions to the ECJ regarding

public health services in the UK (NHS), funded and organised in the same way as in Malta, for further clarity.

- SLO refers to EC Document no. 10865/04 of 25 June 2004 (explanatory note on the provisions related to the posting of workers with a particular emphasis on art. 24) as to the presentation of relevant examples from the ECJ which also reflects the dilemma of harmonisation according to the rules of the internal market.
- Last but not least, E holds that the analysis of the related Community legislation or ECJ case law is not an exercise for the MS, but rather for the Legal Services of the Commission or, if appropriate, of the Council.

*9. Please describe experiences concerning the influence of these EC rules on social SGI (may be “good” or “bad” examples; e.g. have these rules enabled the efficient provision of certain services or have they limited the freedom to realise national social policy goals)?*

As a general statement, most MS inform that, until now, the number of examples reported where EU legislation did have problematic/negative backwash effects on the provision of SHSGI according to national political goals/preferences is rather low, and this – to no surprise – especially in the 10 accession countries of the 2004 enlargement round. Some MS consider relevant ECJ case law as being rather new and therefore premature to definitively conclude on this issue (e.g. E). Changes are expected to be most urgent and relevant with regard to health services, to the cross-border dimension of SHSGI and the co-ordination of social protection schemes. Additionally, an increase in backwash effects (B) or “situations of conflict” is expected to come along with the enforcement of the (future) Directive on Services in the Internal Market (according to the draft version proposed by the EC in spring 2004).

Issues or fields considered problematic or challenging by MS with regard to EC internal market or competition rules are

- planning and quality assurance (A, CY, I, where the planning component is (also) designed as an instrument of participatory democracy, and S, referring to cross-border health care)
- a priori clear and comprehensive definition of all conditions for call for tenders in the field of personal social services (A); in this regard can arise problems due to dynamic developments in the field of social and health services
- demands to allow for competition in the sector of social and socio-medical institutions and services, e.g. related to services for homeless persons, traditionally provided by NGOs with state subsidies (E). The reply of E underlines that competition mechanisms in the sector of social and socio-medical institutions and services (e.g. services for homeless persons) tend to produce negative effects on the service quality because they endanger the realisation of social policy missions/objectives, given the fact that social NGOs, as a rule, also offer accessory/additional services, often provided by volunteers. Furthermore, they are locally anchored and best situated for activities in networks. A for-profit provider could not offer such types of services. On the national level, a solution could be found on the basis of the so-called “beam of indices technique” (*technique du faisceau d'indices*) which has made

explicit the mix of two logics (*rencontre d'une commande de la collectivité justifiant l'application du code des marchés publics et du projet d'une association sans but lucratif justifiant l'attribution d'une subvention dès lors que l'action menée s'inscrit dans une politique publique*).

- separation of NGO activities into “non-business” and “business” (FIN)
- varying assessment as to the appropriateness of competitive tendering and the benefits achieved in that way (FIN). This is further explained in their reply: Firstly, if the market functions well, competition may contribute to making the activities more effective and to enhancing cost savings, but there are plenty of problems in the field of social welfare and health care that are caused by market failures, such as asymmetrically distributed information. Secondly, service provision must also be ensured in situations where the service concerned is only needed by few clients or patients. Thirdly, when a client is in need of several services simultaneously, it is vital to tailor an entirety of services according to the client’s individual needs.
- vague obligations how to act when the general principles related to procurement procedures are not covered by the Directive on Public Procurement (FIN)
- potential conflicts of EC rules mentioned under Q8 with national law (n. 328 of 2000) on integrated social service systems/social services networks, based on public-private co-operation in the fields of planning and provision/management and the principle of horizontal subsidiarity, the private partner being a NGO (I)
- EC rules mentioned under Q8 could endanger the intended balance between competition and solidarity designed in view of a specific relationship between public/state agencies and NGOs, in the framework of a regulated/restricted competition in view of regional planning and a framework of primary responsibility of state institutions (I<sup>13</sup>)
- state guarantees for social housing institutions entrusted with a public interest mission (IRL)
- potential impact of the ECJ rulings on patient mobility and the draft Directive on Services in the Internal Market, which could firstly result in economic inefficiencies in a public health care system that is directly funded, provided and managed by government and secondly influence health policy goals (since funds could be re-directed away from preventive programmes to pay for elective curative care obtained overseas) (M).
- Similar arguments, but mainly focusing on the financial sustainability of the (public) health care systems, are presented by S, the SK and SLO:
  - In the reply of S, problems for national health care systems related to the right (confirmed by the ECJ) to seek health care abroad under certain conditions are mentioned. This might lead to a subsequent transfer of costs to publicly funded national systems (where – at least in the Swedish case – no economic relations between care

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<sup>13</sup> The reply of I mentions the formula of a regulated/restricted competition. The limitation refers to registered organisations (inscribed to a list, following a process of authorisation and accreditation) – actually predominantly NGOs – which have been exclusively conferred the permission to provide social and health services. The law prescribes a categorical discrimination in the first place (against certain types of providers, in conformity with the Italian Constitution) in order to promote a “regulated competition”/restricted and negotiated admission and entrustment (*procedura di aggiudicazione ristrette e negoziate*), excluding the usage of the price as sole criterion. In a market “restricted” accordingly, in the second step NGOs compete with other NGOs.

providers and patients exist): to maintain well-functioning, publicly funded health services in a country, the responsible agencies must be able to estimate and take a position on care needs and set the necessary priorities, otherwise there is a risk that the system will be over- or under-dimensioned in relation to the need for care.

- Referring to the (future) Directive on Services in the Internal Market, the reply of the SK holds that the promotion of rights of citizens of MS to health care anywhere within the EU, even in non-acute cases, may have a significant impact on the sustainability of health care systems in certain MS. It may additionally interfere with their national health policies. Aspects listed in this regard are: internal allocation of resources, priorities set for the funding of health care sectors, national right for the determination of the scope of health care covered from public resources, priority of individual availability of health care from the clinical aspect, strategy related to the management of patients and resources.
- The reply of SLO utters concerns on the implications of relatively free access to the health services in other MS and related financial stability/sustainability of national systems due to a possible increased outflow of health care funds for the reimbursement of costs of the treatment abroad. Therefore, health services, provided within the public network and financed by public statutory health insurance, should not be treated on an equal footing with economic services, which are market driven.

As to the demands of MS

- A holds that planning and quality assurance must not be endangered by a transfer of tasks related to the core of social protection systems and market-oriented service provision based on tendering
- A also shows interest in exchanging information and experiences with PPP-models
- I wished EC rules to allow for an integrated social service system/social services network as well as for the formula of a regulated/restricted competition (cf. also footnote 185)
- The NL propose to bring urban regeneration as a SGI under the scope of the proposed Monti package and therefore perceive a need of more clarity and flexibility in the use of financial/fiscal instruments in deprived urban areas.

As to influences of EC rules mentioned under Q8 on social SGI at national level,

- M mentions the EC regulation 1408/71 (on the application of social security schemes to employed persons and their families moving within the Community) and 574/72 (application of social security schemes to employed persons and their families moving within the Community) whose short-term impact in the field of social security has been more on human resources than on financial resources of the systems. It also recalls the impact of a considerably burdensome EU *acquis communautaire* to comply with as to medicines.
- The NL report that Dutch arguments in favour of certain restrictions on cross border health care were considered in violation of internal market rules (free movement of services) by the ECJ. PL had to abolish a preferential tax treatment in the field of social housing and therefore perceives the impact of the now higher VAT rate on construction materials and on total costs of construction works (including social housing) as a negative example of the influence of EC rules.

- FIN mentions a country-specific feature by requesting the non-applicability of EU rules on diaconal tasks, falling into the scope of church-related activities (cf. Q3).
- EST emphasises that in general limits for the influence of EC rules are set by the obligation to guarantee human rights and the quality of services.

10. Are there examples where the mentioned EC rules were taken into account in advance when planning or reforming national social policy?

Several MS give a positive reply related to the EC rules mentioned under Q8:

- Not surprisingly, some MS state that conformity with EC regulations can be considered a *conditio sine qua non* for all new pieces of national legislation (A, E).
- For MS having adhered to the EU in 2004, accepting the *acquis communautaire* has also been a precondition of accession, a point mentioned by LT and PL.
- E and FIN report on backwash effects on national public procurement rules.
- In making provision for the financing of social housing through the Housing Finance Agency (HFA), IRL has taken account of the Treaty's state aid rules, local authorities and voluntary and co-operative housing bodies have been advised of the need to comply with public procurement rules.

Some MS report on an influence of EC rules in general on social policy (planning):

- LV and M explicitly mention the influence of EC rules on social policy planning in general, The NL for the fields of employment services and health care services.
- E mentions two additional aspects: community criteria – equal treatment, sustainable pensions, transparency and feasibility of complementary statutory schemes, portability, etc. – did have an impact on planning and programming national social policies, shaping their content and channelling their objectives. Additionally, Art. 2 of the Treaty of Amsterdam can be considered as an additional point of reference for legislative change or reform in the field of social protection.
- PL mentions a case related to the general EU principle of equal treatment: when planning the new Law on Social Assistance, EC rules have been taken into account mainly with regard to accessibility criteria (under art. 5 citizens of other MS have the same right to social assistance benefits as Polish citizens, provided that they have a permanent residence permit and actually live on the Polish territory)
- FIN reports on amendments which became necessary to guarantee the exportability of a specific benefit, namely the home care allowance (one of the benefits related to childcare), which is now covered by the scope of regulation 1408/71 on the co-ordination of social security systems.
- FIN also mentions an amendment to Finnish legislation which became necessary due to non-conformity with the Directive on Transparency in related to the aspect of decision-making process concerning the special reimbursement of medicines.
- IRL informs that grant assistance to private childcare providers currently operates under the *de minimis* system under the Equal Opportunities Childcare Programme (EOCP).

- LT endeavoured to take into consideration references to social security in EU legal documents, especially the various recommendations on common criteria concerning sufficient resources and social assistance in social protection systems (Council Recommendation 92/442/EEC on the Convergence of Social Protection Objectives and Policies of 27 July 1992) (cf. Q9).
- Finally, backwash effects are seen by three MS as to the reimbursement of costs for medical treatment abroad (FIN, SK, SLO [problems as the financial burden is not manageable for national health insurance/services system]).

No influence of the mentioned EC rules (under Q8) – at least so far – is seen by the CZ, no example can be given by H and L as well.

*11. Are there specific fields of European law and activities which necessitate further clarification with regard to their impact on social SGI (see also question 8), like e.g.:*

- *Internal market rules;*
- *Art. 81 and/or Art. 82 EC;*
- *Art. 86 EC;*
- *Art 87 EC;*
- *Public procurement rules;*
- *External trade negotiations.*

In addition to the aspects already mentioned above, several MS in their respective reply additionally refer to the draft DSIM. They ask for clarification with regard to the relationship between documents related to SGI and proposals for a regulatory framework for services in the internal market<sup>14</sup>. A explicitly holds that the planned Communication on SHSGI can only be of relevance if social services are to be excluded from the area of application of the draft DSIM.

The majority of MS also underlines that backwash effects also have to be taken into consideration with regard to other pieces of legislation, e.g. state aid and public procurement rules.

- In this regard, E underlines the MS' need for sufficient room of manoeuvre in order to be able to support social SGI in the development of their activities. Otherwise this could endanger the organisational framework of the sector with clear impacts on the Lisbon Strategy objectives of social inclusion and social cohesion. E puts the accent on continuity and security as key factors for a harmonic development of the social dimension both at national and at Community level.
- H considers it useful to clarify scope and extent of the exemptions from EU competition legislation as to social SGI, to be also extended according to the Hungarian government.

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<sup>14</sup> GR wishes the EU to address specific issues concerning the interplay between the provision of tasks of general interest in the social and health field on the one hand and next steps as to the EU internal market rules in the framework of the on-going negotiation process on the proposal of DSIM on the other hand.

Other MS repeat the need to clarify the distinction between the concepts of SGI and SGEI and to define the concept of social SGI (DK, EST, L, LV, SLO). This could be done by applying the OMC, partly to visualise structures existing in and actions taken by MS and thus create transparency on activities in the individual MS, partly to learn from each other's experience in the area (DK). I refers to the EESC opinion "Private, non-profit social services in the context of services of general interest in Europe" (EU Official Journal, 2001, C311, 33 and following) which could offer relevant methodological impulses in this regard.

Still others mention specific fields needing more clarification, such as health care (GB, LT, PL), employment services (M) or educational services (PL). Or they demand for an exemption of (specific) SHSGI from EU competition, state aid and internal market rules (IRL<sup>15</sup>, PL).

The issue of external trade negotiations in the framework of GATS is only referred to by IRL<sup>16</sup> which might be attributable to the concern of first achieving clarifications within the EU before considering its external trade issues.

There are finally some more detailed country-specific reflections contained in the answers submitted by the national governments of CZ, E, FIN and The NL:

- The NL follow another approach in stating that EC procurement and competition rules provide a safeguard for transparency and open competition on the market for re-integration services. In order to step-up the process towards an open market for services for the re-integration into employment, the legislative framework, however, needs to be clear and univocal. The reply holds that further clarification is needed in the scope of the principles to define and proportionality and asks if the latter does set any limitations to the former. In the field of social housing and urban regeneration the reply states that EU internal market rules and competition legislation – to be more precise: state aid in relation to free movement of capital and services – need further clarification and asks "How does the fact of assigning a public task and giving state aid for that task relate to the freedom of capital and services?"
- E doesn't perceive big problems or uncertainties as to the applicability of EU competition law in the field of complementary social protection schemes. The applicability of all EU rules, however, should be questioned, given the fact that the smooth functioning of negotiations in the framework of collective agreements does not allow for a scheme with prior authorisation and strict a posteriori control. For the field of health care institutions and services, the French reply asks to define more precisely backwash effects of the 1998 Kohl and Decker ECJ rulings in the framework of Directive 1408/71 and not in the framework of the DSIM. In the sector of social and socio-medical institutions and services, esp. for services with an

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<sup>15</sup> IRL demands an exemption decision under Art. 86(2) EC for state's arrangements for the funding of social housing and an explicit exemption from internal market and state aid rules to allow for a more effective social provision of childcare.

<sup>16</sup> IRL recalls that related to the GATS no offer has been made by the EU in the areas of education, health or social services. It also underlines to agree with the provision and regulation of public services is a matter for national governments to decide. This remark made in 2004 has become important again, given the ongoing negotiations on free trade agreements (see sub-chapter 3.6, issue 5).

economic dimension which have been conferred with a public service mission, Art. 86 2 EC is often referred to in order to justify limitations as to the application of competition law or internal market legislation. The French reply states that a non-regulated opening of the market to competition/application of EU rules of competition would actually endanger the realisation of social policy objectives. The same holds for specific regulations, esp. in view of a prior authorisation procedure and free choice of service provider, which are basically motivated by concerns about the protection of the users/beneficiaries of social and socio-medical institutions and services.

- FIN refers to the political, governance and national variety dimensions of the issue, holding that answering this question would require a broad-based political preparation, for which there is no possibility in the given context. The reply also states that the need for regulation varies by country and sector according to geographical and historical factors, political decisions and technological development and that therefore it is difficult to form a view on what general regulation would be needed at the EU level.
- In its answer to Q11, the CZ reiterates its proposal to prepare a summary document in order to elucidate on specific fields of European law, in relation to SGI and social services as well as to health services.

*12. Should the work to be carried on only concern social services of general economic interest and concentrate on e.g. competition rules and certain internal market rules or should social SGI both of an economic or non-economic nature be subject for further work?*

The preference for a joint analysis and “treatment” of SHSGI of an economic and non-economic nature as uttered by the majority of MS seems to have a rather pragmatic reason, i.e. the difficulty to draw a clear demarcation line between the two “facets” of services mentioned given the mixed nature of many services and the dynamic development of forms of provision. It is considered that even services of non-economic nature have an (indirect) economic impact.

- Some MS propose a list of criteria to distinguish between SGEI and SGI, given the fact that the latter are not subject to EU internal market and competition rules. As to further action at the Community level, the reply of E states that once a catalogue of social SGI has been prepared, some room can be left for EU action to facilitate the improvement and modernisation of SGI in the field of social protection, within the framework of the OMC, duly tailored to the field to be dealt with. This view is supported by EST which sees no need to common goals and objectives at the European level in the framework of the OMC.
- The need for clarity about “high level definitions”, i.e. what constitutes social SGI and how those of an economic and non-economic nature are to be defined, is underlined (IRL, NL).
- PL asks for a specification concerning which community rules apply and to what extent they do to SHSGI. They also consider the definition of social SGI and their division into economic and non-economic services to be done most adequately by each MS on the basis of its respective national situation.
- A recalls that all considerations should start from and focus on the public/societal aim of a service, and only then analyse the most appropriate form of service provision.

- This argument is supported by the reply of B which mentions the necessity to underline the role of social SGI as basic instruments of social policy. Consequently, the EC competition and internal market regime have to be adapted to the technical specificities and political mission of social SIG of economic nature.
- E states that – in the framework of such a comprehensive approach to be taken due to practical reasons – the aim has to be to guarantee that public service/general interest missions of SGI can be realised.
  - A distinction drawn too strictly would lead to a simplifying approach which also could not take account of the specific added value of social SGI (*opérer une distinction trop stricte en fonction de leur caractère économique ou non économique serait réducteur et nuirait à l'identification de leur apport particulier*).
  - According to the reply by E, in the social sector, principally all work and studies, the follow-up and evaluation should be limited to SGI of economic nature. However, given strong an uncertainty as to the criteria to distinguish between SGI and SGEI, the French government gives preference to a comprehensive approach (*une grande partie des SIG sociaux est de nature non économique et il paraît difficile de distinguer de manière incontestable et définitive les SIG sociaux de nature économique*).
  - The White Paper SGI announced a clarification of the concept of SGI in the framework of EU state aid regulations. According to E, the proposed decisions on state aid, being part of the so-called "Monti package" (as of December 2004), however, cannot provide evidence that a clear distinction between SGI and SGEI can be made.
- FIN would prefer to limit regulation at EU level to aspects which could be considered as a "European added value", i.e. to issues such as the obvious market failure at the European level, conflict solving procedures and cross-border operation of SHSGI.
- H sees no added value with regard to any further examination of the issue. They also have no interest in further elaborating on whether certain social services are economic or not, mainly due to the fact that in the Hungarian system, the step-in possibilities of private enterprises are very limited.
- IRL mentions specific concerns as to social housing policies<sup>17</sup>.

13. *What should be the concrete aim (especially concerning further steps) of the Communication of the Commission on social SGI including health services?*

The MS express a range of expectations as to contents or they focus of the forthcoming Communication on SHSGI. Two main complexes of concern can be identified:

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<sup>17</sup> The reply states that a key aim must be to provide certainty for those who raise funds, who provide funds and who use the funds to provide social housing. While housing policy clearly has to respect the principles of the Treaties, the MS retain competency for the development and implementation of that policy. It would therefore be useful for the smooth operation and delivery of services to disadvantaged households, to have clarity on the State aid position in a manner that reflected this division of competency and the principle of subsidiarity. As the ultimate beneficiaries of these services are disadvantaged households, the provision of article 87(2) that aid of a social character is compatible, could be considered to apply.

- Some of the issues refer to the specificities and role of SHSGI as key elements of national social protection systems. In this context, the following aims are mentioned:
  - acknowledgement of the specificities of social services for social policy, society and a balanced market economy (A, B, CY, I, LV)
  - demonstration and acknowledgement of the fact that a general approach based on economic criteria (of efficiency and effectiveness) does not do justice to SHSGI (A)
  - establishment of an inventory of social services within the EU (A, E, L, P), on which to apply a procedure of exchanging information and experiences (A, LT) and which takes into account the diversity of forms of organisation of SHSGI in the various MS (E<sup>18</sup>, M)
  - identification of common characteristics of social SGI in general as well as sector-specific characteristics (E, L, P, S), based on the beam of indices technique (*technique de faisceau d'indices*) (E)
  - ensure that public policy objectives remain the paramount and sole concern of MS subject to compliance with existing EC rules (GB)
- Other points mentioned refer explicitly to the current and possible future legal and political framework for the operation of SHSGI (regulation, delivery, financing, evaluation). MS expect/demand/propose:
  - the establishment of a “compendium” of the current legal framework (legislation and court rulings/jurisprudence) (A, B, CY, E, F, LT), especially focusing on the legal uncertainties and other problems which need to be tackled (E). In this regard, the reply of E voices the expectation to come to a clarification whether the general principles of the Treaty – like the principle of non-discrimination for non-economic SGI or the freedom of establishment for SGI of economic nature – are the only ones to be applied, or if the obligations established for the accomplishment of Community policies – like those of the internal market and competition law – should be applied too.
  - a clarification as to the distinction between SGI and SGEI and with respect to grey zones in view of the economic or non-economic character of social and health services (B, E<sup>19</sup>, EST, F, GR, I<sup>20</sup>)
  - a clarification as to a scheme of compensation for public interest/service obligations (B, IRL, NL)
  - the recognition of the exemption of social services from the application of competition legislation and/or internal market rules (A, B, CY), thereby enabling them to fulfil their missions

When it comes to more country-specific requests or suggestions,

- some MS, such as the CZ, utter a number of very precise expectations<sup>21</sup>.

<sup>18</sup> The reply of E also proposes – based on documentary efforts in a first step – to launch a Europe-wide consultation on SHSGI in a second step, with a focus on their functions/aims and their quality.

<sup>19</sup> However, the reply of E holds that until now both the EC and the case law of the ECJ have allowed for the development of such services without any need to establish whether they are of an economic nature or not.

<sup>20</sup> In the case of I in order to “justify” a modulated application of competition and internal market rules, as they write.

- E is the only country to ask for an improved consideration of the statute(s) of the various service providers of social SGI.
- FIN underlines its opinion that no clear added value is foreseeable until the objectives of the exercise are clarified (again, the reply of H is in line with this statement) and also hints to the necessity to firstly focus on analysing the effects of the DSIM and the revisions concerning state aid.
- GB does not wish for a European definition of social services. The reply also highlights the national policy goal of liberalising services to help to boost growth, competitiveness and employment.
- I shares this view in stating that an attempt to regulate social SGI at EU level seems very difficult, if not impossible, given the huge institutional differences in the 25 MS representing all types/families of "welfare mix".
- M would like to have an analysis of the impact of internal market rules on equity, access and sustainability of social SGI and on health care systems based on a Beveridge type (direct funding and providing) compared to those based on a Bismarck model (social insurance and reimbursement) included.
- Like other MS (e.g. PL), SLO requests to clearly demarcate and admit national competency for the legislative and organisational regulation of these services, especially in relation to the internal market, where the EU has defined competence.
- PL would like to see the Communication on SHSGI serving as a tool for mainstreaming the quality of health services, in which regard the OMC seems to be the best solution.
- S proposes to explore positive consequences of increased competition according to the rules of the single market in enhancing the supply and quality of services, as a contribution to the achievement of the Lisbon Strategy. This should, however, take into account and respect the characteristics and fundamental principles of social services in the different MS, such as equal access, quality, financial stability, subsidiarity.
- Finally, two MS (A, B) also expect the Communication on SHSGI to contain information on the main lines for future activities as seen by the EC.

*14. Do you consider the use of the open method of co-ordination (existing or new) an appropriate means for further steps? If so, what should be the concrete task of this method? (e.g. common objectives, exchange of good practices, evaluation etc)*

Most of the MS welcome an (intensified) exchange on information, experience and good practice on various issues concerning SHSGI.

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<sup>21</sup> The reply of the CZ contains an enumeration of demands related to social services, ranging from an information system on activities under way and a definition of central terms for a discussion of objectives of the social services sector to the issue of a comprehensive approach vis-à-vis different types of social services and, finally, a discussion of the necessity and form of legislation on social services at the EU level. As to health services it demands to identify issues on the basis of a precise terminology, to determine the common interest in the area of health services, to establish an objective as to the common interest and to ensure its achievement by creating an appropriate legal framework.

- Some MS, however, show clear reservation as to the implementation of an OMC in the field of SHSGI in the way it is being implemented for the policy field of social inclusion. E.g., A does not wish a policy co-ordination process including the element of regular assessment and evaluation.
- A similar “light” and modified version is also preferred by other MS (such as CY, DK [which intends to be able to obtain more clarity as regards concepts of SGI, SGEI and social SGI thereby], GB, IRL, L, LT, NL, P, SLO).
- DK and E do not wish common goals in the field of social services to be defined by this tool of European governance.
  - The reply of E holds that a partial application of the OMC could be considered, namely a structured exchange of experience in the framework of the SPC and the high level group on medical systems and health care (for the field of health care institutions and services), to be accompanied by a regular update on Community legislation and ECJ jurisdiction relevant for social and health SGI.
  - In this regard, the reply of FIN clearly states that defining sufficiently exact joint objectives in this multifaceted area may lead to inappropriateness and conceptual confusion.
- B mentions two other preconditions for the application of the OMC: a common approach as to the term "SGI" has to be defined and indicators focusing on the quality delivered to the beneficiary of the social service must have been agreed upon.

Other MS principally welcome the application of the OMC, as it is seen as a tool to be applied where no Community competence exists (e.g. by E). The OMC could be the appropriate way to deal with social services at Community level, if both the principle of subsidiarity and the fact that responsibility and funding of the social protection systems rest with public authorities in the MS are acknowledged (as mentioned by E) and after several common objectives have been set (as mentioned by P).

- LV and PL would prefer the OMC to be used for further development, evaluation and improvement of the quality of social and health SGI.
- PL additionally defines the main aim to be the development of common priorities for ensuring appropriate quality of these services and their wide availability, as well as good practice sharing, recommendations and working out evaluation methods and tools (with the possibility to maintain the autonomy of MS in the organisation and regulation of social SGI at the same time).
- The CZ asks for more detailed specifications. The use of the OMC in the social services sector should sufficiently take account of the ways in which systems of provision for social services function in the MS, while giving them a sufficient degree of responsibility.
- I defines various roles for the EU related to the more general theme of a modernisation of social protection schemes (co-ordinating agency, promoting agency for information exchange and good practice on instruments of implementation and the process of their assessment, catalyst of processes to spread information on innovative practices, social network development), but wants to have the OMC based on the qualitative parameters of a guarantee of social values, principles and rights.

On the other side of the spectrum, D, EST, GB, S (and SLO) oppose the extension of the OMC to other policy fields than the ones already agreed upon. This seems to be based on considerations taking into account the heterogeneity of social protection schemes, the diversity of socio-economic conditions and the issue of MS' competences, as explicitly mentioned in the reply of SLO, stating that there is no support for an OMC which would attempt to have too much influence on the competence of MS in the field of social policy.

- The reply of GB underlines that "social SGI" is too broad and uncertain a category to warrant a specific OMC. It also states that new policy fields covered by the OMC (such as in the area of health care) should be of a "light touch" and only seek to use existing information within MS.
- At present, also S sees no necessity to extend the OMC within the social field. The OMC is a method based on clear common challenges, clear objectives and an added value shared among MS, but none of these criteria are met when it comes to social services. Therefore, at this very early stage, there should be no decision taken on the application of the OMC.
- Like other MS (e.g. F, FIN, H, S, SLO), EST utters its preference to – in any case – wait for the outcome of the evaluation of the OMC in 2005 before taking any further decisions on the subject.

*15. Could at some stage and without prejudging the right of initiative of the Commission, legislative acts be considered as an appropriate means for further steps (under the assumption that a valid legal base can be found), and if so what should be the concrete task of these instruments (Directives, Regulations, Recommendations)? The following additional questions seem to be possible:*

- *Should these legal acts limit the scope of EU rules and their application to social services?*
- *Should these legal acts establish common standards for social services, allowing EU rules, like the Internal Market rules, to be applied while taking into account fully the social policy goals?*
- *Should there be legally defined criteria, e.g. criteria concerning quality, affordability, accessibility or solidarity at European level?*

A first group of MS explicitly rejects (D, GB, H, PL) or at least for the time being rules out (A, FIN, IRL, L, NL) any legal act in this field, considering that there is neither a competence nor a need to determine criteria of quality, affordability and solidarity in Community law.

- Several MS are opposed to horizontal regulations because they could not take account of specificities of social services (e.g. a framework directive limited to SGEI). As to personal social services, several MS exclude legislative acts, too. A gives the following reasons: lack of a legal basis; no appropriate approach; danger of a cutback in the variety of services offered and of a downgrading of standards; extension of the de minimis-clause for locally offered services, with the cost of tendering being disproportionate to the possible benefit and given the fact that the services directive 92/50 (cf. annex 1 B, category n° 25) is only applied to a limited extent to social services.

- Other replies (e.g. by the CZ) also show the preference that legal acts should limit the scope of EU rules and their application to social services. DK supports this reasoning by stating that there is no need to prepare special framework directives, regulations or guidelines in connection with a co-operation on social services. The provision of obligatory services of sufficiently high quality and at reasonable prices could be ensured through general, horizontal rules on competition, tendering, state subsidies and consumers. And the existing rules should only be supplemented and enhanced with sector-specific regulation if the general, horizontal rules prove to be insufficient. FIN states that further work should focus on joint criteria that enhance legal certainty and on measures to ensure the right of the MS to decide on their social and health care provision at national level. The reply holds that even though an answer cannot be given prior to political discussions, it might be possible to issue general guidelines or recommendations (concerning quality, affordability, accessibility or solidarity) at the European level, a position shared by LT and PL. The reply of GB clearly underlines that an added value in addressing SGI as a whole cannot be seen, that the issues arising are sector-specific and therefore any response at EU level needs to be sector-specific as well. Where an OMC exists and where matters referred to in the questionnaire fall within the scope of these processes, these should be addressed within the context of current mechanisms.

A second group of MS (B, E), however, clearly prefers a framework directive, to be supplemented by sector-specific directives later. These future legal instruments should cover the whole range of social and health services. A horizontal directive would allow several general principles for services of economic and non-economic nature to be defined and certain services to be excluded from the application of the DSIM, if necessary. It could also demonstrate the EU's mission to realise fundamental social rights (B).

- E lists three objectives: Firstly, the definition of the competences and responsibilities of MS and EU, secondly safeguarding their financing, thirdly implementation of procedures/mechanisms for their evaluation and control. The reply clearly states that given a high degree of heterogeneity across the 25 MS, only general principles – and this for every sector – can be established. As requested by the first group of MS, such a framework directive should, however, not define common/EU-wide minimum standards, but rather affirm a set of common social values to be realised by the services analysed beyond market rules. MS must preserve the right to define high standards (B).
- The reply of B additionally states that an evaluation by the EU whether MS fulfil their general interest/public service missions is desirable.

Finally, several specific issues or concerns are mentioned by various MS<sup>22</sup>.

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<sup>22</sup> The reply of EST highlights that it is still an important objective to define the relationship between EU internal market rules and the right of every member state to regulate the specific issues of social service provision at the national level. The reply of GR refers exclusively to the proposal of a DSIM and puts emphasis on the necessary caution so that the designated interventions do not obstruct or hinder the fulfilment of the aims of general interest, which the social services are expected to perform. Therefore GR utters its preference for a documentation and evaluation of the social impact. The reply of M further states

- The reply of CY once again underlines that EU rules should exempt public and non-governmental social SGI because the humanitarian values governing those services (solidarity, social cohesion, support to the needy) should have supremacy over the value of competition. In this context it also highlights that non-governmental social services entail a unique opportunity for civil participation at the local level, for innovative approaches to problem solving, for more flexibility, more efficiency and more effectiveness in response to social needs.
- Two MS (CZ, SK) explain that – below the threshold of Community legislation – common standards of social services could be established, however, on a fairly general level, namely as an output for a detailed consultation process (CZ). The same would hold for legally defined general quality guidelines for social service (CZ). SK supports the preparation of legal acts that determine the common standards for social services and define the criteria of quality, acceptability, and solidarity on the European level on the basis of principles of neutrality, freedom of definition, proportionality as well as equal treatment and non-discrimination<sup>23</sup>.
- The reply of E – like the reply by A under Q6a – refers to Art. III-122 of the EU Constitutional Treaty which concerns social services of general economic interest (provided for in Art. 16 and Art. 86.2 of the EC Treaty) and proposes a shared competence of EU and MS in order to delimit the further scope of Community action asked for under Q15.
- M does not consider legislative acts as an appropriate means for further steps in the field of social security and health service and wants to limit the issue of standard setting instruments to an exchange of information and best practice for the social services sector (as The NL for the sectors “re-integration market/re-insertion into the labour market”, “social housing and urban regeneration” and “health care and welfare and youth care” covered by the questionnaire). It pleads for taking into consideration – as one possible tool – EC directives in the employment services sector.

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that issues mentioned in the June 2004 conference “Social Services of General Interest in the European Union – Assessing their Specificities, Potential and Needs” on this subject should use legally defined criteria because they are horizontal, and a harmonisation of standards would be desirable in such cases.

<sup>23</sup> This position is challenged by other MS (A, EST, LV), underlining that there is no need to regulate the standards or criteria concerning quality, affordability, accessibility or solidarity at the European level. The reply of EST also states that having general European principles, aims and guidelines for offering social services makes sense, but nevertheless every MS should have the possibility to apply the norms according to concrete situation and needs of the state or region.

## 4. Own analysis

### 4.2 Analysis of SPC enquiry on SSGI 2006

#### *4.2.3 Detailed analysis per question*

The 19 questions of the SPC 2006 questionnaire are reproduced in Annex 3, Survey 2, but to facilitate the reading of the own research, they have also been copied below (text in italics). The 19 questions were put under seven headings to structure the enquiry: “Field 1 – Social Services: Description“ for questions 1 and 2, “Field 2 – Pertinence of characteristics” for questions 3 to 7, “Field 3 – Use of characteristics by Member States” for questions 8 to 10, “Field 4 – Use of characteristics at EU level” for question 11, “Field 5 – Experiences with the application of Community law” for questions 12 to 14, “Field 6 – Social security schemes responding to the criteria deriving from the *Poucet and Pistre* case law” for questions 15 and 16 and finally “Field 7 – Future steps at Community level” for questions 17 to 19. As the analysis of the replies follows the structure of the 19 questions of the 2006 SPC enquiry on SSGI, the author endeavoured to attribute the answers to one of them in cases when government replies were made by section or where they deal with an overarching aspect. Mistakes in quotes from governments’ replies as a rule are not corrected, except for minor issues of orthography and grammar in English or in the original language used. The detailed question per question analysis of the 2006 SPC enquiry comprises considerable more quotes from the original replies, in English, but also in French, German, Italian, Portuguese and Spanish. In cases where quotes are not in English in the original text or where they have not been translated into English by the author, they are summarised or introduced (except for quotes in German and for a number of citations in French).

*1. Please indicate whether the description of the social services as provided by the Communication (see above under "scope") is appropriate and adequate, also with a view to social security schemes responding to the criteria deriving from the Poucet and Pistre case law.*

A range of aspects is being covered and raised in the replies of the different MS to Q1. The author endeavoured to carve out six aspects to illustrate the challenge of working towards an EU-level description of SSGI (because it is actually no “definition” in the narrow sense of the term) that works both to support the elaboration and application of a legal and policy framework, but also reflecting main features of diverse national systems and the specific characteristics common to most if not all “social services”. However, this exactly presents the major challenge of the exercise. Firstly analytically, as the description suggested by the EC, for political reasons (see below), embraces basically all social security schemes – using terminology of the International Labour Organisation (ILO)<sup>24</sup> – whereas the term “social services” in most if not all

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<sup>24</sup> Cf. e.g. the description proposed in “Social security for all: Investing in global social and economic development. A consultation” (Issues in Social Security. Discussion Paper 16, Social Security Department, ILO, Geneva, 2006) and comprising i.a. cash benefits paid by social insurances, social

MS traditionally has been and still is being used to describe “personal social services” only (emblematically exemplified in the reply by CZ, see below). The term “(personal) social services” is also used in contrast to cash benefits, benefits in kind or tax advantages as the other three main instruments of welfare or social protection policy. Secondly politically, as objectives and intentions to engage in the SPC enquiry have been – at least partially – different from the start for the bulk of MS’s governments on the one hand and for the Commission services on the other. The six aspects retained and that will structure the following analysis on the following pages are

- Appropriateness of description
- Limitations and problems with the description reported and explained by MS
- Variations as to the scope of what is defined and/or commonly considered to be part of social services between MS
- Interrelatedness between social and health services, but separate policy processes and legislative and non-legislative initiatives also useful
- Views on the appropriateness of distinction between economic and non-economic nature of services in the field of SSGI and on the economic character of (all) SSGI and
- Comments on the description of social security schemes responding to the criteria deriving from the Poucet and Pistre case law

#### *Aspect 1: Appropriateness of description*

The reply of A considers the description of social services as presented in the 2006 Communication on SSGI as being adequate to a large extent. This line is in general also followed by BG, CY, CZ (however, contradictorily in its reply, see also above), E, H, IRL, LT, LV, P and PL whereas on concrete issues most MS’ governments would like to see differences noted and diverging approaches taken in consideration when further developing and fine-tuning a European concept/approach.

- As one MS amongst others, CZ underlines that the description suggested can be brought in line with the own “nomenclatura” (terminology and typology), even though it differs from it. These differences are explained in detail (see above and below).
- D considers accurate and appropriate the suggested organisational characteristics proposed by the EC in Communication (2006)177 and that separately or cumulatively (two up to all six criteria) they indeed would help to describe the specificities of SSGI compared to other SGI and SGEI. D agrees with the four characteristics mentioned in

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assistance, health care and personal social services: “In order to capture adequately the scope of the measures and provisions for discussion, this paper is based on a rather broad understanding – rather than a precise definition – of social security as the set of institutions, measures, rights and obligations whose primary goal is to provide – or aim to provide – according to specified rules, income security and medical care to individual members of society. ... On an operational level, social protection or social security systems may therefore be understood as incorporating 1) those cash transfers in a society that seek to provide income security and, by extension, to prevent or alleviate poverty, 2) those measures which guarantee access to medical care, health and social services and 3) other measures of a similar nature designed to protect the income, health and wellbeing of workers and their families”, p.5, <http://www.pstalker.com/ilo/resources/Social%20security%20for%20all%20--%201519sp1.pdf>.

the sub-item of section 1.1 on “services provided directly to the person”, but suggests “person-related services” as a somewhat more succinct term in this context. They highlight that it is important to explicitly mention fundamental (social) rights when it comes to the recognition and embodiment of the specificity of SSGI. D finally underlines the usefulness brought about with the “clarification made in the sixth characteristic – that the asymmetric relationship between providers and beneficiaries of social services cannot be assimilated with a “normal” supplier/consumer relationship”.

- The Spanish reply considers basically appropriate the description given, however, also points to at least three limitations (see below).
- The Portuguese government would like to see a stronger emphasis on personal social services addressed to particular groups (such as those for children and youth, persons under custody, drug-addicts, and incomplete families) as they are seen as a fundamental pillar and stepping stone for social inclusion<sup>25</sup>.

Contrary to e.g. the response e.g. by A,

- the reply by B calls for a revision of the description, motivated by the aim of policy coherence at EU level the lack of which would have a negative impact at the local level where local and regional authorities have to apply the rules for the organisation, regulation, delivery and financing of SSGI. B requests a description that would include all social services, be they covered or exempted from the application of the services directive<sup>26</sup> (for more details see below).
- The reply by CZ well illustrates one of the fundamental problems of the whole exercise and one source of confusion in the context of the enquiries, namely the use of “social services” as generic term to cover both social insurance and social assistance schemes as suggested in the description by the EC. And this independently of the instrument used (cash benefit, tax advantage, benefit in kind, social service, time right), whereas precisely this term is being reserved to measures of care (of all kind), assistance/support in case of neediness or special needs (in all forms), counselling/guidance/empowerment as well as training/education addressed to a person in most of the EU MS which is a fundamental difference. Having said this and looking closer into the reply by CZ, one can call a “euphemism” their answer having “labelled” the EC description as “satisfactory”. As they state that the “description of social services is unclear from the point of view of

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<sup>25</sup> “O terceiro grupo de serviços, embora apresentado de forma mais sintética, está redigido de forma suficientemente ampla para nele caberem uma série de serviços diferenciados, que detenham as características, no todo ou em parte, que aí são referidas. No entanto, parece-nos que a vertente da protecção a grupos específicos, como as crianças e os jovens, e às pessoas e famílias em situação de maior vulnerabilidade (por exemplo, pessoas idosas, pessoas em situação de dependência, toxicodependentes, famílias disfuncionais) poderia ser reforçada, porque esse é um pilar fundamental para a inclusão social.” (P, Q1)

<sup>26</sup> “The exclusion of healthcare from the scope of this Directive should cover healthcare and pharmaceutical services provided by health professionals to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession in the Member State in which the services are provided”, cf. recital 22 and article 2, 2. (f) of the Directive 2006/123/EC of the European Council and European Parliament on services in the internal market, 12 December 2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:EN:PDF>).

social policy and social benefit schemes, primarily in what is included under social security schemes” and (CZ, Q1), as they underline that the terminology used by the law of the Czech Republic is different and social services divided differently according to Czech law<sup>27</sup> and as CZ reports that stakeholders consulted expressed concerns “that the social protection schemes and therefore also the social benefit schemes should be regarded as social services” (ibid.), an approach the Czech government calls “unacceptable”. They also claim that as “everything about social services of general interest is so unclear ... because it is up to the individual member states to define this term and its content, our opinion is that non-contributory benefit schemes in state social assistance, social care and help in great need should not be regarded as social services of general interest” (ibid.). Disagreeing with the terminology used they write that “the term social protection schemes, which would also include social services, would be much more suitable” (ibid.). According to Czech legislation social services aim “at giving back citizens their social independence and sovereignty” (ibid.).

- D is amongst those MS critical about the three main categories suggested to grasp the broad range of social services for the purpose of EU-level policy development and legislation, considering them not justified and non appropriate from a MS perspective as they would “slice” social protection schemes in a manner to correspond to ECJ rulings and categories of Community law.

#### *Aspect 2: Limitations and problems with the description reported and explained by MS*

Which are the major statements pointing out limitations and problems of the description or more generally of the approach used by the EC? These are listed below and under the following headings for points of major importance mentioned by a number of MS.

- DK reiterates an argument brought forward by many MS already in the 2004 enquiry (and “confirmed” again in this second round, e.g. by BG, S, SLO), explaining the difficulty seen and the partial reluctance shown by selected MS to “define” SSGI at EU level, namely the lack of a “formal” or “legal” definition of SSGI in the national context and legislation. In the Danish case the relevant legislation focuses on their purpose and their objectives, but abstains from a categorisation or a criteria-based definition. “The concept of social services is not formally defined; but according to the Act on Social Services, which sets out the legal authority for most services. Their purpose is to offer counselling and support aimed at preventing social problems, offer a range of services of general interest, which may also have preventive purposes, and make allowances for needs ensuing from physical or mental impairment or special problems (DK, Q1). Their objective i.a. is to “ensure high quality and continuous supply of provided services; guarantee a service to a citizen also in case of non-payment<sup>28</sup>; allocation on basis of

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<sup>27</sup> CZ also adds: “We do not agree with the terminology used. In our opinion, the term social protection schemes, which would also include social services, would be much more suitable.” (CZ, Q1)

<sup>28</sup> The author assumes that “in case of non-payment” in the Danish context refers to benefits and services under tax-financed/non-contributory schemes and/or the entitlement to services even if an own contribution/out-of-the-pocket payment can't be paid by the user for reasons pre-defined by law.

equality” (ibid.). This again underlines the predominance of a teleological approach in MS juxtaposed to the functional approach at EU level. The Danish reply also underlines another important “feature” not covered in the enumeration of particular characteristics of SSGI as elaborated by the EC in recalling that “services are created by law and are subject to a range of provisions on right of appeal and legal protection” (ibid.).

- The reply of E,
  - as in the case of B, also refers to the need of consider in parallel the clarification and definition efforts linked to the transposition of the services directive and the current exercise. Albeit both have provoked processes of analysis and categorisation of the benefits and services in the national systems in an effort to work towards compatibility with EU law, there is still a considerable lack of clarity on where these exercises will and should lead to if it is not only to satisfy formal requirements in a multi-level legislative and governance process.
  - underlines that education services (comprising general and professional education) are not systematically and explicitly considered in the description suggested, although they are interlinked with (here using the Spanish terminology and classification) social insurance and social assistance measures and constitute one of the four pillars of the Spanish Welfare State and of the European Social Model<sup>29</sup>. (E, Q1).
  - warns against a confusion created by the fact of putting social protection schemes and social assistance under one term as they function according to different logics and serve different target groups, on the one hand insurance schemes financed by (mandatory) social contributions and on the other hand social assistance schemes, principally of universal character, financed by taxes, run via public budgets and foreseeing a screening procedure for neediness (means- or income test) or special needs.
- The second aspect above from the Spanish reply is shared by M that would like to see equal emphasis placed on health care and education in the public sector when talking about “social services”.
- Amongst other contributions (and again in line with NGOs) E puts particular emphasis on two dimensions inherent to SSGI, namely fundamental rights and territorial and social cohesion: “*Les services essentiels directement prestés à la personne dépassent les seuls besoins sociaux et sont également liés à l'accès universel aux droits fondamentaux ainsi qu'à la promotion de la cohésion sociale et territoriale*” (E, Q1).
- The reply of I goes even further in claiming that the rights-based character of social services is an element without which the description is insufficient as the make effective

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<sup>29</sup> “*Es importante señalar que el proceso de categorización de estos servicios no debe hacer perder la visión de conjunto de los cuatro pilares del Estado Bienestar que se corresponden con los mismos: sistemas de protección social, sanidad, educación y asistencia social. Las acciones de la Comisión se han dirigido esencialmente a tres de ellos, en particular, los sistemas de protección social y la asistencia social bajo el título de servicios sociales y la sanidad, por una parte, dejando de lado la educación pública que es uno de los fundamentos básicos del modelo social europeo.*” (E, Q1)

social rights of citizens, in other words their legal/enforceable entitlements<sup>30</sup>. Closely linked to this is the consideration that SSGI have to be based on the right of citizens to security and a dignified life. ... The economic dimension of SSGI should not take precedence over their social finality; it has to be subordinated to the latter and to the articulation of a [social or human; added by the author] right<sup>31</sup>.

- Finally, a similar assessment from two Nordic countries pointing to difficulties with the term and concept of SSGI (as also made by other national governments in their replies to the 2004 and 2006 enquires, as e.g. in the case of the Czech Republic (see footnote 199):
  - The contribution by FIN clearly states that “neither the Finnish legislation nor the more general discourse regards social insurance schemes in the field of social security as social services” (FIN, Q1)
  - S argues along the same line in stating that “the concept of “social services of general interest” does not exist in Swedish terms; there is no definition of what is meant by the term social service. When the term is used in Sweden the reference is most often to services falling under the jurisdiction of the Social Services Act (2001:453) and other associated legislation” (S, Q1)

*Aspect 3: Variations as to the scope of what is defined and/or commonly considered to be part of social services between MS*

- The response of B is representative for a number of other replies as it defends the idea of a comprehensive concept of SSGI according to the country-specific definition of their diameter. It rejects to use dividing lines as used e.g. by the services directive (economic-non-economic) or the scope as it had been defined in this piece of Community Law in 2005. The reply also recalls that the SSGI dossier should not be de-coupled from the broader topic of SGI and from the interrelated field of health services. B also requests an interlinked treatment of mandatory and complementary systems of social protection on the one hand and services provided to persons on the other. B presents the example of unemployment benefits as one element and placement services and other measures to improve the employability of unemployed persons, e.g. via vocational training or life-long learning, and eventually their reinsertion into the labour market as the other.
- The German government in addition points to a concern shared by many NGOs, especially by (European and national) networks of providers of social services, namely the use of the term “most vulnerable” (or “most disadvantaged”) defining the scope of

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<sup>30</sup> “A nostro parere devono essere definiti come servizi sociali di interesse generale quei servizi che rendono effettivo un diritto dei cittadini, si tratti o meno di un diritto esigibile (‘giustiziabile’). Solo questa definizione generale può fornire la guida per una descrizione più dettagliata.” (L, Q1)

<sup>31</sup> “I servizi sociali di interesse generale devono essere definiti sulla base dei diritti di tutti i cittadini alla sicurezza e ad una vita degna. Da ciò consegue che l’eventuale natura anche economica dell’attività di erogazione dei servizi (ossia la presenza della vendita d’un servizio – pur se non lucrativa, e del corrispettivo acquisto – pur se a prezzo non proporzionale ai costi) non può far ricadere in nessun modo i servizi di interesse generale sotto la categoria generica di “attività economica” giacché, in questo caso, l’attività economica è subordinata e strumentale all’attuazione di un diritto.” (L, Q1)

SSGI not only too narrow but in an inappropriate manner given social services responding to general needs (or “risks” of needing care, support, etc.) during everybody’s life course: “With regard to the last elements of the second characteristic (“and protect the most vulnerable”), it should be stressed that although this additional specification is accurate for some services (for instance assistance to over-indebted persons, drug addicts or the homeless), on the other hand (person-related) social services as we understand them also cover life-course-specific needs that, in principle, can affect all citizens. This is particularly well illustrated by facilities and services for child care, elderly care and long-term care”. (D, Q1)

- This argument is echoed by GR: “The term’s definition ... should not be limited to “services addressing those in need” only, but include services relating to the realization of social policy goals, to the extent that social services of general interest constitute the main element of this policy; ... should include services that address the total of population, as, for example, family support services, and the issue of education and training should also be considered” (GR, Q1). The Greek reply introduces the concepts of “solidarity” and refers to “fundamental rights” to make the case, the done in the contributions of a number of MS, claiming that the “principle of solidarity also supports the adoption of a more concise definition ...[that] should also take into account the dimension of safeguarding fundamental rights”. (ibid.).
- H informs that the scope of what is understood by social services in Hungary is narrower – as it basically covers social assistance benefits – and that they are also not conceptualised and considered as part of the social security system<sup>32</sup>.
- The Italian government introduces the term “residual welfare/residual welfare state” compared to a universal welfare state (open to all citizens, basing its interventions on rights), with a “welfare for the poor” risking to support a development of a “poor welfare”. They insofar warn against conceptually narrowing down social services<sup>33</sup>.
- ROM informs that social services are part of their social assistance system, of a kind as “provided directly to persons” and underpinned by a range of principles and values<sup>34</sup>.

<sup>32</sup> “In Hungary an unequivocal definition of social services does not exist. Act III of 1993 on social administration and social services ... (Social Act) regulates the field of the social services. The 57 § of the Social Act contains a list of the social services. According to the Social Act we differentiate two kinds of categories among personal social services: basic social services (i.e. in a non-institutionalized/non-residential form) and specialized social services (assisting those who cannot be cared for - because of their age, health conditions or social situations - in the framework of the basic social services. The common characteristic of these services is that they provide assistance for people who cannot care (partly or totally) for themselves due to some special reason (age, health status, addiction, mental status or social situation).” (H, Q1)

<sup>33</sup> “Un welfare residuale, riservato solo alle categorie marginali. Un ‘welfare dei poveri’ destinato a trasformarsi in un ‘povero welfare’. Un simile welfare residuale non sembra adatto ad un equa ed efficace gestione dell’inserimento delle economie nazionali e dello spazio europeo in un ambiente globale. ... Un welfare universale, aperto a tutti i cittadini (pur se in una gradazione dell’intervento in base ai redditi) sembra essere quindi non un residuo del passato, ma un momento essenziale dell’attuale fase di modernizzazione.” (I, Q1)

<sup>34</sup> Being aware of the rather declaratory character of these principles and values in the daily realities on the ground in ROM, it is nevertheless interesting to look at the complete list given by ROM – “a) social solidarity; b) uniqueness of the person; c) freedom to chose the social services with respect to the social

They would insofar fall under the third category of the 2006 Communication on SSGI “other essential services provided to the person”.

- S, aiming for conceptual clarity and a coherence of categories used at EU level with those used in MS, adds another aspect to the debate in stating that the “description of the social services provided by the Commission communication is very broad” (S, Q1) and that therefore “it is difficult to discuss social services (for example, social assistance, home help service and care of drug abusers), social security schemes and unemployment insurance together, as they vary considerably as regards scope, financing, administration and requirements for something in return<sup>35</sup> etc.” (ibid.).
- SLO states that the term and concept used in Slovenian legislation and administrative practice is “services intended to the user”, that their characteristics correspond to characteristics enumerated in the Communication on SSGI. SLO also highlights that “social services” – a term for which there is no general definition – is never used for compulsory or complementary social insurance schemes (the first broad category identified in the above-mentioned EC document) and that rights provided by compulsory insurance cannot be considered services. As e.g. in the case of CZ the Slovenian legislation does not recognise a link between social insurance and social services intended directly for the individual/to the user.
- SLO finally also makes reference to the concept of “public service”<sup>36</sup> (as i.a. E), uses the term “public interest” instead of “general interest” and develops special characteristics justifying a particular treatment from there: “The extensive legal regulation of social services determines their nature as services in public interest, which shall be guaranteed within the framework of social protection system on principles of solidarity and universal and equitable accessibility and non-profit orientation<sup>37</sup>, which makes them so very different from commercial services subjected to market logic and forces.” (SLO, Q1).

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need; d) equality of opportunities and non-discrimination in accessing of, and providing for, the social services; e) beneficiaries’ participation at the whole process of providing for the social services; g) proximity in providing for the social services; h) complementary and integrated approach providing for the social services; i) competition and competitiveness providing for the social services; j) confidentiality; k) partnership between the stakeholders in the process of providing for the social services” (ROM, Q1) as it mentions aspects not highlighted by other governments, such as points d), e), j) and k).

<sup>35</sup> In the author’s view the last element has to be read as “entitlement and eligibility conditions”.

<sup>36</sup> They explain that “public service includes social services of general interest in the following fields: 1) Social protection services and programmes; 2) Services of general interest in the field of care of the disabled; 3) Services of education and provision of various seminars and further training; 4) Social services in the housing sphere; 5) Social services in the sphere of employment” (SLO, Q3) and underline that “the state determines the extent of the network of providers of social services of general interest and, in certain cases, the local community is then responsible for ensuring provision of these services (e.g., the social service of family home help).” (SLO, Q5)

<sup>37</sup> This feature, in SLO of relevance for the fields of social security, education and disability insurance, is explained more in detail: “Services provided as non-commercial public services have a number of common properties: 1) Their purpose, content, extent, conditions for performing them, staff and technical standards are governed by regulations adopted by the state or local community and must be created on the basis of law; 2) Public services are non-profit, and prices are regulated and controlled; 3) Financing is based on solidarity, some are completely free for users, some are paid, often on the basis of census; 4) Providers may be owned by the state or local community or may be private individuals, who must obtain a concession or special permit for carrying out activities and operate under the same conditions as a public

*Aspect 4: Interrelatedness between social and health services, but separate policy processes and legislative and non-legislative initiatives also useful*

The major contributions addressing this issue can be summarised like this. More in detail:

- The response of A approves the separation of policy processes as well as of legislative and non-legislative initiatives for social services on the one hand and health services on the other. In the author's view, building on conversations with representatives of the Austrian government, what is behind this statement is a pragmatic approach, both recognising and generally supporting the development of EU-level initiatives, programmes and legislation in the fields of social and health policies (that would overarch the provision of social and health services within MS) as well as anticipating future dynamics in these fields that justify a differentiated treatment of social and health services in various cases, however, without losing sight of their interfaces. In line with the majority of governments mentioning this aspect the Austrian government underlines that a joint treatment of and a "common perspective" on social and health services at EU level makes sense in a number of fields cutting across both spheres. The reply mentions long-term care (covering out-patient/community nursing as well as in-patient/residential nursing homes), services for homeless people, labour market integration projects comprising strong elements of education and health care and last but not least child care in view of the its health prevention and health education aspects (as can be implicitly read from the reply) to underpin this demand.
- The line of argumentation is similar in the reply of E, also recalling a coherent and coordinated treatment of (ongoing and future) European consultation processes and legislative as well as non-legislative initiatives on social services and health services. At the time of the second SPC enquiry the French government in this context clearly referred to those on SSGI and patients' mobility and rights in cross-border health care: *"La Commission européenne conduit actuellement deux processus parallèles de consultation: l'un sur les SSIG, l'autre sur les services de santé. En France, il existe une combinaison des réponses sanitaires et sociales justifiant une coopération entre services. Il importe donc que ces deux types de services, et a fortiori les services et établissements médico-sociaux, fassent l'objet d'un traitement cohérent et articulé."* (E, Q1)
- The reply of B is similar to the one of A (and various other MS) insofar as it points to services at the interface between health and social services for which a categorisation as "either or" "simply" to allow for an implementation of EU legislation or of EU policies would not only be difficult, but also would construct and "impose" an inappropriate dividing line between the two interrelated "species". B insofar (and stronger and less ambiguously) calls for coherence of EU policies between the two dossiers "health services" on one and "social services" on the other. The request most likely is motivated

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company; 5) The state or local community determines the extent of the public service with documents adopted for a period of several years." (SLO, Q1).

by the firm political conviction and aim that it is the objectives and missions of general interest attributed to health and social services by the competent governments or public authorities to be realised that count and are fundamental for designing the modalities of organisation, regulation, delivery and financing. The concrete case presented to underpin their case is the directive on services in the internal market that excludes from its scope of application health services and a range of social services. It is, however, no secret that this exemption as finally voted (cf. footnote 1) only to a minor extent has been the outcome of a systematic process of reflection and definition according to generally convincing criteria on which services to exempt from the rules of the service directive and from the originally proposed “country of origin principle”, but rather the result of a compromise for which to achieve different stakeholders had to make concessions here and there that not necessarily were of a systematic nature; and the partial exemption of social services from the scope of the services directive was one of the outcomes of what can be described as a bargaining and horse-trading process. A majority of those stakeholders opposing a (far-reaching) exemption for health and social services most probably was optimistic and hoping to get a legislative initiative on health services in the internal market sooner or later anyway. This “desired outcome” materialised into a legislative proposal of 2 July 2008 on the cross-border provision of health services and the mobility of patients and health workers (<http://www.euractiv.com/health/eu-tables-weakened-cross-border-news-220224>) that eventually was adopted as Directive 2011/24/EU on 9 March 2011 on the application of patients’ rights – with the element on health professionals’ mobility, however, cut out from this piece of Community legislation. And for social services the stakeholders referred to above were also interested in facilitating market access for private providers and a market-based provision.

- D is particularly eager to work towards more clarity on a differentiated or integrated approach at EU level when it comes to the provision of health services and social services and reminds, in the interest of the users and from the perspective of the delivery systems of the numerous interfaces to be taken into account in the context of EU-level initiatives and that prevent from an unambiguous classification of services in an “either-or-logic”<sup>38</sup>. The German government admits the necessity to elaborate a separate legislation concerning the reimbursement of costs incurred through health services outside the country of residence and/or affiliation.
- The British government argues that “it is difficult in many cases in practice to distinguish so neatly between the delivery of health and social care, as individuals may require a combination of both” (GB, Q1), explains that in the UK “the distinction between Health

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<sup>38</sup> “The German government calls upon the Commission to explain what approach it is pursuing with its separate treatment of health and social services in the Communication and in the planned Community framework for health services. There are, in all member states, areas of the social protection that are often conceptually and institutionally closely related. For users, and particularly with regard to the effectiveness of the benefits, the most important factor is a smooth transition between various systems which, depending on the national organisation of social protection systems, might be classified as belonging to the social or to the health sphere. Certain services cannot always be classified unambiguously as either health or social services, for instance in the area of ‘long-term care’ and ‘rehabilitation’”. (D, Q1)

and Social Care is a matter of law. The UK Parliament legislated for a National Health Service and for Social Services in separate and distinct acts.” (ibid.) and concludes that “the distinction will be made in different ways in different member states, which is entirely proper given the principle of subsidiarity: the same service may be regarded as 'health care' or 'social care' or indeed neither, according to the context of each member state” (ibid.). This type of pragmatic approach is shared by many MS.

*Aspect 5: Views on the appropriateness of distinction between economic and non-economic nature of services in the field of SSGI and on the economic character of (all) SSGI*

- The contribution by D refers to the divide “economic-non-economic” and to the one-sidedness of the functional approach that also anticipates on the direction and intention of later EU policies. “The Commission's objectives and approaches as presented in both the White Paper on SGI [COM 2004(374) final] and the Communication are based on a concept which itself is rooted in economic criteria and rests on the general assumption that social services are services of an economic nature. This classification does not do full justice to the specific characteristics of social and health services – particularly when we consider their institutional function as a core element of national systems of social protection or their special goals and features and the specific characteristics of their users. Market mechanisms can bring more competition, innovation and transparency, but they cannot ensure that the services provided will adequately fulfil existing needs or provide a guarantee of sustainability, quality and efficiency.” (D, Q1). This approach is also inconsistent with the understanding of social services in a context where “many of the social services offered in Germany constitute assistance provided by non-statutory welfare institutions on the basis of the subsidiarity principle” (ibid.).
- The government of E sings the same tune and regrets that there seems to be an implicit assumption by the EC that basically all social services fall into the economic sphere what in their view is a misconception and wrong conceptualisation/classification. They also see too less an emphasis on the non-economic character of social services. The preliminary remark of F already contains a key request shared by many MS in underlining that Community rules need to be adapted to the sector of SSGI where these services are to be seen as having an economic character according to European legislation and ECJ rulings: “*A titre liminaire, ... les autorités françaises ... regrettent toutefois que la Commission semble postuler implicitement, dans ce document, que les services sociaux d'intérêt général relèvent de la sphère économique. De ce point de vue, la description des services sociaux présentée par la Commission s'avère inappropriée. En effet, dans sa communication, la Commission n'évoque pas le caractère non économique des services reconnus comme tels par le juge communautaire, en particulier les régimes obligatoires de protection sociale, et n'apporte aucune clarification sur les services dits de la «zone grise» dont la qualification est encore incertaine. Les autorités françaises souhaitent donc que soit opérée une claire distinction entre, d'une part, les services sociaux à caractère non économique qui ne sont donc pas soumis aux règles communautaires de la concurrence et du marché intérieur, et, d'autre part, les*

*services sociaux qui, bien que relevant de la sphère économique, présentent des caractéristiques propres qui exigent une application adaptée de ces règles“.* (E, F1). Already here the national government underlines that a (non-adapted) application of internal market rule would disregard or at least hinder a realisation of the public service missions of SGI. *“Une application des règles du marché à ces services aurait pour effet de nier ou à tout le moins d’empêcher une mise en œuvre satisfaisante de leurs missions d’intérêt général“.* (E, F5)

- Concluding from the reasoning above I requests that the “Community law (competition; state aid; internal market) has to be (made) compatible with the public service obligations and not vice versa.” and to support the argument refers to a document (most probably a report or an opinion) adopted by the European Parliament. (I, Q1)
- The Polish reply hints at an inconsistency or even contradiction between the broad definition of the scope of SSGI as suggested by the Communication on SSGI of 2006 and the claim in the same document (cf. 3.1) that almost all social services are to be considered as an economic activity. This implicit criticism refers to one category, social assistance/welfare benefits, but there is another category, social security schemes, question 1 refers to.

*Aspect 6: Comments on the description of social security schemes responding to the criteria deriving from the Poucet and Pistre case law*

Let us first look into the latter category, social security schemes, and into what other MS say: Because it is obvious that should the European Commission consider social security schemes meeting the criteria of the Poucet and Pistre ECJ rulings<sup>39</sup> as economic activity this would turn upside down the very essence of applicable jurisprudence – because these schemes have been to date and based on a range of ECJ rulings recognised and classified as a non-economic activity<sup>40</sup>.

- A potential misunderstanding stemming from the 2006 Communication on SSGI is therefore addressed by a statement made in the reply of A. The Austrian government refuses and opposes<sup>41</sup> (A, Q1) the statement made by the EC in section 2.1 that „almost all services offered in the social field can be considered as „economic activities“ within the meaning of articles 43 and 49 ECT” (p. 6; it is preceded by the following reasoning: With regard to the freedom to provide services and freedom of establishment, the Court

<sup>39</sup> What is the quintessence of these landmark ECJ rulings of 17 February 1993? “The ECJ did not consider compulsory old-age insurance scheme and compulsory sickness and maternity insurance scheme for self-employed persons to be undertakings since they were fulfilling an exclusively social function (...), their activity was based on the principle of national solidarity and (...) they were non- profit making, the benefits paid out being statutory benefits that bore no relation to the level of contributions.” (Kleis/Nicolaidis, 2006:6)

<sup>40</sup> In addition, no MS would consider social security schemes meeting the criteria of the Poucet and Pistre ECJ ruling of economic nature, even more so as this distinction is solely inspired by EU law and traditionally no category used to categorise social protection schemes.

<sup>41</sup> „Die Auffassung ‚dass praktisch alle Dienstleistungen im sozialen Bereich als ‚wirtschaftliche Tätigkeiten‘ im Sinne des Art. 43 und 49 des Vertrages betrachtet werden können‘ (Mitteilung der Kommission, Punkt 2.1.) kann daher aus Sicht Österreichs nicht geteilt werden.“ (A, Q1)

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”, underpinned with a reference to ECJ case 352/85 “Bond van Adverteerders”). In its reply the federal government of A recalls settled case law that systems of statutory social security are considered as of non-economic character insofar questions related to their personal scope are concerned and insofar they are delivered by the statutory agencies, as elaborated in the AOK ruling<sup>42</sup>. A asks the EC to embark jointly with the MS on a in-depth exchange of the economic or non-economic nature of activities of agencies of statutory social security and potential cases which might be considered as economic activity and based on this exercise to fine-tune the description of SSGI. It comes as no surprise that the Austrian social partners oppose the use of “social services” as generic term for “social security”, as in the author’s opinion in their view, in the view of other Austrian stakeholders and a German-speaking audience it has to be exactly the other way around, social services (*Soziale Dienste*) as subcategory of “social security” (*Soziale Sicherheit*) or “social protection” (*Sozialschutz*).

- D underlined the importance and accuracy of wording on the first characteristic of SSGI in the 2006 homonymous communication – i.e. “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”, p. 4 –, putting the emphasis on the exclusively social mission, on activities devoid of any profit-making intent and on the principle of national solidarity in national social insurance schemes<sup>43</sup>. D asks the EC to fully adhere to this interpretation.
- E asks the EC to explain with which purpose and intention the recourse to the Poucet and Pistre case law in the field of SSGI and this enquiry was made, what should be attained by this reference? E would welcome if the criteria developed by the ECJ could be used to delimit the SSGI in a broader manner, not least as they in particular foresee potential unclarity in view of complementary social security schemes that might not in all cases comply with all criteria of the Poucet and Pistre ECJ case law. E gives the example of their public employment service under the responsibility of body of public

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<sup>42</sup> In this key ECJ ruling (C355/01) delivered in 2004 the Luxembourg judges ruled that the German statutory health insurance/sickness fund was not involved in economic activities as three criteria were fulfilled: 1) national legislation decides on benefits insured persons are entitled to; 2) the funds face an interdiction to operate in a for-profit manner, i.e. potential profits can’t be distributed to external stockholders; and 3) the funds are obliged by the national legislator to engage in a system of risk equalisation between funds based on socio-economic criteria. In more general terms Krajewski (2006) summarises relevant ECJ rulings as follows: “The ECJ decided that organizations involved in the management of the public social security system are not to be considered as undertakings in the meaning of competition law if they fulfil an exclusively social function, their activities are based on the principle of national solidarity and are entirely non-profit-making and the benefits paid are statutory benefits and have no relation to the amount of the contributions.” (Krajewski, 2006: 32)

<sup>43</sup> “The Communication’s wording of the first characteristic seems particularly appropriate to capture the essential features of social security schemes and their institutions, in particular the fact that they – for instance health or long-term care insurance schemes and their associations – fulfil an exclusively social mission and carry out an activity which is devoid of any profit-making intent and based on the principle of national solidarity (cf. the criteria of the Poucet & Pistre ECJ cases).”

administration they also would like to see to fall under the Poucet and Pistre criteria and insofar to be considered as non-economic activity, even so legally under Spanish law it is not classified as social service<sup>44</sup>.

- FIN underlines that there are social security bodies and/or activities that partially can fall under the criteria of the Poucet and Pistre ruling (fulfilling an exclusively social function and insofar to be classified as non-economic activity) and partially offer economic activities where EU competition rules can apply, explaining more in detail the design parameters of the Finnish employee pension scheme<sup>45</sup> and insofar comes to the conclusion that the suggested dichotomy is and stays ambiguous.
- IRL claims that the form of administration of social security schemes – by a Central Government Department and not by social insurance funds – leaves no room for unclarities, with these systems being clearly outside the scope of economic activities.
- Along the same line is the reply by S that underlines that the public insurance system is administered by government agencies and provides its benefits without needs assessment.
- P also underlines that national social protection schemes are designed in a way to correspond to the Poucet and Pistre case law, highlighting in this regard the obligatory character and the principle of financial solidarity between those covered.

Let us now come back to the first category from above, highlighted i.a. in the response of PL, social assistance or social welfare benefits (whatever term is being used). They make up for another important share of SSGI in the definition of the EC. As they are financed by taxes or provided by non-contributory social protection schemes for which the criterion of “economic counter-value”, one of the three elements constitutive to be in front of an economic activity according to ECJ rulings, does not apply, there is broad consensus – in full accordance with the ECJ – to consider them as a non-economic activity.

- This explains the implicit criticism in the answer submitted by PL: “The Communication (paragraph 2.1) states that in the light of the case law of the ECJ almost all social services should be considered as economic activity. Thus the question arises whether

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<sup>44</sup> “Siguiendo la Sentencia de 17-2-1993, del Tribunal de Justicia, Poucet y Pistre, que se pronuncia indicando que una Mutua, y una entidad concertada con ella, encargadas de la gestión de regímenes de Seguridad Social no están comprendidas en el concepto de empresa, en el sentido de los artículos 85 y 86 del Tratado, tampoco podría estar comprendido en ese concepto un Organismo de la Administración del Estado. Se señala que en España, la protección por desempleo no se consideraría incluida en la descripción de servicios sociales puesto que la gestión de dicha protección es competencia exclusiva del Servicio Público de Empleo Estatal, por tanto, la protección por desempleo, en sus niveles contributivo y asistencial, tiene carácter público y obligatorio y forma parte de la acción protectora del sistema de Seguridad Social, si bien dentro de esa acción protectora no tienen el carácter de servicio social, según la definición legal de servicios sociales”. (E, Q1)

<sup>45</sup> “ ... its activities can be considered both economic and non-economic; authorised pension providers have thus mainly exclusively social function and they perform a public task and exercise public authority; they can be considered to exercise public authority when they, in accordance with the legislation on employee pension schemes, decide on someone’s rights or obligations, for example by collecting insurance premiums and by allocating benefits; some of the activities of the authorised pension providers can, however, be considered economic, and in such cases competition rules should apply (e.g. competition for clients).” (FIN, Q1)

social security schemes which meet the criteria set out in the Poucet and Pistre case which were considered non-economic by the Court, should be excluded from social services provision or still lie within the scope of social services, though they are not considered to be an economic activity as such. In the latter case social services would be of an economic or non-economic nature, depending on the method of their organization. With a view of the above criteria laid down in joint cases C-159/91 and C-160/91 Poucet and Pistre, namely 1) the management of a public social security scheme, 2) the pursuance of an exclusively social aim, 3) embodying of the principle of solidarity and 4) being entirely non-profit making, also the services provided under the social welfare system on the basis of the Social Assistance Act of 12 March 2004 (Journal of Laws No 64, item. 593 as amended) in the form of non-cash benefits<sup>46</sup> would also be considered to be of a non-economic nature” (PL, Q1)

- This hint contained in the answer of PL puts into question the appropriateness and usefulness of using the criterion of economic activity to advance on this policy dossier if one does not only want to follow a purely functional approach and thereby lack reference to institutions, social policy objectives and the general interest.

How and why the claim of the Communication on SSGI that “in the light of the case law of the ECJ almost all social services should be considered as economic activity” (p. 6, see above) then? What becomes clear is that with its Communication on SSGI of 2006 the EC implicitly suggests to mainly orient debates and policy processes on personal social services as they are economic services in the understanding of the ECJ and the EC and – to move from a legal to a political assessment – as there lies a potential of marketisation.

*2. If you consider that the description could be improved or other (type of) services should be added, please provide for concrete drafting suggestions.*

More than half of the respondents either do not directly reply to this question or state that the description as provided in the 2006 Communication on SSGI is sufficient and/or satisfactory, as e.g. BG, H, LV, and P.

Several MS would like to see mentioned or taken into account additional aspects or dimensions of social services.

- A highlights the need to include preventive character of SSGI (a point systematically also raised by social NGOs), recalls that some social services are targeted to families and not only individuals and would like to see covered by the term social services additional fields such as “civil service and civil protection, fire brigades and rescue, social housing.”<sup>47</sup> (A, Q2).

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<sup>46</sup> In the reply submitted by PL a long list of benefits divided into 18 categories, a) to r), is included.

<sup>47</sup> In the original German version of the reply to the SPC questionnaire this reads „Zivil- und Katastrophenschutz, Feuerwehr- und Rettungswesen, Sozialer Wohnbau.“ (A, Q2)

- D recalls the importance of well-functioning, universally accessible and affordable high-quality SGI for the “realisation of social rights, to the protection of human dignity and to the implementation of objectives of an adjustment of societal imbalances and solidarity as well as social and territorial cohesion.” (D, Q2)
- A clear political message is contained in the demand of E to complete the description with the elements “social cohesion”, “universality”, “equity”, “accessibility” and “guarantee of fundamental rights”. In this context they again refer to the role of SSGI as one of the pillars of the European Social Model, together with health services and education, as guaranteed by member states and the Charter of Fundamental Rights. The reply also highlights the need for services for persons with disabilities to be comprehensively covered. It finally makes one concrete suggestion for rewording<sup>48</sup>.
- Claiming that social housing is and should be an integral part of SSGI, E comes up with a proposal for rewording that makes reference to market failures to house all at decent conditions and to the objective of socially mixed neighbourhoods<sup>49</sup>. (E, Q2)
- ROM would like to see a distinction “between the services of protection of the child separated from his/her parents and the services of support for parents (i.e., services of child care during the day, parents’ schooling, daytime and recovery centres for the disabled children)” (ROM, Q2)
- S would like to have a reference to a requirement, valid for many personal social services, of a needs assessment that “can apply generally to a group or individually to each beneficiary and be carried out by a government agency, other public body or interest organisation” (S, Q2)

As to other demands to amend the description of SSGI as presented in the 2006 Communication the reader is also referred to the analysis presented under Q1 and to the list of more general issues put forward in the contributions of five MS in the paragraph below.

- CY would like to see a more explicit and prominent mentioning of the social mandate of SSGI: “Social services fulfil social objectives based on the principles of fundamental rights, social cohesion, accessibility, affordability, quality and solidarity.” (CY, Q2) and of the principle of solidarity they are based on. Here the Cypriot government suggests a textual change, with the phrase “operating on the basis of solidarity” to be added after “mutual or occupational organisations” in the description of social services regarding

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<sup>48</sup> *Propuesta alternativa de redacción de la definición de los «servicios esenciales prestados directamente a la persona» o «servicios sociales asistenciales»:* «Los servicios sociales tienen por finalidad la promoción del bienestar de las personas, la prevención de situaciones de riesgo de exclusión de grupos desfavorecidos y la compensación de déficit de apoyo social, centrandó su interés en los factores de vulnerabilidad o dependencia que puedan afectar o a su dignidad como persona y así como al ejercicio derechos fundamentales». (E, Q2)

<sup>49</sup> *Ainsi, l’alinéa relatif au logement social pourrait être libellé comme suit:* «Le logement social est un logement dont les conditions d’occupation sont soumises à des obligations particulières afin d’assurer une mission d’intérêt général. Ces services nécessitent une infrastructure spécifique pour répondre aux besoins à court, moyen et long terme liés à l’accès et au maintien dans un logement adapté en termes de qualité et de prix et sont destinés à des ménages qui ne trouvent pas à se loger dans les conditions du marché». (E, Q2)

social security schemes (CY, Q2). The Cypriot government finally recalls their preventive function and their role for social cohesion.

- D makes reference to the EC modernisation agenda for SSGI, however, giving priority to public service principles as objectives of reforms and alluding to the fact that they are or should be the outflow of political decisions by competent authorities within MS<sup>50</sup>. The German response (as in the case of E) also introduces the link between social services and the Charter of Fundamental Social Rights, in particular to Art. 34 on the access to SGI.
- E hints to an important caveat, not adequately addressed up to date which in turn can be explained by the strong political dimension of any description or definition of terms at EU level, namely an incoherence as to the use of the term in different European non-legislative or legislative texts, partially comprising the whole sphere of social protection and/or social housing and/or employment, in other cases not that is and will be a source of legal unclarity<sup>51</sup>.
- FIN make three more general remarks that take up points made by them and other governments under Q1, considering problematic to put insurance and personal social services in one pot, highlighting the sometimes difficult borderline between health and social welfare and questioning if the exercise at EU level is and should be about SGEI or also embracing non-economic services<sup>52</sup>.
- And M suggests building the definition on the criteria “social solidarity” and “social objective” (without elaborating more on what this precisely should mean and which criteria to use to define those terms) and reiterates its demand (cf. Q1) to explicitly mention health and long-term care services as well as public education in the description.

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<sup>50</sup> “..., in accordance with the principle of subsidiarity, concrete modernisation objectives are meant to be implemented at the level of the member states or indeed at their regional and local levels. Accessibility, affordability, complete territorial coverage, adjustment to changes in structures of need and concepts for the promotion of capacities, qualifications, etc. as well as general improvement of the quality of non-profit social and health services can constitute objectives of modernisation efforts geared to strengthening social and territorial cohesion – which includes the objective of facilitated and effective social (re-)integration and participation”. (D, Q2)

<sup>51</sup> “Le terme de «services sociaux» n’est pas satisfaisant et pourrait être source d’insécurité juridiques ultérieures. Son acception varie actuellement d’un texte européen à l’autre: tantôt elle englobe la protection sociale, tantôt pas, de même pour le logement social ou encore les services de la sphère emploi. Le champ couvert est en effet très large”. (E, Q2)

<sup>52</sup> More in detail the Finnish governments states: “a) it is difficult to consider social insurance institutions in charge of managing monetary income security benefits on the one hand and organisations providing personalised social services on the other hand in the same frame of reference as the nature of and the obligations regarding their activities are very different from each other; b) it is sometimes difficult to distinguish between social welfare and health services (e.g. services for the elderly and for alcohol and drug abusers as well as rehabilitation services all incorporate elements of both health care and social welfare services); c) it is important to consider whether the objective is to give a definition to services of general economic interests only or whether the objective is to include also non-economic services of general interest.” (FIN, Q2)

3. Please indicate whether the characteristics identified by the Communication are pertinent to gauge the specific features of social services of general interest as compared to other services (of general interest)?

Two groups of MS can be distinguished as to the main tenor of their answer.

- On the one hand more than half of the MS (A, B, BG, CY, CZ, D, EST, F, H, IRL, L, LT, LV, M, P, and ROM) consider pertinent the characteristics as identified in the Communication on SSGI to gauge the specific characteristics of SSGI. Most of them, however, would like to add aspects or amend the wording of specific organisational characteristics; four countries (B, D, E, and H) make precise remarks related to the single elements.
- On the other hand four MS are either critical vis-à-vis (DK, FIN, and S) or basically disapprove both approach and objectives of (GB) the exercise.

Looking more in detail into the answers of MS falling into the first group, we see that

- CZ would like to give priority to the aspect of “(good) quality of SSGI”, EST to “individual need” and “asymmetry of provider-user-relation”.
- D suggests additional criteria to refine the description characterise the specificities of social services in an internal market and competition environment, one related to the two main income sources and the mechanism of financial solidarity and distribution inherent to them<sup>53</sup>, one to the lack of a not-profit-making motive<sup>54</sup>.
- F welcomes the use of an open and non-exhaustive list of organisational characteristics or criteria (referred to as “*méthode d’identification par faisceau d’indices*” in French) as this has led to the elaboration of an “operational tool” and indirectly advocates for to definition of a specific legal area or set of rules for SSGI<sup>55</sup>.
- FIN underlines the political nature of the design of SSGI and their modalities of organisation, regulation, provision and financing (a thinking underlying the replies of D and E, to question 3 and in general, too).
- H upgrades the principle of solidarity from a “merely” organisational principle to one of constitutive order for SSGIs.
- I restates the importance of social economy organisations for the delivery of SSGI and explains the political preference to confer the delivery to them instead of to commercial

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<sup>53</sup> “The services included in the definition are funded at least in part from taxes or compulsory social contributions. This should also be seen as an indication of the special position of social services as a component of services of general interest within the meaning of Art. 16 EC, and as a justification for their special need for protection.” (D, Q3)

<sup>54</sup> “The activities of the service providers are not geared towards profit-making, but have a general interest orientation. Evidence of this general interest orientation can be found by examining the organisational structures of the service providers, in particular with regard to the type of business, use of profit, staff salaries, and disclosure of the remuneration of legal representatives.” (D, Q3)

<sup>55</sup> “*Ces caractéristiques différencient nettement les SSIG des services d’intérêt général de réseaux. Même si les SSIG ne représentent pas encore une catégorie juridique distincte, ils constituent bel et bien un ensemble cohérent au profit de la cohésion sociale et territoriale. Il est à cet égard important de rappeler une des principales spécificités des SSIG, à savoir la mise en œuvre effective des droits sociaux fondamentaux et notamment la protection des personnes en situation de fragilité.*” (E, Q3)

providers should SSGI be delegated by local and regional territorial authorities to the “private sector” is precisely motivated by the non-profit making logic of the former and the non-distribution of possible surpluses to private stockholder<sup>56</sup>.

- I also puts forward the role SSGI (can) play when it comes to empowerment and user participation and reminds of the (potential) involvement of citizens in the production and planning of SSGI<sup>57</sup>.
- P recalls that it is the fact that the SSGI are tools to realise fundamental rights that distinguishes them from many other services and that it can be deduced from there that the main characteristics are equality and universality in access as well as equity and social justice in view of and for the potential beneficiaries.
- There is no single MS pronouncing itself in favour of keeping the reference to (national, regional and local) traditions as they do not see which specific purpose this should serve; B and E even directly ask to abolish it.
- Several MS (A (in Q5), B, CZ, D, H and I) claim that the involvement of volunteers in the delivery of SSGI only applies to selected services and constellations and therefore is not constitutive to SSGI. B, CZ, D and H (explicitly or implicitly) suggest it should therefore be deleted from the list of generally applicable organisational characteristics.
- Several MS remark that for specific services that are also offered and delivered by commercial providers, e.g. in the field of long-term care, it is not correct to speak of “absence of a profit-making motive” – which consequently cannot be considered as a generally applicable organisational feature. Looking at the not-for-profit character of SSGI H highlights a particularity referred to in many other replies (across all questions), too: “From the rules pertaining to the services we can deduce that the user does not pay the real price of the social services (or pays maximum a limited percentage as co-payment), instead the state (hence the other members of society) is financing it on the basis of the principle of social solidarity. Because of this characteristic the profitability of the services is not possible.” (H, Q3)

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<sup>56</sup> “Nel definire l’*impresa sociale*, ossia l’impresa specificamente concepita per l’erogazione di un servizio di interesse generale, l’ordinamento italiano preveda, come elementi costitutivi, l’assenza dello scopo di lucro e la presenza vincolante di meccanismi di coinvolgimento dei lavoratori nelle decisioni d’impresa. Ciò comporta che l’erogazione di servizi sociali di interesse generale – pur potendo, in linea di principio, essere effettuata da qualunque impresa privata – deve preferibilmente avere a protagoniste imprese che non hanno le stesse motivazioni e le stesse modalità di funzionamento di un’impresa operante sul mercato dei servizi d’altro genere. In linea generale deve essere sottolineato, anche per valorizzare al riguardo la specificità del welfare italiano, che, nel campo dei servizi sociali di interesse generale, la modernizzazione non consiste tanto nella delega di funzioni statali al mercato, quanto nella delega di funzioni statali alla società, ovvero nell’attivazione di forme di lavoro e d’impresa a forte carattere volontario, cooperativistico o comunque sociale.” (I, Q3)

<sup>57</sup> And further: “Né questa modernizzazione consiste tanto nella trasformazione dell’utente in consumatore, quanto nella sua trasformazione in cittadino responsabile e partecipe. Un cittadino che non si limita ad esercitare la voce contro la mancata attuazione di un diritto o l’exit nei confronti di un fornitore privato insoddisfacente, ma che è capace di contribuire, nelle forme della partecipazione democratica, alla costruzione del “piano locale” dei servizi, alla scelta dei servizi da privilegiare, alla loro valutazione rispetto alle esigenze del singolo e della comunità.” (I, Q3)

Textual suggestions how to amend single elements are provided by B, D, E, and H. They refer to the principle of solidarity, the absence of a profit-making objective, the protection of vulnerable persons, the participation of volunteers in the production of welfare (here the delivery of SSGI) and the rootedness of SSGI in national traditions and local contexts.

- B calls for a re-wording of “protection of (most) vulnerable persons” (as part of element 2) as they consider it too restrictive and both conceptually and politically misleading<sup>58</sup>.
- B also suggests including the aspect of need, dependency, etc. to the notion of “asymmetry of relationship between provider and user” (see explanation under footnote 248)
- E would like to see more precise wording on the two notions “solidarity” (“*la no selección de riesgos o la falta de equivalencia a título individual entre cotizaciones y prestaciones*”) (E, Q3) and “social cohesion” and should explicitly mention that this comprises the promotion of dependent people and the promotion of personal autonomy/empowerment (“*la atención a las personas en situación de dependencia y la promoción de la autonomía personal*”) (idid)
- E suggests adding under “asymmetric relation between providers and beneficiaries that cannot be assimilated with a ‘normal’ supplier/consumer relationship” (as part of criterion 6) that for SSGI this relationship cannot be assimilated to a normal provider-consumer relationship<sup>59</sup>.

DK, FIN, and S do not hide the difficulties they have with the outcome achieved up to date in the on-going exercise to elaborate an EU-level description of organisational characteristics of SSGI. These are mainly nourished by general concerns on subsidiarity and differences in the understanding and relative weight of the welfare state design parameters “universality”<sup>60</sup> and “local (political and financial) autonomy”.

- DK fails to see that social services legally or in terms of content are significantly different from other SGI and from there considers it “difficult to set up exact criteria to define how social services of general interest differ from other vital and mandatory social services ... except that they often, though not always, target society’s most disadvantaged people and are often allocated on the basis of concrete, individual evaluation” (DK, Q3).
- Still DK claims that “in the social and other related areas, quality, continuity and security of supply are key characteristics. To this should be added that a high degree of user

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<sup>58</sup> Concerning the element “protection of (most) vulnerable persons”, the reply of the federal government of B explains: “*c) protection des personnes les plus vulnérables: Cette particularité qui complète la caractéristique relative à la garantie des droits humains fondamentaux, nous paraît trop restrictive. La rencontre des besoins liés aux droits fondamentaux doit être universelle.*” (B, Q3)

<sup>59</sup> “*Relación asimétrica entre prestadores y beneficiarios que no se puede asimilar a una relación “normal” del tipo proveedor-consumidor, y que requiere la aplicación de la fórmula de pago por terceros.*” (E, Q3)

<sup>60</sup> This is illustrated as follows: “The Finnish social service system incorporates both standard services provided for the population at large as well as personalised services. ... Universal social services available for the entire population are utilised not only by the most vulnerable but also by others. ... Solidarity is not based on any classification of social service clients; instead the whole social policy system is based on levelling the impact of income differences.” (FIN, Q3)

involvement is a key feature of social services, and that decisions on citizens' right to receive services will be made by the relevant local council" (ibid.).

- The primacy of political decisions on the setup and design of SSGI is restated in this context by FIN: "In Finland the set of services provided by the public sector has been developed in political consensus and in accordance with prevailing needs" (FIN, Q3).
- S shows unhappiness and lack of understanding about the distinction between SSGI of economic and non-economic nature, not least as they do not consider appropriate and useful the splitting up of this policy field in their national context<sup>61</sup>.

D admits that the identified characteristics apply well to the welfare policy instrument or type "social services" (i.e. the second main sub-category identified by the EC in the 2006 Communication on SSGI, p. 4). The German government, however, fails to see "which of the 'groups' of social services mentioned in section 1.1 of the Communication the characteristics summarised in the six sub-items are supposed to precisely [*note: word "precisely" added by the author to better carve out the intention of the German Federal Government*] refer to" (D, Q3).

GB rather bluntly states that they are "not clear on what the context is for defining the specific features of social services of general interest as compared to other services (of general interest)" (GB, Q3), asks "what is envisaged as being the application in practice of any special feature?" (ibid.) and concludes that it is "difficult to see at this stage, before any member state has identified any problem with managing this process, how defining any specificity at the EU level adds any value to the process". (ibid.) It is only consequent that from this reasoning the British government suggests that "doing nothing" (compared to the status quo in 2006) is the avenue to take, given the already existing and achieved policy and legal frameworks at EU level and "given the laws under the Treaty as it stands the UK believes it can both deliver necessary services to satisfy citizens' needs and modernise the delivery of those services within this framework" (ibid.). GB finally comes up with a counter-proposal as to the approach – a shift from functional to teleological – and the main cognitive interest of the description as developed by the EC: "The UK would suggest that the purpose of SSGIs and the outcomes that they achieve are more important, and would provide a more straightforward basis for a common description than the set of characteristics as used by the Commission in their Communication. If required, the UK could propose a description of the outcomes achieved by SSGIs at a later stage and if the SPC agreed that this was a path worth pursuing<sup>62</sup>." (ibid.)

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<sup>61</sup> "The question is whether it is possible to talk about social services of economic interest and social services of non-economic interest; where it is possible to distinguish social services of non-economic interest, these fall within the framework of exclusive national competence." (S, Q3)

<sup>62</sup> The author could not find out if this proposal has been concretised at a later stage and how many MS had pleaded in favour of "pursuing this path" in one of the SPC meetings in 2007 or afterwards.

4. Please provide, if needed, for concrete drafting suggestions for the formulation of the characteristics as they are currently presented by the Communication.

Only a limited number of MS (B, D, E, FIN, P, and ROM) provide concrete drafting proposals and/or directly reply to this question. Other national/federal governments, however, in their replies to question 3 suggest other aspects they would like to see taken into account in addition to the elements identified in the description of organisational characteristics of SSGI by the EC or they would prefer to be given a higher priority. The analysis provided for both questions insofar has to be read together to grasp the different aspects contained in the 25 replies. M makes a hint as to the appropriate framing of the exercise – in the author’s view shared by the majority if not totality of MS – in underlining that the “characteristics (...) are (...) essential to guarantee the fundamental right to human dignity and integrity and are a manifestation of the principles of social cohesion and solidarity.” (M, Q4)

Six MS come up with concrete suggestions, highlighting different aspects respectively:

- B would like to see included the aspects of exposure to a specific risk, dependency, being in need of tailored support, etc. in the element “asymmetry of information between user and provider of SSGI”. They also recall that (in B) the financing of benefits related to addressing risks such as unemployment, sickness or poverty is characterised is organised via mechanisms of solidarity and redistribution<sup>63</sup>.
- D proposes a reformulation of the element dealing with the asymmetric relationship between providers and users of SSGI referring to the service quality, the role of a third party that (as a rule) steps in to actually assume the financing (to a large extent) of SSGI and to – as they put it – the fallacious assumption that we deal with “customer sovereignty” or “free user choice” in the field of SSGI<sup>64</sup>.
- Interestingly enough E suggests expanding the dominant functional approach (at EU level) to a teleological approach by making the social purpose of SSGI – E uses the term “qualified general interest”<sup>65</sup> – part of the equation. They insofar would welcome an

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<sup>63</sup> The federal government of B i.a. writes: “e) *relation asymétrique: Le financement des SSIG relève du choix démocratique des Etats, soit qu’une subvention soit payée au fournisseur de services, soit qu’une aide soit accordée à l’usager, soit encore qu’il y ait recours au tiers payant. Lorsque ces SSIG bénéficient de moyens financiers publics, ce financement est basé sur l’idée de solidarité. Les personnes qui font appel aux services sociaux ou les personnes auxquelles s’adressent les services sociaux sont généralement dans une situation de force majeure (chômage, maladie, pauvreté). Cet élément fait partie de la relation asymétrique.*” (B, Q3)

<sup>64</sup> The suggested alternative formulation reads “an asymmetric relationship between providers and beneficiaries of social services in terms of quality of the benefits and/or of the service providers, an asymmetry which tends to increase when a financing third party is involved.” (D, Q4) – instead of “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”, as suggested in the Communication on SSGI (p. 5). D also suggests adding here the following sentence: “In some areas, the beneficiaries are groups of persons who depend on the service, have no ‘customer sovereignty’ and/or are particularly vulnerable and/or in special need of help and support.” (ibid)

<sup>65</sup> In this regard the Spanish government elaborates as follows: “*Existencia de una «finalidad social» (interés general cualificado). Dicha finalidad o función social se manifiesta de forma concreta bajo diversas formas en virtud del sector de que se trate, si bien todas coinciden en su contribución a la*

explicit mention of SSGI as concrete manifestation of social rights/entitlements enshrined in social law and of human dignity<sup>66</sup>. E also misses a reference to the role of social economy organisations as providers of SSGI<sup>67</sup>.

- Consistent with its replies to other questions FIN underlines that the public interest i.a. in quality provision of social services and in guaranteeing access to SSGI (that can or has to be universal, non-discriminatory, barrier-free, depending on the specific personal social service) would need particular mentioning<sup>68</sup>. They also point out that this “interest of the society” (as this aspect could have been referred in order to grasp the conceptualisation in FIN in the author’s view) is both based on and safeguarded by national legislation.
- P would like to see retained the aspects of prevention and the specific form of management of SSGI.
- ROM proposes a specific mention of the role of local authorities as key actors to coordinate and set up SSGI.

5. Are there characteristics to be added? Please provide for concrete drafting suggestions and examples of services concerned by these characteristics.

Three quarters of the MS propose additional characteristics, but only a few provide for concrete drafting suggestions. Only CY, CZ, GB, H, IRL and LV are abstaining from making suggestions.

The following list illustrates the broad range of characteristics MS would like to see added, ordered by relevance and only listing aspects mentioned by at least two MS.

- Social purpose and positive external effects of (many) social services (D, E, EST, F, GR, L) – D underlines that this social purpose can extend beyond the direct provision of the

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*realización de derechos fundamentales de la persona, íntimamente relacionados con la dignidad humana que le es propia, bajo los principios de universalidad y de igualdad en sentido material, lo que implica un efecto redistributivo.” (E, Q4).*

<sup>66</sup> *“Las características de los servicios sociales de interés general no deberían limitarse únicamente a aquellas de tipo organizativo. ... Las singularidades organizativas que presentan estos servicios son consecuencia precisamente de sus elementos sustantivos, esto es, de sus fines y objetivos que son los que verdaderamente distingue a estos servicios. En el caso de que la intención sea diferenciar a los servicios sociales de interés general de los servicios de interés económico general, también debería partirse de las características sustantivas en tanto resultan muy esclarecedoras, en particular, por lo que respecta a su vinculación con la realización de derechos fundamentales y la garantía de la dignidad de la persona.” (E, Q4)*

<sup>67</sup> *“Respecto de la ausencia de ánimo de lucro, cabría matizar su formulación añadiendo a la que figura en el texto de la Comunicación de la Comisión una referencia a la conveniencia de considerar en particular la situación de las instituciones del ámbito de la economía social (cooperativas, mutualidades, fundaciones, etc.), que gestionan la prestación de servicios sociales y que distribuyen los resultados económicos positivos de su gestión entre los beneficiarios de la misma, como es el caso de las organizaciones que integran a colectivos de personas desfavorecidas o con problemas especiales, para facilitar su integración social y dar respuesta a sus necesidades.” (E, Q4)*

<sup>68</sup> FIN underlines that this public interest, in the EU context referred to as general interest, “may be linked to access to services, costs for service provision, local nature of the service, professionalism, contents, mode of provision, quality of the service and effects on the community.” (FIN, Q4)

actual service within the scope of the social security system and support the realisation of other objectives of social, health and employment policy, an argument also put forward by FIN and I and under question 6;

- Promotion of social cohesion, social inclusion and solidarity (B, (BG), E, I, L, P) – in this context B points to the objectives of equality of access, universality, continuity and transparency intrinsically linked to the former objective; E clarifies their understanding of “solidarity” by i.a. quoting from ECJ rulings in which terms such as “activity outside the economic sphere”, “universal benefit”, “redistributive purpose”, “lack of profit-making objective”, “incompatibility of mission of general interest with commercial interest”, “market failure” are being used to get better grip on this term and concept<sup>69</sup>, not leaving any doubt that they see all or part of these elements represented in the various SSGIs; I recalls that “the costs of non-social interventions” (I, Q5), calls “to fight interpretations of a loss due to investments in social infrastructures and social protection” (ibid.) and deplores that there is “a twisted discourse; investments should/have to be seen as investments into human resources and the development of social cohesion” (ibid.) as “social services also have the function to prevent from situation of poverty and exclusion and to safeguard the individual and consequently also collective/societal wellbeing” (ibid.).
- User rights, user participation and user choice (B, BG, D, EST, S) – D and EST mention participative elements with regard to the selection, organisation and evaluation of SSGI;
- Preconditions for the quality of services including (systems of) quality control and management (A, DK<sup>70</sup>, EST, I) – DK in this context mentions that “social services will

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<sup>69</sup> “Principio de solidaridad: Este es el elemento fundamental de este tipo de servicios y no se limita sólo a la no selección de riesgos y a la falta de correspondencia entre cotizaciones y prestaciones como afirma la Comunicación de la Comisión. El principio de solidaridad es una expresión que emplea el TJCE ... dotado de las siguientes características comunes: a) Ordenación del servicio con una estructura extraeconómica para asegurar una prestación universal y de carácter redistributivo. ... Se trata de actividades más que extraeconómicas, de naturaleza extracomercial ... eliminándose todas las características típicas de una relación económica contractual incluida la contraprestación directa por el servicio ... es cierto que la finalidad última con la que intervienen los Estados prestando servicios sociales no es obtener ganancias económicas. Sin embargo, esto no significa ni que la prestación de servicios sociales se haga a título gratuito ya que supone siempre un coste para el prestador que en última instancia asume el Estado, ni que todos los prestadores carezcan de dicho ánimo de lucro ya que pueden existir empresas que se encargan de la gestión indirecta de determinados servicios que hacen de ellos su negocio (por ejemplo, guardería infantiles). b) Inexistencia de competencia en su prestación, al estar estructurado de forma extracomercial. En efecto, en estos servicios existe una incompatibilidad absoluta entre la misión de interés general asignada y la misión comercial en que consiste el servicio, no existiendo posibilidad alguna para su prestación de acuerdo con el normal funcionamiento del mercado y de las normas de la competencia. ... En la medida en que se excluya la posibilidad de una autodeterminación empresarial en los elementos sustanciales de la prestación de los servicios a través de diversas medidas que predeterminan la actuación de los prestadores de servicios se considerará que no se presta una actividad económica ya que se excluye el interés mercantil propio de la empresa y se impone el interés social contenido en las normas, por lo tanto que no se puede considerar a los prestadores como empresas a efecto de las normas comunitarias sobre competencia del Tratado.” (E, Q5)

<sup>70</sup> DK elaborates on some features of their quality management system in explaining that “the local council determines quality and price requirements posed to all providers, public as well as private. The local councils must approve and conclude agreements with any provider who meets the local council’s

undergo constant modernisation, particularly aimed at meeting desires for improved quality, individual user considerations, free choice between various providers” (DK, Q5); I highlights that service quality is closely linked to the quality of employment, i.e. the level of working and pay conditions of employed personnel, the stability of the employment relation that in turn will improve the quality standards attained

- Personal and continuous relationship with users, continuity of service provision (A<sup>71</sup>, D, E, S);
- Comprehensive approach, taking into account potential multiple needs of a person, and integrated service delivery (E, I, LT, ROM, S) – E links this aspect back to the preventive, inclusive and empowering functions of SSGI in order to guarantee social rights and to protect vulnerable and disadvantaged people
- Definition of objectives of given SSGI, service missions and obligations of general interest for service providers by a public authority (E, PL, SLO) – in this context E defends the idea that this exercise is an internal decision based on political considerations and a decision of a competent public authority in a MS not needing any justification vis-à-vis European institutions or any “blessing” from their side<sup>72</sup>; the same argument is raised by FIN and L.
- Social and territorial planning (B, E, SLO) – B highlights the link from public planning and regulation to the authorisation of providers, the monitoring of the services provided and to the professionalisation of the sector; E mentions the local dimension of the planning of SSGI, depending on local needs and resources
- Promotion of personal development, self-determination and equality of social participation (by selected social services) (D, E, I) – with I stating that “Personalisation of social services means a focus on the needs of the individual. ... A good social service follows a virtuous circle of recognition of rights and of the promotion of the autonomy of the person” (I, Q5);

Other issues promoted and related to a public policy responsibility that have been promoted are the role of public authorities in defining the regulatory framework (B), cost-free or close to cost-free service delivery for many if not most of the users – or at least non-coverage of an important

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requirements to quality and price. The council can only refrain from approving if rejection is founded on non-performance of financial viability, professional integrity, etc. The local council must at least once annually draw up a quality standard and follow up on quality and control of services.” (DK, Q5)

<sup>71</sup> For illustrative purposes the following examples are mentioned by A: support for former inmates of prisons, services for drug (ab)users, services for abused women. (A, Q5)

<sup>72</sup> “Acto de poder o autoridad. Se trata de un acto de poder mediante el que se establece una ordenación específica dentro de un determinado sector que viene ejercido por las autoridades públicas competentes de los Estados miembros que, por lo general, será el poder legislativo. Este acto de poder es el que determina el objetivo de interés general que ha de cumplir el servicio (el qué), así como la organización de la propia actividad y los medios para que se realicen (el cómo). Se trata de una decisión interna que no necesita ser motivada en sí misma por parte del Estado miembro en el entendimiento de que se trata de una decisión de pura oportunidad política. ... la actividad pública ordenando, autorizando y controlando este tipo de instalaciones no puede considerarse parte sustantiva de los servicios sociales.” (E, Q5)

share of the costs by the users (E), universal access to selected SSGI as an expression of a guaranteed social right (I) and finally the preventive character of SSGI (L, P).

A is the only country to conceptually and explicitly distinguish in their answers to most of the questions of the enquiry between “personal social services” on the one hand and “social security” on the other. For the latter sub-category they first refer to the involvement of insured persons in bodies of self-administration of many branches of the mandatory social insurance systems (self-administration principle)<sup>73</sup> and second to income or means tests as well as a “screening procedure of needs and the neediness” as constitutive elements under welfare-based social protection schemes (in German-speaking countries traditionally labelled “social assistance”) as characteristics worthwhile a reflection if they should not be added.

Several MS also make more general remarks to frame their suggestions:

- A restates (as several other MS do) that volunteering is of high importance for specific personal social services, but should not stand out as dominant characteristic and reminds that services provided by qualified staff are indispensable.
- B comes back to an alternative analytic grid for the whole exercise along the two axes “type of activity” and “type of provider”. An intervention by public authorities is justified by the mechanisms of financial solidarity/collective financing of SSGI, to safeguard the service quality and to prevent from non-delivery of personal social services to persons with one or more “bad risks”, i.e. vulnerable, excluded or disadvantaged people<sup>74</sup>. B restates (as most of the other MS in their replies to the SPC questionnaire) the social and societal functions of SSGI and that their provision is contributing to the production of public welfare and a public good, realities that need to be recognised by public policy and have to find their expression in specific modes of financing and an adapted regulatory regime at EU level<sup>75</sup>.

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<sup>73</sup> “Bodies of self administration also have decision capacity, state institutions only exercise the functions of control and tuition (respect of legal framework, functioning according to principles of management according to economic considerations and appropriateness).” (A, Q5)

<sup>74</sup> “Nous pensons qu’il convient d’appliquer une grille d’analyse pour caractériser les SSIG. Cette grille devrait couvrir entre autres deux domaines: a) Le type d’opérateur: celui-ci peut être privé ou public (ou partenariat PP), notamment les organisations syndicales, mutualités et asbl, dont les profits éventuels sont socialisés; b) Le type d’activité: les activités concernées répondent aux besoins liés à l’exercice des droits fondamentaux. Ces activités économiques ou non seront dans la plupart des cas offertes à un prix en dessous du prix coûtant. Soit elles sont payées par un tiers, soit elles font l’objet de subventions ou de financement socialisé, solidarisé. S’agissant d’activité d’intérêt général, elle justifie l’intervention régulatrice de l’autorité publique pour garantir la protection des mauvais risques, pour fixer des normes de qualité et réguler l’utilisation des bénéfices collectifs générés et enfin contrôler la bonne exécution des règles fixées.” (B, Q5)

<sup>75</sup> “Justification: Comme nous avons pu le constater ci-dessus, le seul caractère lucratif ou non lucratif d’un service ne suffit pas à déterminer ni à exclure les types de services qui peuvent être considérés comme des services sociaux d’intérêt général. Il convient en fait de lui adjoindre ou de le supplanter par la notion de finalité sociale ou sociétale du service. Cette finalité sociale, au nom de la production de bénéfices collectifs ou, pour reprendre les termes utilisés au niveau européen, au nom de leur contribution à l’intérêt général, devrait être reconnue par les politiques publiques et faire l’objet de financements publics pour internaliser ces bénéfices sociaux qui ne sont pas toujours pris en compte par le marché. Nous proposons donc de prendre en compte dans la structuration du régime dérogatoire des

- DK under this question touches upon an issue often debated at EU level when it comes to decide upon the applicability and the concrete application of Community law, namely the mandating of external (not-for-profit or commercial) services providers with the delivery of an SSGI which as a rule also involves financial transfers in form of public subsidies/state aid. Using the examples of social housing, youth housing and retirement homes they clarify that only where there is a duty to provide a given social service under Danish legislation there can also be a transfer of an obligation and a public service mission, no legal duty to intervene by state authorities cannot produce a situation with delegated powers.<sup>76</sup>
- E makes an important clarification what to understand by “lack of profit making objective” – wide-spread, but not a constitutive element for all social services – and how this principle translates into modalities of services organisation and financing<sup>77</sup>

6. Please provide as a maximum 3 relevant examples of social services representing one or more of the (additional) characteristics which could be taken as good example for the special nature. Please indicate which concrete element of the characteristics is clearly deducible from the example chosen.

About half of the MS provide examples and in doing so mention a broad range of issues. The following list dwells on topics mentioned by at least two MS, is structured by frequency of reference made to a specific issue and comprises the following aspect:

- functioning of SSGI on the basis of the principle of solidarity (A, E, F, FIN, LV) when it comes to financing, e.g. in the social insurances (A, LV) or in the field of services for disabled persons (LV)
- person-centred and comprehensive, integrated services provision (E, F, FIN, LV, S) – e.g. in services of accompanied housing for elderly persons (in E of universal character and provided in a non-competitive setting)<sup>78</sup>, in spa treatment for elderly persons (in E

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*services non seulement la nature intrinsèque des services et des « produits » qu'ils offrent, mais aussi leur mode d'organisation.”* (B, Q5)

<sup>76</sup> “Under Danish legislation, subsidies are available for establishment of social housing, youth housing and retirement housing. Social housing and youth housing may only be constructed by social housing associations, whereas social retirement housing can be constructed by non-profit housing associations, independent associations for social housing for the elderly and local authorities. However, no duty to construct has been implemented, and therefore no transfer of an obligation exists.” (DK, Q5)

<sup>77</sup> Aiming at preciseness as to selected characteristics and in order to complete their description, E writes: “L’absence de but lucratif est un principe largement répandu sans être pour autant systématique: a) certains SSIG sont assurés par des organismes à but lucratif qui opèrent en vertu d’un agrément ou d’une autorisation exigeant en termes de qualité de service (c’est notamment le cas des services d’insertion par l’activité économique, des organismes de services à la personne qui souhaitent travailler au profit de personnes vulnérables et des établissements pour personnes âgées); b) certains SSIG ne satisfont pas directement au principe de non-lucrativité mais, plus largement, connaissent une obligation de réaffectation des bénéfices au profit de l’objet poursuivi.” (E, Q5)

<sup>78</sup> “A) Servicios de alojamiento en pisos tutelados para personas mayores: c. Principio de solidaridad. a) La estructura extraeconómica del servicio se caracteriza por su carácter universal (para los que cumplan los requisitos para el acceso) y gratuito (aunque se tenga que abonar un precio público no tiene carácter

again of universal character and provided free of charge for those entitled), in vocational rehabilitation services (LV) or in foster care for children (S);

- public guarantee of service provision and financing (A, DK, FIN, GR), e.g. in the field of social housing (with GR using this example to illustrate the public nature of SSGI) to promote social mixity and to counter ghettoisation of residents (DK)<sup>79</sup> or as to the support system for informal care (FIN) to reduce the costs for those needing the services;
- exclusive, predominant or at least partial financing of SSGI by third parties – i.e. public authorities and/or social welfare/assistance schemes (based on taxes) or social security systems (based on social contributions) (A<sup>80</sup>, E, FIN, LV);
- role of SSGI in addressing situations of poverty, vulnerability and social exclusion (FIN, H, ROM, S), as highlighted by H in referring to the example of family support, provided to individuals or families in need of help on account of social or mental-hygienic problems or other crisis situations to prevent and/or eliminate them or by ROM when mentioning the fields “children’s rights protection”, “disabled persons’ protection”, “family protection” and “domestic violence protection”;
- role and importance of volunteers for specific categories of SSGI (D, E, FIN);
- non-profit nature of SSGI – here E refers to public employment services (offering placement, training and labour market (re-)insertion measures) and H to street work – and the not profit-making objective of the service delivery (A, E, H);
- relationship between providers and users of SSGI (E, LV) that cannot be assimilated to a normal supplier-costumer-relation, which becomes obvious when looking e.g. at public employment services (E) or homes for people with disabilities (LV);
- free choice of services of users (DK, S) – for personal and practical support for persons with disabilities (DK) – as a means (under certain condition and with state-based monitoring) to promote improved quality and consideration for users’ needs;
- positive external effects of SSGI, with FIN and I mentioning that child care services not only serve the well-being, care and education of children, but also play a role with regard to the reconciliation of work, family and private life and a high female employment rate.

Issues put forward by only one member states are

- the proximity at a local level between user and provider e.g. in case of socio-medical services for psychically ill persons and drug addicts (A), in the context of this sample

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*de contraprestación – no son las tarifas que aplican los centros privados); b) Su prestación no se produce en condiciones competitivas entre las residencias públicas ni con respecto a las privadas ya que no se produce en condiciones de mercado (sin embargo las privadas entre sí compiten); e. Carácter integral y personalizado. Se ofrecen todos los servicios que pueda necesitar el mayor alojado en la residencia con carácter personalizado.” (E, Q6)*

<sup>79</sup> “Denmark has for many years and increasingly believed that diverse resident composition is necessary to counter ghettoisation. To this belief should be added that social housing associations can only solve their obligations to less empowered applicants, if these groups can be integrated into widely diverse resident groups. This is why all applicants have access to entering waiting lists irrespective of their incomes or needs.” (DK, Q6)

<sup>80</sup> A illustrates these features the federal government considers relevant to depict SSGI by referring to homes for the elderly and persons needing long-term care.

services also mentioning solidarity principle, public utility, neediness, asymmetric relationship as other relevant features;

- a specific legal status set up to facilitate the provision of social services by associating different actors around a social objective and following a not-profit-making logic, presented by E, the *sociétés coopératives d'intérêt collectif* (SCIC)<sup>81</sup>
- the importance of continuity of service provision (S), e.g. for older people in housing for the elderly and people with personal assistance.
- Instead of providing examples for services standing out due to one or more particular characteristics LT mentions the Law on Social Services 2006 defining a mix of guiding principles, in particular “1) co-operation, 2) participation, 3) complexity (= linking services to the person with services to the family), 4) accessibility, 5) social justice, 6) relevance, 7) efficiency and 8) comprehensiveness (= combination with cash social assistance, protection of child rights, employment, health care, education, social housing, special assistance).” (LT, Q6)

7. How could these characteristics relate to the exclusion of specific social services from the scope of the Services Directive (Art. 2(2)(j) read together with the relevant Recital 27) as politically agreed on 29 May 2006 (Doc. 100003/06) [Text available at website [http://ec.europa.eu/internal\\_market/services/services-dir/proposal\\_en.htm](http://ec.europa.eu/internal_market/services/services-dir/proposal_en.htm)]

Only two MS amongst the about a dozen replying to this question, LT and PL, plead in favour of establishing a link between the two documents in a sense of “taking inspiration” from the delimitations operated to define the scope of application of the services directive. LT writes: “The exclusion of specific social services from the scope of the Services Directive made an influence to the better understanding the mission of SSGI and why they need different treatment in EU rules.” (LT, Q7) To which PL adds: “Although point 27 of the preamble in connection with Article 2 (2) (j) of the draft directive is not a definition of services of general interest but it only specifies the scope within which the directive is not applicable, however, it is still a good starting point for differentiating social services from services of general interest.” (PL, Q7)<sup>82</sup>.

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<sup>81</sup> “Concernant la nature du financement des services, le caractère démocratique de la gouvernance, le fonctionnement autonome et participatif comme expression d'une capacité citoyenne et d'une responsabilisation des bénéficiaires, la participation des volontaires, bénévoles et usagers, la France a créé un outil juridique particulièrement adapté aux services sociaux d'intérêt général, à savoir: les sociétés coopératives d'intérêt collectif (SCIC). Les SCIC mises en place par la loi du 17 juillet 2001 et le décret du 21 février 2002 sont une forme alternative aux associations qui permet d'associer autour d'un projet commun salariés, bénévoles, élus, financeurs.... Les SCIC permettent de répondre à des besoins émergents par une logique d'association de l'ensemble des parties prenantes au développement de projets locaux à forte plus value sociale. Elles entraînent des coopérations actives et multiples autour de projets communs dans de nombreux domaines d'activités: services à la personne, services aux collectivités, environnement, culture, éducation, sports, tourisme...” (E, Q6)

<sup>82</sup> In this context they recall the special role of the state in the delivery of SSGI “indicated in point 27 of the preamble to the draft directive on services in the internal market of 29 May 2006 stressing that these are services provided by the state, or by providers authorised by the state, or by charity organisations recognised by the state.” (PL, Q7) E supports and underlines the importance of this approach: “Il convient de préciser que l'expression «Etat» doit être entendue au sens «autorités publiques», afin de prendre en

A first group of MS elaborating on a possible cross-reference between services directive and document (of whatever nature) on SSGI as to a “definition” of social services either do not want to see such a link established or consider it premature, given the state of the description of organisational characteristics of SSGI in the 2006 Communication (in particular D, DK, E, GB) – whereas writing “premature” or “too early”<sup>83</sup> simply can be a more “diplomatic” way of expressing disagreement or at least strong reluctance with regard to this option. Some issues more in detail now:

- D, DK, E and GB clearly express their reluctance (if not opposition) to possibly re-open the long and politically delicate and contentious discussions prior to the adoption of the Services Directive in general and not least in particular concerning its scope by now falling back on the description of SSGI for interpretation or another purpose. D states that “the scope of application of the Services Directive and the exclusion of certain social services (Directive 2006/123/EC of 12 December 2006) are the result of long negotiations and the search for a balanced political compromise. This result should not be interpreted by other instruments” (D, Q7) and DK adds that “the Services Directive does not, in as much as it generally excludes the entire social area from its area of application, constitute a suitable basis for discussions of the special characteristics of social services” (DK, Q7). E joins them in claiming that it is “not appropriate or justified to establish a link between the services excluded under the Services Directive which is a list having its own *raison d’être* and rationale and the specific characteristics listed in the Communication on SSGI”<sup>84</sup>. To underpin this line of argumentation A voices feedback from national stakeholders: “most respondents<sup>85</sup> deplored that social services have not been completely exempted from the scope of application of the services directive” (A, Q7).
- GB again proposes to shift the focus of this political endeavour by aiming at the setting up of a description that would work towards the identification of the objectives and purposes of SSGI: “... the principles covered by the Services Directive in Article 2(2)(j) and recital 27 of the Services Directive are more in line with our concept of describing SSGIs by their purpose than the characteristics used in the Communication, as

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*compte la décentralisation territoriale et l’existence de caisses de sécurité sociale dotées de prérogatives de puissance publique.”* (E, Q7)

<sup>83</sup> To give an illustration, GB writes: “*The precise scope of exclusions in the Services Directive is currently under consideration while the UK Government identifies domestic legislation that will need to be included in the exercise of transposition. It is therefore too early to use the Directive to inform the SSGI debate in reference to any definition of social services.*” (GB, Q7)

<sup>84</sup> “*Establecer una relación entre los servicios sociales excluidos por la Directiva de Servicios de su ámbito de aplicación y las características de la Comunicación no parece conveniente ni justificado. La lista de servicios excluidos de la Directiva tiene su propia lógica interna y no debe servir de referencia ni prejuzgar el ejercicio que ahora se realiza. Tampoco está claro en la Comunicación de qué manera la identificación de dichas características puede aportar valor añadido a la exclusión ya acordada en la Directiva.*” (E, Q7)

<sup>85</sup> According to the reply by A, listing the umbrella organisations the questionnaire was sent to, this means 1) other ministries at national level, 2) regional territorial authorities, 3) local territorial authorities, 4) employers' associations & trade unions and 5) NGOs providing social and health services.

proposed under Q3-6 above, and so we would suggest that this is worth exploring further.” (GB, Q7) (see more on the GB approach under question 3)

- B is puzzled as the organisational specific features of SSGI elaborated and listed in the 2006 Communication cannot explain sufficiently well why not all SSGI have been exempted from the scope of the Services Directive. They also mention the fear a regional government might no longer be allowed in the future to apply the same conditions for market access and control of the activities of service providers from another country as they do for domestic providers of SSGI<sup>86</sup>.
- EST recalls the need to stick to the country of residence principle, given the particular features of SSGI and to have systems of ex-ante verification for service provider, operate(d) by public authorities, as well as effective ex-post verification (providers should apply for a specific authorisation/licence) in order to guarantee compliance with rules (at least in the country of service operation) to safeguard service quality for the user<sup>87</sup> and the public
- E echoes the argument introduced by B (see above) by stating that the list of organisational features elaborated for SSGI exactly illustrates that it was necessary to (to a considerable extent) exclude them from the scope of the Services Directive as otherwise certain modalities of regulation and financing could no longer be used which in turn would endanger their proper functioning or existence<sup>88</sup>.

Two MS show openness as to the idea of “mutual fertilisation”, however, give direction how this should be done (A, E) whereas two make political statements (I, M)<sup>89</sup>. A underlines the broadly

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<sup>86</sup> “Le gouvernement flamand a toujours estimé pendant les négociations au sujet de la Directive relative aux services qu’il souhaitait conserver en tout temps ses possibilités, dans les limites de l’ordre juridique communautaire, et conformément au principe de subsidiarité et de non-discrimination, de soumettre les prestataires de services opérant de l’étranger aux mêmes dispositions et au même contrôle – en vue de la protection des travailleurs et des demandeurs d’emploi, de la protection des consommateurs et des utilisateurs de services et de la protection de la santé publique et de l’environnement – que les prestataires de services sur son propre territoire. Cette position vaut également pour les services sociaux d’intérêt général.” (B, Q7)

<sup>87</sup> “The most important criterion is the fact that social services are based on the needs of a specific person as well as on his physical and social environment, cultural space, customs and standards of the society. The provision of social services intervenes with the individual’s life arrangements and triggers changes in it. The client always holds the weaker position which is why the service provider must be familiar with the customs, standards and traditions in order to provide the service to the client in the most suitable way.” (EST, Q7)

<sup>88</sup> “L’exclusion des SSIG du champ d’application de la directive sur les services dans le marché intérieur est bien cohérente avec les caractéristiques reconnues par la communication de la Commission puisque la libéralisation des services, auxquels ladite directive s’appliquerait, remettrait en question l’existence de certains outils de régulation publique et de certaines modalités de financement dont le maintien est pourtant essentiel pour garantir la pérennité de la prise en compte des objectifs de cohésion sociale et territoriale.” (E, Q7)

<sup>89</sup> I points to the predominantly social character of SSGI, considering their economic character as secondary, and underlines the need for the realisation of social rights to prevail. In the author’s view I insofar does not see too much benefit of further exploring the links. The same holds for M, writing that the “characteristics within this Communication are similar to the characteristics of the specific social services (social housing, childcare and support of families and persons in need) excluded from the scope of the

recognised difficulties to distinguish between social and health services, but not least therefore being interested in using the current process to bring about clarifications with regard to the scope of exempted services. E is open to use the reflections on the applicability of Community law developed in the Communication on SSGI to have a better idea on the borderline of non-economic services of general interest for which (a large share of the body of) Community Law doesn't apply.

A is the only country explicitly referring to possible links between the Services Directive and social security schemes, holding that the definition of social services in Services Directive differs from descriptions in Communication on SSGI but then concluding that this seems to be irrelevant as social security doesn't fall under the scope of application of the Services Directive. They state that "Austria assumes that all social security systems falling under Reg. 1408/71<sup>90</sup> are not covered by the Services Directive" (A, Q7)

*8. Please give a definition of what the "general interest" is in your country, and specify in which way (at national, regional or local level) it is defined or is intended to be defined in the future.*

There are several countries that answer to the affirmative to this question by referring to a definition or concept of general interest anchored in legislation (at whatever level) or in administrative practice (on whatever level). The first question then is where such a definition can be found, the second what "general interest" is about in a given national and/or sectoral context and the third in which way or by which procedure the term is being defined or conceptualised. The next paragraphs follow this structure.

Looking at the first aspect; the "source" in which relevant definitions, descriptions and concepts can be found or can be deduced from, three types of legislative and/or regulatory framework can be identified: constitutional law (B, L), sector-/scheme-specific legislation at national or regional level or administrative regulations issued by public authorities (B, (S)).

- B and L are the two countries falling into the first category. In the case of B the constitutional law contains a reference to services of general interest and in this context both underlines the narrow link to the right to lead a life in human dignity and with guaranteed economic, social and cultural rights for everybody and to the diversity of institutions to which Belgian authorities have conferred public service missions. In L one article obliges the government to take all action to defend the general interest and public safety and security. Jurisprudence has developed from there an understanding that the general interest is linked to the community and society and reaches beyond the interest of its members. L underlines the direct link between the constitutional level and the

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Services Directive, in the sense that such characteristics protect vulnerable people through mechanisms of solidarity." (M, Q7)

<sup>90</sup> Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (14 June 1971), which in the meantime has been replaced by Regulation 883/2004 on the coordination of social security systems (29 April 2004).

municipal legislation where general interest is used to exercise the function of control over public authorities preventing them to act against the general interest.

- A range of MS (A, B, D, E, F, P, LT, LV, PL, SLO) highlight that a definition or understanding of general interest is contained or can be deduced from sector-/scheme-specific<sup>91</sup> regulations (with either national or regional scope).
  - A illustrates this statement with reference to the legislation in three provinces (*Bundesländer*) concerning social assistance – in Carinthia (*Kärnten*) and *Burgenland* – and child care – in Styria (*Steiermark*).
  - D recalls that it is up to the competent national authorities to formulate and implement a concrete public service mission and to define the institution responsible for providing and guaranteeing a specific SSGI: “Provisions contained in individual laws will continue to provide an appropriate framework to define general interest guidelines or requirements and concerns. The task of formulating and implementing concrete public service obligations should remain in the hand of the government authorities entrusted by a country’s institutional system with the organisational responsibility for providing and guaranteeing a specific social service. This is generally laid down in the objectives determined in the course of planning activities regarding individual services or in the statements of purpose and the objectives defined to be achieved of a particular service.” (D, Q8) The reply also recalls that a definition of a specific general interest and public service obligation applies alongside “general principles of how the general interest should be understood – in particular accessibility, affordability, complete territorial coverage or the possibility thereof, quality, continuity, transparency (as constitutive components also reflected in the concept of universal service)” (D, Q8) and continues that “the task of determining public service obligations in actual fact tends to be best achieved for individual areas of social and health services” (*ibid.*) and that the “power of definition is in the hands of the member states and their territorial subdivisions. The Community has no competences in this respect.” (*ibid.*) D concludes from this they “can’t see any advantage in shifting decision-making on the understanding and concrete formulation of the general interest in the area of social services to Community level. Moreover, we can hardly see how in such a case a link could be guaranteed between the Community level and democratically selected and objectively and legally justified decision-making bodies at local, regional and national level.” (*ibid.*).

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<sup>91</sup> Several MS give examples, amongst them are P referring to its Constitution and sector-specific legislation in the field of social security concerning the organisations of societal solidarity (“*instituições particulares de solidariedade social e outras de reconhecido interesse público, sem carácter lucrativo, que prossigam objectivos de natureza social, por forma a garantir o efectivo cumprimento das respectivas obrigações legais e contratuais*”; P, Q8) which are non-profit providers of personal social services (with a share of 80 to 90% mid of the first decade of this millennium) and PL that mentions its 2003 act on public benefit activity and voluntary work. P – as LT – uses the term “public interest” (in Portuguese: *interesse público*). These two and other examples again illustrate the connotation of general or public interest with “solidarity”, “beneficial for the society as a whole” and “lack of profit making objective”.

- E highlights the evolving nature of the concept of general interest depending on context and circumstances, its concretisation for a (sub-)sector and schemes and therefore suggests renouncing to work towards a definition at EU level<sup>92</sup>.
- I makes the regional dimension of the determination of general interest and concrete public service missions explicit in explaining that the definition of the integrated social services system and the related planning and programming falls under the competences of the regions and local authorities and is organised differently across territories<sup>93</sup>.
- Two of the three Baltic States, LT (using the terms “public interest” and “public service”) and LV, have included a reference into national legislation related to social protection/SSGI, which in both cases is mirrored in regulations at local level<sup>94</sup>. LT introduces the term “public legal person” to designate institutions that have as their mission to provide services in the social sphere, in the sphere of education, science, culture, sports and other services provided for by law in the general/public interest. Interestingly the notions “public legal person”<sup>95</sup> and “public service” both comprise

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<sup>92</sup> *“Definir el concepto de “interés general” vigente en España resulta muy difícil, pues se trata de un “concepto abierto e indeterminado”, según lo describía una sentencia del Tribunal Constitucional (STC 68/1984). Su carácter es por naturaleza evolutivo y depende de las circunstancias de cada momento y del contexto en el que se emplee. Para concretar su significado, se sigue un enfoque sectorial, y son las leyes las que atribuyen en cada caso esta condición a determinado servicio o actividad, de modo que el verdadero alcance del interés y su entidad se manifiesta en la regulación específica (obligaciones, condiciones, limitaciones) que se disponga del servicio de que se trate. Dado que esta mecánica va a continuar en el futuro, no parece necesario dar una definición de dicho concepto”.* (E, Q8)

<sup>93</sup> I provides additional information on common elements of these regional and local organisation of social services that comprise – at the level of regions – a set of regulations (i.a. comprising the modalities of authorisation and accreditation) and programmatic tools (plans; guidelines) corresponding to the competences of regional and local authorities in order to develop the system of social (welfare) services: *“a. Più o meno tutte le regioni si sono dotate di uno strumentario normativo e programmatico (Piani regionali, linee guida, ecc.) per assicurare lo sviluppo del sistema di servizi socio-assistenziali; b. Quasi tutti i provvedimenti regionali adottati in tale ambito fanno solitamente riferimento alla normativa più in alto richiamata, ed in particolare alla legge 328/2000, al d.lgs. 112/98; c. In coerenza con la legge 328/00, la legislazione regionale prevede la messa a punto di Piani di Zona che assicurano la “prossimità”, l’integrazione dell’azione, la programmazione condivisa ecc.; d. La normativa regionale, quando presente, disciplina, in armonia con quanto previsto agli articoli 1 (soggetti pubblici e privato sociale provvedono alla gestione ed all’offerta dei servizi), 6 (compiti dei comuni in materia di autorizzazione, accreditamento e vigilanza dei servizi sociali e delle strutture residenziali), 8 (compiti delle regioni in materia di definizione dei criteri per l’autorizzazione, l’accreditamento e la vigilanza delle strutture e dei servizi a gestione pubblica o del privato sociale) della legge 328/00, le modalità di autorizzazione e accreditamento a soggetti pubblici e privati per l’erogazione di prestazioni socio-assistenziali e le modalità di affidamento.”* (I, F3)

<sup>94</sup> “Services of ‘general interest’ can be regulated both in the state level and in the municipal level. ... When the services of ‘general interest’ are provided by local municipalities the main principles of the provision of these services are set at the state level by law.” (LV, Q8) This is the case e.g. for “social housing” and “social services and social assistance” that local municipalities must provide according to needs of population. Services of general interest at state level i.a. comprise the health care and the social security system.

<sup>95</sup> “Public legal persons shall be legal persons established by the state or municipalities, their institutions or other non-profit-seeking persons whose goal is to meet public interests (state and municipality enterprises, state or municipality institutions, public institutions, religious communities, etc.) (Article 2.36 of Civil Code of Lithuania).” (LT, Q8)

- non-state organisations such as religious communities as well as “private persons in the cases and manner provided for by law” (LT, Q8) which indicates that the design and use of the concepts follow a teleological logic, i.e. an approach focusing on the objectives to be achieved by public authorities for the society and not one looking into the legal status of institutions involved in the provision of S(S)GI.
- PL falls into the second group and introduces the term “public benefit activity” encompassing activities for the benefit of society which are, however, restricted to public tasks in the field of personal social services/social welfare/assistance services carried out by nongovernmental organisations and organisational units of various denominations. Activities comprise social welfare (i.a. support of disabled persons, assistance to disadvantaged families and individuals), health protection and promotion, labour market integration and development of local communities. “Public benefit activity” insofar is restricted to a specific type of service provider and explicitly does not cover social security systems or network-based services.
  - B is the sample case referring to the administrative practice and law according to which the general interest is the exclusive motivation of the administrative activity of a public service. They consider it important to underline that the general interest is “conceptualised” and can only be grasped by looking at four different levels – administrative law, general legal principles, public sector principles and principles of good governance – and their interrelatedness and interplay<sup>96</sup>. B also underlines a strong local dimension in pointing out that differences of what is being understood by “general interest” exist over time and across territories, not least due to specific political priorities according to local choices<sup>97</sup>. They conclude with a critical remark about what they see as misconceptions by (a number of) the services and staff of the European Commission of correlates in the Belgian administrative law of such a general interest approach (including interdiction of an excess of power of a public institution and of wrongful use of financial means) that are identified by the former as (something close to) cross-subsidies<sup>98</sup>. B finally recalls counterparts in Belgian administrative law to what is labelled by European institutions with the related term “universal services”, mentioning in this context e.g. “equality of access”.

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<sup>96</sup> “Sans pour autant définir spécifiquement ‘l’intérêt général’, il existe toutefois un concept juridique général ‘d’intérêt général’ en droit administratif belge. Selon ce concept, l’intérêt général est ‘la motivation exclusive de l’activité administrative du service public’. Le droit administratif, les principes juridiques généraux, les principes du service public et les principes de bonne gouvernance précisent tout à tour, en plus du droit constitutionnel, cette spécificité de ‘l’intérêt général’.” (B, Q8).

<sup>97</sup> “Cette notion dépend de la perception au sein de la société et de choix et priorités politiques d’une autorité déterminée, élue démocratiquement à un moment donné. Ce qui est considéré d’intérêt général peut changer et changera donc au fil du temps.” (B, Q8).

<sup>98</sup> “Et cet ensemble juridique cohérent impose à son tour la fameuse interdiction d’excès de pouvoir, de détournements de moyens; etc., ce qui constitue d’emblée un pendant de droit administratif belge à ce que les institutions communautaires considèrent dans certains cas comme des ‘subventions croisées’.” (B, Q8).

When it comes to the second aspect referred to above, the concrete definition or understanding of general interest and what constitutes its core the reader can identify a number of overlaps in the answers given – and some elements specifically highlighted by only one or two MS:

- A reports on not having a general definition of the general interest that would cut across all or most SSGI – as the general interest varies across different policy fields.
- The same holds for D that in addition mentions the lack of a legal definition of the term “common good”. How then “general interest” in the field of health and social services is being conceptualised? D explains that individual legal provisions define it “in a manner to be reflected in concrete public service obligations that are in turn derived from the welfare state principle or seen as part and parcel of the services of general interest which the state has to guarantee”. (D, Q8)
- Non-withstanding its general assessment (see above, under first aspect), E provides a sort of description focusing on the rational, objectives and missions of SSGI. In their view the services have to be understood as a response to individual or collective needs, to be delivered by public authorities and fulfilling several requirements: continuation, guarantee of equality of access, universality, transparency and not adding a burden on the beneficiaries. E sees the public service missions and obligations being assigned to the SGI as well as special rights that might derive from them as based on considerations of general interest, such as the security of supply, the protection of the environment, economic and social solidarity/cohesion, territorial planning and the interest of consumers/consumer protection.
- E presents an understanding of the concept of general interest deduced from philosophical and political thinking in a “republican tradition” that defines “general interest” as the core concept to determine the objectives of the activities of the state and of public authorities and endowing him with the missions, resources and instruments to pursue them, applicable to all citizens and reaching beyond their (aggregated) interests<sup>99</sup>. The French government also underlines that this conceptualisation puts an emphasis on the political nature of setting the objectives for SSGI, their role in fields characterised by (at least partial) market failure and their importance to satisfy general societal needs<sup>100</sup>.
- The answer given by FIN underlines the variety of concrete notions depending on specific sub-sector or measure and includes, as in the case of other MS, a reference to the non-profit status of activities, organisations set up for this very purpose as well as to

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<sup>99</sup> “L’intérêt général se situe, depuis plus de deux cents ans, au cœur de la pensée politique et juridique française, en tant que finalité ultime de l’action publique. Au regard des deux conceptions de l’intérêt général, l’une, d’inspiration utilitariste qui ne voit dans l’intérêt commun que la somme des intérêts particuliers et l’autre d’essence volontariste, qui exige le dépassement des intérêts particuliers au profit de l’expression de la volonté générale, la tradition française s’inscrit, sans conteste, dans la filiation volontariste de l’intérêt général, ce qui confère à l’Etat la mission de poursuivre des fins qui s’imposent à l’ensemble des individus, par delà leurs intérêts particuliers.” (E, Q8)

<sup>100</sup> “L’intérêt général se décline ainsi par des exigences particulières définies par les autorités publiques afin d’atteindre des objectifs d’intérêt général que le fonctionnement de marché ne peut intégrer. L’intérêt général se décline par l’exigence de satisfaction d’un besoin social de base essentiel pour le citoyen et en termes d’exigences sociétales plus globales.” (E, Q8)

special fiscal rules designed for them (as e.g. in D): “The commonly used Finnish term that means “general interest” is translated into English differently depending on the context. In some contexts, the used Finnish word equals the English term “non-profit”. For example, the concept ‘non-profit (= general interest) corporation’ is included in Finnish tax legislation. In Finland such corporations are in principle supported regardless of what services they produce. In value added taxation, on the other hand, support is provided to certain services produced by certain service providers.”

- GR is providing a description, not anchored in legislation, but highlighting the political and societal dimension of the concept in underlining that “the general interest includes the provision of services targeted on the society as a whole; these are considered necessary for the balanced development and the satisfaction of basic needs of all citizens” (GR, Q8). They also mention the role of regulatory bodies and supervisory agencies to monitor the setting of prices and access to SGEI.
- J reports back to the SPC that a legislative degree defines social services as the totality of support, free or to be paid, for different forms of need and difficulties/risks in the life course, excluding from this definition, however, for a purely technical reason, social security and health care.
- IRL provides a description similar to the one of GR in linking “general interest” with the interests of society and community as a whole and broken down to SSGI argues that the nature of organisation means that “primary goal is centred on fulfilling the public interest mission of the service rather than creating a profit.” (IRL, Q8). IRL also puts strong emphasis on key roles of not-for-profit organisations (wholly or partly funded by central or local government agencies and involving volunteers)<sup>101</sup> and the tradition of community participation in finding solutions for delivering social services.
- Building on what has explained above under the first aspect concerning L the reply also highlights that their notion of general interest is strongly linked to the political aim of social cohesion and the task (if not the obligation) to provide for the well-being of all members of society. In the legislation concerning the relations between the state and the organisations providing social welfare/services a similar term is used, “needs defined and recognised by the government” (in French: *“besoins effectifs constatés par le Gouvernement en conseil”*), to the same effect.
- LT explains that “public interest” embraces the idea of a (social) service beneficial for the whole society and supporting the general welfare, corroborated with the guarantee to get access to the necessary social help. “Solidarity, social justice, welfare, social capital, users participation, human dignity, social cohesion” (LT, Q8) are the principles making up the core of what “public/general interest” is.
- In PL the legally defined “public benefit activity” is ... understood as “an activity for the benefit of the public within the sphere of public tasks which is carried out by

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<sup>101</sup> “It is also the case that non-profit providers provide integrated services to users which respond to the wider needs of people while commercial providers tend to respond to one type of need. Such providers, through their experience in dealing directly with users, also play a vital role in informing public authorities about the sufficiency of the response required to meet the social needs of the community and in providing appropriate advice and information.” (IRL, Q8)

nongovernmental organisations and organisational units of various denominations. ... This covers a wider scope of activities than services for disadvantaged groups, encompassing activities for the benefit of society. However, services within the social security schemes or net services are not covered". (PL, Q8)

- SLO explains that "public interest" equals "general welfare" in the Public-Private-Partnership Act, an approach providing a basic orientation, but also giving discretion to the national or local government body later deciding about the concrete manifestation of public or general interest when it comes to the organisation, delivery and financing of a concrete SSGI.

Thirdly, when looking into the way and the procedures by which "general interest" is being defined or conceptualised MS's governments report about laws, law decrees and administrative regulations.

- D mentions the first volume of the Code of Social Law (Article 1 (1) sentence 2 of *Sozialgesetzbuch* (SGB I), covering all statutory social security systems, stipulates that the whole body of legislation applicable to social security and assistance should be phrased in a manner to i.a. help to secure a dignified existence, enable people to earn their living through the exercise of a freely chosen activity and help people to cope with the unexpected difficulties of life, for instance by helping them to help themselves (SGB I). They also list examples of criteria to conceptualise general interest missions or public service obligations in the social and health area. Amongst them are "community orientation", "alignment to the demand and to the needs of users", "involvement of organisations of the civil society", "warranty of a variety of offers by different service providers" and – in some cases – the "beneficiaries' freedom of choice of service provider".
- FIN explains in detail stipulations of the legislation on housing fund loans and interest subsidy loans to illustrate how in this specific legislation general interest objectives and public service obligations are being operationalised<sup>102</sup>.
- I gives a detailed account of their situation. They first refer to law 328 of 2000 defining the pluralistic nature of the system of service provision and then underline that there are different forms of service provision, but always with the aim to realise the general interest as an expression of constitutional rights, independently if done by regions and local authorities. Those actors should promote the initiative of citizens, alone or in association, in line with the principle of subsidiarity. For I participation and subsidiarity insofar are constitutionally recognised principles relevant for and reflected in the field of SSGI. I also mentions the Unified Legislation on Local Authorities, a piece of legislation distinguishing between services of general interest and services of general economic

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<sup>102</sup> "According to the legislation on housing fund loans and interest subsidy loans, a community of general interest and its activities must fulfil certain conditions. Housing communities of general interest cannot report as profit other profit than the moderate profit provided by law for the capital invested by the owners. The amount of the compensation may not exceed the amount, which the communities need in order to fulfil their public service obligations. This incorporates all costs caused by service provision in connection with common economic purposes, including a moderate yield of the capital tied to the service." (FIN, Q8)

interest (“*servizi pubblici a rilevanza economica*” e “*non economica*”) that contains a “teleological definition” of “public service”. It stipulates that they are about producing goods for the public/general wellbeing to realise social objectives and the promotion of economic and local development. Then I concludes – comparing the national situation and the own term with the one at EU level – that what is being referred to as “services without economic relevance” in Italian legislation is largely corresponding to what is broadly understood by “social services”.

- P refers to a framework set by principles of orientation – such as (economic) solidarity, intergenerational solidarity, social inclusion and the primacy of the responsibility of public authorities – in the “Law regulating main issues of social security” that allows the recognition of objectives of general interest and can be read as explicit reference to SSGI<sup>103</sup>.
- PL gives an example from the field of labour market integration to illustrate that the description of a mission of social services consists in defining a public task and the public obligations imposed on providers. This description contains the objectives, the type of service, entitlement conditions, the authorised providers and the methods of their selection.
- S finally informs that the duties of municipalities in the field of SSGI are defined in a range of specific laws that describe the benefits, entitlement conditions, etc. They insist on the fact that the competence of local authorities to choose between and to decide on either in-house provision or outsourcing of a social service is primordial.

On the other hand, there are also countries that lack a definition enshrined in a piece of national (or regional) legislation, non-withstanding an established use of the term in the political or administrative practice in quasi all MS.

- BG is short of a legal definition of “general interest”, but indicates that in many legal acts the concept corresponds to “public interest”.
- CY reports the lack of a national definition, but then explains that the notion of “general interest” is used in connection to “services provided or funded by the state, by semi-governmental organisations and not-for-profit NGOs” (CY, Q8). Looking at the European debate it might come as a surprise that a national government includes the last category, NGO/not-for-profit organisation in this list; however, this is done by other MS, too (e.g. D, PL, ROM) and also in line with the claim and self-image of NGOs providing SSGI.
- CZ is in the same situation, but also provides a workaround in characterising “general interest” as “an activity from which the citizens of a given community, region, or state prosper and benefit; it is an activity that is in accordance with the public interest and the rate of profit is secondary.” – illustrating a striking similarity with CY as to the second “rate of profit = secondary”.

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<sup>103</sup> “*Embora o sistema de segurança social português não contemple uma definição concreta de serviço social de interesse geral, a mesma encontra-se implícita pelos objectivos de ordem social que visa prosseguir como sejam o de promover a melhoria das condições e dos níveis de protecção social, de proteger os trabalhadores e respectivas famílias, bem como as pessoas em situação de falta ou diminuição de meios de subsistência.*” (P, Q8).

- DK on a number of issues shares the line of GB (see below in this paragraph) and makes a number of general statements about the dynamics in the SSGI sector running against a too narrow and fix definition. Interestingly DK wants to overcome the “economic-non-economic” divide in a manner to fight against a wrong assumption that might still prevail in the head of policy and decision makers that private provision of whatever kind does not preclude the existence of “general interest”<sup>104</sup>.
- The government of EST explains that in the Northern-most of the Baltic countries that according to recent discussions the definition could i.a. cover national security, health protection, human welfare, environmental protection, cultural heritage (national language) and services of economic and non-economic nature.
- Another country falling into the second brought category is GB, being on the same line with D and DK when sharing their conviction that a definition of SSGI or of their general interest orientation is not necessary at EU level. This position also mirrors their scepticism as to the feasibility of such an endeavour given the different institutional setups across the EU 27. On another note GB again asks the SPC to take note of the fact that general interest is “an EU term and not necessarily the language of member states” (GB, Q8). As in other instances the British government suggests an alternative road in addressing the challenge of designing an appropriate policy and legal framework for SSGI at EU level, the one where a government sets out political decisions on the aims to be achieved and the purposes to be realised of a SSGI. GB then continues to sketch out their system building on a policy vision – “everyone should have access to public services that are efficient, effective, excellent, equitable, empowering and constantly improving” (GB, Q8) -, policy priorities (e.g. the equity of SSGI provision), defined standards to be delivered, required outcomes, possibilities to cater for users with different needs, user choice (within certain limits) and finally the instrument of Public Service Agreements (on a three-year cycle) governments departments commit to and against which they are accountable for their performance compared to targets<sup>105</sup>.
- H underlines that they not only lack a generally accepted (and legally enshrined) definition of “general interest”, but also do not consider it necessary. H warns against considerable conceptual insecurity and ambiguity due to the fact that a common

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<sup>104</sup> “The borderline between what the public sector performs and what the private sector does should be adjustable, depending on what the individual member state finds to be the most effective approach, without this choice impacting on the measure being a social service of general interest.” (DK, Q8)

<sup>105</sup> “The policy direction in the UK is based on the belief that a) standards in public service can only be delivered effectively by devolution of responsibility to the frontline; b) more flexibility is required for public service organisations to deliver the diversity of service provision needed to respond to wide range of customer aspirations; and c) public services need to offer expanding choice for the customer. Where the Government uses competition to deliver these policy principles, it still specifies the required outcomes but suppliers should be free to deliver in innovative ways so as to improve customer service and produce value for money. The Cabinet Office sets and regulates standards for services across the public sector. It is responsible for advising on standards, regulating services, supporting departments in meeting their standards and recognising quality in public services. Government departments commit to a set of Public Service Agreements (PSAs), on a 3-year cycle, and are accountable for their performance against their PSA targets, on which they report annually. This framework effectively becomes the definition of the services provided.” (GB, Q8)

understanding and generally accepted concept of “general interest” at EU level is missing in a situation where MS are, according to Community law and European institutions, free to define what they mean by SGEI and in particular how they design SSGI.

- I also joins this group in answering that although there is no definition, stipulations in constitutional law and the scheme- and benefit-specific legislations provide for a coherent and coercive framework. For the field of SSGI they give a general description of objectives linked to the realisation of the general interest, consisting in the safeguard of human dignity of all citizens and in the removal of all obstacles to individual freedom and democratic participation. Examples how “general interest” is actually made concrete and put into practice in the field of SSGI are given under the second aspect above.
- M explains that no explicit or universally applicable definition of general interest has been adopted and that in the Social Security Act the content of which is defined on a case-to-case basis by the government. The common element is that social services are conceptualized as an expression of solidarity, depending in form and extent on the different needs and circumstances of individual citizens.
- ROM only works with the term of “public usefulness” referring to measures of local authority and having relevance for the not-for-profit sector, the voluntary sector and the management of public goods and services.
- S informs about the lack of a precise definition enshrined in national legislation and refers to the responsibility of municipalities and county councils to deliver social services (and then also to operationalise their general interest orientation based on the relevant national legislation for schemes and specific benefits).

*9. How can the characteristics be used by the Member States, at national, regional or local level, when defining the particular general interest mission of a social service and determining the arrangement for its performance and organisation?*

There are two broad categories of answers to this question. The first group consisting of 5 MS reports to have used the criteria to define their SSGI (BG; CY) or intend to do so to have inspiration (LT) or in order to run a check for compliance with Community rules (M) or if considered appropriate by their public authorities, on a voluntary basis (E, P). The second group made up of 7 to 10 MS reports not having made use of the list of organisational characteristics and not intending to do so either (A, B, D, E, FIN, GB, L, (LV), (ROM), (S)).

Amongst MS falling into the first category indicating an actual or potential use is E that explains that the “characteristics could be used to define the missions of general interest for the social services, as the basic and common elements and minimum requirements and standards for quality” (E, Q9), but also that further work would be needed prior to more advanced conclusions on their use. LT sees them as “effective tools to modernise delivering and evaluating of social services at national, regional and local level as well as to develop sufficient public policies” (LT, Q9). The most far-reaching answer is provided by M that the “characteristics may be used as

guidelines / criteria for the definition of services of general interest and their compliance with Treaty rules” (M, Q9). P finally holds they could serve as “reference” to improve the definition of the mission and objectives of general interest as well as the transparency in view of the purpose of an SSGI by using a model that takes into account the participation of users and an evaluation of the cost-efficiency-relation.

Reasons given from MS’s governments falling under the second category are that

- the definition of SSGI and their missions depends on the institutional structure of MS (that have a long-standing experience in this field and do not need criteria defined) and falls also into their competence at EU level for this purpose (A, B, D, FIN, L), as confirmed by the White Paper on SGI and the Communication on SSGI and to be guaranteed by Community Law (D)
- organisational characteristics of social services are not generally applicable, not even for the sub-sector of personal social services (not least due to the historically developed structures with regional differences also reflected in a concrete service mission) and therefore a final definition cannot be given (A)
- locally and regionally responsible authorities are entitled to chose from a diversity of modes of mandating – including e.g. subsidies and delegations to not-for-profit enterprises (B) – of what they consider the most appropriate instrument (B<sup>106</sup>, D<sup>107</sup>, L)
- the organisational characteristics of the Communication on SSGI have to be understood merely as guidelines (D) or with informative value (E), in no way binding to MS (D), concluding: “We doubt whether a pan-European definition and comprehensive description of (specific) organisational characteristics is possible at all in view of the great variety of social protection systems and of the social services provided within these systems in the individual member states” (D, Q9)
- SSGI “have developed as a result of a democratic policy process and no common judicial characteristics have been defined for them” (FIN, Q 9) and that both their variety and the requirements i.a in terms of general interest mission defined result from of a long-term development process – in their eyes two good justifications.

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<sup>106</sup> “Il existe une diversité de mécanismes d’agrément; les autorités publiques choisissent le moyen le plus approprié pour mettre en œuvre l’intérêt général dans leur sphère de compétence. Le principe de l’agrément sera décliné en critères d’agrément d’opérateurs au niveau local/régional donnant lieu par exemple: 1) à des possibilités de subvention, ou de financement particulier, 2) à la possibilité d’intervenir sur des marchés concurrentiels sans devoir satisfaire à l’ensemble des obligations incombant aux entreprises marchandes dans la mesure où leur finalité est différente (cf. caractéristique du but non lucratif).” (B, Q9)

<sup>107</sup> “The responsibility for social services arising from general interest missions embodied in national legislation and for the organisation of such services should not be shifted to European level. It must remain in the hands of the relevant state authorities at local, regional or national level. The freedom or organisation mentioned above and the liberty to choose whether, how and by whom a particular social or health services is offered are an expression of the solidarity existing within a particular civil society and important corollaries of the principle of subsidiarity. This means that Europe must offer the necessary leeway for this to happen – if necessary through clarifications.” (D, Q9)

Finally, two MS, CZ and E, make specific remarks only indirectly answering to the question:

- CZ juxtaposes five guiding criteria for the design of the national social services system (accessibility – defined with a financial and territorial dimension; effectiveness; quality; safety; economy) to the organisational characteristics contained in the Communication on SSGI with the intention to show overlaps, however, does not answer the question as to the actual use or “inspiration” of national policies or concepts by the EU-level description.
- And E not only underlines that the technique used for the administrative control the mandating of the service providers under the hypothesis of a service delegation (largely) corresponds to “beam of indices technique” (in French: “*faisceaux d’indices*”) promoted by the Communication on SSGI<sup>108</sup>, but also provides a rich illustration for objectives and missions of general interest in the sector of SSGI recognised by public authorities<sup>109</sup>.

*10. Have there been problems in the past with giving a concrete mandate to fulfil the particular general interest mission of a social service?*

Answers to this question are rather short and straightforward.

- Only one country, E, informs about frequent problems that have occurred with the definition of a mandate specifying the particular general interest mission/public service obligation, however, explaining of which kind and why.
- Not having had any problems is reported by A, (BG), D, E, (IRL), L, LT, LV, (M), P, and S.
- Five MS (CZ, E, FIN, P, and S) refer to a national legislative basis and framework for this task. FIN highlights the central role of local authorities when it comes to the task of defining the public service obligation<sup>110</sup> whereas IRL more in general recalls that the task of defining SSGIs, their obligations and their missions as well as how they are funded and organized is pure MS competence. P informs the SPC that there are cases and

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<sup>108</sup> “Il y a donc convergence entre les caractéristiques des SSIG dégagées par la communication et les critères d’intérêt général mobilisés en droit interne français. Par ailleurs, la méthode de diagnostic de la présence d’un intérêt général, utilisée par le juge pour contrôler l’action de l’administration, s’apparente largement à la technique du faisceau d’indices prônée par la communication de la Commission. Ex. 1: articles L. 116-1 et L. 116-2 du code de l’action sociale et des familles; Ex. 2: articles L.411 et L.411-2 du Code de la Construction et des Habitations.” (E, Q9)

<sup>109</sup> “La cohésion sociale et territoriale, l’effectivité des droits fondamentaux reconnus aux personnes, la réponse aux besoins de vie des personnes vulnérables, l’intervention publique dans des champs où le seul commerce privé est insuffisant pour garantir, quantitativement et qualitativement, la non lucrativité, l’affectation des résultats à l’amélioration de la qualité du service et à la production de nouveaux services, l’ancrage local par la définition d’une compétence territoriale, la solidarité entre les organismes et leurs adhérents par des mécanismes de péréquation et de solidarité financière ou professionnelle, la satisfaction des besoins sociaux constituent des objectifs d’intérêt général pour les pouvoirs publics.” (E, Q9)

<sup>110</sup> “In Finland the local authorities are obligated by law to arrange certain basic services for their inhabitants. The local authorities are free to choose the mode in which these services are organised. However, the Government has striven to steer these services with for example quality recommendations. Occasionally the implementation of the legislation has, however, been lacking.” (FIN, Q 10)

constellations where, due to the (particular) vulnerability of the users services have not been and will not be delegated to third parties (they give the example of adoption services and institutional and financial support to family courts) but continued to be provided directly by public authorities, even though in general the trend is towards delegating services to not-for-profit organisations, underpinned by an ongoing reflection process on possible reforms<sup>111</sup>.

- BG is more generally speaking about a trend and planned development when mentioning the shift away from state monopolies towards social markets<sup>112</sup>, without directly addressing the topic of the definition of a service mission, underlining that their intention is to develop a modernised and simplified social services system “in order to create a new and free market of social services” (BG, Q10). In the author’s view it is safe to assume that BG in 2006 still lacked sound experience with social services provided outside public services and therefore advises to read “free market of social services” – as a proclaimed objective – with caution as it is not clear from Q10 or other questions to which type of services BG refers or if they mean a future parallel system to the existing state-based.
- E warns against too detailed or narrow Community rules that would both restrict the choice of the appropriate instrument and procedure to define the general interest mission. E in particular refers to existing and proven procedures in the field of complementary social security systems where giving a mandate is the rule. E explains that there is a variety of forms and modalities according to sector of social protection, i.a. mentioning authorisations, accreditation or (annual or pluriannual) contracts. The French government also warns against a narrow definition of a mandate in the field of social services as this would risk that providers would have to cut a comprehensive service offer into slices and reorganise their portfolio by separate activities running against a coherent approach in favour of the disadvantaged and vulnerable people and groups they are assumed to operate<sup>113</sup>. More generally E presents the concept of general

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<sup>111</sup> “Atualmente está em curso uma reflexão que questiona se no futuro o Estado não deveria centrar-se fundamentalmente nas funções de regulação que lhe competem, delegando nas instituições/organizações de solidariedade social a prestação de serviços sociais e o exercício da acção social. No entanto, importa sublinhar que existem áreas de intervenção que deverão ser mantidas na esfera da responsabilidade do Estado tendo em conta a fragilidade da população e a responsabilidade do Estado (p.ex.: adopção, apoio a tribunais de família).” (P, Q10)

<sup>112</sup> “The main problems in the past with giving a mandate for social services of general interest were related to the dominant position of the State in this field. Abolishing of this situation created new obstacles such as underdeveloped competition culture among the providers, underdeveloped quality requirements and mechanisms for civil control, insufficient control on the compliance with the social aims of the services instead of the market interests of the providers. These are some of the problems that challenged the social services system towards modernization and simplification in order to create a new and free market of social services.” (BG, Q10)

<sup>113</sup> “Il est cependant nécessaire de donner une définition large de cette notion de mandatement, qui recouvre des formes et des modalités très diverses selon les secteurs (autorisations préalables, conventionnements, habilitations, agréments...). En effet, la tendance récente à concevoir la notion de mandatement suivant une définition très précise des missions peut faire craindre pour certains organismes sociaux un découpage entre leurs différentes activités pouvant être préjudiciable à une approche globale et cohérente de leurs missions au profit des plus vulnérables. Dès lors, il y a lieu de

interest as an outflow of the legality of interventions by public authorities and systematically and quasi intrinsically present in public services and in particular in social services. The use of different mechanisms such as authorisations, accreditations, licensing or labels insofar is the consequence of the general interest orientation and of the objectives of social services<sup>114</sup>.

- M informs that where the provision of social services by external organisations is funded by the state, such provision is normally covered by service-level agreements and that no problems have been encountered with regards to the fulfilling of the obligations by external organisations as established in these agreements. M refers to the definition of performance and functional requirements under public procurement as outlined under section “2.2.1 Delegation” of the 2006 Communication on SSGI<sup>115</sup> and underlines that when delegating a social mission of general interest to a “third party”, it may be essential that the technical specifications of the mandate are established on the basis of these requirements.

*11. Please indicate how (e.g. in a binding way or not), in your view, the organisational characteristics could/should be used at EU level (e.g. agreed checklist) in order to verify whether for a specific social service the applicable Community rules are respected?*

Many MS’ governments consulted were in favour of making use of the list of characteristics of SSGI in one way or the other, some expressing their hope and expectation that this eventually could help to bring about more clarity as to the applicability of Community rules. It is the author’s opinion this recommendation can also be interpreted as the intention to defend and promote the outcome of a joint exercise between EC and MS in parallel publicly consulted upon as a common and commonly accepted point of reference for further policy development and legal or

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*poursuivre la réflexion sur les conditions dans lesquelles devraient s’appliquer, systématiquement ou non, les règles de mandatement et notamment celles relatives aux délégations de service publics ou aux marchés publics, dès lors qu’elles ne s’avèrent pas toujours adaptées.” (E, Q10)*

<sup>114</sup> *“L’intérêt général est un critère d’appréciation de la légalité de l’intervention publique. Par exemple, une subvention ne peut être attribuée à un organisme que si elle est justifiée par un objectif ou une mission d’intérêt général. L’intérêt général est donc systématiquement présent dans l’action des pouvoirs publics et notamment à l’égard des services sociaux. La mise en place de mécanismes de labellisation, de déclaration, d’autorisation, d’agrément ou de conventionnement, en relation avec les mécanismes de tarification et de financement de certaines prestations ou avec une obligation légale, est la conséquence de la finalité d’intérêt général des services sociaux auxquels ils s’appliquent.” (E, Q10)*

<sup>115</sup> “... 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 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.” (p. 7, Communication (2006)177, 26 April 2006)

non-legal initiatives. Interestingly enough the governments in favour of using the list, however, would like to limit its use for social services to a narrow concept of the term in the sense of one of the different instruments or types of welfare policies, precisely “social services”. A makes this explicit, as they suggest another treatment for the first pillar of SSGI in the description suggested by the EC in 2006, (mandatory) social security schemes (for more details see below) and a use of the list of SSGI only for what is commonly understood by “social services” (“*personenbezogene soziale Dienste*”) in German-speaking countries.

Let us look a little bit more in detail into the different ways MS’s governments would like to see used (the) organisational characteristics (developed in the 2006 Communication) at EU level.

- Category 1 of ideas: Several MS are sympathetic about the idea to use the description of organisational characteristics of SSGI to give orientation and as a checklist, including A, BG, CY, CZ, and E. They are, however, not always completely clear about what it is that should be checked and for what purpose this exercise should be done. A number of MS (such as E, I, and L) also present precise conditions they link their general approval to.
  - BG is of the opinion that the “agreed checklist could be a tool for better clarity and coordination.” (BG, Q11)
  - CZ considers better coordination and cooperation across borders as potential added value of a list with an agreed description of special characteristics. It, however, does not become clear from the answer if the expected positive outcome of an improved compatibility refers to social protection schemes in a broad sense or to SSGI in the narrow understanding shared by most MS.
  - E explains how they think next steps should take place: “As it is impossible to establish a common list of specific characteristics for SSGI for all member states, the analysis of those elements that define what SSGI are about should be continued and deepened. This should have an “orienting” purpose.” (E, Q11)
  - E in addition makes a precise suggestion considering most appropriate “to define the requirements as to incompatibilities of national rules (and procedures) with Community law which [as this] also would be more in line with the dynamics in the sector and more respectful of the subsidiarity principle”. (ibid.) According to the Spanish government the description of specific characteristics should be precise enough to clarify issues of compatibility of community rules with national rules, to reduce insecurity and to clarify the applicability of Community law. They consider this aims has not yet been reached and therefore conclude that further work would be needed<sup>116</sup>.
  - E also asks the EC to explain possible cases of abusive use of the general interest by MS as a step to mutually clarify views and to move from assumptions and general references to an abusive use of this argument by the EC as a potential problem,

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<sup>116</sup> “El resultado del análisis debe tener una finalidad orientadora. Además, debe ser lo suficientemente flexible como para permitir valorar distintas situaciones y modelos sociales, pero a la vez lo suficientemente descriptiva como para reducir la inseguridad jurídica, contribuyendo a aclarar si ciertas reglas comunitarias resultan o no aplicables. Conseguir este equilibrio no parece sencillo. De ahí la necesidad de continuar los trabajos en esta área.” (E, Q11)

- however, without having underpinned this point with concrete examples and their legal and political implications as seen by the EC.
- I comes up with a suggestion as to the appropriate context and mode of governance and recalls the need of monitoring of conditions, including the working and pay conditions in the sector: The definition of organisational characteristics of the providers of SSGI should be done in the context of the OMC, this means in a indicative and non-binding manner/format. The definition of common standards, in particular as regards the characteristics of the labour in this sector, should be accompanied by a more precise and detailed monitoring exercise<sup>117</sup>.
  - L is positive about the use of the description as a reference basis for SSGI of economic nature at first sight, but if one looks closer into their reply to question 11 shows a lot of reservation as to its actual use by defining several qualifications as to for what purpose and under which conditions this should be done, such as the respect of a general interest orientation with defined quality standards and a system for quality assurance as to outcomes and processes.
  - L also informs the EC and the other MS of its conviction that there is or should be a rather low level of Community interest in and impact on SSGI as the cross-border relevance of the service provision (and the related potential and actual impact on cross-border trade, the author adds as this is not explicitly spelled out) is fairly weak<sup>118</sup>.
  - P would like to see an enumeration of organisational characteristics of SSGI in an exhaustive and comprehensive manner.
  - All MS mentioning and/or in support of such an approach underline the voluntary nature of such a list and refuse any binding character of a document (to be) developed “agreed upon” at EU level in view of national decisions on modalities of the organisation, regulation, provision and financing of SSGI. The answer by FIN well summarises the standpoint of those MS: “It would be very difficult to come up with a

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<sup>117</sup> “La definizione comune delle caratteristiche organizzative dei fornitori dei servizi sociali di interesse generale dovrebbe seguire, allo stato attuale, le modalità previste dal metodo aperto di coordinamento (OMC) e quindi avere forma indicativa e non prescrittiva. La definizione consensuale di standard comuni, soprattutto per quanto riguarda le caratteristiche del lavoro svolto nei servizi, dovrebbe essere accompagnata da una attività di monitoraggio particolarmente precisa.” (I, Q11)

<sup>118</sup> “Le seul domaine couvert par les bases juridiques communautaires est celui des services d’intérêt général marchands: au niveau de ces services, le recours à une liste de contrôle agréée conjointement par la Communauté et ses Etats membres à des fins de vérification, pourrait éventuellement s’avérer utile. Si au niveau de l’UE le principe d’une telle liste était retenu, elle devrait alors être guidée par le respect d’un concept d’action général qui définit des standards de qualité et par un système d’évaluation de la qualité des prestations fournies. Il y aurait donc lieu de préciser: le niveau de qualité à atteindre, aussi bien en ce qui concerne la qualité-cadre qu’en ce qui concerne la qualité du processus et/ou la qualité du résultat [et] le type d’évaluation. Cette vérification devrait cependant se limiter à des domaines qui, du fait de leur taille et de leur mise en réseau, ont une portée communautaire. Une telle portée n’est cependant généralement pas le propre des services sociaux (Cf: la 5e caractéristique listée dans la communication qui a trait à l’ancrage local des services sociaux)” (L, Q11) ... which reads: “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.” (Communication (2006)177, p. 5)

binding EU level definition of the characteristics since the circumstances affecting social service systems and services differ greatly from each other both nationally and locally. Due to the variety of social services and of the needs for social services, each circumstance must be considered individually.” (FIN, Q11)

- Category 2 of ideas: Another suggestion is the use of the list as an argument to “justify” the reference to specificities of social services in other policies and in legislative measures. This is (or would be) “turning upside down” the perspective, as here the dynamics and results of the process are to be used to safeguard the power and competences of the MS. Recognising special characteristics of SSGI means taking the avenue of introducing special rules for SSGI at EU level and/or exemptions from the application of Community competition, public procurement and internal market rules.
  - D is one of the three countries<sup>119</sup> explicitly suggesting under Field 4 of their answer to the SPC Questionnaire to work towards provisions in areas of Community state aid and public procurement legislation that would help to take the specificities of social services into adequate account and that such regulations “should address individual problems directly and propose solutions” (D, Q11). How could such provisions look like? D gives four examples: “exceptions, exemptions [*correction of translation from German into English by the author, having been involved in the elaboration of the document*] from the scope of application of specific regulations, raised thresholds or more precise criteria for consideration in determining compensation payments or sector-specific relevant criteria within the scope of public calls for tender” (ibid.)
  - E would like to work towards a description based on a non-exhaustive list, but first with the intention to safeguard MS’s competences in second in a (broader) legal framework to protect and formally recognise SSGI<sup>120</sup>. As a corollary E would like to see coordinated efforts and initiatives to adapt relevant Community law as a consequence and to respect the specific characteristics of SSGI<sup>121</sup>.
  - Less explicitly and not devoid of ambiguity is M in stating that “These characteristics should be protected and referred to during discussions in social security related working groups and meetings, especially those discussing EU legislation. Any new

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<sup>119</sup> “Germany is basically open to the use of the organisational characteristics named in the Communication or of other characteristics ... above all if, where services of general economic interest (SGEIs) are concerned, such characteristics were to serve as a basis for provisions in those areas of Community state aid and public procurement legislation that would help take the specificities of social services into adequate account.” (D, Q11)

<sup>120</sup> “Conformément au principe de subsidiarité, les Etats membres sont seuls compétents pour, d’une part, déterminer, selon la méthode du faisceau d’indices, si des activités de services présentent des spécificités de nature à leur conférer un caractère d’intérêt général et, le cas échéant, une qualification de services sociaux d’intérêt général, et, d’autre part, organiser les modalités de prestation de ces services de manière à satisfaire le mieux possible l’objectif d’intérêt général poursuivi.” (E, Q11)

<sup>121</sup> “Dans ce contexte, les autorités françaises sont favorables à l’élaboration d’un cadre juridique communautaire qui sécurise les services sociaux d’intérêt général par la reconnaissance formelle, d’une part, d’une liste non exhaustive de caractéristiques propres à ces services et, d’autre part, des conséquences à tirer de ces spécificités dans l’application des règles communautaires, notamment en matière de dévolution des missions d’intérêt général, de financement des services et d’exercice des libertés du marché intérieur.” (E, Q11)

- measure/secondary legislation introduced should be compatible with these characteristics.”, but in the author’s view the rationale behind is similar to that of D.
- Category 3 of ideas: E when replying to the enquiry had made an innovative proposal: “They could serve as a basis for the formulation of a statute of social services at European level, once the legal basis should be available for such an endeavour”<sup>122</sup> in order to “serve to “mainstream” SSGI in member states in view of their compatibility with rules of Community law”<sup>123</sup> (E, Q11). Even though this is not explicitly stated like this in the Spanish answer, one is safe to assume that such an instrument was to be designed to serve the same purpose as sketched out above by D.

ROM is the only country asking to obligatorily check the respect of relevant Community rules by using the list established list (that could still be improved in their view). When looking into the rationale presented by ROM it nevertheless becomes clear that they expect that the use of the list would help to control for and to defend some specificities of organisation and financing of SSGI at MS level<sup>124</sup>. However, to do so, there is actually no need for an EU-level instrument as the competence to define modalities of the organisation, regulation, delivery and financing of SSGI undisputedly lies with MS! In addition ROM claims the non-economic nature of SSGI<sup>125</sup>, an argument that in the author’s view shows that they precisely would not support an approach aiming at brining SSGI under the scope of relevant Community law in the fields of internal market, state aid and public procurement.

<sup>122</sup> Interestingly enough this idea was taken up and promoted about three years later, in the context of preparatory work. It is also contained in the conclusions of the 3<sup>rd</sup> Forum on SSGI on 25 and 26 October 2010 (see [http://www.socialsecurity.fgov.be/eu/en/agenda/26-27\\_10\\_10.asp](http://www.socialsecurity.fgov.be/eu/en/agenda/26-27_10_10.asp), document “15 recommendations of the 3<sup>rd</sup> Forum on SSGI”, heading “2.12 Setting up a legal instrument adapted to SSGI”, [http://www.socialsecurity.fgov.be/eu/docs/agenda/26-27\\_10\\_10\\_recommandations\\_en.pdf](http://www.socialsecurity.fgov.be/eu/docs/agenda/26-27_10_10_recommandations_en.pdf), p. 11) and in the background paper on “SSGI and public procurement” prepared for the event (cf. [http://www.socialsecurity.fgov.be/eu/docs/agenda/26-27\\_10\\_10\\_ssig\\_marches\\_publics\\_en.pdf](http://www.socialsecurity.fgov.be/eu/docs/agenda/26-27_10_10_ssig_marches_publics_en.pdf), p. 17, and the proposal under “piste 01” to “establish a specific European status for operators of SSGI as social economy actors” as one possible tool for the way forward).

<sup>123</sup> “Las referidas características de los servicios podrían servir de fundamento para avanzar por el camino de la formulación de un estatuto de los servicios de interés general en Europa en el momento que se dispongan las competencias suficientes en el Tratado constitutivo para poder aprobar una norma de estas características. Por otra parte, una utilidad más realista es que sirvan para configurar dicho estatuto con carácter funcional, de manera que sirva para homogeneizar los servicios sociales en los distintos Estados miembros en su relación con el Derecho comunitario a través de la adhesión voluntaria de los Estados.” (E, Q11)

<sup>124</sup> ROM i.a. presents the following reasons why characteristics (to be possibly improved) should be compulsorily used at the EU level in order to check for the observance of the relevant Community rules: “a) If the set-up/registration/accreditation of the social services providers did not take into account the organisational characteristics, confusions might appear for the beneficiaries in them of abuses upon them: tariffs surpassing service costs, non-personalised treatment for the beneficiary’s needs, discrimination, infringement of the latter’s rights etc.; b) What is equal treatment according to market rules (fixing the accommodation service price contingent on the pack etc.) may constitute discrimination according to social services system rules (which must pay attention to beneficiary’s personalised needs, even if this implies the latter’s involvement); c) The principle of solidarity is incompatible with the demand/supply mechanism; d) If the providers of the social services were imposed the market rules, disequilibria could appear.” (ROM, Q11)

<sup>125</sup> To be read as the last bullet point from the list above, fn 309: “e) Although the social services are not of an economic nature, they more or less directly influence the economic activity market.” (ROM, Q11)

On the other side of the line, some MS do not show particular enthusiasm of making further use the EC description of organisational characteristics of SSGI.

- Amongst them is B, as other MS (FIN, GB, H, IRL, LT, LV, PL, S) against the options of use as checklist (at least in the format presented in the 2006 Communication on SSGI) and as binding instrument.
  - The objection put forward by the Belgian government is nourished from two considerations, first from their conclusion that the elements of the description of organisational characteristics of SSGI can be considered neither exclusive nor exhaustive, second from their position that due to the distribution of competences an EU-level checklist for SGI would at all means run against the principle of subsidiarity. B again underlines the need to respect national choices as to the principles of design and organisation of SSGI. In the author's view B's intention was to also have this reading of the EU Treaty and of other relevant EC documents in a way as to cover the modalities of their regulation, delivery and financing operated respectively, too.
  - CY, DK<sup>126</sup>, and H take the same line with regard to this last argument.
  - LT refers to the uniqueness of every national system and the continued change in their provision that would make it complicated to determine a checklist at EU level (as it would be to monitor how they are used), however, is then somewhat contradictory in admitting that “there is necessity to assess and to clarify characteristics for better understanding SSGI and after that to determine just common SSGI organization's principles and mission of these services at EU level.” (LT, Q11).
  - Along the same line is LV's answer that also puts forward “differences in using terminology and [...] different cultural traditions of different countries.” (LV, Q11)
  - A similar intention can also be read from the answer by S – still undecided about any further use of the description and in particular about any possible further regulation – that underlines the need that checklists drawn up be flexible “as the services and the underlying conditions for them change” (S, Q11)
- By stating that a “clear expression of the public interest regarding service provision plays a key role” FIN – in the author's view – indirectly takes its distance to the use of a list at EU level, at least as long as what they see as key requirement is not the starting point and guiding principle of the exercise.
- GB makes clear that “we do not believe that responses to the questionnaire in reference to its scope should be interpreted as supporting the development of a definition based on those categories (...). It should be sufficient for member states to develop and manage their policies in connection with whatever they are committed to delivering in their national context.” (GB, Q1) and underlines that “the UK is not clear on what the context is for defining the specific features of social services of general interest as compared to other services (of general interest). What is envisaged as being the

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<sup>126</sup> “We wish to state that the setup and organisation of social services are items of national competence; therefore, the member states must still be entrusted with adjusting definition and general characteristics to reflect political priority-listings and national customs.” (DK, Q11)

application in practice of any special feature?” (GB, Q2). The British government comes up with an alternative approach building around the purposes of SSGI which also explains its scepticism vis-à-vis the (concept of the) description suggested: “The UK would suggest that the purpose of SSGIs and the outcomes that they achieve are more important, and would provide a more straightforward basis for a common description than the set of characteristics as used by the Commission in their Communication.” (GB, Q3)

- H is rejecting the idea of an overarching EU-wide instrument of whatever kind in addition to national rules on SSGI. (H, Q11), IRL pleads in favour of postponing further EU-level initiatives: “We should consider all possibilities and all the possible advantages and disadvantages for the optimum functioning of SSGIs need to be explored and evaluated before taking action at EU level.” (IRL, Q11)
- PL is unhappy about “the focus on organisational aspects, and in particular on service providers, which in the light of the ECJ case law are undertakings pursuing economic activity, downgrades the role of social services” (PL, Q11). PL also comes back to the delicate distinction between “economic and non-economic services” and the legal consequences of SSGI provision by the state (also covering public bodies) and asks for a clarification of how to understand “non-profit activity” and its legal impact on NGOs and other entrepreneurs providing social services, not least as this term is contained in relevant Polish legislation (i.a. Public Benefit Act) without being defined.

Three MS also mention social security schemes or benefits in their replies under field 4. In doing so, however, neither A nor E nor FIN demand the use of the list referred to in questions 11. It is rather that they call for undertaking a joint comprehensive and detailed exercise to bring about more clarity when it comes to the applicability of Community law on this first core element of SSGI.

- A would like to see progress in the sense of achieving more legal clarity and is open as to the tool to do so, mentioning e.g. a checklist based on existing ECJ rulings that would incorporate the criteria developed up to date to classify a service as being of non-economic nature (cf. AOK case law, (C355/01) see footnote 227) or to limit the applicability of competition law according to Art. 86.2 ECT (cf. i.a. Albany case law<sup>127</sup>). The Austrian government does not rule out the possibility for such a checklist to eventually become legally binding or at least to serve as legal guidance (after other analyses and processes)<sup>128</sup>, but underlines that independently of its status such a

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<sup>127</sup> In the case “C-67/96 Albany International BV vs. Stichting Bedrijfspensioensfonds Textielindustrie” ([1999] ECR I-5751) the ECJ on 21 September 1999 ruled that the mandatory affiliation to a sectoral pension fund for the textile industry and the payment by an employer of a contribution to such a scheme the Dutch state had conferred an exclusive right to – albeit infringing Art. 86 I ECT – could be and actually was justified under Art. 86 II ECT because this sectoral pension fund has to be and is categorised a SGEI.

<sup>128</sup> „Bei der Frage, ob auf europäischer Ebene weitere rechtliche Schritte hinsichtlich der sozialen Dienstleistungen von allgemeinem Interesse geplant werden sollen, sieht Österreich mittelfristig einer rechtsverbindlichen Initiative mit Interesse entgegen. Es sollten jedoch auch nähere Untersuchungen erfolgen, was genau mit welchen Rechtsinstrumenten erreicht werden kann. Wenn diese zu mehr

checklist would constitute an important step forward. A in addition suggests to complement this checklist with another list taking up relevant ECJ rulings in the field of social and health services for the purpose of screening the current legal situation as well as the legal impact when planning reforms within MS.

- E invites the EC to screen the relevant ECJ jurisprudence in an effort to clarify issues of compatibility of community rules with national rules, to reduce insecurity and to clarify the applicability of Community law.
- FIN reminds of the fact that they would like to see a limited scope to such as exercise in underlining that “the EC case law should only refer to the common characteristics” (FIN, Q11).

*The Communication and its Annex provide for a further clarification on the conditions of application of Community rules and principles to social services in particular in the following fields:*

- *Public procurement*
- *Public-private partnerships*
- *Freedom to provide goods and services and freedom of establishment*
- *State aid*

*12. Please indicate whether difficulties (may) still arise and if so in which legal areas and for which type of social services.*

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*13. Please provide for concrete examples and experiences to illustrate these difficulties.*

The analysis of the answers to questions 12 and 13 is done jointly as both are strongly linked, question 13 asking for concrete examples of actual or potential difficulties already described in the replies to question 12. One third of the 27 countries having responded to the enquiry have provided concrete examples for problems, open questions and challenges under question 13, D, E and FIN in the most detailed manner; several examples and illustrations are also already contained in the replies to question 12. They will be presented by different fields of community law, in a first block those related to competition and state aid, in a second those dealing with public procurement and public-private partnerships and in a third section those touching upon the exercise of the fundamental freedoms of the internal market, here the right to move across borders to provide services and the right of establishment.

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*Rechtssicherheit im Interesse der Staaten, der Leistungserbringer aber auch der Nachfrager beitragen können, sind diese Schritte unter Beachtung der Subsidiarität grundsätzlich zu befürworten. So könnte z.B. untersucht werden, ob ein Rechtsinstrument möglich ist, das klarer absteckt, unter welchen Bedingungen Beschränkungen des Wettbewerbsrechts für soziale Dienstleistungen von allgemeinem wirtschaftlichem Interesse von Artikel 86 Abs. 2 EG gedeckt sind.“ (A, Q18)*

Both E and GR make remarks having a general bearing for their answers under field 5:

- E makes a general remark and call to the European Commission to fundamentally reshape its approach towards SSGI<sup>129</sup>. E puts forward the special objectives of SSGI, i.a. linked to the realisation of fundamental rights as well as the specific needs and characteristics of the service users. E claims that the application of market rules to SSGI simply is inappropriate<sup>130</sup>.
- Not that blunt is GR with its general observation, shared by all MS (at least not openly contradicted by any other MS): “What must prevail in the case of SSGI are the protection of the general interest and the specific role of the SSGI as basic elements of social protection. Thus, the rules applied to competition, state aid and internal market, in the case of social services of general interest, should be implemented with great caution and only on supplementary basis and, of course, in case of conflict, national arrangements aiming at safeguarding the specific role of the SSGI should prevail.” (GR, F5)
- LT takes up these concerns identifies a role and need of the state to “interfere in (the) social services market development process because the development and the establishment of the private social services sector should be harmonized with habitants` needs for social services and with financial ability of the State.” (LT, F5)

E still sees difficulties how to categorise services along the dividing line “economic/non-economic” and unclarity how to treat them across the board, i.e. in view of the four fields of Community law mentioned in the questionnaire. They mention i.a. education services, services for children, families, pensioners/retired persons, women, handicapped persons and the payment of complementary social benefits (in general, but more particularly for people with

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<sup>129</sup> “Les SSIG ne peuvent être considérés comme des services «classiques» car ils permettent l’accomplissement de missions d’intérêt général spécifique visant à l’effectivité des droits fondamentaux des personnes et plus généralement à la cohésion sociale et territoriale. A cet effet, leur mise en oeuvre nécessite des modalités de régulation et d’encadrement fort, qui pourraient être considérées comme entravant la liberté de prestation et d’installation des opérateurs si elles n’étaient pas légitimes au regard de la finalité de protection des droits fondamentaux et, plus particulièrement, de ceux des publics vulnérables. Un grand nombre de SSIG s’adressent, ..., à des personnes en situation de fragilité temporaire ou durable qui ne peuvent être assimilées à des «consommateurs» ordinaires. L’inégalité résultant de l’asymétrie entre le prestataire du service et le bénéficiaire a conduit le législateur français à organiser une régulation globale visant à protéger ces personnes. Une application des règles du marché à ces services aurait pour effet de nier ou à tout le moins d’empêcher une mise en œuvre satisfaisante de leurs missions d’intérêt général. Il ne s’agit pas de soustraire ces services aux dispositions générales des Traités mais d’adapter les conditions de mise en œuvre des grandes libertés et droits fondamentaux aux exigences d’intérêt général que se donne un Etat. Cela passe par l’élaboration d’une réglementation propre aux SSIG et de nature à garantir une sécurisation de leur régime juridique.” (E, F5)

<sup>130</sup> Their main conclusion from this reasoning resonates well in a position paper elaborated in early 2011 by the European Public Service Union (EPSU) identifying the “need to get the reference points for policy development and legal initiatives right at EU level: There is a need to shift from a predominant orientation on compatibility of modalities of organisation, regulation and financing of local SSGI with Community law (one could call ‘compliance mania’) to an approach that gives priority to the realisation of objectives of SSGI and of specific missions of general interest taking due account of the specificities of SSGI and their users. For SSGIs this means to start with the question how to take due account of the specificities of social services and their users and how to best translate recognised specific characteristics of the social services and their users into adapted rules and procedures at EU level.” (“SSGI in the EU context – EPSU reflections, requests and recommendations”, 1 March 2011, 2., cf. <http://www.epsu.org/a/7452>).

disabilities) and complementary pension systems operating with both an obligatory affiliation and with the principle of capitalisation. Without elaborating in detail on existing or potential future problems, E mentions employment services and services for integration of handicapped persons and foresees possible difficulties when it comes to the freedom of establishment of foreign providers and to the contractual arrangements for those services in case public authorities take the decision to externalise them<sup>131</sup>.

H mentions a marginal impact of relevant Community rules and the non-relevance of related debates in their country (that is taken up by other MS from Central and Eastern Europe in relation to specific fields of EU law). They also cannot report on relevant activities of foreign providers: “Considering the low number of social services provided by community maintainers in Hungary and the restrained opportunities to outsource social services (meaning the restrained opportunities to the application of market mechanisms), we cannot report on practical instances, difficulties or debates at present.” (H, F5)

BG and ROM consider probable to be soon confronted to open questions or problems with the application of Community law across the four fields mentioned but could not yet report about concrete cases as not yet within the EU when they replied to the questionnaire. P makes the same statement, however, is not precise on which issues and/or which reasons.

Below you’ll find the more detailed analysis of replies related to the applicability and/or actual application of Community law to SSGI and the related or expected impacts structured by the fields asked for in the questionnaire.

#### *Field of Community law 1: Competition legislation and state aid rules*

D gives an appraisal (shared by M), but also has clear demands as to the Community state aid rules. Concretely this means

- The German government is happy with the rules on public service compensation above the *de minimis* threshold as presented in the Community framework. They are expected to create greater legal certainty and transparency, as it clarifies the prerequisites under which compensation which is to be classified as state aid is permissible under Community law. (see on this aspect in a national context e.g. Derosier/Philip 2005)
- D, nevertheless sees an urgent need for a joint effort of clarification by the European Commission together with the member states on how the exemption decision of 28 November 2005 (2005/842/EC of 28 November 2005 – JO L 312 p. 67 of 29 November 2005) as part of the state aid package can be best applied to individual cases. In this

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<sup>131</sup> “... es posible señalar que los conflictos proliferarán especialmente como consecuencia de la progresiva externalización de servicios para que sean prestados por sujetos privados mediante contratación pública. En esto ámbitos los dos frentes posibles de conflicto surgirán de la libertad de establecimiento por parte de empresas procedentes de otros Estados miembros y en la aplicación de la normativa comunitaria de contratación administrativa en cuanto a la adjudicación en su prestación.” (E, Q13)

context D demands that the member states and their territorial subdivisions must be given as much organisational leeway as possible, and asks for the concrete implementation of the exemption decision to be organised in a manner such that the competent national authorities can take the recognised specific characteristics of social and health services into suitable account.

- D also requests to accept and foresee the possibility of fully taking into account in competition and state aid law the specific characteristics of social services. This is justified by the socio-political sovereignty of member states for organising activities fulfilling a legally defined task, financed largely from public funds or taxes and devoid of profit-making intent. This should apply not only to state, regional and local authorities, but also, regardless of legal form, to institutions acting without profit-making intention and for which the state bears the organisational responsibility and the ultimate warranty liability (in German: “*Gewährträgerhaftung*”).
- If financial assistance is indeed found to constitute state aid, D claims that consideration should also be given the possibility of raising thresholds due to the (rather insignificant) amount of the financial assistance or to the (specific) character of the social and health services of general interest.

The second last point requested by D is also taken up by B with a statement shared by and put forward by many MS. B recalls – and regrets – that the functional approach of Community law with its exclusive focus on the nature of the activity and the non-consideration of the status of the provider, as also reflected in recent ECJ rulings, implies the denial of the rationale behind the historical existence of and deliberate choices of individuals and groups for setting up providers of SSGI operating with a constraint of non-distribution of potential surpluses to external shareholders. This approach also means turning a blind eye to the related obligation of providers operating under a statute of social economy to re-invest any gains for the pursuit of the objectives of the organisation – here: social, health or employment policy, social inclusion and/or professional training –, an arrangement that would justify – in the opinion of B and the other MS – an adaptation of state aid rules taking into account this self-obligation. They mention the two forms “association” and “mutual benefit society” as those usually adopted by providers of SSGI, claiming conformity with Community rules for the latter. B also explains that providers of social services are often requested by public authorities to adopt the legal status of a non-profit making body, in the concrete case of B of an *association sans but lucrative (ASBL)*<sup>132</sup>.

A number of unclear issues, open question and critical assessments of problems are reported by different MS (B, CY, D – see above, EST, F, FIN and L):

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<sup>132</sup> “*Les dispositifs européens ne prennent en compte que la nature de l'activité exercée et non le statut de l'opérateur (arrêts Pavel Pavlov, Ambulanz Glöckner, Höfner et Else). Cette approche fait abstraction d'éléments tels que le fait de ne pas poursuivre un but de lucre ou la démocratie interne liés aux statuts et au fonctionnement de nombreux services sociaux agréés comme, par exemple, les mutualités. ... Il est souvent demandé à certains services de se constituer en ASBL pour être dans les conditions d'octroi de subventions.*” (B, F5)

- In two annexes to the questionnaire submitted, B gives detailed examples on the conceptualisation and financial arrangements of social housing policies in Brussels and Wallonia to illustrate problems and incompatibilities they see for this sub-sector (but extrapolating from there also more in general for health and social services) with Community state aid rules. B recalls that social housing does not function without public subsidies<sup>133</sup> and underlines that, e.g. in the case of Brussels, the problem is not potential over-compensation, but rather the lack of sufficient public financial support for social housing that in addition is limited to covering 75% of a possible deficit of a (public) provider of social housing<sup>134</sup>. They also demonstrate that the 4<sup>th</sup> criterion of the ECJ Altmark ruling of 25 July 2003 is not operational – as e.g. the service mission is not attributed by public procurement, but based on an authorisation to operate issued by the competent public authority – and does not make sense – as for social housing in B, but presumably in most or all other Europe countries, there is no genuine profitable market and no competition between providers on lucrative services<sup>135</sup>. Concluding from this, B sees the key objective of social housing, namely the promoting social cohesion, endangered by state aid policies and rules should they be amended in a manner that would actually work against this aim. Given the conceptual and practical difficulties explained they eventually call for considering social housing as an SGI, not an SGEI, which ultimately would put this sub-sector of SSGI outside the scope of Community legislation. They also claim the respect of two key principles in social housing policies, subsidiarity and neutrality of Community law on property arrangements and rules in the MS<sup>136</sup>. B considers this recommendation to also be justified by the definition of public

<sup>133</sup> “Ce n’est un secret pour personne que sans subsides, soit pour rénover ou construire, soit pour combler les différences entre loyers théoriques et loyers réellement payés, le secteur du logement social est inviable. C’est plus fondamentalement la cohésion sociale qui est menacée par une éventuelle révision de la politique et du droit communautaires des aides d’Etat.” (B, Annex 1) ... “Alors que se pose la question de l’application ou non des règles sur les aides d’Etat au logement social, c’est au contraire son sous-financement endémique qui devrait nous interpeller.” (ibid.)

<sup>134</sup> “La compensation doit être proportionnelle à la mission de service public et ne peut donc l’excéder: Le problème est inverse puisqu’il n’y a pas suffisamment de moyens pour rencontrer la demande. Et concernant les différentiels de loyers, le service d’insertion par le logement (ARS) ne s’adresse légalement qu’aux sociétés immobilières de service public (SISPS) en déficit social, donc pas à toutes, et est budgétairement limitée à 75% du différentiel.” (B, Annex 1)

<sup>135</sup> “La mission de service public doit avoir été attribuée soit par procédure de marché public – ce n’est pas le cas, rétablissement de la procédure d’agrément – soit par comparaison avec les coûts d’une entreprise de référence – c’est ne pas le cas non plus vu que, c’est fondamental, il n’existe pour ainsi dire pas de marché du logement social où existerait une concurrence. Forcément le secteur est régulé, organisé, financé par la Région vu qu’il s’agit de rencontrer la plupart du temps les besoins d’une demande non solvable ou aux frontières de la solvabilité sur le marché locatif normal. Si on prend le cas du logement social à Bruxelles, et on peut penser que la situation est semblable dans la plupart des autres secteurs dans les Etats membres, les trois premières conditions peuvent être facilement rencontrées. Il en va différemment de la 4<sup>ème</sup> en raison de la tradition d’organisation directe, par voie législative, du secteur du logement social dont les prestataires ne sont pas mis en concurrence. Quant à la comparaison des «coûts pertinents» qu’il faudrait opérer avec des entreprises similaires, en prenant même des sociétés commerciales ou des propriétaires individuels, elle n’a guère de sens.” (B, Annex 1)

<sup>136</sup> “L’organisation effective d’un service d’intérêt général, économique ou non d’ailleurs, doit se faire dans le respect de 2 grands principes du droit communautaire: 1. le principe général de subsidiarité qui veut que les services d’intérêt général, lesquels ne sont pas de la compétence de la Communauté, soient

service missions in the field social housing, e.g. in Wallonia. These service missions mention the realisation of fundamental rights, a variety of principles (such as human dignity, solidarity, social cohesion, user participation) and their availability to cater for social needs of disadvantaged and vulnerable people market solutions can and could not provide for<sup>137</sup>.

- CY sees remaining legal uncertainties and links difficulties encountered to the small-scale state subsidies paid by the Ministry of Labour and Social Insurance to voluntary organisations which provide social care services for children, older persons, persons with disabilities and other family dependents. In their view one problem is that the diversity of organisations providing SSGI is not sufficiently taken into account when defining the term “undertaking” and the concept of state aid. Issues raised on the backdrop of the Cypriot social welfare landscape are 1) the statute and size of many providers, in particularly in rural areas, small voluntary organisations, as well as the low amounts of public financial support they receive, 2) the non-full payment of the services by the users not corresponding to the concept of “remuneration” and 3) the lack of impact on cross-border trade given the non-attractiveness of the services to potential foreign providers and the small amounts of state aid involved<sup>138</sup>. CY finally recalls a

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*organisés par les Etats membres et leurs ramifications; quand bien même retiendrait-on la qualification de service d'intérêt économique général, dès lors qu'il s'agit d'assurer la cohésion sociale et territoriale, et c'est dans tous les cas bien de cela dont il s'agit, l'article 16 du Traité CE porte également le principe de subsidiarité; 2. le principe de neutralité qui stipule, selon l'article 295 du Traité, que le droit communautaire doit être indifférent à l'égard du régime de propriété (publique, privée mixte) organisé dans chaque Etat.” (B, Annex 1)*

<sup>137</sup> *“Les missions assumées par les opérateurs du logement de service public/social, qui visent la mise à disposition d'un logement décent pour tous, revêtent également une importance capitale, en particulier lorsqu'elles concernent les plus défavorisés ou précarisés, ou encore lorsqu'elles visent à assurer la cohésion sociale par la recherche d'une relative mixité sociale dans les quartiers. Ici encore, l'importance capitale de ces missions sociales et d'intérêt général, justifie que les services d'intérêt général qui sont à l'origine de ces missions soient qualifiés de «sociaux». Parmi des caractéristiques particulières pour les SIG sociaux on trouve: a) leur poursuite de la mise en œuvre concrète des droits fondamentaux, notamment des droits sociaux, et l'instauration de l'égalité des chances, surtout pour les personnes confrontées à des difficultés pour accéder à ces droits et les exercer; b) les principes particuliers sur lesquels ils reposent, à savoir la reconnaissance de l'importance de la dignité humaine, la solidarité, la justice sociale, la cohésion sociale et le bien-être social, le capital social, le renforcement des moyens d'action et la participation des utilisateurs à la constitution, la fourniture et l'évaluation des services sociaux; c) la réponse aux besoins sociaux et aux faiblesses sociétales que le marché n'est pas capable de satisfaire correctement ou qui peuvent même être générés par une structure de marchés spécifiques. Ainsi, ils assurent que les autorités publiques assument leurs responsabilités sur la base du principe d'intérêt général.” (B, Annex 2)* In a more general manner M in its answer to Q12 highlights two key reasons why public support for SSGI should be possible and compatible with EC state aid rules, namely as they are expressions of solidarity and need public financial support to be sustainable.

<sup>138</sup> *“Although some of those bodies provide social services on payment – and hence constitute undertakings – there are other bodies that do so without payment such as voluntary organisations, foundations etc. State aid that covers only a part of their expenditures cannot be considered as “remuneration” according to the ruling on *Bond van Adverteerders*, since the aid does not correspond to the price value of that service. ... Some SSGI providers – whether they constitute undertakings or not – provide services in a small geographical area, e.g. in a town or in a village or in a neighbourhood. The geographical coverage is so small that a question arises as to whether state aid to those bodies would satisfy the “effect on trade” criterion. This criterion is necessary for the existence of state aid according to article 87 of the Treaty. For example, care services for older persons in rural areas of Cyprus do not*

policy shift having occurred during the five years prior to this enquiry when it comes to the treatment of non-profit making organisations with a social mandate: “In the Communication of 2001 on SGI, the Commission excludes from the field of application of competition rules organisations with a clear social mandate and non for profit organisation which do not apply any industrial or commercial activities. The Commission strictly considers those organisations as foundations.” (CY, Q12) In 2006 the distinction is no longer made on the basis of the legal status, aim or economic rules governing an organisation, as back then basically as social service providers are considered as enterprises pursuing an economic activity, as explained in the 2006 Communication on SSGI.

- EST would like to see stipulated the possibility not to apply EC state aid rules to social services, noting that the ECJ has classified them as economic activity, not least as they consider they reflect market failure: “Social services are services that the society is interested in and whose provision is considered necessary by the state but the market is not capable or interested in providing these services, or would provide them insufficiently” (EST, Q12). Looking at the current EU framework for state aid EST sees no need of clarification. They indicate that with the thresholds in place public subsidies as a rule would come below it and therefore would not need to be notified. EST also suggests including elderly care/long-term care institutions under the exceptions of notification of state aid in place for hospitals and social housing.
- E doesn’t question the economic character of services of labour market inclusion for disadvantaged persons by target measures and professional training, however, claims that their organisation on markets has a detrimental effect on the accessibility and quality of the services for those that need them to be adequately supported<sup>139</sup>.
- FIN recalls difficulties due to diverging assumptions comparing the EU level and a Nordic welfare state model when it comes to the treatment of benefits and services of social protection systems. The assumption of EC and ECJ that social services in principle are of an economic nature and provided by enterprises brings about unclarity which Community rules should be applied to national social services<sup>140</sup> and to which extent to do so: “This has significance for example in cases where local authorities

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constitute an economic activity attractive to undertakings abroad. It would therefore not be realistic to conclude that there is competition between those bodies and undertakings abroad which would potentially be interested in care service provision.” (CY, Q12)

<sup>139</sup> “L’application du droit de la concurrence aux activités de formation qualifiante et d’insertion ne se conteste pas. Elles constituent des activités économiques. Cependant, la logique économique peut empêcher les prestataires de formation de proposer une offre de services dès lors que celle-ci ne serait pas rentable. Par conséquent, certains publics en difficulté d’insertion ne bénéficieraient pas ou plus des prestations spécifiques nécessaires à leur insertion sur le marché du travail.” (E, F5)

<sup>140</sup> “It has sometimes proved difficult to separate business that is subject to competition from other NGO activities. By virtue of EC case law, the concept of economic activity is extensive, and in some circumstances it may be difficult to classify a certain activity as economic or non-economic. Since a key aspect of economic activity in the Community law is the equivalence of the service, it has remained to certain extent unclear which Community rules should be applied to national social services. ... The European law definitions of various services are not easy to apply to the principle of welfare services based on the Nordic system of public sector activities.” (FIN, F5)

purchase services from each other or when services are provided in partnership between local authorities and the private sector (including NGOs).” (FIN, F5)

- FIN also defends its system – already questioned or challenged by the EC that surpluses generated by the Finnish Slot Machine Association are ear-marked by law to support activities of not-for-profit organisations<sup>141</sup>. FIN fights against an interpretation of this arrangement in form of an exclusive right as a discrimination against towards potential (domestic or foreign) service providers and insofar a distortion of compensation.
- IRL, as earlier B, focuses on social housing, considers that further clarification of the application of Articles 87 and 86 is required and suggests an “exemption decision under Article 86(2) that would have broad application to the member state’s arrangements for funding of social housing (to be understood as not limited to dwellings by including ancillary infrastructure elements that contribute to the overall social housing environment).” (IRL, F5)
- By invoking a practical example, the *Fonds national de solidarité* delivering payments of a social assistance type, L makes the same problem description as B, by highlighting the difficulty, if not impossibility to apply in many cases the 4<sup>th</sup> criterion of the ECJ Altmark ruling of 25 July 2003<sup>142</sup>, as often there is no market or a non-publicly supported provider of a specific SSGI, simply as these are economically not viable<sup>143</sup>.

### *Field of Community law 2: Public procurement rules*

Instead of pointing to particular questions or problems, the British government rather highlights their policy-driven, rationale approach towards using public procurement in the field of SSGI. Public Service Agreements set the frame for purchasing services from the early stage of inviting expressions of interest to final stages of contracting and reflect business requirements coherent with the strategic mission, vision, objectives and targets of an SSGI and defined in terms of output or outcome<sup>144</sup>. GB argues that on this basis it should be clear due to this specification

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<sup>141</sup> “According to the Finnish law, Finland’s Slot Machine Association has an exclusive right to organise certain gambling games (confirmed by judgment C-124/97). The activities of Finnish social welfare and health organisations depend to a large extent on funding from the Association. These organisations play a key role in the infrastructure of the Finnish system. The basic tasks and role of Finland’s Slot Machine Association are clearly defined in law. The proceeds of Finland’s Slot Machine Association are used for awarding grants to charitable or other non-profit organisations and foundations” (FIN, Q13).

<sup>142</sup> Where the undertaking is not chosen in a public procurement procedure, the level of compensation must be determined by a comparison with an analysis of the costs that a typical transport undertaking would incur (taking into account the receipts and a reasonable profit from discharging the obligations), cf. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000CJ0280:EN:HTML>

<sup>143</sup> “En application de l’arrêt Altmark, les compensations de service public sont exclues du champ des aides d’Etat si elles respectent e.a. la condition suivante: à défaut de marché public, le niveau de la compensation doit être calculé sur la base d’une analyse des coûts en prenant comme référence une «entreprise moyenne, bien gérée et adéquatement équipée»: comment procéder lorsque, faute d’entreprise privée menant l’activité concernée, l’analyse des coûts exigée n’est pas possible (par exemple: cas particulier du Fonds national de solidarité)?” (L, Q12)

<sup>144</sup> “These measures are supported by a full range of audits. There are both National Audit Office (NAO) and internal audits, including an in-house check on all procurement specifications by an expert who is

how a specific SSGI fits into wider Government objectives and – as many other MS – emphasises the need to clearly define what "general interest" means.

I explains the technical terms and concepts used to structure the relationship between public authorities and external providers of SSGI and to organise the administrative practice, as underpinned by the law 328/2000: authorisation to function (entitlement to provide services), accreditation (compliance with quality norms), contract<sup>145</sup>. The institutional accreditation for for-profit and non-profit organisations that have shown that they can deliver according to technical, professional and organisational standards and for this purpose concluding a contract with local authorities has recently replaced the authorisation. I considers them appropriate to strike a good balance between solidarity and competition on social markets and as an instrument realising horizontal subsidiarity between public and private SSGI providers in an effort to deliver a network of integrated services. I underlines that in the context of the externalisation of services – there are a lot of experiences with the definition of norms and procedures for an accreditation in the field of domiciliary care – the law attributes a central and preferential role to third sector organisations, both as to the programming, both as to the provision "in networks", not least to promote transparency and competition, with priority recourse to registered organisations from the third sector and competition amongst those entities only (consistent with the ECJ ruling Sodemare). I clarifies that the cooperation of public authorities, i.e. local and regional authorities, after having externalised services to private providers, in particularly third sector organisations is not to be seen as an institutionalised public-private partnership construction.

SLO explains using three types of mechanisms defined in sectoral legislation to identify an external providers of SSGI – service concessions, public tenders or the granting of a permit for work, issued and possibly revoked by the Ministry of Social Security – and that once they have been chosen and accepted they are being treated in the same manner as public institutions (including social insurances) providing the same services. There is a possibility for bidders to indicate under public tenders a non-profit character (documented by means of the act of establishment of the service provider, stipulating that all income in the basic activity is being reinvested and not handed out to external shareholders.

Four MS (CZ, EST, H and PL) report not yet being yet (really) concerned by this tool to organise service delivery in the field of SSGI:

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independent of the process, and OGC also audits major procurements for compliance with legal requirements, including EU law. It is likely that where "social services of general interest" are contracted out that these would be regarded as sufficiently major procurements to be not only audited in this way but also be actually managed by a process that checks for compliance at each stage en route to agreeing the final contract." (GB, F5)

<sup>145</sup> "1) L'autorizzazione al funzionamento: è il provvedimento amministrativo che consente ad una unità di offerta di avviare legalmente la gestione ed erogare interventi e prestazioni a favore di cittadini; 2) L'accreditamento è il provvedimento amministrativo che consente ad una unità di offerta autorizzata al funzionamento di erogare interventi e prestazioni a favore di cittadini con un livello di qualità definito dall'Ente accreditante; 3) Il contratto è l'atto che impegna l'ente accreditante e la struttura accreditata, in ordine alle modalità di erogazione e pagamento delle prestazioni/interventi resi ai cittadini." (I, F5)

- CZ makes the surprising statement that “Community Law is not applied to social services, as laid down by Act 108/2006 Coll.. Public procurement follows Act 137/2006 Coll., on Public Procurement.”, without, however, giving the rationale behind the first decision and more information why (national) public procurement rules are not applicable to social services.
- EST reports that social services are not yet subject to the national public procurement legislation. EST, however, welcomes the possible future use of the instrument as well as their actual use already when purchasing social services as it is reasonable to have a method – facilitated by the choice between different options available for the public authority intending to tender out a SSGI, namely open procurement, limited procurement, adversarial dialogue or negotiated procurement with prior publication of a procurement notice – for choosing between service providers.
- H has a restricted approach to service delegation as it legally stipulates the possibility of out-sourcing services, i.e. its provision by and external provider for some auxiliary tasks, only, especially cleaning, washing, catering, accounting and maintenance<sup>146</sup>. H also explains that whereas public procurement has to be used should the amount of service delivery be above the threshold, the other modality is an application (again defined in the Social Act).
- For three reasons PL also lacks experience in applying Community rules to social services, first due to the rather recent accession to the EU, second given the fact that modernisation of SSGI delivery has only been started some years ago and third because “many social services have developed relatively recently in connection with the system transformation (e.g. the social welfare scheme, the system of benefits and assistance to the unemployed).” (PL, F5)

Difficulties, open questions and critical assessments are shared by a number of MS (A, B, D, EST, E, FIN, and ROM):

- A reports back from key stakeholders stating that procurement rules do lead to problems and undesired results as they are not adapted to the specificities of the social services sector.
- B asks the European Commission to provide more clarity as to the concept of service concessions and on the modalities how to conclude them, by recalling relevant initiatives already announced by the EC, but not yet delivered. They specify that their major interest consists in getting a better grip of the applicability of Community public procurement rules on institutionalised PPP.
- D agrees in principle with the flexibility provided by section 2.2.1 of the Communication, which says that state authorities delegating social and health services may, if they wish, establish technical specifications only in terms of the aims to be achieved by the

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<sup>146</sup> “The conditions of outsourcing are defined in the Social Act [122/A–122/C §]. .... The institution (maintainer) may sign a contract maximally for 5 years with an organization outside the institution, which may be an economic company, a PPP, or a non-profit association. ... The organization providing the outsourced activity must report once a year to the local government’s representative body about the provision, the prices and potential complaints”. (H, F5)

provider. They, however, request more clarify for the extent to which general objectives constitute an adequate reference variable and control instrument and can be achieved without follow-up negotiations whenever service provision requires an adaptation of delivery during the contractual phase, for instance when the service provision needs to be adjusted to changed and/or unexpected needs of the beneficiaries. Not least because this case applies a fortiori in the area of social services, where attainment of the objective pursued with the services delivered depends not only on their proper provision but also on other socio-economic factors (such as employment market and vocational training market situation).

- D is of the opinion that services demanded and offered on a local basis and close to the place of residence of the users would very unlikely constitute a Community law problem in terms of potential impairment (be it in form of an obstruction, a restriction or a distortion) of internal market trade.
- Finally, D is very critical of legislative proposals and initiatives of the EC regulating calls for tender by public procurement below the thresholds<sup>147</sup> and stresses that the implementation of the principles of transparency, equal treatment and proportionality to be respected for the delegation of social tasks to external organisations is incumbent on the member states, particularly when the delegated task falls below the thresholds of the Public Procurement Directives. This point is taken up and underpinned with examples of pending ECJ cases by FIN (see their answer to Q13).
- EST takes up a point also mentioned by D, by admitting “that with social services it is difficult to define the service description in a very detailed way as the service has to be adjusted to the needs of each individual client” (EST, F5).
- F explains more in detail the problems with using public procurement in the field of SSGI, exemplifying its general statement (see above). Again these are related to the concrete and overarching objectives of SSGI (i.e. addressing of a social problem such as the need of care, guidance and housing to realise social and human rights), their institutional context as part of social protection schemes, specific characteristics of the users. F recalls the risks of non-provision of SSGI needed by our societies if there is (exclusive or predominant) recourse to public procurement due to their non-profit-orientation in financial terms<sup>148</sup>.

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<sup>147</sup> “The Treaty does not stipulate a special European award system for contracts falling below the set thresholds. In this regard, Germany disagrees with the Commission interpretative communication on the Community law applicable to contract award not or only partially subject to the provision of the Public Procurement Directives, and it has brought an action in this respect before the Court of First Instance”.  
(D, F5)

<sup>148</sup> “Le recours, de plus en plus fréquent, par l’administration aux appels d’offres (que ceux-ci soient utilisés dans le champ de la subvention ou des marchés publics) amène les opérateurs à répondre dans le cadre de ces procédures aux côtés d’acteurs à but purement lucratif, voire en concurrence avec d’autres acteurs non lucratifs. Un des risques de ces pratiques de plus en plus répandues, notamment dans les collectivités locales, est de faire sortir du champ non lucratif toutes les activités rentables et de réserver aux acteurs non lucratifs les activités «purement caritatives» au profit des seuls publics en difficulté. Or, ces dernières activités sont le plus souvent déficitaires et face aux contraintes pesant sur les finances publiques, il y a risque de voir disparaître ou réduire un certain nombre d’activités non rentables par défaut de financement sans pour autant que les besoins soient satisfaits dans le cadre du

- In a way comparable to the reasoning presented by D, E is also critical about the risk to mix up concepts and then to apply them to SSGI although this would be inappropriate. E.g. a service concession implies a shift of the financial risk to the provider – which, however, is not the case in the SSGI landscape and how delegated service provision is shaped there<sup>149</sup>.
- E also warns against an inappropriate use of the term “delegation of a public service” contrary to actual traditions and practices of the provision of SSGI<sup>150</sup>.
- FIN advocates for a differentiated view of the use of competitive tendering for SSGI and explains which (evidence-based) pros, cons, caveats and conditions they see<sup>151</sup>.
- Due to the narrow interpretation of the in-house concept, FIN also sees (and implicitly also criticises) a lack of flexibility in situations where the public sector organises services by internal co-operation arrangements, i.e. with regard to the possibility to organise public-public-partnerships. In this context they also present an example from the field of rescue services FIN considers being either in-house or inter-municipal cooperation (as one can read from their line of reasoning): “There is to some extent unclarity regarding the organisation of ambulance services. For example, when a case where a municipality had purchased ambulance services from the regional rescue services was brought to the Market Court, the Court considered that it was not question of work done together by two procurement units but of a purchase that should have been made subject to competitive tendering.” (FIN, Q13)
- ROM echoes a point made by D in holding that “the flexible, personalised nature of the social services creates difficulties in establishing the ‘technical specifications’ concerning the assignment of contracts for the financing of social services. For instance, in the case of financing the home-care social services the debate bears on the efficiency of payment ‘on beneficiary’ or ‘on service/benefits.’ Efficiency indicators for services provision greatly differ from one type of service to another.” (ROM, F5)

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*marché.*” (E, F5). E also recalls that there are cases where providers of SSGI (can) mix (potentially partially) profitable activities with (a priori) non-profitable activities.

<sup>149</sup> “*En pratique, l’organisation des SSIG les rapproche souvent des concessions qui sont un mode original de financement des services mais qui implique un transfert prépondérant du risque financier.*” (E, F5)

<sup>150</sup> “*Très souvent, la reconnaissance ou le transfert de missions de service public est entendue comme une «délégation de service public (DSP)». Cette logique est contraire aux pratiques des services sociaux dans notre pays au sein desquels la participation des usagers est le plus souvent partielle, voire nulle, et sans relation avec le prix de la prestation. La question du risque financier pesant sur l’opérateur prend alors une importance capitale.*” (E, F5)

<sup>151</sup> “There are different views about the appropriateness of competitive tendering and the benefits achieved in that way. a) If the market functions well, competition may contribute to making the activities more effective and to cost savings, but there are plenty of problems in the field of social welfare and health care that are caused by market failures, such as asymmetric information; b) Services must also be ensured in situations where the service concerned only is needed for a few clients or patients; c) When a client is in need of several services simultaneously, it is vital to tailor an entirety of services according to the client’s individual needs; d) Social and health services are also developed continually so that provision of services may at the same time involve reforming and developing the service in question.” (FIN, Q13)

### *Field of Community law 3: Rules governing public-private partnerships*

This issue is taken up by only a very limited number of MS (by A, B, D, E, indirectly also by FIN, see paragraph above)

- A expresses its interest in an in-depth discussion and exchange with other MS on the effects (and limits) of applying Community law to public-private partnerships in the field of social security, based on examples from other MS. On the backdrop of the general trend of outsourcing of (ancillary) tasks – examples given are: electronic health card; IT architecture; rehabilitation centres run by private providers<sup>152</sup> – questions and challenges related to the alternative “purchase/in-house-provision” such as how to guarantee standards after privatisation and how to safeguard influence on prices (price fixing) and service delivery to insured (of a specific insurance agency) of the compulsory social security system in their view make such an exercise even more urgent.
- B expresses its interest to better understand the applicability of Community public procurement rules on institutionalised PPP (see again also in the paragraph above).
- D expresses its scepticism to that a harmonised understanding of service concession can be achieved soon, given that this had been tried in vain within the scope of the Public Procurement Directives revised in 2004, although this would appear expedient and desirable for the providers of SG(E)I. D also recalls the discouraging impact of the ECJ ruling *Stadt Halle* (C-26/03, 11 January 2005) on the establishment of public-private partnerships – in D at least – and the push towards a re-municipalisation it resulted in, suggesting this should be changed, i.a. by legislative measures.
- E criticises that the EU-level conceptualisation of public-private partnerships fails to include (existing and in their view mutually beneficial) practice of cooperation and partnership between public authorities and asks that their design become part of the (back then) on-going debates related to the homonymous Green Paper<sup>153</sup>.

### *Field of Community law 4: Freedom to provide goods and services and freedom of establishment*

Only three countries, FIN, H and L, are providing feedback to this fourth main category of Community rules relevant for SSGI:

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<sup>152</sup> A number of illustrations was provided from the sector of social security: „1) SVC GmbH: Diese Gesellschaft wurde im Zusammenhang mit der Einführung der elektronischen Krankenversicherungskarte (e-card) in Österreich gegründet (alleiniger Gesellschafter ist der Hauptverband selbst). 2) IT SV GmbH: Diese Gesellschaft wurde zwischen dem Hauptverband und den Trägern gegründet, um die IT Architektur aber auch die Infrastruktur für die Träger auf eine einheitliche Basis zu stellen. 3) Rehabilitationszentren: Bei der Gründung privatrechtlicher Gesellschaften für Einrichtungen, die bisher von den Trägern selbst geführt wurden, handelt es sich um Neuland in der österreichischen sozialen Sicherheit. Ziel ist dabei, auch private Marktteilnehmer in die Führung von Rehabilitationszentren einzubeziehen.“ (A, F5)

<sup>153</sup> “... the judgment ultimately complicates the establishment of public-private partnerships: since the ruling there has been a noticeable tendency to place public undertakings back under full public control. Public shareholders are taking back full control of public undertakings in order to secure their ‘in-house’ status. Ultimately this means that the judgment has had negative effects on PPPs.” (D, F5)

- Making reference to the Finnish employee pension, mentioned in Article 3.8 and the appendix of directive 2002/83/EC concerning life insurances and notified by FIN to the EC as a compulsory and statutory social security scheme<sup>154</sup> within the scope of Regulation (EEC) 1408/71 concerning the coordination of social security schemes, FIN recalls the lack of provisions and insofar legal clarity on how EC state aid rules (would) apply to pension insurance undertakings and their employee pension scheme. FIN identifies this as an open question also in view of cross-border provision of financial services and the freedom of establishment of foreign pension insurance providers interested in providing similar services. They clearly request that “the competition rules should not apply to the activities of an authorised pension provider in cases where the rules would prevent the pension provider from fulfilling its key task” (FIN, Q13).
- FIN also sees backwash effects from the application of Community rules in the four fields covered by the questionnaire on the implementation and use of the directive on services in the internal market 2006/123/EC of 12 December 2006.
- H clarifies that for foreign providers – called “community maintainers” in the Hungarian reply – they need to “implement the provisions pertaining to Hungarian providers with the following exemptions: a) Social service provider, social institution, child welfare and child protection service activity can be provided only by community maintainers who are established in Hungary for an economic goal; b) Some services that are provided transcending the state boundaries can be provided by a community maintainer even without being established in Hungary with an economic goal.” (H, F5)
- L wonders how to operationalise the criterion of proportionality to be respected by national measures that could restrict these freedoms and to exemplify the issue refers to the act of authorisation for a provider of SSGI in the fields of social, family and therapeutical services – would this be in compliance with Community law?

*14. Please give an indication on the debate in your country/organisation on how these difficulties should be addressed (e.g. clarification of the non-applicability of state aid rules to different social services of general interest).*

It is interesting to note that the majority of respondents – a total of 15 MS – did not answer this question without, however, explaining if such a debate exists or if they only considered appropriate not reporting back to the European Commission and the other MS about any relevant discussions and actors involved in their national context respectively.

The answers of the ten respondents to the questions what the national debate (primarily) deals with can be summarised under three headings: legal uncertainties, the application of Community law and presumed or real conflicts with national rules as well as the concept of SSGI. F mentions the setup and activities of a coalition of networks and organisations from the

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<sup>154</sup> FIN enumerates a number of features of the employee pension scheme to underpin this categorisation, such as “joint responsibility for pensions, the last institution principle, joint responsibility in case of insolvency, uniformity of pension decisions as well as other legal security factors.” (FIN, F5)

social economy and public administration – the so-called *collectif SSIG* – whereas L refers to activities of intra-governmental coordination under the auspices of the Ministry of Economy.

The aspect of legal uncertainties is highlighted by D, but indirectly alluded to by various other MS: “For years now, stakeholders in Germany have been expecting improved legal certainty and thus a higher medium-and long-term planning certainty with regard to the permissibility of state aid, to the criteria for Community law-compliant granting of compensation for (additional costs due to) the performance of delegated tasks involving public service obligations, and to Community law requirements for the delegation of public tasks to third parties.” (D, Q14). D suggests to align conflicting principles and rules on an equal footing and to abstain from a hierarchy of rules in favour of those on competition, state aid, public procurement and internal market: “The practical concordance that should be sought between internal market and competition rules on the one hand and social objectives on the other does not mean, for instance, that basic freedoms have to be pitted against social services, but rather – particularly in the light of necessities on both sides of the equation – that they should be aligned as much as possible in the context of Community law” (ibid.). E adds that it is indispensable to indicate which SSGI are "affected" by which Community rules to avoid legal uncertainty, in particular given the key importance of "Social Europe".

Six countries (BG, D, E, I, P, and ROM) mention debates on the application of Community law and presumed or real conflicts with national rules.

- In ROM they turn around state aid issues and “deals with the eligibility of units such as medical practices, private hospitals, law offices etc. for benefiting from public budget aid for the services mentioned at point 13. These difficulties should be addressed within the public-private partnership framework” (ROM, Q14).
- The same holds for BG that, however, reports on expectable future debates not reality in 2006 and in this context also refers to public-public partnerships and the aim to better involve NGOs in the service provision as well as to strengthening the role and participation of users<sup>155</sup>.
- The admissibility of state aid and the rules and modalities to follow is also an issue for the two countries on the Hispanic peninsula: E holds that the application of Community law – where they apply – should not obstruct the provision of SSGI. E suggests putting particular emphasis on an extension of the possibility of prior notification, notwithstanding the rights and obligations of state aid control by member states<sup>156</sup>. P

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<sup>155</sup> “The difficulties in application of the Community Law expected in the area of social services derive from the following: 1) provision of State subsidies for social services; 2) accessibility of the State subsidies for all national and foreign (registered in other member states) providers; 3) strong competitive pressure on the still underdeveloped social services sector managed by private entities; 4) the need for development of public-private partnerships and better involvement of the third sector and the users (financial and quality standards, activation, exchange of information, sustainability, etc.)” (BG, Q14)

<sup>156</sup> E also refers to the need to look more in detail into restrictions of the freedom to provide services and recalls that the majority of users of SSGI cannot be considered as "consumers" in the classical sense even if they can select their provider as they are, as it is spelled out by the Communication, in a position of asymmetric information.

refers to the financing of and technical support of the state to NGOs under the particular legal status of a private institution of social solidarity (in Portuguese: *Instituições Particulares de Solidariedade Social/IPSS*) where the design of the instrument of “Protocol of Cooperation” is expected to become an important element of debate<sup>157</sup>.

- I finally refers to discussions related to the tendering out of SSGI and the impact of public procurement rules as enshrined in Community law concerning the modalities and procedures of delegating services in use. I highlights recent jurisprudence of a regional court on the applicability of public procurement in the field of social services that has ruled to exclude social services from the scope of the public procurement rules due to the complex organisation of the service and the service provision. The court has also underlined the general interest and public objective and clarified that cooperatives and third sector organisations are the only addressees of this special procedure of “reserved markets”, but that the selection has to be done based on the economically most advantageous offer. I also shows as a defender and proponent of the in-house concept and explains that the Unified Legislation on Local Authorities foresees the possibility of setting up own entities, with own legal personality and accountability under the responsibility of the local authority, to deliver services on non-economic interest<sup>158</sup>.

FIN is strong on recalling difficulties with a European concept of SSGI and what it could or should mean and imply in a national context: “Problematic issues concerning the national debate: 1) the national legislation does not support the concepts of social services and social services of general interest introduced by the EU; 2) there is no definite answer which services are included in the definition of social services of general interest; 3) it is still unclear whether it will make any difference having the concept of services of general interest in the context of fundamental freedoms of the internal market: free movement of persons and services as well as competition rules; 4) it is almost impossible to distinguish economic and non-economic services; 5) it seems to be unavoidable that the EU institutions (the Court of Justice) will ultimately decide whether a particular service belongs to SSGI or not; 6) how much flexibility in defining SSGI at national or local level is possible regarding the present EU Treaty?” (FIN, Q14) They also recall a political mandate to the Finnish government by the Social Affairs and Health Committee of the Finnish Parliament to define on the basis of national needs the contents of services of general interest and how such services should be financed and organised at the national level so that they would be compatible with the EU internal market rules regarding services of general interest.

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<sup>157</sup> “Admite-se que o facto do Estado estabelecer acordos de cooperação técnica e financeira com as IPSS, em que estas recebem uma comparticipação pública pela prestação dos serviços, acordada no quadro do Protocolo de Cooperação entre o Estado e as Uniões das instituições não lucrativas e actualizada periodicamente, possa constituir um elemento importante para esta discussão.” (P, Q14)

<sup>158</sup> “L'ente locale conferisce il capitale di dotazione; determina le finalità e gli indirizzi; approva gli atti fondamentali; esercita la vigilanza; verifica i risultati della gestione; provvede alla copertura degli eventuali costi sociali.” (I, Q14)

15. Please indicate whether the questions in the Fields 2, 3 and 4 could also have significance with regard to social security schemes responding to the criteria deriving from the Poucet and Pistre case law.

The two questions under field 6 are instructive in the sense that one indirectly can learn and deduce from them that the various questions in the three fields 2 (pertinence of the characteristics identified by the Communication on SSGI to gauge their specific features as compared to other services of general interest), 3 (actual and potential use of these characteristics within MS) and 4 (expectations and preferences as to their use at EU level) actually only concerned the second type of SSGI listed in the Communication of 2006, namely personal social services.

The analysis identifies three types of answers by governments, with the first group of MS conceding (some) significance (BG, E, L, LT, LV, M), the second group of MS (B, CY, D, DK, E, GB, H, S) denying it – in particular as these governments do not see the need for further clarification as to the application of Community law from the field of competition and state aid to social security schemes – and the third group of MS avoiding a clear positioning (A, CZ, I).

Six MS (BG, E, L, LT, LV, M) concede that the questions in fields 2, 3 and 4 could also have (or as in the case of E actually has and has already had) significance for social security schemes.

- BG answers the question to the affirmative and underlines that all social services providers (state, municipalities, private providers) fulfil an exclusively social function in their activities in social services delivery as this is the case for compulsory social security schemes not exercising an economic activity.
- E underlines the conformity of the Spanish framework legislation for social security with Community rules as in its revision it has been inspired and guided by the criteria stipulated in the Poucet and Pistre ECJ rulings. The same refers to the new scheme devoted to the protection and promotion of the personal autonomy of handicapped persons which defines individual rights funded on the principles of universality, equality and accessibility and also contains language about the specific characteristics of entities implementing this piece of social legislation.
- I considers useful to continue and deepen the reflection on the Community dimension and legal framework obligatory and complementary schemes of social protection and its implications and motivates this with open questions that have come up in the context of the (back then) recent consultation on the portability of pensions.
- M sees the link and relevance of these questions in the field of social security schemes, too, as the criteria derived from the Poucet and Pistre ECJ judgements – the reference to the principle of solidarity and that social security schemes pursue a social objective<sup>159</sup>

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<sup>159</sup> The ECJ “also lays down that social security schemes are intended to provide cover for all the persons to whom they apply, against the risks of sickness, old age, death and invalidity, regardless of their financial status and their state of health at the time of affiliation and that insured members with very modest resources are exempted from the payment of contributions.” (M, Q15)

– are all reflected in the organisational characteristics as identified in the Communication on SSGI.

A slightly bigger number of MS (B, CY, D, DK, E, GB, H, S) explicitly or indirectly disapprove of the relevance of questions 15 and 16 under field 6 to the questions asked for under fields 2, 3 and 4.

- B, CY and D would like to see the jurisprudence of the ECJ deriving from the Poucet and Pistre case law confirmed. It excludes social security schemes based on national solidarity, pursuing exclusively social objectives and of an entirely non-profit making character from the application of Community competition law and also denies their character as undertakings.
- D underlines that access and benefits to social security schemes must be guaranteed to all, regardless of individual risk and that (in the German case, but also as general characteristics) contributions and benefits are largely stipulated by law and based on the one hand on the financial capability of the insured persons, on the other on her/his individual need. In its answer D also attaches great importance to recalling the rationale behind the design of mandatory social security schemes highlighting the role of financial solidarity and a redistributive logic<sup>160</sup>.
- DK sees – at first sight – a limited relevance for (benefits of) the unemployment insurance fund individual membership to a specific fund can be freely chosen and is voluntary. However, given exactly for these features the potential conflict of two legal systems due to the criterion of mandatory membership – of key importance in the Poucet and Pistre case law – cannot arise for this branch of the Danish social security system. Insofar DK sees no need for further clarification as to the relation of social security legislation and Community rules in the fields of and as the three MS referred to above rejects significance of the questions listed under fields 2, 3 and 4 with regard to social security schemes.
- E, GB and H do not consider necessary any clarification as to the scope and implications of the Poucet and Pistre case law of the ECJ. GB underlines that this case law applies to a system logic (relevant e.g. for France as in the lawsuit in question) different from their own that is regulated by statute and under the responsibility of the relevant ministries, but that nevertheless “some of the criteria identified are present in the UK’s system e.g. social function, national solidarity and statutory benefits to meet certain social need” (GB, Q15).

Having received only a limited number of answers and opinions from the stakeholders they consulted – some of which of the opinion that the criteria defined for personal social services could also apply to care services delivered in the household of the person needing care

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<sup>160</sup> “There are two reasons why “participation” is not voluntary: to protect individuals from the consequences of errors of judgment in assessing their own need for precautionary planning and financial provision in a long-term perspective (the ‘protective function’), but above all to promote and guarantee solidarity between all participants. Solidarity in the sense of a specific redistribution of means is at the very core of the concept of social insurance.” (D, Q15)

regulated in social security (health insurance) legislation and financed by social security institutions – A does not take a position. The same holds for CZ informing their lack of experience with the ECJ case law in question, but also does not expect future conflicts with national and EU legislation in the field of social security.

16. Please indicate whether there is a need for further and specific clarification on the application of Community rules as enumerated in Field 5 with regard to these social security schemes.

The questions listed under field 5 deal with experiences of the MS with the application of Community law in the fields of public procurement, public-private partnerships, the freedom to provide goods and services and freedom of establishment and state aid and with unclarity as to the conditions and scope of their application. Question 16 is answered to the affirmative by about a quarter of MS (A, CZ, I, LT, M) whereas one third of the MS (BG, D, DK, F, FIN, L, LV, P) doesn't see a need for further clarification, showing a strong overlap with MS that also have given a negative answer under question 15.

MS falling under the first category see a need of clarification with regard to EU competition law and in particular concerning issues of out-sourcing of tasks by social insurance system (A). B reiterates its demand to have the *Pistre* and *Poucet* ECJ ruling confirmed across all social security schemes to achieve a high level of legal security for these institutions, their management and the policy makers. M sees the main purpose of further clarifications in the prevention of misunderstandings on the applicable Community law and its impacts.

For countries falling into the second group E recalls the very logic of the ECJ case that given the non-economic nature of social security schemes they are qua definition outside the scope of application of the Community competition, state aid, public procurement and internal market rules: "*Par définition, l'activité non économique des régimes de sécurité sociale relevant de la jurisprudence «Poucet et Pistre» place ces régimes et les organismes qui en ont la charge en dehors de l'application de ces règles.*" (E, Q16). FIN warns against a contradiction between the Community rules regarding the characteristics of services of general economic interest and the national law with regard to the organisation and financing of social services of general interest that needs to be avoided. P underpins its claim for no further need of clarification by recalling key design principles of the national social security schemes such as solidarity, guarantee of pre-defined entitlements and financial redistribution also organised and channelled via the national budget<sup>161</sup>.

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<sup>161</sup> "Na organização do sistema de segurança social e dos regimes que nele se enquadram está implícita e explícita quer a utilização do princípio da solidariedade a vários níveis, quer a garantia de determinados direitos às pessoas e beneficiários. A gestão dos regimes e prestações é, em geral, feita por entidades públicas dotadas de autonomia administrativa e financeira e o financiamento está, no regime contributivo a cargo das entidades empregadoras e dos trabalhadores, ou só destes, no caso dos

17. Which expectations do you have concerning future steps at Community level?

When reading through the MS's replies one immediately becomes aware of the diversity of expectations in view of future policy initiatives and/or legislative proposals. They range from an exchange of information and good practice to the call for a framework directive on SGEI underpinned by (a) sectoral directive(s) on social services (B) or at least the latter instrument alone (B, E). Five MS (GR, H, IRL, PL, SLO) abstain from noting down expectations in view of future steps, priorities and the main directions of initiatives on SSGI at EU level.

The following paragraph looks into the main expectations towards future policy making and legislation at EU level in the field of SSGI. The answers both comprise requests or wishes by national governments in view of the policy instruments, the key issues and main orientations.

- An important number of MS (A, B, D, E, FIN, GB, P, S) highlights the existing (formal) distribution of competences between the national and the European level and calls for the recognition in writing and for the precedence of the principle of subsidiarity by European institutions, in particular the European Commission. They also express the conviction that the competence for the definition, organisation and financing of social services should stay with the competent authorities of the MS. A has the expectation that this could and should be stipulated at European Treaty level and refers to article III-122 in the draft European Constitution on the competences of local and regional authorities where this could be anchored. P recalls that it “is the exclusive competence of the member states, taking full account of principle of subsidiarity, to define the scope of SSGI (principles and objectives), the systematisation of public service obligations and general interest missions and the organisational principles” (P, Q17). S in this context in particular highlights the decision making power regarding the financing of SSGI in underlining that “it is important that social services continue to be a national responsibility in the future and that the member states are free to build up and finance their systems as they themselves think fit” (S, Q17) and reiterates the general statement that “Member States must remain free to manage their own social services in the light of national policy goals and traditions” (ibid.) E interestingly underlines that the clarification of schemes or rules applicable to SSGI, in particular Community law, will not translate into unjustified and disproportionate limitations of the application of Community law.
- Another expectation and request reiterated here by A, B, FIN and L is the reduction of legal uncertainties to a substantial extend. For B more legal certainty is the most important criterion to be fulfilled when assessing the need and quality of future proposals. In supporting this objective L recalls that this means the need to find equilibrium between regulation (at EU level) and subsidiarity and competence to take a decision for a specific form of organisation, regulation, delivery and financing (in the field of MS). FIN comes up with detailed suggestions on how to make use of the

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*trabalhadores independentes e, no regime não contributivo, é suportado por transferências do Orçamento do Estado aplicando-se o princípio da redistribuição”. (P, Q16)*

organisational characteristics identified to frame and “contain” the scope and impact of Community Law<sup>162</sup>.

- Different MS (including A and GB) would subscribe to a statement expressed by E that in case of conflict between community competition and internal market law and national legislation related to SSGI the higher good has to prevail; this undoubtedly is the provision of social services linked to the guarantee of fundamental rights, in particular for disadvantaged persons at the risk of social exclusion. E also claims then such a constellation should have the effect to make a change the basic principles governing the functioning of the internal market and their application in the field of SSGI. This all has to be read on the backdrop of the claim of the Spanish government to define a common reference frame for accessibility, quality and sustainability of SSGI to allow them to develop according to the specific characteristics of these services and to guarantee security and confidence of the users. GB states that “if there is a significant public interest, then public policy objectives need to be upheld.” (GB, Q17). They also introduce the role of public services and quasi markets and advocate for the entitlement of MS to autonomous policy priorities and decisions: “The UK Government will want to ensure that it can continue to follow its principles for public service delivery and reform. The UK will want to maintain its freedom to use non-government provision, and to make use of limited and managed market forces, whilst being able to set specific policy objectives and support those objectives” (ibid.)
- Finally, there is a country cluster with an unknown common denominator (BG, CY, CZ, EST, LT, M, P) advocating in favour of an exchange of information and good practice and policy coordination. BG wishes the development of “framework definitions of the most important characteristics, principles and instruments for development of social services, but with respect of national responsibilities in the area of social services” (BG, Q17). For CY the exchange should focus on tools and good practice in achieving and improving the quality of SSGI. CZ would like to see an information exchange and mapping exercise on the impact of Community Law on social services, coordinated by the European Commission. P would like to see continued and systemised the work towards a definition of SSGI comprising and enumerating as exhaustively as possible their organisational characteristics.

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<sup>162</sup> “In the further work it is important to focus on those joint criteria that enhance legal certainty and on measures to ensure the right of the member states to decide on their social and health care provision at national level. The defined characteristics of services of general interest could be considered to be used more comprehensively in further proceedings that aim at harmonising national-level social services of general interest with the Community competition and state aid rules. Central characteristics include a definition of the exact nature of the service, availability of the service for all inhabitants in a specific geographical area as well as objective and transparent economic conditions that enable the provision of the service regardless of whether the service is provided by the public sector, a private undertaking or an organisation (NGO).” (FIN, Q18)

Particular issues are put forward by single MS or varying duo constellations of MS:

- A links the proclaimed need to reduce legal uncertainties to the call for a better distinction of economic and non-economic activities, in general, but in particular also in view of welfare state benefits, a demanded supported by BG.
- B and E are the two MS asking for legislative initiatives in the form of a framework directive on SGEI underpinned by a sector directive on SSGI or sectoral directives without an overarching frame (B). The objective is clearly to maintain equilibrium between the fundamental social rights as recognised by the European Treaty and the principles of free movement and competition<sup>163</sup>. They again underline their opinion that the type or nature of the service provider needs to be taken into account and reflected in the relevant Community Law as this should be the case for the competence of public authorities to define the organisation of SSGI. The approach insofar aims at safeguarding national prerogatives and competences including the political choices, not to hand over more rights or influence to the Community level in these regards. B continues with a detailed description of the contents of such a sectoral directive on SSGI<sup>164</sup>. E shares these requests with the same rationale and priorities and refers to an earlier government reply in a consultation on the future of the internal market<sup>165</sup>. E also puts particular emphasis on the fact that such a sector specific legal framework should clearly not apply to social security schemes.
- Again BG and also LT are united in their call to include social partners in the ongoing and future work on SSGI and to foresee a role for social dialogue: “Most important in this process is a strengthening of social dialogue in order to find common understanding and expectations of social partners, providers and other concerned parties. This could be

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<sup>163</sup> “Plusieurs options peuvent être envisagées. L’une d’elle serait d’adopter une directive cadre pour les SIEG et des directives par sous-secteur (santé, services sociaux, ...). Une autre possibilité est de prévoir des directives adaptées pour chaque secteur. Quel que soit le dispositif, l’intention est de maintenir un équilibre entre les droits sociaux fondamentaux reconnus par le Traité et les principes du Traité en matière de libre circulation et de concurrence.” (B, Q17)

<sup>164</sup> “Nous attendons une directive cadre sur les services sociaux qui reconnaisse la spécificité de ceux-ci, établisse l’équilibre entre les droits sociaux et les principes du marché intérieur et de la compétitivité et ne contrevienne pas la capacité d’organisation des SSIG par l’autorité publique, notamment au moyen de 1) la prestation directe par l’Etat ou indirecte au travers d’un acteur public ou privé, d’un regroupement d’acteurs publics, ou d’un partenariat public privé; 2) la délégation de la satisfaction d’un besoin collectif par un acte général et ou spécifique à certains opérateurs, notamment ceux dénués de buts lucratifs, le cas échéant en dérogeant à certaines règles régissant les marchés publics et les concessions; 3) l’imposition par l’autorité publique de régimes d’autorisation et de contrôle sur la capacité réelle du prestataire d’accomplir sa mission d’intérêt général; 4) la possibilité d’octroyer des droits exclusifs et spéciaux; 5) la possibilité de modalités de financement permettant l’accomplissement effectif de la mission (subvention à la prestation ou au prestataire).” (B, Q17)

<sup>165</sup> “Comme elles l’ont souligné dans leur contribution à la consultation publique de la Commission européenne sur l’avenir du marché intérieur, les autorités françaises soutiennent «le principe d’une démarche communautaire sur les services sociaux d’intérêt général ainsi que l’opportunité d’un cadre législatif spécifique pour de tels services». a) Il importe en effet de garantir à ces services un cadre juridique sécurisé et adapté. b) Ce cadre législatif spécifique devra s’inscrire dans une approche visant à assurer la liberté des autorités nationales et locales à déterminer les mission et obligations d’intérêt général et à concilier l’exigence de subsidiarité en matière de choix d’organisation, de mode de financement et d’évaluation avec le respect du marché intérieur et de la concurrence lorsqu’il y a lieu.” (E, Q17)

achieved by active discussions and consultations with social services providers, beneficiaries, NGO, municipalities, etc.” (LT, Q17)

- D is not alone in explicitly suggesting that “sector-specific Community law provisions should come into play only in the case of services of general economic interest that have Community-wide relevance because of their scope, size and structural interconnection. One such derogation allowed by ECJ case law concerns compensation in the case of cross-border purchasing of health services” (D, Q17), although this reflection is shining through other replies, too.
- A somewhat singular position that can be explained by the context of the ongoing transformation of economy, society and the social protection systems, but already building on first experiences with consequences of this change is supported by EST. The Estonian government favours the involvement of private actors or a cooperation of private businesses and local authorities in the provision of social services as only such a system is seen the mainspring to achieve effectiveness and best possible price and quality which could not be achieved in a system of state monopoly. They, however, warn against minimising the influence and power of the state as “the provision of social services only pursuant to the principles of over-the-counter market in bringing state participation to a minimum may bring forth a situation where the state with its different levels is not capable of guaranteeing the availability of services to clients in the best possible way.” (EST, Q17)
- FIN could imagine (to support) the development of guidelines and recommendations on SSGI at a European level.
- GB is against new law-making in the field of SSGI at EU level when declaring: “We do not wish to see EU-level criteria applied to Member States social policy goals, beyond those that already exist in the Treaty” (GB, Q17). On the same line is D and “warns against any initiative to come up with a sectoral directive on health services as this would, at the current state of the debate, restrict or anticipate future steps in the field of social services” (D, Q17).
- M establishes a link between the policy process on SSGI and the (revised) Lisbon Agenda and would like to see the exchange of information maintained for and co-ordinated with its social dimension and reporting systems (including benchmarking).

*18. In case further steps should be considered, what could be the content, but also the advantages or disadvantages of these, including in particular intensified exchange of information, open method of co-ordination, Commission’s Communications but also a Framework Directive for social services?*

When asked about possible or needed future steps, a range of answers has been received by slightly more than half of the MS enquired.

- One issue mentioned is the elaboration, at EU level, of general principles, aims and guidelines of offering social services (EST; in a similar manner by LV). LV would like to see a focus on modalities of financing in this regard. According to PL such an exercise

should lead to an unambiguous determination of specificities of social services and criteria which will decide whether they are of an economic or non-economic nature. ROM links this with the idea of establishing “common indicators meant to assure the evaluation and monitoring of the social services system development, as well as of the funds affected to this destination.” (ROM, Q18)

- Another “evergreen” referred to here by EST, IRL and S is the need for more legal clarity, e.g. as to “the relationship between EU internal market rules and the rights of every member state to regulate the specific issues of social service provision on national level” (EST, Q18) and to the applicability of Community rules on state aid and internal market on social services (S). For S the “question is also whether social services differ so much from other services that they should be specially regulated.” (S, Q18). FIN would like to see a focus on those joint criteria that enhance legal certainty and on measures to ensure the right of the member states to decide on their social and health care provision at national level and makes a suggestion how to proceed in this direction<sup>166</sup>. A expresses its openness to possible future legal initiatives as long as they would contribute to increase the pre-visibility and legal certainty, e.g. in the field of state aids for governments, financing agencies, providers and users<sup>167</sup>.
- E also sings from this hymn-sheet but goes further in recalling the need to have a specific legal framework for SSGI as part of a broader one for SGEI as a *conditio sine qua non* as otherwise other activities, as useful they might be, will stay insufficient<sup>168</sup>.
- GB supports a purely sectoral approach: “Any issues requiring clarity or legislation should be dealt with on a sectoral basis, mindful of the need to respect subsidiarity and member states’ freedom to organise their social services as they see fit”. (GB, Q18). They also warn against the use of this exercise of the SPC enquiry “to develop an EU-wide definition of social services or ... to bring national social services within a framework of cross-sectoral service obligations at EU level (excepting the rules

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<sup>166</sup> “The defined characteristics of services of general interest could be considered to be used more comprehensively in further proceedings that aim at harmonising national-level social services of general interest with the Community competition and state aid rules. Central characteristics include a definition of the exact nature of the service, availability of the service for all inhabitants in a specific geographical area as well as objective and transparent economic conditions that enable the provision of the service regardless of whether the service is provided by the public sector, a private undertaking or an organisation (NGO).” (FIN, Q18)

<sup>167</sup> „Bei der Frage, ob auf europäischer Ebene weitere rechtliche Schritte hinsichtlich der sozialen Dienstleistungen von allgemeinem Interesse geplant werden sollen, sieht Österreich mittelfristig einer rechtsverbindlichen Initiative mit Interesse entgegen. Es sollten jedoch auch nähere Untersuchungen erfolgen, was genau mit welchen Rechtsinstrumenten erreicht werden kann. Wenn diese zu mehr Rechtssicherheit im Interesse der Staaten, der Leistungserbringer aber auch der Nachfrager beitragen können, sind diese Schritte unter Beachtung der Subsidiarität grundsätzlich zu befürworten. So könnte z.B. untersucht werden, ob ein Rechtsinstrument möglich ist, das klarer absteckt, unter welchen Bedingungen Beschränkungen des Wettbewerbsrechts für soziale Dienstleistungen von allgemeinem wirtschaftlichem Interesse von Artikel 86 Abs. 2 EG gedeckt sind.“ (A, Q18)

<sup>168</sup> “Les travaux programmés par la Commission (études, rapports, échange d’informations) sont utiles mais insuffisants. Seul un cadre législatif spécifique pour les SSIG, faisant partie du cadre juridique communautaire sur les SIEG, est en mesure d’apporter les clarifications juridiques souhaitables.” (E, Q18)

governing economic activity).” (ibid.) As D they also oppose EU-level legislative initiatives: “Without prejudicing the final outcome of the consultation, we currently see no evidence of any significant EU-wide problems, and no evidence that tests of competence, subsidiarity, proportionality or Better Regulation would support an EU-wide legislative solution.” (ibid.)

- GR sees a probable need of (sector-specific) legislative measures to keep SSGI outside the scope of “community legally binding commitments, which are not consistent with the nature of the said services, where the application of the community legal framework would create problems”. (GR, Q18).
- I would like to see a reflection of the strong link to territory and persons of any intervention in the context of social assistance and personal social services in the future work on SSGI and to see promoted the concept of social citizenship<sup>169</sup>.
- P also does not want to exclude a future reflection and assessment on the need of a legal instrument for SSGI at EU level and expects that relevant material could be developed in the context of the OMC<sup>170</sup>.
- PL is the only country to mention the link to the 2006 Directive on Services in the Internal Market: “The exclusion of social services from the scope of application of the directives on services in the internal market and separately the financial services related to workers pensions, raises further doubt and calls for their precise clarification, also for defining the scope of exclusions. The debate should focus on the clarification of the provisions of the directive.” (PL, Q18)
- A is the only country here to mention the need of policy development by considering and strengthening the link between social and health services. In this context they mention the issue of cross-border care in the context of the exercise of the fundamental freedoms of the internal market and advocate for a joint treatment of both fields when it comes to the application of Community law as health care is part of social protection/security<sup>171</sup>.

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<sup>169</sup> „Tale orientamento sembrerebbe particolarmente opportuno per assicurare un bilanciamento al carattere fortemente territoriale e personale dell'intervento, che se mancante di indirizzi generali anche con specifico riferimento alle procedure di affidamento, di determinazione dei criteri di efficienza ed efficacia, di qualità e monitoraggio rischia di non raggiungere l'obiettivo principale di un efficace sistema di diritti sociali: di coniugare l'uniformità e indivisibilità della cittadinanza sociale con la valorizzazione delle esperienze territoriali e di prossimità e partecipazione attiva della cittadinanza stessa.“ (I, Q18)

<sup>170</sup> “Porém, não se exclui a possibilidade de reflexão e avaliação sobre a necessidade de desenvolver um quadro/instrumento legislativo comunitário. Os trabalhos levados a cabo no âmbito do Método Aberto de Coordenação, bem como a resposta dos EM ao presente questionário poderão proporcionar matéria relevante para esta reflexão e estudo.” (P, Q18)

<sup>171</sup> „Bei den weiteren Arbeiten ist auch die Beziehung zwischen den Sozialdienstleistungen und den Gesundheitsdienstleistungen wichtig. Sollte z.B. daran gearbeitet werden, die vom EuGH in den Rechtssachen Kohll & Decker und den folgenden Urteilen herausgearbeiteten Grundsätze der Patientenmobilität in einem Rechtsakt zu kodifizieren, sollten auch die gleich gelagerten Aspekte der sozialen Sicherheit mit behandelt werden. So besteht aus österreichischer Sicht kein Unterschied zwischen Personen, die sich zum Zwecke einer bestimmten medizinischen Behandlung (z.B. Operation) in einen anderen Mitgliedstaat begeben (Kernbereich der Patientenmobilität) und Personen, die sich z.B. privat eine Maßnahme der beruflichen Rehabilitation in einem anderen Mitgliedstaat ‚einkaufen‘. Für diese Leistungen, die zur sozialen Sicherheit und nicht zur Gesundheit zählen, gelten dieselben Grundsätze der Dienstleistungsfreiheit wie bei der Patientenmobilität. Dies spricht aus österreichischer Sicht für eine gemeinsame Behandlung.“ (A, Q18)

- B finally sent in a bullet list with eight possible issues or fields of action that takes up many points mentioned by other MS, but as only MS i.a. adds that EU initiatives should help to promote the role of third section/not-for-profit organisations as providers of SSGI<sup>172</sup>.

There are differences between MS if and as to how the Open Method of Coordination (OMC) should be used for further policy development at EU level. In addition, MS distinguish between certain features of an OMC they would consider useful in the field of SSGI and other they would not like to see. The answers are listed in an order of decreasing support for the use of OMC or use in a more restrictive manner.

- Basically all MS that answer to Q18 – amongst them A<sup>173</sup>, B<sup>174</sup>, CY, CZ, DK, FIN, GB, I, IRL<sup>175</sup>, LT, LV and P – would support its use according to the two main objectives the OMC had been originally conceived for, the exchange of information and good practice as well as the development of common objectives.
  - CZ recalls that in addition to communalities there are specific national situations and challenges “caused by demographic, developmental, or other trends and it is these trends that each country takes into account when it comes to its social service scheme” (CZ, Q18).
  - FIN defines objectives for the use of the OMC in this context: “The fundamental aim should be to ensure well-functioning, affordable and high-quality services of general interest to all European citizens, regardless of domicile or economic resources.” (FIN, Q18).

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<sup>172</sup> “1) Visualiser et reconnaître le champ des SSIG; 2) Valoriser les opérateurs sans but lucratif et solidaire; 3) Renforcer la dimension sociale de l’Union européenne; 4) Enrichir les opérateurs SSIG et les EM par une diffusion d’informations, de pratiques d’expériences, d’activités innovantes, d’initiatives reproductibles développées au sein de l’UE; 5) Renforcer la sécurité juridique dans le secteur des SSIG par la définition de principes, de valeurs, de pratiques, etc.; 6) Assurer la continuité et le développement des activités sociales solidaires dans l’UE qui ont pour impact de renforcer la cohésion sociale; 7) Développer un champ spécifique d’évaluation des SSIG; 8) Permettre le développement des SSIG dans un espace sécurisé pour rencontrer les défis démographiques notamment.” (B, Q18)

<sup>173</sup> „Die Anwendung der Methode der offenen Koordinierung im Sinne des Erfahrungsaustausches und gegenseitigen voneinander Lernens (Sammeln von Informationen und best-practice-Modellen) wird unterstützt. Allenfalls könnten die Aspekte der politischen Bedeutung der sozialen Dienstleistungen und auch die laufende Modernisierung in den laufenden Prozess der Nationalen Aktionspläne zur ‚Inclusion‘ aufgenommen werden.“ (A, Q18)

<sup>174</sup> “La méthode ouverte de coordination a déjà produit de bons résultats dans d’autres domaines et mérite certainement d’être envisagée si elle peut également procurer à terme la sécurité juridique nécessaire aux Etats membres et à leurs prestataires de services. L’inconvénient de cette méthode est son approche surtout globale/stratégique sans imposer concrètement l’application de règles juridiques, mais plutôt la formulation et la poursuite d’objectifs communs, ‘peer pressure’, mutual learning, et (pour autant que cela soit autorisé) ‘naming and shaming’ sur la base par exemple de classement d’Etats membres en fonction des ‘benchmarks’ quantifiés convenus.” (B, Q18)

<sup>175</sup> “... social services of general interest is too broad and uncertain a category to warrant specific treatment under the OMC process. We do not believe that an OMC process which is characterised by setting common objectives and reporting by Member States would be useful in this field. It should however, be possible to raise specific issues relating to SSGIs within the existing OMC process where these are relevant to the objectives set down for social protection and social inclusion.” (IRL, Q18)

- GB suggests that “within SPC’s remit we would consider the streamlined OMC on social policy to be adequate for sharing models on social services.” (GB, Q18), but regrets that “some of the best areas for such exchanges that are relevant to SSGIs are not relevant to the SPC, e.g. current work in improving best practice in public procurement” (ibid.). I supports the use of the OMC, but concludes that a sector-specific directive is needed to address in a coherent way the still too many open legal questions and problems<sup>176</sup>.
- L sees the potential to work towards the elaboration of qualitative indicators for SSGI, but then highlights the risk that adding SSGI under the OMC would mean to overcharge it with too many topics and insofar to go against the very objective of the process of streamlining the OMC on social protection and social inclusion.
- LV would like to see a focus on the financing mechanisms of SSGI.
- E sees a potential for exchange on the concept of SSGI and for the supervision of the implementation of the 2006 Directive on Services in the Internal Market and possible interfaces to EU-level SSGI initiatives. But before making more extensive use of the OMC – they even mention information on state aid and contractual arrangements<sup>177</sup>, in which case any assessment needed to be coordinated with national competent authorities – and taking related decisions, E would like to see clarified the scope and objectives of such an endeavour.
- DK and EST would not support setting up common goals or objectives via the OMC. The former find “no basis for setting up common goals be it neither of quantitative nor qualitative nature” (DK, Q18), the latter “do not think it is necessary to settle common goals and objectives on European level in the framework of open method of coordination” (EST, Q18). IRL shares their view (cf. footnote 360).
- B, FIN, GR and L state that the OMC cannot be the appropriate instrument to come up with more legal clarity. FIN holds that “We cannot, however, reinforce the status and legal security of services of general interest with OMC measures in circumstances where the EC internal market and competition rules to a large extent pose provisions for market-based services or forms of subsidies” (FIN, Q18).
- CY is not alone in warning against an important administrative burden: “An Open Method of Coordination does not seem appropriate given the high administrative burden required for this process as well as the simplified administrative procedures promoted by the Council (streamlining of social protection and social inclusion)”. (CY, Q18).

<sup>176</sup> “In tutta la complessa materia dei servizi sociali di interesse generale è opportuno, per ora, procedere con le forme del metodo aperto di coordinamento. Ma si dovrebbe trovare il modo di rendere mano a mano più ‘stringenti’ le indicazioni che scaturiscono dall’OMC, e comunque saggiare la possibilità di una vera e propria Direttiva che riduca i margini di incertezza, ancora troppo larghi.” (I, Q18)

<sup>177</sup> “El Método Abierto de Coordinación (MAC) pretende establecer objetivos comunes e intercambiar información. En materia de SSIG, debería establecerse previamente si se pretende intercambiar información sobre definiciones y sobre implicaciones para el Derecho comunitario y la supervisión; por ejemplo, según el tipo de SSIG. ¿Incluiría información sobre las ayudas de Estado a posibles SSIG y sobre la contratación pública relacionada? ¿Iría orientado a la supervisión de la aplicación de las libertades y el Derecho de Competencia? En este último caso debería contarse de forma destacada con la valoración de las autoridades nacionales de competencia.” (E, Q18)

- D opposes the use of the OMC in the context of the SSGI process, if it is not for a restricted number of cases with structured exchanges of information and experience with other member states on individual jointly agreed issues” (D, Q18). D refuses the idea of cross-country evaluations in the field of SSGI an OMC could lead to: “Sector-based evaluations in the area of services of general economic interest must be restricted to Community areas for which the European Union is responsible and tie in with the objectives established in the sector-based Community regulations for these services (particularly with regard to opening up the market and to universal service obligations). Social and health services do not, however, constitute one of these Community areas.” (ibid.) Other reasons given by D for not wanting to go any further are the distribution of competences as well as a disagreement with the definition of common objectives and with obligatory reporting procedures under the OMC: “Taking into consideration the variations of precise procedures in which the Open Method of Co-ordination (OMC) has been or is being applied to various fields of policy – including social protection –, applying it to social services of general interest is neither necessary nor appropriate to reach the desired objectives. Moreover, implementing the OMC for a particular field of policy implies, inter alia, the definition of common objectives and (with the co-operation of relevant stakeholders in the member states) the elaboration of national reports covering Community-wide indicators (and leading to an EU-level reporting process). These elements of the OMC alone clearly show the conflict with the current system of competences in the social and health area.” (ibid.)

Only 5 MS share their opinion in view of another communication. After an in-depth review of the SSGI in the MS CY could imagine such an instrument, but rather calls it “a report giving specific examples of services in which competition rules do not apply either because services do not constitute economic activities or because they cover a small geographical area”. (CY, Q18). CZ is also open to the idea to clarify future important issues. DK also supports the idea for the EC to issue “from time to time to produce communications or reports on recent case law as well as experience reaped through the open method of coordination” (DK, Q18). FIN seems some leeway to lay down criteria on SSGI in a Communication – fully respecting the MS’s competences and responsibilities – to prevent the ECJ from doing it as a consequence of lacking clarity<sup>178</sup>. L is on the same line as DK in welcoming a communication announced in the 2007 Work Programme of the EC to systemise the application of Community Law on SSGI and expresses its hope to come to clear and final results with such a tool by 2008.

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<sup>178</sup> “The Commission Communication states that each member state can decide for itself what it means by services of general interest. The member state can also decide how the service provision is arranged, that is, whether the services are provided by the public sector or whether they are purchased from a private service provider. At the same time it should be borne in mind that the member states must adhere to the principles of openness and transparency and that the status of services of general interest must not be misused. As a last resort, the characteristics of a service are resolved by the EC Court of Justice. Clear criteria would improve the predictability of the Court rulings and thus reduce the need for case law. On the other hand, detailed criteria should not diminish the possibility to reach solutions based on national public interest regarding the organisation or financing of social welfare and health services.” (FIN, Q18)

More than one third of the respondents express their views on the benefits and disadvantages of elaborating a Framework Directive on SSGI – or such an instrument for SGI, as the question has been read by MS's governments.

- B is in favour of a Framework Directive on SGI and expects increased legal certainty from having this tool.
- Along this line FIN is positive about considering the idea to give primacy to political decisions compared to ECJ rulings on modalities of organisation, regulation, delivery and financing of SSGI.
- In addition to supporting the use of the OMC, I sees the necessity of having a sector-specific directive to address in a coherent manner the in their view still too many open legal questions and problems (see also footnote 361).
- L dresses a list of criteria or desiderata as to the contents and objectives of a possible Framework Directive on SSGI which includes 1) the recognition of the specific nature of SSGI; 2) the reaffirmation of the role, competence and responsibility of MS for the definition and organisation of SSGI; 3) the clarification of the applicability of Community rules and 4) the guarantee of a reliable and transparent legal framework fully respecting the principle of subsidiarity<sup>179</sup>. But they also see some downsides, such as 1) the establishment of a fragmented and incoherent system of rules for SGI and 2) the lacking legal basis<sup>180</sup>. This assessment is echoed by M that does not consider the legal basis to be sufficiently stable to elaborate “a framework directive on services of general interest other than to address where there might be distortions in the free provisions between Member States and with regard to the financing of these services” (M, Q18).
- D is strongly opposed to a sectoral legal instrument on SSGI. In this context they refer “to the Commission's own admission in the White Paper that the consultation process on the Green Paper failed to demonstrate any added value of a horizontal framework as

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<sup>179</sup> “Si une telle directive était considérée comme adéquate, elle devrait: 1) reconnaître la nature et le rôle spécifiques des services sociaux, 2) réaffirmer la responsabilité des Etats membres dans la définition et l'organisation de ces services, 3) clarifier la position de ces services par rapport au droit européen, notamment en matière de concurrence, d'aides d'état et de marchés publics, 4) assurer un cadre juridique stable et transparent dans le strict respect du principe de subsidiarité énoncé à l'article 5, 2e alinéa du traité CE. Avantages : En tant que droit positif, une telle directive aurait pour effet de limiter les incertitudes qui pèsent actuellement sur le développement de ces services. La création de plus de sécurité juridique est d'ailleurs avancée par le Parlement européen dans une résolution adoptée le 27 septembre 2006 et appelant à l'élaboration d'une directive spécifique aux services sociaux d'intérêt général.” (L, Q18)

<sup>180</sup> “1) Les services d'intérêt général pouvant être vus comme formant un ensemble, le traitement isolé des services sociaux d'intérêt général peut être considéré comme inadéquat (au profit d'une directive cadre portant sur tous les services d'intérêt général et complétée par des directives sectorielles). 2) Sous 15., le premier questionnaire sur les services sociaux d'intérêt général (2004) posait la question suivante: «A un certain stade et sans préjuger du droit d'initiative de la Commission, des actes législatifs pourraient-ils être considérés comme un moyen approprié pour les prochaines étapes (dans l'hypothèse où une base juridique valable peut être trouvée)?» Il appert qu'à ce jour, alors que le traité établissant une Constitution pour l'Europe (qui pourrait apporter une base juridique nouvelle du fait de ses articles II-96 et III-122) n'est pas en vigueur, la question de la «base juridique valable» pour une directive reste sans réponse.” (L, Q18)

compared to the current sector-specific approach. Horizontal regulation does not do justice to the specific characteristics of the individual service sectors, particularly in the social and health area; it would therefore have to be kept very general, and sectoral provisions would continue to be necessary.” (D, Q18). D is fully supported by E that cannot see any additional benefit stemming from a framework directive. H joins into this group stating that “Hungary deems that the predominance of the national competences is important due to the special sensitivities of the social area. In our view the existing pluralities of social services among the MSs must be respected, especially if they are not in contrast with competition rules.” (H, Q18)

- DK doesn’t want to see sector-specific rules in order to allow application of horizontal rules on SGI.
- GB is negative highlighting that given “the wide diversity of SSGIs and their link to national traditions, it is difficult for the UK to envisage how such an instrument could be drafted and it could prove extremely difficult to reach agreement on one in a form that allows for its effective implementation in practice.” (GB, Q18)

*19. Please indicate the expectations with regard to the monitoring and dialogue procedure in the form of biennial reports announced by the Communication?*

As a rule reactions of MS are supportive of a reporting and monitoring system as announced in the Communication, including the biennial reports on SSGI.

There is no country in principle rejecting the suggested follow-up, however quite some express scepticism, concern and reservations as to the direction of the exercise, as to be found in the replies of D, FIN, GB and L.

The more detailed account per country or country group follows below:

- A is amongst the MS expressing its principle support to a monitoring and dialogue procedure in the form of biennial reports announced, as do BG, D, H, IRL, LT, LV, M, P, S and SLO
- D is of the same opinion but warns against duplicating other reporting obligations when elaborating the planned biennial report on SSGI and expresses the wish that “the proposed approach should not be allowed to obstruct efforts to create a leaner and simpler (“streamlined”) reporting system. In particular, no action should be taken to disturb the system of competences and the distribution of responsibilities described above” (D, Q19). GB joins D in this concern – as does M, warning against excessive administrative burdens for MS – and also makes the link between the planned biennial report on SSGI and the OMC in the field of social protection: “We note that, as the Communication positions these reports alongside the OMC, there is a commitment to minimise bureaucracy and burdens on member states” (GB, Q 19). Both MS are also on one line as to the need of more clarification on the purpose and later use of the exercise

and GB asks the Commission to “clarify what use they intend to put the information within these reports”.

- E supports both a collection of data and the biennial report on SSGI. For both reporting process the French government, however, requests a role for MS to define the scope of information and data to be furnished by the service providers (and then channelled via the MS’ governments to the EU). There level of involvement (and interest) would depend on the prospect of having efficient, relevant and objective reports and a reporting system. F makes detailed proposals as to the stakeholders to be involved in the data collection, data provision and reporting process (providers, social partners, user organisations) as well in view of the contents of a future biennial report on SSGI<sup>181</sup>. E not least in this context underlines they would like to see the monitoring and reporting exercise as part of a framework directive on SSGI that would also contain a section dealing with evaluation<sup>182</sup>.
- IRL advocates for an independent monitoring and analysis process as a useful method of expanding knowledge, to be used a basis for a more in-depth analysis of specific issues such as trends in financing and organisation of such services. They add that “an intensified exchange of information could allow member states and users and providers to participate in exchanging good and bad experiences.”
- Another aspect is put forward by B, underlining it would welcome a clarification of Community Law and ECJ jurisprudence relevant for SSGI to stay high on the agenda of relevant follow up on SSGI at EU level, a statement to be also found in the contributions by LV, PL and S. Also E is on this line, holding that the main focus of the biennial report should be the continued identification of characteristics of SSGI and of the impact of rules and procedures of Community law and explaining that a two-year reporting cycle is not corresponding to the three-year OMC cycle in the fields of health and pensions.
- FIN clearly and in detail warns against further pushing a competition or internal market orientation in the field of SSGI and insofar also in view of future monitoring and reporting tasks: “We would like to underline that in connection to competition and internal market issues, the welfare tasks of the public sector should be respected. In Finland these tasks include among others explicit obligations that emphasise equity and universalism. Expanding the internal market to cover the entire service sector poses a great challenge for welfare policies and residence-based social security systems. Accordingly, even

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<sup>181</sup> “L’instauration d’un rapport bisannuel qui devrait reposer sur les rapports périodiques des Etats membres ainsi que les contributions des partenaires sociaux, des organisations d’usagers et des organisations de prestataires: ... il devrait ainsi comporter: une analyse de la réglementation et de la jurisprudence communautaires survenus pendant la période de référence; des présentations d’initiatives et de procédures nationales ou locales, en conformité avec la réglementation européenne pour chacun des secteurs d’activités considérés dans les différents Etats membres ; le suivi du rôle des SSIG et de leur poids économique dans les secteurs d’activité concernés. Ainsi conçu, le rapport bisannuel de la Commission contribuerait à enrichir le débat européen à partir d’une connaissance affinée de la réalité prévalant dans les Etats membres. Il amènerait probablement à constater que les régulations publiques accompagnent des SSIG de qualité qui s’adaptent constamment aux évolutions sociales”. (E, Q19)

<sup>182</sup> “Cette évaluation participerait au suivi de l’application de la «directive cadre» relative aux SSIG que la France appelle de ses vœux. Elle permettrait les adaptations ultérieures que cette «directive cadre» nécessiterait”. (E, Q19).

national definitions of EU policies should pay particular attention to ensuring that measures aiming to increase the efficiency of internal market measures do not make it impossible to consider the social policy dimension at the national level.” (FIN, Q19) Then the Finnish government adds a long “wish list” for the orientation of future work and initiatives on SSGI at EU level: “During the consultation process particular attention should be paid to the following issues: 1) clearer concepts (non-profit service vs. SSGI); 2) clearer goals regarding the outcome of the process; 3) analysis of the contradictions (national system / EU-legislation, social rights / market freedoms); 4) analysis of the jurisdictional space for deviation from the internal market rules and EU competition law; 5) proper level of subsidiarity (political issue); 6) need to maintain the current welfare regimes in different parts of Europe (political issue); 7) scrutinize the principle of proportionality and its application; 8) determine the factors that ought not to be used as potential competitive advantages in the field of social services of general interest” (ibid.).

- L also is in favour not to speed up things and to first prove the added value of further initiatives at EU level, including in the monitoring and reporting dimensions, before planning and committing to further steps.
- LV and ROM would wish to have seminars to exchange on good practice as to SSGI organisation, regulation, delivery, financing and evaluation.

## Annexes

### Annex 2: SHSGI/SSGI questionnaires addressed to Member States and to relevant stakeholders

#### Survey 1: SPC Questionnaire 2004 for consultation of Member States and stakeholders to prepare the Communication on Social and Health Services of General Interest

##### Field 1 – Overview of the national SGI

1. What are the general characteristics of the national social SGI<sup>183</sup> with regard to e.g. the following points?
  - Organisation, design and structure (geographical, market structure, administrative level);
  - financing (e.g. contributions, direct funding via government budget, payment of remuneration for the service, charity donations);
  - service provider (e.g. state and local authorities, public enterprises, public-private partnership, voluntary non-profit organisations, role of volunteers, private enterprises);
  - definition of tasks/obligations (what are these tasks/obligations and how are these laid down, i.e. contract, law or other);
  - quality standards.
2. Please indicate whether and if so how these characteristics are likely to develop and change in the coming years. This with a view of the modernisation of these services (taking into account developing users' needs, quality standards and (financial) efficiency).
3. Are there examples of social SGI which use market mechanisms to fulfil their tasks; what could be learnt from these experiences?

##### Field 2 – Definitions of social SGI

4. Is there at national level a notion or definition of social SGI or social services generally?
5. It has been argued that social SGI are different to other SGI – Do you agree with this? Is a more detailed analysis of these possible differences –especially in relation to networks industries<sup>184</sup> – a way forward to gain more certainty?
6. In case you feel that social SGI are different to other SGI please indicate what could then be the elements for a description at European level of these specificities of

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<sup>183</sup> This is the field where it is impossible to give an overview covering all different aspects. So it might be useful to place the services in comparable groups and treat these groups together. Member States are invited to concentrate on those services which seem most important or where the biggest uncertainty is noticeable.

<sup>184</sup> In this context reference has to be made to the Commission Staff Working Paper “Horizontal Evaluation of the Performance of Network Industries providing Services of General Economic Interest” (SEC(2004) 866), which gives a good overview of the different aims and the performance of these services.

social SGI's, taking into account the diversity of general interest missions related to social services in the Member States and the general principles<sup>185</sup>?

Could the elements worked out in the “Key issues” of the Conference “Social Services of General Interest in the EU” (28 and 29 June 2004) be a good base for this description<sup>186</sup> in the European context? Which elements have to be added; which have to be amended?

7. Which of the different sectors outlined under Field 1 should have priority for the examination at European level?

### **Field 3 – Experience with EC internal market or competition rules**

8. Please indicate for the services identified under question 7 with regard to the EC rules listed below (see also background document) whether:
  - a) it is established (in case-law or by way of Community law) that these services fall outside the scope of these rules
  - b) it is established (in case-law or by way of Community law) that these services are falling within the scope of these rules
  - c) it is unclear if these rules apply to these services, there is a need for clarification ("grey zone")
    - Internal market rules;
    - Art. 81 and/or Art. 82 EC;
    - Art. 86 EC;
    - Art 87;
    - Public procurement rules;
    - External trade negotiations.
9. Please describe experiences concerning the influence of these EC rules on social SGI (may be “good” or “bad” examples; e.g. have these rules enabled the efficient provision of certain services or have they limited the freedom to realise national social policy goals)?
10. Are there examples where the mentioned EC rules were taken into account in advance when planning or reforming national social policy?

### **Field 4 – Further steps at European level**

11. Are there specific fields of European law and activities which necessitate further clarification with regard to their impact on social SGI (see also question 8), like e.g.:
  - Internal market rules;
  - Art. 81 and/or Art. 82 EC;
  - Art. 86 EC;
  - Art 87;
  - Public procurement rules;
  - External trade negotiations.

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<sup>185</sup> These principles are *inter alia* quality, availability, equal access, universality, affordability, continuity, participation, transparency).

<sup>186</sup> Document in Annex 2 of the conference documentation mentioned, cf. ISS 2004.

12. Should the work to be carried on only concern social services of general economic interest and concentrate on e.g. competition rules and certain internal market rules or should social SGI both of an economic or non-economic nature be subject for further work?
13. What should be the concrete aim (especially concerning further steps) of the Communication of the Commission on social SGI including health services?
14. Do you consider the use of the open method of co-ordination (existing or new) an appropriate means for further steps? If so, what should be the concrete task of this method? (e.g. common objectives, exchange of good practices, evaluation etc.)
15. Could at some stage and without prejudging the right of initiative of the Commission, legislative acts be considered as an appropriate means for further steps (under the assumption that a valid legal base can be found), and if so what should be the concrete task of these instruments (Directives, Regulations, Recommendations)?  
The following additional questions seem to be possible:
  - Should these legal acts limit the scope of EU rules and their application to social services?
  - Should these legal acts establish common standards for social services, allowing EU rules, like the Internal Market rules, to be applied while taking into account fully the social policy goals?
  - Should there be legally defined criteria, e.g. criteria concerning quality, affordability, accessibility or solidarity at European level?

### Introductory remarks

In the White Paper on Services of General Interest (SGI) the Commission has announced a special Communication on social SGI including health services. A close co-operation with the Member States via the SPC and the High level group on health services and medical care (hereafter "High level group") was explicitly envisaged. This questionnaire aims at collecting input from the SPC and the High level group for the preparation of the Communication.

It has to be recalled that the preparation of the Communication to which this questionnaire contributes cannot replace the work already ongoing in special fields at different levels. Therefore the position of social SGI in relation to

- the planned Directive of Services in the Internal Market must be taken care of in the relevant Council formation;
- the planned package on State aid after the Altmark-decision of the ECJ must be taken care of in the consultation process started by the Commission;
- the evolution of the public procurement provisions with regard to Public-Private-Partnership-Models must be taken care of in the framework of the procedure of consultation started by the Commission in the Green Paper on this topic.

As this exercise is only a first step it will not be possible – especially taking into account the very vast field of different SGI in the Member States – to achieve on the basis of the replies to the

questionnaire an overall description of all social SGI in the EU. Member States are therefore invited to choose the fields which seem to be the most important with a view to their national organisation and in particular the fields that contain "grey zones" not clarified within the EU legal framework and where there may be an impact of Community rules (eg. on the instruments for the delivery and financing of these services).

The following sectors<sup>187</sup> could be relevant for replying to the questionnaire:

- Statutory social protection schemes
- Supplementary social protection schemes: income protection;
- Health and social care services;
- Support for families: child care;
- Services to promote social integration and to support people in difficulties (e.g. homelessness, drug dependence, disability, mental or physical illness);
- Social housing
- Other services which could be relevant in the framework of the current questionnaire (i.e. services with similarities to social and health services or linked to these like employment: access to placement services or education and training)

A "Background Document – Legal Framework" is sent out together with this questionnaire. This document describes the different legal aspects of EC rules which might affect social SGI or could affect these in future following evolutions in the organisation of service provision. These elements, as well as future developments (e.g. the need to adapt services to the changing needs of users, budgetary constraints) could be taken into account by the Member States when replying to the questionnaire.

Member States are invited to provide only one coordinated reply to the questionnaire. Every Member State is entirely free to decide on the way the answers to the questionnaire are prepared and coordinated. Nevertheless it should be taken into account that social partners and NGOs play an important role in this area. Member States might therefore want to envisage an involvement of these partners at national level.

The following questionnaire aims to assist the Member States in providing all relevant elements of information and of concern in this area. It is therefore more a guidance for national statements than a strict obligation to answer all the questions. The questions in the different "Fields" moreover do not preclude additional remarks not directly linked to one of the questions, when this is felt important by the Member State. Member States are invited to provide the information as much as possible in a comprehensive way.

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<sup>187</sup> It is clear that some of these fields go beyond "social protection" in the narrow sense. But nevertheless e.g. also education and training or access to placement services could form part of the social services (e.g. vocational training, training of handicapped persons) or have similarities to social protection which could justify a discussion in the reply to the questionnaire. It is entirely at the discretion of Member States to decide which areas they want to cover in their reply to the questionnaire.

## Survey 2: SPC Questionnaire 2006 for consultation of Member States and stakeholders

### Field 1 – Description of social services

1. Please indicate whether the description of the social services as provided by the Communication (see above under "scope") is appropriate and adequate, also with a view to social security schemes responding to the criteria deriving from the *Poucet and Pistre* case law.
2. If you consider that the description could be improved or other (type of) services should be added, please provide for concrete drafting suggestions.

### Field 2 – Pertinence of the characteristics

3. Please indicate whether the characteristics identified by the Communication are pertinent to gauge the specific features of social services of general interest as compared to other services (of general interest)?
4. Please provide, if needed, for concrete drafting suggestions for the formulation of the characteristics as they are currently presented by the Communication.
5. Are there characteristics to be added? Please provide for concrete drafting suggestions and examples of services concerned by these characteristics.
6. Please provide as a maximum 3 relevant examples of social services representing one or more of the (additional) characteristics which could be taken as good example for the special nature. Please indicate which concrete element of the characteristics is clearly deducible from the example chosen.
7. How could these characteristics relate to the exclusion of specific social services from the scope of the Services Directive (Art. 2(2)(j) read together with the relevant Recital 27) as politically agreed on 29 May 2006 (Doc. 100003/06)<sup>188</sup>?

### Field 3 – Use of characteristics by Member States

8. Please give a definition of what the "general interest" is in your country, and specify in which way (at national, regional or local level) it is defined or is intended to be defined in the future.
9. How can the characteristics be used by the Member States, at national, regional or local level, when defining the particular general interest mission of a social service and determining the arrangement for its performance and organisation?
10. Have there been problems in the past with giving a concrete mandate to fulfil the particular general interest mission of a social service?

### Field 4 – Use of characteristics at EU level

11. Please indicate how (e.g. in a binding way or not), in your view, the organisational characteristics could/should be used at EU level (e.g. agreed checklist) in order to verify whether for a specific social service the applicable Community rules are respected?

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<sup>188</sup> Text available at the following website: [http://ec.europa.eu/internal\\_market/services/services-dir/proposal\\_en.htm](http://ec.europa.eu/internal_market/services/services-dir/proposal_en.htm)

### **Field 5 – Experiences with the application of Community law**

The Communication and its Annex provide for a further clarification on the conditions of application of Community rules and principles to social services in particular in the following fields:

- Public procurement
  - Public-private partnerships
  - Freedom to provide goods and services and freedom of establishment
  - State Aid
12. Please indicate whether difficulties (may) still arise and if so in which legal areas and for which type of social services.
13. Please provide for concrete examples and experiences to illustrate these difficulties.
14. Please give an indication on the debate in your country/organisation on how these difficulties should be addressed (e.g. clarification of the non-applicability of state aid rules to different social services of general interest).

### **Field 6 – Social security schemes responding to the criteria deriving from the *Poucet and Pistre* case law**

15. Please indicate whether the questions in the Fields 2, 3 and 4 could also have significance with regard to social security schemes responding to the criteria deriving from the *Poucet and Pistre* case law.
16. Please indicate whether there is a need for further and specific clarification on the application of Community rules as enumerated in Field 5 with regard to these social security schemes.

### **Field 7 – Future steps at Community level**

17. Which expectations do you have concerning future steps at Community level?
18. In case further steps should be considered, what could be the content, but also the advantages or disadvantages of these, including in particular intensified exchange of information, open method of co-ordination, Commission's Communications but also a Framework Directive for social services?
19. Please indicate the expectations with regard to the monitoring and dialogue procedure in the form of biennial reports announced by the Communication.

### Survey 3: SPC Questionnaire 2008 for consultation of Member States and stakeholders

#### Commission Staff Working Documents on State Aid and Public Procurement rules

- (1) Do you have any general comments on these documents? Are they widely known to relevant stakeholders in your Member State? Are you aware of any feedback from these stakeholders?
- (2) Do you have further concrete examples which help to illustrate the application of Community rules to SSGEI?
- (3) Do you have new questions which, in your opinion, should be added to the two documents? New questions could for instance be related to problems encountered.

#### Questions identified during the SPC working group meeting of 6 and 7 March 2008 as issues on which further feedback from interested parties would be welcomed

##### Questions on public procurement rules

- (4) Are concessions and Institutionalised Public-Private Partnerships (IPPP) frequently used in the social sector? If you have experience with the utilisation of concessions and IPPP in the field of social services, please provide examples. If, as far as IPPP are concerned, you have the impression that they are not frequently used in the field of SSGI, please explain the reasons why this is so.
- (5) In the area of SSGI, what is the legal framework/what are the practices regarding public-public cooperation (e.g. cooperation among two municipalities)? What would be the added value of public-public cooperation in the field of SSGI? Are there in your Member State specific legal frameworks which promote or impose public-public cooperation for certain SSGI or under certain circumstances?
- (6) In the light of the Case 70/95 Sodemare<sup>189</sup>, is there any legislation in your Member State which reserves certain activities in the social field to non-profit organisations? If not, do you intend to draft such legislation? In which sectors in particular and for which reasons have you adopted or do you intend to adopt such legislation?
- (7) Social services are listed in Annex II B of Directive 2004/18/EC<sup>190</sup> and therefore only some detailed principles of the Directive and general principles of the Treaty apply to them. In this light, what are the public procurement rules applicable to SSGI in your Member State? What are the experiences with public procurement procedures in the field of SSGI in your Member State (e.g. concerning the quality of the services offered)?

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<sup>189</sup> Case C-70/95 Sodemare [1997] ECR I-3395.

<sup>190</sup> 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).

## Questions on State aid rules

### *"De minimis" Regulation*

- (8) To your knowledge, is the "de minimis" Commission Regulation<sup>191</sup> frequently used for SSGI? Can you define the kind of SSGI for which it is used? (NOTA BENE: the "de minimis" Commission Regulation establishes that financial support granted to an undertaking and inferior to € 200.000 over a three years' period does not constitute State aid).

### *"SGEI" package<sup>192</sup>*

*This part only aims to obtain additional information on SSGI when available, in order to better illustrate the special situation of this sector in the preparation of the planned SPC report on SSGI. It is not intended to replace or duplicate the ongoing evaluation process of the SGEI package. It has to be stressed once again that those are two different processes.*

- (9) Act of entrustment:
- Form: can you explain under which contractual/legal form(s) SSGI have been entrusted to the various providers active in the field?
  - Providers:
    - How frequently is the provision of SSGI entrusted to non-profit providers<sup>193</sup>? How frequently is the provision of SSGI entrusted to for-profit providers? (if possible, please provide estimations/percentages).
    - Does your answer to the previous question depend on the sector at issue? (please specify the sector(s) if possible).
    - How frequently is the provision of SSGI entrusted to providers that also carry other non-economic services or activities of general interest but not other commercial activities? (if possible, please provide estimations/percentages).
    - How frequently is the provision of SSGI entrusted to providers that also carry other commercial activities? (if possible, please provide estimations/percentages).
- (10) Arrangements to avoid overcompensation: please explain whether the arrangements that have been made to meet the requirements of the Commission Decision of 28 November 2005<sup>194</sup> and to ensure that the costs incurred are not overcompensated have raised problems in the field of SSGI.
- (11) In which areas of SSGI is there a risk that public financing exceeds the thresholds provided in the Commission Decision of 28 November 2005? (NOTA BENE: the

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<sup>191</sup> Commission Regulation n° 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 28.12.2006.

<sup>192</sup> The SGEI package is composed notably by the Commission Decision 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 undertaking entrusted with the operation of services of general economic interest, OJ L 312, 29.11.2005 and by the Community Framework for State aid in the form of public service compensation, OJ C 397, 29.11.2005.

<sup>193</sup> Please note that the mere fact that an entity is non-profit making does not mean that the activities it carries on are not of an economic nature (see notably the reply to question 2.5 of the Staff Working Document on State Aid).

<sup>194</sup> See footnote 7 above. [note by the author: This is the reference in the questionnaire, above it is fn 462]

Decision exempt from notification annual compensation inferior to 30 million € for beneficiaries with an annual turnover inferior to 100 million €. For hospitals and social housing, the exemption is valid without ceilings.

- (12) Have you encountered any problem related to the application of the Commission Decision or the SGEI Framework<sup>195</sup> of 28 November 2005 in the field of SSGI? If yes, please provide details.

### **Questions concerning the application of other competition and internal market rules**

- (13) Do you have any comments concerning the application of other competition rules to SSGI?
- (14) Do you have any comments concerning the application of other internal market rules to SSGI?
- (15) Are there any other points you would like to raise?

### Introductory remarks to questionnaire

In the past, the SPC has already played an active role in analysing the impact on social services of general interest (SSGI) of EC rules on internal market and competition. In November 2007, the Commission issued a Communication on services of general interest<sup>196</sup> (SGI), which builds on a large consultation process and to which the SPC's contribution was significant. The Communication is accompanied by two Staff Working Documents, dealing respectively with State aid<sup>197</sup> and public procurement<sup>198</sup> rules.

The present questionnaire is in line with the SPC's continued interest in SSGI. It has to be read in the context of the 2007 Communication, which acknowledges the difficulties experienced by public authorities and service providers, in particular at the local level, in understanding and applying Community rules and expresses the Commission's commitment to provide better explanations and practical guidance on how to apply these rules. In this context, the Commission has created the 'Interactive Information System', designed to provide topical answers to specific questions relating to the application of EU rules to SGI.

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<sup>195</sup> See footnote 7 above. The Framework applies to public service compensations exceeding the thresholds set in the Decision and specifies the conditions under which such compensations can be declared compatible with Article 86(2) of the EC Treaty. Such compensations however must be notified to the Commission. *[note by the author: This is the reference in the questionnaire, above it is fn 462]*

<sup>196</sup> "Services of general interest, including social services of general interest: a new European commitment", COM(2007) 725 final of 20 November 2007.

<sup>197</sup> Commission Staff Working Document "Frequently asked questions in relation with Commission Decision 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 undertaking entrusted with the operation of services of general economic interest, and of the Community Framework for State aid in the form of public service compensation", SEC(2007) 1516 of 20 November 2007.

<sup>198</sup> Commission Staff Working Document "Frequently asked questions concerning the application of public procurement rules to social services of general interest", SEC(2007) 1514 of 20 November 2007.

Contrary to the previous questionnaire of the SPC which was necessary to collect information on the different SSGI in all Member States, the purpose of the present questionnaire is rather to collect information on how Community rules are applied in the various social sectors, and to identify specific points which – in the opinion of the body giving the answer – still give rise to uncertainties and questions. The SPC intends to issue a report to the Council in December 2008 taking into account the comments and answers received on the basis of this questionnaire.

The first part of the questionnaire concerns the two Staff Working Documents which accompany the 2007 Communication and invites SPC members and stakeholders to provide general comments and feedback on these documents. A list of the main issues that are tackled in these documents is annexed to the questionnaire. If need be, it can be used by SPC Members and stakeholders answering to the questionnaire as a guidance to quickly identify the areas of the documents which are of most relevance or interest to them.

The questions identified in the second part of the questionnaire have emerged from a meeting of the informal working group of experts appointed by SPC members, which was held on 6-7 March, as issues on which further feedback of any interested body would be very useful for the preparation of the report.

The third part of the questionnaire allows SPC members and stakeholders to present their experiences and comments concerning the application, in the social field, of Community rules other than State aid and public procurement rules for which further practical guidance might be necessary.

Some SPC members have already provided comments in the context of the preparation of the present questionnaire. These comments will be taken into account when drafting the report. These members do not need to reiterate their comments but can complete them if they so wish.

In replying to the questionnaire, SPC members and stakeholders are kindly asked to provide as many concrete examples as possible, drawing on the experience on the ground in their Member State in order to demonstrate any difficulties encountered. Please keep in mind that you need to summarise the legal framework concerning the organisation, provision and financing of SSGI only insofar as this is needed for your reader to understand your question, your example or the answer that you are providing.

Please note that this exercise does not interfere with or replace any other on-going processes, as e.g. the report to be submitted by Member States for December 2008 on the implementation of the so-called SGEI package (see references below) or the work going on in the groups concerning public procurement.

It follows from the nature of this questionnaire that it is up to the body answering it to decide on which point it wants to react and what points seem of no relevance to it (it is not obligatory to answer all the points raised).

Member States are invited to provide only one coordinated reply to the questionnaire. Every Member State is entirely free to decide on the way the answers to the questionnaire are prepared or coordinated. Nevertheless it should be taken into account that social partners and NGOs play an important role in this area. Member States might therefore want to envisage an involvement of these partners at national level.

## Annex to questionnaire

### Main issues tackled in the two Staff Working Documents

#### Commission Staff Working Documents on Public Procurement rules

- (1) direct provision of SSGI (this issue is dealt with in answers 1.1. and 1.2. of the Staff Working Document);
- (2) in-house provision (this issue is dealt with in answer 1.2. of the Staff Working Document);
- (3) externalised provision (this issue is dealt with in answers 2.1. to 2.11. of the Staff Working Document);
- (4) notion of public service contracts (this issue is dealt with in answer 2.1. of the Staff Working Document);
- (5) concessions (this issue is dealt with in answer 2.1. of the Staff Working Document);
- (6) set of rules of the public procurement Directive (Directive 2004/18/EC, OJ L 134, 30.4.2004) which apply to SSGI (this issue is dealt with in answer 2.1. of the Staff Working Document);
- (7) services with no cross-border interest (this issue is dealt with in answers 2.1. and 2.3. of the Staff Working Document);
- (8) principles of transparency, equal treatment and non discrimination (this issue is dealt with in answer 2.4. of the Staff Working Document);
- (9) how to reflect, when drafting technical specifications, concerns related to the specificities of the service such as quality requirements, minimum duration of contract, familiarity with the local context, selection of not-for-profit providers... (these issues are dealt with in answers 2.2., 2.6., and 2.7. of the Staff Working Document);
- (10) inter-municipal cooperation (this issue is dealt with in answer 2.9. of the Staff Working Document);
- (11) Public-private partnership (this issue is dealt with in answer 2.10. of the Staff Working Document);
- (12) interaction public procurement/State aid rules (this issue is dealt with in answer 2.11. of the Staff Working Document).

#### Commission Staff Working Documents on State Aid rules

- (13) notion of undertaking/economic activity (this issue is dealt with in answers 2.1. to 2.5. of the Staff Working Document);
- (14) notion of affectation of trade between Member States (this issue is dealt with in answers 2.9. and 2.10. of the Staff Working Document);

- (15) possibility to apply also for SGEI/SSGI the "*de minimis*" Commission Regulation, establishing that financial support inferior to € 200.000 over a three years' period does not constitute State aid (Commission Regulation n° 1998/2006, OJ L 379, 28.12.2006) to SSGI (this issue is dealt with in answers 2.7. and 2.8. of the Staff Working Document);
- (16) criteria developed in the Altmark ruling ((2003) ECR I-7747), meeting which a public service compensation does not constitute State aid (this issue is dealt with in answers 3.1. and 3.2. of the Staff Working Document);
- (17) utilisation of vouchers (this issue is dealt with in answer 2.6. of the Staff Working Document);
- (18) application of the 2005 SGEI package defining conditions for State aid to be considered as compatible with the Treaty. The package is composed notably by the Commission Decision of 28 November 2005, OJ L 312, 29.11.2005 (hereafter, 2005 SGEI decision), and by the Community Framework, OJ C 397, 29.11.2005 (hereafter, 2005 SGEI Framework). (this issue is dealt with in answers 3.3. to 3.8. of the Staff Working Document);
- (19) act of entrustment (this issue is dealt with in answers 5.1. to 5.6. of the Staff Working Document);
- (20) parameters for cost compensation (this issue is dealt with in answers 6.1. to 6.11. of the Staff Working Document);
- (21) accounts separation (this issue is dealt with in answers 6.4. and 6.5. of the Staff Working Document);
- (22) respect of the autonomy of service providers (this issue is dealt with in answer 5.6. of the Staff Working Document).

## **Survey 4: Questionnaire 2006 under the Study on SHSGI in the EU**

### **1. Employment trends in social service sectors**

1. Please describe the overall evolution of employment in the social services sectors that you are concerned with. On which data on employment trends in social and health services do you base your assessment?
2. Are staff shortages (current shortages or expected shortages in the foreseeable future) a concern in any of the social sectors? If yes, please specify.
3. What measures, if needed, are taken or planned to overcome these shortages? (E.g. training, recruitment of foreign born personnel, improved working conditions or better pay.)
4. What is known about the relative wage levels comparing staff working in social services with staff in other sectors? If there is a wage gap, is there any evidence that it has widened or narrowed over the past five years?

### **2. The legal regulations and institutional framework of social services**

#### **Changes in the mode of organisation and provision**

5. If and when public tendering procedures are used or when the service provision is delegated by public authorities, are specific quality criteria of a social nature applied, such as social clauses in view of specific groups of persons in need or in order to safeguard the employment of vulnerable persons? Are any other standards set, such as standards for staff qualification or other professional standards? Please give examples of such criteria/standards for the sectors you are concerned with and refer to the administrative procedures or documents where those are specified.
6. Did evaluations of such processes of delegating services already take place? If this is the case, what were the purposes? Are the results of such evaluations published? If yes, what conclusions can be drawn?

#### **Examples of innovative practice in the legislative procedure, regulatory design and implementation**

7. Please name at least two examples of innovative practice for the way legislative procedure and regulatory design have been undertaken, such as successful market regulation of social services or reactions to ECJ decisions and the like. Please specify why – and from what perspective (public authorities, stakeholders, broad public) – they are perceived as good practice that would be of particular relevance for an exchange between EU Member States.

### **3. The processes of modernisation and changes at work**

8. What are the experiences with the application of regulatory or market mechanisms? Please rate the relative importance of regulatory mechanisms (by using the drop-down menu) from 1 (“very important”) to 5 (“of no, or very little importance”).

<i>Type of regulatory or market mechanism</i>	<i>Sector</i>				
	<i>LTC</i>	<i>SI</i>	<i>LM</i>	<i>CC</i>	<i>SH</i>
Regulatory mechanisms used to insure the equilibrium between supply and demand: service provision on quasi markets/introduction of market-based regulatory mechanisms, regulated by public authorities comprising					
• the introduction of accreditation and monitoring mechanisms for institutions providing social services					
• privatisation of service delivery					
• the introduction of full payment by beneficiary/user (for some services) or partial cost-sharing for services provided under public programmes					
• Planning					
Use of market mechanisms, concerning					
• public procurement procedures					
• outsourcing (of accessory or intermediary services, etc.)					
• introduction of innovative modes of service provision or financing (e.g. by means of voucher systems or personnel budgets)					
Public-private partnerships (PPP), i.e. task sharing with a private partner (including social economy operators) in view of generating general interest-related advantages and benefits					
Beneficiaries/users' participation in service definition					

*Note: When elaborating on concrete issues in the following, please refer to elements from the list above but also to criteria closely linked to general principles such as accessibility, availability and universality, territorial coverage, continuity, affordability (price regulations), quality (quality requirements), user (and consumer) protection, transparency.*

### **The driving forces behind the processes of modernisation and change**

9. Please provide information on the main rationale(s) or driving force(s) behind the general developments and shifts specified above. Please rate the relative importance of regulatory mechanisms (by using the drop-down menu) from 1 ("very important") to 5 ("of no, or very little importance").

<i>Type of driving force</i>	<i>Sector</i>			
	<i>LTC</i>	<i>SI</i>	<i>LM</i>	<i>CC</i>
Demographic changes				
Budgetary constraints of public authorities and/or social				

insurance agencies				
Introduction of new public management concepts				
Evolving relationship between public authorities and non-state service providers (based on contracts, with stronger focus on accountability, efficiency, effectiveness and their control)				
Organisational restructuring (e.g. in the form of integrated services)				
Stronger concern for taking into account user interests and user choices				
Giving more weight to participatory processes				
EU legal and political context				
Evolving concerns/demands (e.g., support to family/informal carers, integrated approach,...)				
Other(s) (please specify)				

Please comment on most important issues: \_\_\_\_

10. Are there modernisation trends that are (at least partly) due to or substantially influenced by the current and evolving legal and political framework at EU level? If this is the case, which specific issues and/or sectors are in particular concerned?

#### **Examples of innovative practice in modernising and reform of social services**

11. Please provide at least 3 examples of innovative practice for the modernisation and reform of social services in your country other than quality initiatives described below under Section 4. Please specify why they are perceived as good practice that would be of particular relevance for an exchange between EU Member States. Please provide examples and relevant documentation (e.g. on reforms or evaluation procedures).

#### **4. Strategies for improving quality**

12. What are current national/regional/local quality development/quality assurance initiatives applied by public authorities and/or private providers in the area of social care services?

13. Which criteria/standards that are applied in existing accreditation mechanisms and public procurement regulations do reflect the specific characteristics of SSGI?

14. In which way are quality assurance initiatives promoted? (E.g. by legal regulation, incentives or requirement to participate in public tendering)

15. Are all providers (public, non-profit, for-profit) treated equally? (E.g. do public providers have to fulfil the same accreditation mechanisms as private providers?) Is there scope for considering differences in the conditions (for instance in terms of size of relevant organisations)?

16. Which organisations/stakeholders are/were involved in developing quality development initiatives? (E.g. have accreditation mechanisms been developed together with providers/user groups?)

17. Is there a national or regional system of social or territorial planning in your country to assess needs, shortcomings in service provision and funds available, and to invest in innovative types of supply? If this is the case, how is this planning process being organised and which stakeholders are involved? For which social services is this the case?

### Examples of innovative practice of quality initiatives

18. Please name at least 3 examples of innovative practice in quality assurance and/or quality development in your country. Please specify, why they are perceived as good practice that would be of particular relevance for an exchange between EU Member States. Please provide examples.

## 5. The impact of Community rules

### Impact on the way in which social and health services of general interest are defined

19. Are there issues and/or cases where Community rules had an impact or where you foresee that these will have an impact on the definition and/or the realisation of public service obligations?

Field of Community rules	SHSGI in general	Per sector				
		LTC	SI	LM	CC	SH
<i>Competition</i>						
1) Anti-trust rules (Art. 81 and 82 EC Treaty)	<input type="checkbox"/>					
2) Public enterprises, services of general economic interest (Art. 86 EC Treaty)	<input type="checkbox"/>					
3) State aid rules (Art. 87 and 88 EC Treaty)	<input type="checkbox"/>					
<i>Public procurement (when delegating the provision of SHSGI, in view of the selection of the service provider and of the services to be provided)</i>						
1) Public (works, supply, service) contracts	<input type="checkbox"/>					
2) Service concessions	<input type="checkbox"/>					
PPP	<input type="checkbox"/>					
<i>Internal market</i>						
1) Free movement of users/patient mobility	<input type="checkbox"/>					
2) Freedom to provide services	<input type="checkbox"/>					
3) Freedom of establishment	<input type="checkbox"/>					

<i>Other relevant principles of the EC Treaty: equal treatment, non-discrimination, proportionality, transparency</i>	<input type="checkbox"/>					
<i>Other(s) (please specify)</i>						
	<input type="checkbox"/>					
	<input type="checkbox"/>					

Please tick the corresponding cells in the table .

Please name and elaborate on a few relevant cases: \_\_\_\_

### Impact on the organisation of social and health services of general interest

20. Are there cases in which Community rules have influenced the way SHSGI are organised, regulated, delivered, financed or evaluated? Please specify which are the relevant Community rules, how these have influenced the way SHSGI are organised, and for which sector(s)? How has impact been perceived?

21. Have existing modes of provision comprising the supply of services next to one another by public, for-profit and not-for-profit providers been legally scrutinised with respect to any of the following:

<i>Aspects for which existing modes of provision legally have been scrutinized</i>	<i>SHSGI in general</i>	<i>Per sector</i>				
		<i>LTC</i>	<i>SI</i>	<i>LM</i>	<i>CC</i>	<i>SH</i>
Freedom of establishment of non-national providers	<input type="checkbox"/>					
Freedom of provision of services (possible limitations to access the market because of accreditation mechanisms)	<input type="checkbox"/>					
Freedom of provider choice for users/patients	<input type="checkbox"/>					
Free movement for users/patient mobility	<input type="checkbox"/>					
Possible state aid issues (see competition between different types of providers, including volunteers of a publicly subsidised non-profit organisation)	<input type="checkbox"/>					
Public procurement mechanisms in case of outsourcing with respect to transparency (namely objective, non discriminatory criteria that are fully specified in writing in an advertisement procedure)	<input type="checkbox"/>					
Reduced VAT rates	<input type="checkbox"/>					
Others (please specify)						
	<input type="checkbox"/>					
	<input type="checkbox"/>					

Please tick the corresponding cells in the table .

Please name and elaborate on a few relevant cases: \_\_\_\_

22. If yes, what are the outcomes of such an analysis of legal compatibility with European Community legislation and what problems are foreseen?

23. Are there cases in which Community rules restrict(ed) or impede(d) the mode of organisation – this comprises selection of provider; as well as delegation of task(s) and public service obligations – of SHSGI, or lead/led to inefficient choices? (This refers e.g. to a segmentation or departmentalisation of service provision). Please illustrate with examples.

24. Is there evidence on how Community rules and European Court of Justice case law have already affected (or most probably will affect) the relationship between public authorities and private providers (including not-for-profit operators) of SHSGI?

### Impact on the financing of social and health services of general interest

25. Are there cases in which Community rules restrict(ed) or impede(d) the mode of financing of SHSGI or lead/led to inefficient choices? Please illustrate with cases or situations already experienced and comment on them.

Field of Community rules	SHSGI in general	Per sector				
		LTC	SI	LM	CC	SH
<i>Competition</i>						
1) Anti-trust rules (Art. 81 and 82 EC Treaty)	<input type="checkbox"/>					
2) Public enterprises, services of general economic interest (Art. 86 EC Treaty)	<input type="checkbox"/>					
3) State aid rules (Art. 87 and 88 EC Treaty)	<input type="checkbox"/>					
<i>Public procurement (when delegating the provision of SHSGI, in view of the selection of the service provider and of the services to be provided)</i>						
1) Public (works, supply, service) contracts	<input type="checkbox"/>					
2) Service concessions	<input type="checkbox"/>					
<i>PPP</i>	<input type="checkbox"/>					
<i>Internal market</i>						
1) Free movement of users/patient mobility	<input type="checkbox"/>					
2) Freedom to provide services	<input type="checkbox"/>					
3) Freedom of establishment	<input type="checkbox"/>					
<i>Other relevant principles of the EC Treaty: equal treatment, non-discrimination, proportionality, transparency</i>	<input type="checkbox"/>					
<i>Other(s) (please specify)</i>						
	<input type="checkbox"/>					
	<input type="checkbox"/>					

Please tick the corresponding cells in the table .

Please illustrate with cases or situations already experienced and comment on them: \_\_\_\_\_

26. Are there characteristics of the source of financing of SHSGI crucial for their effective delivery and their quality not yet (fully or adequately) taken into account in the EU-level discussions and/or Community rules? Please illustrate with examples.

Source of financing	SHSGI in general	Per sector				
		LTC	SI	LM	CC	SH
Direct financing through direct or indirect general taxes/national, regional, local budgets	<input type="checkbox"/>					
Specific financial dedicated fund (financed on a specific basis)	<input type="checkbox"/>					
Solidarity-based financing (in the framework of social insurance schemes)	<input type="checkbox"/>					
Direct payments (total or partial contribution to costs) made by users	<input type="checkbox"/>					
Cross subsidisation between services provided at market prices and services provided at "social" prices	<input type="checkbox"/>					
Other(s) (please specify)						
	<input type="checkbox"/>					
	<input type="checkbox"/>					

Please tick the corresponding cells in the table .

Please elaborate on a few relevant cases: \_\_\_\_

27. Are there characteristics of the ways of financing of SHSGI crucial for their effective delivery and their quality not yet (fully or adequately) taken into account in the EU-level discussions and/or Community rules? Please illustrate with examples.

Way of financing	SHSGI in general	Per sector				
		LTC	SI	LM	CC	SH
Tariff averaging/price equalisation	<input type="checkbox"/>					
Social pricing (by income, level of need/disability, family structure, etc.)	<input type="checkbox"/>					
Other(s) (please specify)						
	<input type="checkbox"/>					
	<input type="checkbox"/>					

Please tick the corresponding cells in the table .

Please elaborate on a few relevant cases: \_\_\_\_

### The role of state aid

28. Are there specific types of state aid crucial for the effective delivery and the quality of SHSGI not yet (fully or adequately) taken into account in the EU-level discussions and/or Community rules? Please illustrate with examples.

Type of state aid	SHSGI in general	Per sector				
		LTC	SI	LM	CC	SH
Direct subsidies for regular costs (including personnel)	<input type="checkbox"/>					
Direct subsidies for infrastructure (construction, maintenance)	<input type="checkbox"/>					
Direct subsidies for deficits	<input type="checkbox"/>					
Lower interest rates	<input type="checkbox"/>					
Loan guarantees	<input type="checkbox"/>					
Tax exemptions	<input type="checkbox"/>					
Reduced VAT rates	<input type="checkbox"/>					
Others (please specify)						
	<input type="checkbox"/>					
	<input type="checkbox"/>					

Please tick the corresponding cells in the table .

Please elaborate on a few relevant cases: \_\_\_\_

### 6. Additional issues and general comments

29. If you will consider that additional issues not directly linked to one of the questions are crucial and need to be dealt with in the study entrusted to us, please explain those issues or give general comments below.

\* Acronyms for the sectors covered in the study and referred to in the tables of the survey:

- LTC: Long-term care (including elderly care, community care, respite care);
- SI: Social integration and reintegration (all types of services to prevent, mitigate or overcome social exclusion, services to support individuals and families with special needs or presenting specific risks, for example migrants and asylum seekers, drug addicts, ex-prisoners, over-indebtedness, disabled people, homeless persons);
- LM: Labour market services focusing on disadvantaged persons (services enhancing their employability aiming at reintegrating them in the regular labour market);
- CC: Child care (with a focus on services offered to families for children, including afternoon care for children at school-age, in order to reconcile work and family life, but also to foster the integration of children of migrants); and
- SH: Social housing (services to help households with difficulties in gaining access to decent and affordable housing, also to prevent “social ghettos”).

## Annex 4: Tables

**Table 1: Sources and data basis**

Source	Data basis for (sub-)chapter or sub-section
Replies of national governments to SPC enquiry on SHSGI (2004) [by 25 countries]	4.1.2 + 4.1.3 + 4.1.4
Replies of national governments to SPC enquiry on SSGI (2006) [by 25 countries]	4.2.2 + 4.2.3 + 4.2.4
Replies by other stakeholders to SPC surveys on SHSGI and SSGI (2004 and 2006)	4.4. + 5.
European Commission (EC) documents (Green and White Papers, Directives, Decisions, Communications, Recommendations, Commission Staff Working Paper and “Non-Papers)	3. + 5.
Grey literature by Commission services	4.1.4 + 4.2.4 + 4.4
European Court of Justice (ECJ) rulings	3. + 4.4 + 5.
Documents issued by the European Council, the European Parliament (EP), the European Economic and Social Committee (EESC) and the Committee of Regions (CoR)	3. + 5.
Grey literature elaborated in the context of the 1 <sup>st</sup> to 3 <sup>rd</sup> Forum on SSGI	3. + 4.4 + 5.
Final Synthesis Report “Study on the Situation of SHSGI in the EU” (= Huber/Maucher/Sak 2008)	3. (in particular 3.3.1) + 4.4 + 5.
Grey literature elaborated in the context of the work of the author for the <i>Beobachtungsstelle für die Entwicklung der sozialen Dienste in Europa</i> , Frankfurt/Berlin (10/2001-08/2007), SOLIDAR, Brussels (09/2007-01/2011) and the European Federation of Public Service Unions (EPSU), Brussels (since 01/2011)	3. + 4.4 + 5.
Previous publications Mathias Maucher	See list in sub-section 1.4.2 and 6.

## **Table 2: Definitions and terminology**

*Introductory remarks by the author:*

- *When analysing the genesis and development of policies for the field of social and health services at EU level key concepts and terms for the political, legal and scientific debates and referred to in this thesis need to be introduced and contextualised. In order to keep chapter 1 rather concise, a rather complete selection of terms necessary to better understand this piece of research have been put into this table of this annex.*
- *The text below is partially copied from Huber/Maucher/Sak 2008, Chapter 3 “Social services of general interest: an emerging EU policy topic”, mostly written by the author, and from the glossary of the study to which the author contributed to a large extent, in cooperation with Barbara Sak.*
- *As the interested reader will find in Commission documents and in the literature many descriptions of the key terms used in the context of debates on SGI, SGEI, SHSGI and SSGI, the author decided not to add own text in this section, but rather to copy relevant text elements from different sources. He also has the intention to show, where appropriate, differences as to vocabulary and as to the key words used in the “definitions” suggested in different documents.*
- *Other elements are taken from the first section “Basic concepts” of chapter 1 “The role of social services as a core element of social policy” of the report referred to above.*
- *For definitions and descriptions taken from other publications the bibliographic reference is given below the entry respectively.*
- *As the terminology and the definitions used in the own analysis in principle refer to the period 2003 to 2008 no update was done, even though the meaning might have (slightly) evolved until around 2012.*

### ***Altmark Trans ECJ Ruling (24 July 2003, Altmark Trans GmbH vs. Regierungspräsidium Magdeburg, Case C-280/00)***

ECJ ruling to the effect that financial support that represents compensation for public service obligations defined by a MS does not constitute state aid. As part of this ruling, the ECJ also further developed the substantive test for assessing when state funding of public services does go beyond compensation and then falls under EC state aid rules (in the scope of Article 87 of the EC Treaty). The new test appears to be far stricter than that under earlier jurisprudence. These are further detailed in the state aid package (adopted 13 July 2005, published 29 November 2005), also referred to as “Monti package”. (Huber/Maucher/Sak 2008:356) On this ECJ ruling and the impact on the SSGI provision by private providers also see BBJ 2003, Belgian Presidency of the European Council 2010, von Boetticher 2003, von Boetticher/Münder 2009, Eilmannsberger/Herzig 2008, Jennert 2005 and Münder/von Boetticher 2004.

### ***Delegation of tasks and services from public authorities to third parties from the private sector***

Transfer of a task (such as the provision of a range of social services) for which public authorities principally have the responsible to organise or to guarantee its fulfilment (in case of

services: its provision) to an external partner, either a private for-profit or a not-for-profit organisation. (Huber/Maucher/Sak 2008:357)

There are different modes of service provision, directly by the competent public authority (this is commonly also referred to as “in-house”, in both economic law – including the jurisprudence on public procurement and service concessions – and public management) or on behalf of this authority by a third party. This implies a decision to delegate a task to a provider outside the public sphere. In the case of SGI the tasks and services handed over to a third party from the private sector, either a for-profit/commercial enterprise or not-for-profit organisation, need to be done in accordance with specific requirements, procedures or modalities that are/should be stipulated in the public service obligation reflecting missions of general interest. In case the public authority wishes to still be associated to the delivery of a service it can opt for a public-private partnership. The first option can also be extended and take the form of a public-public partnership, often in the context of inter-communal cooperation. Linked to this secular trend of the last two decades in many fields of SGI and in basically all EU MS on the level of the systems is the shift from a “provision state” (*Erbringungsstaat*) to a “regulator and guarantee state” (*Gewährleistungsstaat*). [text written by the author] (cf. on this term also Schuppert 2004)

### ***Economic activity/Non-economic activity***

Any activity consisting of supplying goods and service in a given market by an undertaking, regardless of the legal status of the undertaking and the way in which it is financed. It is widely recognised that almost all services offered in the social field can be considered “economic activities” within the meaning of Article 43 and 49 of the EC Treaty. (Huber/Maucher/Sak 2008:358)

The distinction between services of economic and services of non-economic interest is based on a functionalist understanding of an enterprise. It is based on three formal criteria (undertaking<sup>199</sup>; activity on a market; service provision against remuneration, expressing the economic counter-value), that, if fulfilled entail the label “economic activity”<sup>200</sup>. This approach is an expression of the dichotomy that characterises EU law, distinguishing between on the one hand a body of rules that apply to the state (and more general entities of public law) when exercising their state authority/powers (in German: “*hoheitliche Funktion*”) and a body of legislation applicable to entities of private law. However, there is no third legal regime (*tertium*

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<sup>199</sup> Undertaking: For the purpose of EU anti-trust law, any entity engaged in an economic activity – that is an activity consisting in offering goods or services on a given market, regardless of its legal status (public or private, including not-for-profit) and the way in which it is financed – is considered an undertaking. To qualify, no intention to earn profits is required, nor are public bodies by definition excluded. Source: [http://ec.europa.eu/comm/competition/general\\_info/u\\_en.html#t62](http://ec.europa.eu/comm/competition/general_info/u_en.html#t62)

<sup>200</sup> “Economic activity: Any activity consisting of supplying goods and services in a given market by an undertaking, regardless of the legal status of the undertaking and the way in which it is financed is seen as being of economic nature.”, quoted from Communication “Implementing the Community Lisbon programme: Social services of general interest in the European Union”, 26.04.2006, COM(2006)177 final, p. 6, [http://ec.europa.eu/employment\\_social/social\\_protection/docs/com\\_2006\\_177\\_en.pdf](http://ec.europa.eu/employment_social/social_protection/docs/com_2006_177_en.pdf)

*non datur*) for activities of a hybrid nature, e.g. of an economic nature according to EU law, however, in pursuit of an objective of social, health, employment or housing policy and on behalf of and with a mandate by a public authority, as this exactly is the case in the field of SSGI.

According to Herrmann (2005c) “the definite weakness is that ... it starts to define a social fact – the activity of a service provision – from the perspective of the enterprise rather than its societal and social function. ... It can be shown that there is a close link between such a view and developments as social managerialism, departmentalisation and the like in social professions” (Herrmann 2005c:30). Referring to the 2000 Communication on SGI he holds that the philosophy behind the EU-approach towards SG(E)I means for the provision of social services “that they are treated in the same way as any other “economic good” – seeing them as function of the supply and the demand side” (Herrmann 2005c:27). In this document (Commission of the European Communities 2000:13) the Commission clarified that whenever organisations such as trade unions, political parties, churches and religious societies, consumer associations, learned societies, charities as well as relief and aid organisations, in performing a general interest task, engage in economic activities, the relevant body Community principles and rules apply.

With the presentation of the Green and White Paper on SGI this basic approach was upheld, but refined, the Communication on SSGI of 2006 acknowledged a set of specific characteristics. Despite this evolution, a number of fundamental issues linked to the distinction between economic and non-economic activity, however, principally are not taken account of, such as “the orientation along non-monetary values, the specific value arising from social togetherness, the orientation on long-term rather than short-term “profitability” and the non-egoistic behaviour, i.e. activities guided by a genuinely social orientation” (Herrmann 2005c:27).

The distinction between economic and non-economic activity is decisive for applicability of Community competition, public procurement and internal market rules and as a consequence determines degrees of freedom by public authorities in MS as to the selection of providers and modes of organisation, regulation and financing at MS level. Criteria that also come into play are the legal status of the entity providing services (i.e. falling under public law or private law; this also includes concrete forms: associations, co-operatives, foundations, mutual benefit societies), ownership and control partially or totally owned and/or controlled by state authorities. These criteria recurring on institutional criteria, however, are outweighed by the functional approach when it comes to determining the economic nature of an activity according to Community law.

Instruments to (partially or temporarily escape) the application of Community law are

- exemptions (comprehensive for a sector, based on a specific criterion; or for a specific issue, e.g. by falling back on a block exemption);
- derogations (permanent; temporary/for transition periods) or
- alternative frameworks and rules.

It is obvious *prima facie* that the functional approach to economic activity and the dichotomy of Community law are not consistent with national approaches and institutional frameworks for SSGI, neither as regards the starting point of policy design nor the “angles of attack”, even though major challenges identified and core objectives can overlap to a large extent. How to best balance or how to even best reconcile them insofar is one of the recurrent topics and main challenges in developing a policy framework for SSGI at EU level. At national level and within member states we can identify at least three points of reference when regulating, monitoring and financing SSGI:

- Institutional frameworks and embeddedness, with SSGI being seen and conceptualised as a core part of national social protection schemes;
- Objectives of SSGI as defined by the competent legislative body and public administration and to best reflect the needs and expectations of their users;
- Specificities of services and their users;
- In some countries and to some extent also the specific characteristics of defined categories of service providers, namely those with a not-for-profit orientation and/or falling under a specific legal statuses of public/social utility.

### ***Entrustment***

Transfer of responsibility for operation of a service of general (economic) interest to an undertaking concerned by way of one or more official acts, the form of which may be determined by each Member State. (Huber/Maucher/Sak 2008:358)

### ***European Social Model (ESM)***

Services of general interest (SGI) are generally seen as a key component of the European model of society. Although a number of approaches exist to describe the concept of a European Social Model, there seems a broad consensus that SGI constitute a core part thereof and cannot be provided without state involvement. They add to other core elements as e.g. the concept of a social market economy, the subsidiarity principle in varying degrees of application, the existence and guarantee of social rights, social dialogue within the scope of social partnership and dialogue with civil society. (Huber/Maucher/Sak 2008:67)

The background paper prepared for the conference ‘The Future of the European Social Model: A German Perspective’ held on 3 and 4 November 2005 in Berlin, states that “despite the variety of national social models and the difficulty of defining the social profile of the European Union and analysing its complex influences on national social and health systems, there is indeed common ground: for instance the concept of a social market economy, the idea that services of general interest cannot be provided without state involvement, the subsidiarity principle in varying degrees of application, the existence and guarantee of social rights, social dialogue within the scope of social partnership and dialogue with civil society.” (ISS 2006:25). It continues from there by affirming that a definition of the European Social Model that is too general cannot be satisfactory in the long run: “Many of the key concepts used at European

level – ‘social integration’, ‘economic, social and territorial cohesion’, ‘solidarity’ und ‘subsidiarity’ – need to be defined in more concrete terms. A framework for a more concrete elaboration of the European Social Model is provided by the Lisbon Strategy, which encourages the creation of jobs and equal opportunities as a factor in the implementation of a knowledge-based society. For the period between 2005 and 2010, the Social Agenda has established ‘combating poverty’ and ‘creating equal opportunities’ as priorities on an equal footing with ‘employment’. These priorities also include the objective of supporting Member States in their efforts to reform their pension and health systems, an aim for which the Open Method of Coordination constitutes an appropriate instrument.” (ISS 2006:26)

- There is a set of constitutive values and principles “common to all social models in the Member States of the European Union: human dignity, liberty, equality, justice, equal rights, protection of minorities, solidarity and societal participation. These values make up the foundation of the political, economic and social basic rights of EU citizens” (ibid.). They insofar also are the basis of the ESM. The social, economic and political rights in turn “underlie the principles that govern efforts to structure national social protection systems: prohibition of inhumane treatment, protection of confidence, equal treatment and non-discrimination, particularly equality of men and women, equality of opportunities, (actively pursued) social (re-)integration, opportunity of participation in social life and plurality of service offers.” (ibid.)
- The discussion on the ESM brought the “social dimension” of the EU to the foreground. It builds on different instruments – such as legislation, policy coordination, structural and programme policy – that have a direct or indirect effect on policy areas such as “employment”, “social affairs”, “health”, “housing”, “family” and “equality”. In the discourses around the ESM identify social, health, employment and educational/professional training policies as the central foundations for a functioning (social) market economy, a shared value across the EU.
- “A common feature central to all the values and principles of a social model is the fact that they form the basis for individual, enforceable social rights (... providing ...) a basis for supporting individuals and groups and protecting them against various risks in the life cycle by ensuring that they have a guaranteed subsistence minimum and a basic level of health protection, basic education, opportunities for social integration and chances for social participation, by combating unjustified disadvantages and/or improving equality of opportunities, by fighting poverty and social exclusion and by strengthening social cohesion and individual responsibility.” (ISS 2006:26)
- “These values and principles are embodied in the core documents of the Council of Europe and of the European Union: in the European Social Charter, in the provisions of the European Treaties and in the Draft Treaty establishing a Constitution for Europe including the Charter of Fundamental Rights of the European Union.” (ISS 2006:26)

In a programmatic paper issued in October 2007 and entitled “A Social Europe for the People – Positions regarding the European Social Model reflecting the Viewpoint of Non-Profit Organisations”, the six national umbrella organisations of non-statutory welfare in Germany (BAGFW) identify five principles as constitutive for the ESM: social cohesion, solidarity, social

justice, equal opportunities and non-discrimination. The paper states that “the discussion of the European Social Model underlines the demand to have a social Europe for the people. The term is now firmly positioned as part of the political discussion. At its base are the demands of the citizens to have a social Europe where economic, employment and social objectives are of equal importance.” (BAGFW 2007:7).

- The paper claims that “growth and employment have to serve social cohesion” (BAGFW 2007:8) and “solidarity and social cohesion do not exclude necessary modernisation and adaptation” [*of social protection schemes and social policy measures; added by the author*] (ibid.), but when implementing structural changes, growth, employment and social integration as vital parts of a cohesion policy for all have to be secured<sup>201</sup>.
- Looking at the other three principles the paper states that “democracy and the rule of law are characteristics of the development of Europe’s societies. The inherent rights of the individual person constitute vital principles of these societies. The guiding principles herewith are social justice, securing participation, equal opportunities, assuming (own) responsibility, fulfilling basic needs, and – last but not least – non-discrimination. At the basis of and with specific importance for the EU’s action is the fight against discrimination on the grounds of gender, race, ethnic origin, religion and/or worldview, disability, age or sexual orientation.” (...) “Equal treatment of all citizens in all aspects of life has the aim of creating equal opportunities as well as social and legal integration. It is a vital element of a European society that includes all. Education, knowledge and access to information are salient elements for the implementation of equal opportunities and for a Europe that is fit for the future. We view the provision of knowledge via high-quality educational systems and increased investment in skills of people as the best guarantee for the long-term future of the Union’s competitiveness.” (BAGFW 2007:10)

### ***Exclusively social function***

The notion of “exclusively social function” has been developed in the context of ECJ jurisprudence in the field of competition law. Already the Communication on SGI of 2000 draw a clear demarcation line to services of economic nature and declared the following fields of welfare production would not fall under the scope of Community competition, state aid, public procurement and internal market rules: “Services such as national education and compulsory basic social security schemes are ... excluded from the application of competition and internal market rules” (Commission of the European Communities 2000:13). The same holds for services “which are based on the principle of solidarity, non-profit making and where the benefits paid are not proportional to the amount of the compulsory contributions, fulfil an exclusively social function and do not exercise an economic activity” (ibid.).

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<sup>201</sup> The BAGFW makes the link from social cohesion and solidarity to social equity that can be achieved by combating poverty and bringing about social integration. This in turn contributes “towards the good functioning of social security schemes and bring about social cohesion by strengthening cohesion, by increasing effectiveness, by promoting awareness as to one’s own responsibility, and by ensuring social peace.” (BAGFW 2007:9).

These criteria have been reiterated and confirmed by the ECJ case law (i.a. in Poucet & Pistre<sup>202</sup>) for obligatory systems of social protection<sup>203</sup> that embrace, across all EU MS, a range of social insurance and social assistance schemes. These schemes are conceptualised as being an expression of the solidarity principle, having redistributive objectives and effects. During the last decade the formal criteria used to establish the borderline have not been changed. Nonetheless dynamics stem from ECJ jurisprudence reinterpreting the concepts of “exclusively social function” on the one hand and from reforms in the design of welfare state measures that imply an extension of the scope of Community law (that becomes bigger to the extent to which a solidarity principle as mentioned above is weakened or no longer present) on the other.

Commission and ECJ documents give witness of a broad concept of “service”. This is not consistent with the term “service” as used e.g. in comparative welfare state theory, comparative social policy research or MISSOC where “services” in the sense of “personal social services” are one instrument of welfare state intervention amongst others. In the context of “schemes of social protection”, or “schemes of social security”, however, “cash benefits” and another category, in particular in the field of health services, “benefits in kind”, are still the most important types. *[text written by the author]*

### **General interest**

Bernard Enjolras in his contribution to the 2004 conference “Social Services of General Interest in the European Union – Assessing the Specificities, Potential and Needs” (ISS 2004), writes: “There are three definitions of general interest:

- General interest as the sum total or aggregate of individual interests. Apart from the fact that this concept raises methodological problems (how does one create an aggregate of individual interests?), it yields but a minimalist concept of general interest;
- General interest as the common interest: this concept excludes from general interest all areas where interests do not converge;
- General interest as the interests of society or the community: in this case, general interest exceeds and may indeed stand in opposition to the interests of individuals.

Following the latter concept of general interest – general interest as the interest of society – we can identify four characteristics of services of general interest:

- What is in the general interest is not absolute; it is a social construct, i.e. a common good that is defined in a given society at a given moment. Concepts of general interest therefore vary in time and space.
- For the most part, services of general interest involve the implementation of activities of an economic nature, but the objectives of these activities are not purely economic. In

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<sup>202</sup> According to this ECJ ruling (Cases C-159/91, Poucet et Pistre, [1993], ECR I-637), in order for social insurance schemes not to fall within the scope of competition rules, their mechanisms of redistribution and financial solidarity need to be a dominant feature. Another condition is that a possible surplus from the insurance activities or the accumulated capital must not be distributed to stockholders/shareholders.

<sup>203</sup> Other terms used interchangeably are mandatory or compulsory systems of social protection.

other words, the economic activities of these services generate external effects that serve the whole of society or the community (for instance social cohesion, territorial development, equality of access to services etc.).

- There are several "levels" of general interest depending on the criteria used to define "society". A society can be geographically defined, and general interests can thus be local, regional, national, supranational, etc. A community can also be defined in terms of its "solidarity perimeter", a border within which a particular identity is shared.
- As a result of these characteristics, the market fails to produce general interest, and there is a need for non-market institutional mechanisms." (Enjolras in: ISS 2004:110)

Enjolras concludes by stating that "social services are services of general interest to the extent that they contribute to the realisation of certain "common values" that characterise European countries: 1) They contribute to the maintenance of social cohesion in a society; 2) They contribute to the establishment and guarantee of a minimum of security for all members of a society; 3) They contribute to the guarantee of human dignity without which the idea of citizenship would be a mere illusion." (Enjolras in: ISS 2004:111)

Defining the "general interest"<sup>204</sup> and specific public service obligations for various tasks or sectors always implies a broad political and thus societal consensus, even though this consensus cannot always be explicit or defined in all its aspects. The issue in question mainly depends on the preferences and direct needs of the population or of the "general public", whether in a national, regional or local context, or also of a specific subgroup of the resident population albeit of importance for the whole society and insofar "in the general interest". What is understood by "general interest" in the field of SSGI strongly depends on national traditions, welfare state structures, cultures but is also influenced by divergent terms and notions linked to them in the different languages. The understanding also changes across time. (Huber/Maucher/Sak 2008:72f) Since several years we witness ongoing discussions about the concept of "general interest" also for the field of social services. They concern the meaning of the term and elements of this concept, the decision on the competent authority/institutions to define missions of general interest and the form in which these and public service obligations need to be explicitly and transparently defined ex ante. This is relevant when public authorities decide to deliver (social) services by themselves or when they opt for delegating them to private (not-for-profit or commercial) providers. (Huber/Maucher/Sak 2008:72)

Explicit or implicit definitions of general interest in national or regional-level legislation are linked to objectives, target groups and fields of SSGI. For the sector analysed here there is e.g. a clear link between the term "general interest" and the guarantee and realisation of individual social

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<sup>204</sup> In this context, the term "public interest" is also used – by some in an interchangeable way with "general interest" by others with a different connotation. The issue does become less complicated when other languages than English are used. E.g. in German the translation of "general interest" is "*Allgemeininteresse*" whereas rather often also the term "*Gemeinwohl*" is used. What exactly is meant with one or the other term often is not made explicit and also is difficult to define in general. (Huber/Maucher/Sak 2008:72)

rights. We can also witness an explicit or implicit reference to the objectives of social policy when the term “general interest” comes into play. In some MS it is also implicitly understood, as part of the national “tradition”, that services in selected sub-sectors of social protection systems that are entirely or to a large extent funded by taxes or that are based on systems with non negligible mechanisms of financial solidarity, e.g. in the form of redistribution between “richer” and poorer” people independently of the distribution of individual social risks or disadvantages, are “of general interest” – and this without having conferred in an explicit manner a (general) mission of general interest or a (specific) public service obligation. One example for this is social housing for France, but the author would claim that this applies exactly in the same way e.g. also for services for children below primary school age in countries such as Austria or Germany. But in the context of “social markets” and where Community rules for state aid, competition, public procurement or the freedoms of internal market apply, a mission of general interest and a concrete public service obligation need to be defined in writing and for a particular service or type of service. But as there is no consolidated European concept or “definition” for “general interest” and therefore no generally agreed common reference point to counterbalance the dynamics stemming from the applicability of Community rules on state aid, competition, public procurement and the fundamental freedoms of the internal market, “traditional” national approaches come under pressure and are not sufficient. *[text written by the author]*

### ***In-house provision/delivery***

EU law on public procurement applies when a contracting body entrusts a task to a third party, unless the relation between the two is so close that the latter is equivalent to a so-called “in-house” entity. According to the “Stadt Halle” jurisprudence of the ECJ, the Public Procurement Directives apply whenever a contracting authority intends to conclude a contract with a company, the capital of which is at least partly held by private undertakings. (Huber/Maucher/Sak 2008:360)

### ***Means testing***

Means tests are as a rule applied to non-contributory tax-financed schemes. They refer to an investigative process undertaken to determine whether or not an individual or family is eligible to a specific social protection scheme (normally they are used in social assistance schemes in the broadest sense only) and entitled to obtain a specific social benefit. The amount of the benefit may be differentiated according to the level of need or financial neediness. The means test can consist of quantifying a person’s income (from employment, from rent and lease, etc.) or his/her assets or a combination of both. (Huber/Maucher/Sak 2008:361)

### ***Mission of general interest***

This term refers to a set of explicitly stated or regulated obligations defined for services of general interest which comprise i.a. the following elements: accessibility, availability, universality, territorial coverage, continuity, affordability, quality, user protection and

transparency. The explicit statement or regulation of missions of general interest 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, certain derogations from competition rules can be allowed in order for the missions to be fulfilled. (Huber/Maucher/Sak 2008:362; taken from: Commission of the European Communities 2003; Commission of the European Communities 2006b)

=> See also "*General interest*" above.

### ***Non-profit***

Non-profit institutions and organisations are defined as legal or social entities created for the purpose of producing goods and services whose status does not permit them to be a source of income, profit or other financial gains for the units that establish, control or finance them. They mainly produce and supply non-market output for individual/household consumption and take their resources mainly from voluntary contributions made by individuals and households as consumers, but also from donations, grants, in-kind resources from voluntary work and income from property in some cases. (Huber/Maucher/Sak 2008:363)

### ***Open Method of Coordination (OMC)***

Under the open method of coordination, MS agree on broad policy goals. Member States in various fields of social protection and social inclusion policies, which may then be translated into guidelines for national and regional policies, such as on the basis of National Strategy Reports or National Action Plans. Moreover, specific benchmarks and indicators to measure good practice may be agreed upon and results to be monitored, evaluated and published by European Commission services. The OMC uses a decentralised approach largely implemented by the Member States. In the field of social protection, the OMC is currently [2007] applied to the policy fields employment (in the framework of the European Employment Strategy), social inclusion, pensions, health and long-term care. (Huber/Maucher/Sak 2008:363)

For more detailed information see sub-sections 2.1.4 and 2.2.3 as well as e.g. Ashiagbor 2005, Maucher 2005c, Maucher 2005e or Schulz-Nieswandt/Maier-Rigaud 2004.

### ***Outsourcing***

Outsourcing (or contracting out) is often defined as the delegation of non-core operations or jobs from internal production within a business to an external entity (such as a subcontractor) that specialises in that operation. Outsourcing is a business decision that is often made to lower costs or focus on competences. Transfer of a service to a third party, entailing new regulation and possibly more complex supervision processes (and thus transaction costs) since the service is no longer done "in house" anymore, i.e. in the institution or by personnel of the institution which has provided it until now. In the field of social and health services outsourcing

refers to transferring to market-based service providers mainly “accessory services”, e.g. catering and laundry in case of a hospital or more generally accounting works. It allows the social service providers to focus on their core activities, namely the social personal/individual relationships in the service delivery, and not "loose" time with administrative or tasks "external" to their social role. (Huber/Maucher/Sak 2008:364)

### ***Personal social services***

=> See below, at the end of entry “Social services”

### ***Principles of Community law: Equal treatment, non-discrimination, proportionality and subsidiarity***

- Equal treatment: In delegating a social mission of general interest to an external organisation, public authorities need not only to comply with Community competition, public procurement and internal market rules to the extent that they apply, but also with the relevant principles of the Treaty, such as the freedom of establishment, freedom to provide services, equal treatment, non-discrimination, proportionality and transparency. The principle of equal treatment requires that all Community undertakings should 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. (Huber/Maucher/Sak 2008:365)
- Non-discrimination: The aim of non discrimination is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. (Huber/Maucher/Sak 2008:365)
- Proportionality: The principle of proportionality is a political maxim which states that any layer of government should not take any action that exceeds that which is necessary to achieve the objective of government. It is a fundamental principle of European Union law. According to this principle, the EU may only act to the extent that is needed to achieve its objectives (Huber/Maucher/Sak 2008:365)
- Principle whereby the Union does not take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level. It is closely bound up with the principles of proportionality and necessity, which require that any action by the Union should not go beyond what is necessary to achieve the objectives of the Treaty. (Huber/Maucher/Sak 2008:369)

### ***Principles of SGI/SGEI/SHSGI/SSGI: Affordability, continuity, territorial coverage and universality***

- Affordability: Services of general economic interest must be offered at an affordable price (that does, for example, not exceed X% of a household's gross income; or that can be paid by Y% of the population) so that it will be accessible for everyone. Affordability is strongly linked to fair, justifiable and transparent prices. (Huber/Maucher/Sak 2008:364)
- Continuity: This principle implies that services of general interest must be provided in a continuous and regular way - but also in secure conditions -, without interruption. Cases

of “*force majeure*” or exceptions inducing irregular functioning or interruption of service must be kept to a minimum. (Huber/Maucher/Sak 2008:364)

- Territorial coverage: Extent to which a service provision is ensured throughout a given territory. It should thus be measured by the overall service availability in terms of coverage of the given territory (for example, the spatial density of equipments (e.g. hospitals or nursing homes) per square km or per density of population and in terms of possible price differentiation with respect to location (densely populated area versus sparsely populated area). (Huber/Maucher/Sak 2008:369)
- Universality: Requirement for services of general interest to be available of a specified quality to all consumers and users throughout the territory of a Member State, independently of geographical location, and usual at an affordable price. (Huber/Maucher/Sak 2008:365)

### ***Public procurement***

This term refers to the purchases of goods, services and public works by governments and public utilities following an open tendering (or awarding) procedure to collect several offers from providers willing to produce those goods, services and works at a certain price and according to certain conditions and specifications. At EU level, the main legal instrument relevant for social services is the Directive 2004/18/EU of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (30.04.2004). (Huber/Maucher/Sak 2008:366). On the impact of EU public procurement rules on the delivery of social services see e.g. Belgian Presidency of the European Council 2010, Busse/Ehmann 2010, Cox 2003, Döring 2005, Eilmannsberger/Herzig 2008, GÖW 2003, Giesen 2005, Höpfl 2005, INSSP 2010, Schulz-Nieswandt 2004 and Schulz-Nieswandt 2005b.

### ***Public service obligation***

Public service obligations refer to concrete requirements for a service provision deduced from a more general mission of general interest. In cases where public authorities do not carry out the services themselves and consider that 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. (Huber/Maucher/Sak 2008:366)

- Public service obligations for SG(E)I are being laid down in the framework of the delegation of tasks from public authorities to third parties. In the multi-level scheme of regulation, monitoring and governance of the internal market this is a necessary, albeit not sufficient condition for the compliance with Community law on state aid (either direct monetary support allocated in form of subsidies or fiscal advantages attributed by public authorities to certain types of providers or associated with specific activities). Having defined a public service obligation for a given type of service allows for the calculation of state aid corresponding to the additional costs incurred by delivering services according to the set of requirements spelled out. *[text written by the author]*

- As SG(E)I are provided in sectors where pursuing a free market logic is to induce market failure, imposing a public service obligation on providers being charged with the service delivery also is an indispensable tool to support, both in the interest of the service users and the taxpayers, preconditions for quality SSGI (such as sufficient financing or qualified personnel) and to guarantee pre-defined levels of service quality. *[text written by the author]*
- Underpinning this, the 2000 Communication on SGI reads: “If the public authorities consider that certain services are in the general interest and market forces may not result in a satisfactory 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, the granting of special or exclusive rights, or the provision for specific funding mechanisms. The definition of a specific mission of general interest and the attendant service required to fulfil that mission need not imply any specific method of service provision. The classical case is the universal service obligation” (Commission of the European Communities 2000:9)

=> See also “General interest” above.

### ***Services of General Interest (SGI)***

Services of general interest cover a broad scope of economic and non-economic activities and sectors, ranging from large-scale network industries such as transport, water, gas, electricity, telecommunication, postal services that to a large extent are operating or organised across borders, to small-scale, very often locally or regionally organised personal services particularly in the fields of social welfare, health, culture and sport. (Huber/Maucher/Sak 2008:68). SGI have a key role and importance to play in view of a series of objectives of public policy, in particular in view of economic, social and territorial cohesion, societal welfare and well-being and the realisation of fundamental (social) rights of citizens.

This term is broader than the term “services of general economic interest”, which is used in the Treaty, art. 16 and 86(2). It covers both market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations. (Huber/Maucher/Sak 2008:367; taken from Commission of the European Communities 2003a). The term SGI has been incorporated in the Lisbon Treaty, art. 14 TFEU and is being referred to in the Protocol No. 26 on SGI

“The concept of SGI is based on a common set of values and goals, which include: universal access for all (social, spatial and financial), affordability, quality of services, the guarantee of a continuous service and sustainability of service provision, as well as responsiveness to the needs of users and to their preferences, including consumer protection. SGI are entrusted within Member States by public authorities with specific service missions. Their providers have to fulfil public service obligations defined by public authorities in order to guarantee the realisation of the service-specific general interest missions. Moreover, SGI are usually subject to (sector-

)specific regulations (which might in addition differ for specific services) to pursue their mission, originating from national, regional or local legislation within Member States. Depending on the sector they might in addition or predominantly stem from Community law. National regulations concerning their providers add to this set of rules, again impacted on by Community rules as the functional approach with regard to enterprises and economic activity or existing and evolving European statutes for enterprises of different legal status. SGI contribute to economic, social and territorial cohesion within the Member States and across the European Union. Given their infrastructure character and their often enabling and facilitating role for other economic processes and the labour market, their smooth functioning is expected to also help to increase the competitiveness and growth of the economy at both Member State and Community level.” (Huber/Maucher/Sak 2008:67)

Looking at the terminology, it is important to note the differences as to the generally introduced terms in selected MS (e.g. “*Daseinsvorsorge*” in Germany or “*service public*” in France) that also convey other concepts and have other connotations than the term coined for use at EU level, namely “services of general interest”. Second, there is no legal definition for SGI. It is an “artificial construct” allowing for the attribution of competences between the MS and the EU institutions that was exactly elaborated for this purpose mainly and to have a term that can be used outside national contexts and traditions. If a service is labelled “SGI” or “SGEI”, a set of specific Community rules becomes applicable, and there is also the need that within the MS in question public service obligations have been defined. SGIs (and SGEIs) exists both in network-based industries and in the non-network based services, including services in different fields of the social protection (also comprising personal social services), of health, of (social) housing, of education and vocational or continuous training as well as of the labour market and employment services. When looking at the broader EU-level framework it becomes clear that for the majority of the network-based industries (except for water) sectoral directives are in place, whereas for the sectors enumerated under the category “non-network based services” – with the exception of health care, see Directive 2011/24/EU on patients rights in cross-border health care – no sectoral directives exists as of end 2014. [text written by the author]

### ***Services of General Economic Interest (SGEI)***

This term refers to services of an economic nature that have been entrusted with specific public service obligations by virtue of a general interest mission. The concept of services of general economic interest covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications, but also extends to a broad range of social and health services. (Huber/Maucher/Sak 2008:367)

Their specific nature and a major rationale for public intervention is stated in the Communication on SGI of 2000: “Services of general economic interest are different from ordinary services in that public authorities consider that they need to be provided even where the market may not have sufficient incentives to do so.” (Commission of the European Communities 2000:7)

In its Article 86 (2), the European Treaty explicitly refers to services of general economic interest (SGEI). The jurisprudence and the ruling of the European Court of Justice (ECJ) propose the relevant working definitions in order to determine the respective competence of European authorities on the one hand and Member States and public authorities therein on the other. They also define the relations between public services of general (economic) interest and Community competition law, internal market regulations, public procurement rules and the like. (Huber/Maucher/Sak 2008:68).

Another quote from the Communication on SGI of 2000 well illustrates tensions between different principles of organising economy and society, such as “general interest” or “competition”, and related aims to be achieved respectively, such as “social cohesion” or “competitiveness”: “8. At the heart of Community policy on services of general interest lies the interest of citizens. Services of general interest make an important contribution to the overall competitiveness of European industry and to economic, social and territorial cohesion. As users of these services, European citizens have come to expect high quality services at affordable prices. It is thus users and their requirements that are the main focus of public action in this domain.” (Commission of the European Communities 2000:7) It points to the challenge to reconcile or to balance them (at least to a certain extent) and underlines that the “Community protects the objectives of general interest and the mission of serving the public.” (ibid.) Shaping the policy frameworks for SG(E)I in a multi-layer system and by means of multi-level governance in addition means that the concepts of “common good” and “general interest” need to be understood in a similar manner for a given policy field by a multitude of actors. They need to interpret the principle of solidarity, to ponder it against the objective to promote the realisation of the four fundamental freedoms of the internal market and to recalibrate their respective weight time and again in a legal and policy context in which dynamics of the internal market prevail, either because its logics are given precedence or due to the fact that other rationales (e.g. equal access; protection, involvement and choice of users; integrated service delivery) and principles (e.g. solidarity across income groups and/or generations; discrimination-free treatment) for designing systems, policies and procedures have to comply with logics of internal market integration that also apply when quasi markets are being set up or regulated.

### ***Social economy***

This term refers to a wide range of private non-profit organisations that, besides providing social services, pursue other democratic and participative values. The legal form of these organisations and enterprises differs from one country to another, but they often take the form of Cooperatives, Mutual Societies, Associations and Foundations. "Third Sector" is often used as a Synonym. (Huber/Maucher/Sak 2008:368). See for a general introduction e.g. EESC 2012 and for a broader view on a “plural economy” the social economy is an integral part of CIRIEC 2002.

## ***Social and health services of general interest (SHSGI)***

For the purpose of shaping and giving direction to the policy process at EU level, the European Commission proposed a definition of “social services of general interest” that mainly refers to core elements of social protection systems and enumerates a number of specific organisational characteristics: “The term refers to social (and health) services that are entrusted by a competent public authority with a general interest mission of a social or health nature and that are supported or subsidised by a public authority. They are designed to ensure certain objectives such as high levels of social protection, employment and equality. They usually encompass security schemes, be they statutory or complementary, covering risks such as ageing, retirement and disability, accidents at work or unemployment. In principle, health services are also part. SSGI also include a number of other services directly delivered to persons (also sometimes called “proximity” services such as child care and long term care, but also services supporting families and people in need) and playing a preventive or social cohesion role, such as preventing of or dealing with the consequences of poverty, debt and unemployment, of drug addiction and private life tragedies. Occupational training, language training for immigrants and social housing, for instance, are all social services of general interest. They are frequently provided on a non-profit basis and the service provider is often close to the beneficiary”<sup>205</sup>. In the definition used by the European Commission some of the specific organisational characteristics reflect conceptual work on “personal social services” referred to below in the article on “Social services”.

### ***Social services***

There is no “standard”, no generally accepted definition of “social services” or “personal social services”, neither in the academic, nor in the political sphere. This paragraph elaborates on some proposals elaborated to also help to advance a common understanding of “personal social services” in a European context as the policy process on SSGI clearly focuses on social services delivered to persons.

For illustrative purposes we refer in the following to sample “definitions” – or perhaps better called “descriptions” – as proposed by four researchers or organisations. Elaborated by social scientists or EU-level organisations to facilitate research or lobbying, five of the six descriptions were “on the market” when the EC issued its Communication on SSGI in April 2006 – except for the most recent in the list, used in the project proposal for a “Social Platform on Innovative Social Services” (later retained for Commission funding in 2011<sup>206</sup>). The “working definitions” retained here in the author’s view are the most appropriate to better understand the arguments and the reasoning we find in the replies to the SPC enquiries on SHSGI/SSGI of 2004 and 2006, but also when looking at relevant EC documents and are presented in the following order:

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<sup>205</sup> Huber/Maucher/Sak 2008:367

<sup>206</sup> The results of the project can be accessed on page <http://www.inno-serv.eu/>

1) Observatory for the Development of Social Services in Europe (in: ISS 2002) and Anheier/Kumar (2003); 2) Social Platform (2003) and Social Platform (2004); Herrmann (2003) and Herrmann (2005) and 4) Eurich et al. (2011). More detailed information for the selected sample definitions for “social services” is given below.

1) Observatory for the Development of Social Services in Europe (in: ISS 2002)

Building on Helmut Anheier’s definition, the following working definition for “social services” was used in the first years of the operation of the “Observatory for the Development of Social Services in Europe”<sup>207</sup>

- Services relating to persons are characterised by simultaneous and location-specific interactions between two persons and/or groups of persons with different needs.
- Social services are professional services performed by social workers and social education workers as well as by volunteers as part of the civil society.
- Social services are provided by for-profit and not-for-profit organizations as well as local authorities.
- Social services are organisational structures which constitute the general institutional (legal, contractual and financial) conditions for the remunerated professional rendering of social services relating to persons.
- The social benefits system of a welfare state includes the totality of rights stipulated by law including types of benefits, competent organisations with the responsibility to provide the insured with benefits and financing.
- Social services produce personal services, which are characterized by the integration of clients into the process of production. Production and quality depend greatly on the interaction of providers and clients: production and consumption occur at the same time.

2) Anheier/Kumar (2003)

As part of a project on an annotated bibliography on social services Anheier/Kumar (2003) propose a definition of “social services” in a cross-country perspective: “Member states vary in their definition of social services and the extent to which definitions cover some types of services, rather than others. Clearly, developing a common definition of social services is not something that can be imposed; rather, it needs to be developed over time and in relation to the realities of member states. ... Although a common definition of what constitutes social services still has to be developed, it may be useful to focus on personal social services (in German: “*personenbezogene soziale Dienstleistung*”; in French: “*service de proximité*”), i.e., services that are provided by a third party for the benefit of a user or client. This would exclude social security payments and related financial assistance, as well as education and health care. Public, non-profit, and for-profit organisations as well as individuals may deliver services. Typically, financing and delivering social services includes different organisations.” (Anheier/Kumar

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<sup>207</sup> Institut für Sozialarbeit und Sozialpädagogik 2002:52. See also Anheier/Kumar 2003 as well as Bauer 2001 (in an article in German) authoring the first definitions for social services used in the project context.

2003:13f). It can be seen as a common denominator that can embrace various country-specific understandings reflecting different traditions, institutions and paths of development as explained in country chapters.

- **Social Platform (2003): Services of General Interest, including Social Services<sup>208</sup>**

Services of general interest including social services are a key element of the European social model. Indeed, Article 36 of the Charter of Fundamental Rights and Article 16 of the EC Treaty acknowledge the place of SGI amongst the common values of the Union as well as their role in fostering social and territorial cohesion. Implementation of SGIs also ensures that some fundamental human rights are upheld, such as:

  - The right to health and care;
  - The right to education;
  - The right to housing;
  - The right to work;
  - The right to access water, electricity and alike.

(...) Services of general interest and social protection systems both pursue the same goals: implementation of fundamental social and economic rights as well as the achievement of economic, social and territorial cohesion. Social protection systems, [the] promotion [of which] is established as a mission of the European Community in Article 2 and Article 136 TEC, is divided in two components: social security systems and social services. Social security benefits are often made effective via personal social services such as counselling or other supportive measures e.g. unemployment benefits with no training cannot achieve the role of bringing people back to work. Personal social services are therefore services of general interest but also an indispensable element of social protection systems.
- **Social Platform (2004): Characteristics of Social Services of General Interest**
  - Social services of general interest are aiming at implementing codified social rights of people, enhancing the physical and social capacity of individuals to enjoy life and aiming at their full inclusion in society and their participation in social and cultural life.
  - Social services of general interest are person centred services; either meeting essential needs of the population relevant at all times, or appropriate to different stages in the life cycle, or aiming at population groups with specific needs – available, accessible and affordable to all.
  - Social services of general interest are comprehensive, supportive, enabling and long term problem solving – however, users' needs may continue to exist due to their particular nature. They are provided with full respect and support of the dignity and integrity of the person. Their envisaged results depend significantly on the quality of the interaction between the users and the providers.

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<sup>208</sup> Platform of Social NGOs: Common Position “Guaranteeing the Right to Adequate Social Services of High Quality: A substantial contribution to economic development and social cohesion in the European Union”, 20.03.2003. The full text can be found in Institut für Sozialarbeit und Sozialpädagogik 2003:19f.

- Social services of general interest are linked to national social welfare and protection schemes. Thus they are officially recognized, part of nationally determined policies and systems and consequently enjoy clear legal status and specific financial/fiscal treatment. Public authorities, voluntary organisation and associations of public utility, or the private sector may offer them.
- Social services of general interest are based on institutional structures and organisational arrangements with qualified personnel. Such structures allow new initiatives to respond to emerging or uncovered social needs.”
- Herrmann (2003): Central elements and functions of social services<sup>209</sup>
  - Giving social support to everybody who is in need of it – at any time and in every locality.
  - Maintaining the social fabric of the local communities and national societies and going beyond this; it refers to general process of international integration as e.g. the EU-integration-process alike.
  - Innovating mechanisms which keep societies together – not least in terms of finding appropriate answers to new challenges.
  - Providing social services of a high standard which is available and accessible in terms of the needs of people rather than resources they have.
  - Advocating by giving those a voice who do not have one on their own – this can reach from simple user involvement to representing interests of people who are – for any particular reason – not able to do it on their own.
  - Safeguarding values of particular groups – be it religious groups or political ones; be it values linked to ethnic groups or those arising for example from belonging to a certain age group.
- Herrmann (2005): Person-oriented social services of general interest (POSSGIs)<sup>210</sup>

The definition of social services in general and in particular of person-oriented social services of general interest (POSSGIs) has to go beyond the traditional understanding of good-doing and being solely a means for helping the poor. Of course, people who are excluded from society are the most obvious who are in need of such services. However, it is important to see POSSGIs

  - as part of modern society that is important for every citizen and which is part of the normal process of socialisation.
  - Taken in this sense they are not a “gift of society to people in need” but a right, ensuring the participation of the individual in societal matters and guaranteeing the recognition of each individual’s contribution – be it material or not – to society

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<sup>209</sup> Peter Herrmann, rapporteur of the European conference “Social Services as Services of General Interest in the EU – Objectives, Responsibilities and Conditions”, held in Berlin on 2 and 3 September 2003 (cf. ISS 2003:153), summarising central elements and functions of social services.

<sup>210</sup> This text is copied from Herrmann 2005a. Herrmann 2005d presents a “non-conventional approach” to (personal) social services in order to foster a comprehensive, multi-faceted understanding of the concept and its implications. This approach stands positively out compared to other more technical “definitions”.

- As such, POSSGIs are – even if they appear as one-to-one relationship between a “user” and “provider” of a service – complex relationships within society.

Any attempt to privatise such a relationship is by definition incompatible with services that are defined as social by their very nature. (Herrmann 2005a:34)

POSSGIs are concerned with complex relationships of various actors. As the relationship goes beyond that between “user” and “provider” there are different interests involved – not least interests that emerge from the process itself – it had been said that this is a process of socialisation and individualisation. This means as well that as much as processing a legal case is based on more or less exactly defined rules the processing of a “social case” is concerned with defining the concrete meaning of civil, political and social rights. The bridge function of services and service providers is consequently not one of “provision” in a simple sense. Rather, it has to be seen as a matter of processing different interests. The reference to civil, political and social rights entails that “economic activities” are part and parcel of these negotiations. Thus, a division between economic and non-economic services is another time proved to be misleading – against the claims of some policymakers it is a means of undermining modernisation. (Herrmann 2005a:37f)

POSSGIs are at the core of the European Social Model<sup>211</sup>, being based on rights and contributing to social cohesion by bridging between different interests and actors. Though they are dealing with individuals they are simultaneously acting in the social and public realm. In doing so they are at the very same time – at least to some mentionable extent – economic activities. It is only by this mediation between economic and non-economic and between private and public that they truly contribute to social cohesion and to a strong, solidarity based society (Herrmann 2005a:59.)

- Eurich et al. (2011): Project Proposal “Social Platform on Innovative Social Services” (INNOSERV)

Social services systems have developed as specific services and as a wider function of society as they develop in different member state economies in relation to social change and our understanding of society. They also clearly relate to the various models of ‘social protection’ in place across the EU, and more recently have been defined in relation to the ‘active Inclusion of people excluded from the labour market’<sup>212</sup>.

Based on this description, the authors identify a number of challenges for the collective organisation of social services, including (cf. Eurich et al 2011:8)

- Complex changes in social norms (e.g. with regard to gender, family, ethnicity and culture) and rising social expectations with regard to the quality of social experience (social change)
- Increased life expectancy through the use of new medical knowledge and improved health provision, leading to a shift in the balance of age groups in society and growing demands for care for older people (demographic change)

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<sup>211</sup> More on “social services and the European Social model” can be found e.g. in Herrmann 2005b:69ff.

<sup>212</sup> This text is copied from Eurich et al. 2011:7.

- Decreasing levels of government financial investment in services arising from the financial crisis in European economies
- New models of ‘civil society’ across Europe as cultural and social borders become more porous and as models are ‘borrowed’ from other international contexts
- The paradigm shift in care delivery from the medical understanding (considering users as „objects of care“) to the human rights approach
- The technology (ICT) available to provide support
- Opportunities being afforded by information and data management and communication as a result of technological advance
- Migration following economic opportunity both within and between European countries, a particular recent development has been the growth in ‘undocumented’ migrants providing care services
- The use of markets and ‘quasi markets’ in managing social services (welfare mix)<sup>213</sup>.

The author would like to add to these more general definitions – as footnotes – two descriptions provided by not-for-profit providers of personal social services. The first example from Caritas Österreich, being representative for many other contributions from social services providers from the social economy/third sector, highlights the specific characteristics of these services<sup>214</sup>. This description is very much in line with the definitions reproduced above and takes up a lot of the issues states in a more general manner. The second quote, from a memorandum

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<sup>213</sup> And what role and impact has “innovation” in the field of social services? The authors claim that the challenges referred to above “require new and innovative ways in which services should be organised, resourced and delivered to address these changes and provide a core component of the social and economic fabric of changing communities, societies and nations. In this context innovation in social services is critical to the development of new social models across Europe (...).” (Eurich et al 2011:9).

<sup>214</sup> Quote from the position of Caritas Österreich sent to the Austrian Federal Government when drafting the answer of Austria in the context of the first SPC enquiry on SSGI in 2004: *“Soziale Dienste verlangen eine persönliche, kontinuierliche und verantwortliche Beziehung zwischen Betroffenen und BeraterInnen, die nicht nur Wirtschaftlichkeitskriterien unterliegen. Im Unterschied zu anderen Dienstleistungen von allgemeinem Interesse sind soziale Dienste vor allem auch durch eine mobilisierende Wirkung im Gemeinwesen, ehrenamtliches Engagement, Förderung von sozialen Bindungen, Netzwerken und Selbsthilfeinitiativen, selbstverantwortliche Einbindung von Betroffenen etc. gekennzeichnet. Nicht die Nachfrage ist Auslöser für die Leistung, sondern die menschliche Not in einer besonderen Lebenssituation oder Lebensphase. Nicht ökonomisch wirtschaftliche Aspekte sondern Aspekte der Menschenwürde und Solidarität müssen im Vordergrund der Regulierung stehen. Eine Reform des Sozialwesens soll natürlich auch effizientere Leistungen, transparente Preise und möglichst niedrige Kosten im Blickpunkt haben. Besondere Bedeutung bei den sozialen Diensten hat jedoch die inhaltliche Qualität der Dienste. Diese Qualität bei sozialen Diensten hängt aber ganz wesentlich von den gesellschaftlich akzeptierten Werten und den zur Verfügung gestellten Mitteln ab. Diese Mittel werden durch eine Ökonomisierung nicht vermehrt und der erwartete Kostendruck führt zu einem kurzfristigen Preiskampf auf Kosten der Qualität und damit auf Kosten der Menschen in besonderen Lebenssituationen und Lebensphasen. Auch wenn Strukturqualitäten definiert werden können (Kennzahlen wie zum Beispiel Betten pro 1000 Einwohner), ist für die Qualität sozialer Dienste der Prozess der Unterstützung mindestens gleich bedeutend. Es geht nicht um Preiswettbewerb, sondern um Schaffung von Wettbewerb um Qualität, und zwar nicht im Sinne einer strukturellen Festlegung von Bedarf (z.B. Anzahl der Betten für flächendeckende Versorgung), sondern im Sinne von Überlegungen, wie die Hilfsprozesse gestaltet sein müssen, damit hinreichende Leistungsziele und Ergebnisse erreicht werden können.”*

elaborated in 2004 by the national umbrella organisation of the six non-statutory welfare organisations in Germany (BAGFW), illustrates the specific features these organisations have identified to describe their missions and the objectives and ways social services are delivered by their members on the ground<sup>215</sup>.

As regards the term “personal social services”, used by a range of MS and many NGO service providers and their national and European umbrella organisations prior and after 2006 – in particular with the aim to “juxtapose” this term to the working definition for SSGI proposed by the EC in its Communication of 26 April 2006 that afterwards has been quickly used as the main “point of reference” in the EU-level debate, but also in several MS – the author includes text elements from a Background Paper elaborated for the Observatory for the Development of Social Services in Europe as input into the ICSW-Europe Conference, Lucerne, 1-3 June 2005. From existing literature he identified four angles under which the roles, functions, objectives, missions of social services, in particular personal social services, as part of the European Social Model are described:

- Role of (personal) social services as cornerstone and major instrument of social protection systems, complementing/supplementing cash benefits, tax benefits and benefits in kind, as a rule based on (codified) entitlements and obligations
  - Social services are a key instrument of social policy. They are indispensable to guarantee and to implement fundamental social rights, i.e. enforceable entitlements to benefits, and to realise social policy goals, such as
    - creation of comparable living conditions and chances for all,
    - avoidance of all forms of exclusion/protection against general hazards of existence and specific life risks/promotion of social inclusion/eradication of poverty,
    - improvement of participation in society, or

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<sup>215</sup> The following specific features of the non-statutory welfare organisations and of the social services provided by them are identified (cf. BAGFW Memorandum "The Civic Added Value of Voluntary Social Services", October 2004; original document in German, translated into English and French)

- diversity of service providers
- strive to offer social services in accordance with specific quality elements/orientations (guiding principles; user orientation; community and civic orientation; service orientation, taking into account socio-pedagogic and caring approaches and methods; objective and effectiveness orientation; quality management, partnership and co-operation with funding agencies)
- ability to generate voluntary and civic involvement as important elements of communal life in a socially minded society
- potential to put into practice principles of subsidiarity and solidarity in a variety of ways in self-help groups, schemes for neighbourhood assistance, lay assistance, volunteering and civic involvement
- facilitators of participation of people seeking support, counselling, etc., i.e. of users' involvement
- charitable associations and their establishments assume a role of social advocate
- provide for platform for citizens, who desire to help overcome situations of social need, to achieve joint objectives of serving the common good, and to associate for that purpose.

Many of the points listed above are then further elaborated on and illustrated in the position paper „Quality Objectives of the Social Welfare Associations for Obtaining their Specific Quality of Service“ (08.05.2008), see BAGFW 2008.

- full implementation of the principle of non-discrimination/creation of equal opportunities.
  - All these objectives are also enshrined in the EU treaties and the draft European Constitution. Fundamental social rights at stake, being guaranteed by PSS, are e.g. promotion of personal development, enhancement of the physical and social capacity of individuals, self-determination, participation in the labour market, in social and cultural life.
- Function of (personal) social services to contribute to social inclusion and participation in society, social and territorial cohesion, and societal solidarity and commitment to social justice
  - Social services, like other services of general interest, are instruments of social and territorial cohesion. They have to provide affordable, universal and non-discriminatory/equal access, (also independent of personal risks) across all regions in order to fulfil their aims. Continuity of service provision in terms of time and space has also to be ensured in order to fulfil public interest obligations.
  - Social services are of general interest by contributing to the realisation of common values/objectives of society. They are not only useful to their direct beneficiaries, but generate sustainable social effects for the society as a whole – such as social and territorial cohesion, poverty reduction and prevention, security, improved levels of quality of life; mobilisation of donations, involvement of volunteers, etc..
  - Social services are an important instrument to implement social protection policies and solidarity. Basically they are of universal character, i.e. accessible to every citizen. They are often addressed to persons with limited own or household-based financial resources who in addition, as a rule, cannot be considered as sufficiently sovereign, informed and solvent consumers neither. Social services contribute to the fight for social inclusion and against the various facets of discrimination. They also provide conditions/a social infrastructure under which individuals can take part in economy, the labour market, social and cultural matters.
  - Summing up, personal social services of general interest can insofar be considered as comprehensive, supportive, enabling and oriented towards problem solving or alleviation in a middle- and long-term perspective, too.
- (Personal) social services in relation to their various missions and different objectives, themselves based on value orientations
  - PSS are basically not demand-, but rather needs-driven. As one part of social protection systems and as an instrument serving the general interest, they fulfil a broad range of missions and objectives:
    - First and foremost, the provision of (elderly; child; handicapped persons'; health) care, education (continuing education; retraining) and support (counselling; guidance; empowerment; integration; employment promotion), building on a personal and interactive relationship between user/client and service provider/professionals and volunteers.

- Second, protection of vulnerable, dependent, disabled, disadvantaged individuals, protection of persons in precarious living circumstances or poverty, with specific life cycle/course-related needs.
  - Third, social integration and community development.
  - Fourth, regulation in the sense of setting and monitoring (quality) standards.
- All these aspects clearly reflect commonly shared values and aims of all European welfare states and therefore also have to be acknowledged one cornerstone of a ESM.
- Role of (personal) social services as an instrument to promote community development, to foster civic commitment (involvement of volunteers), to respond to new contingencies, risks, or needs until then only identified and addressed by grass-root/local initiatives, to supplement the support by family and neighbourhood networks
  - PSS mainly contribute to community development and other holistic approaches of social planning and intervention.
  - They are anchored at the local level and embedded in local welfare cultures and traditions and help to foster civic engagement as well as user involvement in shaping, delivering and evaluating social services.
  - These forms of involvement of volunteers as well as of recipients is an important aspect in identifying emerging needs and uncovered requirements for PSS. It also favours the development of innovative concepts and measures. In this way, social services also play a socio-political role and might strengthen democratic, i.e. participatory processes.
  - PSS are both complementary and indispensable to other forms of public (mainly via the monetary transfers or tax system) and informal (i.e. family and neighbourhood) support.

### ***Social Services of General Interest (SSGI)***

Even though there is no shared definition or description, there seems to be a broad consensus across Member States as to the sectors which make up for the “core” of SHSGI, namely social insurance schemes, health (care) services, social assistance/welfare schemes, personal social services, and social housing. In other words they comprise the compulsory (basic and complementary) social insurance schemes covering contingencies such as old age, invalidity, work accidents, health and long-term care, maternity, unemployment (and sometimes family allowances/child benefits), often organised on the national level and covering broad categories of the resident population, as well as personal social services. It is broadly recognised that social and health services of general interest are different from other SGI. They are distinguishable by additional objectives (mainly of social policy) or functions (for societal and labour market integration), particular aspects of governance and elements of service quality, not to forget specific characteristics of their users. Being part of the overall social protection system a common cross-country feature is that they guarantee access to entitlements of (individual) social rights and equal treatment, at least once users/beneficiaries are eligible to a specific social protection scheme. The solidarity dimension with regard to their organisation, regulation

and financing is probably the most distinguishing factor from other services. (Huber/Maucher/Sak 2008:71).

Not least the discussions on the (revision of the) Services Directive have highlighted the importance of recognising the specific role of social and health services of general interest especially compared to network-based services of general economic interest. Among these particular characteristics their close link to fundamental social rights and to overarching goals of social cohesion seems to be generally acknowledged. Their organisation and financing usually involves an element of solidarity. SHSGI regularly receive support from the voluntary participation of citizens. Particularly personal social services are being developed and planned as closely as possible to the users, which explains why local authorities play an important role in this regard. (ibid.) The term refers to (...) services that are entrusted by a competent public authority with a general interest mission of a social or health nature and that are supported or subsidised by a public authority. They are designed to ensure certain objectives such as high levels of social protection, employment and equality. (Huber/Maucher/Sak 2008:359).

Social services of general interest (SSGI) can be identified as a key element of all European welfare states to realise social, health and employment policy objectives. The European Union' integration has been mainly driven by the step-wise development of the internal market and the Economic and Monetary Union, framed by the regulative concept of an open market economy with free competition. This also involves a tendency to attribute a basic rights character to the fundamental economic freedoms and strongly increases the importance of Community competition law. The current challenge consists in finding an adequate balance between these dynamic processes on the one hand and national concepts, traditions and structures of organising, regulating, providing and financing SSGI on the other. This implies a legal and political framework at Community level allowing for their smooth and effective functioning in view of realising their general interest objectives and functions. What this should mean concretely is not least determined by a sector- and even measure-specific understanding and implementation of the solidarity principle which allows for strengthening the role of social law and social, health and employment policy aims and concerns. In this context national governments and public authorities (but also service providers and their national federations) normally argue that Member States not only are best placed, but also claim that they have the competence for defining their missions and principles of organisation, regulation, delivery and financing. Among the drivers that might underpin a more important European approach in the field of SSGI are increased economic integration and the trends towards cross-border activities of social protection schemes, with exports of benefits and inflow of patients or vice versa in specific national social protection schemes. (Huber/Maucher/Sak 2008:67f)

The EC gave its "definition" of SSGI in the homonymous Communication of 2006: The two main categories of social services the EC defines for the purposes of further (potential) legal initiatives, policy work and initiatives on the quality of those services are "statutory and complementary social security schemes" on the one hand and "other essential services provided directly to the person" on the other. The first category, "statutory and complementary

social security schemes” is further described as being “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” (Commission of the European Communities 2006a:4). For the “other essential services provided directly to the person” the EC identifies “a preventive and social cohesion role [that] consists [in] customised assistance to facilitate social inclusion and safeguard fundamental rights.” (ibid.) The Communication presents an open list of characteristics reflecting the specific nature of SSGI. “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.” (Commission of the European Communities 2006a:9). The list is made up of 6 categories of organisational characteristics of SSGI<sup>216</sup> and comprises issues such as “operation based on the principle of solidarity”, “personalisation of service delivery tailored to specific needs”, “not-for-profit orientation”, “local embeddedness of service provision”, “asymmetric relationship between providers and beneficiaries that cannot be assimilated with a ‘normal’ supplier/consumer relationship” and “(full or partial) cost coverage by a third party”.

The special characteristics of SSGI are summarised as follows in a background paper prepared for the European conference “Social Services as Services of General Interest in the EU – Objectives, Responsibilities and Conditions” that took place on 28 and 29 June 2006 in Brussels, i.e. about two months after the publication of the EC Communication on SSGI (cf. Institut für Sozialarbeit und Sozialpädagogik 2004:161):

“Social services of general interest are an integral part of the category “services of general interest” because they share their common values, based on the recognition of fundamental rights, and their general principles, such as, universality, accessibility, continuity, quality, user participation, affordability and transparency.

Nevertheless, social services of general interest also have specific characteristics which make them different from other services of general interest (as understood in European Union legislation), such as network industries.

Social services of general interest contribute both to the development of social cohesion, and to implementing social rights of individual users, both key objectives of social protection systems.

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<sup>216</sup> The detailed list reads as follows:

- 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 and in particular to 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.” (Commission of the European Communities 2006a:3-4)

Among the specific characteristics of social services of general interest are:

- They pursue the concrete implementation of fundamental rights, in particular social rights, and the creation of equal opportunities, especially for people who face barriers in the access to and exercise of these rights.
- They are based on particular principles, namely the recognition of the importance of human dignity, solidarity, social justice, social cohesion and welfare, social capital, empowerment and users' participation in shaping, delivering and evaluating social services.
- They respond to social needs and societal weaknesses which the market cannot address in a satisfactory manner, or which may even be generated by particular market structures. Thus they represent a fulfilment of public responsibilities based on the principle of general interest.
- Due to this, they are effective tools for the appropriate implementation of public policies in the areas of social protection, non-discrimination, solidarity, and the fight against poverty and exclusion at local, regional, national, and European level.”

***Sodemare ECJ Ruling (17 June 1997, Sodemare e.a. vs. Regione Lombardia, Case C-70/95)***

ECJ ruling that a MS State may consider that, for the purpose of achieving the social objectives of its social assistance system, the scope of the agreements with the social security authorities has to be limited to private operators working on a non-profit basis. From this ECJ case law it can be inferred that the free movement principles do not preclude a Member State from demarcating the sphere of providers and suppliers in the context of its social protection system. However, it may not discriminate against them on the basis of nationality or place of establishment. (Huber/Maucher/Sak 2008:368f)

***Undertaking***

For the purpose of EU antitrust law, any entity engaged in an economic activity that is an activity consisting in offering goods or services on a given market, regardless of its legal status (public or private, including not-for-profit) and the way in which it is financed, is considered an undertaking. To qualify, no intention to earn profits is required, nor are public bodies by definition excluded. (Huber/Maucher/Sak 2008:370)

***Universal service***

The concept of universal service refers to a set of general interest missions and requirements ensuring that certain services are made available at a specified quality to all consumers and users throughout the territory of a Member State, independently of geographical location, and, in the light of specific national conditions, at an affordable price. (Huber/Maucher/Sak 2008:370)

**Table 3: Analysis of replies of MS to SPC enquiry on SHSGI 2004**

*Table 3 (EXCEL file; printed/published on 54 pages) is attached to the thesis*

**Table 4: Analysis of replies of MS to SPC enquiry on SSGI 2006**

*Table 4 (EXCEL file; printed/published on 128 pages) is attached to the thesis*