

Social Services of General Interest

Reply to the Questionnaire by the Republic of Austria

Introduction

The questionnaire together with the pertinent documentation was sent out to a wide circle of potentially interested parties with the request to provide their comments/replies. The following players were contacted:

- federal ministries
- *Länder*
- Association of Austrian Towns and Cities, Association of Austrian Municipalities
- social partners
- NGOs/providers of social services

Numerous comments have been received, which are summarised in the following. In the health and social services sector roughly three fields can be distinguished, which are treated separately:

- social security
- health
- other social services

Educational questions are addressed within the competent expert bodies.

By way of introduction, the fact should be stressed that the competence for defining, organising and financing services of general interest lies with the Member States. It is pointed out that the guiding principle for the discussion about the future of services of general interest must be the subsidiarity principle. This means that the competence for guaranteeing the security of provision of services of general interest at a high level of quality should rest with the regional and local authorities also in the future. In accordance with the principle of subsidiarity and based on the principle of the autonomy of the *Länder* and municipalities, in Austria the regional and local authorities may decide freely whether they carry out public services themselves, through a spun-off entity or a third party following a public contract award procedure. This freedom of decision must in any case be maintained.

Field 1 – Overview of the national services of general interest
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1. What are the general characteristics of the national 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, mutualisation);**
- **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.**

Social security

The Republic of Austria bases its considerations on the assumption that Austria's statutory social security schemes provide services of general interest – both in terms of comprehensive social protection and the nature of the services provided. It is therefore necessary to cover the entire field of social security.

Considering the fact that this sector – as explained in more detail in the context of Field 3 – to a very far extent does not fall within the scope of Community law, the below description of the system is limited to the indispensable minimum.

In Austria social security systems are partly organised by way of “self-government” (administration by representatives of the insured/employers subject to government supervision, notably in the area of health, accident and pension insurance) and partly directly in the form of state authorities (above all authorities competent for family benefits/services). These systems are financed as follows: full financing from the general government budget (e.g. long-term care provision), financing from a special government fund endowed with earmarked contributions (e.g. family benefits) and financing by contributions of the insured/their employers (health, accident, unemployment and pension insurance); in the latter case government funds may be used to cover general deficits. The entire field of social security is based on a pay-as-you-go scheme (no funded elements, no reserve fund under benefits law).

Another important characteristic feature of social security in Austria is that all health, accident and pension insurance institutions together form an umbrella organisation, i.e. the Federation of Austrian Social Insurance Institutions. The Federation is organised on the basis of the principle of self-government and has to make leading policy decisions. In Austria all self-governed entities are subject to government supervision.

The services/benefits are provided either directly by government authorities (e.g. family allowance) or insurance institutions (within their own purview or in the case of child-care allowance on the basis of responsibilities assigned to them). The latter

operate based on the principle of self-government. They provide benefits in kind – in particular of the health and accident insurance – either through their own facilities (e.g. rehabilitation centres of the pension insurance institutions or accident hospitals of the accident insurance institutions) or by involving private or other public service providers under private-law contracts. Public-private partnerships (PPP) are, however, becoming more and more common in the field of social security.

With the entry into force of the Federal Act Governing Long-Term Care Benefits (Bundespflegegeldgesetz / BPGG) on 1 July 1993, in Austria a seven-level, need-based long-term care benefit was introduced as an independent social benefit, to which there is a legal claim irrespective of a person's income and assets as well as the reason for the need for long-term care. In accordance with the Acts on Long-Term Care of the *Länder*, those persons who are not eligible under the BPGG are guaranteed long-term care benefits of the same amount and based on the same principles as the benefits pursuant to the BPGG. The expenditure on long-term care benefits is financed by the Federal Republic and the *Länder* out of general tax revenues in the framework of their constitutional responsibilities.

The second main element of long-term care provision in Austria is the further development of social services, for which the *Länder* are responsible. Under the agreement between the Republic of Austria and the *Länder* pursuant to Art. 15a of the Federal Constitution of Austria (Bundesverfassungsgesetz / B-VG) concerning measures for persons in need of long-term care, the *Länder* have an obligation to ensure a minimum standard of social services for persons in need of long-term care. The services are provided either by the *Länder* themselves or by other organisations on their behalf. The costs of social services (social assistance) are financed with general tax revenues.

The tasks of statutory social security are – as the term implies – to a very large extent defined in the law. Entities like the insurance institutions operating on the basis of the principle of self-government have autonomy in those fields where the legislator explicitly grants freedom of scope (e.g. additional health insurance services like dental treatment, which may be stipulated in the statutes of the respective health insurance fund) or in the framework of private-law contracts concluded with service providers. The basic principles and policies defined in the overall agreements of the respective umbrella organisation (e.g. Federation of Austrian Social Insurance Institutions and the Federal Medical Chamber) must, however, be taken into account.

Even within the ongoing reform projects in the field of social security (e.g. health reform) there are no plans to change these structural pillars. However, it is likely that an increasing number of PPP models will be created to benefit from the advantages of the free market also in the field of social security.

Health

More than two thirds of all hospital services are carried out in public / private non-profit hospitals. The main feature of these hospitals is that they are not operated for pecuniary benefit. Due to mandatory planning, the geographical distribution of the aforementioned hospitals in Austria conforms to actual needs. The hospitals are mainly financed with public funds (social insurance contributions, tax revenues). More than half of these funds are granted on the basis of diagnosis-related payments. Furthermore, hospitals receive fees for services from patients and private insurance.

If the services are not covered by the statutory health insurance, patients have to pay a fee laid down by the government of the respective *Land*.

Public hospitals are mainly run by the *Länder* as well as cities and municipalities, or private-law entities established and supervised by these local authorities. Private non-profit hospitals are primarily operated by religious communities. Furthermore, the statutory health insurance funds have their own facilities, in particular independent out-patient clinics.

Out-patient services are organised and financed on the basis of a contractual partnership between the health insurance institutions and the Medical Chambers (as the regulatory self-governing bodies of the medical profession under Austrian law). In the framework of this agreement the social partners define the infrastructure and the obligations of the service providers on the one hand and the health insurance funds on the other hand. Moreover, they lay down quality standards for the services performed.

One important service of the public health sector are vaccinations. Specific vaccinations recommended by Austria's Supreme Health Council (Oberster Sanitätsrat) are available free of charge for children aged between 3 months and 15 years. The costs are borne by the public sector and the social insurance.

Other social services

Social services with a focus on public service missions contribute to the promotion of social cohesion and the enforcement of the social rights of citizens. Social services of general interest are strongly influenced by national, regional and local traditions, structures and needs and are subject to permanent change. Social services are built on reliability, continuity and long-term responsibility.

Social services are *inter alia* provided in the following areas at regional and local level:

- children and young people: childcare, youth counselling, parent counselling or educational care;
- families and sole parents: marriage, family, pregnancy and parent counselling;
- older people: services for senior citizens, meals on wheels, assisted living, residential and nursing homes for the elderly, visiting services;
- people with disabilities: pre-kindergarten, school and occupational support, assisted living and nursing services;
- drug and alcohol addicts, Aids patients: preventive measures, therapy facilities, day care centres;
- migrants: counselling for foreigners, integration projects;
- people in social need: emergency beds, counselling and support for people with rent arrears in private apartments, debtor counselling, hotlines for people in distress;
- victims of violence: intervention centres, shelters for battered women;
- services promoting self-help;
- promotion of social integration.

In several spheres (e.g. rehabilitation of people with disabilities, long-term care provision) the *Länder* have a legal obligation to offer an adequate number of suitable facilities.

These services are mostly financed with funds of the public sector (*Länder* and municipalities) and the Labour Market Service and often also by the service recipients making income-dependent payments.

Social and health services are to a very large extent performed by non-profit organisations, e.g. non-profit limited liability companies (GmbHs), associations, self-help groups, loose platforms, religious organisations (parish Caritas, parish nursing, parish kindergartens, social services and educational facilities provided by religious communities, etc.), which are supported – partly considerably – by honorary helpers and charity donations. For this type of services the firm commitment of persons and groups acting on a honorary basis is indispensable. Established and recognised regional and local non-profit organisations are the basis for both honorary work and fund-raising as without them no “mobilisation effect” could be achieved. And without these personal contributions it would be impossible to finance and afford the social system at its current high level of quality.

The tasks to be performed are mostly laid down in agreements with the service providers in accordance with legal provisions. Quality criteria are in general also defined in the law. Service providers often have to undergo approval procedures. In some cases the quality criteria are contractually stipulated (e.g. general counselling and care facilities such as women’s refuges or debtor counselling).

There is a legal claim to some social services (e.g. social assistance, rehabilitation measures).

The actual costs of social services may not and should not be borne by the users of the services as in most cases they are in a difficult financial situation.

To illustrate the range of social services carried out by the *Länder*, an overview of the social services provided by the *Land* of Upper Austria is provided in the Appendix.

- 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).**

Social security

All spheres of social security are subject to modernisation on an ongoing basis to take into account continuously changing requirements. In this context mention should be made of the fact that the use of electronic services will be intensified in the framework of the e-government initiative.

Health

As regards planning in the health sector, the current Hospital Sites and Bed Capacity Plan is to be further developed into a Services Supply Plan taking into account the remaining segments of the health sector.

There are also plans to develop more quality standards for health services and probably make them legal requirements. Moreover, interface management will be implemented to boost the efficiency for the patients on the one hand and the system as such on the other hand.

Social services

Social services should be further developed with a view to increasing customer-orientation and consumer protection. Other priorities are improved quality management, controlling and the development of ratio systems and benchmarking models. Competition in this sector should also be subject to quality requirements, and the price of services should not be the only decisive criterion.

Two *Länder* informed about projects, which may be quoted as examples (this does, however, not mean that other *Länder* do not take similar measures). Styria draws attention to the self-imposed principle of participation, i.e. the involvement of those affected, in further developing social services. Due to the demographic development and the trend of individualisation, there is a markedly growing demand for care for the elderly.

In transposing Directive 2003/109/EC, Vienna plans to grant third-country nationals (who are long-term residents) a legal claim to social assistance.

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

Social security

In the field of health insurance market mechanisms are predominantly used when services are not procured in-house but through private law contracts. In this context, the field of medicinal products (drugs) has to be highlighted, which has proven to be one of the major cost factors in the health insurance system. Austria has therefore taken action to control the cost development in this sensitive area in the past few years. Measures carried out in this field also aim at implementing the so-called "Transparency Directive"¹. The use of less expensive generics is to be promoted. However, so far no data are available to assess whether market mechanisms have had cost-cutting effects in this sector.

Health

With the exception of diagnosis-related financing based on detailed cost calculation, examples of using market mechanisms in hospitals can be found particularly in the area of non-patient services (e.g. services of hospital kitchens, laundries). Besides the system based on a contractual partnership mentioned in the reply to Question 1), out-patient services in Austria are also provided by doctors who have no contracts with the social insurance funds and may be freely chosen by the patients ("Wahlärzte"). In Austria every doctor is basically entitled to "free establishment", i.e. to open a surgery. This system of "Wahlärzte" is exclusively based on market mechanisms. There are no mechanisms to control or intervene in the local distribution of the "Wahlärzte" and to influence the prices or the medical services offered. The services of "Wahlärzte" alone would be insufficient to ensure a balanced and nation-wide infrastructure for out-patient services but they have proven to be a valuable supplementary offer to the system of doctors having contracts with insurance funds ("Vertragsärzte"). As the statutory health insurance even refunds a percentage of the fees paid by patients for treatment by a "Wahlarzt" this system is integrated into the statutory social security system.

¹ Directive 89/105/ECC; Austria's previous legislation was partly in conflict with this Directive – see Case C-424/99, Commission vs. Austria.

Other social services

Social services are predominantly performed by non-profit organisations since there is no real “market”. Basically market structures can, however, be considered a suitable approach to the performance of social services provided that quality requirements taking into account the special needs of the target groups are met. Experience has shown that quasi-market competition situations of the service providers can have beneficial effects in terms of quality assurance and the prevention of monopoly structures.

Concrete examples for using market mechanisms have been mentioned only in individual cases:

- Experience in the field of social housing shows that the housing construction costs of non-profit building associations are lower than those of industrial property developers.
- Vienna mentioned the weekly delivery of frozen food in the framework of the “meals on wheels” service (as a supplementary service to the basic offer); Upper Austria gave transport services for people with disabilities as an example. No information was provided about the experience made.

The respondents provided diverging opinions on the effects of market mechanisms in the field of labour market services (e.g. courses for jobless people).

In some comments, notably by the employee representation, labour market services were described as a negative example of the effects of market mechanisms. The price competition resulting from market mechanisms was stated to have led to a significant loss of quality. Previously, the services were provided mainly by non-profit organisations. In the opinion of some players it has practically become impossible to develop innovative measures jointly with the providers as the content of measures has to be specified in advance in the framework of the mandatory contract award procedures.

Another problem highlighted in connection with contract award procedures for labour market services is that the successful providers cut their prices at the expense of the employees as they do not offer standard employment contracts. Providers with well qualified and experienced fixed-term employees hardly stand a chance of being awarded a contract on this basis.

With reference to an active labour market policy and rehabilitation measures, the employers’ representation points out that the benefits of market mechanisms may be taken advantage of in specific subsectors. Increased transparency, cost-efficiency and higher quality are considered advantages of outsourcing. In the sphere of the Labour Market Service (AMS) experience has shown that since the introduction of mandatory contract award procedures the market for advanced occupational training has become more transparent and fairer. Innovative measures may be tested in pilot projects on a small scale not subject to mandatory contract award procedures. If they prove successful, tenders may be invited.

The argument has been put forward that many social services currently performed by the government could be provided by private (non-profit) entities, without that the state would have to abandon its social responsibility and control. In general, control through “consumer power” is welcome to promote self-determination. However, the framework conditions have to ensure that individual providers do not concentrate on

an optimum range (e.g. care services only in urban areas, where customers have more purchasing power and distances are shorter).

Field 2 – Definitions of social services of general interest

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

No.

Definitions concerning individual fields (e.g. social assistance, youth welfare) are contained in the respective legislation of the *Länder*.

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?

A large majority of respondents agrees to this argument. In individual cases it is, however, argued that there are no significant differences or that basically similar provisions apply. However, these organisations also point out that social services constitute highly sensitive public goods and that it is therefore crucial for the quality of the services carried out to define framework conditions and to monitor compliance.

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 SGIs, 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?

As services of general interest, social and health services are a central element of the European social model. Quality, availability and affordability of social services have to be guaranteed also in the future. With regard to the objective of the completion of the internal market, it is important to ensure that the respective provisions of the Treaty Establishing a Constitution for Europe (Art. III-122²) are not dismantled.

² Art. III-122: European laws shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Constitution, to provide, to commission and to fund such services.

Social security

In Austria the services of general interest *in the sphere of social security* are characterised by the following key criteria:

- protection of the active population irrespective of the type of economic activity (e.g. including the self-employed and atypical employment relations) or the income level;
- the insurance contributions of all insured are based on the income; there is no grading of contributions based on risk groups (e.g. health status, age, sex, number of dependants, dangerousness of activity);
- on the one hand, benefits/services are to ensure an adequate compensation for a loss of income if an insured risk event occurs;
- on the other hand, the benefits law takes into account the concerns and needs of the socially weak (e.g. minimum benefits/services irrespective of the level of the insured income, benefits/services for families with dependants, exemption from additional contributions mandatory for the insured with greater economic capacity, e.g. for benefits/services of the health insurance);
- financing of the benefits/services exclusively based on the pay-as-you-go scheme from contributions, earmarked taxes or the general tax revenue;
- social services for people with disabilities and in need of nursing care are performed on the basis of the principles of social assistance (e.g. individuality principle, taking into account income and assets).
- the quality of the services to be provided is to a large extent defined by the state (by enacting the benefits law binding on all service providers).

As a result, the Austrian system of social security is shaped by various elements of solidarity (e.g. between the needy and those with more financial power, between the active and the inactive, between the genders, between persons with maintenance obligations and those without, between the different age groups, between different groups of gainfully active). The importance of the solidarity element is underlined by the fact that the individual has an enforceable claim, which is also guaranteed by supplementary measures (e.g. people's ombudsman or other ombudsmen). This all-embracing solidarity constitutes a major difference to other services of general interest. Since the relations between the institutions with a mandate to provide services of social security in Austria and the persons having a legal claim to these services may not be compared to the relations between service providers and consumers in other sectors (e.g. network industries providing services of general economic interest), priority has to be given to social security also in the framework of services of general interest.

Therefore the criteria developed by the Conference "Social Services of General Interest in the EU" are strongly supported from the perspective of social security systems in Austria.

Health

Health services of general interest are *inter alia* characterised by the following criteria:

- nation-wide supply/accessibility,
- affordability,
- crucial importance of quality assurance,
- necessity of long-term and supraregional planning,
- absence of an optimal market,
- as a rule contractual obligations on the part of the service providers,
- financing mainly by contributions and tax revenues, and
- in a majority of cases there is no direct contractual relationship between those in demand of services and the service providers.

Other social services

In the common position of the *Länder* pursuant to Art. 23d B-VG on the White Paper of the European Commission on Services of General Interest the fact was stressed that services of general interest, notably social services, differ from other services. The laws of the internal market are of minor relevance for this type of services. The focus must be on people and their individual needs for a life worth living. Social services differ fundamentally from other services as they require a personal, continuous and responsible relationship between those affected on the one hand and counsellors and care providers on the other hand; hence, they are not determined exclusively by profitability criteria.

Social services often have the aim to cushion the side-effects of market economy. In contrast to other services of general interest, which are generally of relevance for the entire population, social services are targeted at groups with special needs in specific life situations. Their objectives are integration, stabilisation, rehabilitation and / or preventing the socially weak from “dropping out“ from the mainstream of society. Social services strongly depend on the regional social development.

Another characteristic distinguishing social services from other services of general interest is that work on an honorary basis and charity donations play a major role; without these elements it would be impossible to finance the system at its current high level. As a result, regionally and locally established and recognised service providers have a network of voluntary helpers active on an honorary basis and donators, that has gradually developed over time. They cannot simply be replaced by other service providers lacking this indispensable regional and local integration.

In general one may state that social services are often provided by the public sector and financed with public funds.

Key characteristics of social services are equal access to services of high quality and financing based on the solidarity principle. Hence, these services make a vital contribution to territorial and social cohesion. It is therefore also necessary to ensure the nation-wide supply with social services adjusted to regional demand and the continuity of provision.

The quality of these services has to be subject to external control based on minimum quality criteria since due to their special social situation the service recipients are often not in the position to ensure that their quality demands are met. Another specificity of social services is that they may be carried out by administrative order or granted by decision of the authorities.

The criteria worked out by the Conference “Social Services of General Interest in the EU“ have been qualified as a good base also by the players in the field of social services.

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

Social security

For the reasons explained in more detail in the context of Field 3, the sphere of health insurance should be examined more closely from the perspective of EC competition rules. In fact this is the area showing the strongest interrelations between the governmental mandate of ensuring adequate supply of the entire population with health insurance services and the provider market, which is undoubtedly subject to the mechanisms of the private economy. As this does not apply to the same extent to pension or family benefits, these fields do not have to be priorities of further action at European level. It is a main characteristic of the Austrian pension system that there is a very clear delimitation between the 1st pillar based exclusively on the pay-as-you-go scheme (undoubtedly prevailing in Europe) and various 2nd and 3rd pillar schemes.

Other social services

This question has obviously been expressed in an unclear way and has therefore been interpreted differently. In those cases where replies to this question were provided, a majority rejected the examination of individual social services at European level since the EU has no competence in this area.

Field 3 – Experience with EC internal market or competition rules
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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 fall 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.

Social security

The Republic of Austria assumes that in general the entire social security system does not perform services of general *economic* interest. Regarding the question if the Austrian system of compulsory insurance conforms to EU rules (e.g. in Austria gainfully active persons are compulsory members of the competent insurance

institution specified in the law), Austria may quote the judgements of the European Court of Justice (ECJ) ruling that the comparable insurance institutions of other Member States are not enterprises performing economic activities³. In a recent judgement the ECJ also clarified that such institutions do not provide economic services⁴; in this respect the Austrian system is comparable with the German health insurance system. Austria's Constitutional Court has recently ruled that it was unconstitutional to cover the losses of specific insurance funds for employees by resorting to the funds of the institutions responsible for other occupational groups⁵. Nevertheless, this does not prejudice the principle that risk balancing between the different insurance funds is possible through the corresponding Equalisation Fund. Furthermore the fact should be highlighted that the principle of solidarity is certainly more pronounced in Austria than in Germany as Austrians – unlike Germans – may not freely choose an insurance fund.

Before clarification in the ECJ ruling, the benefits law governing health insurance was the sphere giving rise to most speculations about possible effects of the EC competition rules (especially Articles 81 and 82 in conjunction with Art. 86 EC). If the insurance funds had been found to constitute “enterprises”, in particular the contractual relations between the insurance funds (or their umbrella organisation, the Federation of Austrian Social Insurance Institutions) and the providers of medical services could have been considered to form a cartel or to abuse their dominant market position.

However, the ECJ itself pointed out that the entire range of health insurance services is not automatically excluded from EC competition rules. The Republic of Austria would therefore like to express its interest in an intensified exchange of experience concerning this grey zone to clearly define those areas where even systems like the German or Austrian health insurance might have to observe EC competition rules.

Other social services

Apparently, many doubts and problems arise in connection with public procurement. The *Land* of Upper Austria particularly recommended to clarify to what extent the area of youth welfare is subject to public procurement rules.

If a local authority acting at national level wants to perform a public service of general interest defined by it that is already available in or accessible through the market it is undisputed that this service will basically be exposed to competition by conducting an open, transparent and non-discriminatory contract award procedure. This does not only conform to the principle of competition but also to the basic rules of the EC Treaty⁶.

However, there is no absolute general obligation of conducting formal contract award procedures. It is explicitly stressed that the local authorities may decide whether they wish to carry out the services of general interest themselves (directly) or whether they contract third parties to perform them. The European Commission has not yet provided an adequate definition of the in-house provision of services of general interest. In particular the European Commission has not offered any clarification as to when and under which conditions there is an “in-house situation” justifying an

³ Case C-159/91 and C-160/91, Poucet and Pistre, and Case C-218/00, Cical di Battistello.

⁴ Case C-264/01 etc., AOK Bundesverband.

⁵ Decision by the Austrian Constitutional Court of 13 March 2004, G 279/02.

⁶ Cf. Case C-324/98, Teleaustria.

exception from the Community contract award procedures according to the “Teckal” ruling of the ECJ⁷.

It is incompatible with the mandate of legal certainty to wait for the ECJ to provide a more precise definition of the principles of in-house procurement developed in the “Teckal” proceedings. There is urgent need for clarification by the European Commission.

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)?

Social security

EC rules must certainly be observed if contracts are awarded to private providers of services. The ECJ ruled for example that EC rules on award procedures have to be complied with if the Austrian insurance funds conclude contracts with enterprises providing patient transport services⁸.

The field of health insurance is also well suited to highlight another trend that could be observed in Austria in the recent past. Due to the complexity of this area, it has become necessary to outsource more and more tasks, which were probably considered core missions of social security in the past. A good example is the Austrian project to provide all insured persons with a national electronic health insurance card (“e-card”), which above all was planned to replace the health insurance tickets. Of course, this project has posed great challenges as a suitable software has to be developed and the service providers require the necessary equipment to read these e-cards. As the social insurance lacked adequate capacity to implement this project, the services had to be procured externally. As a result of the great economic interest in this contract, the complexity of the award procedure under Community legislation⁹ but also due to the fact that the capacity of private bidders cannot be influenced by the government, the originally envisaged date for introducing the e-card in Austria has had to be postponed several times. In a long-term project of this kind it is also important to take into account fast technological progress as well as political developments. Moreover, in the course of time a clear political mandate has evolved that the Austrian e-card should not only serve as an electronic health insurance ticket but also offer the functionality of a general citizen’s card. This has automatically led to problems with the EC rules on award procedures as the scope of performance specified in the respective invitation to tender had not outlined this development in a sufficiently flexible way.

This example documents that the – mandatory – involvement of the market does not necessarily mean more efficiency but may in fact obstruct rapid developments, notably in technology. Moreover, one should bear in mind that planning by the state and quality assurance could be adversely affected if crucial tasks of social security are transferred to private market participants.

⁷ Case C-107/98.

⁸ Case C-76/97, Tögl.

⁹ Just in this context 2 cases have been pending with the ECJ (Case C-314/01, Siemens AG Austria, decision already available, and C-229/02, Debis, not yet decided).

This critical view is not shared by the Economic Chamber Austria (Wirtschaftskammer Österreich). The interest representation of the self-employed stresses the greater flexibility of award procedures resulting from the EC rules on contract awarding and also points out that the aforementioned project is still very successful compared to other tasks the social insurance continues to perform directly.

Of course, private-public partnership (PPP) models in the field of social security are also affected by the problem described above. Austria is aware of the fact that basically these problems are not directly related to Community legislation. Austria would, however, welcome an intensified exchange of experience regarding these issues with the other Member States.

Other social services

In several comments received the fact was stressed that the EC procurement rules in the field of social services may lead to undesired results. The requirement to define the respective service in advance is problematic as this is not always possible and useful due to the dynamic development of social and health services.

The *Land* of Upper Austria informs about two cases in connection with the award procedures for service contracts:

- In the context of awarding contracts for personal assistance services (particularly domiciliary care of patients) Upper Austria received a warning letter from the European Commission in 2000 since the necessary transparency had not been ensured. The *Land* of Upper Austria argued *inter alia* that the contracts with the organisations providing the services had been in force for many years and that their conclusion partly dated back to the period before Austria's accession to the EU. The infringement proceedings were finally discontinued by the European Commission without stating any concrete reasons.
- To reduce the monthly financial burden (a subscription fee of currently 18.17 euro) on the users of a emergency call programme, the emergency call devices were procured and financed directly by the *Land* of Upper Austria. The *Land* of Upper Austria did not conduct a formal award procedure as only one provider qualified in terms of system compatibility and quality requirements. After the infringement proceedings for contravening EC rules on contract awarding, a different approach was chosen. The *Land* of Upper Austria now only appears as a sponsor of the programme.

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

Conformity with EC rules is a *sine qua non* for new national legislation.

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.**

There is need for clarification in particular regarding the relations between the consultation processes of the Green and White Papers, the announced Communication of the European Commission on social services and the existing proposals for legal acts in the sphere of state aid and services in the internal market. In several comments the fact is stressed that the process initiated by the public consultation of the Green and White Papers to the present questionnaire and the planned Communication of the Commission is only of relevance when social services are excluded from the Framework Directive on Services in the Internal Market. Exceptions should be incorporated analogously in other legal acts (state aid; legislation on public contracts).

Austria has therefore demanded exemptions for health and social services in the Directive on Services in the Internal Market and in the sphere of state aid.

Social security

The Republic of Austria advocates that the work concerning social security services should be carried on provided that this enhances clarity and legal certainty.

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?

Services of general, non-economic interest do not fall within the internal market and competition rules of the European Union. Therefore it could be useful to prepare a catalogue of criteria to distinguish between general economic services and general non-economic services.

Some respondents also argued that a strict delimitation between economic and non-economic services was not imperative and that the focus should be on the social objective to be met (e.g. nation-wide supply with services of adequate quality for persons in need of nursing care); only after agreeing on this basis should the question be discussed whether this goal is to be achieved by way of open competition, restricted competition or within the competence of the public sector.

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

Undoubtedly it must be the primary objective of the forthcoming Communication to highlight the special societal and social relevance of social services of general interest and the fact that the basic concept of economic performance criteria cannot be applied to social services of general interest. Moreover, the Communication could also initiate a survey of social services in the EU serving as a basis for an exchange of information and cooperation among service providers. In addition, the

Communication could provide an overview of existing legal acts of relevance for social services as well as of the ECJ rulings.

The Communication could also cover quality aspects, which are of crucial importance for social services.

Several players have already emphasised in this connection that the aim of the Communication should not be to enact new legislation since all the necessary legal acts have already been adopted in the past.

The Communication should also outline the envisaged further steps as indicated in the reply to Question 14.

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.)?

The application of the open method of co-ordination in the sense of periodic assessment and evaluation is rejected. From the perspective of the *Länder*, the establishment of informal networks and the exchange of experience on best practices and benchmark comparisons could also be a suitable approach to enhance the efficiency and effectiveness as well as to improve the understanding of the mechanisms of social and health services in the Member States. Therefore an informal cooperation seems recommendable that is not referred to as “open method of co-ordination” but lends the necessary weight to the field of social services. The competent Council formation of the Ministers for Labour, Health and Social Affairs could hold consultations about the relevant progress reports at regular intervals (the Social Protection Committee should continue to be in charge of preparing the respective debates). These progress reports could provide clarification and information about national and international developments (e.g. new ECJ proceedings) and in any case raise the political awareness of this subject.

The discussions about the health sector should be prepared in an informal context of the cooperation between the Social Protection Committee with the “High Level Group on Health Services and Medical Care“ by involving the “Council Working Party on Public Health Meeting at Senior Level“.

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?**

Social security

In the field of social security Austria does not want to rule out the possibility of independent legislative acts. However, this matter has still to be clarified in more detail at national and European level. If legislative steps are taken at European level (e.g. a special framework directive) they have to be restricted to social services of general economic interest. On the one hand, the specificities of *social* services require a separate legal instrument (no horizontal instrument for all services of general interest); on the other hand, in view of the clear legal foundation the scope of such a legal instrument has to be narrowed down to *economic* services.

The package that is currently being developed by the Commission to implement the ECJ's Altmark judgement in the area of state aid could serve as a model for the field of social services. Analogously the criteria for granting exceptions from the principles of Art. 86(2) EC for social *economic* services of general interest could be defined by taking into account the principles developed by the ECJ so far. In this context, the elements of solidarity could for example be defined in more detail. In this process the differences between the systems of the individual Member States, which are still considerable, should be taken into account. Interference in the respective autonomy of the Member State could not be accepted. For this reason, quality standards for the social sector also seem unacceptable to Austria, at least from the current perspective.

However, if the scope of a legal instrument is limited to *economic* services, this should not be considered a failure to arrive at a uniform regulation for all social services of general interest. In view of the blurred delimitation between economic and non-economic services, notably in the social sector, and the continuous further development and shifting delimitation, the Member States will in any case try to ensure that the services currently classified as "non-economic" will comply with the criteria laid down. This would enable them to benefit automatically from the advantages offered under Art. 86(2) EC in the event of a changing legal framework (e.g. if an insurance institution is classified by the ECJ as an "enterprise" according to EC competition rules).

Austria's position on social security systems in the preparatory work for the Directive on Services in the Internal Market (especially exceptions for social and health services as well as the incorporation of all rules concerning patient mobility in Regulation 1408/71) has already been presented in the competent Council working party, but should be mentioned in this document as well.

Other social services

Legal acts in the field of social services are rejected, notably because there is no legal basis for legislation in this area. Due to the great differences between the Member States, uniform criteria are considered inappropriate. If minimum standards applying to the entire EU were defined, this could have negative effects. In those Member States with currently high standards the level of quality would for example be reduced, leading to a deterioration of supply. In view of these great differences, the criteria concerning the quality, affordability, accessibility or solidarity at European level would have to be defined in a rather abstract way so that it would hardly be possible to initiate a favourable development.

The *de minimis* rule developed by the European Commission should also be applied to local/communal services of general interest of a minor volume and without effect on Community trade by setting concrete ceilings for them. According to this principle, it is assumed that intra-Community trade is not affected if the criteria defined are complied with. The costs of contract award procedures are considered to be out of all proportion to possible benefits of public competition.

Provided that they fall within the scope of the EC Treaty, social services are in general services as defined in Annex I B to Directive 92/50/EEC (“non-priority services”). Therefore, a simplified contract award procedure is to be applied in respect of these services. In the literature on European legislation¹⁰ the problem has, however, been discussed that in particular social welfare services (e.g. “meals on wheels”, mobile carers) do not fall within the scope of the EC Treaty. An explicit exemption of social services from the scope of the directives on contract awarding should therefore be considered, especially since in practice it does not make sense to award contracts for these services in a transparent procedure.

According to the Land Tyrol in the field of social services at most a recommendation should be considered.

¹⁰ Cf. Ipsen, “Soziale Dienstleistungen und EG-Recht“