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COVER NOTE

from:	General Secretariat of the Council
to:	Delegations
Subject:	**Report of the Social Protection Committee on the application of Community rules to Social Services of General Interest**

Delegations will find in the Annex a report from the Social Protection Committee on the application of Community rules to Social Services of General Interest (SSGI).

REPORT OF THE SOCIAL PROTECTION COMMITTEE ON THE APPLICATION OF COMMUNITY RULES TO SSGI

1. INTRODUCTION

Over recent years, the Social Protection Committee (SPC) has played an active role in analysing the impact that EC rules on internal market and competition have on social services of general interest (SSGI).

In November 2007, the Commission adopted a Communication on "Services of general interest, including social services of general interest: a new European commitment"[1]. This Communication builds on a large consultation process, to which the SPC's contribution was significant. It acknowledges the difficulties experienced by public authorities and service providers, in particular at the local level, in understanding and applying Community rules and the need to provide better explanations and practical guidance on how to apply these rules. In this context, two Staff Working Documents, dealing respectively with public procurement[2] and state aid rules[3], have been issued. These documents provide answers to frequently asked questions (FAQs) relating to the application of State aid and public procurement rules (PP rules), most of which were collected during the consultation process in the area of social services. They are complemented by an 'interactive information service' (IIS), which is a web service aimed at providing concrete guidance to citizens, public authorities and service providers in the area of services of general interest (SGI).

In January 2008, the SPC mandated an informal working group on SSGI with the following tasks: (i) analyse the answers provided in the two Staff Working Documents on public procurement and State aid, in light of Member States' experience concerning the application of such rules; (ii) identify more examples derived from the SSGI area which could be added to these documents; (iii) review whether further questions arise or specific problems have to be reported concerning the application of public procurement and State aid rules and (iv) discuss questions concerning the application of Community rules other than public procurement and State aid rules.

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1 COM(2007) 725 final of 20 November 2007.

2 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.

3 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.

On 6 and 7 March 2008, a general exchange of views on the two Commission Staff Working Documents took place within the working group. Drawing on the results of this meeting, the working group identified a series of questions deserving further examination and prepared a questionnaire. After adoption by the SPC, the questionnaire was sent to Member States and stakeholders active at European level on 7 July 2008. Member States were also asked to envisage, in the preparation of their reply, an involvement of social partners and NGOs, as these actors play an important role in this field.

The present SPC report summarizes and analyses the answers received to the questionnaire[4]. The following section 2 concerns the two Staff Working Documents in general: how they are perceived by stakeholders and how they could be completed, through the addition of concrete examples or additional questions. The main thrust of the report is the analysis, in sections 3 and 4, of the answers to the questionnaire concerning the application of public procurement and state aid rules. The comments made regarding other Community rules than State aid and public procurement are addressed in section 5.

2. FEEDBACK ON THE TWO FAQS DOCUMENTS

2.1. General feedback

The feedback on the FAQs is generally positive: most Member States and stakeholders consider that they provide helpful information and contribute to clarifying the legal framework applicable to SSGI. When the IIS is referred to, it is considered a useful tool to provide guidance and to gather real world examples for further evaluation. Some stakeholders point out that the questions and answers should be made available (at least to Member States). One Member State underlines that, in order to make this tool a success, it should be possible to ask questions and receive answers in all official languages. It also suggests that in each reply, a contact person is identified to facilitate the follow-up.

Some Member States and stakeholders inform that the documents and/or other relevant information concerning the application of Community rules have been brought to the attention of their local authorities/members/other relevant actors. However, they generally underline that the documents are not always known by those for which they are most relevant, i.e. local public authorities.

Several Member States and stakeholders also underline that:

– the FAQs are Staff Working Documents, thereby not legally binding. They cannot constitute an adequate answer to the level of legal uncertainly in the social sector;

– they leave aside topical issues[5] (e.g. definitions of relevant notions such as economic/non economic activities or SGI, internal market issues);

– they do not take sufficiently account of the specificities of SSGI. One Member State also takes the view that the message given by the Commission in the 2007 Communication and in the FAQs is biased as the application of Community rules in the social sector should be the exception and not the rule.

[4] It also takes into account comments made by Member States in the preparatory phase of the questionnaire.
[5] Other Member States do not share this view.

2.2. New questions

The present section gathers the main new questions that according to Member States and stakeholders could be added to the FAQs documents. These questions concern the application of public procurement rules and state aid rules, as well as the interaction between the two sets of rules.

2.2.1. New questions on PP rules

Scope of PP rules

There are situations where PP rules do not apply, e.g. when there is no cross-border interest, when service provision is not externalised and when no remuneration is paid to the service provider.

In this area, many Member States express a clear request for more detailed guidance.

For instance, regarding the issue of cross-border interest, it is stressed that the examples should not be limited to situations where the value of the contract is very low. It is also asked to clarify who has the burden of proof in this matter[6].

The comments made regarding externalisation and remuneration are often made by Member States when referring to public-public cooperation:

– the meaning of the concept of "remuneration" is sometimes uncertain[7];

– there are several ways in which public authorities can cooperate in the different Member States and it is not always clear whether and under which conditions cooperation frameworks between public authorities are likely to fall under the scope of PP rules. Several Member States consider that the examples of public-public cooperation given in the answer to question 2.9 of the PP FAQs are too restrictive and that the interpretation of the Commission unduly limits public authorities' autonomy.

Example:

Two communes decide to create a limited company to run together a home for elderly people. If one reads the reply to question 2.9 of the PP FAQs, it seems that they are not able to entrust this task to the company without applying PP rules. The second example given in 2.9 indeed seems to require the complete transfer of a public task to be performed by the transferee in full independence and under its own responsibility, while the communes may whish to maintain a certain control/overview on the entrusted company and on the performed task.

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6 In this regard, one should analyse the implications of recent judgements of the ECJ. For example, in *An Post*, the Court clarifies that contracts for certain services – identified in an Annex to the Directive, which cover social services - are not, "*in the light of their specific nature, of cross-border interest such as to justify their award being subject to the conclusion of a tendering procedure intended to enable undertakings from other Member States to examine the contract notice and submit a tender*". The Court also states that a mere statement by the Commission that a complaint was made to it in relation to the contract in question is not sufficient to establish that the contract was of certain cross-border interest. Judgement of the Court of 13 November 2007 in case C-507/03, Commission v. Ireland (An post). See in particular paragraphs 25, 32 and 34.

7 See for example judgement of the Court of 18 December 2007 in case C-532/03, Commission v. Ireland (Dublin City Council) – the mere fact that there is a funding arrangement between two public authorities does not mean that there has been an award of a public contract (see in particular paragraph 37).

Concerning the award of contracts falling below the thresholds of the PP Directive, one Member State in particular stresses that it does not share the views of the Commission on the application of the principles of transparency and non-discrimination[8]. It also disagrees with the fact that in the FAQs the same approach concerning the application of these principles is taken regarding the grant of concessions.

Public-public cooperation is further discussed under section 3.2.

Other issues

– *Mixed contracts*: a few Member States and stakeholders ask for more guidance regarding the concept of "mixed contracts". For example, how to assess a call for tender which covers at the same time the establishment of an infrastructure and the provision of a social service?

– *Possibility to negotiate with potential providers during a PP procedure*: this issue is already addressed in the reply to question 2.8 of the relevant "FAQs" but in a succinct way. One Member State points out that, under the PP Directive[9], negotiation is only allowed if the public authority has opted for a negotiated procedure. This is only possible under certain limited circumstances and conditions. As these procedural provisions do not apply to social services[10], the room for manoeuvre public authorities enjoy in this regard is not entirely clear.

– *Award criteria*: one Member State asks to which extent the already existing relationship between the provider and the user, as well as a deep understanding of specific local circumstances, can be taken into account.

2.2.2. New questions on state aid rules

2.2.2.1. Scope of state aid rules

The relevant FAQs contain some examples of situations where an activity is not considered economic or where there is no affectation of trade. Several Member States ask for:

– more examples of the distinction between economic and non-economic activities. Some Member States stress in particular that the existing case-law concerning social services and social security systems should be described in more detail. A few Member States consider that the decision as to whether an activity is economic or not should not be left to the ECJ but to the Member States.

– more information on the criteria to be taken into account when assessing the "affectation of trade" criteria (e.g. geographic location, use by citizens of other Member States, amount of the aid, economic size and strategic position of the company that receives it).

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[8] This position of the Commission is notably expressed in an interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ C 179 of 01.08.2006. This Communication is contested by Germany and several other Member States before the ECJ.

[9] 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).

[10] except if the Member State concerned decided not to avail itself from the flexibility provided for in the Directive when implementing it.

2.2.2.2. SGEI Package[11]

Act of entrustment

In order to benefit from the SGEI package, a provider must be entrusted with a mission of general interest. This "act of entrustment" implies an "obligation to provide" the service. According to the Commission, such "obligation to provide" is also one of the conditions imposed on certain social services to be excluded from the scope of the Services Directive[12].

For some Member States and stakeholders, the links and possible differences between the concept of "obligation" under the SGEI package and under the Services Directive should be clarified. For example, if a Member State decides to keep certain social services under the scope of application of the Directive because of the absence of entrustment, does it imply that it can no longer fulfill the conditions to benefit from Article 86(2) ECT to justify state aids granted for the provision of these services? Can the "economic necessity", i.e. when the existence of an undertaking completely depends on public financing, be considered as equivalent to an obligation to provide?

One Member State would consider useful to have more examples of the Commission practice and legal reasoning in concrete cases of application of the SGEI package. One stakeholder would like to understand better the limits that the concept of "act of entrustment" puts on the autonomy of the actors. It refers to situations where an organization is entrusted by law with a general mission but its local branches are very autonomous in determining their priorities.

Compensation of cost and prohibition to overcompensate

One Member State wonders whether it is sufficient to have a mechanism in place aimed at preventing overcompensation or whether a public authority should be able to prove that there is no overcompensation. It stresses that the complexity of e.g. health care services often makes it impossible to prove the absence of overcompensation.

Some stakeholders raise the following questions:

– how to assess that there is no overcompensation when a SGEI is financed by different public authorities? If a single provider in entrusted with several SGEIs, should this criterion be assessed globally or for each SGEI?

– does the concept of "annual compensation" make sense for SGEIs dependent on real estate/infrastructures? If the public service obligation imposed on service providers is not limited in time, how should the control of the cost compensation take place?

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[11] The objective of the SGEI package is to facilitate the grant of state aid aimed at compensating service providers for the costs incurred in carrying out a mission of general interest. The package encompasses notably 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, and the Community Framework for State aid in the form of public service compensation, OJ C 397, 29.11.2005.

[12] See Article 2 (2) (j) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376/36 of 27.12.2006. See also Handbook on the implementation of the Services Directive: http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf .

Several Member States point out the importance of the recent Bupa case[13], the conclusions of which should be reflected in the FAQs documents.

Account separation

A few Member States underline that the obligation to keep separate accounts for an undertaking providing a SGEI while carrying out other activities is a heavy burden, in particular for SMEs. One of them also asked whether separate accounting is also required in a situation where the two types of services are so closely linked that it is difficult to distinguish the commercial services from the task of general economic interest (reference is made to the Corbeau[14] and Glöckner[15] case-law).

2.2.2.3. Other state aid issues

– *Article 87(2a) - aid of a social nature to individual users*: the FAQs document clarifies in the reply to question 2.6 that financial support granted to individual service users does not create problems under state aid rules if it is granted without discrimination related to the origin of the service concerned. One Member State takes the view that more examples should be added in the light of the fact that vouchers are increasingly used to finance social services in certain Member States (e.g. aid granted to associations of parents to support the organisation of activities for children).

– *Article 87(3) ECT*: one Member State asks whether an aid can still be declared compatible on the basis of Article 87 (3) ECT, if the conditions of the Decision or the Framework are not met. This Member State also informs about an ongoing discussion in the health care sector concerning the grant of "transitional" aid to a sector ("is it allowed that the government gives temporary financial allowances to some care companies/organisations in order to facilitate changes in the system of financing of the care concerned? Financial compensation during a transitional period for those companies/organisations which are negatively affected by a new system of financing could help to get support for change and prevent serious financial disruption of certain companies/organisations").

2.2.3. New questions on the interaction between PP rules and state aid rules

The interaction between the two set of rules[16] remain a topical issue for a few Member States and stakeholders.

– One Member State asks for more explanations concerning the fourth criterion of the Altmark ruling[17], and in particular the type of PP procedure which is required.

– Another Member State asks whether the grant of financial support to certain providers (on a "de minimis" basis) for the establishment of an infrastructure, followed by a procedure to grant a contract/concession to the already equipped operators is compatible with internal market rules.

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13 Judgement of the Court of First Instance of 12 February 2008 in case T-289/03, OJ C 79 of 29.03.2008, p.25.

14 Case C-320/91, Corbeau [1993] ECR I-2533.

15 Case C-475/99 Ambulanz Glöckner [2001] ECR I-8089, I-8094.

16 This issue is dealt with in the reply to question 2.11 of the FAQs on PP rules.

17 See case C-280/00 Altmark Trans [2003] ECR I-7747. In this judgement, the Court held that a public service compensation does not constitute state aid if four cumulative criteria are met. The fourth criterion notably refers to the selection of the bidder pursuant to a public procurement procedure.

– One stakeholder asks for more guidance concerning the possibilities to grant financial support to SSGI providers without selecting them via PP procedures.

– One Member State refers to situations where a public authority grants financial support to a project considered as being of general interest (i.e. this activity is in line with public policy objectives). This project is however initiated and carried out by the provider on its own initiative and no particular service is directly provided to the public authority. This example of a situation where PP rules do not apply could be used to complement the reply to question 2.11 of the FAQs on PP rules.

3. EXPERIENCES WITH PUBLIC PROCUREMENT RULES

In this area of Community law, the questionnaire focused on four different issues: (i) concessions and Institutionalised Public-Private Partnerships (IPPPs) in the social sector; (ii) public-public cooperation; (iii) the treatment of non-profit organisations and (iv) the public procurement procedures used in the field of SSGI.

3.1. Concessions and IPPPs

In light of the answers received, and even if there are exceptions, it appears that concessions and IPPPs are not often used in the social sector. This is in particular true for IPPPs.

3.1.1. Concessions

It is the transfer of the responsibility of exploitation/operating risk which distinguishes a concession from a public contract. In the case of concessions, the source of revenue for the economic operator consists either solely in the right of exploitation or in this right together with payment[18]. The PP Directive does not apply to service concessions that are nevertheless subject to the rules and principles of the EC Treaty (in particular the principles of equal treatment and transparency)[19].

Although it is not the most common instrument in the social field, concessions are referred to by several Member States. When examples are given, they concern the following sectors: residential homes for the elderly, occupational activity centres, kindergartens, transportation by ambulance, specific specialised medical care, social housing, child-care and home services. From the answers received, it seems that the distinction between concessions and PP is sometimes blurred.

There is not necessarily a common understanding of this concept and two Member States make interesting comments in this regard.

[18] See the interpretative Communication on concessions adopted by the Commission in 2000, OJ C 121 of 29.04.2000. It identifies concessions' main characteristics and specifies the rules applicable to them under the Treaty and secondary legislation, as well as the ECJ case-law.

[19] See footnote 7.

The first Member State explains that, on its territory, social services are provided on the basis of a "triangular relationship" between the State, the user and the provider. Under this model, all providers meeting the requirements fixed by the State are allowed to operate (licensing model). The users can then choose between these providers, which carry the operating risks as they have no guarantee as to the number of users they will attract. According to this Member State, this model presents the advantage to continuously stimulate competition between service providers and to promote users' choice. This Member State, as well as some stakeholders active on its territory, emphasizes that in order to avoid impacting on this model, any possible EC instrument on concessions will have to clarify that it does not apply to licensing procedures.

The second Member State refers to a new legislation that should soon enter into force. This new legislation is presented as an alternative to the application of PP rules that will offer new possibilities to organise the provision of health care and social services. The main features of this new procedure are the following:

– the public authority must decide whether to apply the new legislative framework and for which services. This new framework is suitable when the authority's purpose is to increase the choice and influence of users and to promote a diversity of providers;

– the public authority must then define the requirements that prospective providers of services must meet before agreements can be made. These requirements are specified in the contract documents. The public authority also has to state the payment that the supplier will receive for providing a particular service. The price is set in advance and there is no price competition between suppliers. This price also applies to the "in-house" service provider in case there is one;

– suppliers interested in providing services then submit their application to the authority, which assesses whether they meet the specified requirements in the contract documents. If so, the supplier is entitled to sign an agreement under civil law. All providers that meet the requirements in the contract documents are admitted to the system and the users have the choice between these providers. This Member State explains that the selection is therefore not based on the criteria applicable in the context of a PP procedure[20];

– regular monitoring will ensure that the requirements are met and that the service functions well. The issue of quality requirements is currently discussed (with a possibility to set up some national quality criteria for social services to older people and people with disabilities).

3.1.2. IPPPs

There is no legal definition of IPPPs in Community law. In a Communication adopted in February 2008, the Commission describes IPPPs as a co-operation between public and private parties involving the establishment of a mixed capital entity which performs public contracts or concessions. The private input to the IPPP consists – apart from the contribution of capital or other assets – in the active participation in the operation of the contracts awarded to the public-private entity and/or the management of the public-private entity[21].

[20] In the context of a PP procedure, contracts are awarded to the tender "most economically advantageous" from the point of view of the contracted authority (i.e. based on various criteria linked to the subject matter of the contract, such as quality, price, etc) or to the tender presenting the "lowest price". See Article 53 (1) of the PP Directive.

[21] See Communication on institutionalised public-private partnerships C(2007) 6661 of 5 February 2008.

The answers to the questionnaire confirm that IPPPs are not very common in the social sector or at least that no information/assessment is yet available. In some Member States, this can be explained by the fact that relevant legislative frameworks are relatively recent or in discussion. Generally speaking, it seems that in the social sector, public and private operators (generally non-profit operators) rather cooperate through partnerships/cooperation agreements.

According to the respondents, IPPPs as such are used in the following sectors: maintenance and operations of hospitals and health care centres, social housing, residential homes for the elderly, dedicated schools and preschool education institutions.

3.2. Public-public cooperation

PP rules apply when a public authority intends to conclude a contract against remuneration with a third party and in theory it does not matter whether this third party is a private or a public operator. The FAQs on PP rules gives examples of situations where public-public cooperation does not fall under the scope of PP rules[22].

The objective of the questionnaire was to obtain more information on public-public cooperation in the field of social services. The following elements emerge from the comments received:

– in several Member States, public authorities cooperate between themselves for the provision of SSGI;

– this cooperation can take different forms and Member States use different terms to describe it: (mutual) contracts between public authorities, intermunicipal associations, confederations of municipalities, joint municipalities entrusted with specific tasks, institutional or "multipurpose" partnerships, "communautés d'agglomérations ou de communes", "établissements publics de coopération intercommunale" (EPCI) and "centres intercommunaux d'action sociale", agreements between municipalities. One Member State distinguishes between three types of cooperation agreements which are provided for by regional legislations: (i) when a public authority delegates to another authority the responsibility to execute a specific task; (ii) when a public authority mandates another public authority to carry out a task but remains responsible for its execution and (iii) when two public authorities establish together a joint venture with a specific purpose, which is a public law entity to which the specific task is transferred. This Member State explains that, under applicable regional legislations, only the second situation is subject to PP rules.

– even if in most cases it is not imposed on public authorities to cooperate, legislative frameworks describing the forms this cooperation can take seem very frequent. This might be done at different levels (national - even constitutional - or regional level) and through different legal instruments. Sometimes these cooperation frameworks are task-specific and sometimes they are not.

– these cooperation frameworks are particularly precious where municipalities are small and it is too costly for a single municipality to organise the provision of social services on its own. One Member State specifies that cooperation between two or more municipalities increases efficiency and quality, while guaranteeing the continuity of service provision and the possibility of directly steering the services offered. It adds that the cross-border effect of these services is generally very limited or completely absent.

[22] See reply to question 2.9.

As mentioned earlier in this report, it is not always clear whether and under which conditions cooperation frameworks between public authorities fall under the scope of PP rules. Several Member States take the view that the Commission's current position on public-public cooperation unduly restricts their autonomy in organising and providing social services. Some Member States also point out that a model according to which municipalities organize their statutory services together with other municipalities, e.g. by mutual contracts, cannot be compared to the procurement of services from the market. They therefore consider that mere inter-municipal cooperation should be excluded from the scope of PP rules.

Even if not all Member States make such clear statements, the description most of them give of the way their public authorities cooperate seems to imply that they do not necessarily apply PP rules in all situations.

3.3. Non-profit organisations

The FAQs on PP rules clarifies that, under certain circumstances, public authorities may limit the participation in tender procedures for the provision of social services to non-profit providers (i.e. the existence of a national law providing for a restricted access to certain services for the benefit of non-profit operators)[23]. One Member State takes the view that this interpretation is too strict.

The questionnaire's objective was to determine whether, at national level, certain activities in the social field are reserved to non-profit providers or where stakeholders believe that it should be the case.

From the answers received, it seems that in general, activities in the social field are not reserved to non-profit operators. Only one Member State explains that its Social Assistance Act provides that social assistance is a non-profit activity which means that providers are prohibited to make profit and that all revenues in excess of expenses should be allocated to the activity which is carried out.

This general statement should however be nuanced:

- there are a few exceptions, limited to specific activities. For example, one Member State explains that as blood service is based on voluntary donation, no remuneration can be perceived and only municipalities, joint municipal boards, associations or other comparable corporations can create a blood service establishment. In another Member State, the legislation on health centres (centres de santé) specifies that the provider has to be a "collectivité territoriale" or a non-profit organisation. In another Member State, there is an exception in the field of care institutions but it is currently called into question.

- in certain Member States, even if no activities are as such reserved to non-profit operators, their skills and expertise in the provision of social welfare services are legally recognised. This recognition can then translate into partnership agreements between the public and the voluntary sector. In one Member State, different legal frameworks apply for the selection of non-profit and profit making providers in certain areas of social services. NGOs act on behalf of the State, under a specific legislative framework. One Member State informs that it is currently examining how to reinforce the NGO status.

[23] See reply to question 2.7.

– finally, one Member State explains that in practice non-profit operators are predominant in certain sectors because e.g.

– there is no profit to make (e.g. assistance to homeless people);

– non-profit operators participating in a call for tender often win over for profit operator due to their ability to develop service quality aspects.

Some non-profit stakeholders regret that in general the important role they play in the social field is not sufficiently recognised at EU level.

3.4. Public procurement procedures in the social field

Social services are listed in Annex II B of the PP Directive and therefore only some principles of the Directive and general principles of the EC Treaty apply to them. The questionnaire aimed at better understanding possible specificities in the way PP rules are applied to SSGI in the different Member States.

The following emerges from the replies received:

– some Member States apply lighter procedures for the procurement of social services or are planning to implement simplified procedures;

– in several Member States, however, the applicable legal frameworks do not seem to provide for specific and lighter procedures for the procurement of social services;

– as mentioned earlier in this report, some Member States have introduced or are planning to introduce specific procedures which could apply in the social field and constitute alternatives to the application of PP rules;

– one Member State explains that most social services are performed in-house and that PP rules generally do not apply;

– in some Member States, the impact of new PP legislation on social and health services, in particular on the quality of these services, is currently assessed.

Different views are expressed on the application of PP rules in the area of social services. Some Member States and stakeholders consider such application as problematic and they refer to bad experiences. The most frequent criticisms are the following:

– contracts are often awarded to the tender which proposes the lowest price, to the detriment of quality;

– PP rules create an additional administrative burden, particularly detrimental to small, non-profit service providers. They can favour larger service providers, which can create risks in terms of territorial coverage and capacity to develop tailor-made solutions taking into account the particularities of the local situation;

– competitive tendering generates additional costs (supervision costs and costs incurred through the procurement procedure). The necessity to develop quality control methods also has an impact on cost;

– PP procedures can lead to short-term contracts and to discontinuity in service provision;

– PP procedures might hamper preventive work or the development of certain social services. Non-profit operators active in the social field often play a vital role in detecting evolving social needs. The PP logic trivializes the role and specificities of these actors. One stakeholder points out that there is a need to develop more flexible and adapted procedures in the field of social services (e.g. call for proposals).

Other Member States and stakeholders are more neutral or report good experiences. One stakeholder explains that if there is a tendency to award contracts to the cheapest bid, it is rather due to existing financial constraints than to the application of PP rules. It also points out that PP procedures are rather flexible and that the alleged disadvantages of these procedures (e.g. short-term contracts, focus on price) often result from the way they are put into practice.

4. EXPERIENCES WITH STATE AID RULES

In the area of State aid, the questionnaire focused on two main issues: the application of the "de minimis" Regulation[24] and the application of the SGEI package on services of general economic interest.

4.1. The application of the "de minimis" Regulation

The "de minimis" Commission Regulation provides that financial support granted to an undertaking and inferior to € 200.000 over a three years' period does not constitute State aid.

Some stakeholders consider that the "de minimis" Regulation can be a useful tool for susbsidies granted at local level. In one Member State, the responsible administration systematically checks whether the criteria of the "de minimis" Regulation and or the SGEI Decision are met. In another Member State, it is used for certain fee exemptions.

However, for most Member States and some stakeholders which replied to this question, the "de minimis" Regulation is not very much used in the social sector, for manifold reasons:

– the amount is too low;

– public authorities rather use exemption Regulations (notably that dealing with aid to employment[25]);

[24] 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.

[25] State aid for employment is now covered by the general block exemption Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L 214 of 9.8.2008, p.3.

– they apply PP rules for the selection of the service provider to which financial support is given. Therefore, such financial support does not constitute State aid;

– the only subsidies granted are defined by the law and, according to the respondent, do not constitute state aid;

– other instruments (Altmark judgement, SGEI package, exemption regulations) are easier to apply. One stakeholder points out that the provision on guarantee schemes can create problems when e.g. implementing an ESF project[26].

– local actors do not know this instrument very well. One Member State explains that a guide on SGEI and state aid has been issued to raise the awareness of the central government and of local authorities regarding these different instruments.

4.2. The application of the SGEI package

The SGEI package, also known as the "Monti-Kroes" or "Altmark" package, encompasses two main instruments, a Commission Decision and a Community Framework, aimed at facilitating the grant of public service compensations.

The Decision exempts from notification to the Commission annual compensation inferior to 30 million € for beneficiaries with an annual turnover inferior to 100 million €. For hospitals and social housing, the exemption applies without ceilings.

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) ECT. These compensations must however be notified to the Commission.

The questionnaire focused mainly on the Decision and sought in particular to obtain more information on (i) the **form(s)** under which SSGI are generally entrusted to service providers and (ii) the **type of providers** concerned; (iii) the arrangements made to avoid **overcompensation,** i.e. to make sure that the aid granted does not overcompensate the costs incurred by the service provider; (iv) whether the **thresholds** of the Decision are insufficient in certain areas. Finally, the questionnaire also encouraged Member States and stakeholders to report on any problems encountered in the application of the Decision or of the Framework.

4.2.1. Forms of entrustment

The comments made by Member States and stakeholders in this context do not necessarily strictly relate to the concept of "act of entrustment" in the context of the application of state aid rules. They rather provide information on the various frameworks and acts which regulate the provision of SSGI.

[26] The general block exemption Regulation creates a safe harbour covering guarantee schemes as long as the total amount of the guaranteed part of a loan is not higher than €1.5 million (or €750,000 in the road transport sector).

For the sake of simplification, the following models can be distinguished:

– the service is provided internally by a public authority or in cooperation with another public authority (see section 3.2. for the issues raised regarding public-public cooperation). It is frequent that local authorities operate under a legal framework which regulates their activity while giving them some autonomy in the implementation of the objectives pursued.

Example

In the field of sheltered employment, a national legislation specifies how the government and municipalities are jointly responsible for making work available to the persons concerned. Municipalities enjoy some room for manoeuvre in implementing this legislation: they can cooperate with each other and create regional *sheltered employment offices*. They can also implement it independently and found *separate legal entities* for this purpose (private law entities, generally owned by the municipalities).

– service provision is externalised via tender/similar procedures. Public contracts/concessions (in the traditional meaning) between the provider(s) selected constitute the act of entrustment.

– service provision is externalised to licensed/authorised operators. These authorisation schemes can take different forms and are sometimes also referred to as "concessions" (see section 3.1.1). Sometimes, contracts are then signed between the public authority and the authorised/licensed providers and could easily be considered as "acts of entrustment under state aid rules. However, this is not always so clear.

– a public authority grants direct financial support to a service provider for the provision of a social service. The agreement(s)/act(s) which put this financing contribution into effect can under certain circumstances constitute the act of entrustment.

These models can take different forms, across the EU but also within each Member State. They are not exclusive and can be combined, as the organisation of service provision can be a complex operation.

Example:

In one Member State, municipalities are entrusted by the law with the mission to reintegrate unemployed and occupationally disabled persons. They have the choice of (a) implementing reintegration themselves, (b) arranging for an organisation affiliated with the municipality to implement reintegration or (c) outsourcing reintegration to a private organisation. The Member State concerned explains that reintegration activities are implemented in large measure by for-profit providers.

These models are generally accompanied by specific mechanisms aimed at financing service providers. In this context, one Member State refers to vouchers, which are a financing tool aimed at increasing users' choices by allowing them to select their service provider. They presuppose that several providers are present on the market (in general providers that have been authorised to operate on the market).

4.2.2. Providers

A non-profit stakeholder active in the social field in various Member States gives the following overview of the situation:

– non-profit providers play an important role in the provision of social services but their importance differs from one Member State to the other, ranging from 50 % to sometimes even 90 %;

– this percentage is lower for health services, where the commercial sector has a higher share.

This information seems corroborated by comments made by Member States:

– in certain Member States, the provision of social services is traditionally dominated by non-profit operators and the share of commercial providers is very limited;

– some Member States however confirm that the role of commercial providers has increased over the last few years in certain segments of social services, e.g. residential and family care of children and young people, home services, employment services, long-term care and health services, adult care and homes/services for the elderly, services aimed at promoting safety and health at the work place. One Member State explains that NGOs are generally dominant in the following sectors: services for drug addicts, homes for pregnant women/mothers with young children and shelters for battered family members;

– one Member State informs that the nature of provision is changing quickly. The division between non-profit and other provision is less clear, and the boundary between types of service exists less, especially where services are integrated. It also explains that, in social care, informal carers (family members and volunteers not working through organisations) make a significant contribution alongside the formal care services.

4.2.3. Arrangements aimed at preventing overcompensation

Very few comments were made on this point specifically, and they generally take the form of new questions that could be introduced in the FAQs documents (see section 2.2.2).

4.2.4. Thresholds

The question on the thresholds of the SGEI Decision did not trigger many reactions. Two Member States seem to consider that the thresholds are sufficient, particularly for services provided at local/municipal level.

One Member State in which non-profit operators play an important role in the provision of social services considers however that the thresholds might not be sufficient if applied to the association as a whole and not to each of its local branches. The same remarks are made by the stakeholders which are active in this Member State.

This Member State also made two other remarks:

– in terms of costs, long-term care services for the elderly and for disabled people present similar features to those of social housing and hospitals. One should consider whether they should not benefit from the same treatment;

– due to the interaction between the two different thresholds referred to in the SGEI Decision (i.e. amount of the subsidy and turnover of the beneficiary of the aid), there can be differences in treatment which is not always justified.

4.2.5. Other problems of application

A few Member States explicitly indicate that they will provide more information in their national report on the SGEI package which is due for the end of 2008. This might also explain why relatively few comments were made in the context of the questionnaire.

Some Member States suggest that the SPC should closely follow the evaluation exercise carried by the Commission.

Some of these comments take the form of questions and have been gathered in section 2.2.2 (e.g. the difficulty to concretely control the absence of overcompensation, the fact that SSGI are highly dependent on public funding and, often, on different sources of public funding). In particular, some Member States stress that the implementation of the SGEI package could be burdensome for small local authorities.

One concrete problem of application is raised by a Member State and the NGOs active on its territory. It concerns the tax advantages linked to the non-profit status of service providers. According to the SGEI Decision (see question 6.8 of the FAQs on state aid, tax advantages have to be taken into account when determining the amount of the compensation necessary to provide the SGEI. This Member State and the stakeholders concerned however point out that the specific constraints linked to this status are not taken into account (e.g. restrictions on investments, prohibition to distribute profits). They therefore propose that the tax advantages resulting from the non-profit status of some providers are not taken into account when determining the compensation.

5. OTHER COMMUNITY RULES

The aim of this part of the questionnaire was to gather possible comments on the application of other Community rules to SSGI.

Most of these comments concern internal market rules, i.e. Articles 43 and 49 ECT and the implementation of the Services Directive in the area of social services. Recurrent issues for which some Member States and stakeholders (see section 2.2.2) consider that further clarification is needed are for example:

- the scope of the exclusion of some social services from the Directive[27];

[27] For example, the concept of "person in need" according to Article 2 (2) (j) of the Directive should be clarified.

- the links and possible differences between the "obligation to provide" the service under the SGEI package and under the Services Directive;

- the concept of "overriding reasons of general interest";

- the impact of Articles 43 and 49 on services excluded from the Services Directive.

Some non-profit stakeholders regret that in general the important role they play in the social field is not sufficiently recognised at EU level. They also express their concerns regarding the case-by-case approach of the ECJ and the impact recent rulings could have in the social field (Viking Line[28], Laval[29] and Rüffert[30]).

6. OPERATIONAL CONCLUSIONS

The seminar held in March 2008 and the replies to the questionnaire have shown that Member States and stakeholders are increasingly aware of the impact that Community rules might have in the field of SSGI. There is however also some remaining reluctance to a systematic application of Community rules to all aspects of the organisation, financing and provision of SSGI.

The SPC notes that the FAQs are generally welcomed and considered useful by most Member States and stakeholders. There are however remaining questions regarding the application of PP and state aid rules that the FAQs should address, with a view to reduce legal uncertainty in the social field. These questions relate in particular to the criterion of "affectation of trade between Member States", to the scope of PP rules and to the application of the SGEI package. They are identified in section 2.2 of the present report. The SPC proposes that these questions are taken into account when the Commission updates the FAQs. New relevant case-law - for example the Bupa[31] and the Coditel[32] cases - should also be referred to in the revised version of the FAQs documents. Furthermore, one should explore whether the FAQs should cover other Community rules. The SPC however notes that the FAQs cannot be the answer to all legal issues arising in the social field.

The SPC also observes that the FAQs and the IIS are not always known by those most concerned. The SPC believes that disseminating information on these guidance tools is crucial to increase legal certainty in the social field and that both the Commission and the Member States should take the necessary steps to increase public authorities and stakeholders' awareness. In particular, the FAQs should be available in all official languages and regularly updated. The IIS should also be accessible in all official languages. Member States should ensure that these documents and other relevant information are brought to the attention of their local authorities and other relevant actors.

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28 Judgement of the Court of 11 December 2007 in case C-438/05, JO C 51 of 23.02.2008 p.11.
29 Judgement of the Court of 18 December 2007 in case C-341/05, OJ C 51 of 23.02.2008, p. 9.
30 Judgement of the Court of 3 April 2008 in case C-346/06, OJ C 128 of 24.05.2008, p.9.
31 Judgement of the Court of First Instance of 12 February 2008 in case T-289/03, OJ C 79 of 29.03.2008, p.25.
32 Judgement of the Court of 13 November 2008 in case C 324/07.

Finally, the SPC has identified a few themes which are likely to deserve specific attention:

- ***public-public cooperation***: public-public cooperation is a way for Member States to organise the provision of social services and it is not always clear whether and under which conditions these cooperation frameworks fall under the scope of PP rules. Several Member States take the view that the Commission's current position on public-public cooperation unduly restricts their autonomy in organising and providing social services.

- ***the role of non-profit providers***: in general, activities in the social field are not reserved to non-profit providers. However, in the light of the important role they play in the social field, their skills and expertise are legally recognised in several Member States and this recognition could have consequences in terms of the application of Community rules.

- ***PP procedures and possible alternatives***: some Member States have opted for lighter or simplified regimes for the procurement of social services, as allowed under the PP Directive, but this is not the case everywhere. Moreover, in some Member States, there are specific procedures which can constitute alternatives to the application of PP rules in the social field (licensing models, calls for proposal, grants to projects initiated and carried out by a service provider on its own initiative).

The SPC proposes that these themes are explored more fully by the Commission when revising the FAQs. Moreover, if it results from such analysis that the existing legal framework should be adapted, for example concerning the cooperation between public authorities, the SPC suggests that the Commission takes the appropriate steps, as part of its commitment "to continue to consolidate the EU framework applicable to SGI, including social and health services, providing concrete solutions to concrete problems where they exist"[33].

The SPC also considers that there is scope for exchange of information and mutual learning between the Member States regarding the PP procedures applicable to SSGI and possible alternatives to these procedures.

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[33] See the Communication referred to in footnote 1, first paragraph of section 4.

Annex: list of respondents

The report is based on the answers provided by Member States and stakeholders in response to the SPC questionnaire which was sent to them on 7 July.

Member States

	Member State	Date
1	PL	15/09/08
2	FI	15/09/08 + rev 18/09/08
3	UK	15/09/08
4	CY	15/09/08
5	CZ	16/09/08
6	MT	16/09/08 - final 18/09/08
7	HU	16/09/08
8	NL	17/09/08 EN version 18/09/08
9	LU	24/09/08 + social housing 06/10/08
10	DK	25/09/08
11	DE	25/09/08 EN version on 23/10/08
12	AT	01/10/08
13	SE	09/10/08
14	FR	21/10/08
15	LV	22/10/08
16	ES	03/11/08
17	RO	07/11/08

Some Member States (DE, ES, SI, LT, CZ, IT and NL) also provided comments in the preparatory phase of the questionnaire. These comments were also taken into account.

Stakeholders

	Organisation	Date
1	UEAPME + AT member	02/09/08
2	Fédération de la formation professionnelle (FFF) – FR	08/09/08
3	Business Europe	12/09/08
4	Union pour l'habitat (FR)	15/09/08
5	Eurodiaconia	17/09/08
6	Caritas Europe (Caritas CZ le 27/08)	17/09/08
7	Collectif SSIG	19/09/08
8	Mutualités FR	25/09/08
9	BAG FW (DE)	26/09/08
10	AIM	30/09/08
11	CES	03/10/08