



01 March 2007

COMMISSION COMMUNICATION ON SOCIAL SERVICES OF GENERAL INTEREST

Summary

BUSINESSEUROPE broadly agrees with the organisational characteristics of SSGI sketched in the Commission communication and shares the Commission conviction that these services do not constitute a legal category distinct from the broader concept of services of general interest. Furthermore, BUSINESSEUROPE is convinced that existing EU competition rules allows for the accommodation of the non-commercial nature of SSGI. ECJ jurisprudence clearly establishes that any activity consisting of the supply of goods and services by an undertaking constitutes an economic activity, regardless of the legal status of the undertaking and the way in which it is financed. At the same time, ECJ jurisprudence also recognises the specificities of social services, and on the basis of existing Community law provides the means to evaluate when a social service provider exercises an economic activity and when it fulfils a general interest task. For these reasons, proposing an EU directive on SSGI is neither necessary nor desirable.

BUSINESSEUROPE fully agrees that the community framework which governs these services must respect the competence of public authorities within Member States to define the obligations and missions of these services. However, Member States must take into account relevant community rules when exercising this competence.

European companies welcome the fact that the Commission clarifies that the social services of general interest excluded from the scope of the recently adopted services directive will nevertheless continue to be directly subject to the principles of freedom of establishment and freedom to provide services as defined in articles 43 and 49 of the EC Treaty.

BUSINESSEUROPE would welcome Commission clarification (perhaps in the form of an interpretative Communication) concerning institutionalised PPPs as problems of compliance can arise from the manner in which this mixed capital operator has won the right to deliver a service. European employers would also welcome Commission clarification in respect of services concessions.

In addition, BUSINESSEUROPE agrees with the proposal to publish biennial reports on SSGI and believes that this should be part of open method of coordination on social protection and inclusion.

Introduction

On 26 April 2006, the Commission published a communication on social services of general interest (SSGI). In this document, the Commission highlights the importance of modernising these services as part of the European growth and jobs strategy and recalls the EU commitment to make the internal market for services fully operational while preserving the European social model.

The Commission also clarifies how existing EU competition rules take account of the specificities of SSGI and announces the publication of biennial reports as an information tool to enhance knowledge on the evolution of these services and community rules applying to them. In the light of this work, the Commission will, at a later stage, identify the best approach to take, including giving consideration to the need for a legislative proposal.

As part of the consultation process announced in the Communication, the Commission also invited Member States, European social partners and other European stakeholders to reply to a questionnaire on SSGI. This position paper therefore sets out BUSINESSEUROPE's view on the Commission communication and also replies to the SSGI questionnaire.

General comments

BUSINESSEUROPE fully agrees that the community framework which governs these services must respect the competence of public authorities within Member States to define the obligations and missions of general interest of these services. As the Commission rightly points out, one of the trends in the modernisation of SSGI is decentralisation to local or regional level to take better account of different needs and get closer to the service beneficiaries.

However, Member States must take into account relevant community rules when exercising their competence. In this context, European business welcomes the fact that the Commission clarifies that the social services of general interest excluded from the scope of the recently adopted services directive will nevertheless continue to be directly subject to the principles of freedom of establishment and freedom to provide services guaranteed by articles 43 and 49 of the EC Treaty.

BUSINESSEUROPE agrees with the Commission that almost all SSGI can be considered economic in nature, notwithstanding the fact that they may be 'not for profit' and regardless of the way in which they are financed.

BUSINESSEUROPE broadly agrees with the list of organisational characteristics of SSGI set out in the Commission communication but has serious reservations about including the 'not-for-profit' characteristic and insists that this feature should not deprive access to the market to any for-profit company (considering that both for-profit and not-for-profit entities are subject to the same rules) since the quality of service, rather than the ownership structure of the provider is the key concern. Preventing for-profit companies to be active in the area of SSGI is likely to have serious implications for the value for money and quality of the social services concerned.

European employers share the Commission conviction that these services do not constitute a legal category distinct from the broader concept of services of general



interest. Furthermore, BUSINESSEUROPE is convinced that existing EU competition rules allow taking account the non-commercial nature of SSGI (see specific comments on community rules applying to SSGI below). For these reasons, BUSINESSEUROPE is convinced that proposing an EU directive on SSGI is neither necessary nor desirable. A directive for SSGI may be used by Member States to maintain the privileged or monopoly positions of public operators in activities which the European Court of Justice (ECJ) regards as economic, in stead of optimising public spending based on increased opening of these markets.

Last but not least, BUSINESSEUROPE welcomes the proposal to publish biennial reports on SSGI and fully agrees that this should be part of open method of coordination on social protection and inclusion.

Specific comments

On the coverage of the communication

BUSINESSEUROPE considers that the description of what is meant by SSGI and of what services are covered by its communication is confusing. The Commission states that health services are not covered by the communication. However, at the same time it specifies that statutory social security schemes covering the main risks of life, including health are SSGI. It is of paramount importance to clarify the scope of the communication, given the likely impact on the health market and the sector's ability to deliver value for money.

On the trends in the modernisation of SSGI

BUSINESSEUROPE agrees that the main trends observed in the modernisation process of SSGI are the introduction of methods of benchmarking, decentralisation to local or regional level, outsourcing of public sector tasks to private operators with public authorities focussing on ensuring fair competition and effective organisation of these services and the development of public private partnerships.

BUSINESSEUROPE welcomes these trends, which are important for improving the cost effectiveness of SSGI, and fully supports the principles of effectiveness and transparency which form an integral part of the modernisation sought.

On the key principles of community rules applying to SSGI

The freedom of the Member States to define the missions of general interest of social services and to establish organisational principles governing them must be exercised in a transparent and non-discriminatory way. Hence, the importance of full respect for Community law.

In this context, the communication rightly recalls that ECJ jurisprudence clearly establishes that any activity consisting in supplying goods and services by an undertaking constitutes an economic activity, regardless of the legal status of the undertaking and the way in which it is financed. Consequently, almost all social services can potentially be considered as economic activities within the meaning of articles 43 and 49 of the Treaty. Nevertheless existing Community law provides the necessary basis for evaluating when a social service provider exercises an economic activity and when it fulfils a general interest task.

At the same time, ECJ jurisprudence also recognises the specificities of social services since it acknowledges that social policy objectives are overriding reasons based on the general interest which may justify the application of measures such as an obligation to hold a permit in order to provide a social service.

Economic activity is by definition in constant evolution and the pursuit of legal clarity in this field cannot be at the expense of necessary flexibility. In BUSINESSEUROPE's view, the best way to achieve reasonable legal clarity without creating undue rigidities is to check on a case-by-case basis compliance with relevant Treaty provisions and existing relevant EU legislation through ECJ jurisprudence.

On the involvement of private service providers

Public authorities may decide to delegate a social mission in whole or in part to an external partner or to form a public-private partnership (PPP). BUSINESSEUROPE agrees with the Commission that when public authorities decide to do so, they must at least respect the principles of transparency, equal treatment, proportionality and the rules outlined in the Public Procurement Directives.

It is sometimes difficult to establish in advance a precise description of the specifications of the service required. In this instance the Commission's suggestion that "technical specification may be established on the basis of performances and functional requirements" has merit. In our view the success of PPP contracts is based on the way in which they focus on good performance. Defining just the aims to be achieved would allow the service provider the necessary flexibility to deliver the required service. Such flexibility would also allow the possibility that a contract may be adapted and amended in a fair way over the course of its life time in order to continue to deliver an excellent service.

We also agree with what the Commission says about the need to clarify and define "concessions". In BUSINESSEUROPE's view, any move to clarify or set guidelines in respect of concessions should be with a view to encouraging the expansion of opportunities. We do not believe that new legislation on PPPs is necessary or even desirable. However, we support the idea of the Commission to clarify a number of elements of the debate in as much as such clarification may help spread the practice of concessions. We believe that clarification should focus on services concessions and the contractual relationship therein between the public and the private sectors bearing in mind that services are operated in the long term. While the new procurement directives contain some definitions of what constitutes a concession, it remains a complex matter. Therefore it might be useful to include clarification of the accumulated case law of the European Court of Justice on these matters.¹

With regard to Institutionalised PPPs, we believe problems of compliance with EU rules do not arise from the institutional nature of the operator delivering the service. Rather they can arise from the manner in which this mixed capital operator has won the right to deliver a service. It is an established EU rule that when a public authority transfers an economic activity to a private entity, it must be done on a competitive basis using

¹ BUSINESSEUROPE Comments on the Commission communication on Public Private Partnerships, Public Procurement and Concessions, October 2006.



applicable European rules and the principles of the Treaty. This principle has been upheld and clarified by several decisions of the ECJ. However we would welcome Commission clarification (perhaps in the form of an interpretative Communication) of this.

Conclusion

The comments made above clearly show that the non-commercial nature of general interest missions fulfilled by SSGI providers is taken into account when implementing existing EU competition, state aid and public procurement award of contract rules. However, SSGI are not a distinct category from the broader notion of services of general interest and their non-commercial nature does not mean that they are “non-economic.”

BUSINESSEUROPE would be opposed to proposing new legislation on SSGI. However, BUSINESSEUROPE would welcome Commission clarification (perhaps in the form of an interpretative Communication) concerning institutionalised PPPs as problems of compliance can arise from the manner in which this mixed capital operator has won the right to deliver a service. European employers would also welcome Commission clarification in respect of services concessions.

In addition, BUSINESSEUROPE supports the publication of a biennial report proposed by the Commission and agrees that this should be part of the open method of coordination on social protection and inclusion.