

Social Services of General Interest

Questionnaire

Introductory Remarks

FINLAND

Questionnaire

This questionnaire does not engage the Commission or any of its services

Field 1 – Description of social services

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

The Finnish social security system rests on the basic principles of universal social welfare and health services and a comprehensive income security system. The aim is to provide the entire population with social welfare and health services that are mainly tax-funded and whose organisational responsibility is decentralised, being assigned to the municipalities. The income security system is by nature risk-based social insurance system, which is supplemented by residence-based benefits. A more detailed description on the organizational principles of the Finnish social services is provided in the reply to the previous questionnaire on social services of general interest from 2004. The responses to this questionnaire will not discuss public or private employment services as a part of social services of general interest.

Neither the Finnish legislation nor the more general discourse regards social insurance schemes in the field of social security as social services. The proposed division into compulsory social security schemes that do not carry out economic activities and other schemes, especially complementary social security schemes, is ambiguous. The economic nature of the activities of institutions involved in the management of the compulsory social insurance schemes and the definition of these institutions as undertakings has led to a number of cases in the EG Court of Justice.

The above division cannot be applied as such to the Finnish employee pension scheme since its activities can be considered both economic and non-economic. The pension security of employees and self-employed persons is provided by law and the implementation of this compulsory and statutory pension security has been assigned to the authorised pension providers, i.e. authorised pension companies, company pension funds, and pension societies, that compete with each other. They exist only for the implementation of the legislation on employee pension schemes. The authorised pension providers have thus mainly exclusively social function and they perform a public task and exercise public authority. The authorised pension providers can be considered to exercise public authority when they, in accordance with the legislation on employee pension schemes, decide on someone's rights or obligations, for example by collecting insurance premiums and by allocating benefits. Some of the activities of the authorised pension providers can, however, be considered economic, and in such cases competition rules should apply. The economic activities include for example competition for clients.

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

It is difficult to consider social insurance institutions in charge of managing monetary income security benefits on one hand and organisations providing personalised social services on the other hand in the same frame of reference as the nature of and the obligations regarding their activities are very different from each other. It is sometimes difficult to distinguish between social welfare and health services: for instance, services for the elderly and for alcohol and drug abusers as well as rehabilitation services all incorporate elements of both health care and social welfare services.

It is important to consider whether the objective is to give a definition to services of general economic interests only or whether the objective is to include also non-economic services of general interest. This distinction is significant with regard to the Community internal market and competition rules.

Field 2 – Pertinence of the characteristics

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

It is difficult to find clear common characteristics of social services of general interest. Services can be provided by profit-seeking companies, by third sector actors that are not for profit or by the public sector. The use and efficiency of market mechanisms depend on the nature of the service. Also the financing arrangements as well as the financing share of the third party may vary.

The characteristics of social services of general interest presented in the Communication cannot be used to describe the Finnish social service system or its basic premises. The Finnish social service system incorporates both standard services provided for the population at large as well as personalised services. In Finland the role of voluntary work is not very significant. Universal social services available for the entire population are utilised not only by the most vulnerable but also by others. Solidarity is not based on any classification of social service clients; instead the whole social policy system is based on levelling the impact of income differences. In Finland the set of services provided by the public sector has been developed in political consensus and in accordance with prevailing needs. The significance of proximity and cultural traditions depends on the nature of the service.

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

A key factor is the existence of a public interest in the service provision (such as income transfers and social housing). Public interest may be linked to access to services, costs for service provision, local nature of the service, professionalism, contents, mode of provision, quality of the service and effects on the community. The realisation of the public interest is safeguarded by national legislation.

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

Cf. above. It is difficult to define comprehensive and common criteria for all services of general interest. Characteristics of social services of general interest are inevitably rough and broad and leave room for interpretations. In Finland, the question of which social services should be publicly organised, is defined by political process and based on the political will reflecting the needs of the population (political approach); not by the characteristics of the services (legal approach)

6. Please provide as a maximum 3 relevant examples of social services representing one or more of the (additional) characteristics which could be taken as good example for the special nature. Please indicate which concrete element of the characteristics is clearly deducible from the example chosen.
- *Child daycare services – public organisational responsibility; subjective right; both public and private service providers; client fees; public interest: reconciliation of work and family life and high employment rate, professionalism in early childhood education and care; universality, no solidarity-based selection of clients; no voluntary workers*
 - *Support system for informal care, public interest: reduction of costs, voluntary work plays a significant role, subsidiarity principle, public support, not available for everyone*
 - *Private home-help services, such as cleaning services for the elderly; they are totally private undertakings, public interest – support for elderly persons' abilities to live and cope at home, no direct public support, no public organisational responsibility, the possibility to use the right to deduction (cf. optician's services).*
 - *Authorised pension companies compete for clients chiefly with the quality of services and the amount of potential bonuses and rebates to clients. If the company has adequate solvency, it can pay its clients bonuses and rebates if the company's investment income is higher than required or the administrative costs are lower than the standard. This encourages pension providers to improve their investments and services, and thus it also benefits the efficiency of the entire employee pension scheme. Authorised pension companies may seek profit only in the strictly defined sense that the capital the owners have invested in the company can yield only the moderate return provided by law. (Note that the capital invested by the owners is usually negligible (i.e. per mils) compared to the company's entire capital.)*
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 ?

The scope of the Services Directive with regard to social services needs to be specified as the Directive is implemented. In Finland, the public responsibility to organise social services does not apply merely to the services provided for the most vulnerable. It also includes child daycare services, which are based on the principle of universality. Accordingly, daycare services purchased by the municipality do not in this context belong to the scope of the Services Directive. The system for informal care is non-economic by

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

character, which means that it falls outside the scope of the Services Directive. Private home-help services or housing services fall within the scope of the Services Directive if the legislation does not specifically define them to fall within to the scope of the public organisational responsibility.

Field 3 – Use of characteristics by Member States

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

In Finland there is no definition of social services of general interest. The concept of general interest appears in various Finnish acts, but there is no uniform definition. Instead, the contents of the term depend on the contents of respective act. Examples of the definition of general interest in national legislation have been provided in Finland's response to the previous questionnaire on social services of general interest in 2004.

For example the commonly used Finnish term that means "general interest" is translated into English differently depending on the context. In some contexts, the used Finnish word equals the English term "non-profit". For example, the concept 'non-profit (=general interest) corporation' is included in Finnish tax legislation. In Finland such corporations are in principle supported regardless of what services they produce. In value added taxation, on the other hand, support is provided to certain services produced by certain service providers.

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

Regarding the employee pension scheme, there is no specific definition of services of general interest. However, it is justified to consider the employee pension scheme as an actor that is incorporated in the definition of services of general (economic) interest. Also according to EC case law, it is the task of the Member State to decide on the definition.

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

The characteristics are guidelines for defining the general-interest nature of social services. They are not, however, as such applicable to describe the entire Finnish social service system. Social services differ significantly from each other also with regard to the described characteristics. Social services of public interest have developed as a result of a democratic policy process and no common judicial characteristics have been defined for

them. The variety of social services and the requirements defined for them are the result of a long-term development process.

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

In Finland the local authorities are obligated by law to arrange certain basic services for their inhabitants. The local authorities are free to choose the mode in which these services are organised. However, the Government has striven to steer these services with for example quality recommendations. Occasionally the implementation of the legislation has, however, been lacking. Local authorities have purchased services from private service providers. Direct subsidies for fulfilling the organisational responsibilities regarding public services have been rarely paid to providers of social services.

Productisation and invitations to tender regarding social services is a demanding and difficult task. Local authorities have had problems with regard to competence in purchasing services and especially in public procurement. Defining the quality of services, monitoring the quality, the terms of employment, securing the continuity of activities as well as development requirements concerning the contents of the work have caused problems. A reform of the legislation on public procurement paid particular attention to the sufficient flexibility of the public procurement procedures.

Field 4 – Use of characteristics at EU level

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

It would be very difficult to come up with a binding EU-level definition of the characteristics since the circumstances affecting social service systems and services differ greatly from each other both nationally and locally. Due to the variety of social services and of the needs for social services, each circumstance must be considered individually. A clear expression of the public interest regarding service provision plays a key role. Also, the EC case law should only refer to the common characteristics.

Field 5 – Experiences with the application of Community law

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

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

- State Aid

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

Public procurement:

The situation is to some extent not flexible enough in regard to services produced by the local authorities responsible for providing services in regional co-operation, i.e. in situations where the public sector organises services by internal co-operation arrangements (in-house definitions).

State Aid:

It has sometimes proved difficult to separate business that is subject to competition from other NGO activities.

By virtue of EC case law, the concept of economic activity is extensive, and in some circumstances it may be difficult to classify a certain activity as economic or non-economic. Since a key aspect of economic activity in the Community law is the equivalence of the service, it has remained to certain extent unclear which Community rules should be applied to national social services. This has significance for example in cases where local authorities purchase services from each other or when services are provided in partnership between local authorities and the private sector (including NGOs). The European law definitions of various services are not easy to apply to the principle of welfare services based on the Nordic system of public sector activities.

Freedom to provide goods and services and freedom of establishment:

The provisions in the appendix to the act concerning the accession of Finland to the European Union are applied to authorised pension providers. In effect directives on life insurances are not applied to “pension insurance undertakings”. These provisions, which now are included in Article 3.8 of the Directive concerning life insurance (2002/83/EC), state that the Directive does not apply to “pension activities of pension insurance undertakings”. These provisions thus exclude pension insurance undertakings from the scope of the Directive concerning life insurance.

The appendix provisions and the Article 3.8 aim at ensuring that pension insurance activities in Finland conform to the Finnish law even when a foreign undertaking carries out these activities. Hence, the appendix provision also ensures that undertakings in other Member States have the right to establish and practice pension insurance activities in Finland and in accordance with the Finnish law. These provisions do not, however, prescribe how “pension insurance undertakings” are related to the Community competition rules.

The mere existence of the appendix provisions and the Directive shows, however, that the Commission has recognised the special nature of the Finnish employee pension scheme as an actor implementing the compulsory social security system. The specific features of the Finnish employee pension scheme include, inter alia, joint responsibility for pensions, the last institution principle, joint responsibility in case of insolvency, uniformity of pension

decisions as well as other legal security factors. Finland has also notified the employee pension scheme as the compulsory and statutory social security scheme within the scope of Regulation (EEC) No 1408/71 concerning the coordination of social security schemes.

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

In the following some problematic effects of the Community law on national legislation and policies are described.

There is to some extent unclarity regarding the organisation of ambulance services. For example, when a case where a municipality had purchased ambulance services from the regional rescue services was brought to the Market Court, the Court considered that it was not question of work done together by two procurement units but of a purchase that should have been made subject to competitive tendering.

The European Court of Justice has issued its judgment in the case of the Republic of Finland (C-229/00), according to which the Finnish legislation is not in conformity with the Directive on transparency (89/105/EEC) in regard to the decision-making process concerning the special reimbursement of medicines. The legislation has been amended accordingly.

In its case law the European Court of Justice has also looked at the Finnish home care allowance for children and established that this benefit is covered by the scope of the Regulation on co-ordination of social security systems (C-333/00).

The provisions on public procurements are applied to purchase of social and health services. There are different views about the appropriateness of competitive tendering and the benefits achieved in that way. If the market functions well, competition may contribute to making the activities more effective and to cost savings, but there are plenty of problems in the field of social welfare and health care that are caused by market failures, such as asymmetric information. Services must also be ensured in situations where the service concerned only is needed for a few clients or patients. When a client is in need of several services simultaneously, it is vital to tailor an entirety of services according to the client's individual needs. Social and health services are also developed continually so that provision of services may at the same time involve reforming and developing the service in question.

According to the case Telaustria the Treaty presupposes that the principle of openness must be observed in purchases that are not covered by the scope of the Directive on public procurement, i.e. they must be advertised publicly. In other respects, the meaning of the principles derived from the Treaty in regard to procurements not covered by the scope of the Directive is subject to interpretation. The vagueness of the obligations on how to act has been experienced problematic, and that could maybe be paid attention to. The issue has also been touched upon in Finland's opinion on the Commission's Green Paper on public-private partnerships.

Furthermore, four cases are pending at the European Court of Justice regarding application of the obligations derived from the Treaty to purchases not covered by the Directive on public procurement (the case of Finnish Senaattikiinteistöt-Senate Properties C-195/04 (lower than the threshold value), service procurement concerning social contributions in Ireland C-507/03, Irish ambulance services C-532/03 and Spanish respiratory therapy services C234/03)

The internal market rules of the EC have considerably influenced the national alcohol policy. Finland has had to give up some restrictions on access to alcoholic beverages, and the taxation of alcoholic beverages has been lowered in order to curb their importation from other EU countries. Alkoholihaitat ovat kasvaneet merkittävästi. The national regulation of importation of alcoholic beverages from outside the EU has been approved by judgment C-394/97 of the European Court of Justice. The status of the national alcohol monopoly was established in judgment C-189/95.

According to the Finnish law, Finland's Slot Machine Association has an exclusive right to undertake gaming activities involving the operating of slot machines, casino-type games, and casino activities in Finland in order to generate funds for the promotion of health and social welfare. The Association was established in 1938 and the activities of Finnish social welfare and health organisations depend to a large extent on funding from the Association. These organisations play a key role in the infrastructure of the Finnish system. The basic tasks and role of Finland's Slot Machine Association are clearly defined in law. According the Lotteries Act (1047/2001) that entered into force at the outset of 2002, proceeds of Finland's Slot Machine Association are used for awarding grants to charitable or other non-profit organisations and foundations. The sole right of the Finnish Slot Machine Association to organise certain gambling games has been confirmed by judgment C-124/97. The Community competition and state aid rules have had impact on the definition of projects that receive grants.

Giving a definition for economic activities of general interest has particular significance for the Finnish employee pension scheme with regard to the application of Community competition rules. According to the EC case law so far, it seems obvious that the main task of the authorised pension providers, i.e. public pension insurance activities, can be considered a service of general interest. The competition rules should not apply to the activities of an authorised pension provider in cases where the rules would prevent the pension provider from fulfilling its key task.

The application of the competition and internal market rules may affect indirectly the capacity of Member States to provide services and finance them in the way they want to. Possible effects of the new Directive on services, must be examined further. It must be taken into account, in particular, that there are differences in the Member States' service systems. The judgments of the European Court of Justice, have brought about uncertainty.

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).

Problematic issues concerning the national debate:

- *the national legislation does not support the concepts of social services and social services of general interest introduced by the EU*
- *there is no definite answer which services are included in the definition of social services of general interest*
- *it is still unclear whether it will make any difference having the concept of services of general interest in the context of fundamental freedoms of the internal market: free movement of persons and services as well as competition rules*
- *it is almost impossible to distinguish economic and non-economic services*
- *it seems to be unavoidable that the EU institutions (the Court of Justice) will ultimately decide whether a particular service belongs to SSGI or not*
- *how much flexibility in defining SSGI at national or local level is possible regarding the present EU Treaty?*

The Social Affairs and Health Committee of the Finnish Parliament has emphasised that Finland should on the basis of national needs define the contents of services of general interest and how such services should be financed and organised at the national level so that they would be compatible with the EU internal market rules regarding services of general interest. According to the Committee, Finland should soon decide on a definition on services of general interest and services of general economic interest. Finland should also decide on a national strategy with regard to such services. At the national level, a review on the concept of general interest has already been initiated from the viewpoint of the Finnish service system.

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

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

According to EC case law, an organisation does not practice economic activities if it is responsible for the management of the public social service system and if it fulfils an exclusively social function. Its activities should also be based on the principle of national solidarity and it should be entirely non-profit-making. A key assessment tool is then the system's degree of solidarity. This means for example that the following issues have been considered²:

- *Pensions are financed by the working population;*
- *All persons are insured irrespective of their economic or health status;*

² C-159/91 (*Poucet and Pistre*); organisations that manage sickness and maternity schemes for self-employed persons are not considered as companies engaged in economic activities. C-218/00 *Cisal*: the Italian institution entrusted by law with the management of a scheme providing insurance against accidents at work and occupational disease is not an undertaking engaged in economic activities.

- *The system is based on a compulsory insurance;*
- *The system involves redistribution of income;*
- *The size of the pension does not depend on the size of the insurance contributions;*
- *The system takes part in financing such systems that have structural economic difficulties;*
- *In the end it is the State that confirms the amount of benefits and insurance contributions;*
- *The system is financed with insurance contributions proportioned according to income from the occupation and pensions;*
- *The State monitors the activities.*

However, based on the Community law, it is not clear to what extent the conditions stated in the case law are cumulative and complementary. The EC Court of Justice has a functional approach, i.e. the contents of the activities are emphasised instead of the organisation of the activities. The judicial character of the organisation is not considered significant.

The starting point for the employee pension scheme is that the authorised pension providers exercise economic activities in accordance with the competition rules. However, the activities of the authorised pension providers are not to be regarded predominantly economic as the authorised pension providers are chiefly responsible for paying employee pension in accordance with the principles of the distribution system. The above-mentioned criteria presented by the EC Court are in many parts, but not in all parts, applicable also to the employee pension scheme.

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

As maintained above, the Community rules regarding the characteristics of services of general economic interest should not be contradictory to the national law with regard to the organisation and financing of social services of general interest. See Section 11.

Field 7 – Future steps at Community level

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

It is possible to issue at European level general suggestive guidelines or recommendations on this issue, if that is generally seen sensible with a view to clarifying the States' operational models.

No such European added value can be seen linked to a further definition of legal criteria as could be co-ordinated with the principles of subsidiarity and proportionality.

It is advisable to clarify the relationship between the national decision-making power and the Community law, in particular in the implementation of the EU's

internal market rules and competence legislation, but it appears at this stage that it will not be possible by means of the concept of social services of general interest.

In the further work it is important to focus on those joint criteria that enhance legal certainty and on measures to ensure the right of the Member States to decide on their social and health care provision at national level.

We are pleased to note that the Commission states that it is primarily a task for the relevant national, regional and local authorities to define, organise, finance and monitor services of general interest and maintain that social and health services including social security should be kept within the competence of each Member State. Consequently, we support an open method of coordination including sharing of best practices. The fundamental aim should be to ensure well-functioning, affordable and high-quality services of general interest to all European citizens, regardless of domicile or economic resources.

With regard to social housing, housing and social services form an indivisible whole, and the appropriate organisation of social housing requires judicial and functional reliability. If the State or local authority provides social services of general interest in connection to social housing the Treaty is not applicable.

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

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

The Open Method of Coordination has been the best means to deal with social welfare and health issues at the EU level. We cannot, however, reinforce the status and legal security of services of general interest with OMC measures in circumstances where the EC internal market and competition rules to a large extent pose provisions for market-based services or forms of subsidies. At most, Community rules should focus on defining common criteria for social services of general interest. It is of primary importance to find common criteria in order for us to decide at the national level which services are of general interest and how the provision of these services is organised. A case-by-case interpretation of these issues in the EC Court is not desirable. Improving the legal security calls for clear criteria. Also, Community rules should have clear boundaries so that even in future the Member States retain a possibility to organise services in the manner they see best.

The Framework Directive proposed by the Commission might clarify the present situation where the EC Court creates new justice regarding social services by interpreting the competition rules. Clear legislation is of particular importance for the Finnish system where the public sector is the main provider of social welfare and health services.

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

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

Major differences between Member States' systems highlighted in the Commission Communication as well as the lack of uniformity regarding the concepts used advocate the proposed consultation process and dialogue, at the same time maintaining that no prerequisites for framework regulations exist.

Regarding the Commission's consultation and reporting process, we would like to underline that in connection to competition and internal market issues, the welfare tasks of the public sector should be respected. In Finland these tasks include among others explicit obligations that emphasise equity and universalism. Expanding the internal market to cover the entire service sector poses a great challenge for welfare policies and residence-based social security systems. Accordingly, even national definitions of EU policies should pay particular attention to ensuring that measures aiming to increase the efficiency of internal market measures do not make it impossible to consider the social policy dimension at the national level.

During the consultation process particular attention should be paid to the following issues:

- *more clear concepts (non-profit service vs. SSGI)*
- *more clear goals regarding the outcome of the process*
- *analysis of the contradictions (national system / EU-legislation, social rights / market freedoms)*
- *analysis of the jurisdictional space for deviation from the internal market rules and EU competition law*
- *proper level of subsidiarity (political issue)*
- *need to maintain the current welfare regimes in different parts of Europe (political issue)*
- *scrutinize the principle of proportionality and its application*

- *determine the factors that ought not to be used as potential competitive advantages in the field of social services of general interest.*