

TSEP Workshop:
The Third Sector and the influence of EU competition law
Tilburg /The Netherlands, 25 June 2004

This was the second in a series of policy workshops organised as part of the Third Sector European Policy network.

The workshop was hosted and organised by TSEP's Dutch team, Wim van de Donk and Taco Brandsen, from Tilburg University, The Netherlands. The focus of this policy workshop was on the growing influence of market principles on Third Sector organisations, from the perspective of

- 1) a senior EU level (European Commission) official; and
- 2) a national level (the Netherlands) third sector service provider

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1. Stefan Wilbert (DG Competition):

The White Paper on Services of General Interests: An example of the decision making process at the EU level

The Background

The White Paper on Services of General interests (COM (2004) 374 final) published in May 2004 is the successor of the 2003 Green paper dealing with the same subject. In contrast to Services of General *Economic* Interest, Services of General Interest (SGI) do not have a clear definition nor are they mentioned in the Treaties. Nevertheless, we can say that SGIs cover both 'market' and 'non-market' services ranging from the fields of health care, and education to network industries such as energy or telecommunications.

A basic underlying question from the Commission's perspective is whether these services are best provided privately - meaning according to market principles - or by the state. In any case, the service provision has to guarantee the general access to these services for the citizens.

The decision on how SGIs are provided is complex, especially because different conceptualisations exist in different Member States. For instance the German idea of

“Daseinsvorsorge” with its concept of subsidiarity in the fields of health and social care may contrast with the UK understanding of service provision, in which there is no clear principle of tiered responsibility.

Another fundamental aspect of the debate is whether there is a real need for a legal framework for SGIs at EU level at all.

The Third Sector and its role in the decision making process

The White Paper on Services of General Interests is of special interests to Third Sector organisations, as in their role as service providers, they may potentially be affected by any legal framework that subsequently develops. Consequently, they have a special interest in voicing their opinion. Stefan Wilbert pointed out that Third Sector Organisations had the opportunity to have their say at various stages of the decision making process.

The Green Paper-initiated process

The public consultation period which took place directly after the publication of the Green Paper on Services of General Interests was an important moment for the input of perspectives from the Third Sector. However, the speaker considered the response rate to the relevant public consultation as quite low - with 273 contributions made in total. The countries of origin were predominantly Belgium, France, Germany, and Austria. These responses came from a mixture of sectors: Beside traditional service providing Third Sector organisations, industrial and academic institutions, and sub-national public authorities made written contributions.

The report of the Commission on the outcome of the public consultation does not assign opinions to individual groups. However, there was a consensus among the participating organisations that no further powers should be transferred to the EU level, while at the same time, some groups stress the necessity of a EU legal framework. The national diversity of definitions of SGI was strongly highlighted in the consultation process.

Another – more institutionalised – way of Third Sector involvement in consultations is provided by the European Economic and Social Committee (EESC), where Third Sector organisations are represented in Group III (various interests). The EESC’s opinion argued for a framework directive on SGIs. In contrast, the other main institutionalised consultative body, the Committee of the Regions (CoR), took the view that a regulation at EU level was not

necessary, and could inappropriately violate the principle of subsidiarity. This perspective could be explained by the fact that its members, the local and regional authorities, are usually involved in the provision of SGIs. Thus, a EU framework on SGIs would imply a loss of competence for them.

The European Parliament (EP) has supported the idea of a legal framework for SGIs at EU level. However, Stefan Wilbert observed fading support for a Directive in the EP. He concluded that despite the involvement of several institutions and groups in the consultation process altogether the Council, the Commission and the EP were still the most influential stakeholders in the process.

***The White Paper on Services of General Interests
and its potential impacts/relevance for Third Sector organisations***

The Green Paper-initiated consultation was a prelude to the White Paper. This now rejects the idea of a framework directive on SGIs - but expresses the Commission's intention to re-examine the subject if/when the Constitutional Treaty is adopted. Besides the declaration of intent the White Paper includes guiding principles for policies on SGIs. Special emphasis is laid on the citizen's right of universal access to these services, and on the necessity to guarantee safety and quality. At the same time, the White Paper acknowledges the services providers' needs to gain a decisive level of legal certainty.

The speaker also underlined that the White Paper still gives the Member States a great leeway of freedom for regulating the ways SGIs should be provided. Especially in terms of crucial issues - such as providing subsidies or the general decision whether private or public institutions should be assigned for service provision - the Member States are free to make their own decisions. From the speaker's point of view, the issues dominating the discussions on SGIs are the degree of liberalisation and concerns about the degree to which the system of subsidiarity might be restrained.

Discussion

The discussion that followed the presentation between the speaker and TSEP Partners highlighted firstly the aspects of Third Sector involvement and the consultation procedures as such; and secondly the influence of market principles on service provision by the Third Sector in the future. The last aspect was expressed by a general question concerning the commission's attitude towards service provision by the Third Sector outside the market and the still existing protection of their work by the Member States e.g. the privileged position of the Free Welfare Associations in Germany. It was pointed out that service provision by the Third Sector is considered as a way of consumer protection. Furthermore, several goods or services especially in the fields of health and social care are regarded as 'not being competitive'.

The speaker challenged this view. He pointing out that this attitude was in the past taken for granted in fields such as telecommunications – but here, the liberalisation process had proved that fears of incompatibility between market principles and consumer protection were wrong. From his point of view, the introduction of market principles to further fields does not mean that NPOs will be prevented from service provision. He made it clear that the EC Treaties in general are premised on the idea that a free market is the best guarantee of good service provision. Nevertheless, Member States still have the right to exclude certain fields from the free market criterion as Wilbert underlined.

During the discussion it was again highlighted that different opinions or concepts towards service provision exist in the member states. The general tendency of liberalisation is not implemented equally in all countries. This is also reflected in the origin of the contributions to the public consultation, as the speaker underlined. He concluded that the more organisations fear a loss of their existing privileged position, the more likely they had been to respond to the consultation procedure. This seemed most evident in the contributions from France and Germany, which stressed the organisations' wish to ensure the status quo. However, he would have welcomed further contributions from countries with a stronger tradition of marketisation to make it possible that their opinions were taken into account as well.

Altogether he did not feel able to give a complete explanation of why there was more reaction from some countries than from others but he stressed that the organisations' participation in

the consultation process is their only possibility to be heard and to point out their attitude. The speaker explained further that most organisations that handed in their statements were vertical (within particular policy fields or 'industries') rather than horizontal (with members or activities cutting across 'industries').

In the end of the discussion there was a general agreement that the overall outcome of the process of the White Paper on Services of General Interests and the consultation is neither strong nor does it really clarify the situation. Future developments require further observation to come to a definite conclusion about possible challenges for Third Sector organisations.

2. Bas van den Dungen (CEO of the National Association for Home Care):

Home Care in the Netherlands and third party policy

Background

The Dutch National Association for Home Care (Landelijke Vereniging voor Thuiszorg [LVT]) provides a broad spectrum of services ranging from maternity and baby care to dietary advice, nursing or supplying disability equipment. The Association is the umbrella organisation of approximately 200 home care organisations dealing with almost 3 mill clients in the Netherlands.

Current issues

Bas van den Dungen pointed out the different challenges the LVT is facing today. The exploding demand for their services is taking place in the context of financial cut-backs. At the same time the stakeholders involved in the process around service delivery by the LVT have changed in the last years: The influence of the central government has diminished in favour of local government, but insurance companies have also become more prominent. The most important change is that the clients are now enabled to pay for their services directly and consequently it is easier for them to choose their service provider. Thus, the LVT now has to deal with more direct pay relationships and as such finds itself in a situation which bears more similarities to market conditions.

The LVT between market conditions and state regulations

As a reaction to the new necessity to compete for clients the LVT has developed a scheme with the priority to win the clients' trust. Bas van den Dungen outlined that benchmarking and certification are important aspects of this scheme. Altogether, he sees his organisation in an odd position acting between the old sphere protected by the government and the new requirements of a more market-like situation. From his point of view, both the Dutch government and the EU have to undertake steps to resolve this situation and provide good working conditions for organisations like the LVT.

The EU's approach to strictly distinguish between 'the market' and 'the state' as spheres does not work in van den Dungen's eyes. He pointed out that, for instance, the Dutch health care system is at least indirectly influenced by the regulations of the internal market. As a consequence, van den Dungen called for the development of a 'third party policy' in the EU which reflects the needs and situation of organisations like the LVT.

Discussion

The discussion following Bas van den Dungen's presentation focused on the possibilities and limits of social welfare service provision by for-profits. The concern voiced by van den Dungen was that not just the "market issue" should be taken into account, but also the "care issue". Both dimensions were needed to safeguard client welfare. From his point of view, the overall service configuration provided by the LVT serves is effective in combining these elements for groups such as older people. This was the advantage of a single provider which has more or less a monopolistic position.

At the same time, Bas van den Dungen recognised that a monopolistic position was not without potential problems. But he argued that this allowed LVT to guarantee sufficient service delivery in the different fields; the organisation actively cross-subsidised to ensure people with difficult and costly needs were appropriately supported. For-profit penetration into certain fields impeded this process for organisations like his, with 'cherry picking' or 'cream skimming' making it harder for Third Sector organisations to cross subsidise. Thus, for-profits would tend to focus on the 'easier' types of clients and services, limiting the capacity of the Third Sector to use surpluses from these activities to subsidise the more complex and costly activities in which they, and not for-profits, were involved.

The first speaker challenged the notion that a discrepancy necessarily existed between the LVT's and the EU Commission ideas about how to provide services. The Dutch government has the opportunity to define appropriate service delivery mechanisms, which could allow markets to function without creating these sorts of problems. He argued that in the health care field in particular, Member States had proven it possible to balance concerns.

For his part, Van den Dungen made it clear that the Dutch Government saw itself as acting according to the EU competition regulations and has established a kind of regulated competition. One feature of this was a private budget system, which enabled clients to pay their service providers directly. This could indeed be a challenge to LVT. But for him the current prevalence of market ideas has to be seen in the context of a historic development: The LVT started as a private initiative but was taken over by government regulation in the 1970s. This development could now be resolved into freer market regulation, whereas now, there was a mixture of quite onerous regulation *and* market mechanisms which was disabling. Van den Dungen concluded that, if mechanisms were found to ensure budgets could reflect the complexity and intensity of need, his organisation was sympathetic to the use of quasi-market mechanisms.

Another issue which arose during the discussion was how far the LVT took the EU into account in its decision making. Van den Dungen explained that the importance of the EU was quite new on the agenda of Dutch Third Sector organisations. However, they were now starting to lobby to protect their interests.