

# **Roles and Reality of Non-profit Social and Health Care Providers – Understanding and Applying EU Initiatives**

**EU – Germany - SSGI**

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## Role of welfare associations in the German social system

- German constitution: “Germany is a democratic and social Federation.”  
Welfare associations take part significantly in fulfilling this requirement
- Welfare associations work in **partnership** with the public authorities  
**users’ needs** as our guiding principle
- private service providers enjoy **preference** over public service provision
- premaxy of private providers is also the reason for **individual initiatives** by private associations, as, for example, debt counselling, family support, help for people with HIV/AIDS and the so-called “hospice movement”

## Legal examples of private premacy and partnership in providing SSGI

- Art. 75 SGB XII – **premac**y in the field of **social assistance**: public authorities have to cooperate with private institutions already existing
- Art. 11 SGB XI - **premac**y of private providers in the area of **elderly care**
- Art. 17 SGB I: cooperation (**partnership**) between public bodies and non-profit and other private institutions while considering their respective independence and objectives, as well as the ways of performing their respective tasks
- Art. 3 and Art. 4 SGB VIII – **partnership** between public authorities and non-profit providers in the area of youth assistance

## Political environment for non-profit providers in the German welfare state

- In general the environment for non-profit providers is **rather satisfying**: strong position vis à vis the state because
  - a) the users have got individual rights
  - b) the funding to implement the users' individual rights is ensured by law.
- In the 1990s: a **change of paradigm**, enhanced privatisation, especially in the area of elderly care.
- competition as such is not a problem because every provider meeting the legal requirements for the provision of SSGI gets permission to run a relevant institution.
- Competition for SSGI in general takes place in a special **triangular relationship** between the user, the funding body and the provider: the user contracting with the provider – competition with regard to the users

## „Triangular relationship“ in German Social Law

- strong and self-responsible inclusion of users: right to choose a provider by themselves (Wunsch- und Wahlrecht)  
impact: private providers are granted market access and permission to offer their services, but no guarantee for sufficient demand.
- Private providers are carrying the entrepreneurial risk of their unit by themselves.

## Law of state aid and public procurement: Areas of EU legislation with impact on our work

- SSGI providers are subject to European law of competition as far as their services qualify as an **economic activity**. Most of SSGI in Germany are regarded as such.
- EU legislation on subsidies and public procurement has large impact on SSGI providers and often poses severe problems, with German SSGI especially concerned.

## Important aspects concerning public procurement law

- Public procurement law – the idea behind = transparency. In Germany, the **dominant objective** of public bodies is to save money
- Participation of welfare associations in the social system is hampered seriously if the provision of SSGI is micro-managed by the procuring authority, leaving to the provider no freedom of action to implement a user-oriented design of social services
- Public procurement law restricts the freedom of choice and endangers the robustness and sustainability of social infrastructures

## Important aspects concerning state aid

- In general the **special financial support** by the state for SSGI is recognised by the EU
- EU legislation on subsidies: calculation of an **added value** of SSGI. Financial support by the state is only granted if a social service institution is run for “general interest”

Problem: the “added value” of SSGI is influenced by the society in which they take place, i.e. by **social infrastructures** as well as by **civil society** as a whole and **community engagement** in particular.

No calculation of the “added value” for detection of an alleged overcompensation.

- non-profit law: concerning financial advantages, as well as tax advantages - considered as being relevant for state aid. But the economic restrictions non-profit undertakings have to respect are not taken into consideration – this **imbalance** has to be acknowledged.

## What is a “public mandate”?

■ **two different public “mandates”** in state aid law and in public procurement law:

■ The **act of entrustment**: not a public mandate instructing the provider to fulfill a certain design of services which public authorities have drawn in advance

■ The entrustment results from the **provision and funding agreements**. Providers are autonomous - they fulfill their own tasks

■ The act of entrustment in state aid law fits into the German system as far as provision and quality agreements are considered as public act

■ The **public mandate in public procurement law** doesn't fit to the system of social law in Germany: autonomy of the providers; „triangular relationship”: user chooses the provider; user = direct relationship to the provider

## PP in Germany

- Application on social services especially in the realm of promotion of employment.
- Experiences are sobering. No use of the leeway which the German competition law accords to authorities to assess other criteria than prices properly.
- The criterion of good management (Wirtschaftlichkeit) purely understood in the sense of price competition.
- Reasons: lack of knowledge or experience, as well as one-sided intentions (i.e. to save money)
- No indication that German public authorities are inclined to deal seriously with the contents of the FAQ-Paper submitted by the Commission on the subject of procurement law and social services, and to put its messages into practice.

## Our proposals

- The „triangular relationship“ - well functioning solution for the conflict between competition and autonomy of SSGI providers
  - for the diversity of relevant providers
  - for the guarantee of freedom of choice for the users
  
- **No exclusive procurement** ,as the design and the diversity of the social services must be opened for different providers - e.g. in the area of sheltered workshops for people with disabilities –
  
- Alternatives to public procurement - not concessioning but some kind of **licensing**. Allowing an applicant to run a social institution if it meets the legal requirements

## What can be helpful?

- There are still open questions about public financial support, a **directive will not be the solution**
- A directive could be useful as a display of **political will** which has to be respected by the ECJ
- public procurement law: **quality criteria, social criteria** compulsory
- The **Monti-package** could be modified – non-profit organisations should be able to have tax advantages (principle of state substitution)
- Concerning the de minimis thresholds we strongly recommend an increase

**Thank you very much for your attention!**