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***Social services of general interest:
European Commission/ EPC questionnaire***

Joint opinion

***of the German social insurance
umbrella organisations***

presented on 8 December 2006

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I. Preliminary remarks

In April 2005 the German social insurance umbrella organisations presented an own-initiative opinion entitled "Social insurance as a 'social service' in the internal market: Not a concept for Europe". In this document they reached, inter alia, the following conclusions:

- The role of European law in shaping Europe's future has been increasingly reduced in recent years to a purely market-oriented/economic consideration of all areas of social life. At the same time, one of the main concerns of European legal development is a radical opening of the market to tasks previously performed by the public authorities.
- The way is at the same time thereby opened to attempts by interested circles to liberalise and ultimately privatise social insurance irrespective of any possible added value or even with acceptance of additional burdens for those affected.
- The safeguarding and use of the European legal principle of subsidiarity in the field of social insurance therefore requires a basic readjustment of the relationship between member-states sovereignty as regards social policy questions on the one hand and the dominance, under European law, of the market orientation of all social areas on the other. The German social insurance umbrella organisations wish hereby to initiate such a discussion.

In the view of the German social insurance umbrella organisations, the questionnaire now available forms part of a forced creation, at global and European level, of structural conditions relating to extensive liberalisation and ultimately privatisation as well as extensive deregulation of social services. As previously stated in our opinion of April 2005, the DSV umbrella organisations in contrast emphasize the fact that social insurance services are overwhelmingly financed from taxes and social insurance contributions and are not "paid for" by the user in specific cases. This is an expression of the special public responsibility for achieving social policy objectives linked with social insurance. Social protection, social insurance and health are not economic goods tradable in the market, on which - if at all - general interest obligations are imposed, but they are themselves an expression and symbol of the general interest. The decisive structural conditions for market-oriented product design and pricing thereby cease to be applicable.

Organising social insurance "in the internal market" would not be possible without a basic change in the respectively pursued social objectives; it would be to a large extent synonymous with renouncing the steering of social policy objectives. If, on the other hand, it is wished in fact to organise social insurance "on the basis of competition" while fully preserving all its elements and social policy objectives, an artificial, highly regulated environment with an extreme reduction of entrepreneurial freedoms would have to be created which, moreover, would have to be sufficiently flexible in order, at any time, to put into practice democratically legitimated changes of social policy objectives. It is not apparent what advantages such a system would have for the participants. On the contrary, the "organisation" and "simulation" of competition is coupled with quite some costs and risks (award, concessions, public-private partnerships), and the yields of the operators acting in the market would have to be financed.

For the decision on the organisation of "social services and benefits" in general and of social insurance in particular, recourse to the market and competition is not an end in itself but is one among other possible instruments for achieving greater efficiency. In Germany, these elements are quite used. Whether and how they are used is, however, something to be decided at the level which is responsible for organising and financing the services. This, according to the European system of distribution of powers, is still and with good reason the level of Member States.

Against this background, this hereby presented answer to the questionnaire can also be understood as a critical assessment of the overall strategy on which the individual questions are based and which is not always recognisable at first glance. However, at the same time the questionnaire offers an opportunity to check on the main principles of social protection which endure even amidst global change but which in the political and administrative "daily routine" are increasingly threatened with oblivion.

Beforehand, a reference to the terminology used in the questionnaire appears necessary. Obviously the term "social services" means the relevant service itself (see the Annex entitled "Terms used"), while the term "social service" means, however, the organisation which

provides the services (see the chapter entitled "Organisational characteristics" and Question 10). It is therefore not always easy to grasp with certainty the meaning of the questions posed.

II. Answers to the individual questions

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

- The specified list of social services is in any event incorrect because it also covers "basic compulsory social insurance schemes based on the principle of solidarity and do not carry out economic activities". With this characteristic, these schemes do not in particular provide any (social) "services" within the meaning of Articles 49ff. of the EC Treaty.
- Social services of general interest cannot be distinguished precisely from other services of general interest. How the general interest is substantiated in an individual case is for the sovereign decision of the Member States. As here no uniform criteria of overriding importance are to be found, a general "checklist" should be dispensed with. Besides, for this reason alone a special sectoral directive relating to social services does not make any sense.
- Any meaningful answer to the question in relation to the doubtlessly "social" character of the statutory social insurance schemes moreover presupposes that legal consequences arise from the specific character of what is "social" in relation to other services of general interest. Those consequences are, however, not apparent from the current interpretation of Article 86 of the EC Treaty. Paragraph 2 opens "services of general economic interest" to the European internal market and competition. If it were a question in this connection of differentiating the "economic" from a "social" interest, an answer would in fact have to be found to Question 1. The case law of the European Court of Justice has, however, in effect redefined the wording of the legal definition in the sense of "economic services of general interest". By this is meant, as is rightly stated in the Glossary ("Terms used"), "any economic activity linked with general interest obligations". At the same time, it no longer matters whether and to what extent the "general interest" can be based on "social" considerations. The decisive question therefore lies in the arguments and proof of the "general interest" (see Question 8).

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

In the determination of the "scope", Point 1 ("Basic compulsory social insurance schemes ...") should be deleted while Point 3 should be supplemented as follows: "other essential services **of an economic nature** . . .".

Questions 3 to 7:

3. *Please indicate whether the characteristics identified by the Communication are pertinent to gauge the specific features of social services of general interest as compared to other services (of general interest)?*
4. *Please provide, if needed, for concrete drafting suggestions for the formulation of the characteristics as they are currently presented by the Communication.*

5. *Are there characteristics to be added? Please provide for concrete drafting suggestions and examples of services concerned by these characteristics.*
6. *Please provide as a maximum 3 relevant examples of social services representing one or more of the (additional) characteristics which could be taken as good example for their special nature. Please indicate which concrete element of the characteristics is clearly deducible from the example chosen.*
7. *How could these characteristics relate to the exclusion of specific social services from the scope of the Services Directive (Art. 2(2)(j) read together with the relevant Recital 27) as politically agreed on 29 May 2006 (Doc. 100003/06)¹?*

As, in our view, the question of the "description" of "social" services cannot be meaningfully answered (see Point 2 of our answer to Question 1), an answer to the questions as to the relevance of the "characteristics" of social services is not necessary.

Nevertheless, a certain trend can be gathered from the "organisational characteristics" and from Recital No. 27, mentioned in Question 7, of the draft Service Directive, in accordance with which social services selectively serve "the needy" (Recital 27) or "especially endangered" persons "in particularly difficult situations" (see organisational characteristics). Against this is to be objected that even a social state dedicated to the European social model may by no means limit itself to the protection of the most needy but has a much more extensive task. It offers and organises protection and care against elementary life risks, with individual protection against which even average to better situated persons would generally be unable to cope.

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

A case study of February 2005² prepared for the European Parliament has comprehensively and aptly summarised why the search for a European answer to the question of a uniform definition of the "general interest" must fail against the background of the broad spectrum of member-states ideas and practices. With this abstractness, a definition of the term "general interest" therefore does not make any sense. Moreover, applied to different specific sectors, the term has entirely different meanings and characteristics, and the understanding of what is to be viewed as "general interest" in a concrete case and what belongs exclusively to the private sphere is subject to constant change in the political-democratic formulation of political objectives. Normally, it is expressed implicitly in the result of political procedures - the law including official recitals - in which the legislator pursues the interests of the common good and where it draws the limits to individual interests. At the same time, it is more a question of political culture than question of principle as to what extent further specification takes place at the level of administration or other entrusted institutions. From the standpoint of the Member States, nothing would therefore be gained if every state intervention were explicitly justified with reference to the "general interest".

¹ Text available at the following website: http://ec.europa.eu/internal_market/services/services-dir/proposal_en.htm

² Contractor: Professor Gabriel Obermans, Institute of Public Sector Economics, University of Economics and Business Administration, Vienna, Austria, entitled "Services of General Interest in the Internal Market" prepared for the European Parliament in February 2005.

The problem is clearly due to use of the term "general interest" in Article 16 and Article 86 par. 2 of the EC Treaty in which the term has assumed a European dimension insofar as it sets limits to arbitrary and abusive use by the Member States: State regulations which clearly do not have any relation to the general interest cannot at all appeal to the exceptional circumstances dealt with in those regulations by reference to the application of Community law. To this extent, a - not always unproblematic - control of abuse is exercised by the European Court of Justice. In practice, however, the legal scrutiny does not so much concentrate on an examination of the "general interest" but on an examination of the question whether the regulation concerned is necessary and required for the pursuit of the given and accepted general interest. In this respect, regularly points of friction arise with the subsidiarity principle and the competence of the Member States to organise and finance (social) services of general interest.

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

Depending on the sector involved and on political preferences, in the legal process of concrete formulation of the (general interest) missions and arrangements, the "characteristics" can from case to case be helpful. For the social insurance sector it is obvious that the "solidarity principle" as well as the "renunciation of a profit-making purpose" are leading elements. A further decisive point of view must be the question whether these services - as in the case of social insurance - are in the main financed by public funds, including social insurance contributions, or if they are paid for by the users themselves in every case.

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

The term "social service" here clearly does not mean the service, but the institution which provides the services.

In the area of German social insurance, insurance cover is ensured by public institutions. They are directly subject to law, are subject to State supervision, and in the event of a dispute are subject to independent legal review. Ensuring the "general interest mission" by the legally authorised bodies therefore does not give rise in principle to any problems; moreover the legislature can intervene at any time.

The situation can be different where third parties are entrusted with safeguarding the general interest mission.

Finally, particularly in the matter of social insurance the German practice of self-management has made an independent contribution to the definition and specification of the general interest which is the result of the reconciliation of the conflicting interests of the social partners. Fulfilment of the general interest mission has therefore to a large extent been made possible by the system of social self-management and certainly in the sense of "best practice", at least insofar as the general interest can be achieved by social policy.

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

It is not easy to deduce the meaning of this question. Apparently it involves the determination of characteristics which decide whether the internal-market and competition-related rules of the EC Treaty are applicable. This question is also discussed from the standpoint of the differentiation between services of an "economic" nature and those of "non-economic" nature. In this it appears to be more and accepted that basically all social services are of an "economic" nature insofar as they can in principle also be provided in the market, even if this may require (co-) financing by public funds.

The German social insurance umbrella organisations do not agree with this point of view. For the purpose of differentiating "economic" and "non-economic" services and thus for the application of the internal-market and competition rules, what should rather be decisive in the main is that the institution concerned pursues public purposes without the intention of making a profit. A further major aspect is the fact that the services are paid for wholly or partly by public funds - including social insurance contributions - (see in this connection the answer to Question 17). On the other hand, it is not important whether, in addition, a market exists and private undertakings (wish to) offer services which are similar or of the same kind.

Questions 12, 13 and 14

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

With regard to the individual fields indicated in Question 11, the questions can be answered as follows:

- Public procurement

As the requirements, particularly for complex social services, are subject to constant and politically determined change and moreover must often be geared to the (likewise changing) needs of individual cases, a precise description in advance in the context of a public award procedure, is often not possible or meaningful. Experience has shown that later adaptations entail considerable costs or even make a fresh invitation to tender necessary. This was also clearly seen by quite a few participants in an initial consultation on social services. In its communication of 26 April 2006³, the Commission tries to get rid of these objections by reference to a change in the description of the concrete features of the services. In this connection it is stated that it is possible to limit oneself to determining

³ Commission communication of 26 April 2006 entitled "Implementing the Community Lisbon programme: Social services of general interest in the European Union" (COM (2006) 177 final).

the goal to be achieved. This implies that the details of provision of the service can be left to the entrepreneurial discretion of the service provider.

This approach is, however, by no means suited to simplifying the award of complex services. Among other, such an approach contradicts transparency requirements for all tenders on the one hand and legal certainty on the other by reference to legal contract award procedure. Finally, it should also be considered that the achievement of the objective pursued with the service depends in most cases not only on the performance of services in accordance with the rules. This, for example, becomes clear for services provided by pension insurance for the purpose of medical and professional rehabilitation. Apart from the health policy objectives, the goal of professional (re-) integration is to the fore. Whether this is achieved depends, however, not only on the quality of the services provided under the statutory mission but also on the labour- market situation. Certainly the "bar could be kept low" in this connection in order to give the service provider the opportunity of achieving the contractual objective. As experience in the area of work placement shows, this gives rise, however, at the same time to the temptation to fabricate artificial successes relating to the achievement of objectives rather than really achieving them. Likewise the approach pursued by the Commission is not suited to taking account of a relevant deviation of the actual required services from the original assumptions and expectations. Firstly, the objectives to be achieved can change with the passage of time or be readjusted in political discourse and the formation of public opinion. But as well in the event of adaptation to changed or unforeseen "needs of those affected", looking back and insisting in agreed general objectives will scarcely be sufficient to compel - if necessary - a costly alteration in the course of the entrepreneurial actions of the service provider without subsequent negotiations reflecting those costs. A shift of such imponderables into the risk area of the service provider would be either unrealistic or would have to be paid for dearly at the outset.

Moreover, at this point reference has to be made to a basic problem involved in competition between public and private institutions for the award of a public contract. The case law of the European Court of Justice⁴ creates a "special law" for public institutions which face competition and obtain a contract under a public tendering procedure. Unlike their commercial competitors, they may not freely award subsequent subcontracts but must for their part use the formal public procurement procedure. In this connection, it makes no difference whether they have a statutory or private-law legal form⁵. This legal situation will make the tender which is to be made on a competitive basis by a potential contracting authority in many cases more expensive, and it confronts the public authorities as the owners of enterprises with an insoluble dilemma: on the one hand they must behave like a private investor with the usual expectation of profit, while on the other hand with their public undertakings they must, as a contracting authority, comply with costly procedures, by which a private undertaking - if it puts out a subcontract for tender at all - would not be bound. This contradiction infringes the principle of "competitive neutrality of the regulatory environment" which always takes effect when public undertakings compete with private ones in the market⁶. If the contradiction cannot be remedied, it can

⁴ ECJ, judgment of 18.11.2004, Case C- 126/03

⁵ ECJ, judgment of 13.01.2005, Case C-84/03 ("*City of Halle*").

⁶ OECD: "Regulated market activities in the public sector", Background note by Deborah Cope, *OECD Journal of Competition Law and Policy*, Vol. 7, No. 3, 2005, p.62.

ultimately be solved only by consistent privatisation, i.e. by relinquishing public participation in an undertaking.

The alternative to such a privatisation-oriented path would consist in a consequent concentration of public tasks and their execution at the level of the central government, which would be comparable with a "merger" of private firms. The case law of the European Court of Justice scarcely leaves room in between. Thus once again the sovereignty of the Member States is being infringed: The competence to decide on their own on the organisation and the performance of public tasks under democratic structures. The organisation of public administration, the allocation of tasks and responsibilities and cooperation between public bodies and administrations are not topics for which Europe possesses or should possess competence.

Still unpredictable are the effects of the Commission communication of July 2006 entitled "Interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives". The guidelines are limited not only to the award of "small contracts" but also include services which were to a large extent previously excluded from application of the European public procurement rules under Annex II Part B of the relevant Directive 2004/18 as so-called "non-priority" services. This can naturally also affect the broad area of social "payments in kind", including health services. The focus of the guidelines lies on obligations that allegedly derive themselves from the "transparency obligation": ensuring for potential tenderers an adequate degree of publicity which opens up the service market to competition and makes it possible to verify whether the award procedures were carried out impartially. In particular, no conditions should be set which directly or indirectly disadvantage potential tenderers in other Member States. The discretionary award of such services should therefore no longer be possible.

This could be important for social insurance institutions selecting private providers for the delivery of social services. This can happen in the form of a purchasing procedure, or as a procedure to give limited access for instance to private health care providers to treat the social insured people - in any event where the number of authorisations is limited for reasons of demand planning. Many of these cases should be based on the grant of a public concession, which is not covered by the communication. Nevertheless even for these cases the European Court of Justice has already derived directly from the EC Treaty the basic obligation of a transparent award. The Commission will address this of questions in another place in connection with the consequential measures to be taken in relation to the Green Paper on public-private partnerships.

The German social insurance umbrella organisation take note that the European Court of Justice - supported by the Commission - has, in a broad interpretation, disregarded the aim of the European legislator. For good reasons - partly for pragmatic and also partly for social policy reasons - the latter has not prescribed a european-wide award procedure for all procurement transactions and has explicitly excluded some of the transactions from its scope. While this may be viewed as insufficient by certain institutions, it nevertheless has to be respected. The umbrella organisations therefore support the complaint of the German federal government before the European Court of Justice against the Commission communication which has been mentioned.

As regards the case itself, it should be noted that the European legislature has with good reason introduced threshold values for small contracts (currently € 210,000 for supplies and services), as the cost of a Europe-wide tendering procedure, with all its usual inherent risks, would be disproportionately high. If the Commission line should gain acceptance, it would therefore in many cases be attractive to annul – following a thorough commercial audit – outsourcing decisions and to have required goods and services produced by the public authorities themselves.

The opening of the public procurement markets to social services in the narrower sense which is aimed at by the Commission communication confronts contracting authorities with all the difficulties described at the beginning of this chapter ("Public procurement"). Moreover, in the European context of the social services there has also been little experience of dealing with such procurement and awarding rules which, in line with the Commission communication, would to a large extent have to follow strict and formal procedures. Here an exchange of experience at European level would be greatly welcomed. However, it would have to be conducted in a way that would not determine the result from the outset: Member States, social insurance bodies, local umbrella associations, welfare and consumer associations would have to participate on the basis of equal weight.

In parallel with this and clearly also with regard to the development of European public procurement law, countermeasures are possible only at the level of readjustment of the rules of the EC Treaty itself. Legal steps against the activities of the Commission are in any event insufficient as, in the long term, they could not cope efficiently with the exhaustive legal interpretation of primary law by the European Court of Justice.

- Public-private partnerships

In the context of the EU concept of "**public-private partnerships**", a changed understanding of the role of the state is envisaged: the State refrains from its function as direct provider and reduces its tasks to the organisation, regulation and control of the services for which it is responsible.

In relation to social insurance, this concept implicitly pursues a policy of replacing **compulsory insurance** with an **insurance obligation** and of transferring the tasks and functions of public social insurance bodies to private service providers. The latter would ultimately also define services and access conditions in conformity with the market principles, while persons who in this way would no longer receive adequate protection would then have to be supported by the general budget.

In its own-initiative opinion of April 2005 the German social insurance umbrella organisations called attention to the fact that as a result such an approach would by no means be limited to achieving with the use of market-related and competitive elements "more efficiently" the social policy objectives previously pursued by public social insurance schemes. On the contrary, it would insidiously change the concrete content of various elements of social policy:

- There would necessarily be a **loss of democratic steering and control possibilities**. The values, basic concepts and priorities which can change as a result of the democratic process require adapted and flexible rules which, through contractual

relations with outsiders, for example in the context of public-private partnerships, often cannot be created at all or only with inappropriate expenditure.

- The **standardisation and harmonisation pressure exercised on product standards** for the purpose of integrating the internal market would not remain without an impact on the "social policy objectives" themselves. This is because an ambitious definition of concrete standards would not be very realistic against a background where European policy aims at extending cross-border supply-sided competition and thereby only excepts "external" normative guidelines that are as low as possible or at best left entirely to the business sector (see some elements of the European Service Directive). Private operators are likely to become themselves "regulators" by determining in practice the service specifications and in this regard ultimately the content of the "social objectives".
- The reorientation of social protection to a purely competitive model will therefore have an impact on the basic orientation of social policy and social protection. Public social protection financed by taxes or social insurance contributions would be limited to **basic protection**, and social services going beyond this level would be offered in accordance with the laws of "the market and competition". But "basic" protection and benefits as well would be organised in the market. Persons who cannot be expected to bear in full the cost of premiums asked by market oriented service providers, calculated in accordance with risk, would eventually receive public grants, depending on the state budget situation. This would admittedly sustain the concerns of the internal market and competition. From a social policy point of view, however, solidarity would be reduced to mere **poverty avoidance** and also made directly subject to the current budget situation. Solidarity would no longer be an integral part of social protection schemes which are typically oriented to special situations in life and elementary life risks and thus always maintain awareness of the necessity of "redistribution" - unlike a redistribution through taxes.
- Thus the model would lead not to any improvement in social protection but to additional costs (e.g. investor yields). It would entail unforeseeable and drastic changes in the principles and details of the content of social protection and of the costs to be financed by the individual.
- The decision to move on the prescribed path is therefore not only a question of the method of organisation (close to the market or more in distance from the market) but ultimately also of the content and extent of publicly guaranteed social protection and rights. In the light of the "social policy objectives" pursued, the choice of means to be used is by no means a neutral one.

Concrete problems in connection with public-private partnerships could also arise in the area of social insurance where various statutory bodies cooperate, either in the form of joint institutions or through the use of own institutions by persons insured by another statutory body. Actually, instead of "public-private"-partnership this constellation should better be described as a "public-public" partnership. In this connection, however, the development of the case law on cooperation between local authorities is also being observed with concern by the German social insurance umbrella organisations. It must - if necessary through adaptations of the legal environment - also be ensured in future that

appropriate cooperation, in which no private or profit-oriented undertakings participate, does not, in its internal relationship, come under the rules of European public procurement rules..

- Freedom to provide services

The European **freedom to provide services** is an additional element of the comprehensive liberalisation strategy aiming to set clear limits to the autonomous organisation of social services. The characteristics of the content of services, quality standards and liability questions would be, are, if required, still publicly regulated, although in the interests of the internal market not at national level but by EU rules.

On the service demand side, the freedom to provide services has given a major impetus to patient mobility. The growth of rights and possibilities requires, however, increased responsibility on the part of all participants in order to control quality standards and prices. The latest EU legislative initiative on "Services in the internal market" aims, on the other hand, at a supply-side improvement of market access. In this respect, care must in particular be taken that the proven cost-containment and quality-assurance management elements continue to be maintained.

As far as the social-insurance provision function is concerned, certain statements by the European Court of Justice in the *Watts* case ⁷ open up a wide field of new legal uncertainties. According to these statements, the rules on freedom to provide services should in principle be applicable even in situations in which certain services (in this case hospital treatment) are considered to be services in one country but possibly not in another country because of specific organisational features (in this case: state run public health service). Applied to the social insurance schemes which in the meantime, particularly in the new EU Member States, are being increasingly privatised, this would ultimately pave the way to any "opt-out" from a public social insurance scheme. This case law should therefore likewise be an occasion for a readjustment of the European legal framework.

- State aid

The prohibition of state aid under European law is being successively expanded in such a way that services previously (and traditionally) provided by public authorities have to be increasingly privatised. If it provides public services in the market, even a public body must on the basis of these legal guidelines ultimately act like a private undertaking. This compels it above all to link its action to the intention to make profits and gain returns of investment as high as possible, because refraining from normal profits obtainable in the market already represents an aid. Achieving a profit customary in the market will, however, often fail precisely because a public institution has to award subcontracts in accordance with a formal procedure, and this thereby gives rise to additional costs which private competitors in turn do not have to bear. Thus under European law public authorities find themselves in a situation which ultimately pushes them out of the market. Moreover the purpose of a state undertaking, even when it acts in the market or close to it, does not precisely consist of achieving a profit or a yield in the same way like private undertakings and its investors do.

⁷ Judgment of the European Court of Justice of 16 May 2006 in the *Watts* case (C-372/04).

At this point, opposition has to be expressed to the view of the European Court of Justice that an state aid always occurs when public authorities operate an undertaking without the intention of making profit. This position overlooks, for instance in connection with the provision of health services, that there are areas in which no profit can be obtained. Moreover it must also be taken into consideration that obtaining genuine profit under a scheme is often not compatible with public budget law. Particularly in the area of social insurance, managing money paid by the insured people or their employers, surpluses have to be reinvested or reallocated to the social insurance assets, for example, if they occur following reductions in the remuneration for doctors services or medicines.

Anyway, in cases where the public authorities provide services through their own undertakings or wholly owned undertakings, the question of aids cannot arise. A state aid only comes into question where the public authorities promote a private third party who provides a corresponding service for the public authorities. No state aid occurs where - on a statutory basis or authorisation - a public authority is acting at the same time as an agency responsible for the provision of benefits and as the provider of those benefits, and therefore does not behave in a way that could affect competition. If, for example, the legislator decides to organise its social insurance schemes in this sense, this happens in the context of its organisational freedom relating to social policy, and it cannot be “taken away” by European rules on state aid.

Especially in the case of the statutory social insurance schemes, problems can in principle arise due to the fact that, since the decision of the ECJ in the Danner case, the "voluntary" components of statutory social insurance schemes can possibly be viewed as "services" within the meaning of Articles 49ff. of the EC Treaty. Consequently, it cannot be excluded that voluntary social insurance could be put into competition with pure financial services, which in the light of its special social function would be completely inappropriate. The same applies to a possible separation, ordered from outside, of bookkeeping between the compulsory sector and the voluntary sector in connection with a subsequent control under the rules of state aid law. The voluntary elements within the statutory schemes are subject to the same statutory rules that are applicable to compulsorily insured persons; both groups belong to the same solidarity community.

Questions 15 and 16

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

The answers to the preceding questions relate mainly to the social insurance schemes mentioned in Questions 15 and 16. A separate answer is therefore not necessary.

Question 17: *Which expectations do you have concerning future steps at Community level?*

From the legal point of view, what is required is a basic revision of the European legal understanding of the boundaries between "market-related", "economic" and "entrepreneurial" activity, with the uncontested application of European economic administrative law on the one hand and such activities on the other which - because of their general social link and with the simultaneous absence of private profit-making - are subject to the exclusive organisational discretion of the Member States. This implies a **readjustment of the term "undertaking"** in the non-liberalised sectors. In accordance with this new understanding, "economic" activities would be considered to be only those which are carried out in the market with the intention of making private profit. On the other hand, activities which are carried out in accordance with a statutorily defined task, are financed mainly by public funds, including social insurance contributions, and which are not conducted with the intention of making profit, would in any event not be regarded as entrepreneurial or economic activities within the meaning of European law. The same applies to the assessment of an activity as an (economic) "service" within the meaning of the EC Treaty. Such a definition would leave the competence of each individual Member State unaffected as regards taking further liberalisation measures within its sphere of responsibility.

Such a project could, however, quickly encounter limits if the some new trends in case law should become firmly established. There are tendencies to derive from the EC Tracy an obligation to re-organize services, previously provided by the public authorities and in the general interest, in conformity with market principles and therefore to privatise the production and delivery (*Freskot case*⁸), and to apply at the same time the principles of freedom to provide services, irrespective of whether in a concrete case the activities concerned are regarded in all Member States as a "service" within the meaning of Articles 49ff. of the EC Treaty (*Watts case*⁹). Such a further legal development cannot by any means be compellingly derived from the text of the Treaty. However, it should not be overlooked that the limits set in the Treaty to such a development no longer function and that also in that respect an answer has to be found at the level of primary EU law.

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

A major role of the Community, particularly in the field of social insurance, consists of promoting cooperation between the Member States with the aim of dealing with questions of common interest, inter alia, by application of the "Open Method of Coordination" (OMC). In the area of social insurance, this method is selectively used in the fields of "pensions" and, recently, "health", although with varying degrees of intensity. An extension of the method for the purpose of defining and differentiating social services of general interest is, however, rejected.

In addition, the OMC must - in its form which has now been streamlined and integrated to a greater extent in the Lisbon process - also treat social protection independently and with equal weight as a supporting pillar of the economic and political success of European integration in

⁸ Judgment of the European Court of Justice of 22 May 2003 in the *Freskot* case (C-355/00)

⁹ Judgment of the European Court of Justice of 16 May 2006 in the *Watts* case (C-372/04)

addition to the areas of growth and employment. In this connection, greater emphasis should in future be placed on the following aspects¹⁰:

- Reporting should be simplified. It would be a real relief for the participating governments and stakeholders if annual reporting could concentrate on one of the sectors concerned - inclusion, pensions or health.
- In the interest of comparability, a great deal should be demanded as regards the selection of the indicators. In order to obtain an adequate and system-neutral picture of the social protection schemes, it should be used a sufficiently large number of valid indicators. As previously, the pursuit of specifically national objectives should remain possible and should also be capable of being expressed in the context of the OMC.
- The German social insurance umbrella organisations request that, in the context of the newly streamlined OMC, contributions to compulsory **pension insurance** should not be regarded as a "tax" in the context of measurement of the marginal burden of the factor "work". One important reason is the required system-neutrality of the indicators applied throughout Europe, irrespective of whether, in the case of contributions, they relate to public pension schemes financed by contributions or contributions to capital-funded schemes.
- The indicators used for projecting State expenditure on old-age protection up to the year 2050 (in GDP percentage terms) should be modified in the sense of a more comprehensive illustration of the real burdens involved. This includes in particular not only public old-age protection expenditure but also State promotion of additional provision in the second and third pillars. In addition, means tested services and benefits for older people should also be taken into consideration to a greater extent and particularly in a way equally applicable for all Member States, both in the projections and also already in the description of actual situation.
- In the context of the new indicator portfolios aimed at illustrating the common OMC objectives of overriding importance, an underweighting of the decisive social policy objective of old-age protection is apparent, namely, maintenance of the standard of living at an advanced age after retirement. The overarching indicators admittedly look to the long-term developments (up to the year 2050) relating to public pension expenditure but not to the consequences for the adequacy of pensions, especially by reference to the maintenance of an adequate standard of living. This must be urgently rectified.
- The objectives pursued by the OMC in the **health area** (ensuring access; high quality and the sustainability of financing of care) are welcomed as a matter of principle. Nevertheless it has to be warned that, under the "streamlined process", the health area is to be considered in future only from the standpoint of poverty avoidance and social inclusion

¹⁰ See in this connection the joint opinion of the German social insurance umbrella organisations of May 2006 on the European Commission communication of 22 December 2005 entitled "Working together, working better: A new framework for the open coordination of social protection and inclusion policies in the European Union" [COM (2005) 706 final].

and, in this connection, care and quality aspects are to be systematically subordinated to fiscal policy considerations.

- The inclusion - especially in the list of overarching indicators - of so-called “subjective feeling indicators” for the area of health and long-term care must be emphatically rejected. In concrete terms these are "unmet needs for care" as an indicator of access equality and also "healthy life expectancy" as an indicator of health-outcome and inequality. They should be replaced by indicators which reflect the actual conditions of access to health care and which depict child mortality, perinatal mortality and also prenatal mortality.
- The organisation and basic features of the health schemes are within the competence of the Member States. The relevant national actors and here in particular the social insurance umbrella organisations affected must therefore be integrated to a considerably greater extent in goal development and indicator formation in the context of the parliamentary process.

Insofar as additional legal instruments are required in the interest of a better balance in the relationship between European market- and competition-related rules on the one hand and the autonomous organisation of social protection by Member States on the other (see answer to Question 17), a readjustment of the primary-law rules of the EC Treaty, above all by reference to Article 86 EC, would be the appropriate solution, and not a **framework Directive**.

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

In the context of the (streamlined) open coordination method (OCM), the social insurance schemes (see Questions 15 and 16) are already subject to ongoing observation. In this area, additional procedures do not create any added value but only additional reporting costs. If in this respect additional points of view are to be included, this should be done through further development within the framework of the OCM.

This opinion is supported by the following German social insurance umbrella organizations:

- AOK-Bundesverband**
- Bundesverband der Betriebskrankenkassen**
- Bundesverband der Innungskrankenkassen**
- Bundesverband der landwirtschaftlichen Krankenkassen**
- Verband der Angestellten-Krankenkassen**
- Arbeiter-Ersatzkassen-Verband**
- Knappschaft**
- See-Krankenkasse**
- Bundesverband der landwirtschaftlichen Berufsgenossenschaften**
- Hauptverband der Gewerblichen Berufsgenossenschaften**
- Bundesverband der Unfallkassen**
- Gesamtverband der landwirtschaftlichen Alterskassen**
- Deutsche Rentenversicherung Bund**