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Tendering or Direct Awarding of Public Services – Plea for the Right To Choose for Territorial Authorities

On the Need for Legal Provisions on the In-house Concept in the European Union

Statement of the Scientific Council
of the Gesellschaft für öffentliche Wirtschaft

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I. The Problem: Local Self-government and the European Internal Market

1. The object of this statement is the conflict between the competition and Internal Market rules of the European Union and the rights and the room for manoeuvre of the Member States and their subordinated territorial authorities in the area of public services, which are called “Daseinsvorsorge” in Germany and “Services of general (or general economic) interest – SG(E)Is” in EU terminology. The focus is directed above all on the situation in Germany, where the great majority of these services are provided at the local level, whose competence, however, has so far hardly been safeguarded in European law.

2. At European level considerable significance has certainly been accorded to services of general interest. As far as services of general *economic* interest are concerned, Article 16 of the EC Treaty stresses their “place [...] in the shared values of the Union” and “their

role in promoting social and territorial cohesion". In Article 16 the Community and the Member States are charged with designing the principles and conditions for the operation of these services in a way, "which [will] enable them to fulfil their missions". Article 86 para. 2 of the EC Treaty stipulates that the application of the rules of the Treaty, in particular of the competition rules, may not hinder the accomplishment of tasks by undertakings entrusted with services of general economic interest either legally or factually. The significance of free access to services of general interest as a basic right of the citizens of the Union is emphasised in the Charter of Fundamental Rights of Nice from the year 2000.[1] Both the content of Article 16 of the EC Treaty as well as the Charter of Fundamental Rights have been incorporated in the European Constitutional Treaty[2], which was adopted in 2004 by the Heads of State and Government of the then 25 Member States, and in the meantime has been ratified by 17 Member States – representing the majority of the European population.

3. In the opinion of the European Commission services of general interest are an "essential element of the European model of society" and a "pillar of European citizenship".[3] With this approach the Commission is continuing the long tradition in the Member States of considering a high quality and economically priced offer of public services as an important element of solidarity and public welfare within the economic and social order.

4. Article 16 of the EC Treaty makes it clear that both the Community and the Member States have their competences in relation to services of general economic interest. The national competences in this area are recognised by the European Commission in principle; within the framework of numerous communications, green and white papers and directives it has asserted again and again the right of the Member States to define these services as well as their quality, amount, the method of setting prices, etc.[4] Supported by the Internal Market rules of the EC Treaty and the jurisdiction of the European Court of Justice, the Commission however (as "guardian of the Treaties"[5]) sees its mission as scrutinizing the national practice of

[1] Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (2000/C 364/01).
[2] Treaty on a Constitution for Europe (IGC 87/04 of 6 August 2004).
[3] Green Paper of the Commission of the European Communities on Services of General Interest (COM (2003) 270 final of 21 May 2003), para. 2.
[4] See e.g. ibid, para. 22 ff.
[5] Cf. Article 211 of the EC Treaty.

the Member States for compatibility with the Internal Market and – to the extent that further authority is transferred to it in individual sectors such as transport or postal services – as a steering function. Here in particular competition, state aid and public procurement law apply, but fundamentally also the principle of non-discrimination as well as the related notion of transparency close to the citizens.

5. The policy followed by the Commission is presented in such a way that in principle the Member States leave it to the markets to produce and provide public services, and restrict themselves to the role of guarantor and regulator. The goal to strive for is a type of performance or fulfilment of public missions that conforms as much as possible to the market. Participation of the State itself in making services available is allowed as long as the State or its enterprises enter as market participants without privileges; Article 295 of the EC Treaty, which protects the rules in Member States governing the system of property ownership, would also stand in the way of an exclusion from market participation. However, the policy of the Commission reveals not only a preference for competition, but also for the provision of services by private parties.

   The Commission regards the obligation to tender for public services as a central instrument for implementation of this state guarantor concept. In the spirit of the competition principle, all interested enterprises should have the chance to apply for the award. These services are exempted from competitive tendering only if (1) the State or the sub-state territorial authority provides them itself or if (2) the territorial authority entrusts a legal entity separate from itself with the provision, e.g. an own enterprise, over which it exercises control as over its own departments, whereby this legal entity must provide the service essentially for the regional authority. With this second exception – called the "in-house" exception – the Commission bases itself on the Teckal Judgment of the Court of Justice of the European Communities (ECJ) of 18 November 1999[6], which has been confirmed in recent years by a series of further ECJ judgments (e.g. Stadt Halle of 11 January 2005[7], Parking Brixen of 13 October 2005[8], Gemeinde Mödling of 10 November 2005[9], Carbotermo of 11 May 2006[10]) and has been further developed in the direction of an even stronger restriction of the scope for exemption from the ob-

[6] C-107/98.
[7] C-26/03.
[8] C-458/03.
[9] C-29/04.
[10] C-340/04.

ligation to put to tender. This is the case in particular for mixed-economy enterprises, for which in the Stadt Halle Judgment the ECJ rejected the possibility of control as over own departments even in the case of the slightest private participation.

6. The Carbotermo Judgment of 11 May 2006 at least opens up latitude for giving an assignment free of tendering to local public enterprises that are 100 % owned by one or more territorial authorities. This judgment is basically in line with the framework of the criteria developed in the Teckal Judgment, but therein the ECJ states that a specific legal form per se does not yet say anything about the character and extent of the control. For the question of whether the first Teckal criterion is fulfilled, according to the Carbotermo Judgment all legal provisions including statutes, decisions of relevant deciding bodies and all concrete determining circumstances must be evaluated, in order to ascertain the control and the influence of the territorial authority on the decisions of the enterprise. The result of this kind of evaluation can be that with the appropriate arrangement the territiorial authority can exercise control as over its own departments with a purely local public enterprise, e.g. in the legal form of the limited liability company (GmbH). In the case of a purely municipal *public limited company* this question can be more difficult to answer. Nonetheless here too there must be an examination in each individual case as to whether the territorial authorities as shareholders still have rights of control and influence over essential decisions in spite of stock corporation law. The ECJ judgment of April 2006 in the ANAV case formed the basis for the ECJ's explanations in the Carbotermo Judgment[11]; here the ECJ decided for the first time that the legal form of the public limited company did not as a general rule exclude the compliance with the control criterion of the Teckal Judgment.

   The ECJ argues similarly on the basis of individual cases in the Carbotermo Judgment on the second Teckal criterion, when it comes to evaluating the business activity which is destined essentially to be provided for the territorial authority or its citizens. Here too "all quantitative and qualitative circumstances" of the individual case must be observed. Among these, for example, is whether the mode and extent of external service provision outside the region must be considered as of minor importance or inessential in relation to the main activity within the region.

[11] C-410/04.

The more recent jurisdiction of the ECJ could, with careful assessment, at least offer starting points for an appropriate interpretation of in-house criteria, even though an important problem still remains unresolved: the question of in-house ownership with mixed-economy enterprises, which is rejected by the ECJ even in the event of minimal private participation.

If the local authorities could be certain that for purely local public enterprises in the future a decision will be made about the in-house character in individual cases, they would have the possibility of designing their legal form for legally certain in-house solutions, provided there is a special interest in assignments free of tendering. We will address this later in this statement, as well as the question of whether and how the in-house difficulty can be solved with mixed-economy enterprises.

7. The distinction between services of general economic interest (SGEIs) and services of the non-economic type is significant. Only SGEIs are mentioned in the EC Treaty; on the basis of this there are explicit EU competences. This is not the case with regard to services of a non-economic nature; however, the Internal Market rules of the Treaty are also applicable to them in principle, if the regional authorities make use of third parties for their provision.

8. In Germany, according to national law, specifically under Article 28 para. 2 of the Constitution, local authorities have the right to local self-government. An essential corner stone of this law is that the provision of public services is mainly the responsibility of the local authorities. Consequently according to national law they have extensive freedom of choice as to the way in which they fulfil their service provision functions: through their own administrations, with their own local public enterprises, in cooperation with other territorial authorities, through local mixed-economy enterprises or through assignment to private third parties.

9. The fulfilment of public missions is made considerably more difficult, however, if the Internal Market and competition rules are given priority over all other important objectives of European primary law. The activities of the European Commission as well as the case law of the ECJ on tendering law, and in particular the question of putting public services or public service concessions out to tender, are moving in this direction. The ECJ judgments mentioned above show

that in case of doubt European law is interpreted as primary in the sense of the competition paradigm.[12]

10. The dogma that according to the spirit of European tendering law public service missions are exempt from the tendering procedure only when they represent in-house transactions in the sense of the two Teckal criteria (see I.5.), could mean that outsourced service providers in the form of local public or mixed-economy enterprises in the legal form of public limited or limited liability companies go beyond the scope of the framework of the in-house concept. The awarding of a public service mission or a service concession to such enterprises that have become independent but are still public enterprises would accordingly be fully subject to European tendering law[13], with the result that these services would have to be put to tender.[14] According to the Stadt Halle Judgment, even in the case of a private minority participating interest of only a few percent, the contracting authority or the territorial authority does not exercise control as it does over an own department.

11. It is critical to ask whether this very narrow interpretation of the in-house concept is appropriate. With respect to the question of whether there is an in-house relation, one should not only take into account the legal form or the participation of private parties. The legal form or a minority participating interest as such do not yet say anything about the controlling influence of the public authorities. As recommended by Advocate General Stix-Hackl in the Teckal case[15], all concrete influential circumstances should be evaluated, in order to be able to answer the question about the mode of control and influence of the contractor, and thus of the territorial authority, over the decisions of the enterprise. This procedure would lead to an evaluation and decision regarding the individual case, as we know it in competition policy in the assessment of cartels and market-dominating mergers with the “rule of reason” as an alternative to per-se prohibition regulations.

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[12] An amendment may be expected from the ratification of the European Constitutional Treaty, which states in Article I-5 that “the national identities” of the Member States must be respected, “inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”. Greater weight should be given through the Constitution to special national features such as the right to local self-government in Germany, also in economic respect, or the public service concept in France, in the implementation of the European Internal Market.

[13] Directives 2004/17/EC and 2004/18/EC.

[14] Whereas cases of service concession are exempted from application of the aforementioned directives; however, according to the Parking Brixen Judgment they are subject to minimum standards in relation to transparency and non-discrimination.

[15] See her opinion of 22 September 2004 in case C-26/03.

The result of this type of evaluation of individual cases could certainly be that not only in the case of a municipal public limited company, but also with a mixed-economy company with a private minority participating interest – in whatever legal form – the territorial authority exercises dominating control.

12. Also when it comes to assessing the business activity as to whether it is taking place essentially for the territorial authority or its citizens (2nd Teckal criterion), "all – quantitative and qualitative – circumstances of the individual case should be taken into consideration." The Carbotermo Judgment mentioned earlier also reaches this conclusion, however in relation to the first Teckal criterion it represents rather a tightening of previous ECJ judgments, because the evaluation of the individual case, in itself reasonable, does not take the place of the general exclusion of an in-house solution in the event of any private participation, but rather this evaluation of the individual case comes into question at all only in cases where there is no participation of private parties whatsoever.

13. In its most recent judgments the ECJ has drawn ever more narrow boundaries for the in-house area that is exempted from the tendering process, and thus has considerably limited organisational sovereignty of the local authorities and the free choice of the way in which the mission is to be accomplished. It must be stated that there is considerable legal uncertainty in relation to in-house elements. More legal security can only come from new secondary law provisions that relativise or even correct existing ECJ jurisdiction.

14. The fact that in future public enterprises will be subject to more intense competition, and that this should be regarded as a positive challenge, has already been expressed by the Scientific Council in earlier statements.[16] The goal must be an improved and even more advantageous offer of services for citizens. Considerable reservations must be expressed, however, as to transferring the principles of competition almost dogmatically at any price and without differentiation to the provision of public services, by making competitive tendering an obligation almost without limitation. In the view of the Scientific Council there are important factors in the current discussion about public and above all local services in the European Internal Market that are given too little attention, but that must be dis-

[16] For example in its position paper "Wandel und Perspektiven der öffentlichen Wirtschaft" of January 2003, in: Zeitschrift für öffentliche und gemeinwirtschaftliche Unternehmen (ZögU) (Journal for Public and Nonprofit Services), Volume 26, Number 1, 2003, pp. 83-93.

cussed more intensively if one-sided and undifferentiated decisions, which would jeopardise the mission of providing public services, are to be avoided.

- Since the possibilities and positive effects of competitive tendering with public services are disputed and in part overestimated, we first address the question of the ability of competitive tendering to function, and the limits of a general obligation to put to tender (section II).
- In reference to the German situation the question must be posed as to the significance of local self-government, which is an essential constitutive element of the federal State structure in Germany. A general obligation to put to tender would considerably restrict this right to local self-government and own economic activity. Thus the value of local self-government must be weighed against the effects of general competitive tendering (section III).
- Finally we should determine what possible solutions are open and reasonable in relation to the in-house issue (section IV). Here we must first examine whether the in-house services concept used by the EU Commission and the ECJ or the criteria applied in the various legal cases and the legal conclusions drawn from them can be considered as appropriate. Subsequently we will investigate whether the sector-related draft of the European Commission for a "Regulation of the European Parliament and of the Council on Public Passenger Transport Services by Rail and Road" of 20 July 2005 in the version of the Common Position of the Council of 11 December 2006[17] as well as the Carbotermo Judgment contain starting points for an appropriate in-house interpretation. In the process we must investigate whether they could serve as a basis for a new legislation which regulates the tendering of public service missions across sectors with respect to awarding contracts outside the tendering procedure.

II. Possibilities and Limitations of a General Obligation to Put Public Services to Tender

1. The Scientific Council of the Gesellschaft für öffentliche Wirtschaft is of the opinion that competitive tendering in the area of public services is definitely to be supported, provided that the conditions exist

[17] 13736/1/06.

for its ability to function, but that there are often misjudgements as to the fulfilment of these conditions.[18]

On the one hand the demands to be made for competitive tendering to be operative are high and can therefore often not be fulfilled, or very ambitious assumptions are made. For example an important condition for workable competitive tendering would be that a sufficient number of bidders and free access to the market should be guaranteed, so that appropriate competitive pressure arises. Restrictive market practices on the part of bidders, in the form of collusive tendering, abusive hindering practices and excessively narrow market structures (narrow oligopolies), through which bidder competition may likewise be restricted, can stand in the way of this.

On the other hand, however, there are also “natural” limits of competitive tendering to be taken into account, which result from the specific nature of the tendering object or the sector. Analyses of individual cases on the basis of a catalogue of criteria and decisions on individual cases are therefore necessary.

2. Whether a sufficient number or a minimum number of bidders are present depends upon the respective specific tender. For the workability and intensity of the competitive tendering, however, not only the number of bidders is decisive, but also their market power. Where large dominant groups appear as bidders, narrow oligopolies will form permanently. In such markets small and medium-sized public enterprises – German Stadtwerke for instance – have a difficult position in the bidding contest. On specific services markets, structural barriers to market entry may also exist, for example in the form of high planning costs, high investments that can be irreversible and in extreme cases even cause sunk costs. This applies above all to capital-intensive network and infrastructure investments. Beyond this there can also be strategic market entry barriers, when market-dominant bidders deter competitors from market entry through the application of appropriate strategies or through threats. This too can represent market entry barriers for small and medium-sized bidders.

[18] On this and the following, cf.: Helmut Cox (ed.), Ausschreibungswettbewerb bei öffentlichen Dienstleistungen, Schriftenreihe der Gesellschaft für öffentliche Wirtschaft, Number 52, Baden-Baden 2003; also Strukturwandel in der öffentlichen Wirtschaft unter dem Einfluss von Marktintegration und europäischer Wettbewerbsordnung. Zum Paradigmenwechsel in Theorie und Praxis der öffentlichen Wirtschaft, Schriften zur öffentlichen Verwaltung und öffentlichen Wirtschaft, Volume 200, Berlin 2005, pp. 213-248.

3. It must be stated that large oligopolists, in part multinational global players, are venturing more and more into the local markets. However, if the market structures continue to narrow down to a few large suppliers, there is a danger that the desired positive effects of competitive tendering will have the opposite effect. The major oligopolistic groups can apply obstruction strategies of the most varied types, including even cutthroat competition with internal cross-subsidiation. Especially in narrow oligopolies deterrent and market closing strategies, parallel market behaviour or even collusive tendering can considerably decrease the intensity of the competitive tendering between the few large bidders.

4. As a result the public services markets would then no longer be determined by competition, but by market power and abusive practices, which can result for example in losses of quality and in excessive price levels. This hypothesis can counter with at least equal validity the hypothesis – until now not sufficiently confirmed – of the superiority of mandatory competitive tendering.

5. The question thus arises of opportunities in competition, especially for small and medium sized Stadtwerke, which constitute the majority of local public service provision. In a comparison of the advantages and disadvantages of public enterprises, particularly local public enterprises, in competitive tendering, the disadvantages far outweigh the advantages, even though standard wages have been and are still being adjusted. In any event there is in practice an increasing number of cases in which the small and medium-sized Stadtwerke hardly have any chance against the large oligopolists in competitive tendering.

   The public welfare obligation of local public enterprises also includes services whose costs are not covered, and which require internal or external financial compensation. However, this must not be confused with the cross-subsidising mentioned above in the event of cutthroat competition. In addition, public enterprises are subject to Article 86 para. 2 of the EC Treaty, which prohibits unjustified competitive advantages of public undertakings, unless deviations from the competition rules of the EC Treaty are necessary for general interest reasons. This is the case for example when a specific public service can, on a verifiable basis, only be provided if exempted from the competition rules.

   Whether local and regional public enterprises have unjustified advantages in competitive tendering on the basis of their firm estab-

lishment in the regional market and their prior monopoly rights is disputed in the current discussion. Much speaks for the argument that proximity to the contracting authority is a pseudo problem, because the procedure for awarding contracts is transparent and can be monitored. In the end the argument of firm establishment in the local market is not tenable either, because every established enterprise generally has first mover advantages – that is normal structural competitive advantages – which cannot then be criticised if they are based on economic efficiency. This is true to the greatest possible extent for local public enterprises, because they are distinguished by their immediate proximity to the customers in the region, by good knowledge of the local market, by exploiting economies of scale and scope as well as of synergies.

6. Above all public enterprises subject to the regional or territorial principle would have to accept considerable competitive disadvantages in competitive tendering, which could compensate for alleged or actually existing competitive advantages.

   In Germany this is true for most local public enterprises, for which competition outside the region is legally impossible due to municipal law concerning public services provision, but often also technically impossible due to production possibilities. The regional principle leads to a structurally determined abnormality, because the flexibility of offerings of the local public enterprise is very limited. In contrast, private bidders can move freely in all national and international markets.

   In the event of failure to succeed in the competitive tendering a public enterprise that is subject to the regional principle can end up in serious difficulties, if for instance a concession that is put to tender is important for the enterprise or even essential to its survival. It would have no alternative. In extreme cases, the closing of the enterprise or the loss of the sector concerned would be necessary, with the corresponding negative consequences for the employees, for the irreversible and non-amortised investments, but also for the long-term safeguarding of the public service mission.

7. The founding of mixed-economy enterprises – in the terminology of the EU Commission “institutional public-private partnerships” (IPPPs) – is in fact expressly desired by the European Commis-

sion.[19] However, it turns out not to be reasonable, or at least clearly becomes less attractive, if the mixed-economy enterprise has to be subject to competitive tendering.[20]

8. In the current discussion the question is not taken further as to what effects mandatory competitive tendering has on the services which are in the public interest not cost-covering and therefore subsidised internally or externally, for example within the framework of the so-called Querverbund (integrated utilities), through subsidy payments from the public budget or from specific compensation funds. Such financing subsidies are meant to be minimised through tendering competition. In principle this must be evaluated positively if the level of public services is preserved. But it can by no means be taken for granted that the latter is the case. Competitive tendering is meant to mobilise private bidders and private capital and increase the efficiency of the public service. In a competitive environment this functions best, however, with a tendering object that promises a profit or the highest possible profitability, and burdens the bidders as little as possible with public welfare obligations. There must be careful examination as to whether in a mandatory competitive tendering the public service contract is not being undermined, if in the sole interest of intensive competitive tendering the public welfare requirements in the form of minimum standards are set as low as possible in order to minimise the burdening of potential profits or subsidies. The question of the negative effects of obligatory competitive tendering on the quantity and quality of services of general interest has by no means been fully discussed. To believe that competitive tendering would arrange everything, even pertaining the general interest and the concrete public service missions, would be too optimistic in regard to the market mechanism. Such an idea would contradict the public welfare concept advocated here and also the universal services concept of the European Union.[21]

9. Special care is advisable in the application of competitive tendering to social and health care services. Arguments against such an application are the important function of these services for social cohabitation, their diversity (from home care through residential facilities to university clinics), the varied nature of the service pro-

[19] On this subject see especially the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, COM(2004) 327 final of 30 April 2004.

[20] For private parties, participation in a mixed-economy enterprise does not make much sense if this enterprise cannot obtain follow-up contracts without tendering.

[21] See Green Paper of the European Commission on Services of General Interest, COM(2003) 270 final of 21 May 2003, para. 50 ff.

viders (from charitable organisations to hospital enterprises quoted on the stock exchange) and the system for financing them, which is based in part on social pacts.

10. Limits to mandatory competitive tendering can also result from the problem of transaction costs. In the case of tendering, transaction costs arise for both contractual parties, not only in advance of the tendering and in the tendering process as such, but also in respect of the contracts, e.g. in the form of contract initiating costs, contract conclusion costs, running costs to monitor contract execution, and possibly costs for contract disputes. All these transaction costs represent a heavy burden for the tendering regional authority and in particular for small and medium-sized public enterprises that want to participate in the competitive tendering. It must be taken into account, however, that even with a direct award to an own enterprise transaction costs arise in the form of monitoring costs. All transaction costs are relevant for deciding on the question of whether competitive tendering is worth it at all. The higher the transaction costs are, the more the cost reductions that are meant to be achieved by the tendering can be counteracted.[22]

    With the concession contracts to be discussed here it is usually a matter of medium to long-term contracts. The more long term the contracts are, the more problematic they become from the point of view of contract theory – in contrast to short-term contracts, which raise fewer problems because they tend in the direction of completeness. As a rule longer-term contracts are incomplete because it is not possible in the contract to record and regulate all the conceivable facts relevant to the contract, which for the most part lie in the future. In addition it would not be economically rational to include clauses in the contract for all conceivable future events, because this would involve excessively high transaction costs in the form of costs for information, contract execution and monitoring. Contracts that are concluded after a competitive tendering must as a rule be incomplete, "relational" contracts, for example on building and operating infrastructure or corresponding large-scale plants in which it is not possible to record contractually all eventualities for the long term.

    Thus contract and transaction cost theory arguments can likewise be advanced against a categorical obligation to put to tender, be-

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[22] However, when weighing things up it must be taken into consideration that with tendering it is possible that transaction gains in the form of information made available free of charge may offset the transaction costs that occur.

cause with longer-term incomplete contracts a significant rise in transaction costs must be expected over the timeframe of the contract.

From this aspect also, obligatory competitive tendering does not appear as the optimum procurement procedure. Possibly – in connection with competition substitutes (competition surrogates) – the direct awarding of concessions to an own public enterprise of the territorial authority, or the assignment of a mission to a specific suitable enterprise without prior tendering, could be more advisable economically.

11. If a direct award comes into question, as a replacement for the competitive tendering, competition surrogates must come into play which guarantee that pressure for efficient allocation is exercised on prices, costs and subsidy claims. With the help of such quasi-competitive standards of comparison (yardsticks) a direct award can also be implemented in a way that is oriented to the market and that allocates efficiently. Such yardsticks can be obtained on markets that are comparable in their object, location and time. In competition theory this procedure is known as the comparative market approach. The prices and costs obtained in comparative markets are the standard for checking competition.

    Although for various reasons the comparative market concept is also not undisputed in competition theory, there is currently no procedure that is better than operating with comparative markets if one accepts price-cost control in principle. This would be necessary if for the above-mentioned reasons the competitive bidding procedure were not to be applied. Instead of an ideally functioning competitive “seek and find” process one must find out in a different way what the “right” costs, prices and products are, i.e. the ones that are in line with the market or represent efficient allocation. Such yardsticks may be questionable from the perspective of neoclassical freedom of competition, nonetheless the comparative market concept still supplies approximate solutions and well-founded suppositions about the standards and criteria to which one can refer with the price-cost control in the framework of the market-oriented direct award.

12. There is also a problem with competitive tendering due to the fact that local authorities are for the most part lacking in efficient tendering management. In the event of mandatory tendering, the skills of the local authorities in this area will have to be significantly improved and safeguarded, among other things by bundling professional

know-how at the municipal or even inter-municipal level. However, this will involve considerable additional costs.

13. From the observations above it can be concluded that the introduction of mandatory tendering would guarantee more efficiency in the provision of public services only if there are specific, ideal-typical prerequisites for workable competitive tendering. In practice, however, in the best case these conditions more or less exist. Therefore it is not uncommon that, due to high market entry and exit costs for instance, there are only bids from a few, in part large firms, which possess considerable oligopolistic market power and can restrict the competitive tendering more or less effectively through collusive and competition-hindering market behaviour. Beyond this, tenders often bring considerable transaction costs, such as costs for the tendering process, concluding the contract, adapting the contract, monitoring the contract and its execution. These costs and other undesired side effects such as quality losses and high prices offset, at least partially, the actual and supposed advantages of competitive tendering. The fulfilment of the public welfare is certainly not made easier by awarding the contract to a private enterprise. Taking into account all costs and effects, the direct awarding of a service mission to a public enterprise can be more beneficial in the end. Consequently a general tendering obligation for public services missions is not in the interest of the citizens and must therefore be rejected. Instead it must be examined on an individual case basis whether tendering actually promises more advantages in comparison with a direct award to a territorial authority's own enterprise.

III. Local Self-government as a Limit to the EU Requirement for Mandatory Tendering of Public Services

As early as April 2004 in a statement entitled "For the Retention of Municipal Services in the European Union"[23] the Scientific Council indicated that the liberalisation being driven by the EU in the area of public services was jeopardizing the system of local service provision in Germany, which is based on local self-government.

Since the considerations advanced in this statement are still valid, excerpts from the statement are cited below:

[23] „Zur Beibehaltung kommunaler Dienstleistungen in der Europäischen Union", in: Zeitschrift für öffentliche und gemeinwirtschaftliche Unternehmen (ZögU) (Journal for Public and Nonprofit Services), Volume 27, Number 2, 2004, pp. 187-196.

1. *The municipal self-administration of local authorities in Germany has a long-standing political as well as economic tradition. The municipalities dispose of their own revenues, their own budgets and their own assets, thereby strengthening their economic and political independence. It has always been a part of German political culture that municipalities secure their position in the federal system by these means as well, thus fortifying a type of democracy in which citizens are closely involved. In this sense, municipal self-administration is laid down by law in article 28 para. 2 of the German Constitution.*

   Based on this foundation, the German municipalities, especially the cities, have traditionally rendered and secured numerous services for their residents by providing and maintaining the necessary enterprises and institutions themselves.

   The services in question are partly services of general economic interest (especially energy and water supply, waste disposal, public transport, savings banks), partly non-economic services of general interest, particularly those of culture and education (e.g. museums, theatres, libraries, schools, kindergartens), sports grounds and entertainment-related facilities, social and health care related facilities (youth centres and old people's homes, advice centres, hospitals, etc.) and other facilities (e.g. fire stations, graveyards, zoological and botanical gardens). Depending on the local conditions, the local authorities run many more enterprises and facilities such as ports, airports, exhibition centres and health-resort facilities.

2. *By providing these services of general economic and non-economic interest, the municipalities take on the special responsibility of securing services of general interest ("Daseinsvorsorge") on an intergenerational basis, shaping the local living quarter and maintaining the stability of the infrastructural basis of economic activities.*

   It is important that these services are rendered and accounted for locally. Basic questions concerning the actual provision of services, particularly larger investments, and the decisions as to which services to provide in what quality and at which price are made by the municipal parliament - which is destined to safeguard the interests of the citizens.

3. *The German tradition of the provision of services through local authorities deserves to be continued in a future which will be determined by the common internal market. On the one hand, federalism must be supported in principle. Because decentralised policy decisions can fundamentally take the preferences of the customers into*

account better than centralised ones, they enable an efficient choice of context-oriented public services. On the other hand, they are developed by far more than the economic environment: besides the interests of the investor this also allows the interests of the citizens as a whole to be included in the decisions. This can strengthen citizen responsibility and therefore be beneficial for democratic development.

4. *In recent years the EU has almost exclusively pursued the idea of promotion of EU-wide competition and has practised the policy of liberalisation accordingly. The EU intended to create equal opportunities for all enterprises in Europe to win contracts tendered by public administrations – which in the starting point was justified. [...] The aim is to [...] include public services in the obligation to tender [...].*

   According to the jurisdiction of the European Court of Justice there is one exception from compulsory tendering, namely if the city wishes to commission an enterprise that is controlled by the city like an administrative department (so called inhouse principle). However, little is gained for the German municipal economy because the commission of municipal enterprises, stripped completely of their entrepreneurial freedom of decision by this, is just what is not intended here. In part this would be a grave retrograde step against the laws on commercial public entities without legal status (Eigenbetriebe) since this form of organisation was initiated to facilitate a corporate planning free of the rigid rules of budget planning and which should be able to adapt to changes in demand in a flexible way.

5. *For the majority of the municipal economy in Germany, an obligation to tender is likely to cause problems in many respects, in particular for the smaller and medium-sized municipal enterprises. A municipal enterprise that has been active in the municipality so far, can also apply for the contract and, should it win the tender, continue to operate. If, however, another company receives the contract, the municipal enterprise would have to be liquidated in the worst case, because the principle of territory prohibits it from compensating the defeat by applying, as a whole, for contracts elsewhere. [...] Looking at this realistically, one has to assume that once a service has been given away to a third party it cannot be retrieved under the system favoured by the EU. The municipality is only left with the option of tendering and appointing the winner - having completely lost its freedom of action in organisational respect. This would result in*

municipal enterprises being excluded from competition in a system that is aimed at generating more competition.

6. *[...] it was in the spirit of the European Treaties from the very beginning, that they should show proper consideration for the particularities of the Member States and for a long time, this was actually the general procedure. Meanwhile, article I-5 par.1 of the not yet legally binding Draft Constitution for the EU which expresses the volition of the Member States, especially foresees: "The Union shall respect the national identities of Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." [...] it is thereby unmistakeably stated that the EU as legislator and executive power respects the specific features of the Member States inherent to their national identity, especially the particular regional and municipal self-administration. The EU therefore has not to impose a European average of municipal self-administration, but in regard to Germany, to respect the distinctive form of municipal self-administration and ensure that this is not infringed on by European activities.*

   As a result, and this is the decisive point, the principle of competition will possibly have to step back, if the German system of municipal self-administration cannot be protected by other means. As article 1 of the planned European Constitution makes clear, the Union is based on a number of common basic principles, among them, for instance, also the subsidiarity principle. The freedom of goods and services is not a higher principle, but ranks alongside other principles and thus also has to accept restrictions if need be.

7. *The EU has to respect the deep-rooted German system of self-administration of the local authorities and allow the municipalities to decide whether they wish to provide important local services such as water supply, public transport, waste disposal and similar services themselves, or employ a third party enterprise. Only in the second case does an obligation to tender arise.*

   The inhouse principle should by no means be restricted but, on the contrary, be extended to enterprises that are held by the majority by the municipality and mainly provide services for the citizens of the municipality in question. Only with a generous interpretation of the inhouse principle do cities and rural communities have a real choice as to whether they wish to provide the services themselves or not.

IV. Ways to Resolve the In-house Difficulty

1. In its Communication of 15 November 2005 on PPPs and concessions[24] the EU Commission made it clear that it was in favour of a legislative initiative in the area of concessions. In the Commission's interpretation, the concept of concessions expressly also covers service concessions, which are according to the current state of affairs clearly not subject to public procurement law. All in all it is not possible to avoid the impression that new procurement elements must be created. Thus the Commission wants expressly to extend the protection of bidders under procurement law to the assignment of service concessions.

   With its Communication of 24 July 2006 on the awarding of public contracts that do not fall under the procurement directives in full or in part[25], the Commission has consequently begun to translate its intention into practice. For here "basic requirements" are being established in reference to the EC Treaty, which in the end form their own procurement system for missions that do not fall under the procurement directives 2004/18/EC and 2004/17/EC.

2. As a whole the Commission is currently concentrating almost exclusively on questions of competition law, here in particular on the expansion of the area for tendering. This is alarming, because as a result one of the pillars of the European model of society, the area of SGIs/SGEIs, is being neglected and possibly irreversibly damaged. Besides, neither competition nor procurement law is in itself an independent goal or purpose, but rather only one instrument among others for providing transparency, cost efficiency and improved services in a non-discriminatory way.

   On this basis there is an acute need for action in the "in-house" area in relation to institutional public private partnerships and with a view to the so-called service concessions. The solution should be found through legal clarifications in EU law and should bring about a reconciliation between the principles of self-government and competition.

   In this context a legal clarification of the in-house status seems to be a priority. Should a practical solution be found here, numerous

[24] Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions, COM(2005) 569 final.

[25] Commission Interpretative Communication on the Community Law Applicable to Contract Awards not or not Fully Subject to the Provisions of the Public Procurement Directives (2006/C 179/02).

problems in practice associated with public-private partnerships and the so-called service provision concessions could also be resolved.

3. The ECJ considers awarding missions by the local authorities to own public enterprises organised under civil law – including without tendering – as possible under certain conditions. This should then be the case when there is an in-house relation. The ECJ established the conditions for the non-application of the aforementioned procurement directives in its judgment of 18 November 1999.[26] As already explained (I.5.) a contract must, according to this judgment, be awarded to an enterprise over which the public authority exercises control as over an own department, and in addition the company given the mission must essentially perform its activity for the territorial authority or authorities that hold its shares. In its judgment of 11 January 2005[27] the ECJ decided meanwhile that an in-house transaction exempt from tendering can occur only if 100 % of the shares of the enterprise to be entrusted with the mission are held by the public authorities. In the light of what was said above, this view goes too far. It is also by no means legally binding – for instance on the basis of the EC Treaty – as the explanations of Advocate General Stix-Hackl showed earlier in the opinion on the Stadt Halle case. In order to come back to reasonable results here, explicit secondary law legislation is required, allowing the transfer of assignments to mixed-economy enterprises under certain conditions.

4. In this context the in-house definition proposed by the European Parliament within the framework of the negotiations on the legislative package for procurement law seems to be not inappropriate.[28] This stipulates that control in the aforementioned sense can also be present in the event that the institution in question is financed primarily by the State, by subordinate territorial authorities or by other institutions under public law, is subject to supervision by the latter in respect of their management or whose administrative, management or supervisory body consists as a majority of members that have been appointed by the State, by the subordinate territorial authorities or by multiple institutions under public law. The decisive factor in the process in the end should be the formulation in the articles of association. In order to fulfil the aforementioned essentiality criterion, the fact that the activity in question is performed at least 80 % for the

[26] Teckal (C-107/98).
[27] Stadt Halle (C-26/03).
[28] Proposal of the European Parliament for Article 18a of the “traditional” Directive 2004/18/EC.

contracting authority should be sufficient. This limit is already known from the sector directives.

However, this approach to a solution is – from a policy standpoint – hardly feasible any more, because the definition of the Teckal criteria by way of such a legal expansion in favour of the parties interested in the in-house transaction seems insufficient, in particular to the Commission. Voices are also heard repeatedly which welcome the ECJ case law in any event because it would have created legal security.[29] The fact that the aforementioned 80 % criterion was expressly rejected by the ECJ in the judgment on "Carbotermo"[30] may be of significance in this connection. Insofar much speaks for illuminating the "in-house concept" (also) from another angle, complementing with additional criteria or extending the concept.

In addition, the fact that a legal in-house definition could become part of the public procurement directives in effect is considered as not practical from various angles, since the procurement directives, which went into effect in 2004 only and currently have still not been entirely transposed, would then have to be "undone" again.[31] Furthermore the hope that an in-house definition could be found in an SGI or SGEI framework directive was dampened by the resolution of the European Parliament on the SGI White Paper of September 2006.[32] Admittedly there was no explicit farewell to a framework directive; yet, it was left to the Commission to decide how it proceeds in detail.

5. However, precisely the fact that on this point the Commission was called upon by the European Parliament leads to a situation where the amended Commission proposal for a "Regulation of the European Parliament and of the Council on Passenger Transport Services by Rail and Road" of 20 July 2005 in the version of the Common Position of the Council of 11 December 2006[33] must be incorporated into the ideas on in-house. Because this draft proposal has not only progressed far in the meantime and seems capable of consensus, it also contains a further developed in-house construction.

[29] Cf. only the "Nachrichten des Brüsseler Büros der Bundesrechtsanwaltskammer" 2/2005, p. 2, the EU-Info of the Österreichischer Gemeindebund 1/2005, p. 6, as well as Juliane Kokott, Advocate General of the ECJ, in the framework of a presentation on the occasion of the 99th session of the Committee for Economy and European Internal Market of the Deutscher Städtetag on 20 October 2006 in Heidelberg.

[30] C-340/04.

[31] Cf. for instance Number 2 of the Resolution of the European Parliament on Public-Private Partnerships and Community Law on Public Procurement and Concessions of 26 October 2006 (A6-0363/2006).

[32] P6_TA(2006)0380.

[33] 13736/1/06.

6. This in-house construction contains some essential considerations which were raised in the past in order to achieve clear criteria for fixing the limits of in-house activity.

   a) Article 5 of the proposed regulation is based on the assumption that every competent local authority – whether or not it is an individual authority or a group of authorities – can decide to provide services itself or to award them directly to a legally distinct entity. The local authority – or in the case of a group of authorities at least one competent local authority – must exercise control over this distinct entity similar to the control it exercises over its own departments. In this way the first of the criteria established by the ECJ in the Teckal Judgment is codified.

   In order to determine whether the local authority exercises control in the sense of the above, Article 5 of the regulation draws on factors such as the degree of representation on administrative, management or supervisory bodies, specifications relating thereto in the articles of association, ownership, effective influence and control over strategic decisions and individual management decisions. This requirement for examination with respect to the control exercised is of judgmental and flexible nature and provides scope for an appropriate evaluation of the in-house characteristics.

   For a control in the sense of the above-mentioned draft Urban Transport Regulation it is not absolutely necessary, according to Article 5 para. 2 point "a", "in accordance with Community law", that the local authority be 100 % owner. Here it is apparent that the most recent ECJ case law on in-house has been incorporated into the deliberations, and – especially the legal consequences of the Stadt Halle Judgment – should be curtailed. For according to the wording, even a private participation in the in-house construction is possible. The fact that this is the intention is supported not least by the reference made in this respect to public-private partnerships.

   b) In Article 5 para. 2 point "b" of the draft regulation the essentiality criterion of the Teckal Judgment is modified, in that firstly a territorial limitation is made. A prerequisite for in-house application is, according to this article, an area limitation of the content, that the entity awarded in-house "and any entity over which [it] exerts even a minimal influence perform their public passenger transport activity within the territory of the competent local authority". This reference to territory is a new element insofar as it is not tied to procurement law in the stricter sense. The question is therefore not raised as to whether, from an economic point of view, a (legal) person, or two

persons, exist so that a contractual relationship can occur at all, but it is sought through the characteristic of the area of activity in line with de-minimis or subsidiarity criteria. This path thus seems passable, also to the extent that a threshold can be found below which European procurement law should indeed not apply. For most economic activities one should be able to ascertain such areas. For the energy and water sectors this orientation towards concluded concessions contracts seems feasible. It is indeed an advantage that the provision of certain partial services is possible in the territory of neighbouring competent local authorities, without this conflicting with an in-house consideration. For territorial limitation is valid, according to Article 5 para. 2 point "b" "notwithstanding any outgoing lines or other ancillary elements of that activity which enter the territory of neighbouring competent local authorities" – an exemption rule which opens up a certain degree of flexibility.

According to Article 5 para. 2 point "b" it is also necessary for the application of the in-house rule, that the entity awarded in-house, and every entity over which the latter again exercises even the slightest influence, do not take part in competitive tenders concerning the provision of public services organised outside the territory of its competent local authority. Insofar the local link is again limited and the second Teckal criterion further modified.

c) According to Article 5 para. 2 point "c" the "assignee" through the in-house business can participate in other competitive tenders as from two years before the end of its directly awarded public service contract under the condition that a final decision has been taken to submit services to "fair competitive tender" and to the extent that the intended in-house entity has not concluded any other directly awarded public service contract. Thus the in-house rule of the draft regulation contains an element of time, which is requested from various quarters, to create no "situation which is cast in stone".[34]

7. Overall one can conclude that the in-house definition of the Urban Transport draft regulation – developing further the ECJ's Teckal criteria – contains the essential elements which have been suggested for in-house up to now. These are essentially :

- Influence of local authorities as over own departments (no 100 % ownership required)

[34] See in this respect numbers 29 and 30 of the Resolution of the European Parliament on Public-Private Partnerships and the Community Legal Regulations for Public Procurement and Concessions of 26 October 2006 (A6-0363/2006).

- Local and if necessary simultaneous factual limitation of the “in-house activity”
- Time-limited ban on participation in tendering procedures outside the territory of the competent authority.

If the local authority respects these conditions, it has the possibility of deciding on an in-house solution. It then does not participate in the – Europe-wide – competition, but focuses on providing services locally. According to the draft Urban Transport Regulation this solution meets the intended balance between the self-government and competition principles and thus ensures the freedom of choice of local authorities between self provision and assigning to third parties, a right which can be democratically determined at local level. This approach is to be encouraged and can be generalised further beyond the draft Urban Transport Regulation.

V. Conclusion

As a whole it follows that based on the present assessment legislation needs to be put in place for the “in-house” area. Only in this way can the case law of the ECJ, which is not appropriate in every respect, be corrected. This involves reformulating the ECJ’s Teckal criteria or adding new criteria. The Commission’s proposal, modified by the European Council, for an Urban Transport Regulation, provides important starting points in this respect.

The in-house solution proposed in the draft Urban Transport Regulation appears to be practicable. It offers local authorities the right to choose, and it does justice to the balance between the principle of competition and the safeguarding of services of general economic interest.

Furthermore local authorities would have the possibility of shaping the legal form of public enterprises and public-private partnerships with respect to decision and control competences for legally secure in-house solutions, if they have an interest in in-house assignments exempt from tendering procedures. This could occur for example through corresponding provisions in the statutes through decisions of the legislative bodies (e.g. municipal councils) or in other legally binding ways.

A legal regulation would have to include the following basic elements :

1. The competent authority has the right to choose whether it
   - provides a public service itself through its own departments,
   - has it provided as an in-house service by its own or mixed-economy enterprises, which meet the Teckal criteria further developed in the sense of the provisions of the draft Urban Transport Regulation,
   - takes the necessary steps to avoid overcompensations in cases of direct awards of services in observance of the Altmark Trans-criteria[35], or
   - puts the service to tender.

   This approach corresponds to the principles of State sovereignty of organisation and, on the local level, of local self-government, which still have a high sociopolitical standing.

2. In-house procurement is to be aligned with the further developed Teckal criteria, where the influence and control function of the authority on its own enterprise is to be ascertained in a case by case analysis where all essential circumstances, influencing factors and control powers are to be taken into account. This approach in checking the effective control is an evaluation and appreciation process based on individual cases, whereby more flexibility is achieved through consideration of all relevant criteria and which opens up margins of discretion which enable an appropriate assessment of such a complex issue as the control function of the authority.

3. It is necessary for this examination to draw on appropriate evaluation criteria which are meaningful and verifiable with respect to the actual influence and control of the authority. The following examples can be mentioned :
   - Scope of the representation of the authority on the level of the control and management organs (quantitatively or by number of votes, qualitatively)

[35] (1) The recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined. (2) The parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner. (3) The compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations [...]. (4) […] the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run [...], would have incurred in discharging those obligations [...]. See the judgment in the "Altmark Trans" case of 24 July 2003 (C-280/00).

- Character and extent of the participation of the authority in essential “strategic” corporate decisions, such as mergers, cooperations, institutionalised public-private partnerships, participations in other enterprises, increases in capital, profit distribution, price and tariff rate policy, staff decisions at management level, tendering procedures and so on
- Method of establishing the rights of the authority with respect to essential corporate decisions in statutes, decisions of statutory bodies or in other legally binding ways.

It is necessary to develop further key criteria of this kind, which are suitable for determining the in-house character of the provision of services.

4. The participation of private third parties does not basically exclude the possibility of an in-house relationship. It should be included in the evaluation of and decision on the control and influence of the authority.

5. The provision of services should be limited essentially to the territory of the authority or several cooperating authorities or the Zweckverbände (special purpose associations). Competitive businesses outside the territory, which have an unreasonably large scope compared to in-house activity, would question the in-house character of the provision of services. The same would apply for tendering activities outside the territory. At least a time-limited ban on participation in non-local tendering procedures would be reasonable.

   According to the ECJ the admissibility of in-house business does not depend on which area the activity in question is carried out in. But insofar as the provision of services is limited to the territory of an authority, several cooperating authorities or a Zweckverband, less strict criteria for the determination of the in-house character must be accepted, according to the rationale of the draft Urban Transport Regulation – not least under the aspect of Internal Market relevance –, criteria such as the inclusion of mixed economy enterprises. This applies all the more if a time-limited ban on participation in non-local tendering procedures is agreed.

6. The decision in favour of an in-house arrangement or of tendering must be justified in detail by the territorial authority, and such justify-

cation made public. This would meet the demands for transparency of the EC Treaty and would if need be permit a legal verifiability of the decision.

Berlin, May 2007

The Scientific Council of the Gesellschaft für öffentliche Wirtschaft

Statement drawn up under the direction of Prof. Dr. Helmut Cox, Universität Duisburg-Essen

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