



MORE LEGAL CERTAINTY FOR LOCAL AUTHORITIES AND LOCAL PUBLIC ENTERPRISES ON THE EUROPEAN INTERNAL MARKET

JOINT DECLARATION

- German County Association (DLT)
- German Association of Cities (DST)
- German Association of Towns and Municipalities (DStGB)
- German Association of Local Utilities (VKU)
- French Mayors Association (AMF)
- Association of Mayors of French Large Cities (AMGVF)
- French Association of Small Towns (APVF)
- Association of Mayors of French Medium-Sized Towns (FMVM)
- French Association of Local Public Enterprises (FNSEM)

In May 2006 the French and German associations representing the local level as well as the associations FNSEM and VKU representing local public enterprises published a declaration in which they called upon a more secure legal framework applicable to local public services. The declaration especially underlined the significance of free choice of local authorities concerning the organisation, administration and financing of local public services.

The year 2008 is a decisive year for the public services due to the renegotiation of the Community Treaties in Lisbon, the Commission's publication of its vision of the internal market in the 21st century, the revision of the Lisbon strategy, preparations for a Directive on concessions and the publication of a Communication on institutionalised public-private partnerships.

The German and French associations have the same concern: Local authorities should be in the position to provide citizens with high quality local public services accessible for everyone, adapted to the citizens' needs and provided on site. For this reason the German and French associations think that local authorities must have the possibility to decide freely on the most adequate way of organisation, exploitation and administration.

Following a meeting on December 14, 2007, which had offered good opportunities to exchange experience, the signatories wanted to adopt the declaration on hand.

At first the signatories remind of their adherence to the principle of local self-government as it is described in the Charter of Local Self-Government. They would like to contribute to strengthening it further. With the declaration on hand they hence wish to express their consent to the agreement reached in Lisbon as this agreement fully recognizes the principle of local self-government.

Secondly the signatories would hereby like to formulate their suggestions for the projects on local public services, which are either currently worked out or have already been introduced by the European Commission, in order to strengthen the legal certainty for local authorities and local public enterprises on the European internal market in this field.

In the framework of the Treaty of Lisbon the member states' Heads of State and Government have clearly incorporated the local authorities' freedom in the field of services of general interest in the European legal system as a top priority for the first time. As a result this freedom has become an independent principle beside the principle of subsidiarity and strengthens the role of municipalities in Europe.

The European Commission has recently introduced its vision of the European internal market of the 21st century. Additionally it has published an accompanying document on services of general interest and has furthermore announced the publication of a legal act in the field of service concessions. Finally an interpretative Communication on institutionalised public-private partnerships was published on February 18, 2008.

From the point of view of the municipalities and their enterprises it will be decisive how the Commission will take the Treaty of Lisbon into account in the course of implementing the Protocol on services of general economic interest in the appendix of the Treaty of Lisbon.

This declaration is an explicit statement of the German and French municipalities and their enterprises in favour of strengthening local self-government in Europe in the spirit of the Charter of Local Self-Government but also in the spirit of the basic agreement reached by the member states of the European Union on the Reform Treaty of Lisbon.

Against the background of the Reform Treaty the signatories of this declaration expect that the European Union does not give priority to the rules of competition over other decisive principles of the EC Treaty, particularly the principle of territorial cohesion which constitutes an objective of the EU Reform Treaty.

The signatories consider the principles of subsidiarity and proportionality, which are the basis of local freedom of action, to be just as important as the principles of non-discrimination, equal treatment and transparency. The European measures following now have to take this into account. In this context the signatories set high hopes on the French Presidency starting on July 1, 2008.

The rules suggested in this declaration shall strengthen local self-government on the level of Community law and contribute to more legal certainty in the central field of local services of general interest.

Against this background the signatories have therefore agreed on the following recommendations:

1. Inter-communal cooperation is not a matter of the European internal market

Local authorities must cooperate in order to fulfill their numerous tasks. Such an inter-communal cooperation is not identical with awarding a contract on the market – no matter if the cooperation takes place on contractual basis or by the setting up of a legally distinct body (local authority consortia etc.). It rather is – independent of the type of task organisation – an inner-organisational act of the respective local authorities. All inter-communal co-operations of any type are cases of the member states' domestic organisation that have to be decided upon at national level and that do not come under the Community rules on public procurement. Only this approach respects local self-government and therefore corresponds to local freedom of action according to the Reform Treaty of Lisbon and the Charter of Local Self-Government.

2. Making “in-house” contract awards more flexible

The signatories hold the opinion that the "in-house" problem requires new legal provisions in the public supply contracts Directives. With its current jurisdiction in the field of “in-house” the ECJ only decides individual cases. In this way neither the local authorities concerned nor their partners can

acquire the legal certainty necessary for long-term investments. Therefore general rules applicable to any case are required in order to accomplish a satisfactory goal.

The new regulation on public transport could provide a solution to the problem of defining "in-house" contract awards.

Taking this into account an "in-house" situation exists if the local authority exercises effective control over the service provider on the basis of a control relationship and if the service provider performs an essential part of its activities for the local authority or for several authorities if there is an agreement existing between them. In this sense effective control can also be possible if the enterprise does not belong to the local authority to 100%.

3. Establishing binding rules for institutionalised public-private partnerships (IPPP)

An institutionalised public-private partnership (IPPP) is one of several instruments to fulfill local service responsibilities. Moreover it contributes to economic stability in an efficient way. The ECJ's jurisdiction has led to legal uncertainty in this field.

Local authorities and their private partners, shareholders and local public enterprises need concrete and clear as well as simple and practical provisions to found such IPPPs. This corresponds to the European Parliament's vote on the Weiler report concerning the Green Paper on IPPP. There the Commission was asked to develop criteria which establish a stable reference framework for decisions to be taken by local authorities.

The signatories agree insofar to the Communication published by the Commission as it differentiates the legislation applicable for local public-private enterprises dependent on whether an award of a public contract or whether a concession is existent. Furthermore they welcome the Commission's acceptance of the variety of instruments that are at the local authorities' disposal for providing their services and that are used in the different member states.

The signatories also consider it to be a step into the right direction if the Commission proposes that awarding public contracts to public-private enterprises is done by single, non-discriminatory and transparent proceedings and is not subject to double tendering. The signatories therefore think that such proposals of the European Commission should be safeguarded by a legislative initiative to be approved by the Council and the Parliament.

4. No European legislation necessary for service concessions

There is no necessity for legislation on a European level in the field of service concessions. In several judgments concerning service concessions the European Court of Justice has declared central principles of EU primary legislation (transparency, non-discrimination, proportionality) to be applicable. Consequently the substantial principles for service concessions are set for public authorities. In contrast further European legal provisions would not lead to an increase in legal certainty but rather to further excessive legislation in the field of service concessions. As a consequence the local freedom of action would be unreasonably restricted.

If the Commission nevertheless suggests a provision on service concessions the signatories consider it necessary to distinguish clearly between these contracts and public procurement. Furthermore the necessary flexibility is to be kept concerning this type of commissioning as well as transparency is to be guaranteed during the entire process. This particularly concerns the freedom of negotiation with the applicants as this is not only a matter of mere exchange of services but of entrusting local responsibilities. This implies that the concessionaire takes over risks which do not have to be taken over by a person awarded a public contract as described in the interpretative Communication of the European Commission of April 29, 2000.

In any case legislation on service concessions should create the legal certainty expected by local actors in the aforementioned fields (definition of "in-house" awards and regulation for IPPP).

5. Involvement of the Parliament

Regarding the mentioned points the co-decision procedure has to be applied for all necessary legislative initiatives.

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