

## IN THIS ISSUE

- 2 Editorial
- 3 The "Bolkestein Directive":  
Introductory Notes  
*Ruth Ruiz*
- 5 Social services of general interest  
challenged by the Services  
Directive and public-private  
partnership  
*Jean-Claude Boual*
- 7 "Services of general interest":  
Market or Democracy?  
*Marc Uhry*
- 9 Impact of the Services Directive  
on Healthcare  
*Rita Baeten*
- 11 What is the status of social  
housing in the European Union?  
Answers to emerge this Autumn  
*Laurent Ghékiere*
- 14 Social Housing and State Aid:  
A Case in Point  
*Irish Council for Social Housing*
- 16 EU Directive on Services –  
an attack on public services  
in Europe  
*EPSU*
- 17 Services of General Interest  
in the face of the draft  
Services Directive  
*Carole Saleres*
- 19 How can the draft services  
directive be amended to  
recognise the specific  
characteristics of social services  
in Europe?  
*Kathleen Spencer-  
Chapman*

# The Future of Service Provision in Europe: The Homeless Sector and the Draft Services Directive

competition

economic growth

vulnerable groups

internal market

public interest

state aid

human rights

**Social Housing  
and State Aid:  
A Case in Point**

*Page 14*



# HOMELESS *in Europe*



FEANTSA  
is supported by  
the European  
Commission

Spring 2005



The draft directive on services has been the focus for substantial exchange and debate and thus it has served to highlight and crystallise certain outstanding questions in relation to service provision in Europe.

At the present time, the future of service provision in Europe is taking shape, as attempts are made at EU level to put in place an internal market for services. Creating a genuine internal market for services requires substantial removal of the remaining barriers to the free movement of services. A significant step towards this goal was taken when the Commission produced its draft proposal for a Directive on the Internal Market in Services in January 2004. The development of EU law in the area of regulation of the internal market and competition is a complicated affair and the draft services directive produced by the Commission is a technical and complex document. For this reason, it can be tempting for service providers at national level to avoid involvement in the debate and to ignore the possible ramifications for future day-to-day working. In the present-day EU, however, decisions taken at European level have a direct impact on the situation on the ground at national level. Those service providers working with homeless people across Europe, and who make up **FEANTSA**, need to be aware of impact EU policy-making may have on their sector. This latest edition of the **FEANTSA** magazine "**HOMELESS in Europe**" seeks to provide a comprehensive overview of the debate on service provision in Europe and its implications for the different service sectors that cater for the needs of homeless people.

The draft directive on services has been the focus for substantial exchange and debate and thus it has served to highlight and crystallise certain outstanding questions in relation to service provision in Europe. The uncompromising scope of the directive (covering all services, whatever their nature, provided for a consideration) has strengthened calls for a clear EU framework in relation to services which fulfil a task of public interest. In providing food, shelter, health services, housing and services leading to social reintegration to homeless people, the service providers concerned are fulfilling just such a task of public interest. These "services of general interest" are not given any special status in the draft directive however, despite the fact that the public service tasks they provide are recognised as taking precedence over competition in the *acquis communautaire* (established body of Community laws and regulations). A call to clarify and concretise the status of services of general interest through a clear European directive is one of the elements that has emerged strongly from the debate on the services directive and its failure to distinguish between commercial and social services.

What is the draft directive on services? What are its objectives and how does it go about achieving these? What are the implications for the social sector and what are the elements that are problematic for services fulfilling a task of public interest and meeting the needs of vulnerable groups? The introductory article contributed by Ruth Ruiz of the **FEANTSA** office sets out the answer to these central questions and provides the key elements for the debate on the draft directive. In his article, Jean-Claude Boual, secretary general of the European Liaison Committee on Services of General Interest (CELSIG) arms readers with a thorough understanding of services of general interest, their place in European development and their status in relation to competition law. He highlights the essential contradiction inherent in the recognition at EU level of the importance of the public service tasks provided for through these services on the one hand, and the attempt to include them within the scope of the draft services directive on the other. Marc Uhry of French NGO FAPIL further deepens the debate on services of general interest by considering them from a human rights perspective and making the argument that the notion of services of general interest may be strengthened by anchoring it firmly in the area of respect for human rights.

Services that meet the needs of homeless people cover a whole range of sectors: emergency social services and shelter, health services, housing services – even public utilities, in that they often incorporate principles of solidarity and equality – have a role in relation to homeless people and other vulnerable and marginalised groups. Other contributors to the magazine offer an analysis of the implications of the draft services directive from the perspective of these different sectors. Rita Baeten of the European Social Observatory analyses the impact of the draft directive in relation to the specificities of the health sector and the problems it poses in relation to the conception of healthcare as a fundamental right. Laurent Ghekière of the Union Sociale pour l'Habitat analyses the question of social housing provision and the status of social housing services at EU level. This analysis examines the issue of social housing as a public service task and the ramifications in relation to the services directive and state aid. The analysis of social housing is illustrated and complemented by the article on the provision of social housing in Ireland from the Irish Council of Social Housing and the decision by the Commission to allow State aid to social housing providers in light of the public task being carried out. The Trade Unions EPSU (a European trade union federation representing over 190 public service unions) and UNIOPSS (French national union of organisations from the health and social sector) offer the perspective of the service providers they represent. EPSU expresses the fear that the draft services directive may constitute an attack on standards in public services across Europe and UNIOPSS highlights the threat to quality standards, especially in services catering for vulnerable groups.

Naturally, the debate on the services directive is ongoing. The Social Platform (which brings together many European social NGOs, including **FEANTSA**) has been instrumental in bringing the debate forward and in representing the concerns of the social sector across Europe. It is evident that many of these concerns are indeed being heard and that the debate is set to continue. In the final article, Kathleen Spencer-Chapman of the social platform brings us up to date on where the discussion stands at present, the issues that have been highlighted as needing to be addressed and the options that are being discussed.

As always, **FEANTSA** offers its sincere thanks to all contributors for their time and expertise. Your reactions to the magazine are welcome. You can send them to [dearbhah.murphy@feantsa.org](mailto:dearbhah.murphy@feantsa.org) •



# The Bolkestein Directive: Introductory notes

By Ruth Ruiz, *FEANTSA office*. Contact: [office@feantsa.org](mailto:office@feantsa.org)

A decade after the envisaged completion of the internal market, considerable work needs to be done in order to make the internal market for services a reality.

While trade in goods has grown rapidly since the Internal Market was established in 1993. The same is not true for services: whilst non-public services account for 54 per cent of EU economic output and 68 per cent of employment, they only account for only around 20 per cent of trade in the Internal Market.

With the aim of achieving what constitutes one of the key elements of the Lisbon strategy, namely, the establishment of a genuine internal market in services, the European Commission presented, in January 2004, a proposal for a Directive on the Internal Market in Services, also known as the "Bolkestein Directive", after the Commissioner who drafted it.

The proposal has as its double objective:

- To eliminate the obstacles to the free movement of services, i.e. those that prevent service providers from offering their services across borders, and;
- To eliminate the barriers to the freedom of establishment, i.e. those that stop service providers from opening premises in other Member States.

The directive follows a horizontal approach and establishes a general legal framework that is applicable to all economic activities consisting of the provision of a service for consideration. This approach, which breaks the existing tradition in the field of internal market in services of using sector-specific instruments, is based on the assumption that legal obstacles to the achievement of a genuine internal market for services are often common to a large number of different activities and have many features in common.

In order to **eliminate the obstacles to the freedom of establishment**<sup>1</sup> the proposal provides, among other things, for:

1. Certain principles which must be respected in all administrative procedures for granting **authorisations, licenses, approvals or concessions** to service providers. For example, the text provides that Member States will be only allowed to subject access or exercise of a service activity to an authorisation scheme<sup>2</sup> if the following conditions are met; the authorisation scheme cannot be discriminatory against the service provider in question; the need for such authorisation shall be

objectively justified by an overriding reason relating to the public interest, and; they must prove that there are no other less restrictive means to attain the objective pursued. On the other hand, Member States are required to base authorisation schemes only on **criteria** which preclude the competent authorities from exercising their power of assessment in an arbitrary or discretionary manner. These criteria must be: non-discriminatory, objectively justified by an overriding reason relating to the public interest, proportionate to that public interest objective, precise and unambiguous and objective; furthermore, they shall be made public in advance. In principle, the validity of authorisations to establish will not be time-limited. Furthermore, the authorisation shall enable a person to provide services throughout the national territory.

2. *The obligation of Member States to eliminate certain legal requirements<sup>3</sup> such as discriminatory requirements (including nationality and place of registered office), the obligation to provide a financial guarantee, the obligation to be registered in the registers of the host country, or the case-by-case application of an economic test.*
3. The obligation of Member States to verify that certain other legal requirements satisfy the conditions of non-discrimination, proportionality and necessity. Among the requirements to be evaluated we find the following;
  - an obligation on a provider to take a specific legal form, in particular to be a legal person, to be a company with individual ownership, to be a non-profit making organisation or a company owned exclusively by natural persons;
  - requirements fixing a minimum number of employees;
  - fixed minimum and / or maximum tariffs with which the provider must comply;
  - an obligation on the provider to supply other specific services jointly with his service;
  - quantitative or territorial restrictions, in particular in the form of limits fixed according to population, or of a minimum geographical distance between service-providers;

In order to **eliminate the obstacles to the free movement of services**, the proposal provides, among other things, for:

1. The application of the **country of origin principle**. According to this principle, Member States shall ensure that all operators who intend to provide a service in their territory, **without being established there**, are

With the aim of achieving the establishment of a genuine internal market in services, the European Commission presented, in January 2004, a proposal for a Directive on the Internal Market in Services.

only subject to the national provisions of their Member State of origin relating to access to and exercise of a service activity, in particular as regards those requirements governing the **behaviour** of the provider, the **quality or content of the service**, advertising, contracts and the provider's liability. The Directive also provides that it will be the competent authorities of the Member State where the provider is established (i.e. the authorities of the country of origin), the ones responsible for supervising all of his service activities (Article 16(3)), even when he is providing a service in another Member State. On the other hand, under this principle Member States are prohibited from imposing an obligation on providers (temporarily providing a service in their territory) to comply with requirements such as;

- an obligation on the provider to have an establishment, an address or representative in their territory;
  - an obligation to possess an identity document or to obtain an authorisation from, their competent authorities, or to register with a professional body or association in their territory;
  - a ban on the provider setting up a certain infrastructure in their territory (an office or chambers);
  - **an obligation on the provider to comply with requirements, relating to the exercise of a service activity, applicable in their territory;**
  - requirements which affect the use of equipment which is an integral part of the service provided;
2. *The right of recipients to use services from other Member States without being hindered by restrictive measures imposed by their country or by discriminatory behaviour on the part of public authorities or private operators;*

3. *A mechanism to provide assistance to recipients who use a service provided by an operator established in another Member State.*

With a view to establishing the mutual trust between Member States necessary for eliminating these obstacles, the proposal provides for:

1. Harmonization of some legislation e.g. professional insurance, dispute settlement, exchange of information, etc;
2. **stronger mutual assistance between national authorities** with a view to effective supervision of service activities on the basis of a clear distribution of roles between the Member States and obligations to cooperate;
3. **measures for promoting the quality of services**, such as voluntary certification of activities, quality charters or cooperation between the chambers of commerce and of crafts;
4. encouraging **codes of conduct** drawn up by interested parties at Community level on certain questions, including in particular commercial communications by the regulated professions.

The adoption of the services directive requires a qualified majority in the Council and is subject to co-decision with the European Parliament. The text is currently being discussed in the Parliament's Internal Market and Consumer protection Committee and a first reading from the parliament is expected in June.

However, under heavy pressure from France, Germany and other countries, the Commission announced on 3 March that it will rewrite its proposal. ●

<sup>1</sup> Establishment in another country implies the participation in the economic life there on a **stable and continuous** basis.

<sup>2</sup> For the purposes of this Directive, an authorisation scheme is any administrative procedure for granting authorisations, licenses, approvals or concessions.

<sup>3</sup> For the purposes of this Directive "requirement" means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice or the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy.



## Social services of general interest challenged by the Services Directive and public-private partnership

By **Jean-Claude Boual**, *Secretary General, European Liaison Committee on Services of General Interest (CELSIG)* <http://www.celsig.org>

The Prodi Commission set going two conflicting approaches on services of general interest. The White Paper flags up a Communication on social services of general interest and recognizes the full importance of SGIs to European integration. But this clashes with the proposal for a Services Directive aiming to establish the internal market in services, the two fundamental principles of which - scrapping authorizations that are seen as abusive, and the country of origin principle - preclude or cut down Member States' rights to define public service obligations as defined by Community legislation. On top of that, the Green Paper on public-private partnerships focuses heavily on the provision of infrastructure and the tasks of services of general interest, which it does not clearly define.

### THE WHITE PAPER ON SGIs

This White Paper is the incomplete outcome of protracted discussions and unremitting pressure kept up by civil society over fifteen-odd years.

The liberalization policy pursued by the Community bodies (Commission, Council, Parliament) and Member States since the mid-1980s to establish the European internal market has produced mixed results, to say the least. Although this market has moved closer, it is still well short of the target, whether in telecoms, postal services, energy or transport. And consumers have not always benefited: electricity bills have gone up, for example, as have transport costs, and phone charges are all over the place. Quality of service has not improved everywhere. A thorough, transparent assessment of these policies in which both sides of the case are put and debated still needs to be done.

The Community bodies are in "push me-pull you" mode. They are pressing on with, if not extending, liberalization, without thinking through the effects of the policies being pursued, while acknowledging the importance of services of general interest for the European model of civilization and social model.

### WHAT DOES THE WHITE PAPER SAY?

The consultation, says the Commission, confirmed "the existence of a common concept of services of general interest in the Union. This concept reflects Community values and goals and is based on a set of common elements, including: universal service, continuity, quality of service, affordability, as well as user and consumer protection". Further on, it refers to "defining a European concept of general interest", which is new.

It stresses that defining, financing, regulating, and ensuring the quality and performance of public service obligations remain tasks for the public authorities, and emphasizes the need to respect the subsidiarity principle, and Member States' right to define public service obligations.

It also indicates for the first time that "under the EC Treaty and subject to the conditions set out in Article 86(2), the effective performance of a general interest task prevails, in case of tension, over the application of Treaty rules" (in plain terms, over the application of the competition rules). "Thus, missions are protected rather than the way they are fulfilled", it adds.

This moves from the exception to the rule - the public service obligations are what prevail.

But the Commission does not conclude from these findings that there is a need to formalize the European principles and concept of services of general interest through horizontal legislation (or a framework law), as both the European Parliament and civil society have called for.

It has shelved the proposal until after the draft constitutional Treaty has entered into force.

While the draft Treaty does not include services of general interest as such in either the values (article 2) or objectives (article 3) of the EU as the proponents of SGIs in the European Union and Convention had wanted, several of these values and objectives - like respect for human rights, human dignity, minority rights, pluralism, especially in the media, non-discrimination, solidarity, justice, equality, etc. - can provide the basis for services of general interest in the Member States and within the EU.



Among the Union's objectives (article 3), full employment and social progress, a high level of protection and improvement of the quality of the environment, combatting social exclusion and discrimination, security, social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child, economic, social and territorial cohesion, should also provide the foundations for SGIs.

On the other hand, substantive legislation could be framed on SGIs under article II-96 and especially article III-122 of the draft Treaty. Article II-96 (former article 34 of the Charter of Fundamental Rights), entitled "Access to services of general economic interest" says that, "The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Constitution, in order to promote the social and territorial cohesion of the Union".

This article may perhaps have more going for it, including from the legal angle, than might appear at first glance. It is the first ever linkage made in a charter of fundamental rights between fundamental rights and public service, and brings into play the guarantee of fundamental rights by SGEIs (i.e., upholding and recognizing access to public services of general economic interest). Then, the linkage between national law and the European Constitution is recognized both through a non-regression clause for the most advanced rights, and compliance with the subsidiarity principle, while giving recognition to the Union's role in framing the bulk of legislation in this area through the normal legislative procedure of co-decision by Council and Parliament.

The principles laid down in this provision do not address all the issues raised - what areas are covered, when citizens can use the provision to base a court case, in particular - but the prospects are there. Implementing these principles makes cross-cutting legislation on services of general interest to address these issues more pressing than ever.

The most important provision on services of general economic interest comes in part III (the policies and functioning of the union), namely article III-122, "Without prejudice to Articles I-5, III-166, III-167 and III-238, and given the place occupied by services of general economic interest as services to which all in the Union attribute value as well as their role in promoting its social and territorial cohesion, the Union and the Member States, each within their respective competences and within the scope of application of the Constitution, shall take care that such services operate on the basis of principles and conditions, in particular economic and financial conditions, which enable them to fulfil their missions. 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".

The operation of SGEIs remains an exception to the competition rules - a powerful and absolute one, certainly, but still an exception. But the key aspect is the obligation placed on the Community bodies to legislate on this matter, which means giving the exception the force of law, rendering it less uncertain. Legislation or framework legislation is provided for in the draft Treaty, although the Community bodies and Member States have so far held out against legislating on it, the excuse being that the Treaty provided no sound legal basis for it. This will no longer be the case, the content of the legislation is not specified and will obviously depend on who holds the upper political, social and economic hand in what are bound to be heated debates when the opportunity comes, if the draft constitution is adopted.

I do not think it overstating the case, therefore, to say that we are poised to see the affirmation of a European concept of SGIs, not to say the creation of European SGIs, some of which already exist.

## THE DRAFT SERVICES DIRECTIVE

This draft directive aims to create an internal market in services. The Commission's proposal claims that it is not intending to liberalize SGIs, nor pre-empting Member States' right to define public service obligations. But two key provisions of this draft directive raise questions about how well it links into and squares with the White Paper.

One is the country of origin principle. Introducing into a State's territory a right that State does not control clashes with that State's freedom to define public service obligations; there is a real risk of "dumping" of SGIs. It is at odds with equal treatment and rights of citizens within a State. What this draft directive is by default, is actually a draft framework directive on SGIs, when, as we saw earlier, the Commission has so far been very guarded about drawing up framework legislation, and is due to report on it at the end of 2005. Control of the service provider and services provided, including when provided in another Member State, is to be left to the provider's Member State of origin, which is an utter impossibility in practice. The draft directive also raises many other questions about the completion of the internal market, and European integration more broadly. Generalizing the country of origin principle creates a paradigm shift in the shaping of the Union - harmonization is judged impossible in an EU of twenty-five, so the Commission is attempting to legalize the differences. This opens wide the door to "dumping" in all areas - social, tax, and general interest services. The Community "acquis" (established body of Community laws and regulations) itself may be thrown open to question if the consequences of this principle are pushed to the limit.

The other principle is that of Community supervision of authorization and approval schemes for providers establishing and exercising a service activity in a State other than their State of origin. These provisions obviously apply to all services of general interest that fall within the scope of the directive, especially social, health, housing and other services of general interest which are often subject to authorization or approval. Will the Commission and other Member States allow a State to classify an activity as a public service obligation, even if the State stands alone in doing so for overriding reasons relating to the general interest or public policy? The draft is not clear on this.

## THE GREEN PAPER ON PUBLIC-PRIVATE PARTNERSHIP

This Green Paper set going a debate on the relationships between the public and private sectors, although the unspoken agenda is basically about services of general interest. The Commission is currently distilling the essence of reactions to its Green Paper, but the positions taken are sometimes very far apart. Some question whether services can be delivered direct by government or government agencies when the draft Treaty establishing a Constitution for the European Union enshrines the principle of local and regional self-government. A sharp watch is needed for services of general interest on this front, too, therefore.

## THE ROLE OF CIVIL SOCIETY

The European Parliament held a hearing on 11 November 2004 on the draft Services Directive, which revealed strong opposition from NGOs, trade unions and many lawyers and experts to the country of origin principle, amongst other things. Once again, civil society organizations need to be vigilant, take concerted action and get to work with MEPs and all the European institutions. The European Union must develop in a way that brings improved living conditions to its citizens and residents, not just create an internal market, however useful that may be.

That, at any rate, is what the draft constitutional Treaty says. ●



## “Services of general interest”: Market or Democracy?

By Marc Uhry, *Fapil (France)*.



International relations at both world and European levels are more than ever today based - among other things - on the idea that freedom to produce and move goods around is *the* way of delivering the best quality of life to the greatest number.

This premise - whatever one may think of it - dominates the way international bodies are organized and work. So, the European Union has powers to enforce competition and consumer protection rules. Where European integration is concerned, it impels the Member States to organize all services in line with market-driven rules which are gradually becoming the norm in sectors where the market approach has so far been absent or secondary. The social sector is a case in point - it is now exposed to tendering procedures, the increased farming out of public services, the tradeable sector stepping into social services provision, etc<sup>1</sup>.

Obviously, this approach proved unfeasible for some services. Tendering, for example, is not readily applicable to the armed forces or national legal service. These, along with others, form a blanket category of Services of General Interest (SGIs), subdivided into Social Services of General Interest and Services of General Economic Interest. These concepts are currently being defined at European level and in the Member States.

The issue now, therefore, is to spell out the theoretical foundations and scope of this general interest service principle, and how to put it into effect locally, in order to explore how this framework can be turned into an opportunity to put across the values that we as welfare organizations promote.

### THE THEORETICAL FOUNDATIONS

Why should a service be outside the competition rules? We need to be able to go beyond instinctive feeling and suggest a border line, a demarcation rule; one that separates the market and democracy.

The competition rules see individuals as *consumers of services offered* to them by *producers*.

The rules of democracy see individuals as *citizens* linked together by *rights* that are *guaranteed* by the *community*.

But these two spheres overlap: the provision of services is regimented by a number of rights (employment rights, safety standards, for example). Conversely, rights - especially social rights - are assured by the implementation of services.

I would argue that Services of General Interest form part of these services designed to ensure fundamental rights, and that their *guarantee* aspect warrants the community making the economic aspect of their implementation a side issue.

Exemption from the competition rules may therefore be justified on the grounds of fundamental rights, both individual (access to care, education, housing, etc.) and collective (respect for minorities, equality before the law, etc.), where fundamental rights can be defined as those that determine that all human beings are equal in dignity.

For our sector, therefore, attempts to enforce the right to housing are the main justification for allowing government to bend the competition rules in devising ways of ensuring it.

More generally, everything we do in an attempt to ensure that all human beings are equal in dignity, can fall under this “Service of General Interest” approach.

### SCOPE

The Service of General Interest concept can be defined by three inputs:

- **the target group:** the groups whose rights are denied, or in market terms “without the ability to choose their service provider”, to whom the competition rules cannot apply, therefore - e.g., the poor.
- **the services:** services which inherently entail collective ownership control of their content, not strictly tied to their economic effectiveness - e.g., education.
- **the actors:** those whose objective (or at least part of it) transcends the activity itself, and who are therefore inherently driven by motives not necessarily linked to the financial soundness of their choices - e.g., value promoting groups, or organizations supervised by regulatory agencies.

Why should a service  
be outside the  
competition rules?

## NATIONAL VARIATIONS

It remains to identify the different ways in which Services of General Interest can be deployed locally, and there are two aspects here: how they are classified, and the advantages that accrue to them.

There are already different ways that Services of General Interest can be classified in France, each of which confers a specific status carrying different regulatory frameworks and advantages.

- the first is "public service" status - i.e., falling directly under the executive branch, with specific terms and conditions of employment for staff, accounting methods, etc. Administrative law is a distinct branch of the law.
- then, there is a range of statuses linked to and wholly or partly controlled by the government - e.g., statutory bodies, semi-public companies, etc.
- the other forms of recognition involve type-approval of actors ("public benefit" associations, CHRS approval, Besson Act approval) or objectives (project by project approval).

The benefits relate chiefly to tax advantages differentiated by actors and/or objectives, and public procurement procedures that may derogate from the competition rules (e.g., the invitation to tender system). The price to pay for these advantages is (or should be) performance appraisal by an independent body by reference to criteria that justify the exemption.

In practical terms, the provision of homeless hostels could be ordered by the government from an approved organization without going through an invitation to tender, and the organization would get tax concessions and grants to provide them.

These exceptions to the competition rules are justified by the government's responsibility for giving effect to the right to housing.

That involves assessing how the actor and the objective have contributed to giving effect to the right to housing. This means coming up with new takes on the situation that make the link between individual rights, the services offered, and the target groups.

Putting the assessment focus on rights is an opportunity to improve services in the sense of the *guarantees* given to families.

Services of General Interest are therefore at first sight arguably a poor defensive shield against a free market tide that is turning States into service providers and citizens into consumers.

But a proactive approach to the concept of "SGIs" can help give a firmer basis to the social aspect of public and semi-public provision by forging a stronger link with the individual rights to which they refer. What we have to do is come up with the relevant analyses for classifying and evaluating them.

The issue is nothing less than drawing the dividing line between the market and democracy.

Also, with the ongoing discussions on relaxing the convergence criteria, there is an argument for including financing for SGIs in the scope for exceeding the budget deficit restrictions.

The reason is that because the State underwrites the actual exercise of rights regardless of the cost of the services concerned, it cannot be assessed on the "profitability" of services which it is entitled to see in different terms. Such an exception would restore the primacy of the basic functions of the State over its identity as manager of the public purse. •

<sup>1</sup> These various changes are theorized in *New Public Management*, which broadly replaces a *liability through the exercise of rights* approach with a *quality of services* approach.





## Impact of the Services Directive on Healthcare

By Rita Baeten, *European Social Observatory*. <http://www.ose.be>

The proposal for a Services Directive is applicable in its entirety to healthcare services just as to any commercial service. Despite recent assurances that “publicly-funded healthcare” will not fall under the scope of the directive, the exact status of healthcare services under the planned directive is not clear. It is a question that needs careful consideration, however, as some specific features of healthcare make the application of this proposal to healthcare services highly problematic.

The underlying concept of the proposal is a simple relationship between a consumer and a provider. Yet, healthcare services form part of a complex system involving interactions and structural links between the many involved players. Furthermore, in the healthcare sector there is also a “third party” involved, which pays the major part of the bill - mainly with public money. Consequently, price mechanisms, based on the relationship between supply and demand, do not function properly. Therefore, healthcare financiers make agreements with care providers on the price, content and volume of the care provided to their clients. These contracts should prevent care providers from steering the demand for care in their own interest. Healthcare is indeed increasingly complex and patients do not, in general, have all the necessary information and background knowledge to make an informed decision about the care they need and the quality of the service they receive. Since healthcare providers may have other interests than their patients, the information asymmetry makes the relationship very precarious.

Moreover, in Europe, access to high quality healthcare is considered as a fundamental right. European healthcare systems are therefore based on principles of social solidarity and universal coverage. The provision of high quality care equally accessible to all citizens is considered a core task of the public authorities. Therefore, this sector is mainly publicly funded. It is thanks to this system that marginalised and vulnerable groups, who are not strong consumers, can command a service adequate to their needs.

For all these reasons public authorities need legal instruments to guarantee the most effective use of the limited budgets available, to keep prices down, to guide choices between comparable treatments and to guarantee access for all to high-quality care. We will illustrate in what ways the proposal would put these necessary regulatory powers of the public authorities under pressure.

The chapter on the freedom of establishment of the proposed Directive obliges Member States to simplify and remove a large number of authorisations and licensing procedures and to limit the number of documents required for access to a healthcare service activity and to the exercise of health care provision. Member States are expected to set up a major screening exercise to identify and assess procedures and conditions that care providers have to comply with. They must verify that these requirements are non-discriminatory, necessary and proportional. If not, the conditions should be changed or abolished. The conditions that need to be screened include the basic instruments of the healthcare authorities. We would mention the rules on planning, necessary to guarantee a balanced geographical spread of health care supply, the price fixing mechanism, guaranteeing affordable prices, staff norms in health care institutions and referral systems. After the entry into force of the Directive, Member States will no longer be able to introduce any new requirements of this sort, unless the need for it arises from new circumstances. The Commission will examine the compatibility of any new requirements with Community law, and can request that Member States refrain from adopting or abolish the requirement.

It is not specified how the criteria for non-discrimination and proportionality, but most importantly necessity, would apply to the healthcare sector. Consequently, the provisions could create considerable legal uncertainty for health care authorities. The European Commission can oblige national health care authorities to abolish or change regulations. However, the Commission can only verify whether the healthcare regulations are in conformity with the internal market rules, but not whether they are necessary and effective to achieve their basic objectives, that is to guarantee to their citizens high quality services accessible to all. The Commission thus cannot take over the responsibilities and obligations of the Member States, but the national level loses its capacity to steer the system.

Moreover, in Europe, access to high quality healthcare is considered as a fundamental right. European healthcare systems are therefore based on principles of social solidarity and universal coverage.

For service providers who wish to provide services in another Member State on a temporary basis, the proposed Directive introduces the principle of the country of origin. According to this principle, health care providers would be allowed to provide care on a temporary basis in other Member States without being subject to the national provisions of the Member State where they provide this care, but only to those of the Member State where they are established. This goes in particular for requirements related to the behaviour of the care provider, the quality or content of the care, advertising, contracts and the provider's liability. The host Member State may not require the provider to make a notification to the competent authorities or may not forbid the provider to set up a certain infrastructure such as an office with consulting rooms.

Many crucial questions remain unanswered. The extent to which the exercise of regulated health care professions (e.g. doctors, nurses, pharmacists, midwives) would be exempted from this principle is not clear. It is also unclear whether the social protection system of the host Member State have to fund the care of the health care provider who supplies care on a temporary basis in another Member State and if so, at what tariff and under what conditions.

If this proposal were to become law, health care providers established in a Member State that imposes lower conditions on the provision of health care could, based on the legislation of this Member State, provide care in other Member States, competing with the health care providers of host Member States who do have to comply with more legal requirements. This would put pressure on the regulations in host Member States and could provoke a spiral of deregulation.

According to the proposal for a Directive, the Member State of origin is also responsible for supervising the provider and the care provided abroad. Apart from the question as to the feasibility of supervision by the Member State of origin, we can question the legitimacy and motivation of a public authority to control health care services provided abroad to citizens of another Member State.

Member States must also ensure that patients can obtain in their Member State of residence information on the legislation applicable in other Member States related to the access to and exercise of the (healthcare) service activity. However, health care systems are extremely complex and it is not easy to make citizens understand the health care system of their own country. Enabling a citizen to understand the systems of 25 countries, all potentially operational on the territory of his country, and expecting him to make an informed choice between providers could be highly problematic. Moreover, patients need this information at a time when they are in a vulnerable and dependent position, because they need care.

In conclusion, the proposal does not take into account the specificity of the health care sector, where extensive regulation is needed to redress market imperfections and to guarantee the accessibility of high-quality care to all citizens. The proposal does not take into account the involvement of a third party in the health care sector, the (public) financier of the care service. The proposal would lead to legal uncertainty for public authorities, providers and patients and could result in deregulation in this sector where regulation is a crucial element for quality- and cost control.

It is clear that vulnerable social groups would be the first victims should public authorities have problems fulfilling their task of guaranteeing accessible quality care to their citizens. Indeed, if public authorities lose the capacity to control expenditures, public funding of the services could be reduced. More out-of-pocket payments or more private insurances for healthcare will reduce the accessibility of healthcare for vulnerable groups. Furthermore, if the healthcare provision becomes more complex, if patients find themselves obliged to check by themselves the quality, the applicable legislation, the contractual stipulations of the care etc, this could, in the first place, become problematic for low skilled social groups and groups without easy access to the necessary information sources. The same would be true if advertising for healthcare services were more generally allowed. ●



# What is the status of social housing in the European Union?

## Answers to emerge this Autumn

By **Laurent Ghékiere**, *Representative to the EU L'Union sociale pour l'habitat*

It is a crucial and confusing time in Brussels for social housing. State aid to social housing bodies; the impact of the services directive on approval schemes for social housing bodies; the communication on social services of general interest, including social housing: a careful analysis of the elements at stake is necessary, at a time when debate in the European Parliament is being polarized between the would-be protectors of services of general interest and the partisans of a strict application of internal market and competition rules. It is a power struggle of a rare intensity and favourable towards partisans of liberalisation, given the opposing political balances, which undermine a calm and measured application of the provisions in the Treaties in terms of balance between public interest and community interest. This power struggle has crystallized around three key issues in relation to social housing - issues on which the outcomes may be expected next autumn.

Three principle issues, which are closely linked to one another, are today the focus of attention of representatives of the social housing sector to the EU institutions. These three issues concern:

- The conditions for legality of aid given by public authorities to social housing bodies, in accordance with community regulations on State Aid.
- The conditions for legality of approval and licensing schemes of social housing bodies, within the framework of the proposal for a directive on services within the internal market.
- And finally, the more general question of social housing as a service of general interest of a social nature, which should figure in a specific Commission communication on services of general interest between now and the Autumn 2005.

What is common to these three issues is that the conditions for the application of the provisions contained in the Treaty, and notably in article 86.2, affirm that allowing a legitimate public service task to be discharged takes precedence over the application of competition and internal market rules. This is a priority that member States want, in line with the principle of balance in the Treaties between community interest and public interest, but the Commission sometimes tends to restrict this precedence through a strict and uniform application of the rules to all services, no matter what their nature. This tendency is particularly evident in the proposal for a services directive and it has led Ms Evelyn Gebhardt (Germany, PSE) to call for the exclusion of services of general interest from the scope of the directive.

### STATE AID TO SOCIAL HOUSING BODIES: THE END OF THE TUNNEL

As regards the first of these three issues, the question is about to be closed, with an outcome that is favourable to the social housing sector, after three years of intense negotiation and many new developments. Provision of social housing has been explicitly recognised as a public interest task and the competition authorities have recognised its minimal impact on community trade. As a result, public financing that is given to social housing bodies discharging a legitimate public service task is considered compatible with the community State Aid rules adopted by member States. Thus these bodies are exempted from notification procedures to the European Commission. This decision by the competition authorities, based on article 86.3 of the Treaty and on the mandate of authority on competition accorded by member States, is currently the subject of inter-service consultation

within the Commission, with a view to presenting it to member States before the summer and having it finally adopted in the autumn. This is a community decision with immediate and direct application in all member States. Its aim is to give legal security to social housing operators following a very restrictive decree by the Court of Justice. To sum up: as a service of general economic interest, the State aid granted can cover 100% of the costs of providing and managing the service (investment and service, in the case of hospitals and social housing) with deduction of any profit generated, but cannot go beyond this. The competition authorities consider that aid beyond 100% of the costs would give the operator an economic advantage (unfair State aid), which might lead to a distortion of competition through its use for other ends.

### SETBACK IN THE EUROPEAN PARLIAMENT

On the basis of a what was, essentially, a complaint by the European Union of Developers and House Builders against this Commission proposal, the European Parliament declared in Plenary that it was against this clarification, considering that by its nature, aid to a social housing body may cause distortion of competition and that therefore prior notification procedures remain necessary in order to verify that the aid is compatible with EU rules. This "presumption of guilt" was thoroughly supported by the liberal parliament rapporteur Ms Sophie Int'Veld (Netherlands, ALDE) and was carried in plenary by an EPP-ALDE majority, despite the many amendments in support of the principle of "presumption of innocence" proposed by Commission. What is more, the notification requirement is also unrealistic, simply due to the material impossibility of notifying and verifying every construction or renovation programme of the 20 000 social housing bodies in the European Union. This opinion emitted by Parliament does not bind the Commission, however, as member States have given it full powers in relation to State aid monitoring.

This decision by the Commission is, of course, based on the supposition that each member State will define the scope of application through internal legislation, that is to say, they will lay down which activities by housing bodies may be considered as a service of general economic interest; which specific obligations may be considered as being part of a public service task; the nature of the bodies concerned; and the nature of the aid concerned, with latter limited only, to use EU jargon, "to what is necessary to cover the costs incurred in discharging the public service obligation." The 25 European Housing Ministers collectively called for the rapid adoption of this decision. The member States will nonetheless have a period of 12 to 18 months to pass this legislation and to inform the Commission about the scope of its application. Social housing bodies that carry out both services of general interest and competitive activities must have separate accounting systems in line with the directive on transparency, with the State aid being strictly limited to activities to discharge a public service task.

### SERVICES DIRECTIVE: EXEMPTION OF SOCIAL HOUSING AS A SERVICE OF GENERAL ECONOMIC INTEREST

"Thank you Bolkestein!" The services directive has shown up the need to accelerate the establishment of a community framework for services of general interest in order to codify the *acquis communautaire* in this area, but also in order to write in stone the specificities of such services.

By proposing a services directive that would apply uniformly to all services, without taking account of their natures, whether commercial or with a public service task to discharge, the European Commission gave new impetus to the political debate on this question. And rightly so! By applying the country of origin principle, which allows a service provider providing services in another member State to be subject to the national provisions relating to service provision of its country of origin, the Commission proposal weakens the freedom of member States to define services of general interest by placing specific public service obligations on service providers. Furthermore, by imposing strict control of authorisation and licensing schemes, the Commission fails to take account of the need for public authorities to carefully screen the service provider before charging it with a public service task and the need to subject it to certain specific rules with a view to ensuring that it will be able to discharge this task. This lacuna is all the more surprising in lights of the recent decree of the Court of Justice which recognised the capacity of member States to put in place specific authorisation and licensing schemes as a means of imposing a public service obligation.

Transposed into the social housing sector, the services directive would lead to an in-depth transformation of the system of social housing operators, a revision of the statutes of these bodies, as well of their territorial competency and of the notification procedures to the European Commission for evaluation of their proportionality. What is more, a German social housing actor providing services in France could use the directive to impose German social housing law in France as regards the content and quality of the service provided, while still demanding French public financing, in accordance with the principle of non-discrimination on the grounds of the nationality of the service provider.

The exclusion of social housing and all services of general interest from the scope of the services directive has been proposed by the Parliament rapporteur Ms Evelyne Gebhardt (Germany, PSE), but this proposal was not unanimously received by the Parliament. The shadow rapporteur Mr Malcolm Harbour (United Kingdom, PPE) has clearly opposed such a reduction of the scope of the directive. A contradictory opinion has, however, been emitted by Mr Jacques Toubon (France, PPE) of the same political group, who is in favour of the exclusion of services of general interest and regulated professions.

A political battle is therefore underway in the Parliament on this question, with a vote on the first reading announced for the autumn. The content of this vote will have a determining effect on what follows. It will condition the attitude of the Commission and the Council concerning the treatment of services of general interest, and in particular of social housing, in its revised proposal for a directive on services, expected at the end of the year.

### **THE NEED TO GO BEYOND THE IDEOLOGICAL DEBATE IN ORDER TO CONCENTRATE ON THE CONDITIONS NECESSARY FOR A BALANCE BETWEEN THE TREATIES AND THE JURISPRUDENCE OF THE COURT OF JUSTICE TO BE STRUCK**

The polarisation of the parliamentary debate in a great wave of slogans and invective arising from memorandum of the Developers and House Builders demanding the liberalization of social housing, does not in any way clarify the debate with reference to the real provisions in the Treaty and the balance that member States want between community interest and national public interest. The provisions contained in the Treaty may in no way undermine the discharging of a public service task, nor the catering for fundamental rights, whether these are defined at community level, in the constitutions of member States or in the international conventions which they have ratified. The principle of balance and of precedence of public service tasks and values over competition and interior market rules may no longer be left to the discretion, ex post, of a community judge on the basis of principles of necessity and proportionality. It must henceforth be translated into a *modus operandi* and integrated from the outset into the horizontal provisions on the basis of a community framework specific to services of general interest.

Paradoxically, the services directive should speed up the preparatory work for such a community framework on services of general interest. A report from the Commission is expected at the end of the year on his question, in line with the request from the Parliament (Herzog report) and the Council and the "think tanks" will once again be taking up their work on analysis and drafting of this community framework. In anticipation of the entering into force of the Constitution in 2009, a citizens' petition (the submission of such petitions is provided for in the constitutional treaty) asks the Commission to propose such a community framework on services of general interest.





## COMMUNICATION ON THE SERVICES OF GENERAL INTEREST: A LIFE-SIZE TEST

The horizontal communication on social services of general interest, which has also been announced for next autumn, following the first reading of the Parliament on the services directive, will be a good way of gauging the temperature in the Commission on this question, as well as the state of internal compromise between the different Commissioners, who will have to adopt it collectively. What is at stake in this communication is the recognition of the specificity of these social services of general interest in providing for the respect of fundamental social rights (health, housing, education...) and the clarification of the conditions for application of competition and internal market rules, given the current grey zone. Indeed, although the Court of Justice has recognised them as activities of an economic nature, the application of community law to these services is happening progressively due to a series of disputes but without a political approach that is coherent and adapted to the nature of the services concerned, contrary to other services which fall under sectorial directives and which have a framework of application that is adapted to their nature. Sensitive subjects include health, education, care for older people and people with disabilities; and these are concerned in the same way as social housing services, to be explicitly dealt with in the communication. On the basis of a questionnaire addressed to member States, the Commission is working to outline the precise nature of these specificities as well as the tensions that may exist between the provisions contained in community law and the discharging of public interest tasks.

## ACTIVELY PARTICIPATING IN THE NECESSARY REVERSAL OF THE POWER STRUGGLE

The outcome will depend directly on the power struggle taking place within the Parliament, but also within the Council and even within the Commission, which remains divided on this question. The sympathies of the new member States do not lie particularly in public services – they may even be hostile towards them, associating them with a return to collectivism or with protectionist practices on the part of the EU 15. Thus the representatives of the new member

States clearly shift the balance in favour of liberalisation and the putting in place of the internal market, on which their economic catching-up is dependent. Nonetheless, this way of thinking has certain limits. Thus on the one hand the draft report from Markus Pieper (Allemagne, PPE) on the white paper on services of general interest *"proposes better highlighting the need to liberalise in order to improve economic, social and territorial cohesion and to encourage further liberalization of those sectors that haven't already been opened up"*, while on the other many parliamentary amendments to the draft report on structural funds propose making housing eligible for these funds in order to combat the effects of privatization on the public housing stock in the new member States. The return to a calm and rooted debate on the existing provisions in the Treaty and its attempt to balance different interests is an absolute necessity if we are to avoid a situation where tomorrow the community structural funds are used simply to repair the mistakes of unregulated liberalization of services of general interest. But attaining this kind of calm approach assumes, not only a mobilisation of civil society and all of the actors concerned, but also an effort to promote improved information and communication on the real issues at stake and on the philosophy of balance within the Treaty and which must be given a positive status in law. We are still far from this situation and the referendum campaign has not served to have a positive impact and reverse the general tendency.

## FOR YOUR DIARY: THE AUTUMN MEETING THAT YOU SHOULD NOT MISS

**European Parliament:** Housing Europe – European week on social housing from the 10-14 of October 2005, organised by CECODHAS, the European Liaison Committee on Social Housing with the participation of the UK presidency of the European Union and of the President of the European Parliament. ●

### To find out more, contact:

**Laurent Ghékiere**  
Representative to the EU  
L'Union sociale pour l'habitat  
Tel : + 322 229 2143

## Social Housing and State Aid: A Case in Point



*Why social housing provision by non-state bodies in Ireland can receive state aid that is compatible with the EU internal market – A target group approach*

**By The Irish Council for Social Housing**

There has been a great deal of concern in the social sector concerning which services of a social nature might potentially fall within the scope the draft services directive; and which services would qualify as "non-economic" services and remain outside it. Most social services involve economic exchange of some kind and thus, through the services directive, might be facing increased competition for the provision of social services. At the moment there is a lot of debate about the need to protect social services from competition and from interference of the EU. It is not clear, however, on the basis of what exact criteria social services could be exempt from the scope of the draft service directive.

There have already been concrete initiatives to limit the negative impact of EU competition law on the quality and sustainability of social policy of the Member States. Exemption is a commonly used method, but it is also possible to allow State aid when it helps companies to fulfil a public service obligation. We believe the concept of public service obligation might be useful to limit in a well-considered way the scope of the service directive.

In this article we would like to present an interesting interpretation of public service obligation, which the European Commission developed in the framework of a state aid case involving public support for social housing associations. We believe the focus on the target population of the service should indeed be a important determining factor.

There is widespread consternation at the possibility of services that meet a social need of vulnerable groups facing competition, that would place them under pressure and might force them to apply a for-profit approach, that makes no sense in relation to weak and underprivileged service users, unable to command the services they need in an open market.

Social housing services are an area of a particular concern, particularly where the provision of social housing is being carried out by non-state bodies. It is in this context that it is useful to consider a recent Commission decision recognising that state aid to voluntary housing bodies in Ireland is compatible with the internal mar-

ket, despite the fact that state aid is generally inadmissible under EU competition law. The exception was justified through article 86(2) of the EC treaty which allows exemption of services of general economic interest from competition law where the application of these rules would obstruct them from carrying out their public service task. In applying this exception the Commission recognised that the provision of social housing in Ireland is a legitimate public service task. As will be detailed below, this recognition was based on the vulnerable target group that is catered for through this service.

### **SOCIAL HOUSING IN IRELAND:**

In Ireland, social housing is funded by the government through the Housing Finance Agency (HFA). This is a credit institution created by the government for this purpose. Its directors are appointed by the Minister for the Environment, Heritage and Local government, with the consent of the Minister for Finance. Its activities are governed by the Housing Finance Agency Act. These activities consist of raising funds on the capital markets to fund social housing. To facilitate this work, the borrowing of the HFA may be subject to a guarantee by the Minister for Finance. Until 2002, the funds raised were transferred to local authorities to support them in carrying out their statutory duty to provide social housing. The Irish Government notified the European Commission of the legislation and the system in Ireland and the Commission found that the aid provided through the state to local authorities for provision of social housing was compatible with the internal market.

In 2002, however, legislation in Ireland in this area was amended somewhat. These changes increased the borrowing power of the HFA and provided that it could lend directly to approved voluntary housing bodies engaged in the provision of social housing. The "approval" must come from the Minister for Environment and Local Government, under the terms of the 2002 Housing Act. The provision of cheap funding by the HFA is limited just to the statutory duties of these bodies. These voluntary housing bodies operate on a not-for-profit basis and apply the same eligibility criteria as local authorities. This includes people whose need for accommodation has been included in local authority assess-



ments of housing needs, homeless people and returning indigent emigrants. Although these voluntary bodies were previously funded by the local authorities, it was felt that direct access to funding from the HFA would be empowering and allow them to play a more significant and effective role.

The Irish government was concerned that lenders might question whether the increased lending powers of the Housing Finance Agency and the lending to voluntary housing bodies was in fact compatible with EU competition law or whether it might not constitute "aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods" as stated in article 87 of the EC Treaty, and so be incompatible. It applied to the Commission in 2004 for an assessment of the new measures.

### **STATE AID FOR SOCIAL HOUSING: THE COMMISSION'S DECISIONS**

The Commission reviewed the whole situation, examining both the HFA and its status as a special credit institution, as well as the practice of lending directly to voluntary housing bodies. It decided that the two issues needed to be assessed separately, as the issues at play were somewhat different.

The Commission first reviewed the activities of the HFA and found that it has the sole function of raising funds for social housing. Thus, any advantage resulting from the state guarantees that underpin its borrowing cannot be used by the agency in order to compete with commercial banks and lend to other third parties. For this reason, the Commission decided that the state guarantees to the HFA did not constitute unfair state aid and were therefore in line with the internal market.

The second decision relating to the funding of voluntary housing bodies was more complicated. The Commission decided that the preferential financing that these bodies get from the HFA distorts competition in the housing market. The voluntary bodies are actors in the housing market. Due to their financing from the HFA, they can provide cheaper housing conditions to certain customers and they do so in competition with other actors in the housing market. They are favoured over these other actors and in this way competition in the housing market is distorted. This in turn has an impact on competition in the construction sector. Finally, given that real estate markets are the focus of significant foreign investment, there may even be an impact on trade between member states. The Commission concluded, therefore, that the financing of the voluntary housing bodies by the HFA constitutes state aid incompatible with the internal market.

### **AUTHORISATION OF STATE AID FOR CERTAIN PUBLIC SERVICE OBLIGATIONS – WHY STATE AID FOR SOCIAL HOUSING IS COMPATIBLE WITH THE INTERNAL MARKET**

However, under article 86 (2) of the EC treaty, such aid may be authorised in certain cases. The article states that "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

It is set out in the text of the Commission's decision that there are certain conditions to be met if the exemption allowed for through this provision is to be applied:

- First, the recipient must actually have a public service obligation to discharge, and the obligation must be clearly defined.
- Secondly, the recipient must have been entrusted with the public service task.
- Third, the compensation must not exceed what is necessary to cover the costs incurred in discharging the public service obligation.
- Fourth, the development of trade must not be affected contrary to the interests of the Community.

### **OPERATION AND DEFINITION OF A PUBLIC SERVICE OBLIGATION: SOCIAL HOUSING**

The objective of the Irish Government's housing policy, as set out in the Housing Acts, is to ensure that the most socially disadvantaged households can have a good dwelling in a good housing environment. These programmes consist of the provision of general mortgage finance, the operation of a shared ownership scheme, an affordable housing scheme aimed at providing low-cost housing, a rental subsidy scheme and miscellaneous grant schemes for elderly and disabled persons. Beneficiaries of these measures are socially disadvantaged households whose economic circumstances do not permit them to purchase or rent houses on the open market. Due to their poor creditworthiness, these households are generally unable to obtain a housing loan in the commercial, competitive sector at affordable rates, which has also to be proved by submitting letters of rejection from two private sector mortgage lenders. They can, through this housing-funding system, turn to the municipalities for housing at cheaper rents.

On the basis of the disadvantaged and vulnerable group that is catered for by this service, and

in the light of the fact that they would be unable to command an adequate service on the private market, the Commission recognised that a legitimate public service task of the state is being carried out through these bodies and it is one that is clearly defined in legislation.

### ENTRUSTMENT

Under Irish housing law the municipalities are obliged to grant loans or to hire and construct houses. The voluntary housing bodies are entrusted with the provision of social housing supplementary to that provided by the local authorities for allocation to disadvantaged households by Section 6 of the Housing (Miscellaneous Provisions) Act 1992 and Section 15 of the Housing Act 1998. Through this legislation, it is clear that Ireland has taken specific steps to entrust the municipalities as well as the voluntary housing bodies with the task of implementing social housing policy.

### PROPORTIONALITY OF THE COMPENSATION

The local authorities in Ireland are obliged to publish accounts in a format which separately shows income and expenditure under a range of functional headings. In this way, the accounts of social housing and other activities are kept, audited and published separately by the local authorities.

Since approved voluntary housing bodies are not engaged in commercial activities but their housing projects fall within the social housing category the issue of separate accounting does not arise. The preferential financing granted by HFA to the municipalities and the voluntary housing bodies can only be used to perform the public social housing obligations imposed by legislation and to cover the costs of the social public housing service insofar, as these costs could not be otherwise recovered.

*Consequently the benefit of the cheap guaranteed financing from the Agency to the voluntary bodies goes directly and exclusively to the disadvantaged households for which those bodies provide housing.*

Furthermore in the event of a surplus arising from the provision of social housing (e.g. rents from tenants), local authorities have to apply this surplus to housing purposes. Also the approved voluntary housing bodies as not-for-profit organisations must have in its memorandum of

association or registered rules provisions prohibiting the distribution of any surplus or profit to members and requiring the assets of the body be applied solely towards its objectives.

### DEVELOPMENT OF TRADE WITHIN THE UNION

The ultimate objective of the notified scheme is social housing. As was mentioned above, social housing was recognised as a legitimate element of public policy by the Commission. Given that the state aid for social housing in Ireland is proportionate to the costs incurred by the operators, it is not liable to produce distortion to an extent contrary to the Community interest.

### CONCLUSION:

Thus the final decision of the Commission was that, while the state guarantees to the HFA did not constitute unfair state aid, the financing of social housing by the Irish government did indeed constitute such aid – something not allowed under competition law in general. However, state aid may be permitted in order to allow a legitimate public service task to be discharged, if this would not otherwise be possible. The Commission recognised that the provision of social housing is a just such as task, in light of the vulnerable group that is provided for – a group that might be unable to command housing on the private market.

This is the same group targeted by service providers working in the area of homelessness. Homeless people are also unable to command many services that are fundamental for their lives on the private market, something that must be taken into account when assessing whether the services which meet their needs should be opened to competition. Would such services be able to operate as effectively if forced into a competitive market? If there is benefit from the lack of competition, does it not accrue directly to these vulnerable groups? As this case shows, these are questions that must be borne in mind when deciding on the scope of the draft services directive and assessing the impact that it could have. ●

You can read the full text of the Commission's decision here:

[http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/comp-2004/n089-04.pdf](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/comp-2004/n089-04.pdf)

Irish Council of Social Housing

<http://www.icsh.ie/>





## EU Directive on Services – an attack on public services in Europe

Opinion from EPSU, A European trade union federation representing over 190 public service unions.

Website: <http://www.epsu.org> email: [epsu@epsu.org](mailto:epsu@epsu.org)

*EPSU is a European trade union federation representing over 190 public service unions organising approximately 8 million workers in more than 33 countries (EU, candidate countries and the European Economic Area). It is a member of the ETUC. EPSU's key areas of activity: national and European administration, regional and local government, public utilities (electricity, gas and water, waste) and health and social services.*

Shortly before he left the EU Commission, Frits Bolkestein, EU Commissioner for the Single Market up until November 2004, gave Europe and the EU member states a farewell present which made quite a splash: The Commission's proposal for an EU Directive on Services in the Single Market of January 13, 2004.

This directive covers all services in Member States that are provided on a "remunerated basis". Given this broad definition, this includes virtually all public services as these are generally paid for one way or another. All basic services (e.g. water, electricity, waste disposal) and even healthcare and social services will come under the Directive.

The purpose of the draft directive is promote competition in the services sector in the EU Single Market. The aim is to ensure that companies from all 25 EU member states are not prevented from engaging in economic pursuits in other EU countries by the various national rules pertaining to tax, trade, contract, liability or environmental law.

What this means is that there will be a heavy downward pressure on standards. The less standards and rules any country has, the more the service providers in that country will be free to do what they like. Countries with high standards will be viewed as "punishing" their service providers and will be pressurised into dropping them. The only standards that will escape this pressure will be European ones. However there are few social and labour standards at EU level and we do not have a law protecting public services (or services of general economic interest in EU-speak) from EU competition rules.

So, the impact of the Directive on public services is a real concern. There have been comments recently from the Commission and some governments that *publicly funded services of general interest* are to be excluded. But is this assurance really any progress in comparison to the text of the draft Directive? We don't think so. Such a change would still mean that only services provided by the state, for *no consideration* are excluded from the scope of the directive. It still leaves us with the limbo of having to distinguish economic and non-economic SGI. The shifting boundaries between SGI and SGEI make this exemption rather unconvincing especially in the absence of a legal framework. Healthcare for instance is the prime example of a service that was deemed non-economic and has now been turned into a SGEI. It is therefore not enough to exclude for example 'publicly funded' health care – to use McCreevy speak – from the directive.

We also have many concerns regarding other areas of public services

- **Energy:** the directive on services would have dramatic repercussions for energy-related services. Companies in these sectors would be able to offer their services to the energy sector on an EU-wide basis in accordance with the legal situation prevailing in their country of origin.
- **Water,** recent discussions within the Commission suggests that efforts are being made to draw a distinction in the water industry

between supplies of drinking water and other services related to the supply of water. Applying this approach, the Commission could, for example, try to liberalize the construction, maintenance and servicing of pipelines, filter and purification plants, metering and billing services as well as other services in the water sector. In this way, substantial parts of the water sector would be affected by the Directive on Services.

- **Waste disposal:** this sector is another example where ambiguities and changes in the definition of the sector could have major repercussions: waste disposal regulations in the countries where the service is provided are exempted from the Directive but all other areas of the waste disposal industry, e.g. the collection, transportation and sorting of waste, will come under the terms of this Directive. Municipalities and regions close to borders in particular will be able to invite foreign waste disposal companies, which will only be required to comply with the tax, trade, environmental and liability law prevailing in their country of origin, in bidding procedures.

Trade unionists and others turned out in massive numbers on March 19 to protest against the Directive. Concerns about the Directive are getting attention. However, we should not be complacent! The European Council that met on March 21/22 did not demand that the Commission withdraws the text, only added its weight to the various calls for the review of the most controversial aspects.

The Directive is, in any case, still with the European Parliament. The Parliament - not the Commission or the Council - must decide what to do now with the text. In the next weeks we shall have the two reports from the main Committees dealing with the proposal and the Parliament will express its opinion in June or July. Trade unions and civil society need to make their concerns heard to MEPs. We need to ensure that public services and social and labour law are not adversely effected by Services Directive. But at the same time an exemption strategy for public services is not enough, and does not provide a long-lasting solution. We need to develop common European principles that go beyond the market rationale, principles relating to solidarity, equality, sustainability, risk sharing, territorial cohesion. This means pressing on with the follow-up to the White Paper on Services on General Interest to develop the necessary counterweight. A positive approach to public services and to public policy objectives is needed at EU level more than ever.

There are differences between the Member States in how they organise and pay for public services. However, there are principles of solidarity and security that underpin all of them. Thus public services are accessible to vulnerable groups, who would not be able to command such a service on the open market. We must not allow public services to function solely on the basis of market rules. There is no contradiction between strong economic growth and setting up fair systems of access to healthcare, for example. We must combine both and keep working on the principles of solidarity, universality and equality. ●

Two developments in particular stand out: the White Paper on services of general interest and the proposal for a directive on services in the internal market (Services Directive).

## Services of General Interest in the face of the draft Services Directive

*SGIs at European level must be safeguarded to guarantee users' individual rights.*

By **Carole Saleres**, *UNIOPSS Technical Adviser Europe*

UNIOPSS (Union nationale interfédérale des oeuvres et Organismes Privés Sanitaires et Sociaux)<sup>3</sup>

Since 1957, the European Community has developed along economic lines aimed at achieving a Europe-wide single market. Over time, this European economic integration has impinged on areas hitherto regulated at national level.

As operators of services with an economic aspect<sup>1</sup>, therefore, private welfare organizations have been led to step into the European debate on services of general interest (SGIs).

Liberalization of the so-called networked SGIs like telecommunications, energy and postal services, the status of social SGIs and how Community internal market and competition law affect them have come onto the agenda.

Private welfare organizations are now concerned by the European debate on SGIs on two counts: as operators of services, and because they deal with vulnerable groups with no "automatic" guarantee of access to SGIs.

The Community legal framework for the internal market, competition law and services of general interest (SGIs) has developed over the past two years in ways that raise questions about the identity of welfare organizations and how they cater to the social needs of vulnerable groups.

Two developments in particular stand out: the White Paper on services of general interest and the proposal for a directive on services in the internal market (Services Directive).

The Commission White Paper published in 2004 focused on the specific situation of social services of general interest, and pledged to put forward a Communication on them in 2005 to provide increased clarity and legal certainty for this class of SGIs within the Community framework. This White Paper is being examined with interest by welfare organizations.

At the same time, the European Commission brought forward a proposal for a directive in January 2004 aimed at creating an effective internal market in services by 2010.

This proposal for a directive is set to be adopted by the end of 2006, and aims to do away with legal obstacles to freedom of establishment for service providers and the free movement of services within the Europe-wide single market. It lays down a general legal framework that applies to almost all service activities with an economic aspect. Its extremely wide scope covers all services, especially social and health care services.

But, the proposal's overriding aim is to create an effective internal market in services, without regard for the specific characteristics of social and health care services, or issues around Member States framing their own general interest policies on social welfare and public health.

The content of this proposal for a directive as it stands raises problems and questions for the health and social sector, and for welfare organizations. Not least of these are the restrictions on national authorization and planning systems, and regulation of service activities.

In France, for example, social and community health service provision is regulated by legislation<sup>2</sup>. This requires prior authorization of all operators to give assurances of quality of service provision, and safety of service users. The question is whether this kind of legislation will be seen as consistent with the draft directive's aims, and not as too restrictive or even a disincentive to operators setting up.

The characteristics of the groups catered to by the social and community health services provided by welfare organizations is also a consideration. Arguably, they cannot be seen in the draft directive's terms as consumers able to make a rational and informed choice within a traditional market-based supply and demand system. Social welfare activities deal with extremely vulnerable people in precarious situations. How can this kind of user be assumed to exercise independent choice? Are not prior precautionary measures needed as regards operators?



Finally, the vague wording of some of the directive's provisions is clearly going to create legal uncertainties for service operators.

The debate around the directive has attracted media coverage in recent months. The many misgivings voiced by various players (NGOs, trade unions, political parties, etc.) about the directive's contents prompted the European Commission in early February to announce a complete overhaul of it.

Welfare organizations welcome this total rethink: the challenge is how to get better recognition (and more legal security) at European level for the community service and general interest aspects of what welfare organizations do, and give due weight to the specific characteristics of social and health care services.

The aim of promoting SGIs at European level must be to guarantee improved effectiveness of users' individual rights.

The fact is that services of general interest can deliver access to fundamental economic and social rights for all citizens, especially the most vulnerable groups, by guaranteeing equal treatment, a universal service, continuity, quality of service, accessibility (in terms of affordability and equal access for all nationwide).

NGOs that work with vulnerable and socially excluded groups keep watch to ensure that people's rights - especially those of the poorest in society - are effectively exercised. As voluntary actors, they act as intermediary agencies working to deliver access to their fundamental rights back to the most vulnerable groups.

They do so by working on the principle of equal access for all to rights (right to health care guaranteed by a universal system of social protection, right to housing, right of access to basic goods, etc.) and warn against systems based purely on short-term profit-making, or that put operators into competition at the risk of denying some population groups access to these services. ●

---

<sup>1</sup> Private welfare organisations in many EU countries run a wide range of social welfare services, like home help, nursing and medical assistance services, hostels and social rehabilitation centres, retirement homes, centres for people with disabilities, and other services.

<sup>2</sup> Social Welfare and Community Health Reform Act of 2/01/2002

<sup>3</sup> The Union nationale interfédérale des oeuvres et Organismes Privés Sanitaires et Sociaux (UNIOPSS) links together 129 national voluntary health, social welfare and community health organizations plus 22 regional federations (Uriopss) comprising 7200 voluntary establishments and services. (<http://www.uniopss.asso.fr>).

## The services directive and social services

By Kathleen Spencer Chapman, *Social Platform*

***How can the draft services directive be amended to recognise the specific characteristics of social services in Europe?***

This was the tricky question at the core of the seminar in the European Parliament on the 5<sup>th</sup> April, organised jointly by the Social Platform and the Greens/EFA Group and entitled “*Social services, quality in services and the services directive*”. The Social Platform’s membership includes both organisations of non-profit social service **providers**, and organisations representing social services **users**, giving it a particularly interesting stake in the debate on the services directive. As the discussions in the European Parliament are in full swing, it is crucial to ensure that social services – in particular, their users – are fully taken into account in the future directive.

The question of authorisation regimes emerged from the seminar as the key issue for social services, alongside other areas of concern. Whether speaking about services for the homeless, social housing, or nursing care, to take just a few examples, the message to MEPs from the morning’s contributors was that the national systems currently regulating social services are crucial to ensure the quality of social services. These regulations are particularly important given one of the main characteristics of social services, which is the vulnerability of many of their users who are not in a position (for a variety of reasons) to demand high quality standards. Yet these national regulatory systems are under threat from the directive as it currently stands.

The debate helped clarify a number of aspects. Social NGOs are not against competition; in fact, they’re used to it and already have to compete with other service providers on a daily basis! (albeit primarily non-profit providers). The question is therefore not competition versus no competition, but rather, regulation versus no regulation. Equally, this does not mean NGOs wish to protect the current status quo with regard to regulations – these can sometimes be very burdensome for service providers – but rather, they defend a notion of general interest, and the ability of the public authorities to guarantee high quality social services, in the general interest.

The difficult part was to try and draw out some practical conclusions from this clear understanding of the problems. Most speakers clearly supported a sectoral approach rather than a horizontal directive covering all sectors in a blanket fashion, including Pierre Jonckheer from the Green/EFA Group. Mr Jonckheer echoed the views of many participants when he challenged the basic assumptions underlying the directive – such as the idea that increased competition would automatically lead to increased employment and growth. The morning’s contributions also highlighted the fact that for social services, the directive would be more likely to increase the amount of bureaucracy and red tape, rather than reduce it.

The absence of the European Commission, despite a number of invitations, was notable. Participants expressed frustration at the lack of clear answers from the Commission on a whole range of different questions, and the fact that the Parliament was now left in a position where it had to amend a text on which there was no general consensus. However, as the Commission has not agreed to take the directive back to the drawing board (they’ve won a tactical victory up to now), all expressed their desire to take a more pragmatic approach.

One option discussed was to exclude social and health services. Although there was wide agreement that they should probably not be covered (notably, by Othmar Karas of the EPP Group), Heide Rühle from the Greens/EFA Group noted that the idea of a directive full of exceptions – or ‘holes’ – is not ideal. Anne van Lancker, PES Rapporteur for the Employment and Social Affairs Committee, supported the exclusion of all Services of General Interest (SGIs), arguing that maybe one day a market in SGIs would be desirable but we’re not ready for that yet! Evelyne Gebhardt, overall Rapporteur, expressed clear support for harmonisation as alternative to the country of origin principle or mutual recognition, and informed the seminar that her forthcoming report would propose leaving in the country of origin principle but in a modified form. Carola Fischbach-Pyttel from the European Public Services Union took the debate to another level, suggesting that a legal definition of the principle of solidarity is needed at EU level to counterbalance the current dominance of the internal market ideology.

The seminar proved a useful contribution to reflections and although no clear answer emerged from the morning, it helped to move decision-makers closer to this goal. It clarified what the main issues that are that need addressing, and provided directions for further discussions and analysis both within the Social Platform and the European Parliament. ●

A report of the seminar will be available shortly on the Social Platform website, [http:// www.socialplatform.org](http://www.socialplatform.org).