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**Implementing the Community Lisbon programme:
Social services of general interest in the European Union**

{SEC(2006) 516}

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INTRODUCTION

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

This communication is a follow-up to the White Paper on services of general interest¹, which announced a “systematic approach in order to identify and recognise the specific characteristics of social and health services of general interest and to clarify the framework in which they operate and can be modernised”, as reiterated in the Social Agenda² and the Community Lisbon programme³. Following the vote in Parliament on the first reading of the proposal for a directive on services in the internal market on 16 February 2006, the Commission excluded health services from the field of application of its amended proposal⁴. It undertook to present a specific initiative and is now giving thought to this subject⁵. Consequently, this communication does not deal with these services. In its amended proposal for a directive on services in the internal market the Commission excluded “*social services relating to social housing, childcare and support of families and persons in need*” from the scope of the Directive. It is now the responsibility of the European legislator to finalise the legislative process.

This communication should be seen in the context of the shared responsibility of the Community and of the Member States for services of general economic interest, established by Article 16 of the EC Treaty. It is the result of close consultation⁶ with the Member States and civil society organisations, which has allowed the Commission to conduct an initial survey of the issues at stake and the relevant questions. The Commission strongly wishes to pursue this open process of consultation and reflection through the following steps as set out in this communication.

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

¹ COM(2004) 374, 12.5.2004.

² COM(2005) 33, 9.2.2005.

³ SEC(2005) 981, 20.7.2005.

⁴ COM(2006) 160, 4.4.2006.

⁵ See Annual Policy Strategy for 2007, COM(2006) 122, 14.3.2006, p. 11.

⁶ The results can be found at:

http://europa.eu.int/comm/employment_social/social_protection/questionnaire_en.htm.

I – SOCIAL SERVICES – PILLARS OF EUROPEAN SOCIETY AND THE EUROPEAN ECONOMY

1.1. Social services in the European Union

What do we mean by social services in the European Union? In addition to health services, which are not covered by this communication, we find two main categories of social services:

- statutory and complementary social security schemes, organised in various ways (mutual or occupational organisations), covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability;
- other essential services provided directly to the person. These services that play a preventive and social cohesion role consist of customised assistance to facilitate social inclusion and safeguard fundamental rights. They comprise, first of all, assistance for persons faced by personal challenges or crises (such as debt, unemployment, drug addiction or family breakdown). Secondly, they include activities to ensure that the persons concerned are able to completely reintegrate into society (rehabilitation, language training for immigrants) and, in particular, the labour market (occupational training and reintegration). These services complement and support the role of families in caring for the youngest and oldest members of society in particular. Thirdly, these services include activities to integrate persons with long-term health or disability problems. Fourthly, they also include social housing, providing housing for disadvantaged citizens or socially less advantaged groups. Certain services can obviously include all of these four dimensions⁷.

Although, under Community law, social services do not constitute a legally distinct category of service within services of general interest, the list above demonstrates their special role as pillars of the European society and economy, primarily as a result of their contribution to several essential values and objectives of the Community, such as achieving a high level of employment and social protection, a high level of human health protection, equality between men and women, and economic, social and territorial cohesion. Their value is also a function of the vital nature of the needs they are intended to cover, thus guaranteeing the application of fundamental rights such as the dignity and integrity of the person. It became clear during the consultation with Member States and civil society organisations that, as a result of these specific features - in the performance of their general interest role - social services often present in practice one or more of the organisational characteristics below⁸:

- 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,

⁷ Education and training, although they are services of general interest with a clear social function, are not covered by this Communication.

⁸ These criteria are the result of the survey mentioned above (see footnote 6).

- they are not for profit⁹ 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.

1.2. A general trend towards modernisation and quality

Social services constitute a booming sector, in terms of both economic growth and job creation. They are also the subject of an intensive quest for quality and effectiveness¹⁰. All the Member States have embarked upon modernisation of their social services to tackle the tensions between universality, quality and financial sustainability. Although social services are organised very differently in the Member States, certain general aspects of this modernisation process can be seen:

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

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

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

Many financial and political Community initiatives and actions, including the social dialogue, are already supporting the development and modernisation of social services. From a financing point of view, the European Social Fund supports many projects concerned with the quality of services intended to foster social inclusion and integration through employment. Similarly, the ERDF has earmarked almost seven billion euro for social services and

⁹ In the Sodemare judgment, the Court took the view that a not-for-profit condition could be compatible with the principle of freedom of establishment.

¹⁰ See Annex 1 to Commission working document SEC(2006) 516.

healthcare infrastructure in the EU25 during the period 2000-2006. Among the political initiatives, the open method of coordination has allowed the identification of good European practices for the quality and integration of services intended to combat poverty; it has applied directly since 2005 to long-term care services. The action programme for social inclusion encourages the exchange of good practices and transnational cooperation. Other fields of activity of the Union, in particular in the area of public finances, also provide support and a framework to the modernisation of social services.

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

At the same time, this new situation for those concerned has meant that the conditions for the application of certain Community rules need to be clarified¹¹.

II – THE APPLICATION OF THE COMMUNITY RULES IN THE AREA OF SOCIAL SERVICES – AN ONGOING LOGIC

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

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

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

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

In the field of competition law, the Court has established that any activity consisting of supplying goods and services in a given market by an undertaking constitutes an economic activity, regardless of the legal status of the undertaking and the way in which it is financed¹².

With regard to the freedom to provide services and freedom of establishment, the Court has ruled that services provided generally for payment must be considered as economic activities

¹¹ This request for clarification was one of the main results of the consultation exercise.

¹² See, for example, cases C-180/98 to C-184/98, Pavlov and others.

within the meaning of the Treaty. However, the Treaty does not require the service to be paid for directly by those benefiting from it¹³. It therefore follows that almost all services offered in the social field can be considered “economic activities” within the meaning of Articles 43 and 49 of the EC Treaty.

The public authorities and the operators in the field of social services of general interest perceive the constant evolution of Court jurisprudence, in particular for the notion of “economic activity” as a source of uncertainty. Whilst the case law and Community legislation¹⁴ have endeavoured to reduce this uncertainty or clarify its impact, they cannot do away with it completely.

2.2. Specific situations encountered today by the social services

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

2.2.1. Delegation

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

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

In such cases, the public body delegating a social mission of general interest to an external organisation must, at the very least, respect the principles of transparency, equal treatment and proportionality. Moreover, in certain cases, the public contracts directives impose more specific obligations. For example, Directive 2004/18/EC concerning, inter alia, public service contracts requires contracting authorities to establish technical specifications for contract documents such as contract notifications, specifications or complementary documents. Certain Member States and service providers have pointed out the difficulty of establishing in advance a precise description of the specifications for social services, which must be adaptable to the individual circumstances of persons in need.

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

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

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

In this context, the term “concessions” and the rules concerning their award, as well as the application of the provisions of public contracts relating to the creation of mixed capital

¹³ Case C-352/85, *Bond van Adverteerders*.

¹⁴ See Annex 2 to Commission working document SEC(2006) 516.

entities whose objective is to provide a public service (institutionalised PPPs), should be clarified. Consultation has shown that clarification is required for institutionalised PPPs.

Significant clarifications on the distinction between “internal” and “third party” entities were brought by the Court of Justice’s judgment in the Stadt Halle case¹⁵. According to this ruling, the procedures for awarding public contracts apply as soon as a public authority intends to conclude a contract for pecuniary interest with a legally distinct enterprise in whose capital it has a holding with one or more private enterprises.

2.2.2. Use of public financial compensation

A public authority may decide to pay compensation to an external body for the performance of a social mission of general interest. This financial compensation is intended to make up for any expenditure involved in accomplishing this mission which would not have been incurred by an enterprise operating solely according to market criteria. Following a judgment of the Court¹⁶, the Commission¹⁷ took a decision pertaining to State aid which has already considerably simplified the requirements on financial compensation received by social service providers and provided the necessary legal certainty. This decision established the thresholds and criteria in such a way that the compensation received by the vast majority of social services is automatically considered to be compatible with the competition rules and therefore exempt from the obligation of prior notification. Compensation will still have to be communicated to the Commission for the small number of social services which do not meet these thresholds and criteria¹⁸.

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

2.2.3. Regulation of the market

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

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

Freedom to provide services (Article 49 of the EC Treaty) means that an economic operator may provide services temporarily in another Member State without being established there. It

¹⁵ Case C-26/03, judgment of 11.1.2005.

¹⁶ Case C-280/00, judgment of 24.7.2003, Altmark Trans.

¹⁷ OJ L 312 of 29.11.2005, pp. 67-73.

¹⁸ See Annex 2 to Commission working document SEC(2006) 516.

also allows a consumer to use services offered by a provider established in another Member State. Articles 43 and 49 of the EC Treaty rule out not only discriminatory national rules but also any national rule applied indiscriminately to national and foreign operators which makes exercising these fundamental freedoms more difficult or less attractive. However, according to the case law of the Court, social policy objectives are overriding reasons based on the general interest which may justify the application of measures intended to regulate the market, such as the obligation to hold a permit in order to provide a social service. The Court ruled that such measures must be based on objective, non-discriminatory criteria which are known in advance so as to support the exercise of the national authorities' powers of appraisal. To be compatible with Community law, these measures must also be proportionate. Moreover, the opportunity for access to an adequate recourse has to be guaranteed¹⁹.

2.2.4. Compatibility with the rules on access to the market

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

III – BETTER MONITORING OF AND SUPPORT FOR SOCIAL SERVICES OF GENERAL INTEREST IN THE EUROPEAN UNION

3.1. In-depth consultation on the specificity characteristics

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

- the elements constituting these characteristics as well as their pertinence to gauge the specific features of social services of general interest;
- how they could be considered by the Member States when defining the general interest missions of social services and the arrangements for their organisation, so as to ensure a good institutionalised link with the Community framework;
- the experiences with the application of Community law in the field of social services of general interest and possible problems that are faced in this context;

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

- how the same (or other) characteristics could be considered by the Commission where it has to check subsequently and individually, the compatibility of the organisation modalities of social services with the applicable Community rules.

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

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

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

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

CONCLUSION

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

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