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LOGON FINAL GUIDE

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Bundesministerium für auswärtige Angelegenheiten

Austrian Federal Ministry of Foreign Affairs

AACT - Association of Austrian Cities and Towns

and LOGON PARTNERS

PROJECT PART-FINANCED BY THE EUROPEAN UNION

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CEMR Working Group EU-Enlargement - LOGON

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LOGON Final Guide

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"Europe is uniting and growing together – and so are we": after decades of division, countries, regions and cities are meeting as partners on an equal footing in the European Union since EU enlargement became reality on 1 May 2004. This fundamental change in Europe's geopolitical structure creates improved frame conditions for cross-border co-operation and the development of Europe as an economic location and living space. It has also opened up enormous potentials for efficient co-operation in economic and social issues, which promises more prosperity for all. Making our common interests heard and respected by the European Union as well as by our own national states can gain additional momentum through systematic and intensive co-operation. This applies e.g. to Structural Fund use in the new programme period from 2007 to 2013 or to the supra-regional implementation of the objectives of cohesion policy, European research policy or EU environmental policy.

Right from the beginning, the LOGON network embodied an excellent form of co-operation. The intensified exchange of information between the network partners has created a foundation for mutual support in the context of negotiations at EU level as well as for lobbying work to advance jointly formulated positions – after all, lobbying was a main focus of the LOGON Report 2002. The present LOGON Final Guide is inter alia dedicated to Services of General Interest, to the PR work of local authorities and to the first experiences made by the new Member States after their accession to the European Union. For this reason, our chief goal must lie in supporting a united and strong Europe rooted in local and regional self-government and democracy; a Europe where decisions are taken in close interaction with citizens and along the principle of subsidiarity.

As the President of CEMR, I will make use of this my function to champion above all intensified relations between the different associations of European cities as well as increased political commitment in such areas as Services of General Interest, subsidiarity or cohesion.

I would like to express my thanks to the many outstanding experts that have brought together their experience and wisdom in this publication. Furthermore, many thanks go to the Austrian government and INTERREG. Both have continuously supported this project which – in my opinion – is an extremely valuable contribution to make enlargement a success and moreover offers a good chance for the development of a new Europe based on democratic rights, wealth, peace and local strength.

Michael Häupl
Mayor of Vienna, President of CEMR

Foreword – Mr. Erich Pramböck

LOGON is the biggest network uniting associations of local and regional authorities from the old and new Member States of the European Union.

The network was established in the context of CEMR in autumn 1998 to coincide with the negotiations with the then 12 candidate countries and has always followed the objective of communicating the experience already made by associations of municipalities in the European Union to CEMR member associations in states planning to accede to the European Union.

The associations in the candidate countries were to be enabled to initiate early talks with their governments to find ways to cope with the new challenges from both the organisational and financial angles. However, another important goal lays in conveying that a structure of co-operation between municipalities and the respective national government is of particular importance.

In the LOGON project, a central role was assigned to the then three new Member States, i.e. Austria, Finland and Sweden, for whom the transition had to be intensively prepared as well.

Inter alia because of Austria's Council Presidency at the moment of initiating negotiations and establishing LOGON, it was possible to obtain co-financing by the Austrian federal government for all phases of this project subsidised under the INTERREG umbrella. This ensured the participation of municipal representatives from all 12 candidate countries throughout the entire project run.

LOGON made its body of experience available by way of Working Group meetings, seminars, conferences and lectures given at events held in the candidate countries. The LOGON Working Group moreover prepared a number of internationally lauded publications dealing with the effects of European Union membership on the municipal level. In all, LOGON Reports were issued in 1999, 2000, 2002 and 2005.

They comprise suggestions on steps to be taken in the phase of preparation for accession, an overview of EU rules affecting municipalities and experience reports from Sweden, Finland and Austria, a list of actors at the European level (European Commission, European Parliament, Committee of the Regions, European Court of Justice [LOGON Report 2000]) and a number of contributions on such focal issues as lobbying [LOGON Report 2002] or, in this volume, Services of General Interest [LOGON Final Guide].

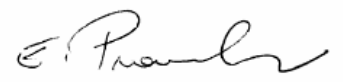
The LOGON Readers 2004 above all contain an overview of qualification requirements for the staff of associations of municipalities and inform about Public

Management and Governance; the LOGON Studies volume likewise published in 2004 focuses on the problem of waste prevention.

The collaborators of associations and cities from 10 Member States of the European Union all contributed their substantial know-how to the project free of charge. In my capacity as Chairman of the LOGON Working Group, I would like to thank everybody and in particular Dr. Wendelin Wanka (deceased) of the Municipal Administration of the City of Vienna.

My thanks also go to Erja Horttanainen of the Association of Finnish Local and Regional Authorities for her support in chairing the Working Group as well as to the staff of KDZ – Centre for Public Administration Research in Vienna, who likewise contributed to the project and conducted studies but also handled the highly important task of administrative management of the entire project.

All documents can be accessed online at www.ceec-logon.net.



Erich Pramböck
Secretary General of the Association of Austrian Cities and Towns

Executive Summary

Thomas Prorok – KDZ Centre for Public Administration Research, Vienna

1 LOGON – The Local Governments Network[1]

From February 25th to 26th, 1999, the representatives of local and regional authorities from altogether 15 EU Member States and candidate countries met in the Vienna City Hall for the first LOGON Conference "European Union enlargement - a challenge for the local level". With this conference LOGON was born and gave its first strong sign of life. The main objectives of LOGON were defined in the preparation phase of the conference: To strengthen the local level and to provide independent information and know-how about the consequences of EU accession and membership for cities and municipalities in Central and Eastern European countries, which – in the meantime – already became new EU member countries. The idea came up by the Austrian, Finnish and Swedish associations of cities after their experiences with EU accession of their countries in 1995. Ten years later we look back over a successful network which reached its objectives. After the accession of ten Middle and Eastern European countries in May 2004, LOGON faces new challenges. But first let us go back to the beginning.

2 The birthday of LOGON - Conference "European Union enlargement - a challenge for the local level"

The first LOGON conference 1999 was dedicated to the impact of the European integration process at local level. The conference was divided into four thematic workshops – environment, structural policy, financial and economic policy and other issues related to the local level like land transactions, free movement of persons, goods and services and rights connected with EU citizenship. With small adaptations these issues have dominated the LOGON work till today and the results of the conference have been valid at that time as well as today.

Above all, the local and regional authorities' associations in Finland, Sweden and Austria reported on the experiences gained during the EU-accession process of their respective countries. These experiences clearly showed that it is an effective,

[1] All reports and documents mentioned in this guide are available online at www.ceec-logon.net.

appropriate and timely preparatory phase which is part of a successful accession strategy for the benefit of all citizens.

EU accession and, in its course, the adoption of the "acquis communautaire" has a considerable impact at national, regional and local levels. Notably local authorities, being the traditional focal points of community life in which political decisions and regulations directly affect the individual citizen, are the level at which the impacts of accession are most directly felt. This applies to local and regional economic policy, to public procurement, public finances, new framework regulations for municipal utilities, the implementation of environmental standards, as well as the introduction of the four fundamental freedoms of the Internal Market, the latter directly touching upon the citizens' daily life (for example acquisition of real estate by citizens of the Union, the freedom of establishment and the right to participate in municipal elections).

These fundamental impacts of EU policies at regional and local levels call for a timely preparatory process on behalf of local authorities and regions. The reports prepared by the associations of local and regional authorities in the countries which joined the EU in 1995 share the opinion that providing local authorities and regions with the relevant information at an early stage, as well as their active participation in and contribution to the national decision-making process in all issues of relevance to this government level, are an essential precondition for a successful accession.

The experiences made at national level and by associations of local and regional authorities with respect to incorporating this level in the decision-making process, were very positive as well.

As political representatives of cities and regions are important opinion leaders, it is important to include them in the relevant process at national level and in European issues. This is the only way to ensure that they exert their influence and transmit the new "European" way of thinking to the citizens, and, through intensive awareness-raising measures, raise the citizens' interest in and motivation for the European integration process. Such public-relations campaigns are also of importance in case the accession is preceded by a public referendum.

In view of the manifold impacts of EU accession at local and regional levels and in recognition of the importance of the European unification process, the representatives of the associations of local and regional authorities demanded that

- the national governments of the accession countries provide for a direct and active involvement of their regions and local authorities in the integration process, and that

- the European Union, too, ensures that the concerns of regions and local authorities in the accession countries be appropriately taken into consideration.

Till today and also for the future these requirements formulated at the LOGON conference 1999 are basic foundations of the policy of local governments and their associations. All in all, the first LOGON conference ended with an agreement between all participants to continue this process of constructive exchange of experience and to develop additional initiatives to support the preparatory process of local authorities and regions in the "accession" countries.

3 The first LOGON experiences and recommendations

During the first period of LOGON the associations of Austria, Finland and Sweden summarized their experiences with the preparation for the membership in the European Union. As summarized in the first LOGON Report 1999 "The Enlargement of the European Union - New Challenges for the Local Level" the major effort during the preparatory phase was focused on the extensive and demanding task of screening and adjusting the national laws and other regulations to the acquis communautaire. Especially new EU regulations in the following fields determined the preparatory phase:

- Adjustment of the legal system
- Public procurement
- Principles of the Structural Funds
- Subsidies (economic promotion)
- The right of all EU citizens to vote and to stand as a candidate in municipal elections
- Municipal and regional finances
- Environmental policy
- Employment policy
- Urban development - administration development

The most important preparatory measures towards integration were the following:

- Ensuring the availability of appropriate staff. This applies to the political committees - notably the „European Committees" - as well as to personnel employed by the associations, the appointment of „European officers" in the larger cities and regions and the setting up of liaison offices in Brussels.

- Initiating and pushing training measures aimed at familiarising politicians, civil servants in local and regional authorities and the associations' staff with the organs and the functioning of the European Union. Additionally, information

on the EU regulatory instruments, such as directives and regulations, on funding programmes and on the relevant decision-making processes has to be provided. Another objective was the improvement of language skills, especially English and French.

- Preparing reports on the possible impacts of EU membership, including general information on structural and regional policies and support measures. Special „European sheets“ should be inserted in the associations' regular information bulletins and the websites can be used for the presentation of European issues. Expert groups and annual meetings of the associations should be used for the regularly discussion of „European“ topics.

- Efforts should be made to establish a constructive dialogue on EU-relevant issues between all decision-making bodies. It is important in this context to apply, or indeed to establish the principle of partnership with business and other social partners, with NGOs and, most of all, within the public sector (horizontally between local authorities and regions, vertically between local authorities and regions and the central government).

- The European Union is an alliance of national states. The Member States' individual interests are safeguarded by their representatives in the European Council. It is therefore indispensable for this level to be included in the national integration process as soon as possible. This not only applies to a smooth and timely flow of information from the national to the local and regional levels, but above all to the formally binding integration of local authorities and regions into the national decision-making process. Here it is of importance for local and regional authorities to be able to bring in their interests and concerns already during the pre-accession process.

- The vast amount of additional information necessitates the wide-scale use of modern information and communication technologies. At the same time, experts and trainer teams should ensure that the complete range of stakeholders - elected representatives, public-service employees, citizens interests groups, etc. - be informed on the appropriate preparatory measures for and the expected consequences of EU accession.

- Competent representation of the interests of local and regional authorities at national and European level requires good and continuous preparatory work, in the course of which the priority issues, the set objectives and the measures to be implemented in order to be included in the decision-making process should be clearly determined. In this sense individual authorities should establish and intensify their links to the national government, which can also be promoted by inviting central government representatives to attend municipal expert meetings etc.

- The pre-accession preparatory work is only one phase in a continuous process of adjustment and changes. A broad involvement of local authorities, regions and their representative organisations in the overall EU-relevant decision-making process may contribute considerably to the successful implementation of EU accession.

4 LOGON – On top of local government's issues

LOGON has always dealt with current political issues concerning the local level. However, LOGON has been successful because of the interactive network-construction which allowed a flexible handling of new issues. In the last years besides the daily LOGON work three main topics have determined the LOGON network: Lobbying and communication policy of the local level (1); Services of General Interest (2) and the European Constitution and modernisation of public administration (3).

4.1 Lobbying in Europe – a challenge for local and regional authorities

Making the voice of the cities and municipalities heard and being involved in the decision making processes of the European Union is of growing importance for the local and regional level. Cities, towns, municipalities and regions are faced with a number of direct challenges with regard to the application and implementation of European legislation and indirect challenges as a result of the decision-making mechanisms which have been created at European level. More and more decisions are made in Brussels, while at the same time the number of players involved is increasing. Processes and procedures become more complex and work-intensive, and changes in decision-making structures and new information channels require an increase in communication and a considerable amount of flexibility to adjust to the new structures.

Officially, municipalities and regions have to communicate their own concerns via the relevant member state, since within the EU's decision-making structures, national interests must be represented by the individual Member States. The local and regional level has been officially involved in the decision-making structures only since the creation of the Committee of the Regions. And also the European Constitution would strengthen the municipalities' position in the decision making process of the European Union.

Nevertheless, the formal procedures of the EU decision-making processes include municipalities and cities at a relatively late stage with very limited rights. Therefore, the municipalities and regions are called upon to voice their own interests and concerns in an informal way through lobbying activities in Brussels and to introduce

them into the decision-making process early on, in the conception phase of new European rules and regulations.

LOGON has edited a 300 pages LOGON report on the lobbying issue and organised a conference "Lobbying in Europe – a challenge for local and regional authorities" in Vienna in 2002. The main outcomes of the conference have been formulated in the conference declaration:

Lobbying in Europe – A Challenge for Local and Regional Authorities
Vienna, October 28th and 29th 2002
Conference Declaration – Making the voice of the cities and municipalities heard

Preparing for membership of the European Union and being a member results in significant changes. Europe develops its structures on the basis of discussions where all relevant groups are called upon to raise their voice. This is true for cities, municipalities and regions as well. Participation in the future development of Europe necessitates being "close to the decision-making process".

Membership offers a wide range of options and opportunities for the development of the local and regional level, the quality of life and economic prosperity of citizens. Effective participation in the decision-making process requires being involved in the flow of information as well as focussing on issues relevant to the local level. In order to influence decisions on the European level, municipalities, regions and their associations need to formulate clear positions. Successful lobbying requires proper networking in Brussels and with the national government. The Brussels office is dependent on good communication and strong support from the home authority in order to work effectively. It would be advantageous if the Brussels offices of local authorities associations were integrated in the official mission to the European Union. In order to enable the local level to deal with "European" issues, national governments and the European Union should provide financial support as well as training for "European officers" on the local and regional level. To be effective, cooperation between the offices and their European organisation, the CEMR, is a necessity.

The local and regional governments are called upon as well to make their voices heard in the debate on the future structure of the European Union. At the time of this LOGON Conference the "Convention on the future of the European Union" is taking important decisions. Therefore we emphasize the role and significance of cities and regions in the European Union and ask to clearly indicate the respect of the European Union for the role of local governments in the future constitution. The Committee of the Regions is important as representing local and regional government within the formal decision-making process. However we call for a

stronger integration of local and regional organisations in the policymaking process such as CEMR and EUROCITIES and for the participation of cities and municipalities in matters affecting their responsibilities. Only then can the main objectives of the Convention – creating a "new", transparent, simplified and citizen-oriented European Union – be accomplished. In this context we underline the CEMR position paper "The Convention on the Future of Europe" claiming the freedom of cities to decide on the services they provide to their inhabitants and stress the following governance principles which are indispensable to the local level:

- **Proximity** - the EU being close to its citizens through cities and municipalities. Therefore the role of local and regional authorities has to be recognized in the Constitutional Treaty.

- **Consultation** - with cities and their associations when elaborating new regulations, especially in the policy–making phase.

- **Partnership** - with cities and particularly their representative associations.

For us, consultation of our European and national associations at an early stage is of the highest importance, whenever new regulations are being developed which affect our main responsibilities and which have financial consequences as well. Particularly with regard to the various funding programmes we ask for a stronger involvement of the local level to better express the principle of partnership.

In addition to the formal, institutional approach to strengthening the local and regional level in the EU we see that lobbying is most effective when several associations adopt a common position to achieve their goals. For the future this means - whenever common interests exist - intensifying co-operation among the associations of local governments and their offices in Brussels in order to "speak with one voice". Closer co-operation between local and regional liaison offices and their European umbrella organisations will therefore have not only positive effects for European cities and regions but also for the whole of Europe.

Based on the declaration, LOGON adjusted the own lobbying strategy together with the partners and drafted a work programme on enhancing the communication policies of the partner associations. As a consequence two communication workshops during the Final LOGON conference in Warsaw 2005 and in connection with the LOGON working group meeting in Bratislava 2005, can be mentioned. Also this Final Guide covers a chapter "Local government communicating".

4.2 Services of General Interest

Services of General Interest have been a LOGON issue since the beginning. When the European Commission started to prepare a Green Paper on SGI, the topic raised more and more LOGON attention. The LOGON conference in November 2003 was dedicated to the newest developments of Services of General Interests and a LOGON Guide on SGI has been published in 2004 including the position of the European Commission formulated in the White Paper from May 12th, 2004. The Final LOGON Conference in Warsaw 2005 hosted a special workshop on Services of General Interests which was co-organised by CEMR. Also this Final Guide includes the current developments of SGI with a special and updated "Guide on Services of General Interest". LOGON formulated its position during the conference in Vienna in November 2003.

Vienna Declaration, November 3rd – 4th, 2003

Services of General Interest

Services of General Interest (SGI) are part of the values shared by all European societies and form an essential element of the European model of democracy and social solidarity. They are essential for improving the quality of life, and for overcoming social exclusion and isolation. The Conference welcomes the European Commission's Green Paper on Services of General Interest as a vital contribution to the ongoing debate about the role of SGI in a modern Europe, the proper relationship in this context between the roles and responsibilities of the public and private sectors, and the appropriate role and limitations of European-level regulation. We are aware that many local and regional governments have decided to tender out important services, as a policy choice taken by them. This has often, though not always, led to positive results for the authority and the services in terms of cost and quality. However, the decisions on tendering and choice of provider are for local and regional elected politicians to take. There is no need to limit these regional and/or local responsibilities.

In recent years local and regional governments across Europe have become increasingly concerned at the drift towards redefining Services of General Interest as Services of General Economic Interest, and thus opening them to the potential impact of European competition and State Aid laws, and to potential requirements, generated by the European Commission, to liberalise categories of local or regional services.

The Conference strengthens the position of the Council of European Municipalities and Regions (CEMR) and the European Centre of Enterprises with Public Participation (CEEP) in stating its opposition to any attempts to impose European law

on local governments, for example the compulsory competitive tendering of SGI. It is the essence of local and regional democracy that citizens elect their representatives, who are accountable to them. Local and regional services are at the heart of this issue of democratic accountability. We cannot build a popular united Europe without respecting Europe's grassroots democracy and diversity.

This Conference therefore stresses the need for legal certainty within a framework following the principles of social and territorial cohesion, social justice and non discrimination, and the need for consideration of the principles of subsidiarity, proportionality and universality in the follow up to the European Commission's Green paper.

Since this declaration was launched, the discussion about definition and legal status of Services of General Interest was going on and mostly did not confirm with the LOGON declaration from 2003. But till today the future of SGI in the European Union does not seem to be decided and is still open for developments as the chapter "Services of General Interest – current development" of this Final Guide shows.

4.3 European Constitution and modernisation of public administration

When LOGON started, issues of law and constitution have been on the top of the agenda. All LOGON Reports included the chapter "Implementing the EU aquis at local and regional level" and it is one of the most read parts of the LOGON publications. When the discussion about the European Constitution started, LOGON collected the position of the partners during the Conference in Vienna in 2003 and presented the status quo of the negotiations at the EU Convention. It is well known that currently the constitutional process is suspended. Nevertheless the draft EU Constitution follows the way that the Maastricht Treaty has started in 1992 with slowly strengthening the local level in the European Treaties. And the constitutional agreements concerning the local level will for sure be part of the European Union's development of the next years. For this reason the expected consequences of the EU-Constitution for the local level have not only been part of the LOGON Conference 2003 but also have a famous position in this Final Guide.

Modernisation needs in public administrations also touch the local level. Due to financial constraints and the requirements of Good Governance the local governments have to start a modernisation development which provides tools to survive in the competitive and challenging environment of the European Union. LOGON gave consideration to this modernisation needs with the publication of two readers on Public Governance and Human Resource Management in local governments as well as the organisation of two workshops on e-government and communication policy in local governments. The Final Guide provides the composite results of these LOGON activities.

5 The LOGON Final Guide 2005 – a compact summary of the past LOGON period

Looking back to the history of LOGON the publications have always been the central information platform of this knowledge transfers. Till now, five general reports have been published. In your hands you hold the sixth LOGON Report which is called the LOGON Final Guide 2005, expressing that the subsidised phase of LOGON is finishing and a new era begins.

The first reports in the year 1999 and 2000 dealt with the challenges of the accession and membership in the European Union for the local level and could be seen as guidelines for the preparation for the membership in the European Union. The following reports covered specific topics for local governments in (future) EU-countries: Lobbying (2002), Human Resource Development and Training (2004), Competition Rules for State Aid in the European Union (2004), Public Management and Governance (2004).

Between 2003 and 2005 the LOGON activities have been mainly funded by Interreg IIIc and the Austrian Ministry of Foreign Affairs. The activities of this ending period correspond to the three LOGON main topics of lobbying and communication policy of the local level (1); Services of General Interest (2) and the European Constitution and modernisation of public administration (3). According to these topics this Final Guide summarises the work of the past LOGON period and gives a clear overview about the challenges of the local and regional governments in the European Union and the acceding countries. The broad scope starts with the Legal Framework of European Local Governments, reaches Services of General Interests as well as Public Governance and ends with the statements of local governments from EU- and non-EU-countries. Of course in the meantime a traditional chapter on the implementation of EU acquis at local and regional level is also part of the LOGON Final Guide.

5.1 Chapter one: Legal framework for European local government

Chapter one starts with the EU-Constitution and proves that the draft treaty plans the strengthening of municipalities and regions in Europe. For the first time a European treaty appreciates the right of local and regional self-government. The relevant articles are:

- Art I-5 Para 1 respects the national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. This is the very first time a European law mentions local and regional self-government.

- Art I-11 Para 3 foresees that according to the principle of subsidiarity the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level.

- Art I-32 Para 2 states that the Committee of the Regions shall consist of local and regional elected representatives and constitutes one of the Union's advisory bodies.

- Art I-47 Para 1 foresees an opportunity for consultation and participation of national associations with EU institutions.

- Art II-96 recognises and respects access to Services of General Economic Interest as provided for in national laws and practices, in accordance with the Constitution.

- Art III-122 attributes the legal competence for Services of General Economic Interest to the European level. European laws shall establish these principles and set these conditions without prejudice to the competence of Member States to provide, to commission and to fund such services.

- Art III-238 strengthens the idea of Service of General Interest in the transport sector.

- The Protocol on the application of the principles of subsidiarity and Proportionality foresees an assessment procedure of European Union draft legislation with regard to its financial and political impact on the local and regional level. It also gives the European Court of Justice Jurisdiction over subsidiarity infringements.

Chapter one additionally covers the new EU acquis concerning the local and regional level. It is well known that the implementation of approximately 60 per cent of all mandatory European-law based regulations has to be carried out by local governments. With the country's accession to the EU, local as well as regional authorities must take account of yet another, new dimension of Community law in their administrative activities. This includes an increasing volume of accounting and reporting duties, both in terms of additional study of EC law and necessary adjustments vis-à-vis the EC legislative level. For the local level, potential problems resulting from accession are likely to arise from the fact that additional actors are involved in the decision-making process, which means that more lobbyists than before participate in the formal and informal negotiation and bargaining processes. The Final Guide follows the tradition of the former LOGON Reports and covers new EU acquis related to the local and regional level in the listed policies:

- Legislation and framework conditions in the environmental sector;
- Legislation and framework conditions concerning public procurement;
- Legislation and framework conditions concerning State Aid;
- Framework conditions for local authorities in the field of electricity and gas management;
- Framework conditions for local authorities in the field of energy efficiency;
- Framework conditions for public utilities;
- Special regulations for public enterprises;
- Legislation and framework conditions concerning anti-discrimination and free movement of people;
- Acquisition of land by foreigners;
- Legislation and framework conditions concerning social policy.

5.2 Chapter two: Services of General Interest – current developments

Services of General Interest and related issues have been the major concerns of the past LOGON period. This is also reflected in the Final Guide with a comprehensive chapter divided into four subtopics:

1. The future of Services of General Interest in an enlarged Union;
2. A guide on Services of General Interest;
3. Public Service Operation and State Aid;
4. Public-Private Partnerships seen from the viewpoint of European law.

These four articles written by declared experts in the fields provide an up-to-date insight into the subjects and can be used as guidelines for the daily work in (local) public administrations to be in accordance to the current regulations of European law.

Primary EU law refers to the term “Services of General Economic Interests” and does not mention “Services of General Interest”. The Green Paper on Services of General

Interest describes the services as “forming some of the rights enjoyed by European citizens and providing an opportunity for dialogue with public authorities within the context of good governance.” The same paper goes on to list as “services of both general economic and non-economic interest”, network industries such as energy, postal services, transport, telecommunications, but also health education and social services. The term “Services of General Economic Interest” is deemed in community practice to refer to “services of an economic nature which the Member states or the Community subject to specific public service obligations by virtue of a general interest criterion.” This definition includes “any other economic activity subject to public service obligations”. Despite the vagueness of the definition of SGEI, it is clear that it includes economic services for which the consumer pays and where there is an obligation to serve the general public. But generally the member states are free under the terms of the European Treaty to define SGEI as they see it.

The discussion about the consequences of the “official” definition is vital for (local) public administrations as their competences are widely related to Services of General Interest. New European standards of the Services of General Interest change the standards in competition-, procurement- and State Aid rules as well as the basis for public private partnerships in the vulnerable field of SGI. Local governments rely on the statement of the EC Communication (DOC/00/25) which states clearly that “whether a service is to be regarded as a SGI and how it should be operated are issues that are first and foremost decided locally.”

But meanwhile a Green Paper (2003) and a White Paper (2004) have been published by the European Commission, various consultations on these papers have been conducted, positions of the European Parliament and other key actors have been implemented in the discussion. At the same time different decisions of the European Court of Justice clarified open issues on State Aid, procurement and public private partnerships and generally spoken on Services of General Interest. It was a way into a model of compulsory competitive tendering under the strict State Aid and competition rules.

After the negative referenda on the European Constitution it seems that the development of Services of General Interest in the European Union is more incalculable than ever.

5.3 Chapter three: Public sector reform strategies

5.3.1 Public Governance

Before Public Governance started to become an eventual management strategy for the public service, New Public Management (NPM) has been introduced in the late 80s / early 90s of the 20th century. NPM was and still is a reorganisation strategy for

states and public administrations. There are several reasons why Public Governance has been discussed more often lately and why it is considered to be the new instrument for modernising the public sector:

- Responsible persons in the public sector realised that there are insufficient political control and shortcomings in the implementation of administrative modernisation.
- Traditional problems of the public sector continue to occur such as high unemployment rates, more demands for communication and participation from citizens and medium-term EU-targets of the Lisbon strategy (from the year 2000).
- Lacking ability of measuring quality in every field of activity;
- Stronger influence of the media;
- Continuous communication, strengthening and developing of moral and ethical values.

Public Governance as development of NPM and Good Governance therefore stresses new objectives like securing social freedom and cohesion in the community through political action, emphasising the issue of equal treatment of various segments of the population, accelerating the cooperation between public and private actors on an equal partner-like footing to solve social problems and last but not least increasing the faith in democracy. All in all Public Governance focuses on the basic principles Transparency, Participation, Equal treatment, Accountability, Effectiveness, Coherence, Sustainability and Evaluation.

5.3.2 Human Resource Management

Human Resource Management (HRM) is meant to achieve goals like the improvement of qualifications and the increase in organisational know-how. It also helps the organisation to adapt to changes in organisational environment and to stimulate a customer care orientation. Regarding the employees Human Resource Development (HRD) aims to develop the sense of responsibility and quality among the managers and staff and to develop an ability to take on responsibility and create methods to motivate the staff. Increased job satisfaction and the improvement of learning opportunities as well as the enforcement of team work and the development of a shared organisational culture are results of HRD in an organisation.

Concerning the public sector modernisation, there is a large focus on training in public administrations to catch up with the ongoing changes in the public sector

environment. The results of a survey among the LOGON partners (18 associations participated in the survey between summer 2003 and spring 2004) show the current fields of training in the associations of the LOGON partners. Currently the main focus of the trainings is put on financial issues, next to Public Management as well as public modernisation and EU-issues. Important training subjects like project management, languages as well as citizens' participation and public procurement are, at the moment, underrepresented in the trainings of the employees in the associations. It is noticeable that only ten out of the 18 questioned associations recognized topics of necessary trainings in the future. Again EU issues and Public Management and reform were amongst the main topics needed. In addition it is necessary – in the point of view of the associations – to get trained in foreign languages in order to compete with the enlarging Europe. Other key topics for training can be identified as: IT, public relations, exchange programs, development indicators, quality management, team building, local development strategies, urban policy, human resources, public services, communication and conflict management.

5.3.3 E-government

E-government consists on the one hand of an administration related part with the objective to raise efficiency and customer orientation in electronic service delivery (e-administration). On the other hand e-government more and more should be seen as e-democracy. E-democracy guarantees a broad access to e-government with citizens and the relation of citizens to administration and politics in the main focus of interests. Concerning the implementation of e-government in cities and municipalities no "best way or best practice" can be recommended. Nevertheless some key elements have to be taken into consideration: First of all, it has to be stressed that e-government is a managerial function. The overall responsibility is settled by the heads of the city administrations. The usage of modern project-management's instruments is highly recommended and should include the following steps: Design your processes thoroughly (1); Ensure transparency (2); Allow for participation (3); Include viewer's view (4); Develop and use standards (5); Ensure cooperation (6); Tailor-make your finances (7); Select and provide services (8); Use Networks (9); National Strategy (10). These elements can be seen as a thread running through the e-government implementation and they show once more that the "best solution, the best way, the best practice" does not exist. Nevertheless, the experiences of others can be used to prevent own errors.

5.3.4 Local government communicating

As a tool to reach good Public Governance, communication became a major issue of LOGON during the last period. Following various requests of the LOGON partners communication workshops have been organised by CEMR and "communication

guidelines for local governments" can be found in the conclusions of the chapter "Local Government Communicating":

- Communication is and must be one of the key elements of any municipality's, towns' or association of local government's action plans.
- Press offices must be filled with experienced, suitably qualified communication professionals.
- A simple but comprehensive communication strategy must be devised, and reviewed regularly.
- Choose the right communication tools for the right audience and for the right message.
- Apply the number one rule of communication: adapt your message to your audience.
- There is a difference between political, technical or legal documents on one hand, and communication documents on another.
- The rules for local government communication are exactly the same that apply to private companies, NGOs, political parties and to any organisation that is in contact with the outside world.
- Remember "the Gauguin Syndrome": What is the point of producing masterpieces if you do not make them available to a wide and relevant audience?

5.4 Chapter four: EU membership and enlargement

5.4.1 Czech Republic, Hungary and Latvia

Ten new countries entered the European Union on May 1st, 2004. This day was prepared by years of negotiations and adjustments. High expectations and hope but also scepticism and fear accompanied the accession process. One year after the biggest enlargement of the European Union, LOGON partner associations give a short insight of how the local level has handled the EU-membership in their countries. All in all an optimistic picture is drawn by these statements. "The Czech cities, towns and municipalities assess the one year EU membership mostly in a positive way. Local authorities quickly responded to opportunities offered by the EU, modernise operating of their offices, learn how to work in a strategic manner, improve their project management, exchange experience, unite for the purpose of designing projects and cooperate with the private sector. From the progress they

have achieved in these areas the state administration could also learn a lot." Hungarian local authorities do not face the European Union as challenge anymore but as a core part of everyday life. "It represents a space for cooperation that urges local authorities to compete, strengthen integration and guarantee the improvement of life standards."

Examples of how intensive European Funds assisted individual municipalities and regions can be brought (Czech Republic). On the other hand in Latvia the first year showed that the expectation of EU Structural Funds being available for priorities of local development was too optimistic. "Local governments had prepared a large amount of projects related to basic infrastructure. At the same time only few of those were accepted. For local governments it is much simpler to get acceptance for a project about equal opportunities, than for infrastructure. Pre-financing and co-financing problems are too difficult to handle for small budgets."

The implementation of the acquis communautaire, especially public procurement, the environment and State Aid, in all processes of the daily work life, is still in progress. The first complaints files with the European Commission have appeared. In the Czech Republic "experience revealed that when preparing oneself for the EU legislation it is not safe to simply rely on the national government. The national departments have not passed through a real reform and they have their own difficulties to comply with modern functioning of the European bureaucracy." On the positive side it has to be mentioned that municipalities have significantly increased their chance to share experiences through building up networks with other European municipalities. "Especially twinning partnerships are established not only between towns and villages, but also between schools and various social clubs."

Based on a general approach Mr. Pukis, Latvian Association of Local and Regional Governments, concluded: "Only one year is too short time for historical scale conclusions. But one is clear – EU matters now are internal matters for Latvian local and regional governments. Therefore Latvian self-governments are now responsible (together with other political actors) for improvement of the EU, if something is going wrong. Another important conclusion is that the character of the majority of problems is domestic. We can solve them as part of the Latvian political process."

5.4.2 Bulgaria and Romania

Bulgaria and Romania are the two countries whose EU-accessions have been postponed. Nevertheless those LOGON partners will be welcomed in the European Union in foreseeable time. They could not deliver their experiences with EU membership but nevertheless the local governments´ association of Bulgaria and Romania provide a general estimation of the situation in their countries in this Final Guide 2005. In Bulgaria the "Municipal Action Plan for EU-accession (2004 – 2007)"

is the core document for the successful preparation of local authorities for EU accession. Based on this document the current agenda for Bulgarian local authorities includes

- the realization of the fiscal decentralization and delegating taxation powers to the local authorities,
- the preparation of the local authorities for the accession, including capacity building for absorption of EU funds and the
- building of professional networks of experts in municipalities in different fields of activities for dissemination of municipal practices and capacity building at local level.

In Romania the local authorities are facing a great challenge and are eager to learn from their European counterparts how to improve the services provision and attend a better quality of life for their citizens. “The Romanian local authorities now have green light for the Community town twinning assistance since 4th April, 2005; hopefully many Romanian local authorities will be able to access funds for implementation of town twinning projects. The main challenges for the local authorities in the future are to prepare themselves from the institutional point of view to face the new EU legal order that will be enforced after 2007 and to strengthen their absorption capacity for the community assistance, especially structural funds.”

5.4.3 Albania and Serbia

Albania and Serbia are part of the chapter “EU enlargement – quo vadis”. As potential future EU members the local government associations present their view on approaching to the European Union. For Serbia and Montenegro the wish to become a future EU member is a key foreign policy goal. In April 2005, Serbia and Montenegro finally received a positive Feasibility Report on its readiness to start the process of EU accession. It has opened the doors for signing the Stabilisation and Association Agreement with the EU. Today the challenges involve “more substantial funding, but also much more intense institutional interaction, in order to allow for exchange of information, expertise, best models and practices, and thus assist Serbian municipalities in building up their capacities and be able to respond to the expectations of their citizens, but also to contribute to the overall maximising of Serbia’s potential to make up for lost ground and finally secure its road towards the integration into EU.”

As a conclusion for Albania it can be said that “there is an obvious lack of access of the regional and local authorities in the process of the European integration. On the one hand the associations of the regional and local authorities in Albania are trying to

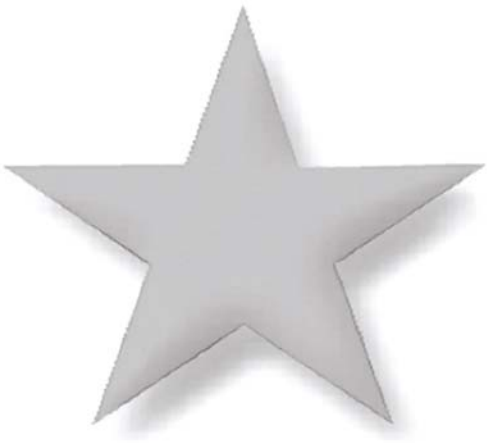
play the role that they must have in this process, but on the other hand, the lack of appropriate experience and financial funds is felt. To solve these problems, the associations of the regional and local authorities in Albania are strengthening their cooperation with the associations of the regional and local authorities of those countries that already have successfully passed the process of the European integration and are now members of the EU with full rights. Their experience seems to be very valuable and suitable to be used also by the regional and local power in Albania."

6 The future of LOGON

On May 1st 2004 the European Union welcomed ten new members as partners in the European family. LOGON has contributed its part to the successful accession of our partners. Since 1998 the know-how transfer on EU tasks between the LOGON partners was working well. The local and regional governments in the new member countries have been provided with essential information and experiences from the other members of the European Union. Between 2003 and 2005 the LOGON activities have mainly been funded by Interreg IIIc and the Austrian Ministry of Foreign Affairs. This LOGON Final Guide expresses that the subsidised phase of LOGON finishes now and a new era will begin.

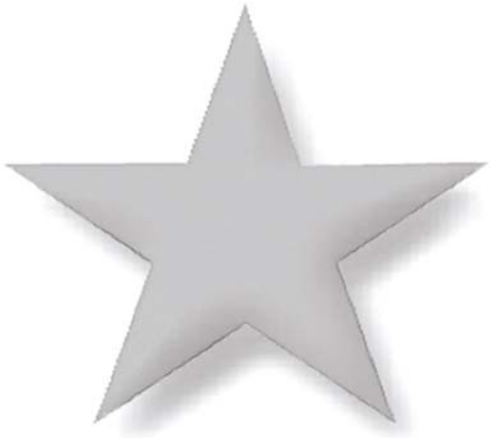
After the past enlargement process of the European Union the regional focus of the LOGON network changes to the south-east of Europe as many countries of this region may become members of the EU in the near and middle future or participate in the new Neighbourhood Policy. This will result in a system of open partnership which allows for additional associations of this region to become LOGON partners.

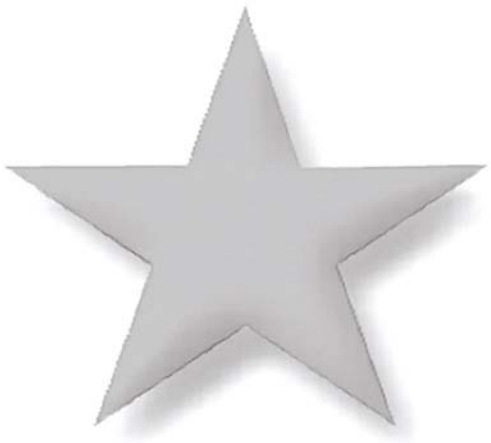
LOGON will continue its agenda of working out the consequences of current EU-decisions for the local level. Advantages and perspectives as well as challenges and threats of the European integration process for local governments and associations will enhance this agenda. The experiences of the ten new members will certainly provide an excellent basis for first-hand information.



CHAPTER I

Legal framework for European local government





1 Local government in the EU Constitution

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The weeks before the nearly unanimous adoption of the draft constitution (June 2003) by its authors (i.e. the members of the Constitutional Convention) were hampered with malice and malicious joy. Many hoped to see the Convention fail. But the three components of the Convention (national Parliaments, European Parliament and the European Commission) won over the fourth component (representatives of the Member States' governments). The latter were especially noticed during the 16 working weeks of the Convention in sabotaging its work.

1.1 Background

Since the Maastricht Treaty (1992) the national governments had not the energy (or the will) for a true reform of the Union and there were no signs that this situation would evolve in the future. At the Laeken Summit (2001) the heads of states and governments finally realised that they had reached an impasse. A Constitutional Convention, consisting mostly of parliamentarians, was set up to stop things going off course in the Union and to re-install its ability to act.

Not an easy task but the result was considerable: "The spirit of European understanding was set free", said the President of the Convention and of the CEMR, Valery Giscard d'Estaing. The Constitution shows that Europe is more than a single market and a free movement of goods. The Union is defined as a community with shared values, based on the cultural, humanistic and religious heritage of European history, through which it takes its model for the future.

1.2 Set-up

The Constitution consists of a preamble and four parts with a total of 448 articles. Part I (article I-1 to article I-60) talks about the definition and objectives of the Union. As a tribute to the Union's unique constitutional (legal) character, the EU is defined as a "Union of European citizens and European states". Also regulated in this part is the institutional framework, the legislative procedures, the division of competences between the Union and the Member States and the voluntary withdrawal from the Union.

Part II (article II-61 to article II-114) consists of the European Charta of Fundamental Rights. In the future the Charta should be legally binding and give citizens the chance to go to court upon infringement of their political and social rights.

Part III (article III-115 to article III436) talks about the policies and functioning of the Union. The most decisive changes concern the co-decision procedure and the

complete equality in the legislative procedure between the European Parliament and the governments of the Member States.

Part IV (article IV-437 to article IV-448) has general and final provisions, amongst the possibilities for future revision procedures. This part is followed by protocols and declarations (e.g. about subsidiarity and proportionality, on the weighing of votes in the Council etc.)

1.3 Articles relevant to the local and regional level

The Constitutional Treaty plans a decisive strengthening of municipalities and regions in Europe. For the first time a European treaty appreciates the right of local and regional self-government.

- **Art I-5 Para 1** respects the national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. This is the very first time a European law mentions local and regional self-government.

- **Art I-11 Para 3** foresees that according to the principle of subsidiarity the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level.

- **Art I-32 Para 2** states that the Committee of the Regions shall consist of local and regional elected representatives and constitutes one of the Union's advisory bodies.

- **Art I-47 Para 1** foresees an opportunity for consultation and participation of national associations with EU institutions.

- **Art II-96** recognises and respects access to Services of General Economic Interest as provided for in national laws and practices, in accordance with the Constitution.

- **Art III-122** attributes the legal competence for Services of General Economic Interest to the European level. European laws shall establish these principles and set these conditions without prejudice to the competence of Member States to provide, to commission and to fund such services. (This article was introduced as a result of intense lobbying by national local-government associations and is necessary to finally reach legal certainty. It should provide protection from the far too free forces of the free market and demonstrate a clear progress compared to the current legal situation in the Union.)

- **Art III-238** strengthens the idea of service of general interest in the transport sector.

- The **Protocol** on the application of the Principles of Subsidiarity and Proportionality foresees an assessment procedure of European Union draft legislation with regard to its financial and political impact on the local and regional level. It also gives the European Court of Justice jurisdiction over subsidiarity infringements.

1.4 Acknowledgement

The European Convention was the first occasion where the public was involved in the shaping of the European Union. The contrast between the debates of the Convention members and the debates of the diplomats, who in former times prepared the revision of the European treaties, could not have been greater. If the diplomats were bound by instructions of their national governments and held their meetings in camera (behind closed doors), the European Convention represented a broad range of opinions and ideas and their meetings were open to the public. The former president of the European Commission, Jacques Delors, said that through the Convention it had become possible “to re-dream Europe and to forge projects for the future”.

1.5 Outlook

A Constitution for Europe would finally bring a simplification of the already existing treaties, would close the so-called “lack of legitimacy”, establish a recognisable hierarchy of norms, provide a better protection of Human Rights and would deepen the national democracies through the existence of a constitutional democracy on European level.

Of course, the constitutional treaty is important but it is not decisive for the fate of Europe. The European Union will always have to adapt to new situations and its institutions must continue to learn. What is important is the political content and the further direction of the Union. The European order is not a strict hierarchical one, not an authoritarian or a completely clear-cut order. It is a network order composed by the different political communities, the different but complementary loyalties of the citizens. And we shall not forget that Europe without political, economic and socially efficient Member States cannot exist.

To say it with the words of Professor Dr. Udo di Fabio, one of the most distinguished German constitutional experts: “We should be imperturbable in view of the ratification of the European Constitutional Treaty and not create unnecessary pressure. It is false to say that a negative vote on the Constitution would mean the exclusion of the respective Member State. Europe will not profit from loose lips, will not grow through

over-regulation and certainly not advance by statements like “he, who is not with us, is against us”. Europe is founded on the rational idea of a united continent existing in a continuing diversity.” And so be it.

1.6 Timetable

18 June 2003	Completion of the Constitution by the Constitutional Convention
20 June 2003	Presentation of the Constitution at the European Thessalonica Summit
12 Dec. 2003	Failure to adopt the Constitution at the European Brussels Summit (mainly because of Council voting rights)
18 June 2004	Adoption of the Constitution at the European Brussels Summit
29 Oct. 2004	Signing of the Constitution by the heads of states and governments in Rome
Spring 2005	legal and linguistic checked copies in all 20 languages available for the citizens
since Feb. 2005	ratification procedures of the Constitution: 13 YES-votes, 2 NO-votes
2007-2009	Entry into force of the Constitution, one year after the last ratification (Reorganisation of the European Commission in 2015).

1.7 Draft Treaty establishing a Constitution for Europe

www.European-convention.eu.int/docs/treaty/cv00850.en.03.pdf

2 Implementing the EU acquis at local and regional level - EU directives and regulations

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2.1 Introduction

The implementation of approximately 60 per cent of all mandatory European-law based regulations has to be carried out by local governments. This is an attempt to give an overview on the major fields of local actions requested by European Union's legislation. However, it has to be considered that in most cases the said formal legal actions are preceded or paralleled by a variety of legally still not binding, but politically important steps, for instance the Communication “towards a thematic strategy on the urban environment” of the Commission [COM (2004) 60 final].

Above all, the White Book of the European Commission on the completion of the Internal Market in 1985 [KOM (85) 310 final] and the following directives and preliminary decisions gave a major impetus to the European integration on a local level. A shining example for regulations concerning the Internal Market having immediate local effect is the public contract awarding.

The continuously proceeding integration aiming at the implementation of the known four fundamental freedoms has evolved further political fields on the European as well as on the local/regional level. In fact, an increasing number of political realms of the European Union are of high local significance.

The process of enlargement of the European Union has been a challenge for the Union as a whole, as well as for each country that has already joined or will be joining the EU. Local and regional authorities will not only have to implement a major part of the acquis communautaire and may even be held responsible for failure to do so ("direct effect"), they will also have to cope with the social, economic and ecological challenges of membership.

- Cities/ regions have to implement EU legislation incorporated into national law and in some well-defined cases ("direct effect" of primary and secondary legislation, see below) need to adhere to EU law even if it is not – or not properly - transposed into national law.

- Cities/ regions have to implement or administrate provisions within their areas of competence.

The future financial framework regarding EU funding for European territorial cooperation among the Member States and third countries is still uncertain. In May 2004 the Commission presented its draft concerning the financial perspective 2007-2013. According to this proposal the budget regarding structural funds during this period is suggested to count 336,3 billion Euros. At the European Council Summit in Luxembourg on 16 and 17 June 2005 no agreement concerning the financial perspective 2007-2013 could be achieved. The government of Luxembourg, which held the presidency of the European Council until the end of June 2005, proposed a total budget of 309,3 billion Euros for structural funds for the future programming period. The Commission (COM) suggested that 13,2 billion Euros should be available for European territorial cooperation, that will be including today's INTERREG III - strand A to C. The former EU-presidency of Luxembourg (LUX) suggested only to provide 7,5 billion Euros as a part of a compromise to achieve an agreement among Member States regarding the overall budget 2007-2013. Whilst money for cross-border cooperation (INTERREG strand A) would not be decreased significantly (COM: 6,3 billion / LUX: 5,8 billion) there would be an immense decrease concerning transnational cooperation (COM: 6,3 billion/ LUX: 1,4 billion). The budget of today's INTERREG III - strand C (interregional cooperation plus networks) would be cut heavily, too (COM: 0,6 billion/ LUX: 0,3 billion). As said before, the financial framework of the programming period 2007-2013 is still not fixed. Despite the failure to achieve an agreement at the European Council Summit in Luxembourg there seems to be a strong tendency towards the suggestion the former presidency of Luxembourg made.

One of the most distinctive features of the EU is that in many policy areas it does not have its own machinery for implementing the decisions it takes. It is customary to say that the Union's decisions are implemented by the Member States.

Nevertheless, closer examination reveals that, since the scope of its decision-making powers has expanded to include virtually all sectors of economic and many areas of social policy, the Union's decisions are now in practical terms increasingly implemented by local and regional authorities even if the legal responsibility lies with the Member States. Moreover, the role of local and regional authorities is not confined solely to implementing legislation; rather, they often play a key role in initiating and maintaining a desired course of development.

In this context it is necessary to note that due to its peculiar structure and evolution, the EU system does not only operate on the basis of legally binding primary and secondary legislation and case law, but is also based on providing certain incentives (programmes and other funding opportunities) to actors of civil society in order to better attain the European model of society as outlined in the common provisions of the EU Treaty.

In areas such as in the field of social inclusion, integration of minorities or employment, cities and regions play a major role in helping to attain EU standards and in contributing to the "process of creating an ever closer union among the peoples of Europe". The EU related activity of cities and regions goes far beyond the purely legalistic implementation of EU law which in many cases does in itself not provide the desired impact on the living conditions and quality of life of EU citizens.

It is also important to note that cities and regions provide the closest level of government to the citizens and local businesses. Accordingly cities and regions have a task/responsibility as information provider to the general public about the impact of EU membership and the legal, economic and social changes going with it.

Due to the restricted approach of this overview such fields of legislation with an indirect but nonetheless profound impact on local authorities have not been included in this background document. It has been clear to the authors of this paper that responsibilities and tasks as well as constitutional or delegated powers of cities and regions vary from country to country. Several important proposals for directives which are currently in the process of law-making have been included in this overview.

2.2 Legislation and framework conditions in the environmental sector

Community policy and environmental policy in particular, aims to achieve sustainability. The principles underlying that policy are set out in Article 174 of the Treaty.

In June 2001 the Commission presented its Communication “A sustainable Europe for a better world: A European Union strategy for sustainable development” -COM (2001) 264 final- to the European Council of Gothenborg. This strategy proposed a number of coherent measures focussed on the long term to fight climate change, emerging health risks and poverty, just to mention a few. It combines the idea of a dynamic economy with high environmental standards and social cohesion. As a part of the implementation of the EU Sustainable Development Strategy the Commission introduced a system of extended impact assessment for all major policy proposals. This assessment shall contribute to estimate costs and benefits of specific environmental measures in order to promote sustainable development and environmental integration. In February the Commission released COM (2005) 37 final, a Communication containing a 2005 review of the EU sustainable development. A revised proposal for this strategy will be presented by the Commission sometime in 2005 according to this Communication.

Implementation and enforcement of environmental legislation is often delegated to regional or local authorities or other institutions responsible for monitoring, issuing of permits and inspection. In many cases, the work of these bodies will be seriously affected by the new legislation, with additional obligations requiring more efficient

management and additional staff training. The development of regional and local environmental administration will need specific attention in all countries which might be joining the EU in the future.

The awareness of European cities and towns towards environmental issues is rising. At the 4th European Conference on Sustainable Cities and Towns in June 2004 in Aalborg (Denmark) 110 municipalities from 46 countries all over Europe signed the ten Aalborg commitments. These cities pledged themselves to sustainable development. The Aalborg commitments address ten themes: governance, urban management, natural common goods, responsible consumption, planning and design, better mobility, local action for health, sustainable local economy, social equity and justice and “local to global” (improving sustainability beyond the EU).

But there are still remaining gaps in knowledge towards environmental EU legislation. They result from inadequate and weak communication structures and national governments withholding this information from the local level. Even if national governments do have the necessary information, transfer to local authorities does not always occur. This can be attributed to a number of reasons, such as lack of appropriate resources, lack of staff, poor targeting of information, lack of responsibility of local authorities in these fields and low overall attention to the issue.

2.2.1 Waste management

The overall structure for an effective waste management regime is set out in the Waste Framework Directive and the complementary Hazardous Waste Directive. These directives establish the framework for waste management structures, which has been elaborated by two types of "daughter" directives: one group sets down requirements for the permitting and operations of waste disposal facilities. The other group deals with specific types of waste such as oils, packaging and batteries.

Waste framework - Overview on the EU Waste Management System

- Waste Framework Directive (75/442/EEC amended by 91/156/EEC)
- Hazardous Waste Directive (91/689/EEC)

Special wastes

- Waste Electrical and Electronic Equipment (2002/96/EC)
- Packaging (94/62/EC)
- Waste Oils (75/439/EEC)
- PCB's and PCT's (96/59/EC)
- Sewage Sludge (86/278/EEC)

Processing and disposal facilities

- Incineration of waste (2000/76/EC)
- End-of-life vehicles (2000/53/EC)
- Landfill (99/31/EC)

Transport/import/export

- Shipments of waste (259/93/EEC)

Waste statistics

- Regulation 2150/2002/EC on waste statistics

Therefore, the following statutory documents of the European Union are of main importance for local authorities with respect to waste:

Waste Framework Directive (75/442/EC amended by 91/156/EC)
The directive aims at protecting human health and the environment against negative effects of the collection, transport, treatment and disposal of waste. As there is no blueprint which solves everything, the EU works with a set of principles:

- Prevention: waste production must be reduced and avoided where possible
- Polluter pays: those who generate waste pay the full cost of their actions
- Precautionary: rather than waiting for problems to appear, they need to be anticipated
- Proximity: waste should be dealt with as close as possible to where it is produced.

National competent authorities under the directive must draw up waste management plans as soon as possible, covering the wastes to be recovered or disposed of, technical requirements, special arrangements for particular wastes, and suitable disposal sites or installations. The national authorities also serve as the permit authorities for establishments carrying out disposal or recovery operations.

Hazardous Waste Directive (91/689/EEC)
The principal aim of the directive is to formulate a common definition of hazardous waste and introduce greater harmonisation of the management of such waste. It lists hazardous wastes, constituents and properties which render waste hazardous. Establishments which carry out their own waste disposal will need a license.

Hazardous waste management plans have to be published by the competent authorities, either as part of the general waste management plan (according to 75/442/EEC) or separately. The competent authorities must inspect installations producing and receiving hazardous waste as well as means of transporting the waste. Stricter control procedures such as inspection of installations are also required.

The so called 'daughter' directives can be divided into directives setting requirements for specific waste streams and those setting requirements for disposal facilities:

Special wastes

Directive on Waste Electrical and Electronic Equipment (2002/96/EC)
This directive aims at the prevention of electrical and electronic equipment waste (WEEE) as a first priority. Secondly, it is focussed on recycling and other forms of recovery of such wastes in order to reduce the disposal of waste. It also seeks to improve the environmental performance of all operators involved in the life cycle of electrical and electronic equipment (e.g. producers).

Packaging and Packaging Waste (94/62/EC)
The Packaging Directive prescribes recycling quotas (regarding both the material itself and through incineration) for packaging waste (50 to 65 per cent in weight) as well as material recycling quotas (25 to 45 per cent in weight, at least 15 per cent for each material). This presupposes organising the separate collection and recycling of this waste, which has to be organised (and paid for) by local authorities. Packaging waste is usually collected by private companies and in some cases by the municipalities themselves. Existing systems would have to be assessed to ensure compliance with EU requirements and avoid distortions of the free market. Article 6, paragraph 1 of Directive 94/62/EC prescribes quotas regarding incineration, recycling and recovery to be attained by Member States until fixed dates.

Amongst others the following targets are set:

- Until 31 December 2008 as a minimum 60 per cent by weight of packaging waste must be recovered or incinerated at waste incineration plants with energy recovery

- Between 55 per cent as a minimum and 80 per cent as a maximum by weight of packaging waste must be recycled until 31 December 2008 at the latest.

- Specific recycling quotas by weight for metals (50 per cent), glass (60 per cent), paper and board (60 per cent), wood (15 per cent) and plastics (22,5 per cent) must be attained until by 31 December 2008 at the latest. Paying attention to the situation of Member States that joined the EU on 1 May 2004

there are some exceptions regarding the achievement of recycling quotas. These Member States need an additional span of time to fully adapt the acquis communautaire concerning the environment. Exceptions are laid down in Directive 2005/20/EC amending Directive 94/62/EC.

The three above-mentioned hyphenated targets must be attained by the Czech Republic, Estonia, Cyprus, Lithuania, Hungary, Slovenia and Slovakia not later than 31 December 2012. The deadline for Malta to achieve these targets is the end of 2013 whilst Poland must attain them until 31 December 2014 at the latest. Latvia must achieve these targets not later than 31 December 2015.

Disposal of Waste Oils (75/439/EEC)
This directive aims to create a harmonised system for the collection, treatment, storage and disposal of waste oils; Member States must ensure the safe collection and disposal of waste oils. Adequate disposal structures and strict control procedures have to be put in place in order to avoid illegal or inadequate disposal of waste oils.

Disposal of PCB's and PCT's (96/59/EC)
This directive aims at the elimination of PCB's and PCT's and at the decontamination of equipment containing them. Strict regulations and enforcing instruments have to be created or strengthened in order to ensure the enforcement of the requirements of the directive.

Batteries and Accumulators containing dangerous Substances (91/157/EEC)
Member States must draw up programmes to reduce their heavy metal content, to promote the marketing of improved batteries and accumulators, to gradually reduce the phased out products, to promote research and favour the use of less-polluting substitute substances in them. Consumers must be fully informed about aspects of the risks and disposal opportunities.

Sewage Sludge used in Agriculture (86/278/EEC)
The directive aims to control the use of sewage sludge in agriculture by establishing maximum limit values for concentrations of heavy metals in the soil and in the sludge, and maximum quantities of heavy metal (cadmium, copper, nickel, lead, zinc and mercury) which may be added to the soil. The authorities responsible for water treatment, waste management, agriculture and enforcement will need to work together to achieve the aims of the directive. A proposal for either a revised or a new directive to repeal 86/278/EEC is expected to be presented by the Commission at the end of 2005.

Processing and disposal facilities

Incineration of Waste (2000/76/EC)
The aim of this directive is to prevent or to limit as far as practicable negative effects on the environment, in particular pollution by emissions into air, soil, surface water and groundwater, and the resulting risks to human health, from the incineration and co-incineration of waste. This aim shall be met by means of stringent operational conditions and technical requirements, through setting emission limit values for waste incineration and co-incineration plants within the Community and also through meeting the requirements of Directive 75/442/EEC.

Directive 89/429/EEC (Emission limit values of existing municipal waste incineration plants) and Directive 89/369/EEC on new municipal incineration plants shall only be mentioned here. Both will be repealed on 28 December 2005 by Directive 2000/76/EC. Furthermore, Directive 94/67/EC on the incineration of hazardous waste will be repealed that day, too.

End-of-life Vehicles (2000/53/EC)
This directive lays down measures which aim, as a first priority, at the prevention of waste from vehicles and, in addition, at the reuse, recycling and other forms of recovery of end-of-life vehicles and their components so as to reduce the disposal of waste, as well as at the improvement in the environmental performance of all of the economic operators involved in the life cycle of vehicles and especially the operators directly involved in the treatment of end-of-life vehicles.

Landfill Directive (99/31/EC)
This directive intends to prevent or reduce the adverse effects of the landfill of waste on the environment, in particular on surface water, groundwater, soil, air and human health. It defines the different categories of waste (municipal waste, hazardous waste, non-hazardous waste and inert waste) and applies to all landfills, defined as waste disposal sites for the deposit of waste onto or into land. A standard waste acceptance procedure is laid down so as to avoid any risks:

- waste must be treated before being land-filled;
- hazardous waste within the meaning of the directive must be assigned to a hazardous waste landfill;
- landfills for non-hazardous waste must be used for municipal waste and for non-hazardous waste;
- landfill sites for inert waste must be used only for inert waste.

The directive sets up a system of operating permits for landfill sites. Applications for permits must contain the following information:

- the identity of the applicant and, in some cases, of the operator;
- a description of the types and total quantity of waste to be deposited;
- the capacity of the disposal site;
- a description of the site;
- the proposed methods for pollution prevention and abatement;
- the proposed operation, monitoring and control plan;
- the plan for closure and aftercare procedures;
- the applicant's financial standing;
- an impact assessment study, where required, under Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.

Member States must ensure that existing landfill sites may not continue to operate unless they comply with the provisions of the directive as soon as possible. Member States must report to the Commission every three years on the implementation of the directive. On the basis of these reports, the Commission must publish a Community report on the implementation of the directive. Local and regional authorities have a major role to play in implementing this directive and in reporting to their national authorities. Additionally the issue of transport, import and export of waste is dealt with under a specific Regulation.

Poland needs not fully apply the provisions of Directive 99/31/EC relating to water control, leachate management, protection of soil and water, gas control and stability to municipal landfills until 1 July 2012. Nevertheless several intermediate targets need to be fulfilled. This exception is codified in the annex to the Act of Accession 2003 regarding Poland.

Waste Shipment Regulation (259/93/EEC)
This regulation applies to the supervision and control of shipment of waste within, into and out of the European Union and establishes a system for controlling the movement of waste. Member States must identify the appropriate competent authority or authorities to control the movement of wastes under the regulation. Special training is likely to be necessary to supplement procedural information.

An amended proposal by the Commission regarding a Regulation on shipments of waste to repeal Regulation No. 259/93 is currently in the process of law-making [COM (2004) 172 final]. The next stage within the process of law-making will be the second reading in the European Parliament (date of status: 7 July 2005).

Regulation on Waste Statistics (2150/2002/EC)
This Regulation establishes a framework for the production of Community statistics on the generation, recovery and disposal of waste. Member States and the Commission shall produce Community statistics covering the aforementioned topics.

2.2.2 Water quality - drinking water, waste water

Water is one of the most comprehensively regulated areas of EU environmental legislation. Early European water policy began already in the 1970s. Since then it had become clear that an efficient protection of water needs emission limit value legislation as well as water quality standards legislation, i.e. a so-called "combined approach". In the following you will find the main Community legislation in the field of water policy.

Directive 2000/60/EC (framework directive for community action in the field of water policy)
The hitherto use-oriented rules for water management were replaced by this comprehensive framework directive on water management. For the first time, emission and immission standards are combined with an ecological orientation (biological water quality). Principally, the new instrument provides cost-coverage prices for all forms of water use, including drinking water supply and wastewater. The idea behind this directive is that it forms the very basis of the European water strategy. It aims to bring considerable improvements in sustainable and integrated management of our water resources. For the first time it covers, in a single legal text, all types and uses of water. It repeals no less than six existing European water directives (dangerous substances; surface water; fish water; shellfish water; groundwater and information exchange).

The purpose of this directive is to establish a framework in order to achieve the following four main objectives of a sustainable water policy:

- sufficient provision of drinking water;
- sufficient provision of water for other economic requirements;
- protection of the environment;
- alleviation of the adverse impact of floods and droughts.

Member States will have to ensure that services to water users are paid at full cost recovery prices (basically prices for water supply and waste water collection and treatment). The programme of measures will have to be based on all relevant water-related legislation, be it Community, national, regional or local legislation and will have to be legally binding.

With the Framework Directive, the European Commission follows the pattern it has established in the fields of waste and air quality which are also governed by a single integrated framework directive supported by a series of technical directives setting specific limitations and requirements.

Groundwater Directive (80/68/EEC)
This directive on the protection of groundwater pollution caused by certain dangerous substances seeks to control the direct and indirect discharge of certain substances into the groundwater. This is to be achieved primarily by an authorisation system for discharges as well as disposal or tipping. For certain substances and groups of substances any discharge to groundwater is prohibited, whilst others must be subject to an elaborate authorisation procedure. Directive 2006/60/EC (Water Framework Directive) regulates that Directive 80/68/EEC will be lifted at the end of 2013.

Groundwater Directive (in law-making process at present)
There is a proposal by the Commission for a Directive on the protection of groundwater against chemical pollution and deterioration [COM (2005) 282 final]. After the first reading in the European Parliament at the end of April 2005 the Commission presented an amended proposal. The next step in the law-making process will be the first reading in the Council (date of status: 7 July 2005).

The directive which will result from the proposal, establishes specific measures mentioned in the water framework Directive 2000/60/EC in order to prevent and to control groundwater pollution. Whilst Directive 80/68/EEC requires monitoring of groundwater only in case of authorisation of direct discharge of substances into it, COM (2005) 282 regulates a continuous monitoring of groundwater quality. The element of prevention of a deterioration of the quality of groundwater bodies is not sufficiently covered by Directive 80/68/EEC, too. To secure a high quality of ground water COM (2005) 282 regulates that Member States shall take measures at an early stage if identifying any significant upward trend regarding pollutant concentrations in ground water. The directive to result from the Commission's proposal will establish requirements to prevent and to limit indirect discharges of pollutants into groundwater. Moreover, COM (2005) 282 lays down common criteria for the assessment of good groundwater chemical status. COM (2005) 282 regulates that investigations and authorisations pursuant to Directive 80/68/EEC shall take into account the provisions of the Directive to result from COM (2005) 282.

Drinking water Directive (98/83/EC)
This directive aims at protecting and securing the quality of drinking water throughout the EU. The directive obliges Member States to supervise the quality of water. They regularly have to check its quality by considering the analytical methods in accordance to this directive to guarantee common standards. After a period of three years each member state is obliged to report on the quality of drinking water to the Commission and to inform the consumers that the quality is compliant with EU standards.

There are exceptions for Estonia concerning the values set for the indicator parameters colour, hydrogen ion concentration, iron manganese, odour and turbidity. These values need not be applied for distribution systems until 31 December 2007 (serving more than 2.000 persons) and accordingly until 31 December 2013 (serving 2.000 or fewer persons). Values set for the indicator parameters chloride, conductivity and sulphate must be attained until 2008 and 2013. These exceptions are codified in the annex to the Act of Accession 2003 regarding Estonia.

Surface Water for Drinking Water Abstraction Directive (75/440/EEC) concerning the quality required of surface water intended for the abstraction of drinking water lays down requirements to ensure that it meets certain minimum standards specified in the directive. Wherever a water body used or intended for use in drinking water abstraction does not meet the requirements, Member States have to establish and implement plans of action. Directive 2000/60/EC regulates that Directive 75/440/EEC will be repealed at the end of 2007.

Measurement and Sampling of Surface Waters Directive (79/869/EEC) establishes the sampling and measurement procedures for the waters covered by Directive 75/440/EEC. Directive 2000/60/EC regulates that Directive 75/440/EEC will be repealed at the end of 2007.

Bathing Water Directive (76/160/EEC) on the quality of bathing waters seeks to ensure the quality of bathing water throughout the EU, both for fresh water and coastal water bathing areas. Member States have to take all appropriate measures in order to comply with the mandatory quality standards laid down in the Directive.

The Commission presented a proposal for a new directive concerning the quality of bathing water in autumn 2002. It will repeal Directive 76/160/EEC. The proposal has been modified several times during the process of law-making. The latest proposal COM (2005) 277 final was released at the end of June 2005. The next step will be the second reading in the Council, which might not yet result in an adoption (date of status: 8 July 2005). Proposal COM (2005) 277 only contains two bacteriological indicator parameters concerning bathing water quality, but it sets a higher health standard than Directive 76/160/EEC. It provides long-term quality assessment and

management methods in order to reduce both monitoring frequency and monitoring costs.

Decision 77/795/EEC on information exchange establishes a common procedure of exchange of information on the quality of surface fresh waters in the EU. The Decision establishes a network of monitoring points with a monitoring regime covering several parameters. It will be repealed at the end of 2007 according to a provision of Directive 2000/60/EC.

The Fish Water Directive (78/659/EEC) seeks to protect those fresh water bodies identified by Member States as fish waters. It sets water quality standards for salmonid waters and cyprinid waters. Directive 78/659/EEC will be repealed at the end of 2013 due to a provision of Directive 2000/60/EC.

The Shell Water Directive (79/923/EEC) seeks to protect those coastal and brackish water bodies identified by Member States as shellfish waters. For those it sets water quality standards. It will be repealed at the end of 2013 due to a provision of Directive 2000/60/EC.

Urban Waste Water Directive (91/271/EEC)
This directive aims to protect surface inland waters and coastal waters by regulating collection and treatment of urban waste water and discharge of certain biodegradable industrial waste water (basically from the agro-food industry). All municipalities with more than 15.000 inhabitants (until the end of 2000) and more than 10.000 inhabitants (until the end of 2005) must dispose of secondary treatment facilities, i.e. a biological purification process. 2005 is furthermore the deadline for the introduction of secondary wastewater treatment for all municipalities with 2.000 to 10.000 inhabitants whose wastewater is emitted into inland waters (or estuaries). More advanced treatment is required for so-called sensitive areas (i.e. water bodies subject to eutrophication or in danger to become so). For certain marine waters, primary, mechanical treatment might be sufficient, provided it can be proved that the water quality is not adversely affected.

In co-operation with their national governments, cities and regions need to

- identify agglomerations, which need a sewerage system and/or a treatment plant or its improvement,
- establish a phased implementation programme for sewerage and treatment systems,
- develop detailed capital investment strategies in order to cope with the expenditures needed to construct, improve or replace sewerage and/or treatment systems,

- assess costs for users, develop strategies for cost recovery (cf. also Water Framework Directive on full cost recovery),

- develop and implement strategies for the reuse and/or disposal of sewage sludge from waste water treatment, including where necessary the phasing-out of discharge or dumping to waters,

- assess the need for training the necessary staff for maintenance of sewerage systems and treatment plants.

There are exceptions regarding the application of this directive by Member States that joined the EU on 1 May 2004. These are codified in the annexes to the Act of Accession 2003 concerning specific conditions of each country that acceded the Union that date. The annexes (one for each country) contain transitional provisions regarding the adoption of the acquis communautaire.

The Czech Republic must ensure compliance with the provisions of Directive 91/271/EEC until 31 December 2006 at the latest. Requirements regarding the treatment of urban waste water need not be fully applied by Malta until 31 March 2007 whilst requirements for collecting systems need to be fulfilled until 31 October 2006. Anyhow, intermediate targets must be achieved. The provisions of this directive regarding collecting systems and the treatment of urban waste water need not be applied fully in Lithuania until 31 December 2009 and in Estonia until 31 December 2010. Several intermediate targets must be achieved.

Furthermore, several provisions regarding the treatment of waste water must not fully be applied by Cyprus until 31 December 2012. Latvia, Slovakia, Poland, Slovenia and Hungary must ensure full compliance with the requirements regarding collecting systems and the treatment of urban waste water until 31 December 2015 at the latest. Several intermediate targets need to be attained until then by these countries.

Nitrates from Agricultural Sources Directive (91/676/EEC) concerning the protection of water against pollution caused by nitrates from agricultural sources, complements the Urban Waste Water Directive by reducing and preventing the nitrates pollution of water from agricultural sources, i.e. chemical fertiliser and livestock manure, both to safeguard drinking water supplies and to protect fresh water and marine waters from eutrophication.

Dangerous Substances Discharges Directive (76/464/EEC) on pollution caused by certain dangerous substances discharged into water, requires Member States to control all emissions of dangerous substances by a permit or authorisation system. Daughter directives have so far covered 18 substances at a Community level. The directive obliges Member States to set maximum emission limit values established in these directives. It will be repealed at the end of 2013 due to a provision of Directive 2000/60/EC.

2.2.3 Soil protection

On 16 April 2004 the Commission published its Communication “Towards a thematic strategy for soil protection” [COM (2002) 179 final]. As a result of this release there have been several consultations by the Commission and six working groups were initiated. These working groups cover the following topics: erosion, organic matter, contamination, monitoring and research. An advisory forum was established, too. Legislative drafts to result from consultations, findings and reports are expected for the end of 2005 or early 2006.

2.2.4 Urban environment

The Commission adopted Communication COM (2004) 60 final -“Towards a thematic strategy on the Urban Environment” in January 2004. It contains ideas of the Commission for legislative measures focussing on the following topics: urban environmental management, urban transport, sustainable construction and urban design. The thematic strategy on Urban Environment announced in this communication is expected to be presented in early 2006. It seems like the Commission will only present some guidelines about best practices concerning urban environment instead of a “complete” strategy. Furthermore it is deemed unlikely that the Commission will present legislative proposals regarding environmental management plans and urban transport for cities with more than 100.000 inhabitants. However, political and legislative developments in the field of urban environment should be observed.

2.2.5 Air quality

In 2001 the Commission launched a campaign called “Clean air for Europe” (CAFE) with its communication COM (2001) 245 final - “Towards a thematic strategy for air quality”. The aim of this programme is the development of an integrated long-term strategy in order to protect human health and the environment from significant negative effects by air pollution. Implementing measures shall be suggested by the Commission till the end of 2005.

Directive 96/62/EC on ambient air quality assessment and management, known as the Air Quality Framework Directive, aims to set the basic principles of a common strategy which

- defines and establishes objectives for ambient air quality in the Union in order to avoid, prevent or reduce harmful effects on human health and the environment as a whole;

- assesses the ambient air quality in Member States on the basis of common methods and criteria;

- produces adequate publicly available information about ambient air quality and ensures that it is available to the public by means of alert thresholds, etc.;

- maintains ambient air quality where it is good and improves it in other cases.

The Framework Directive sets key pollution management parameters for the private sector. New standards will be adopted under the directive which will replace earlier directives concerning sulphur dioxide and particulates, lead and nitrogen oxide, described below. Over a period of ten to fifteen years, optimal ambient air quality limit values, margins of tolerance, assessment procedures and reporting requirements will be established for individual pollutants through a series of daughter directives. The first of these daughter directives (99/30/EC) concerning NO2, SO2 particulates and lead was adopted in 1999. Further daughter directives have been released such as the Directive 2000/69/EC relating to limit values for benzene and carbon monoxide in ambient air and the Directive 2002/3/EC relating to ozone in ambient air.

Once limit values and alert thresholds have been determined, ambient air quality will have to be assessed. Action plans must be drawn up for zones which do not meet the limit values. Measures must integrate the protection of air, water and soil and be aimed at meeting deadlines. The public must be informed when alert thresholds are exceeded.

The directive's requirements presuppose adequate administrative systems, scientific know how and standards-based regimes for the management of ambient air quality. Often new procedures of consultation between authorities, alignment of monitoring and measuring methodologies, reporting and assessment are needed. Laboratories must be accredited in a manner consistent with European standards for quality assurance. Both laboratories and measuring sites must have organised systematic internal quality controls. Air quality improvement plans must be developed for areas of poor air quality with specific improvement deadlines. The plans may provide for measures to control or suspend activities such as motor vehicle traffic which contribute to the limit values being exceeded. Representatives from air polluting industries as well as other interested parties should be consulted on implementation requirements, especially on the drawing up of the improvement plans so as to smooth the way to compliance with air quality standards.

Directive 2002/3/EC (Ozone in ambient air)
Directive 2002/3/EC establishes long-term objectives for ozone in the ambient air to be achieved by 2010. It contains thresholds. The targets follow Directive 2001/81/EC on national emission ceilings. In case of non-compliance with thresholds Member States have to work out reduction plans and programmes. They need to be reported to the Commission and to be made available to the public. Moreover, Directive 2002/3/EC includes improved and more detailed requirements to monitor and assess ozone concentrations and to inform citizens about the actual pollution load.

Directive 2001/81/EC (National emission ceilings)
The aim of this directive is to limit emissions of acidifying and eutrophying pollutants and ozone precursors in order to improve the protection in the Community of the environment and human health against risks of adverse effects from acidification, soil eutrophication and ground-level ozone and to move towards the long-term objectives of not exceeding critical levels and loads and of effective protection of all people against recognised health risks from air pollution by establishing national emission ceilings, taking the years 2010 and 2020 as benchmarks, and by means of successive reviews.

Directive 2001/80/EC (Emissions from large combustion plants)
This directive applies to combustion plants, the rated thermal input of which is equal to or greater than 50 MW, irrespective of the type of fuel used (solid, liquid or gaseous). For these plants some rules for granting the permit or licence as well as emission limit values for dust, SO2 and NOx are set.

Directive 1999/30/EC (Limit values for substances in ambient air)
This directive regulates limit values for NOx, SO2, Pb and PM10 in ambient air. Member States have to ensure that information which is up to date on ambient concentrations of SO2, NOx, particulate matter and lead is frequently made available to the public. Whilst limit values for NOx for the protection of vegetation had to be met by 2001, health limit values must be met by 2005. Limit values for NO2 and Pb must be kept until 2010 at the latest. Member States have to develop programmes showing how they will meet limit values. These programmes must be made available to the public and sent to the Commission. The annex of Directive 1999/30/EC was amended by Commission Decision 2001/744/EC.

2.2.6 Environmental noise

Directive 2002/49/EC (Assessment and management of environmental noise)
Directive 2002/49/EC is focussed on environmental noise to which humans are exposed. This includes noise in public parks and other quiet areas in agglomeration or build-up areas. Directive 2002/49/EC applies to areas near schools, hospitals and other noise-sensitive buildings and areas, too. Member States have to designate competent authorities to assess environmental noise and to approve noise maps and action plans for agglomerations, major roads, major railways and airports, necessary. This directive also lays down common noise indicators and assessment methods. Moreover, Member States are obliged to make noise maps public to the citizens.

2.2.7 Trans-sectoral regulations

Directive 2004/35/EC (Environmental Liability Directive)
This directive establishes a framework of environmental liability based on the “polluter-pays” principle in order to prevent and remedy environmental damage. If

necessary operators need to undertake preventive measures in order to prevent any damage. If an environmental damage occurs, operators have to inform the authorities. They have to bear costs for preventive and remedial actions taken pursuant to this directive. Competent authorities are entitled to recover costs to overcome an environmental damage from any natural or legal person having caused this damage. Within five years for from the date on which those measures have been completed a cost recovery is possible. This directive must be implemented into national legislation by the Member States until 30 April 2007 at the latest.

Thematic strategy on the sustainable use of natural resources
In October 2003 the Commission adopted COM (2003) 572 final - a communication regarding the development of a strategy on sustainable use of natural resources. The overarching environmental aim of a resources strategy is the reduction of negative impacts of resource use on the environment, i.e. on air, water, soil and living organisms. This strategy shall provide a knowledge base by identifying critical issues of resource-related impact and then assessing the options for improvement. Currently there are not any proposals for directives regarding sustainable use of natural resources. Despite this, concrete announcements for legislative measures by the Commission might follow soon.

Directive 2003/35/EC (Public participation regarding environmental measures)
This directive aims at improving public participation and information with regard to drawing up plans and programmes relating to the environment. It shall contribute to the implementation of the obligations arising from the Århus Convention, which the EU signed in 2001. The Århus Convention which entered into force on 30 October 2001 has established a number of rights of the public (for citizens and associations as well) regarding the environment. This directive had to be implemented into national legislation of the Member States until 25 June 2005 at the latest.

Directive 2003/4/EC (Public access to environmental information)
Directive 2003/4/EC is focussed on securing rights of the citizens to have access to environmental information. It also obliges Member States to disseminate information about the environment regularly to achieve the widest possible availability. Directive 2003/4/EC is also a part of the implementation to fulfil the obligations arising from the Århus Convention.

Directive on access to justice in environmental matters (in law-making process at present)
Proposal COM (2003) 624 final of the Commission is focussed on access to justice in environmental matters. Like the two aforementioned directives this proposal was presented to fulfil the Århus Convention. It has reached the stage of adoption by the Council, which might follow soon (date of status: 14 July 2005).

Directive for an Infrastructure for Spatial Information - INSPIRE (in law-making process at present)
Proposal COM (2004) 516 final for a directive establishing an infrastructure for spatial information in the Community (INSPIRE) aims at creating a system regarding the collection of environmental data within the EU. It shall be maintained for the purposes of environmental policies and activities of the Community if these might have either a direct or an indirect impact on the environment. The data base will both include spatial data and metadata and shall be updated permanently. Proposal COM (2004) 516 is still in the process of law-making. It is now approaching the stage of the first reading in the Council (date of status: 11 July 2005).

Directive 1999/62/EC (Directive on road charging)
Directive 1999/62/EC lays down certain rules defining the conditions under which user charges ("Eurovignette") and tolls may be applied to heavy good vehicles for the use of infrastructures, e.g. motorways. Though this directive is not implemented by local authorities it heavily affects them. As a result of charges on heavy good vehicles there is a tendency that especially lorries avoid using motorways because of those charges. Therefore roads beneath the motorway level are used more and more frequently. Traffic as well as air and noise pollution, even in the countryside, increases. On 23 July 2003, the Commission presented a proposal on the charging of heavy goods vehicles on motorways - COM (2003) 448 final - to amend Directive 1999/62/EC. It aims to adapt a charging framework of road transport to cover both internal and external costs, in order to comply with the principles of sustainability. The law-making process has already reached the stage of the first reading in the Council, which will follow soon (date of status: 14 July 2005)

Directive 96/61/EC (Integrated Pollution Prevention Control Directive)
The Integrated Pollution Prevention Control Directive (IPPC) applies both to new and existing facilities. To safeguard a high protection standard for the environment in general, the effects of facilities impacting the environment are to be comprehensively reviewed to prevent the shifting of emissions from one medium (air, water, soil) to another. The stipulations for granting licenses must be based on best available technology requirements. The immission-side approach of the IPPC Directive caused some discussion, as this would permit to emit regulation ordinaries more pollutants in less polluted areas than in areas with high levels of pollution.

The requirements for the granting of permits for existing installations do not apply to about 20 combustion installations in Poland until 31 December 2010. This exception concerns the obligation to operate these installations in accordance with emission limit values, equivalent parameters or technical measures based on best available techniques according to relevant articles in this directive. There are exceptions for Slovenia and Slovakia regarding the same provisions of Directive 96/61/EC. The requirements for several combustion installations located in Slovenia need to be fulfilled in either 2008 or 2010. Ten combustion installations situated in Slovakia have

to attain the aforementioned provisions until 2009, 2010 or 2011. These exceptions are codified in the annexes to the Act of Accession 2003 regarding Poland, Slovenia and Slovakia.

Directive 85/337/EEC (Environmental Impact Assessment - EIA). Regional and local authorities have major competences in spatial development and land use planning. The EIA obliges them to assess the impact of infrastructure and other projects on the environment. The responsibility for the formal implementation of the directive therefore rests not only with the national governments but also with regional or local authorities.

A report suggests that every EIA requires a number of steps, so the minimum level of costs is likely to be in the range of 10.000 to 20.000 ECU. The main costs arise from the use of internal staff time, payments for expert advice and consultancy time and publicity and publications. Of these the staff and consultancy costs account for over 90 per cent. Evidence suggests that introduction of strategic environmental assessments to regional and local land-use planning may increase the costs by 5 to 10 per cent.

2.3 Legislation and framework conditions concerning public procurement

In order to complete the internal market and safeguard free movement of goods, services and persons, public procurement must likewise be opened to general competition. Since 1970, several directives have provided the legal basis for this opening. This basis, however, remained without effect until additional directives were issued, which enabled enterprises, affected by this disregard, to initiate formal legal proceedings leading to the awarding of damages. However, the directives only apply if the contracts to be awarded exceed a certain volume. The threshold values are Euro 200,000 for public supply and service contracts, and Euro 5 million for public works.

In practice, this means that contracts exceeding these thresholds presuppose a call for tender in the entire EU territory. A specific information procedure needs to be designed by the national authorities for this purpose. While public authorities in the past could apply additional criteria when awarding contracts, e.g. commissioning above all enterprises within their own municipal area or region, thereby safeguarding local employment, competitors from the entire EU must now be taken account of. To avoid problems, the services/works to be executed must be precisely described. Future maintenance and service work, too, may be included in the tender, thereby permitting local entrepreneurs to turn their physical proximity into an advantage.

A separate directive covers public procurement in the water, energy, transport and telecommunications sectors, since these facilities are partly subject to public law and partly to private law. The threshold values for these sectors are: Euro 400,000 for

service and supply contracts of operators of energy, transport and drinking water networks and Euro 600,000 for the telecommunications sector. The threshold value for public works contracts remains unchanged at Euro 5 million.

Currently, the following directives should be observed:

- Council Directive 93/36/EC of 14th June 1993 concerning the co-ordination of procedures for the award of public supply contracts;

- Council Directive 93/37/EC of 14th June 1993 concerning the co-ordination of procedures for the award of public works contracts;

- Council Directive 93/38/EC of 14th June 1993 concerning the co-ordination of the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (all published in the Official Journal L 199 of 9th August 1993); this directive is only applicable to areas where the market is not yet completely liberalised. (For example, the telecom area is nearly everywhere in the European Union liberalised). The European Commission issues a statement to the respective member state on the basis of article 8 of the Directive 93/38/EC if the directive is not longer applicable for a certain area.

- Council Directive 92/50/EC of 18th June 1992 concerning the co-ordination of procedures for the award of public service contracts (published in the Official Journal L 209/1 of 24th July 1992).

To implement the provisions laid down in the four above-mentioned directives, another two so-called remedy directives were adopted to provide for the establishment of institutions offering legal remedy in case of infringements of public procurement procedures:

- Council Directive of 21st December 1989 on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EC, published in the Official Journal L 395/33 of 30th December 1989);

- Council Directive 92/13/EC of 25th February 1992 co-ordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (published in the Official Journal L 76/14 of 23rd March 1992).

Two further directives were adopted under the multilateral agreement on public procurement to liberalise and expand world trade, thereby adjusting the prevailing legal system:

- Directive 97/52/EC of the European Parliament and the Council of 13th October 1997 amending directives 92/50/EC, 93/36/EC and 93/37/EC, co-ordinating the procurement procedures for the award of public service contracts, public supply contracts and public works contracts (published in the Official Journal L 328 of 28th November 1997);

- Directive 98/4/EC of the European Parliament and the Council of 16th February 1998, amending directive 93/38/EC, co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (published in the Official Journal L 101 of 1st April 1998).

The complexity of the procurement provisions provoked vehement criticism on the part of the Member States, so that the Commission felt obliged to propose several modifications in a Green Book. Inter alia, critics complained that the directives were confusing because of numerous amendments; that low thresholds resulted in high administration costs in relation to marginal cost cuts, thus causing more costs than benefits; and finally, that the award procedures in several areas were overly cumbersome. Local authorities additionally complained that they did not conduct large-scale public works very often; as a result, the provisions of the public works directive would not be applied frequently enough to ensure that their staff was familiar with the regulations. Regarding the public supply co-ordination directive, it was criticised that the low threshold did not encourage wide participation of enterprises despite public tenders across the EU. Discussions were also triggered by the abolition of "local preferences", i.e. the priorisation of local enterprises. This, however, had already been reduced before in the big cities. On the other hand, the increased transparency of contract awarding and pan-European procurement was also explicitly welcomed.

The Commission intends to propose a number of clarifications regarding the public procurement directives and also to suggest some amendments.

2.4 Legislation and framework conditions concerning State Aid

Under Article 87 Para 1 of the EC Treaty any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market. In any case, the Commission must be informed (notified) of all forms of subsidies and then will decide about their admissibility by way of a review procedure.

Exemptions from State aid law include State aid regulations for small and medium-sized enterprises (SMEs).

More detailed provisions are contained in Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises.

In line with Regulation (EC) No 994/98, which enables the European Commission to grant exemptions to certain categories of state aid, the regulation presented here recognises the role played by small and medium-sized enterprises in creating jobs and economic dynamism in Europe and exempts them from the prior notification requirement where the granting of state aid is concerned, provided that the conditions laid down in the Regulation are met.

In view of the difficulties which SMEs may face in gaining access to the new technologies and to technology transfers, the Commission has amended Regulation (EC) No 70/2001 by means of Regulation (EC) No 364/2004. As a result, it will now be possible to set higher ceilings for the exemption of aid to SMEs for research and development purposes. This does not apply to large enterprises, for which the Community framework for state aid to research and development will continue to be used.

In the field of European State Aid law it is, however, difficult to delimit the areas of Services of General (Economic) Interest. Opinions differ in particular on the question whether state compensation concerning Services of General Interest are subject to the general ban on State aid in Art. 87 of the EC Treaty. In any case, this view cannot be clearly deduced from the ECJ ruling in the “Altmark Trans” case (C-280/00). In this case, the ECJ further specified the concept of state aid by establishing four criteria. Furthermore, it looked into the subject of “favouring certain undertakings”.

2.5 Framework conditions for local authorities in the field of electricity and gas management

Directive 2003/54/EC concerning common rules for the internal market in electricity establishes common rules for the generation, transmission, distribution and supply of electricity. It lays down the rules relating to the organisation and functioning of the electricity sector and access to the market and the criteria and procedures applicable to calls for tenders and the granting of authorisations and the operation of systems.

The objective of Directive 96/92/EC on the internal market in electricity, which was repealed by Directive 2003/54/EC was opening up the market for big consumers as of February 1999 and which had to be completed for smaller consumers by 2003.

EC Directive 2003/55/EC concerning common rules for the internal market in natural gas is focussed on rules for transmission, distribution, supply and storage of natural gas. It regulates the organisation and functioning of the natural gas sector, as well as access to the market. Furthermore, it establishes criteria and procedures applicable to the granting of authorisations for transmission, distribution, supply and storage of natural gas and the operation of systems. Directive 2003/55/EC applies to any kind of gas, e.g. biogas or gas from biomass. It regulates that Member States have to open their gas market until 1 July 2007 to all customers at the latest. Independent regulatory authorities designated by the Member States shall be responsible for the efficient functioning of the gas market.

2.6 Framework conditions for local authorities in the field of energy efficiency

The energy performance of buildings is subject of Directive 2002/91/EC. It shall help to improve the energy performance of buildings within the Community. It takes into account outdoor climatic and local conditions, as well as indoor climate requirements and cost-effectiveness. This Directive lays down requirements with regard to the energy performance of new, large existing buildings (to be renovated) and the energy certification of buildings, for instance. It establishes a framework for a methodology of calculation of the integrated energy performance. This directive must be implemented into national legislation by the Member States until 4 January 2006 at the latest.

Directive 93/76/EEC to limit carbon dioxide emissions by improving energy efficiency (SAVE) aims at limiting carbon dioxide emissions by improving energy efficiency. Member States shall draw up and implement programmes in the following fields:

- energy certification of buildings,
- the billing of heating, air-conditioning and hot water costs on the basis of actual consumption,
- third-party financing for energy efficiency investments in the public sector,

- thermal insulation of new buildings,
- regular inspection of boilers,
- energy audits of undertakings with high energy consumption.

Currently there is a proposal of the Commission for a Directive on energy end-use-efficiency and energy services in the process of law-making [COM (2003) 739 final]. If entering into force Directive 93/76/EEC will be repealed by it. The proposal has recently been in the first reading of the Council. Most of the amendments the European Parliament made in its first reading were rejected. The directive to result from COM (2003) 739 will apply to any kind of energy (electricity, fuel, coal etc.). The European Parliament modified the Commission´s proposal and agreed that the overall energy saving for each Member State should be 11,5 per cent for the period 2006-2015. Even 16 per cent of energy should be saved by the public sector during this span of time. On 28 June 2005 the Council rejected to include any legally binding energy saving percentages into this directive (date of status: 10 July 2005).

2.7 Framework conditions for public utilities

In most cases the state participates in the economic process in order to pursue public interests rather than to realise profit-oriented objectives. It thus ensures the provision of services which are essential for the European Commission and cannot be rendered at a socially tolerable price by private enterprises.

The aim is to reduce existing differences between public-owned and private enterprises within the European internal market. For this reason it is basically stated in article 86(1) of the Treaty of Amsterdam that public enterprises shall not hold a privileged position. This means that besides the prohibition of discrimination also EC regulations on competition shall be applied to public enterprises.

These regulations include the following prohibitions:

- Cartel and other agreements leading to uncompetitive practises
- Misuse of market-dominating positions
- Dumping
- Subsidisation

Special regulations for public enterprises

Following coinciding conditions exempt public enterprises from EC competition regulations:

- The relevant enterprises render services of common economic interests. These do not only include public utilities, but also state financial monopolies.

However, this applies exclusively to public-owned production monopolies; state trade monopolies cannot hold a privileged position (Article 31 Treaty of Amsterdam).

- The application of the competition regulations would prevent public enterprises from performing the tasks they have been entrusted with.

- The development of trade between the Member States must not be impaired to an extent running against to EC interests.

The Directive on the Transparency of Financial Relations between Member States and Public Undertakings (2000/52/EEC) is of special interest for public-owned undertakings. The Transparency Directive lays down the obligation to maintain separate accounts and applies to both private and public undertakings. In order to avoid disproportionate burden, the provisions of the Directive do not apply to undertakings whose annual turnover is less than EUR 40 million (SME) or to economic sectors already subject to specific rules. If an undertaking does not have the potential to distort competition or affect trade between Member States or where the compensation for the performance of a public task was fixed following an open, transparent and non-discriminatory procedure the directive likewise shall not apply.

2.8 Legislation and framework conditions concerning anti-discrimination and free movement of people

In the case of the free movement of people, a distinction must be made between the free movement of workers (Article 39 Treaty of Amsterdam - ToA) and the freedom of establishment for independent natural or legal persons (Article 43 ToA). Sub-national authorities are confronted by these treaty provisions when they set rules or operate a policy in these areas. In addition, the free movement of workers is also important to them in their role as employers.

Within the scope of application of the EC Treaty, the general prohibition of discrimination under Article 12 ToA bans all forms of discrimination on grounds of nationality. This also comprises the so-called "hidden" discrimination which occurs if legal provisions are linked to conditions that can be regularly complied with only, or at least considerably more easily, by nationals.

The right of establishment refers to the pursuing of activities as self-employed persons and the management of undertakings. Under this right, the citizens of the Union are entitled to set up and manage an enterprise in any Member State; this also relates to the purchase of the required production and accommodation facilities. The right of residence linked to the right of establishment moreover extends to the family and dependants of the self-employed person. The mutual recognition of professional qualifications and diplomas is also closely linked to the right of establishment.

Under the right of free movement of workers across the Community, workers holding the nationality of a Member State and employed in the territory of another Member State enjoy the same rights and privileges as nationals of that Member State with respect to the accommodation required by them, including the acquisition of a dwelling.

The rights of migration, as outlined in Article 39 ToA, can be restricted on the grounds of public order, public security and public health. Finally, the Treaty contains an exception, with respect to positions in government, which applies to both the abrogation of discrimination and the rights of migration. For sub-national authorities in their role as employer, it is of primary importance that the exception for employment in government is interpreted by the Court in a narrow manner. The exception only covers positions in government with a direct or indirect involvement in exercising public authority and those functions in which one has the responsibility to protect the interest of the state or that of the other public bodies. It follows that the rules of free movement of workers will apply to many functions within sub-national authorities.

The abrogation of discrimination in Article 39(2) ToA, makes clear that the government as employer cannot in this case require that the teacher to be appointed has the nationality of the Member State concerned. Such forms of direct discrimination are banned and that is self-evident. But according to the jurisprudence of the ECJ, the abrogation of discrimination has wider repercussions. The abrogation also includes conditions which are not based on a distinction between nationalities but nevertheless put subjects of other Member States at a disadvantage. An example of this was a provision by the Italian legislature which, without any reference to nationality, determined that employment contracts for foreign language teachers could be for a fixed period while this did not apply to other employees. According to the Court, this constituted a prohibited indirect discrimination. It will be clear that such forms of indirect discrimination in particular, which are not immediately obvious, may pose problems for sub-national authorities.

Article 7 of Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community provides for equality of treatment in respect of any conditions of employment and work for migrant workers that are EU citizens, in particular as regards remuneration, dismissal and, should workers become unemployed, reinstatement or re-employment. Where labour law is concerned migrant workers are subject to the legislation of the country of employment.

Council Directive 2000/43/EC of 29 June 2000 covers implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (“Race Directive”);

Council Directive 2000/78/EC of 27 November 2000 is about establishing a general framework for equal treatment in employment and occupation ("Equal Treatment Directive"). This directive put in place a general framework to ensure equal treatment of individuals in the European Union, regardless of their religion or belief, disability, age or sexual orientation, as regards access to employment or occupation.

2.9 Acquisition of land by foreigners

Although the legal provisions on property acquisition, sale and transfer do not constitute a separate matter under EC law, this legal issue is substantially affected by the fundamental freedoms of the EU and by the general prohibition of discrimination laid down in EC law (Art. 12 and Art. 13 Treaty of Amsterdam - ToA).

- To implement the right of establishment, Art. 44(2) ToA stipulates that every citizen of an EU Member State may acquire and use land in the context of the exercise of his/her occupation. According to the jurisprudence of the European Court of Justice (ECJ), the right of foreigners, who are also EU nationals, to acquire land does not only extend to production facilities but also to the private residence of the self-employed person established in another Member State.

- The free movement of workers enables workers from other EU Member States to acquire land in a Member State for the purpose of living there.

- Moreover, the capital movement Directive (88/361/EC), adopted to implement the free movement of capital, enables private citizens of any EU Member State to invest in real property in any EU Member State to the same extent as nationals of that Member State.

The free movement of capital, however, can cause problems for the Member States if - e.g. due to dramatic price differences or specific characteristics of the landscape - second homes begin to proliferate while the access to the real property market is limited for local population groups with inferior purchasing power, e.g. as a result of a possible price increase. For this reason, Member States have instituted provisions to regulate the acquisition of land by citizens of the Union for the purpose of establishing second homes. But it is prohibited to prevent the acquisition of land by citizens of the Union for the purpose of capital investment.

Within the scope of application of the EC Treaty, the general prohibition of discrimination under Article 136 ToA bans all forms of discrimination on grounds of nationality. This also comprises the so-called "hidden" discrimination which occurs if legal provisions are linked to conditions that can be regularly complied with only, or at least considerably more easily, by nationals. Therefore citizens of the Union legally entitled to stay in the territory of a Member State for a longer period of time (these

are retired persons and financially independent persons including their families under the 1990 "residence directives") can not be prevented from acquiring land in that Member State for their main place of residence. Restrictive provisions on land use - e.g. under regional planning concepts, building codes or land zoning and development plans - remain a national competence but must be applied equally to foreigners and nationals. This means that restrictions of second homes (must) apply both to citizens of the Union and nationals as stipulated by the prohibition of discrimination.

2.10 Legislation and framework conditions concerning Social Policy

2.10.1 Health and safety at work

Legislation in place mainly concerns local and regional authorities as employers (public administration, municipal utilities, and other services).

Relevant EU legislation in force:

- Council Directive 92/58/EEC of 24 June 1992 on the minimum requirements for the provision of safety and/or health signs at work.

- Protection against vinyl chloride monomers (DIR 78/610/EEC; OJ L 197 of 1978) - established atmospheric limit values, technical preventive measures and personal protection measures; this directive was partly changed by the Council Directive 92/58/EEC (as above) and the Council Directive 97/42/EC of 27 June 1997 amending for the first time Directive 90/394/EEC on the protection of workers from the risks related to exposure to carcinogens at work and the Council Directive 1999/38/EC of 29 April 1999 amending for the second time Directive 90/394/EEC on the protection of workers from the risks related to exposure to carcinogens at work and extending it to mutagens.

- First Framework Directive (DIR 80/1107/EEC; OJ L 327 of 1980) on protecting workers from all dangerous, physical, chemical and biological agents - consolidated in 1988 (DIR 88/642/EEC; OJ L 356 of 1988) - sets out limit values for exposure and requires employers to take preventive, protection and emergency measures, inform workers and monitor their health. This directive was changed by the Council Directive 88/642/EEC of 16 December 1988 amending Directive 80/1107/EEC on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work.

- Exposure to metallic lead and its ionic compounds (DIR 82/605/EEC; OJ L 247 of 1982) - sets out exposure limit values and imposes regular monitoring and clinical assessments of the workers exposed.

- Exposure to asbestos (DIR 83/447/EEC; OJ L 263 of 1983) - sets limits on the concentration of asbestos dust in the workplace and measures on the best way to avoid it; revised in 1991 (DIR 91/382/EEC; OJ L206 of 1991).

- Exposure to noise (DIR 86/188/EEC; OJ L137 of 1986) - sets out the maximum admissible level of sound emissions and the average acoustic pressure.

- Banning certain agents and work activities (DIR 88/364/EEC; OJ L 179 of 1988) - bans the production of four aromatic amines.

- 1989 Framework Directive (DIR 89/391/EEC; OJ L183 of 1989).

- Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace.

- Council Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work.

- The use of work equipment (DIR 89/391/EEC; OJ L 393 of 1989) - means that employers must take the necessary measures to ensure that the work equipment made available to workers may be used without impairment to their health and safety.

- The manual handling of heavy loads (DIR 90/269/EEC; OJ L156 of 1990) - lays down minimum health and safety requirements to reduce risks, especially of back injury, involved in the handling of heavy loads.

- Work with display screen equipment (DIR 90/270/EEC; OJ L156 of 1990) - sets out standards including requiring employers to test workers' eyesight and allowing workers' activity to be organised in such a way that the daily working time on a DSE includes regular breaks or changes in activity.

- Exposure to carcinogens (DIR 90/394/EEC; OJ L 196 of 1990) - sets out the obligation for the employer to use, whenever this is technically feasible, non-carcinogenic substitutes, imposes restrictions on access to places where carcinogenic agents are used, and describes measures for personal hygiene and protective equipment. This directive was changed by the Council Directive 97/42/EC of 27 June amending for the first time Directive 90/394/EC on the protection of workers from the risks related to exposure to carcinogens at work and the Council Directive 1999/38/EC of 29 April 1999 amending for the second time Directive 90/394/EEC.

- Directive 2000/54/EC of the European Parliament and of the Council of 18 September 2000 on the protection of workers from risks related to exposure to biological agents at work.

- Health and safety of temporary workers (DIR 91/383/EEC; OJ L 206 of 1991);

- Medical treatment on vessels (DIR 92/29/EC; OJ L 113 of 1992) - aimed at securing a minimum standard of medical care for seafarers, by for example listing the medical stores to be carried on board;

- Protection of pregnant women at work and women who have recently given birth (DIR 92/85/EEC; OJ L 348 of 1992);

- Organisation of working time (DIR 93/104/E**C**; OJ L 307 of 1993);

- Protection of young people at work (OJ L 216 of 1994).

- Council Directive 89/654/EEC of 30 November concerning the minimum safety and health requirements for the workplace.

- Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work.

- Council Directive 1999/38/EC of 29 April 1999 amending for the second time Directive 90/394/EEC on the protection of workers from the risks related to exposure to carcinogens at work and extending it to mutagens.

- Directive 1999/92/EC of the European Parliament and of the Council of 16 December 1999 on minimum requirements for improving safety and health protection of workers potentially at risk from explosive atmospheres.

- Commission Directive 2000/39/EC of 8 June 2000 establishing first list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC on the protection of health and safety of workers from the risks related to chemical agents at work.

- Directive 2002/44/EC of the European Parliament and of the Council of 25 June 2002 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (vibration).

- Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (“Construction Sites Directive”);

- Directive 95/63/EC of 5 December 1995, amending Directive 89/655/EEC concerning the minimum safety and health requirements for the use of work equipment by workers at work ("Amendment to the Use of Work Equipment Directive");

- Directive 2001/45/EC of 27 June 2001 amending Directive 89/655/EEC concerning the minimum safety and health requirements for the use of work equipment by workers at work ("Second Amendment to the Use of Work Equipment Directive");

- Directive 2003/10/EC of 6 February 2003 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) ("Noise Directive");

- Directive 2004/40/EC of 30 April 2004 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) ("Electromagnetic Fields Directive – EMF Directive");

- Directive 2004/37/EC of 29 April 2004 on the protection of workers from the risks related to exposure to carcinogens or mutagens at work ("Carcinogens Directive").

Relevant legislation action under consideration:

- Transport activities and workplaces on means of transport (OJ C 294 of 1993) - covers minimum health and safety requirements and working conditions on board of all means of transport.

- Mobility and safe transport of workers with reduced mobility (OJ C 15 of 1992).

2.10.2 Equal opportunities

- The Directive on Equal Pay (DIR 75/117/EEC; OJ L45 of 1975) creates the obligation to apply the principle of equal pay for the same work at piece rates calculated on the basis of the same unit of measurement and equal pay for work at time rates for the same job.

- The Directive on the principle of equal treatment for men and women as regards access to employment, vocational training and working conditions (DIR 76/207/EEC; OJ L39 of 1976) states that equal treatment means the absence of any discrimination on the grounds of a person's sex, including indirect discrimination based on marital or family status.

- Directive 2002/73/EC of 23 September 2002 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions ("Equal Treatment Amendment Directive");

- Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security ("Equal Treatment Directive – Social Security");

- Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood ("Equal Treatment Directive – Self-Employed Persons");

- Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes ("Occupational Social Security Directive");

- Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes ("Amendment Directive to Occupational Social Security Directive);

- Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex ("Burden of Proof Directive"); scope extended by Council Directive 98/52/EC of 13 July 1998 ("Extension of Burden of Proof Directive");

- Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC ("Parental Leave Directive"); scope extended by Council Directive 97/75/EC of 15 December 1997 ("Extension of Parental Leave Directive");

- Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

2.10.3 Social security, pension and retirement

Article 141 of the Treaty of Amsterdam, which established the principle of equal pay, covers not only wages and salaries, but also overtime, bonus payments, sick pay and benefits payable through occupational pensions. The EU has undertaken considerable work relating to equal opportunities in the area of pensions, social

security and retirement. Relevant legislation includes the Directive on Equal Treatment in Statutory Social Security Schemes (DIR 79/7/EEC; OJ L6 of 1979) and the Regulation (EEC) No 1408/71 of the Council of 14 June 1971 of the application of social security schemes to employed persons and their families moving within the Community (a regulation is directly applicable to the member states).

This regulation is applicable to all acts of law concerning social security, payments for sickness and motherhood, payments for disability and for payments which aim to improve or support the ability to work. It is also applicable for payments for retired people, for survivor's pension, payments in the case of work accidents and work diseases, death grants and unemployment benefits. The regulation coordinates the different systems for social security in the member states to ensure that all employees and self employed persons have the same rights in different member states.

Whilst EU law permits Member States to operate differing ages of retirement for men and women, the European Court of Justice (ECJ) has established that all women employed in the public sector have the right to retire at the same age as the men with whom they work. Furthermore, the UK Government has proposed that the pension age should be equalised at 65 from the year 2010. In the Marshall Case, a woman had been head dietician with the Southampton and South West Hampshire Health Authority for over 13 years, when she was dismissed in 1980 at the age of 62. The ECJ ruled that the dismissal was made entirely on the grounds that she was beyond the normal retirement age for women (60) and amounted to sexual discrimination. Mrs Marshall was awarded compensation. This case confirmed that an employer contravenes the 'Equal Treatment' Directive when setting different retirement ages for male and female workers. Furthermore, state sector employees can rely upon this legislation to counteract such discrimination (Case 152/84 1986; OJ C79 of 1986).

Directive on the protection of pregnant women at work and women who have recently given birth (DIR 92/85/EEC; OJ L 348 of 1992). It established a minimum 14 week period of leave, the right to time off for ante-natal examinations and the prohibition of dismissal on the grounds of maternity. It therefore gives all British women the right to 14 weeks' leave regardless of their length of service, in addition to the longer period of absence (up to 29 weeks after the baby is born) for those who have two years' service. It also specifies that pregnant women should not be exposed to certain dangerous substances.

The Directive on parental leave (DIR 96/34/EC; OJ L 145 of 1996) was adopted by the Council of Ministers in 1996. Workers of both sexes are guaranteed a minimum of three months unpaid leave to care for young children up to the age of eight. Similarly, workers may take time off for 'urgent family reasons in cases of sickness or accident'.

2.11 Framework conditions concerning local and regional finances

With regard to this point it has to be noted that the public sector, which is the actual payer of the EU membership fee, gets back only a small part in terms of structural funds and other funding schemes. It is particularly the agricultural sector or subsidised industrial enterprises which benefit from the greater part of EU funds. In addition local and regional authorities have to muster considerable funds for modernising their infrastructure and administration in order to comply with EU law. Furthermore, it has to be mentioned that EU subsidies must be supplemented by national, regional and local funds (co-financing), which puts even more strain on public finance.

2.11.1 Effects related to local taxes

Basically, the 6th VAT Directive (91/680/EEC) and the consumer-tax system directive are of importance for local and regional authorities, depending on local and regional tax systems, since these instruments prohibit the levying of similar charges or give only a narrow leeway for such charges. It is of great importance, that those municipal charges, where the slightest doubt exists about their compliance with Community Law, must be carefully checked not only with the negotiation representatives of the European Commission but also be incorporated in the Accession Treaty.

2.11.2 European Monetary Union (EMU)

This part of the EU acquis communautaire is also binding for the countries accessing the EU. In general, the accession to the European Union does not mean necessarily the accession to EMU. After joining the EU they can at the earliest enter EMU after 2 years, this requires the fulfilment of the Maastricht Criteria.

These criteria ensure the stability of the Euro. That means that the applicant countries expected to fulfil these criteria within a couple of years after the accession to the Union to be able to join the Monetary Union as well.

The term "public deficit" comprises the budgets of central government as well as local and regional authorities and some other public institutions, such as social security funds. This means that if the public deficit is to be reduced, local budgets will be affected as well. So local and regional governments of those countries participating in the EMU will be directly affected by the public deficit criteria and the conditions of the stability pact concerning public debt as well as by the requirements for the introduction of the Euro.

2.12 Legislation concerning local elections

Article 19 of the Treaty of Amsterdam (invented in Maastricht 1992 as Article 8b) establishes Union citizens' right to vote and stand as a candidate in municipal elections. Substantively, Article 8b does not aim at harmonising the legal provisions of the individual Member States; it rather intends to eliminate existing legal obstacles and reservations on local or national level. On the basis of the principle of equal treatment of all Union citizens, Article 19(1) ToA states that "every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State".

The provision of Article 19 ToA contains the two classic preconditions for the exercise of the active and passive right of vote: nationality and residence. The important new "European" element lies in the fact that the concept of nationality is indirectly separated from that of the national state and lifted to a Union level. Thus the actually determining element is no longer nationality of an individual Member State but rather citizenship of the Union. However, nationality of a Member State is still the prerequisite for holding Union citizenship.

The details for the implementation of the provisions contained in Article 19 ToA were laid down in 1994 in a separate directive outlining detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals (directive 94/80/EC of 19 December 1994). This was to become national law in all Member States by January 1st, 1996 at the latest.

The directive contains the following principles:

- The provisions of the directive only refer to municipal, not to regional or national elections.

- The right to vote and stand as a candidate is voluntary, i.e. it depends on the Union citizen's own initiative whether he/she is entered into the respective voting list or not. For this purpose, the Member State of residence shall inform all persons entitled to vote and stand as candidates in due time and in a suitable manner about the conditions and details of exercising their right of vote in municipal elections.

- The conditions for exercising the right of vote should be the same for non-nationals as for nationals of the country in which the elections take place (principle of equal treatment of nationals and non-nationals). This refers in particular to a possibly prescribed minimum duration of residence in the municipality in which the elections take place.

- The national state's provisions concerning its own nationals are not affected, in particular if these reside outside the territory of their Member State of origin. This permits "parallel voting", i.e. citizens of the Union may participate in municipal elections in their Member State of origin despite being residents of another Member State, in which they likewise are entitled to vote and stand as candidates in municipal elections.

- Under the directive, the right of vote in municipal elections for citizens of the Union is to be implemented in the context of territorial authorities of the lowest level. In keeping with the national legal provisions, these territorial authorities of the lowest level must dispose of organs elected in general, direct elections and have competence for the independent administration of local affairs at the lowest level of political and administrative organisation.

Inter alia, this led to the municipal right of vote being also implemented at the district level, e.g. in the German "city-states" Hamburg and Berlin, as well as in Vienna, which is both municipality and Land and where many municipal officials are at the same time officials of the Land Vienna.

In addition to the right to stand as a candidate in direct elections for the European Parliament, the right of citizens of the Union to participate in municipal elections is regarded as a clear and evident element of the development of the European Union towards a "political" Union and may certainly be viewed as an important step towards the "Europe of citizens".

2.13 Legislation and framework conditions concerning structural funds and regional policy

The forthcoming enlargement of the EU is remarkable for the socio-economic problems of the applicant countries and the fact that the essential structural policies are virtually or completely non-existent. This means that, as in the new German Länder, Community assistance will go hand-in-hand with the introduction of these policies. However, by contrast with the situation in the new Länder and previous rounds of enlargement, for the first time specifically targeted structural aid will be granted to the future Member States before their accession (pre-accession aid).

Regional and local government are vital for regional development, particularly in support for small businesses, local development schemes and the establishment of partnership. Yet progress with regard to decentralisation in CEE Countries is low and communication between central and local government or with regional government, where existent, is usually not very developed.

Most Accession Countries will need to strengthen project development and management capacity to be able to absorb increased pre-accession aid and to

prepare for their participation in the Structural Funds. They also have to involve regional and local authorities, which currently lack the necessary fund and technical experience, to absorb and manage structural funding and to build up a partnership culture. In order to positively contribute to this process, local and regional authorities in Accession Countries need training and preparation as much as central government.

The EU has already established various programmes to assist the candidate countries in their preparation for an EU-membership; the main programmes within the so called pre-accession aid are the following:

2.13.1 EU Pre-Accession Aid: ISPA, SAPARD and PHARE 2000

The EU decided to set up (by 1st January 2000) three pre-accession funds to co-finance accession-related projects as part of Agenda 2000 (the political and financial reform package for the years 2000 - 2006). These funds support projects in the candidate countries dealing with transport and environment (ISPA), agriculture (SAPARD) and on other membership-oriented projects, mainly institution building (PHARE). These three instruments do provide the ten candidate CEECs with 3,12 billion Euros per year, i.e. a total of around 22 billion Euro between 2000 - 2006. The Commission decided an indicative allocation for ISPA and SAPARD, while the national PHARE programmes are being approved separately.

The candidates have to come up with appropriate, well prepared projects that are not only in line with the respective guidelines but also with both the priorities of the Accession Partnerships (AP) and the National Programme for the Adoption of the Acquis (NPAA). Well prepared projects are a prerequisite for a successful participation in the pre-accession aid programmes of the European Union.

The Accession Partnerships provide a single framework for the programming of the priorities of each candidate country and the programming of the financial means available to implement those priorities.

Thus, no more than 20 pages in length, the APs aim to mobilise all forms of EU support within a single framework for each country. The APs are multi-annual and will last until accession. Each country’s AP is completed by its own National Programme for the Adoption of the Acquis (NPAA). For its part, the NPAA gives details of each country’s commitments with regard to achieving the Copenhagen Criteria and adopting the acquis communautaire. In this way, the NPAA complements the AP: it contains a timetable for achieving the priorities and objectives and, where possible and relevant, indicates the human and financial resources to be allocated.

2.13.2 ISPA - Instrument for Structural Policies for Pre-Accession

This aid is mainly directed towards aligning the applicant countries on Community infrastructure standards, particularly in the transport and environmental sector and therefore finances major environmental and transport infrastructure projects. Thus, ISPA has an annual budget of 1.040 million Euro. ISPA is under the responsibility of former DGXVI, now DG Regional Policy.

Projects have to have a minimum financial volume of 5 million Euros, although some smaller projects could be combined to a bigger one. ISPA is funding a maximum of 75 percent of a project. Council Regulation 1267/1999 EC of 21st June 1999 establishing an Instrument for Structural Policies for pre-accession is the legal basis.

2.13.3 SAPARD - Special Accession Programme for Agriculture and Rural Development

SAPARD aims to help candidate countries deal with the problems of the structural adjustment in their agricultural sectors and rural areas, as well as the implementation of the aquis communautaire concerning the Common Agricultural Policy (CAP) and related legislation. SAPARD has come into effect on January 1st, 2000, and is budgeted until 2006. Thus, SAPARD finances major agricultural and rural development projects and has an annual budget of 520 million Euro. SAPARD is under the responsibility of former DGVI, now DG Agriculture.
The legal basis is Council Regulation 1268/1999 EC of 21st June 1999 on Community support for pre-accession measures for agriculture and rural development in the applicant countries of Central and Eastern Europe in the pre-accession period. However, candidate countries may only benefit through SAPARD until they join the Union.

SAPARD is the first programme for the accession countries which is completely decentralized. By decentralising the management to the candidate country, SAPARD gives a future Member State an opportunity to gain valuable experience in applying the mechanisms for EU funds, and to obtain the benefits of a rural development programme. Therefore the implementation of the SAPARD programme in the accession countries is linked to the condition that the candidate countries must have their SAPARD Agency accredited.

Finally, Council Regulation 1266/1999 EC of 21st June 1999 on co-ordinating aid to the applicant countries in the framework of the pre-accession strategy and amending Regulation 3906/89 EEC has to be mentioned here.

2.13.4 PHARE Programme

In Agenda 2000, the European Commission proposed to focus the Phare Programme on preparing the candidate countries for EU membership by concentrating its support on two crucial priorities in the adoption of the acquis communautaire: Institution building and investment support.

Institution building helps CEEC to reinforce their institutional and administrative capacity, developing structures, human resources and management skills. Administrative and technical expertise is made available to the candidate states mainly through Twinning at national level. About 30 percent of the annual budget of the PHARE programme, about 500 million Euros could be used for measures within the institution building scheme. About 70 percent are used to improve the legal system as well as to foster the economic and social cohesion and therefore to make the implementation of the acquis communautaire in the candidate countries easier.

2.14 Framework conditions concerning consumer protection

An area requiring particular consideration is public health which, following the Amsterdam Treaty, now acquires a new prominence in European affairs. Local authorities are typically enforcement bodies, monitoring compliance and taking enforcement action where appropriate. Local authority environmental health officers are usually responsible for enforcing food safety and hygiene legislation.

Several Member States have a strong tradition in public health analyses and actions, e.g. Scandinavia, whereas others have a poor understanding of these issues. Already within the EU Consumer, protection is still far from meeting the acquis communautaire.

With the enlargement of the EU, there needs to be a new emphasis on public health because there is a very large number of structural factors which have a major impact on consumer health and well-being, e.g. water, sanitation, housing, industry, transport, local planning and other environmental policies which have received too little attention in relation to health.

Local authorities are very important information providers: as the enforcement of food law is often entrusted to local authorities, local and regional authorities carry out inspection services and usually have the necessary powers to enforce regulation and to take appropriate measures in case of hazard to public health or non-conformity with legislation.

There remains, however, confusion about the exact scope and objectives of consumer policy. This, in part, explains difficulties in the effective enforcement of

consumer laws. Other factors which need to be addressed include a lack of expert staff, organisational deficits, and a lack of sensitivity to consumer questions.

In the field of food safety, a regulation establishing the basis for a European Food Safety Authority was adopted by both, the Commission and the Council on 28th January 2002. This authority is still starting its operation and will provide procedures in matters of food safety. After years of food scandals like Dioxine poultry and mad cow diseases, it was of priority for the Union to prevent these problems and to install a kind of early warning system in this area.

2.15 Legislation and framework conditions concerning transport

Since transport is the backbone of the internal market, it is of particular importance for the EU and the effects of enlargement on this sector will be considerable. Given that in the EU in 1996 some 87 per cent of total passenger transport was carried out on land, the bulk of this in private cars, and some 75 per cent of freight transport by land, with road transport taking 58 per cent of the total, we can already see the impact this policy field will have on the regional and local situation. As neither the transport infrastructure nor the environmental impact of road transport is the subject of this overview, we will stick to the purely legislative impact of the transport acquis communautaire.

Apart from granting transit rights regional and local authorities will be confronted with the need to enforce European regulations in the following areas:

- Public service: liberalising market access (see public procurement), public service obligations, and State Aid (cross subsidising).
- Road safety (registration signs, driving licenses, use of safety belts, roadworthiness of vehicles, transport of dangerous goods).
- Social legislation for drivers (regions/local authorities as employers of municipal utilities) and harmonisation of professional standards.

Most important legislation with relevance for local/regional authorities:

- Council Regulation (EEC) 881/92 of 26th March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States. Common rules for access to the Community international road freight transport markets, where principles of freedom, non-discrimination and equality of conditions in service provisions are valid. International carriage of goods by road is based on a quota-free Community transport authorisation.

- Council Regulation (EEC) No 3820/85 of 20th December 1985 on the harmonisation of certain social legislation relating to road transport. Any driver of a vehicle used for the carriage of passengers or goods by road within the Community, is subject to certain general exemptions and derogations which Member States may introduce.

- Council Directive 88/599/EEC on standard checking procedures for the implementation of Regulation (EEC) no. 3820/85 on the harmonisation of certain social legislation relating to road transport and Regulation (EEC) no. 3821/85 on recording equipment in road transport. Establishes uniform minimum requirements for checking. Since August 25th, 2002, consolidated version available.

- Council Directive 96/26/EC of 29th April 1996 on admission to the occupation of road haulage operator and road passenger transport operator and mutual recognition of diplomas, certificates and other evidence of formal qualifications intended to facilitate for these operators the right of freedom of establishment in national and international transport operations. Tightens the standards for access to the profession and harmonises the application of the three qualitative criteria – good repute, financial standing and professional competence.

- Council Directive 76/914/EEC on the minimum level of training for some road transport drivers. Mutual recognition of training and the appropriate national driving licences. Legislative Act: Directive 2003/59/EC of the European Parliament and of the Council on the initial qualification and periodic training of drivers of certain road vehicles for the carriage of goods or passengers, amending Council Regulation 3820/85/EEC and Council Directive 91/439/EEC and repealing Council Directive 76/914/EEC.

- Council Regulation (EEC) no. 1191/69 of 26th June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (Council Regulation (EEC) no. 3572/90 (OJ L 353 of 17.12.90).

- Council Regulation (EEG) no. 1893/91 (OJ L 169 of 29.6.91). Eliminates disparities causing distortion in competition conditions, regulating public service obligations and minimising scope for cross-subsidising.

- Council Directive 93/89/EEC of 25th October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures. Regulates road tolls and user charges.

- Council Directive 96/53/EC of 25th July 1996 laying down the maximum authorised dimensions in national and international traffic and the maximum authorised weights in international traffic for certain road vehicles circulating within the Community. Gives certain technical specifications for operating road vehicles in passenger and freight transport.

- Council Directive 91/439/EEC of 29th July 1991 on driving licenses. Facilitates recognition of driving licences and the movement of persons settling in another Member State without passing a new driving test, harmonisation of categories of vehicles, prescribing minimum requirements for obtaining the licence, specific provisions for handicapped persons.

- Council Directive 91/671/EEC on the approximation of the laws of the Member States relating to compulsory use of safety belts in vehicles of less than 5 tons. Harmonising the compulsory use of safety belts in the Member States.

- Council Directive 96/96/EC of 20th December 1996 on the approximation of the laws of the Member States relating to roadworthiness tests for motor vehicles and their trailers. Aiming at similar safety and competitive conditions, it lists categories of vehicles to be tested, defines the frequency of tests and the items to be tested.

- Council Directive 94/55/EC on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road.

- Council Directive 95/50/EC of 6th October 1995 on uniform procedures for checks on the transport of dangerous goods by road.

2.16 Legislation and framework conditions concerning police and judicial co-operation

In Agenda 2000 the Commission concluded that some of the central challenges of accession lie in the field of justice and home affairs, especially in the areas of asylum policy, organised and serious crime and the establishment of freedom of movement.

The ongoing creation of an area of freedom, security and justice within the borders of the EU, impacts mainly upon regional and local authorities with competencies in home and justice affairs (e.g. the interior and judicial ministries of the German and Austrian Bundesländer) and as well as policing (most local authorities).

The Commission considers the existence of organised crime and the related corruption to be a particular problem. Combating organised crime and corruption therefore features as a further priority in the accession partnerships. Another problem

in the view of the Commission is the inefficiency and ineffectiveness of the relevant institutions (police, justice, border surveillance) in the majority of applicant countries.

Since the Schengen 'acquis' has been integrated into the framework of the European Union at Amsterdam (Treaty of Amsterdam), this 'acquis' as well as further measures taken by the institutions relating to the free movement of people must be accepted in full by all applicant countries. This means in principle that on accession the free movement of persons between the joining countries and the Member States that are a party to Schengen co-operation (at present all except for the UK and Ireland) should be a reality.

This places a particular challenge to the establishment of effective structures on national, regional and local level, particularly for combating organised crime, money laundering, drug-trafficking and terrorism. According to the latest progress reports, the applicant countries have displayed clear evidence of problems in this area. They are major fields of activity for organised crime and some are transit countries for international drug-trafficking and/or drug-producing countries. Since the restructuring of the PHARE Programme the area of justice and home affairs has become an explicit priority in connection with the consolidation of democratic institutions and of public administration.

2.17 Final considerations

With the country's accession to the EU local as well as regional authorities must take account of yet another, new dimension of Community law in their administrative activities. For local/regional authorities, this means an increasing volume of accounting and reporting duties, both in terms of additional study of EC law and necessary adjustments vis-à-vis the EC legislative level. However, this does not change much in the purely formal management of administrative action: as with national law, EC law is implemented and enforced through the national structures and according to the national division of competencies. For the local level, potential problems resulting from accession are likely to arise from the fact that additional actors are involved in the decision-making process, which means that more lobbyists than before participate in the formal and informal negotiation and bargaining processes.

In this context, it is an important learning process leading local/regional authorities to realise that measures taken by them in their own field and using their own funds, e.g. the promotion of local business, may only be implemented when respecting the Community competition rules and must usually be approved in advance. This applies not only to subsidies in cash, but also to other measures, such as the provision of subsidised land for industrial enterprises. It therefore entails a restriction of local authorities' autonomy regarding economic policy, with the aim of preventing distorted competition in the Community.

Generally speaking, it has to be accepted that the European Union as a supranational organisation restricts the leeway for action of national, regional and local authorities in very many areas, so that the parties concerned must learn to act in keeping with this new situation.

In the view of all these manifold impacts of EU accession at local and regional level, it has to be pointed out very clearly, as already done in the Final Declaration of the LOGON-Conference "European Union Enlargement - A Challenge For The Local Level", held in the Vienna City Hall on February 25th - 26th, 1999, that "the national governments of the accession countries provide for a direct and active involvement of their regions and local authorities in the integration process as soon as possible, and that the European Union, too, ensures that the concerns of regions and local authorities in the accession countries be appropriately taken into consideration."

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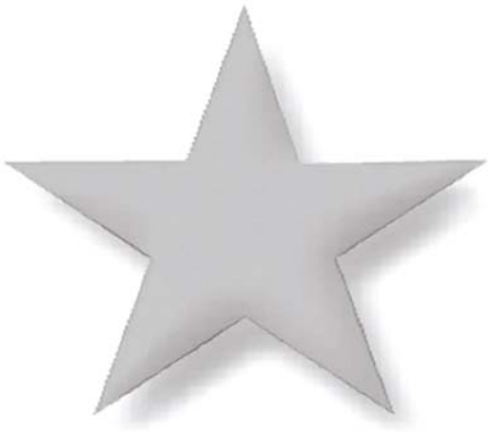
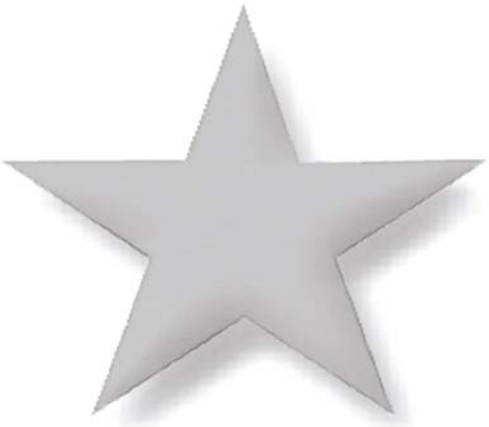
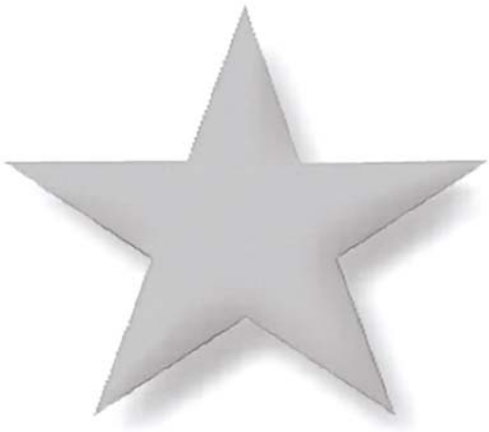


CHAPTER II

Services of General Interest – Current developments





1 The future of Services of General Interest (SGI) in an enlarged Union

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1.1 Introduction

The LOGON Report 2002 tried to figure out, in which direction the discussion on SGI would develop within the European Union. More specific, the question seemed of prime importance, whether Europe was to copy the American Model of Society or maintain its own accomplishments in a world of globalising markets. Unlike the US, the European Model of Society could be described as based upon principles like social coherence and sustainable development. These principles are expressed best by the idea of SGI, which follow rules that are different from the mechanisms of the free market. Security of supply, continuity, social price policy, health and sustainability are the relevant criteria to be considered. The aim to complete the European single market and to abolish all obstacles to fair trade between Member States put a lot of pressure on the provision of these services recently. The financial compensation of public services is frequently regarded as being in contradiction with State Aid rules and the prohibition to distort competition. Meanwhile many initiatives have been launched on a European level in the field of SGI. Several rulings of the European Court of Justice contributed substantially to the ongoing debate. At the beginning of 2005 the mid-term evaluation of the Lisbon Strategy suggested that all relevant targets of the Union for 2010 are out of reach. Even after so many years of discussion the struggle for the future of SGI does not seem to be decided in the one or the other direction. Whatever the outcome will be, the board is now set, the pieces are moving.

1.2 The European Policy Approach

In the follow-up of the conclusions of the Lisbon Council in June 2000 the European Commission continued its policy to stimulate and facilitate the opening of certain public utility sectors to more competition:

- On 26 July 2000 the Commission submitted a proposal for a regulation of the European Parliament and the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway (COM (2000) 7 final). In principle, this draft regulation intended to impose compulsory competitive tendering on competent authorities for the award of exclusive rights in public transport.

- On 29 April 2003 the Commission submitted the EU offer of the General Agreement on Trade in Services (GATS) to the World Trade Organisation (WTO) on behalf of the Member States. The EU's offer contained no commitments in the field of public services.

- One month later, the EU requested 72 other WTO members within the GATS talks to open up their water markets to European businesses.

- On 7 May 2003 the Commission published a communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions concerning the priorities 2003-2006 of the Internal Market Strategy (COM (2003) 238 final). Here, the Commission for the first time openly laid down its intention to assess the role competition plays within the water sector in the Member States. If necessary it announced to propose a new and better regulatory framework for the water sector.

- On 21 May 2003 the European Commission presented a Green Paper on Services of General Interest[1], continuing the debate on the liberalisation of the water sector (COM (2003) 270 final). Main focus of the Green Paper was to get a more general view on how to proceed with the legal framework on SGI. Above all the question was raised, whether a Framework Directive would bring more legal safety and clarity to the debate and thus be beneficial to the protection of SGI. The feedback on the Green Paper was enormous – almost 300 position papers were returned to the Commission, many rejecting the sector approach for further liberalisation of public services.

- One year later, on 12 May 2004, the Green Paper was followed by a White Paper of the European Commission on Services of General Interest[2]. However it did not contain a specific proposal for a Framework Directive on SGI. Instead, the White Paper stated the Commission's intention to proceed with the approach of sector specific liberalisation. Consequently a Communication was announced both for the water sector and the social and health services within the Union.

1 Commission Green Papers are documents intended to stimulate debate and launch a process of consultation at European level on a particular topic. These consultations may then lead to the publication of a White Paper, translating the conclusions of the debate into practical proposals for Community action.

2 Commission White Papers are documents containing proposals for Community action in a specific area. In some cases they follow a Green Paper published to launch a consultation process at European level. When a White Paper has been favourably received by the Council, it can become the action programme for the Union in the relevant area.

- In October 2004 the Social Protection Committee of the Council addressed a questionnaire to the Member States in order to assess the ways social and health services are organised and function there.

Besides this sector specific approach to liberalise SGI, the European Commission has been pushing strongly for a liberalisation of the services sector across the European Union since the beginning of 2004:

- On 19 January 2004 the Commission launched a proposal for a directive of the European Parliament and the Council on services in the internal market (COM (2004)2 final). This "Draft Services Directive" aimed at abandoning all administrative burdens for cross border services by introducing the so called "country of origin" principle as the guiding idea.

  According to the country of origin principle all service providers shall be free to deliver a service within the Union in line with the rules and regulations of the home country. With regard to social and environmental standards, control of provision and SGI the Draft Services Directive poses a lot of yet unsolved questions. Following its own logic, the Draft Services Directive does not list sectors or sub-sectors of services, but rather follows a horizontal approach of liberalisation:

  It shall therefore be applicable to all services that are not explicitly exempt from its scope or the country of origin principle. One of the main concerns is that the country of origin principle would lead to up to 25 different service standards in the Union and thus result in a contradictory situation to the idea of a single market (with harmonised minimum standards). Many Member States, NGO's and stakeholders fear that the issuing of this horizontal legal proposal will lead both to lower quality, lower environmental and social standards in the services sector and to a decrease of legal safety for consumers.

  From the perspective of public services the problem of this draft is that SGI are not excluded from its scope. This is irritating both with regard to the importance SGI play for the European model of society and the continuing sector specific liberalisation policy approach of the Commission.

For the negotiations on the international level it has to be mentioned that the General Agreement on Trade in Services (GATS) within the World Trade Organisation (WTO) does not exempt SGI from its scope. This results from a general lack of understanding why public services should be treated differently from other services sectors. By definition, the GATS is a legal instrument encouraging an ever ongoing process of further liberalisation in services through regular consultations and negotiations. The agreement is based upon guiding principles similar to the ideas of

the Common Market within the EU. These are e.g. transparency, non-discrimination, proportionality and the principle of the "most favoured nation". The principle of the most favoured nation means that a WTO Member State must apply the same advantages to all WTO Members that have been granted to one trading partner.

Basically the negotiation process is a step by step approach between the GATS Member States towards abandoning barriers in the services market. The negotiation results are finally being fixed formally within so called "lists of specific commitments" for each Member State. These lists are an integral part of the individual obligation and are therefore legally binding. One problem with commitments in the GATS is that they are virtually irreversible: If a Member State wishes to step back from a commitment laid down in the lists, it can do so only after a period of three years and by offering compensation to the other trading partners. This could either be in financial terms or by opening other services sectors or sub-sectors to further competition instead. A policy shift from liberalisation back towards public utility services is thus very difficult to perform. This is also the case when empiric data suggest a different policy approach to be more advantageous to the economic development of a Member State. In the field of SGI many examples show the bad consequences of the liberalisation process. The GATS suffers from a lack of flexibility to react proportionally and quickly to these newly encountered experiences. Critics speak in this respect of a "one way road towards more liberalisation".

So far the EU has been showing a rather offensive position in the GATS negotiations. As mentioned above it requested a further liberalisation of the water sector vis-à-vis 72 other WTO member states (many of which are being grouped among the list of "least developed countries"). During the sessions to prepare the new offer earlier this year several Member States like Sweden, the UK, Belgium and Austria asked the Commission in writing to withdraw the request dating from May 2003 with regard to the water sector. In spite of this demand the Commission's position remained unchanged. The next WTO round of ministers is foreseen for December 2005 in Hong Kong.

1.3 State of the art in some sectors of SGI

1.3.1 Public transport

After its first proposal of 26 July 2000 to open public passenger transport to competition, the Commission faced a lot of resistance and critical debates across the EU. In the follow-up of a series of failures and bad experiences with liberalisations in the UK and elsewhere, increasingly more stakeholders doubted that the general aim to open public services sectors to competition would turn out to be beneficial for Europe. In public transport first effects could be seen in daily life of what can happen, if things go wrong. It were the metropolitan cities together with a large number of local and regional authorities and public undertakings that – for the first time in the

liberalisation debate – loudly asked for measures to maintain a high quality level, universal access for all citizens, continuity, security of supply and sustainability for these services. 486 amendments before the first reading in the European Parliament in November 2001 added up in delaying a rushed political decision in favour of liberalisation. One of the key positions of the European Parliament was to maintain the political decision, whether to keep transport services in-house or put them to public tender, on the level of the competent authority. This argument follows from a proper understanding of the principle of subsidiarity in Art. 5 EC. In February 2002 the Commission published an amended proposal for a regulation to liberalise public transport. It took into account some demands of the Parliament. However, it did not respect the Parliament's wish for a free choice of will. Up to now the Council of Ministers has not agreed upon a common position. The adoption of a position of the Council is indispensable for the further law-giving process on the European level. For a couple of months a third amended proposal has been circulating within the institutions unofficially. After its formal adoption and publication by the European Commission it still has to be approved by the Council and – in second reading – by the Parliament. It seems unlikely that a successful adoption of a new proposal in public transport will be possible by the end of the Austrian Presidency in June 2006.

1.3.2 Water

Liberalisation of the Water Sector – finally abandoned or only postponed?

The debate on the liberalisation of the water sector was started on European level about two years ago. More precisely the European Commission announced in a communication of 7 May 2003 concerning the priorities 2003-2006 of the internal Market Strategy to examine the competitive capacity of the water sector in EU-Member States and - if necessary - to adopt legal measures promoting liberalisation. The document argues that there is scope for improvement in the performance of the European water sector, particularly in pricing, environmental and health terms. Increased competition would lead to lower water prices and greater efficiency and transparency.

In the Commission's "Green Paper on Services of General Interest" of 21 May 2003 the discussion about the liberalisation of the water market continued. The Member States understood that the European Commission was getting down to business with the idea of liberalising the water sector. The questionnaires, sent to the Member States in June 2003 containing detailed questions regarding the water supply, confirmed this assumption.

The European water liberalisation plans meet with strong resistance of numerous cities in Europe who want to maintain their right to decide whether to provide water services themselves or to put them out to tender: As seen below, 18 cities (Amsterdam, Athens, Barcelona, Berlin, Bratislava, Brno, Brussels, Frankfurt,

Leipzig, London, Luxembourg, Madrid, Munich, Paris, Rome, Sofia, Stuttgart and Vienna), following an initiative of the Mayor of Vienna, adopted a resolution on 19 February 2004 on maintaining Services of General Interest in Europe, rejecting the liberalisation of the water sector.

Not only cities but also regions, local authorities and stakeholders raised objections to the idea of liberalising the water market. Their main arguments are as follows:

- Water is a natural monopoly. Water supply requires high investments in pipes and pumps (sunk costs) which cannot be left to the private sector. Measures to abandon this monopoly will lead to higher prices which have to be finally paid by consumers.

- Liberalisation of the water market has failed in the past: As examples from England, Wales and France show, liberalising the water sector results in a deterioration of quality and efficiency and in a loss of know-how and jobs.

- Efficiency of water supply is measured in terms of water pipe leakage. Statistics show that in countries where the water sector has been opened to the market (like in England, Wales and France) the rate of leakages is distinctly higher than in Austria.

- Diversity in the organisation of the water-supply sector in Europe is a sign of the principle of subsidiarity enshrined in the EU and EC treaties.

- Environmental control measures become more complicated.

In the past the European Parliament has shown to be a major ally for cities, municipalities and regions, proved in the following documents:

14 January 2004: In the Resolution on the Green Paper on Services of General Interest the European Parliament made clear that water and waste services should not be subject to EU sectoral directives.

11 March 2004: In the Resolution on the Commission's Internal Market Strategy Priorities 2003-2006 the European Parliament again rejected the liberalisation of the water sector.

The Commission however prepared a White Paper on Services of General Interest (12 May 2004) in which it announced the evaluation of the water sector in a separate communication to be published by the end of 2004.

In a Eurobarometer survey on the “liberalisation of water” published by the European Commission in August 2004, a clear majority of EU citizens refused the liberalisation of the water market.

In November 2004 the Commission’s Euromarket project was sent to the EU Member States. The main task of this report was to analyse liberalisation scenarios in order to determine the extent to which competition in the water supply and sanitation sector is possible. The annex of the report provides a broad overview of the institutional arrangements regarding to the water sector in each Member State.

The announced deadline for the communication was postponed several times until Commission’s experts declared in a hearing in Vienna in April 2005 that the communication will not be published. After the examination of the questionnaires sent to the Member States, the Commission concluded that there is no need to adopt legal measures in the field of the water market. The experts emphasised that the Member States maintain their right of self-determination. There will be no compulsory competitive tendering in the water sector, they said. Only if the Member States themselves have already made efforts to contract out their water supply and sanitation tasks, European public procurement law applies.

It seems that the European Commission postponed the idea of liberalising the water sector. Time will tell if the Commission really abandoned it.

1.3.3 Social and health services

Social and health Services of General Interest within the European Union - a new target of Commission’s liberalisation plans?

An increasing importance of the social and health sector across European countries has been observed over the past years. This is mainly due to an aging population, a radical change of family patterns, a demographic alteration and a rising demand. For that reason nearly all Member States have to face a growing pressure on health service budgets. Against the background of this development, the question came up which measures could be taken on a European level to maintain the high quality standards of these services.

Within the European Union, public health and social services fall in the competence of the Member States. However, the European Union coordinates some activities in the development of social and health protection.

In the White Paper on Services of General Interest, the Commission considered to develop a systematic approach to identify and recognise the specific characteristics of social and health Services of General Interest. For these purposes the Commission announced to adopt a Communication in the course of 2005. In autumn

2004 a questionnaire prepared within the Social Protection Committee was addressed to EU Member States in order to clarify the framework in which social and health services operate.

A first feedback document in March 2005 gave a broad overview of the organisational, legal and political structure of social and health services in the Member States. The typical providers of social and health services are public authorities supported by voluntary organisations. In some Member States (e.g. the Netherlands) also the private sector plays an important role, e.g., in the long-term care facilities. It turned out that a wide range of social and health services exist, including benefits of social insurance, public welfare, charitable social services, independent voluntary and self-help organisations, support of old and handicapped people or assistance to citizens without means. Most of the replies to the questionnaire point out that social and health services are part of the European social model.

The following specific characteristics of these services are underlined by the Member States:

- The goal of social and health services is to promote the well-being of people and communities.
- Social services focus on individual human needs and do not primarily aim at satisfying competition law.
- They should be available to all citizens, regardless of their income.
- They are financed by social contributions and tax revenue.
- They follow principles like universal accessibility, affordability and quality.
- They play a key role in social cohesion.

Concerning the relationship with the European level all Member States made clear that they want to maintain the right to organise the social and health sector themselves. Therefore some Member States (Austria, Germany, and Hungary) reject the idea of a framework legislation for Services of General Interest. These countries prefer an evaluation system or a systematic exchange of good practices. Others (Belgium, France, and Malta) argue for a framework legislation in order to provide availability, quality and consumer protection.

On the other hand the Commission emphasises that it does not have in mind legal actions in the social and health sector. The main reason for the communication is to

identify specific characteristics of these services and to recommend modernisation measures.

With regard to the European discussion about maintaining Services of General Interest it has to be criticised that the Commission pursues a sectoral and a horizontal approach at the same time. Besides the idea of liberalising different sectors like water, public transport, waste and social services, the negotiations on the proposed directive on services in the Internal Market (COM (2004)2 final), as mentioned above, do not exclude social and health services from its scope. This fact was met with strong resistance from European regions and cities, political parties, stakeholders and trade unions. They all demand from the Commission either to withdraw the proposal or to redraft it. The European Parliament's rapporteur on the services directive, Ms Evelyne Gebhardt, calls in her report for the exemption of Services of General Interest, including health and social services, from the application. They should be addressed by a separate framework legislation which allows for the specific characteristics of these services.

Future prospects

The announced communication should be published in the course of 2005. The first reading in the European Parliament regarding the services directive is foreseen for October 2005. If Ms. Gebhardt is able to find a majority for her report, the directive could be passed under Austrian Presidency in the first term of 2006. In that case, Services of General Interest including health and social services would be exempted from the scope of the directive. Hence the Commission has three main possibilities for an approach in the field of health and social services. Firstly the Commission could promote the idea of a framework legislation for all Services of General Interest. Secondly there remains the possibility to regulate the health and the social sector by a directive of its own. And lastly the Commission might introduce a benchmark system. The discussion on the communication about health and social Services of General Interest and the services directive shows that there is a strong tendency towards the first possibility.

1.4 The European Parliament and SGI

While the European Commission has been actively fostering the process of liberalisation, the Parliament frequently took a more balanced position in the current discussion. As shown above it was the Parliament that rejected the idea of the draft regulation to introduce compulsory competitive tendering into public transport and which strongly supported a clear "no" in the attempt to liberalise the water sector. Insofar the Parliament proved a mighty ally both for local and regional authorities and the citizen's view.

The recent amendments of the European legal framework through the Treaties of Amsterdam in May 1999 and Nice in February 2003 dedicated extended competences to the European Parliament by making the Parliament a full player in European law shaping. This was mainly achieved by increasing the number of co-decision making procedures. Co-decision means that no legal proposal can be adopted by the Council of Ministers against the political will of the Parliament. In practical terms these amendments of the Treaty have been contributing considerably to the strengthened position of the Parliament.

Now, successful lobbying has to focus both on the European Commission and the Parliament! From the very start the City of Vienna tried to take the Parliament's new powers into consideration: Two resolutions of major metropolises in Europe were initiated by the Mayor of Vienna in the field of SGI, supporting the view of the Parliament. In May 2001 Barcelona, Berlin, Lisbon, London, Luxembourg, Munich, Nuremberg, Paris and Vienna spoke out against the draft regulation of public transport. In February 2004 a second resolution supported the Parliament's view on main aspects of the future of SGI in Europe. It is displayed here as a practical example for lobbying by local authorities within the EU.

Resolution

on the Future of Services of General Interest (SGI) in Europe

Every day the cities, municipalities and regions of Europe render a multitude of public services for the benefit of their citizens. Drinking water supply, water and sewage disposal, local public passenger transport, as well as culture and social welfare services of all kinds are just some examples from the wide range of tasks.

Fulfilling them presents major challenges to most regional and local authorities: service provision throughout the respective territory, accessibility of Services of General Interest for all citizens at adequate and socially acceptable prices, guaranteed continuity and security of supply, compliance with health and quality criteria, and economical use of natural resources – these and other criteria are important parameters for building a common European house. After all, Europe has committed itself not only to completing the Single Market but also to the objectives of sustainable development as well as territorial and social cohesion. Services of general (economic) interest constitute a fundamental pillar of the European model of society.

***We**, the mayors of Vienna, Berlin, London, Paris, Rome, Athens, Amsterdam, Luxemburg, Sofia, Bratislava, Barcelona, Munich, Leipzig, Frankfurt, Stuttgart, Brno, Madrid and Brussels*

- *recognising the high importance of Services of General Interest (SGI) for the common good and as a basis for a thriving European economy;*

- *recalling the principle of subsidiarity laid down in the EC Treaty;*

- *having regard to the principles of regional and local autonomy (including free choice) in the provision of SGI, which are laid down in the national constitutions of several Member States;*

- *considering that the Draft Constitutional Treaty also makes reference to local and regional self-government in the context of SGI (Article I – 5);*

- *recognising that compulsory competitive tendering does not necessarily enhance efficiency and economy in the provision of SGI;*

- *having regard to the challenge of providing SGI in accordance with Community law, permanently respecting the principles of efficiency, transparency and true costs, and keeping the burden on public budgets down,*

welcome the European Parliament Resolution of 14 January 2004 on the Commission Green Paper on Services of General Interest (COM[2003] 270) and express our unequivocal support for the following specific demands and propositions made by the European Parliament:

- *In the preamble to the Resolution, the European Parliament (EP) has clearly stated that Services of General Interest constitute an **integral part** of the economic and social system as well as of the **European social model** as a whole. Further the EP explicitly insists on respect for the principle of subsidiarity (item P of the preamble), an in-depth **assessment of the (present) impact of sectoral liberalisation** (item H), and the European Commission's task in the **GATS** negotiations to defend the Member States' right to provide services within their respective territories (item W). Regarding the draft Constitutional Treaty proposed by the European Convention, the EP has made explicit reference to the **right to local and regional self-government** laid down in Article I.5 of the draft Treaty (item L).*

- *In particular, the EP has emphasised the relevance of **quality criteria, social equity, reliability of supply and continuity** (item 4) while insisting on its key role in the creation of a legal framework (co-decision procedure) for Services of General Interest (item 5). The EP has called on the European Commission to draw a conclusion from the opinions submitted on the Green Paper by April 2004 at the latest, and to present a **follow-up** allowing for a clearer definition of the potential legal framework (item 6).*

- *As regards the fields of **water supply, waste management services and sewage disposal**, the EP has explicitly **rejected** sectoral provisions for **market opening**, but has called for these sectors to be "modernised" on the basis of economic principles and in accordance with quality and environmental standards.*

- *With regard to any further **GATS** negotiations, the EP has demanded that comprehensive consultations with the EP and its competent Committee be held in good time.*

In supporting these propositions, we express our hope and conviction that the future development of Services of General Interest in Europe will continue to be based on the fundamental principles of democratic co-decision, closeness to the citizen, transparency and proportionality, within the political responsibility of decision-makers in accordance with the principle of subsidiarity, and that it will be possible to preserve unity in diversity.

Vienna, February 2004

However, the Parliament's latest vote on a proposal of the European Commission on SGI and State Aid is less attractive. In her report on the so called "Monti package" the rapporteur of the Parliament, Ms. Sophia in´t Veld, urged the Commission to abolish the proposed exclusions for hospitals and social housing from prior notification. On 21 February 2005 the Parliament adopted this opinion with an overwhelming majority, thus demanding a stricter State Aid regime than the Commission in its initial proposal. In the discussions to come the role of the Parliament will be decisive for the future of SGI. At the moment its position is not very transparent in this respect. Some clarification will be achieved by the Parliament's vote on Ms. Gebhardt´s report on the draft services directive by the end of October 2005 in the plenary.

1.5 Rulings of the Court of Justice

Important contributions and further clarification in the context of SGI and the rules of the Common Market were delivered by rulings of the European Court of Justice (ECJ).

- In the famous Altmark Case ("Magdeburg", C-280/00) the ECJ laid down in detail the criteria for lawful financial compensation in the field of SGI. According to the Court's opinion, financial compensation is in line with the European State Aid Rules, provided that transparency and a clear assignment of the public service obligation to one operator are in place. Furthermore no financial overcompensation with regard to the service obligation must occur. Finally, some indicators have to prove that the operator in place is compatible with an average – well managed - undertaking within the relevant market. However difficult some of the criteria may seem to be proven, it is important to note that the ECJ has not ruled a general obligation for compulsory competitive tendering from the scope of European legislation.

- In a more recent judgement of 11 January 2005 ("Halle", C-26/03) the ECJ had to deal with the scope of in-house transactions within (semi-)public entities. The question of in-house contracting is the most important exemption from public procurement rules for public authorities. It has great influence on the form of organisation and delivery of SGI. In its ruling the ECJ made clear that an authority may only award contracts "in-house" if the contracting

authority holds 100% of the shares in the contractor. This decision affects the flexibility of public entities and has negative effects on Public Private Partnership (PPP) models, as private participation in public companies results in the obligation to chose the private partner in a non-discriminatory and transparent way. In practise this bureaucratic approach widely diminishes the attraction of generating additional financial means through PPPs.

1.6 Conclusions

After the negative referenda in France and the Netherlands on the European Constitution it seems that one part of the journey of the EU into a model of compulsory competitive tendering under the strict State Aid and competition rules in all aspects of life is over. The clear vote of the citizens was a signal that the people expect more from Europe than just economic liberalism at all cost: more social security, more European activities to stimulate the labour markets (instead of just surveying the Convergence Criteria to keep the currency stable) and resolve the problem to open new perspectives for long term unemployed etc. When asked to name advantages of being part of the EU, many citizens say that they feel left alone by Europe when it comes to their everyday problems.

Certainly these problems need to be dealt with very carefully. Some commentators blamed the missing communication strategy of the EU for the current difficulties. This is true, yes, but only part of the truth. The actual situation is a big chance to correct some of the last mistakes and have a substantial shift in European politics. Europe must find satisfactory answers to the citizens that are unemployed, that do not participate in shareholder value and – especially – to the young Europeans. And it must find these answers quickly to avoid long term stagnation leading to sustained crisis. The local and regional authorities are now called upon to further shift this policy. Aware of the citizens' cares and needs they have the best prerequisites to make Europe a success for all.

2 A guide on Services of General Interest and State Aid[1]

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Introduction

The discussion currently conducted by the European Commission and the Member States shows clearly that agreement on the importance of high-level Services of General Economic Interest for Europe's societies has been attained. Due to the distribution of tasks and competences between the EU and the Member States, it is clear that both sides assume joint responsibilities.

On the one hand, the Member States shall ensure efficient access, at affordable prices, of every citizen and every undertaking in the EU to these services in order to safeguard social and territorial cohesion within the Union.

On the other hand, it is the task of the Commission, in this field as in others, to monitor compliance with the rules of the EC Treaty, in particular with respect to competition and internal market legislation.

In this complex interplay of tasks, both sides must strive to optimise the available service range in an efficiency-enhancing competitive environment, with account taken of national particularities.

2.1 Services of General Economic Interest and Services of General Interest

2.1.1 Concept, problems and historical development

The EC Treaty makes mention merely of Services of General Economic Interest, not of Services of General Interest; the concept of Services of General Interest appears first in the Commission Communication on Services of General Interest in Europe of 2000[2], in the report by the Commission to the Laeken European Council of 17 October 2001 and in a non-paper of the Commission of 12 November 2002[3]. Article 16 and Article 86 para. 2 of the EC Treaty mention Services of General Economic Interest. In the interpretation of the Commission, as the communication on Services of General Interest in Europe of 2000 shows, Services of General Interest comprise both market and non-market services classed as being of general interest and

1 Status quo as per July 2005
2 Commission Communication on Services of General Interest in Europe, OJ C 17 of 19 January 2001, p. 4.
3 Commission non-paper of 12 November 2002, "Services of General Economic Interest and state aid", http://www.europa.eu.int/comm/competition/state_aid/others/1759_sieg_en.pdf.

subject to specific public service obligations. Conversely, the concept of Services of General Economic Interest refers to market services which the Member States subject to specific public service obligations by virtue of a general interest criterion[4]. This covers such activities as postal services, transport networks, energy and communications[5]. Thus the concept of Services of General Interest is wider than that of Services of General Economic Interest.

The EC competition rules must be principally applied to all market economic activities and hence also extend to undertakings entrusted by the State with providing Services of General Economic Interest. However, the pursuit of objectives of general interest at the national level may cause friction with the principles of free market economy and competition at the Community level.

To ensure that specific Services of General Economic Interest may be rendered in an effective manner, it may be necessary for the State, under certain conditions, to assume the whole or part of the costs of a public service obligation. Under Article 295 of the EC Treaty[6], it is immaterial from the viewpoint of Community legislation whether the Services of General Economic Interest are rendered by public or private undertakings.

With respect to State funding of such services of economic character that have a cross-border effect and neither meet the criteria of the Block Exemption Regulation (de minimis threshold)[7] nor one of the two compatibility requirements laid down in Article 87 para. 2 or 3 of the EC Treaty, Services of General Economic Interest come under the State Aid prohibition of the Community pursuant to Article 87 para. 1 of the EC Treaty.

Unless the undertaking in question is definitely not favoured by State funding (cf. Altmark criteria in Chapter 2.1.1), the Member States may invoke application of the narrowly interpreted exception rule contained in Article 86 para. 2 of the EC Treaty. According to this rule, the operation of Services of General Economic Interest entrusted by the State to specific undertakings must not, in law or in fact, be obstructed by the application of the rules of the EC Treaty, in particular the rules on competition; however, this must not affect the development of trade to an extent

4 Commission Communication on Services of General Interest in Europe (cf. footnote 2), report to the Laeken European Council: Services of General Interest [COM(2001) 598 fin., 17 October 2001].

5 Cf. also: Commission Communication on Services of General Interest in Europe, OJ C 281 of 26 September 1996, p. 3; Notice on the application of the competition rules to the postal sector and on the assessment of certain state measures relating to postal services, OJ C 39 of 1998, p. 2.

6 Article 295 of the EC Treaty stipulates that “the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership“.

7 OJ L 10, p. 30 of 13 January 2001.

contrary to the interests of the Community. For this reason, the application of the EC Treaty rules must be limited to the degree necessary to enable the respective undertaking to perform the particular task assigned to it by the State.

The importance of Services of General Economic Interest was in particular emphasised by the new Article 16 of the EC Treaty included in the Treaty of Amsterdam, which states as follows, *"Without prejudice to Articles 73, 86 and 87 and given the place occupied by Services of General Economic Interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions."*

The Commission has stated its position in detail in its two Communications on Services of General Interest in Europe of 1996[8] and 2000[9]. In these documents, the Commission in particular lays down the criteria for application of the internal market and competition rules of the Treaty and draws on concrete examples to show that the correct application of these criteria does not affect the smooth functioning of Services of General Interest and that these do therefore not per se conflict with the objectives of competition.

In this, the Commission responds to concerns of some Member States that the application of the rules of the Treaty might endanger traditionally grown structures and in particular the provision of services at the municipal level. Conversely, the Commission also notes that the relevant rules of the Treaty, while aimed at safeguarding service, offer no absolute protection for the continuance of specific structures and forms of service provision. However, differences and specific traits (e.g. in the field of culture) of the individual Member States may certainly be taken account of.

While the Nice European Council from 7 to 9 December 2000 noted and approved the Commission Communication on Services of General Interest in Europe of 2000[10], it also invited the Commission to report on the functioning of Services of General Interest. The Commission responded to this request with its report to the Laeken European Council[11] adopted on 17 October 2001, emphasising already at this point that the Community rules on State Aid permit the Member States to grant the undertakings entrusted with Services of General Economic Interest the necessary financial support to compensate for the additional costs incurred as a result of the performance of the particular tasks assigned to them. Conversely,

8 Cf. footnote 4.
9 Cf. footnote 2.
10 Cf. footnote 2.
11 COM(2001) 598 of 17 October 2001.

Community legislation prohibits the granting of State Aid exceeding the amount necessary for the provision of the public service in question.

This report was prepared by the Commission against the background of a judgement of the Court of First Instance[12], according to which compensation for public services constitutes State Aid pursuant to Article 87 para. 1 of the EC Treaty. In the meantime, however, the Court of Justice has handed down a judgement in the Ferring Case[13], in which it maintains that compensation for the benefit of specific undertakings entrusted with a service of general economic interest does not constitute State Aid pursuant to Article 87 para. 1 of the EC Treaty, hence overturning the interpretation of the Court of First Instance.

In its report to the Seville European Council[14] from 21 to 22 June 2002, the Commission drew attention to the evolution of jurisdiction and emphasised that the Court of Justice's judgments in the cases still pending (Altmark Trans[15] and GEMO[16]) should be awaited with respect to the legal classification of compensation for public services[17]. Independently of this, the Commission in December 2002 published a first discussion paper on the application of Article 87 of the EC Treaty to Services of General Economic Interest as the basis for an exchange of opinions with the Member States' experts[18].

In keeping with the invitation extended by the Barcelona European Council, the Commission reported on the status of its work to the Copenhagen European Council[19]. In this connection, the Commission explained that it planned to first submit a discussion paper in the form of a Green Paper[20] on a possible Framework Directive, for which purpose an overview of all Community policies relating to Services of General Interest and a test of their coherence and consistency were required. With the adoption of the Green Paper, the Commission intended to launch a debate at the European level on several issues related to Services of General Interest and to draw appropriate conclusions on the basis of the results of this and own evaluations.

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12 In particular the judgments in FFSA of 27 February 1997, Case T-106/95 (cf. Chapter 2.2.1 for a more detailed presentation), and SIC of 10 May 2000, Case T-46/97.

13 Case C-53/00 of 22 November 2001 (cf. Chapter 2.2.1 for a more detailed presentation).

14 Report from the Commission on the status of work on the guidelines for state aid and Services of General Economic Interest, COM(2002) 280 final.

15 Case C-280/00.

16 Case C-126/07.

17 Cf. report of 13 December 2002 to the Copenhagen European Council.

18 Cf. footnote 3.

19 Report from the Commission of 13 December 2002 on the state of play in the work on the guidelines for state aid and Services of General Economic Interest.

20 For more details cf. Chapter 2.1.2

2.1.2 Green Paper on Services of General Interest of 21 May 2003[21]

On a request by the European Parliament and the European Council, the Commission on 21 May 2003 published a discussion paper in order to provide input for a debate on the role of the European Union in the promotion of high-quality public services. This was the first time that the Commission has launched a full review of its previous policies relating to Services of General Economic Interest. In its Green Paper, the Commission recognised that there was a need for an open debate on the overall role of the Union for defining the objectives of general interest that are pursued by these services as well as on the way they are organised, financed and evaluated. At the same time, it confirmed the significant contribution made by the internal market and the competition rules to modernising and improving the quality and efficiency increase of many public services for the benefit of citizens and businesses in Europe. In this connection, the Green Paper also takes account of the context of globalisation and liberalisation and raises the question whether there is a need for creating a general legal framework for Services of General Interest at Community level.

The Green Paper stated that the reality of Services of General Interest in the European Union is complex and constantly evolving, specifying in particular that it concerns

a) a broad range of different types of activities, from the big network industries (energy, postal services, transport and telecommunications) to health, education and social services;

b) a wide dimension in the provision of these services – from European and even global to purely local level;

c) services provided on a different basis; some are market based and some non-market based in their nature.

The organisation of these services varies according to cultural traditions, the history and geographical conditions of each Member State and the characteristics of the activity concerned, in particular technological development, the Green Paper adds. For example, water supply has been liberalised in France but not in Greece, while the provision of child-care facilities has been liberalised in Sweden but not in France. The Green Paper noted that the European Union, in keeping with the principle of subsidiarity, has always respected this diversity and the role of the national, regional and local authorities in ensuring the well-being of their citizens and in guaranteeing

21 COM(2003) 270 final of 21 May 2003. The Green Paper is available at the Internet address: http://europa.eu.int/eur-lex/en/com/gpr/2003/com2003_0270en01.pdf

democratic choices regarding, among other things, the level of service quality, adding that this diversity explains the various degrees of Community action and the use of different instruments.

The Green Paper explains that since the mid-1980s a number of sectors providing Services of General Interest have gradually been opened to competition, emphasising that this has been in particular the case with telecommunications, postal services, transport and energy. The first evaluation has shown, the Green Paper contends, that liberalisation has stimulated the modernisation, interconnection and integration of these sectors, increasing the number of competitors and leading to price reductions, especially in those sectors and countries that liberalised earlier. Although there is as yet insufficient evidence to fully assess the long-term impact of the opening to competition of Services of General Interest, there is, based on the available information, no evidence supporting the thesis that liberalisation has had a negative impact on their overall performance, at least as far as affordability and the provision of universal service are concerned, the Green Paper maintains. In the framework of the completion of the Internal Market, the European Union has always accompanied liberalisation by measures to protect the general interest, in particular through the concept of “universal service" to guarantee access for everyone, whatever the economic, social or geographic situation, to a service of a specified quality at an affordable price.

Initial fears that market opening would have a negative impact on employment levels or the provision of Services of General Economic Interest have so far proved unfounded, the Green Paper states. On the contrary, market opening has made services generally more affordable. For consumers in the lowest income brackets, for example, the percentage of personal income needed to buy a standard basket of telephone calls or a standard volume of electricity consumption has fallen in most Member States between 1996 and 2002[22]. The impact of market opening on net employment has also been broadly positive, the Green Paper adds. Job losses, in particular among former monopolies, have been more than compensated for by the creation of new jobs thanks to market growth. According to current estimates, the liberalisation of the network industries has led to the creation of nearly one million jobs across the European Union, the Green Paper contends[23].

The Green Paper moreover states that there is certainly the need to explain better the current framework, to assess the possible improvements and define common standards to maintain and develop at the European level. For this reason, it followed requests of the European Parliament and the Council and seeks to address these issues by raising questions with regard to

22 Eighth Telecommunications Regulation and market reports, December 2002.
23 The Internal Market – Ten Years without Frontiers, SEC(2002) 1417 of 7 January 2003.

- the scope of possible further Community initiatives implementing the Treaty in full respect of the principle of subsidiarity,

- the principles that could be included in an eventual framework legislation on Services of General Interest and its concrete added value,

- the definition of good governance in the area of organisation, regulation, financing and evaluation of Services of General Interest in order to ensure simultaneously greater competitiveness of the economy and efficient and equitable access of all persons to high-quality services that satisfy their needs,

- the assessment of any further measures that could possibly be put in place in order to increase legal certainty and to ensure a coherent and harmonious link between the objective of maintaining high-quality Services of General Interest on the one hand and rigorous application of competition and internal market rules on the other hand.

On the basis of the Green Paper, the Commission launched a broad public consultation in which it seeks comments from all interested parties on the questions set out. The consultation period ended on 15 September 2003.

2.1.3 White Paper on Services of General Interest of 12 May 2004[24]

The White Paper submitted is a follow-up to the Green Paper of 21 May 2003 on Services of General Interest[25], through which the Commission launched a broad public debate on the role of the EU regarding the provision of high-quality Services of General Interest. The Green Paper invited comments on the possible need for framework rules and the thus achieved added benefit as well as on the overall role of the EU in defining the public service objectives pursued by Services of General Interest and on the way these services are organised, financed and evaluated.

The debate launched by the Green Paper met with considerable interest. The Commission received close to 300 contributions from a wide variety of respondents[26]. Commission staff has prepared a Report which analyses the contributions submitted and provides background material to the present White Paper[27].

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24 COM (2004) 374 final of 12 May 2004. For the full text of the White Paper, go to: http://europa.eu.int/comm/secretariat_general/services_general_interest/index_en.htm.

25 Cf. footnote 21.

26 These contributions can be accessed in detail at the Commission website: http://europa.eu.int/comm/secretariat_general/services_general_interest/comments/public_en.htm.

27 Commission staff working paper, Report on the Public Consultation on the Green Paper on Services of General Interest, SEC(2004) 326 of 15 March 2004, available at: http://europa.eu.int/comm/secretariat_general/services_general_interest/index_en.htm.

In line with the request made by the European Parliament in its Resolution on the Green Paper of 14 January 2004[28], the Commission draws its conclusions from the debate and the problems at hand in the present White Paper. The White Paper principally sets out the Commission's approach and identifies specific orientations for a coherent policy on Services of General Interest.

The White Paper illustrates certain guiding principles on which the Commission's policy for Services of General Interest is based, e.g. maintaining a high level of quality, security and safety, ensuring consumer and user rights, enabling public authorities to operate close to citizens und undertakings, ensuring cohesion and universal access, respecting diversity, evaluating performance, and providing transparency and legal certainty.

One of the key questions raised in the public debate concerned the need for a possible Framework Directive on Services of General Interest. The views expressed on the subject in public consultation were divided; a number of Member States remain sceptical on this issue, and the debates in the European Parliament were rather controversial.

As a result, it remains doubtful whether a Framework Directive would create a sufficient added benefit at this stage. The Commission therefore considers it appropriate not to proceed to submitting a proposal at this point in time but to examine the issue at a later stage. For the time being, the Commission will, as a general rule, pursue and develop its sectoral approach by proposing, where necessary and appropriate, sector-specific rules that allow account to be taken of the specific requirements and situations in each sector.

On the basis of the results of the public consultation, the Commission furthermore considers it necessary that the legal framework for the compensation of public service tasks be clarified and simplified. For this purpose, the Commission intends to adopt a package of measures by July 2005 at the latest, since most of the individual elements of the package were submitted for consultation in draft form.

Moreover, the public debate has emphasised the necessity of a clear and transparent framework for the selection of undertakings entrusted with the provision of Services of General Interest.

28 European Parliament Resolution on the Green Paper on Services of General Interest, 14 January 2004 (T5-0018/2004).

2.1.4 Anchoring in primary law?

The first approach for a European Constitution was laid down in a draft document providing for explicit rules with regard to Services of General Economic Interest. This Draft Treaty Establishing a Constitution for Europe, which was signed by the heads of State and government on 29 October 2004 in Rome, amends the current Article 16 of the EC Treaty by adding a legal basis for the adoption of EU legislation in the field of Services of General Economic Interest[29].

From a legal point of view this Treaty Establishing a Constitution for Europe can only enter into force with the ratification of all Member States. Since the plebiscite[30] has already led to a negative result in two Member States (France and Netherlands) it is difficult to forecast if there will be a European Constitution in the originally planned way. In case the Treaty Establishing a Constitution for Europe will not enter into force, the Nice Treaty, which does not foresee specific rules on Services of General Economic Interest, will continue to be valid.

Currently the ratification procedures in the European Member States continue. At the end of the day it will show how many Member States will refuse the European Constitution. If it will be five Member States or less, a European Council will assemble in order to work out possible solutions.

2.2 Definition of State Aid pursuant to article 87 para. 1 of the EC treaty

According to the definition set out in Article 87 para. 1 of the EC Treaty, any aid granted by a Member State or through State resources in any form is incompatible with the common market if it distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, insofar as this affects trade between Member States.

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29 Article III-6 of the Constitution: “Without prejudice to Articles I-5 and III-166, III-167 and III-238 and given the place occupied by Services of General Economic Interest as services to which all in the Union attribute value as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of the Constitution, shall take care that such services operate on the basis of principles and conditions, in particular economic and financial, which enable them to fulfil their missions. European laws shall define these principles and conditions without prejudice to the competence of Member States, in compliance with the Constitution, to provide, to commission and to fund such services“.

30 Some Member States (Netherlands, Luxembourg, Polen Denmark, Portugal, Ireland, Great Britain, eventually Czech Republic) foresee a referendum within the ratification procedure.

2.2.1 Evaluation of compensation from the viewpoint of State Aid law

For a long time, the evaluation of compensation for Services of General Economic Interest from the viewpoint of State Aid law raised two crucial questions: firstly, the question concerning the legal nature of compensation, which meant to clarify whether compensation for Services of General Interest should be generally viewed as favourable treatment and hence always as State Aid pursuant to Article 87 para. 1 of the EC Treaty, to be solely granted as a derogation under Article 86 para. 2 of the EC Treaty (State Aid approach), or whether compensation, since it is merely to cover the additional costs incurred as a result of the provision of Services of General Interest, constitutes no favourable treatment and hence no State Aid (compensation approach). Irrespective of the legal classification of compensation, the second question concerns the calculation of the additional costs resulting from the operation of Services of General Interest, especially since over-compensation of undertakings in any case constitutes State Aid under Article 87 para.1 of the EC Treaty, which cannot be granted pursuant to Article 86 para. 2 of the EC Treaty.

Legal nature of compensation

For a long time, both the judgements of the Court of First Instance and of the European Court of Justice and the Opinions of the Advocates General on cases pending before the Court of Justice for the classification or non-classification of compensation for Services of General Economic Interest as State Aid were heterogeneous.

Originally, the Commission maintained – based on a 1985 judgement of the Court of Justice on the disposal of waste oils[31] – that compensation for Services of General Interest constitutes no State Aid under Article 87 para. 1 of the EC Treaty as long as it does not exceed the additional costs. However, in 1997 the Court of First Instance ruled in a case concerning the French postal services (FFSA[32]) that compensation of costs for Services of General Economic Interest (concretely, this concerned a tax exemption) principally constitutes State Aid, which, however, in the specific case was compatible under Article 86(2) of the EC Treaty, since the State Aid did not exceed the additional costs incurred because of the task assigned.

In 2001, the interpretation of the Court of First Instance was revised by the Court of Justice, which returned to the compensation approach in the Ferring Case[33] and hence ruled that compensation whose amount does not exceed the costs of the

31 ECJ 7 February 1985, C-240/83, Procureur de la République vs. Association de défense des brûleurs d'huiles usagées (ADBHU).
32 CFI of 27 February 1997,T-106/95, Fédération française des sociétés d'assurances (FFSA).
33 ECJ 22 November 2001, C-53/00, Ferring S.A. and Agence centrale des organismes de sécurité sociale (ACOSS).

service of general economic interest does not create an advantage for the favoured undertaking and hence does not constitute State Aid under Article 87 para. 1 of the EC Treaty.

The diverging judgements triggered considerable controversy between the Advocates General at the Court of Justice. For example, Advocate General Philippe Léger in his Opinion in Altmark Trans GmbH[34] supported a return to the State Aid approach. The degree of legal uncertainty was further exacerbated by the Opinion of Advocate General Francis G. Jacobs in GEMO SA[35], which supported a "distinguish the case" approach differentiating between the compensation and State Aid approaches. Advocate General Christine Stix-Hackl followed this approach in her opinion in Enirisorse SpA[36].

The legal discussions regarding the classification of compensation for public services had no effects on the smooth functioning of Services of General Economic Interest. Essentially, this discussion merely concerned the scope of the Member States' notification requirements and hence the Commission's powers of ex-ante control of compensation paid by the Member States for Services of General Interest.

On 24 July 2003, the Court of Justice handed down its judgement in the Altmark Trans GmbH Case[37]. In its ruling, it established that a financial measure by the State granted as offset or compensation to an undertaking for discharging a public service obligation must not be classified as an advantage and hence not as State Aid under Article 87 of the EC Treaty if the four conditions below are complied with:

1. First, the recipient undertaking must actually have public service obligations to discharge, and those obligations must be clearly defined.

2. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.

3. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

34 Opinion of Advocate General Léger of 19 March 2002, C-280/00, Altmark Trans GmbH.
35 Opinion of Advocate General Jacobs of 30 April 2002, C-126/01, GEMO SA.
36 Opinion of Advocate General Stix-Hackl of 7 November 2002, joined cases C-34/01 to C-38/01, Enirisorse SpA.
37 ECJ 24 July 2003, C-280/00, Altmark Trans GmbH and Regierungspräsidium Magdeburg/ Nahverkehrsgesellschaft Altmark GmbH.

4. Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical, well-run undertaking in the same sector would have incurred (taking into account its receipts and a reasonable profit for discharging its obligations).

If these conditions (Altmark criteria) are not met and if all other conditions pursuant to Article 87 para. 1 of the EC Treaty are fulfilled, compensation granted for the provision of Services of General Economic Interest constitutes State Aid, which is subject to Articles 73, 86, 87 and 88 of the EC Treaty.

However, there may be cases where the undertakings entrusted with the operation of Services of General Economic Interest actually need State Aid granted in the form of compensation as a basis and prerequisite for discharging their tasks. These forms of State Aid may be declared compatible with the common market under the conditions of Article 86 para. 2 of the EC Treaty[38].

Over-compensation

Over-compensation constitutes State Aid as defined in Article 87 para. 1 of the EC Treaty. Since it is not necessary for the operation of a service of general economic interest, it cannot be declared compatible with the common market according to Article 86 para. 2 of the EC Treaty. As a rule, the amount exceeding the necessary extent must be repaid to the State. In case of marginal over-compensation, the amount paid in excess, in the opinion of the Commission, may be carried forward to the next year[39].

If an undertaking discharges several public service obligations, over-compensation of a public service may also be used to finance another public service operated by the same undertaking if this transfer of funds is shown in the accounts of the undertaking in question. Even where the undertaking, in addition to other public services, discharges non-public services, cross-subsidisation among public services (but only among them!) is admissible if the accounts of the undertaking in question clearly show the financial flows involved.

The amount of over-compensation cannot remain with an undertaking on the ground that it would rank as State Aid compatible with the EC Treaty (e.g. State Aid for environmental protection, for employment or for small and medium-sized

38 For more details cf. Chapter 2.2.2 below.
39 Cf. item 97 of the Commission non-paper (footnote 3).

enterprises). If a Member State wishes to grant such aid, the prior notification procedure laid down in Article 88 para. 3 of the EC Treaty must be complied with. State Aid may be disbursed only if it has been authorised by the Commission.

2.2.2 The conditions laid down in Article 86 para. 2 of the EC Treaty

According to Article 86 para. 2 of the EC Treaty, the rules contained in the Treaty, i.e. in particular the competition rules, also apply to undertakings entrusted with the operation of Services of General Economic Interest or having the character of a revenue-producing monopoly, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Moreover, the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

Services of General Interest of an economic nature with cross-border effect come under the scope of application of Community competition (State Aid) legislation. Article 86 para. 2 of the EC Treaty (as well as Article 87 para. 2 and para. 3 of the EC Treaty) should be understood as a derogation from Article 87 para. 1 of the EC Treaty, i.e. Article 86 para. 2 of the EC Treaty is invoked wherever State Aid pursuant to Article 87 para. 1 of the EC Treaty applies because of non-compliance with the Altmark criteria.

In its Communication on Services of General Interest in Europe[40], the Commission has interpreted the rule laid down in Article 86 para. 2 of the EC Treaty in greater detail in order to further clarify both the scope of application of competition and State Aid legislation to Services of General Interest and Member States' margin of discretion.

Precise definition (public service contract)

In the opinion of the Commission, Services of General Economic Interest are different from ordinary services (with particular or group interests) in that "public authorities consider that they need to be provided even where the market may not have sufficient incentives to do so"[41]. Thus the decisive criterion is whether the respective service could or could not be equally provided by the market (under competitive terms).

The question of whether a service is a service of general economic interest must be principally determined by the Member States at the national, regional or local level through a public service contract that precisely determines the obligations to be discharged, respectively, by the undertakings and the State. The Member States

40 COM(2000) 580 final (OJ C 17 of 19 January 2001).
41 Cf. footnote 2.

thus enjoy comprehensive freedom to define what constitutes a service of general interest; this freedom is merely subject to control for manifest error by the Commission and the Court of Justice.

For example, the European Court of Justice has affirmed that general economic interest applies in the case of electricity companies charged with the continuous electricity supply of all consumers in a concession area[42]. Moreover, general interest was identified in the delivery of postal consignments on the entire national territory at uniform postal dues and in constant quality[43], in the operation of a public telephone network[44], and in the safeguarding of comprehensive emergency transport for sick or injured persons[45]. Conversely, services distinct from universal postal service and falling outside the scope of standard postal service cannot be of general interest[46].

Entrustment (assignment of a public service contract)

Undertakings to which a service of general economic interest has been assigned must be duly entrusted by the respective Member State through an official legal act, which may be a law, an ordinance or a contractual agreement. The act of entrustment must be express, definite, official, undertaking-specific as well as, on request, open to inspection; it must both clearly define the service of general economic interest in question and identify the undertaking that is to perform the service.

Proportionality test

In evaluating proportionality with respect to compensation granted by the State to the entrusted undertaking, the Commission assumes that the undertaking needs State funding to operate the service of general economic interest. However, such compensation may only offset the net additional costs resulting from the operation of the service of general interest (also taking account of other direct or indirect revenue from the public service contract), thereby ensuring that it will be compatible with Community State Aid legislation. If compensation exceeds the net additional costs of the service of general interest, over-compensation applies, which is not compatible with the common market[47].

42 ECJ C-393/92, Almelo; ECJ 23 October 1997, C-157/94, Commission/Netherlands.
43 ECJ 17 May 2001; C-340/99, TNT Traco.
44 ECJ, C-18/88, GB-Inno-BM.
45 ECJ 25 October 2001, C-475/99, Ambulanz Glöckner.
46 ECJ 19 May 1993, C-320/91, Corbeau.
47 For more details cf. Chapter 2.2.1 above.

Effect on trade

It is a task of the Commission to ensure that the exemption of Services of General Economic Interest from the application of the rules of the Treaty and the related limitation of competition will not affect the development of trade to such an extent as would be contrary to the interests of the Community. This consideration is the key instrument to harmonise the Member States' interests in pursuing the objectives of Services of General Interest on the one hand and the Community's interest in free market economy and competition on the other hand.

2.3 Problem areas relating to Services of General Economic Interest

2.3.1 Selection of a service provider in service procurement

Principally, the Member States are free to choose the way in which Services of General Economic Interest are to be performed, i.e. whether the State itself assumes the obligation to provide the service or assigns this task to public or private undertakings. However, in the case that an undertaking is entrusted with the provision of a service, the Member States must comply with the relevant rules of EC law governing the selection of service providers.

If the State decides to entrust an undertaking with the performance of a service of general economic interest falling within the scope of the Community Public Procurement Directives[48], the obligations deriving from these Directives must be observed. The awards of the public contract will therefore have to comply with the relevant rules set out in the respective Directives and in particular those applicable to competitive tendering and transparency of award procedures.

Discussions focus on the question whether special obligations also relate to the awarding of a public service contract not within the scope of application of the Directives on the award of public service contracts. In accordance with the case law of the Court of Justice[49], the relevant rules and principles laid down in the Treaty have to be observed in this case as well, i.e. the rules to be observed by the State in selecting a service provider result directly from the internal market rules of the EC Treaty. These include the rules governing the freedom to provide services and the

48 Council Directive 92/50/EC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209 of 24 July 1992), Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ L 199 of 9 August 1993), Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199 of 9 August 1993), Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 99 of 9 August 1993).

49 ECJ 7 December 2000, C-324/98, Teleaustria.

freedom of establishment as well as the principles of transparency, equal treatment and proportionality.

According to the principle of transparency, in the interest of any potential tenderer, an appropriate degree of publicity should be guaranteed permitting opening-up of the service contract to competition and monitoring of the impartiality of award procedures. The principle of equality of treatment requires that all Community undertakings should be able to bid for Services of General Economic Interest under the same conditions. The Commission maintains that the application of these principles can have only favourable effects for both users and economic actors and will evaluate whether additional measures are necessary to further clarify these rules.

Even if the Commission does not evaluate the efficiency of the operation of a service of general interest in the context of its proportionality test, it believes that the organisation of a transparent and competitive tendering procedure is suitable in various respects to safeguard the financing of Services of General Economic Interest in compliance with State Aid legislation.

Where the conditions for such a procedure are met, i.e. a market that, economically speaking, is effectively contestable, a sufficient number of potential bidders and a contract value sufficient to justify administrative costs, the awarding of public service operation on the one hand assumes official character while the public announcement of a call for tender on the other hand allows the precise determination of the nature and extent of the services. Moreover, this eliminates the danger of over-compensation, since the lowest bidder is awarded the contract[50].

Such calls for tender in particular cannot be considered in those cases where the respective service is not offered in the market, which typically applies wherever this service could only be provided at a loss. For this reason, no market price exists nor could be set by means of a call for tender for lack of competing bidders.

2.3.2 Transparency requirements – Cross-subsidisation

Undertakings entrusted with the operation of a service of general economic interest enjoy exclusive or special rights and thus fall within the scope of Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings (Transparency Directive)[51]. According to this directive, Member States shall ensure that financial relations between themselves and undertakings entrusted with a

50 or more details cf. Chapter 2.2.1.

51 Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, OJ L 193/75 of 29 July 2000.

service of general economic interest are transparent. Transparency is ensured by disclosing the extent both of public funds made available directly by public authorities and of other public funds made available by public authorities through the intermediary of public undertakings or financial institutions as well as the use to which these public funds are actually put[52].

In case where an undertaking entrusted with a service of general economic interest also carries out other activities outside the scope of Services of General Economic Interest, in which it performs "normal", commercial activities open to competition, separate accounts must be kept for the two different service areas[53], i.e. the costs and revenue relating to the performance of the public service must be shown separately from the costs and revenue resulting from the other activities. Wherever the same resources (staff, equipment, fixed installations, etc.) are used for both types of activity, their costs must be allocated on the basis of objectively justified criteria. Verification of the undertaking's accounts by an independent auditor helps to guarantee their reliability[54].

The reason for the obligation to maintain separate accounts introduced in the context of the last amendment to the Transparency Directive lies in ensuring that compensation received for the performance of a public service contract will not be used to cross-subsidise services performed in competition with others. The Commission has no competence over the Member States' use of funds – irrespective of this, however, separate accounts also enable the Member States to use public funds sparingly and ensure the necessary transparency and accountability of their use.

The provisions of the Transparency Directive do not apply to undertakings whose annual net turnover is less than EUR 40 million or whose compensation for the performance of a public task was fixed following an open, transparent and non-discriminatory procedure. If the activity of the undertaking is limited to the performance of the public service or to economic sectors already subject to specific rules (e.g. postal services[55] or electricity[56]), the directive likewise shall not apply.

52 Cf. Article 1 para. 1 of the consolidated version of the Transparency Directive.
53 Cf. Article 1 para. 2 and Article 2 para. 1 d) of the consolidated version of the Transparency Directive.
54 Cf. item 91 of the Commission non-paper (footnote 3).
55 Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15 of 21 January 1998.
56 Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27 of 30 January 1997.

2.3.3 Calculation of net additional costs

Pursuant to the Court's case law compensation may cover all the net additional costs incurred in performing a public service task, since the undertaking in question must be able to perform its public service obligations under conditions of economic equilibrium and hence has a right to earn a normal return.

For this reason, a comparison based on precise data must be carried out between the additional costs resulting from the operation of the service of general economic interest on the one hand and compensation on the other hand; this constitutes a precondition for clarifying whether or not over-compensation and hence material compatibility (or incompatibility) of compensation with Article 87 of the EC Treaty apply.

In this, the Commission distinguishes whether the service of general economic interest has been assigned following a tendering procedure and other forms of public service contract award[57].

a) Amount of compensation in the case of a tendering procedure

All undertakings interested in participating in a tendering procedure should be informed of the precise conditions for operating the public service in question. These include the standards laid down by the public service obligations, the selection criteria applied by the Member State, the rules governing changes to and cancellation of the service contract, the period of validity of the contract, the penalties applicable in the event of non-compliance with the contract, and the pricing conditions for operating the public service[58].

Where the tendering procedure is preceded by a pre-selection procedure and/or a procedure for verifying the conditions of eligibility, the conditions applied by the Member State must be proportional, open, transparent and non-discriminatory.

The amount of compensation corresponds to the "market price" and hence does not include any elements of excess compensation if

- the relevant market is, economically speaking, an effectively contestable market, i.e. there are other operators potentially capable of submitting valid bids,
- the procedure has resulted in genuinely competitive tendering, and

57 Cf. also Chapter 2.3.1.
58 Cf. item 86 of the Commission non-paper (footnote 3).

- the service of general economic interest is awarded to the undertaking requesting the lowest level of compensation, and the other conditions (quality of service, employment, investment, etc.) are imposed simply as minimum criteria.

When a tendering procedure has been organised but the relevant market is not an effectively contestable market or when the service of general economic interest is not awarded to the undertaking requesting the lowest level of compensation or is awarded to an undertaking proposing a service different from that publicised prior to the selection of the undertaking, the amount of compensation is not presumed to reflect the market price[59].

b) Amount of compensation in the absence of a tendering procedure

Notwithstanding the tendering obligations relating to the choice of the provider of a service of general economic interest, the amount of compensation may, in some cases (e.g. where the services are not offered on the market and hence no market price has been set), be determined in advance and thus may not result from a tendering procedure.

To exclude over-compensation in such cases, the amount of compensation may not exceed the difference between the costs borne by the undertaking in operating the service of general interest and the revenue accruing from that activity. This approach reflects the concept of net additional costs, since only additional costs remaining after deduction of all income from performance of the service may be offset without resulting in over-compensation.

Where the activities of the undertaking in question are confined to the service of general interest, all its costs may be taken into consideration for assessing compensation. However, where the undertaking engages in activities outside the scope of the service of general economic interest, its accounts must distinguish clearly between the costs and revenue associated with the operation of the service of general interest and those relating to its other activities, thus reflecting the principles of the Transparency Directive[60].

The Member States determine the frequency of the compensatory payments. However, an annual assessment must be carried out by the national authorities to ensure that no excess or over-compensation has been paid. When the exact costs and compensation are not known in advance – thus necessitating for the Commission to evaluate, in the context of ex-ante State Aid control, whether the notified measures only offset the net additional cost or in fact go beyond them –, the

59 Cf. item 88 of the Commission non-paper (footnote 3).
60 For more details cf. Chapter 2.3.2 above.

Commission expects the authorities of the Member States to ensure at the end of each year that the amount of compensation received is not excessive in terms of the costs actually incurred.

2.4 Package of measures

The judgement of the Court of Justice in Altmark Trans GmbH[61] rules that compensation for the operation of public services does not constitute State Aid in the meaning of Article 87 para. 1 of the EC Treaty if it complies with certain criteria. However, if these criteria are not met with and the facts described in Article 87 para. 1 of the EC Treaty apply, compensation paid for the operation of public services constitutes State Aid.

For this reason, the Commission considers it useful to provide rules for State Aid granted to certain undertakings as compensation for the operation of Services of General Economic Interest.

Article 86 para. 3 of the EC Treaty states as follows, “The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States“. Therefore the matter of State Aid in connection with compensation will be regulated by means of an ad-hoc Community Framework, a Decision according to Article 86 para. 3 of the EC Treaty and by amending Directive 80/723/EEC.

2.4.1 Community Framework

The Community Framework for State Aid in the form of public service compensation is to clarify the conditions under which such State Aid may be considered compatible with the common market pursuant to Article 86 para. 2 of the EC Treaty.

Such State Aid can only be declared compatible with the EC Treaty if it ensures the operation of services that are genuine Services of General Economic Interest within the meaning of Article 86 of the EC Treaty. It results from the case law that, in the absence of Community rules governing the matter, the Member States have a wide margin of discretion regarding the nature of services that could be classified as being Services of General Economic Interest. In the absence of Community rules, it is therefore the Commission’s task to ensure that the Member States’ margin of discretion is applied without manifest error. It transpires from Article 86 para. 2 of the EC Treaty that undertakings entrusted with the operation of Services of General Economic Interest are undertakings entrusted with “a particular task“.

61 Cf. footnote 37.

The amount of compensation can only be duly calculated and reviewed if the public service obligations assumed by the undertaking and the obligations of the State (if any) have been precisely embodied in an official legal act. Depending on the legislation in the different Member States, the official act may take various forms but must always contain the information necessary to determine the special obligations to be assumed by the undertakings. In any case, public service contracts should specify, among other things, the precise nature and the duration of the public service obligations, the undertakings and territory concerned, the nature of any exclusive or special rights assigned to the undertakings, the parameters for calculating any compensation, and the arrangements for repaying any over-compensation.

In order to avoid unjustified distortion of competition, the amount of compensation may not exceed what is necessary to cover (in full or in part) the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations. This may in particular include the specific costs actually borne by the undertakings in regions as referred to in Article 87 para. 3 a) and c) of the EC Treaty.

The Community Framework is to apply to all economic sectors covered by the EC Treaty with the exception of the transport sector, without prejudice to the existence of stricter provisions relating to public service obligations contained in sectoral Community legislation. For this reason, it is not to apply to public service broadcasting, which is covered by the Communication from the Commission on the application of State Aid rules to public service broadcasting[62]. Neither will the Community Framework affect the Community rules applying to public procurement.

2.4.2 Commission Decision

The Commission Decision addressed to the Member States on the application of Article 86 of the EC Treaty to State Aid granted to certain undertakings as compensation for the operation of Services of General Economic Interest explains the conditions under which specific compensation can be State Aid compatible with Article 86 para. 2 of the EC Treaty and exempts such State Aid from the notification requirements pursuant to Article 88 para. 3 of the EC Treaty.

With a view to the compatibility of such aid, the Decision mirrors the Community Framework: insofar as compensation is granted to undertakings entrusted with the operation of Services of General Economic Interest, the amount corresponds to the costs of the public service obligation and development of trade is not affected to such an extent as would be contrary to the interests of the Community, these payments constitute State Aid that may be declared compatible with the common market pursuant to Article 86 para. 2 of the EC Treaty.

62 OJ C 320 of 15 November 2001.

With a view to the exemption from notification requirements, a distinction must be made for compensation with State Aid character compatible with the common market between aid that, because of its amount, may lead to major distortion of competition and aid of more modest dimensions. In the latter case, the risk of distortion of competition is small if the Member States observe the previously defined compatibility criteria. Moreover, effective application of the State Aid rules combined with simplification of administrative procedures must be ensured in such cases.

a) Undertakings with low annual turnover

Small amounts of compensation granted to undertakings entrusted with the provision of Services of General Economic Interest, whose turnover is limited and which comply with the above-mentioned compatibility criteria, do not substantially affect competition. When the criteria provided for in the Decision (see below) are fulfilled, prior notification pursuant to Article 88 para. 3 of the EC Treaty is therefore not necessary. For the purpose of defining the scope of exemption from notification, the turnover of undertakings receiving compensation for the provision of Services of General Economic Interest and the level of such compensation should be taken into consideration.

The exemption from notification requirements should therefore apply to undertakings with an annual turnover before tax of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned and with annual compensation for the service in question of less than EUR 30 million. The latter threshold may be determined by taking an annual average representing the present value of compensation granted during the contract period or, optionally, over a period of five years. For credit institutions, the threshold of EUR 100 million is replaced by a threshold of EUR 800 million in terms of balance-sheet total.

Comparable thresholds can be found in the current multisectoral framework on regional aid for large investment projects.

b) Hospitals and social housing

Hospitals and social housing undertakings that carry out activities involving Services of General Economic Interest, present specifics that must be taken into consideration. Particular account should be taken of the fact that both the turnover and level of compensation may be very high without there being any particularly large risks of competition being distorted. As a result, hospitals and social housing undertakings that carry out Services of General Economic Interest should benefit from the exemption of notification.

c) Transport

In the area of transport, the present Decision only applies to compensation for Services of General Economic Interests which are granted in accordance with sectoral rules of the Community and contribute to maritime links with islands where traffic does not exceed 100,000 passengers annually.
However, compensation constituting State Aid and not covered by the scope of application of the Commission Decision pursuant to Article 86 para. 3 of the EC Treaty will still have to be notified in advance according to Article 88 para. 3 of the EC Treaty.

The Decision is to apply to all economic sectors covered by the EC Treaty, with the exception of the sectors of air and sea links. However, in the area of sea links, it is to apply if the public service is a maritime link to islands with an annual passenger turnover of fewer than 100,000. The Decision does not affect any stricter provisions relating to public service obligations contained in sectoral Community legislation; neither does it affect the Community rules applying to public procurement.

d) Transitional Period

For existing compensations having been paid in the past, which are often illegal because they have never been notified to the Commission and probably also incompatible with the EC-Treaty, because they don't meet the conditions specified in the Decision, the Commission foresees a transitional period, which allows Member States sufficient time to adapt their existing system of compensation. Consequently, the Decision could apply immediately to all compensations which meet at least the following criteria, which have been requested by the Commission during the last ten years and are consequently well known by the Member States:

- the nature and the duration of the public service obligation must be defined;
- the undertakings and the territory concerned must be identified;
- the compensation must not lead to over-compensation.

The other conditions regarding notably the parameters for calculating the compensation, the arrangements for avoiding and repaying any overcompensation, or the control of overcompensation, could enter into force only one year after publication of the Decision.

2.4.3 Commission Directive amending Directive 80/723/EEC

According to Commission Directive 2000/52/EC of 26 July 2000 (amending Directive 80/723/EEC of 25 June 1980), separate accounts are only required to be maintained if the undertakings entrusted with Services of General Economic Interest receive State Aid[63]. However, in its judgment in Altmark Trans GmbH, the Court of Justice ruled that, under certain conditions, compensation for Services of General Economic Interest may not constitute State Aid in the meaning of Article 87 para. 1 of the EC Treaty.

Irrespective of the legal classification of public service compensation, separate accounts must be maintained where undertakings receiving such compensation also carry out activities outside the scope of the Services of General Economic Interest. It is only by maintaining separate accounts that the costs imputable to Services of General Economic Interest can be identified and the correct amount of compensation calculated.

Directive 2000/52/EC should therefore be amended accordingly so that the obligation to maintain separate accounts is applicable to undertakings receiving compensation for Services of General Economic Interest that also carry out activities outside the scope of Services of General Economic Interest, irrespective of the legal classification of such compensation in the light of Article 87 para. 1 of the EC Treaty.

Although there is no formal direct link between the Transparency Directive 2000/52/EC and the applicability of the Decision, the latter one provides in its Article 5.5 for the obligation to maintain separate accounts in order to justify the costs of the service of general economic interest[64].

63 Cf. footnote 53.
64 See also point 16 of the Community Framework.

3 Public service operation and State Aid law: Recent developments[1]

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For local authorities, the outcome of the "Monti package" may be cautiously termed a positive one. The block exemptions granted under this scheme are extraordinarily (and, it may be said, unexpectedly) generous: Euro 30 million of annual aid for a turnover of up to Euro 100 million are of considerable importance for local authorities and mean much more than the proverbial "drop in the bucket". Conversely – and this must not be underestimated –, the formal preconditions imposed by the Decision and the Community Framework entail not inconsiderable restrictions of the economic autonomy of local authorities and, ultimately, create new risk factors in assessing what constitutes or does not constitute State Aid. However, the increase in legal certainty is definitely to be welcomed.

3.1 Introduction

While the ECJ's steadily growing emphasis on the necessity of tendering requirements for the award of public services may be unpleasant for local authorities in specific cases,[3] tenders do have one advantage: as the ECJ noted roughly two years ago in its Altmark Trans judgment, the organisation of tender procedures as a rule means that the consideration paid to the best tenderer for the service performed is exempted from the State Aid regime as compensation:[4] there is thus no need to notify it, nor does the payment have to be approved by the European Commission.

It is true that, in very many cases, compensation for the performance of public services is not paid on the basis of a tender organised under procurement law; thus the topicality of State Aid problems relating to such payments remains definitely great. Principally, State Aid law is therefore relevant for local authorities seeking to finance Services of General Interest even after Altmark, above all because the ECJ

1 Revised and extended version of a lecture held by P. Segalla on the occasion of the conference "In-house Awards" organised by the Association of Austrian Cities and Towns together with Haslinger, Nagele und Partner on 20 June 2005 at Vienna City Hall. Status quo as per July 2005

2 From April to July 2005, Martin Loga underwent a practice stint at the Association of Austrian Cities and Towns in Vienna.

3 Cf. the other contributions on problems relating to awarding law in this volume.

4 Cf. the "fourth Altmark criterion" of the ECJ. While some authors contend that the logical link between the organisation of a tender on the one hand and the claim that the consideration paid should thus not be considered State aid on the other hand may not be assumed to apply automatically, it seems that the risk of infringing State aid law is comparatively low if award or other tender procedures are organised.

ruling states in particular that "the relatively small amount of aid or the relatively small size of the undertaking that receives it does not as such exclude the possibility that trade between Member States might be affected." In particular, wherever a cross-border market for a service to be operated already exists, this might lead to relatively small amounts paid to small undertakings, such as municipal enterprises, coming under State Aid law. Obviously, the financing of Services of General Interest by larger cities may in any case be – at least principally – of relevance under State Aid law.

For several reasons, it seems particularly appropriate to address this problem at the present moment. Firstly, the seminal ECJ judgment in the Altmark Trans case is almost exactly two years in the past, as mentioned above; it seems therefore useful to review the development of case law and State Aid practice, in particular with respect to decisions taken by the European Commission since then. Secondly, the further development of the State Aid framework is currently being evaluated by the Commission, which has submitted an Action Plan for the reform of the legal framework in the 2005 – 2009 period. Thirdly, the Commission has taken a decision a few weeks ago regarding the so-called "Monti package" with the objective of significantly facilitating the financing of public service operation in the near future.

3.2 State Aid law two years after Altmark

3.2.1 No further development of case-law since Altmark Trans

On 24 July 2003, the ECJ ruled as follows in the Altmark Trans case:[5]

"However, public subsidies intended to enable the operation of urban, suburban or regional scheduled transport services are not caught by that provision where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. For the purpose of applying that criterion, it is for the national court to ascertain that the following conditions are satisfied:

- first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;

- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;

5 ECJ, C-280/00, Altmark Trans, 2003, I-07747, lit. 88 ff.

- third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

- fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations."

Both the ECJ and the Court of First Instance have since then confirmed these four criteria in several judgments and affirmed their (potential) applicability to areas other than (sub)urban and regional scheduled transport services, e.g. the operation of ports[6] or the provision of infrastructure.[7] However, so far, these criteria have been neither developed further nor clarified more precisely in case law, although a need for clarification was voiced by practitioners quite soon after pronouncement of the Altmark judgment.

3.2.2 Decisions taken by the Commission

In view of the lack of clarifying case law by the Community courts, the decisions taken by the European Commission assume prime significance at the moment, at least until the first relevant judgments are handed down by the ECJ. For the time being, the Commission regularly invokes the four Altmark criteria and primarily monitors compliance with them when ruling on compensation paid by Member States.[8] However, it interprets the criteria, in particular the second and fourth, very strictly; thus circumventing the scope of application of State Aid law does not seem a practical possibility.

3.2.3 Article 86(2) of the EC Treaty regarding its application to State Aid law

So far, the State Aid law decisions of the Commission are less influenced by the Altmark judgment than by Article 86(2) of the EC Treaty in providing a definite guideline regarding the viability of State subsidies for the financing of Services of

6 ECJ, 27 November 2003, C-34/01 et al., Enirisorse, lit. 31 ff. (not yet in the Official Collection).
7 ECJ, 16 September 2004, T-274/01, Valmont case, lit. 131 (not yet in the Official Collection).
8 Cf. Commission Decision 2005/351/EC of 20 October 2004 concerning the aid scheme implemented by Spain for an airline, lit. 59 ff.; Commission Decision of 19 May 2004, TV2 v. Denmark C (2004) 1814 final., lit. 70 f. (cf. press release of 19 May 2004, IP/04/666, and the cases brought by Denmark and TV2 before the ECJ, OJ C-262 of 23 October 2004, p. 43 ff.).

General Interest.[9] Contrary to compensation, which meets the Altmark criteria and hence does not come under the State Aid concept, the application of Article 86(2) of the EC Treaty to State Aid law, in the opinion of the Commission, definitely requires prior notification. When evaluating such cases, the Competition Directorate-General uses a three-tiered scheme based on the wording of Article 86(2) of the EC Treaty and ECJ case law in order to clarify whether State Aid is justified under the above-mentioned primary-law (exemption) rule:

- the service performed must be a service of general economic interest, and it must be clearly defined as such by the Member State;
- the undertaking in question must have been expressly entrusted with the operation of the service by the Member State;
- the application of the competition rules of the EC Treaty must impair the operation of the service; however, any deviation from these rules must not affect Community trade to an extent as would be contrary to the interests of the Community (proportionality test).

In practice, the Commission grants Member States a wide margin of discretion in defining what constitutes a service of general economic interest[10] – at least where no sector-specific rules (e.g. universal service in the telecommunications sector) apply – and merely checks for potential misuse of the rule, while yet strictly monitoring all other prerequisites. This concerns in particular the definition of the service and the entrustment of the undertaking. In this, however, Member States are free to choose the legal form for defining the service and commissioning the undertaking: laws (or ordinances) as well as contractual agreements (under public or private law) are admissible.[11] The latter aspect in particular is of importance for Austrian local

9 Exemptions from State aid law going beyond Altmark may only be invoked by local authorities financing Services of General Interest in the following cases:
– State aid coming under the de-minimis thresholds (Commission Regulation (EC) No. 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty on de-minimis aid, OJ, No. L 10 of 13 January 2001, p. 30);
– State aid to small and medium-sized enterprises under the SME Directive, with SMEs classified as undertakings controlled by territorial authorities only if the latter have fewer than 5,000 inhabitants and an annual budget of less than Euro 10 million (Commission Regulation (EC) No. 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises, OJ L 10 of 13 January 2001, p. 33; cf. Article 3(4) of Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124 of 20 May 2003, p. 36).

10 Regarding the concept of Services of General Interest, cf. e.g. *Koenig/Kühlung,* Art. 86, in: Streinz, EUV/EGV, lit. 43 ff., and *Hochbaum,* Artikel 86, in: *Schröter/Jacob/Mederer,* Kommentar zum europäischen Wettbewerbsrecht, lit. 49 ff.

11 The question of whether contracts under private law are sufficient for the purposes of Article 86(2) of the EC Treaty was frequently raised in the German-speaking literature and partly

authorities, since they, as a rule, only dispose of the instrument of private-law contracts to organise Services of General Interest.

In its proportionality test, the Commission is chiefly concerned with ensuring that the compensation to be evaluated does not exceed the necessary extent (i.e. the costs of the service performed minus any revenue); in this, the compensation paid includes – in accordance with the general concept of State Aid – all other advantages granted to the undertaking. Already today, the Commission is increasingly paying attention to mechanisms that prevent the control of compensation and (possible) over-compensation;[12] this point is generalised in the "Monti package" discussed below.

3.3 The "Monti package"

The granting of State Aid on the basis of Article 86(2) is a protracted procedure and affected by high legal uncertainty for the authorities disbursing the aid. The same is true if the Altmark criteria are to be met. For this reason, the Commission, in its White Paper on Services of General Interest[13], announced that it would be adopting several acts in the area of State Aid law to create greater legal certainty.

The three acts described below were proposed by the Commission already in early 2004 and adopted on 15 July 2005. They are among the first initiatives in the context of a planned package to reform Community State Aid law for the 2005-2009 period.[14]

3.3.1 Decision on the application of Article 86 of the Treaty to State Aid

Pursuant to Article 86(3) of the EC Treaty, the Commission adopted the "Decision on the application of Article 86(2) of the Treaty on the form of public service compensation granted to certain undertakings entrusted with the operation of

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negated (cf. *Hellermann,* Örtliche Daseinsvorsorge und gemeindliche Selbstverwaltung, 115 f.). However, with a view to legal certainty and above all the neutrality of Community law vis-à-vis the legal systems of Member States, the flexibility of the Commission – as expressed in the Communication on Services of General Interest, OJ C 17 of 19 January 2001, p. 4 – regarding this issue must be welcomed and is also legally correct.

12 In particular with a view to the pending cases to examine the financing of public broadcasters, cf. the Commission press release regarding the case against Germany, Ireland and the Netherlands, IP/05/250 of 3 March 2005.

13 Communication from the Commission – White Paper on Services of General Interest, COM (2004) 374 final of 12 May 2004. The White Paper can be accessed at http://europa.eu.int/comm/secretariat_general/services_general_interest/index_en.htm.

14 The "State Aid Action Plan – A Roadmap for State Aid Reform 2005–2009" (consultation document) can be accessed at http://europa.eu.int/comm/competition/state_aid/others/action_plan/.

Services of General Economic Interest“ on 15 July 2004.[15] The Decision will apply to compensation that does not comply with the four criteria of the Altmark judgment and hence qualifies as State Aid under Article 87(1) of the EC Treaty and is notifiable under Article(2) of the EC Treaty. Compensation for the operation of Services of General Economic Interest coming under the Decision is generally exempted from the notification requirement under Article 88(3) of the EC Treaty. According to Article 2 of the Decision, the following forms of compensation come under this rule:[16]

- public service compensation granted to undertakings for the performance of Services of General Economic Interest receiving annual compensation for the service in question of less than EUR 30 million. However, in this case, the average annual turnover before tax during the two financial years preceding that in which the service of general economic interest was assigned must be less than Euro 100 million.

- public service compensation granted to hospitals and social housing undertakings. The total sum paid as compensation is immaterial, but the activity must be qualified as a service of general economic interest by the respective Member State.

- public service compensation for air or maritime links to islands on which average annual traffic during the two financial years preceding that in which the service was assigned did not exceed 300,000 (maritime ports) und 1.000,000 (airports) passengers.

- public service compensation granted to credit institutions of less than Euro 100 million annually. However, the balance-sheet total of the credit institutions must be less than Euro 800 million.

However, this Decision ties exemptions from the notification requirement to a number of strict prerequisites, in particular with respect to entrustment and the monitoring of the management of compensation payments:

[15] At the moment of completing the present contribution, the Decision had not yet been published in the Official Journal. It can be accessed at http://europa.eu.int/comm/competition/state_aid/others/action_plan/sgei_art86_en.pdf.

[16] The Commission assumes that compensation meeting the criteria of the Decision does not significantly affect the development of Community trade (recital 14 of the Decision).

- a valid act of entrustment[17] must be in place, from which the nature and the duration of the public service obligations (lit. a), the undertaking and territory concerned (lit. b) and, finally, the nature of any special or exclusive rights assigned to the undertaking (lit. c) derive;

- the parameters for calculating, reviewing and controlling the compensation must be specified (lit. d);

- the arrangement for avoiding and repaying any over-compensation must equally emerge from the act of entrustment (lit. e);

- the compensation must not exceed the costs incurred in the discharge of the public service obligations (including reasonable profit) (Article 5 of the Decision provides for this point in detail)[18].

Article 6 of the Decision stipulates that Member States must carry out regular checks to avoid over-compensation and, if necessary, demand the repayment of funds and adjust the compensation parameters.[19] Articles 7 and 8 deal with the keeping of documents and the notification requirements of Member States.

Article 4 (lit. c, d and e) and Article 6 of the Decision are applicable as of 15 July 2006 (i.e. one year after adoption of the Decision). Since these rules lay down concrete requirements for acts of entrustment and monitoring, this period is to enable Member States to prepare adequately. After this "transition phase", the Decision will be applicable without derogations.

3.3.2 Community Framework for State Aid in the form of public service compensation

Compensation that neither fully meets the four criteria of the Altmark judgment nor fulfils the prerequisites under the Commission Decision specified above can be declared compatible with the Common Market on the basis of the Community Framework. However, State Aid coming under this Community Framework[20] must be notified to the Commission pursuant to Article 88(3) of the EC Treaty before being

17 The legal form of entrustment "may be determined by each Member State" (Article 4 2. of the Decision).

18 Thus a reasonable profit for the undertaking as well as revenue from the service discharged and profits from services for which the undertaking enjoys special or exclusive rights must be taken account of.

19 Over-compensation of up to 10% of the annual compensation may be carried forward to the next compensation period.

20 Community Framework für State aid in the form of pubic service compensation. Not yet published in the Official Journal. The Community Framework can be accessed at http://europa.eu.int/comm/competition/state_aid/others/action_plan/sgei_encadrement_en.pdf.

disbursed. The Community Framework is to remain in force until 15 July 2011. State Aid meets the requirements only if an act of entrustment is in place that specifies:

- the undertaking thus entrusted;
- the precise nature of the public service obligation;
- the territory concerned;
- the nature of any exclusive or special rights assigned to the undertaking;
- and the parameters for calculating, controlling and reviewing the compensation.

Like the Decision, the Community Framework, too, stipulates that Member States must carry out controls to avoid over-compensation and if necessary, demand the repayment of over-compensation. The key difference that distinguishes the scope of application of the Community Framework from that of the Decision thus lies in the prior notification requirement for the aid and the evaluation by the Commission stipulated by the Framework. In both cases, any individual scope of application of Article 86(2) of the EC Treaty is excluded, even if – legally speaking – at least the Community Framework is merely to interpret the primary-law rule.

3.3.3 Amendment to the Transparency Directive

To complement the Decision and the Community Framework, the package also provides for an amendment to the so-called "Transparency Directive" 80/723/EEC[21], which was likewise adopted on the basis of Article 86(2) of the EC Treaty.[22]

The currently applicable version of the Directive inter alia stipulates that public undertakings that are entrusted with the discharge of Services of General Economic Interest for which they receive public service compensation and also carry on other activities must maintain separate accounts to ensure transparency and avoid cross-subsidies.

After the amendment, this applies to all public undertakings entrusted with the operation of Services of General Economic Interest that receive compensation for these services from the Member State – i.e. irrespective of whether these payments

21 Commission Directive amending Directive 80/723/EEC on the transparency of financial relations between Members States and public undertakings. Not yet published in the Official Journal. Can be accessed at http://europa.eu.int/comm/competition/state_aid/others/action_plan/sgei_directive_en.pdf.

22 It seems that the Transparency Directive has not yet been transposed into Austrian law with respect to its applicability to local authorities.

should be qualified as State Aid under Article 87 of the EC Treaty or, by fulfilling the Altmark criteria, no longer fall under the State Aid concept.[23]

3.4 Conclusion and evaluation

The "Monti package" constitutes, on the one hand, a prioritisation of State Aid designed to balance the costs of Services of General Economic Interest.

On the other hand, however, it renders the formal requirements for such aids more stringent and (deliberately, it may be assumed) restricts the margin of discretion granted under Article 86(2). Experience has shown that above all stricter transparency requirements moreover entail greater efficiency of State Aid controls by the Commission.

For local authorities, the outcome may be cautiously termed a positive one. The block exemptions granted under this scheme are extraordinarily (and, it may be said, unexpectedly) generous: Euro 30 million of annual aid for a turnover of up to Euro 100 million are of considerable importance for local authorities and mean much more than the proverbial "drop in the bucket".

Conversely – and this must not be underestimated –, the formal preconditions imposed by the Decision and the Community Framework entail not inconsiderable restrictions of the economic autonomy of local authorities and, ultimately, create new risk factors in assessing what constitutes or does not constitute State Aid. While the increase in legal certainty is definitely to be welcomed, it should be emphasised that only very few judgments of the Community courts on the application of Article 86(2) of the EC Treaty are so far available, so that the course does not yet seem to be definitely set in this matter.

[23] The currently available German version of the Amending Directive presents a notable translation error: contrary to the applicable version, undertakings required to maintain separate accounts are defined as public undertakings that enjoy a special or exclusive right and (instead of "or") are entrusted with the operation of a service of general economic interest. This wording clearly contradicts the purpose of the rule as well as the English version of the Amending Directive.

4 Public-Private Partnerships seen from the viewpoint of European law[1]

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Where there is much desire to learn,
there of necessity will be much arguing,
much writing, many opinions;
for opinions in good men is but knowledge in the making.
John Milton
English poet (1608-1674)

4.1 Introduction

PPPs are a reality of modern-day economic life. Neither public authorities nor private economic actors are in a position to ignore the importance of such partnerships in terms of economic and social policy: after all, these are instruments that enable the state or its territorial authorities (regions, provinces or – in the case of Austria and Germany – Länder) to comply with their mandate, i.e. the creation of a viable environment in the widest sense for its citizens, by drawing on private funds or know-how.

Generally speaking, the increased falling-back of the state on financial means of the private sector results, on the one hand, from tensions between reduced state budgets or the redistribution of funds to other areas and, on the other hand, from a constantly growing number of tasks the state is supposed to essentially comply with despite budget cuts. These tensions have stimulated inventiveness: typically, whenever the specifics of new cases no longer fit into a given legal framework or threaten to go beyond its scope, at least two phenomena emerge. Legal standards are interpreted

- so as to permit subsuming new case specifics, thus ensuring that these can still come under the scope of application of the standards, or

- so that new case specifics are defined as not coming – even as never having come – under the scope of application of the standards (i.e. as being outside the scope of application).

1 Status quo as per July 2005

2 The author is Administrator at the European Commission in Brussels and currently working for the Internal Market and Services Directorate-General. The present report reflects the personal opinions of the author.

If we look at the developments regarding public-private partnerships in Europe over the past few years, it becomes clear that this is exactly what has happened.

- But which of the above-mentioned approaches is the right one?
- Which decisions taken by contracting authorities comply with the awarding rules in force at the European level?
- Are there any grey zones to which neither option is applicable?
- Are there still unresolved case specifics?

Especially because contributions such as the present text do not come alive through abstract legal comments, findings and conclusions but by drawing on actual or hypothetical cases, the present contribution proposes possible solutions to questions of the type raised above and tries to illustrate them by means of specific cases[3]. Of course, statements are offered only regarding cases on which the European Commission has also published its legal opinion. Cases that were the object of proceedings before the European Court of Justice are expressly referred to as such. All other cases serve exclusively to illustrate the respectively applicable legal standards and are presented impartially.

The scope of this brief contribution is clearly insufficient to deal exhaustively with the issue at hand: however, the objective is to provide contracting authorities at the local and regional levels with a concise overview of the conceptual structure developed by the European Commission in order to come at least a little closer towards a solution for many unresolved questions in connection with PPPs. Those interested in the structure of the decision-making process preceding the conclusion of a PPP contract or in specimen contracts and the related consequences under civil and company law should consult the highly informative and detailed PPP guidance texts published by the national authorities[4], many of which can be downloaded from the Internet.

Upon careful reflection and in view of the title of both the present publication and the professional background of the author, who for a certain period was concerned with the Mödling case quoted in the text on behalf of the European Commission, it seemed an obvious choice to structure the text along the lines of the Green Paper of

3 The present contribution exclusively refers to case specifics that are public knowledge (through print media, position papers of municipal associations, cases cited as examples in guidance material or press releases of the European Commission or the Member States). The author assumes no responsibility for the completeness of the factual elements of each case.

4 PPP guidance of the German Federal Ministry of the Interior, the Federal Ministry for Economics and Labour, etc. The sketches in Chapter 4.3 were likewise drawn from this material.

the European Commission on PPPs[5]. With the Green Paper, which was submitted to a public consultation process, the Commission has taken an official position vis-à-vis this issue. Since 3 May 2005, the report[6] summarising contributions by third parties has also been publicly accessible.

However, the topicality of the present contribution stems above all from the recent decision of the European Court of Justice (ECJ) on public procurement issues, which clarified the "in-house" concept through its judgment in the *Halle case*[7]. It will be highly interesting to see whether the ECJ will stand by its ruling and arrive at the same judgment in the still pending Mödling case[8], where proceedings were instituted by the Commission against the Republic of Austria.

But before discussing these complex factual and legal specifics in the text below, it seems useful to return to the point of departure, i.e. to the question of how to define PPPs.

4.2 Public-Private Partnerships between public authorities and private stakeholders - Dimensions and characteristics of PPPs

The areas of application for PPPs are wide; they encompass urbanism and urban development, economic promotion, infrastructure development, research and development, technology transfer, Services of General Interest, environmental protection, cultural activities, the educational sector, tourism and social policy.

Both in literature and in practice, different ways of structuring as well as of naming PPPs abound. The approach to structuring chosen in the following should not be considered exhaustive and does not claim to be the only valid one.

4.2.1 From internal task management to full privatisation

The ventures covered by the concept of PPPs range from purely internal project or task management by public authorities to full privatisation, i.e. the full or partial transfer of formerly municipal/regional tasks to private stakeholders. Conversely, formal (or organisational) privatisation does not really constitute a PPP, as the State

5 Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, COM (2004) 327 final.

6 Commission staff working paper, Report on the Public Consultation on the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, SEC (2005) 629.

7 ECJ, judgment of 11 January 2005, C-26/03, Stadt Halle and RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna.

8 Conclusions of the Advocate General, C-29/04, Commission of the European Communities v. Republic of Austria, of 21 April 2005.

continues to discharge public tasks but now uses private-law instruments, in particular undertakings owned by it but established under private law (such as municipal utilities companies, i.e. so-called “Stadtwerke”).

4.2.2 From financing models to organisational models

PPPs are usually divided into these two categories, with either organisational type determining its structure of financing and risk distribution. The exemplary models cited below differ from each other also in terms of legal and economic ownership in the resulting works or objects, which in its turn entails specific consequences under tax law.

a) Financing models

The concept of private pre-financing serves as an umbrella for standard models such as leasing and hire-purchase. These are characterised by the fact that planning and operation are not the subject-matter of the contract: its focus is rather on financing, because private stakeholders, in addition to constructing the works according to the stipulated planning specifications laid down by the contracting authority, handle the financing of the object in the context of a hire-purchase or leasing contract. As a rule, the contractor is paid consideration only as of the moment of actual exploitation. This is an approach different from conventional financing models where consideration is typically paid in relation to progress of the works.

In recent years, however, it has become evident that, while financing does constitute an important component of a PPP, it must be viewed in the overall context of the project in question, i.e. in connection with planning, implementation, operation and exploitation.

Municipal loans

The overwhelming part of investments by municipalities is done through municipal loans. Compared to other financing options, this one is particularly characterised by favourable interest rates, prompt availability, flexible repayment schemes and fixed-interest conditions.

Factoring

In the field of supply or disposal utilities, investments may be financed through a private undertaking that is granted funds for the construction of the works by a bank, to which future financial claims of the municipality vis-à-vis the users of the facility are in turn forfeited. In this case, the investment is financed with the paid-out cash value of the future financial claim, determined on the basis of financial mathematics.

Leasing, sale and leaseback, US cross-border lease

Leasing is defined as the commercial assignment or rental of movables or non-movables. The lessor receives part payments as consideration for the assignment, and the object of the lease normally returns to the lessor after expiry of the contract. However, a leasing contract may also comprise rights of purchase or prolongation. Still, leasing options are often more costly for municipalities than handling projects on their own.

In the sale and leaseback option, a public building or facility is sold to a private owner and leased back by the State. From the legal angle, such contract types may violate anti-sale conditions that are often part of municipal constitutions. A possible justification for the sale and leaseback option is that it may serve as a quick financing option for the rehabilitation, enlargement or updating of a municipal property.

If this financing option is implemented together with a US investor (US cross-border lease), this may result in considerable tax savings. The investor leases or rents movables or non-movables, such as sewage treatment plants, water supply plants, etc., from a European municipality for a period of several decades and immediately leases these properties back to the municipality. This enabled the US investor to claim tax benefits in the United States and pass these on to the municipality as present value benefit, which made this leasing option more attractive than “simple” leasing; the municipality remained the civil-law owner of the properties. Changes in US tax law have, however, much diminished the attractiveness of this financing option.

Case 1 – Wastewater association, Austria[9]– US cross-border leasing [10]

An Austrian wastewater association owns sewage treatment plants and sewers valued at USD 200 million. These infrastructure assets are to be exploited by means

9 According to information furnished by Tiroler TIWAG Wasserkraft AG, the company has concluded three cross-border leases for its power plants Sellrain-Silz, Achensee, Imst, Kirchbichl, Amlach, Kalserbach and Heinfels. The contracts, which were concluded for varying periods, create a total net present value benefit – this is the financial benefit (allowing for all transaction costs) remaining with TIWAG – of Euro 171 million for the company. These funds were mostly used to finance the strategic partnership between TIWAG and Innsbrucker Kommunalbetriebe. In all transactions, ownership in the power plants remained with TIWAG. The contractual partners of TIWAG in the already completed transactions were highly regarded US supply-sector enterprises, insurance groups as well as a number of international and Austrian banks; Report by the Financial Administration to the Governor of the Federal Province of Tyrol, Provincial Diet of Tyrol, 30 June 2003.

10 Platzer, Die Gemeinden im Spannungsfeld zwischen Maastrichtkriterien und Daseinsvorsorge, Zeitschrift für Gemeinwirtschaft, Vol. 39/2, p. 90.

of a US lease model, with the revenue generated through this setup used to upgrade the sewer network. For this purpose, the US partner establishes a single-purpose trust. The contractual provisions stipulate that creditors of the US investor have no right to seize any assets held by the trust. This protects the Austrian wastewater association against potential economic difficulties of the US investment partner. The wastewater association leases its infrastructure assets to the trust on a long-term basis but remains owner of the plants (head-lease). Conversely, the trust pays the rent for the entire duration of the contract already on the day of concluding the transaction (usually by way of investor's equity of at least 13% and through loans by banks). On the same day, the wastewater association leases the plants back by means of a second leasing contract (sub-lease). This second leasing contract also contains the option of terminating the whole transaction after expiry of the sub-lease. The actual duration of the whole transaction is thus determined by the duration of the sub-lease. In order to make its current leasing payments under the sub-lease, the wastewater association deposits up to 97% of the income from the head-lease in a bank. During the sub-lease period, regular instalment payments are made to the trust from this deposit, and the trust in its turn uses these funds to repay the outside capital raised for the head-lease.

According to US tax law, the trust, by virtue of the long-term lease, becomes the beneficial owner of the assets invested. The investor can write off the infrastructure assets against taxes and deduct the financial expenditure related to the transaction (the taxation treatment of the assets in Austria remains the same). The tax benefit admissible according to US law is shared between the investor and the wastewater association. The advantage of creating additional liquidity for the association may account for up to 3-7% of the transaction volume.

Rental, hire-purchase

The advantage of rental contracts lies in the fact that municipalities assume neither the price risk nor the general risk relating to the objects they rent. By the same token, they are not obliged (but also not entitled) to purchase the rented object after expiry of the rental agreement (although this option is part of hire-purchase agreements). In case of long-term rental agreements, the rent is adjusted (increased) according to developments in the real-estate market, which may prove an unexpected burden on the municipal budget.

The hire-purchase option is frequently used where private investors construct a building that is then purchased by a municipality after a long (usually 20 or 30 years) rental period: the rent payments are true instalment payments with a view to purchasing the respective building.

Investor model (build and finance option)

Municipalities that decide for this model organise a tender for the construction of a building by a consortium composed of an architect, a building contractor and a bank. The best bidder chosen establishes an investment company and award a works contract. The land is at the investor's disposal by way of hereditary building right. After completion of the building, the public authority may rent, lease or purchase it via payment of instalments after a specific, longer period (usually 30 years).

This financing option has the advantage of creating a stable financial basis by involving a bank in the consortium.

Contracting

Contracting models are mostly used in the energy sector where the objective is to safeguard the delivery of an agreed service, e.g. optimisation of energy use. The private investor guarantees the supply of heating energy for a building and, conversely, is paid a monthly consideration by the municipality for energy provision and the quantities consumed. This model, too, may authorise the municipality to purchase the facility from the contractor after expiry of the contract, in keeping with previously agreed conditions, or to re-tender or simply renew the contract.

b) Organisational models

In the widest sense of the term, organisational models may encompass operator, concession, joint company, management and participation models, which are all mentioned below. These models are distinguished from each other with respect to their instruments under company law and their functional competences. This chapter describes only the most frequently selected models.

Organisational PPPs are distinct from those instruments where the State uses its own municipal departments or undertakings, i.e. public undertakings incorporated under private law (GmbH/public limited company, AG/joint-stock company), to fulfil its tasks.

Operator model

In the case of operator models, a municipality charges a third party with operating a public facility either in whole or in part. Following a call for tender, the municipality assigns the financing, construction and operation of a public facility in whole or in part to the third party. More specifically, operation, servicing, maintenance or other operational management tasks are taken over either on their own or in addition to other services.

Since civil law does not provide for operating contracts as a distinct, specific contract type, they may take a variety of forms, depending on the subject-matter of the agreement:

- in cases where the operating contract covers, in addition to operation, the construction, maintenance and financing of the facility as well, the contract may contain elements of hire-purchase, leasing or rental (depending on the clauses for contract termination);

- if the subject-matter of the contract is neither the construction, maintenance or financing of the construction and maintenance costs, but exclusively the operation of the public facility, the agreement is a “classic-style” service contract.

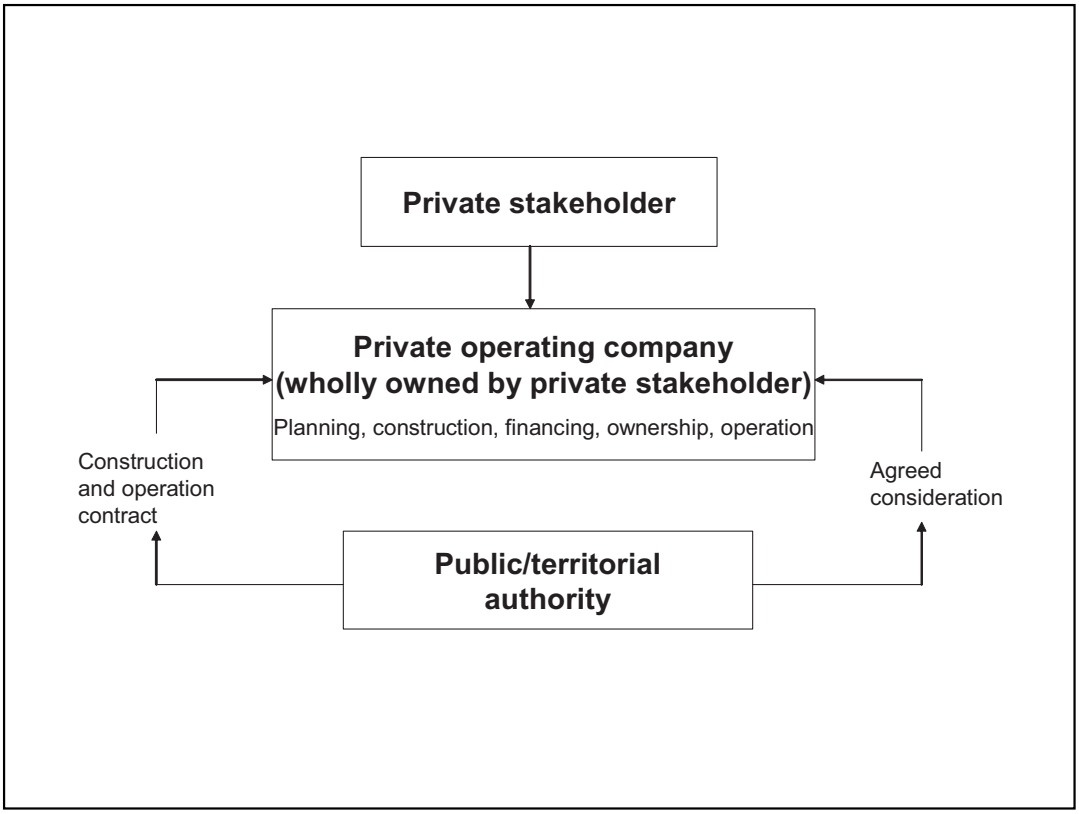
However, the operator is frequently also granted ownership of the newly built facility, either by transfer or on the grounds of having the facility constructed.

However, if the facility is operated as a municipal facility in the general interest of the public, the contractor agrees to the dedication of the facility for municipal purposes. Vis-à-vis the outside world and clearly visible to citizens, the municipality remains the carrier and operator of the facility. The contractor receives an operator’s consideration composed of consideration for the operating cost, interest rate, turnover tax and compensation for the entrepreneurial risk and comprising the contractor’s profit. The municipality refinances the operator’s consideration on the basis of user fees and other contributions.

Operating contracts frequently are of long duration and – like e.g. all typical service contracts for waste collection and disposal – contain very detailed descriptions relating to the operation of the facility to be constructed, the discharging of the contractually agreed activities, the definition of primary and secondary obligations of the contracting parties, provisions regarding financing and consideration, supervision and liability, dealing with potential service interruptions, the possibility of involving third parties and contract amendments.

The operator model differs from the concession with respect to a key element of concessions, i.e. the economic risk borne by the concessionaire, which is not assumed by the operator. Another difference often lies in the fact that concessionaires receive consideration on the basis of user fees for the facilities built/operated by them, while operators are directly compensated by the State for performing a service.

Figure 1 Operator model



Operating contracts are used with particular frequency in the field of wastewater disposal.

Case 2 – Sewage treatment plant in Rahden, Germany [11]

Rahden is situated in North Rhine-Westphalia and has 17,000 inhabitants. 75 per cent of households are connected to the public sewer network; the remaining 25 per cent have decentralised waste disposal. In the early 1990s, the sewage treatment plant was in need of urgent rehabilitation; in addition, the legal requirements for a third purification stage had to be met. The City of Rahden organised a call for tender. The specific wording of the notice allowed for bids focusing solely on the construction of a new sewage treatment plant as well as for bids that, in addition to constructing the plant, also offered to operate it under the operator model.

11 Deutscher Städte- und Gemeindebund, Documentation No. 28, Public-Private Partnerships. Dieter Schörken, Warnowquerung – Das erste privatfinanzierte Verkehrsprojekt Deutschlands, Beiträge zur öffentlichen Wirtschaft, Vol. 21, p. 89.

The contract was awarded to an undertaking offering an operator model with the following contractual aspects:

- duration of 25 years
- takeover of old plant by operator
- hereditary building right
- planning, upgrading and financing of the enlargement of the sewage treatment plant
- fully private financing of construction works
- wastewater purification and disposal services against operator's consideration (measured by volume)
- wastewater disposal and maintenance of the sewer network remain municipal tasks
- the citizens pay wastewater charges to the municipality

This project was positively evaluated by the City of Rahden, in particular because of the rapid completion of the sewage treatment plant by the operator, which handled the planning and construction works without further partners.

Build-operate-transfer models, too, belong to the group of operator models. However, these are short-term contracts with a focus on private planning, financing and implementation of the construction works; after expiry of the contract, ownership passes to the State. In the long term, the facility is therefore to be operated by the municipality, i.e. compliance with public tasks remains a municipal responsibility. For this reason, it is important to pay particular attention to the design and wording of the contract in order to ensure that tasks can be duly met in the long term.

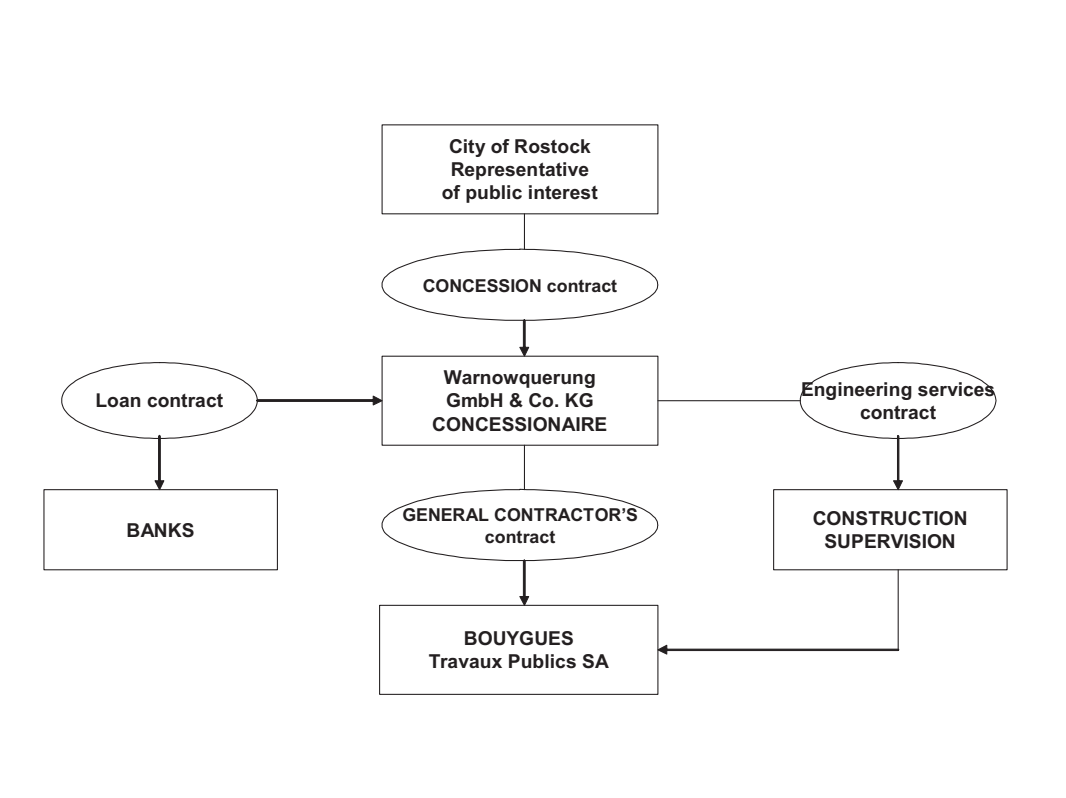
Case 3 – Warnow Tunnel in Rostock, Germany – Works concession: the first traffic PPP in Germany – F model [12]

September 2003 saw the inauguration of the Warnow Tunnel and hence of the first privately financed toll-road in Germany. To this day, this is one of only two F models concluded on the basis of a concession contract. According to the call for tender, planning, construction, financing and operation were to be handled by one single tenderer. This project was implemented in co-operation with a French group. In 1996, the City of Rostock concluded a concession contract with Warnowquerung VerwaltungsGmbH, an undertaking in which Bouygues Travaux Publics held 30 per cent, while 70 per cent were held by Macquarie, an Australian bank. Finally, VerwaltungsGmbH concluded a general contractor agreement with Bouygues Travaux Publics SA. As the contracting authority, the City of Rostock reserved the

12 Dieter Schörken, Warnowquerung – Das erste privatfinanzierte Verkehrsprojekt Deutschlands, Beiträge zur öffentlichen Wirtschaft, Vol. 21, p. 89.

right of direct construction supervision, even though the concessionaire had concluded engineering services contracts for construction supervision.

Figure 2 Warnow Tunnel



This project was considered very successful by representatives of the German city, in particular because financing was achieved faster than would have been the case had the project been exclusively publicly financed. The project, originally scheduled for completion in 2017, was thus already inaugurated in 2003.

Remark – Federal highway construction: the A model and the F model – Operator models making use of a concession contract

Both models have one common denominator in that they are operator models, with the subject-matter of the contract being the construction, operation and financing of a traffic infrastructure project. Like A models, F models, too, are provided with some initial financing by the Federal Republic, which is, however, smaller, amounting to only 20 per cent of the construction investment costs.

In the case of the *A model*, private stakeholders handle the upgrading, maintenance and operation of an existing motorway section. Up to 50% of the expected costs are initially financed by the Federal Republic, plus the federal revenue from the toll paid by lorries for the respective motorway section. In addition, for the duration of the contract, the Federal Republic passes the toll charged for heavy-duty vehicles pursuant to the Law on motorway tolls proportionately on to the operator. As it is the Federal Republic to levy the toll, no legal basis had to be created for the operation of the respective motorway section by private stakeholders.

Conversely, the *F model* provides for the construction and operation of individual projects, e.g. tunnels or bridges, by a private stakeholder. The essential difference between the two models lies in the fact that F model refinancing is ensured by the operator's levying of tolls from users, pursuant to the Law on private highway construction financing (FstrPrivFinG) and the Amendment Law, i.e. by the State entitling the private stakeholder to carry out certain activities normally reserved for territorial authorities[13].

Concession model

In this model, the concessionaire undertakes to render a specific performance directly for the benefit of users/citizens, at its own economic risk. Conversely, the concessionaire is entitled to finance its costs through charges or fees levied from users. The performance may be the construction of a facility (works concession) or the provision of a service (service concession).

[13] Regarding recent A model infrastructure projects of the German Federal Ministry for Transport and legal details on the award of such projects, cf. Byok/Hansen, Durchbruch für das A-Modell im Fernstraßenbau?, NZBau, 5/2005, p. 241.

Figure 3 Work concession

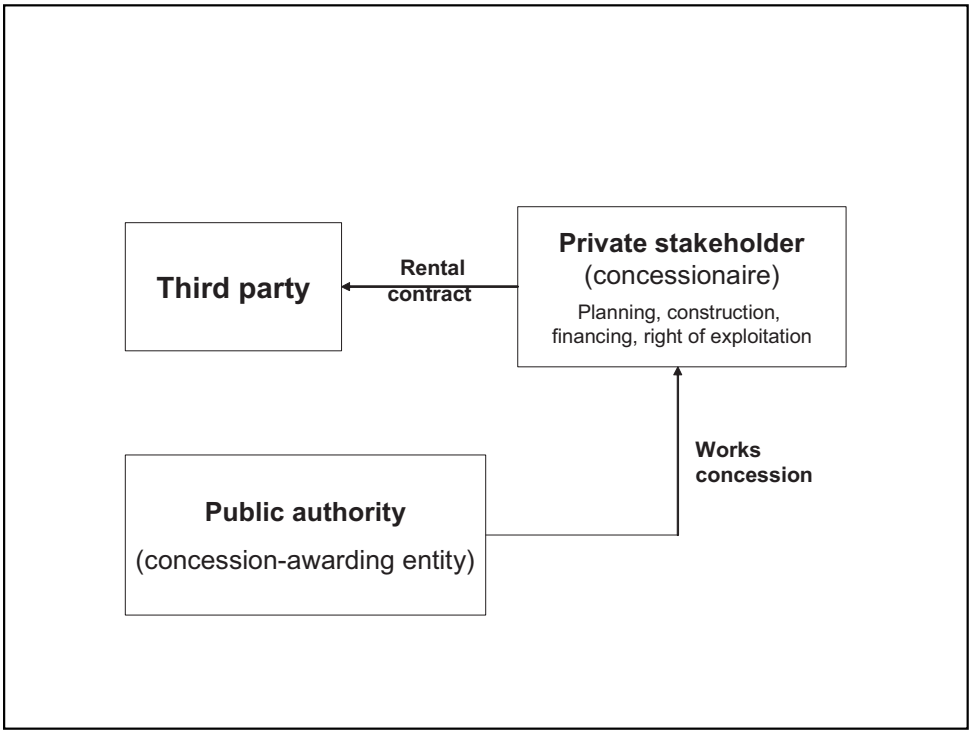
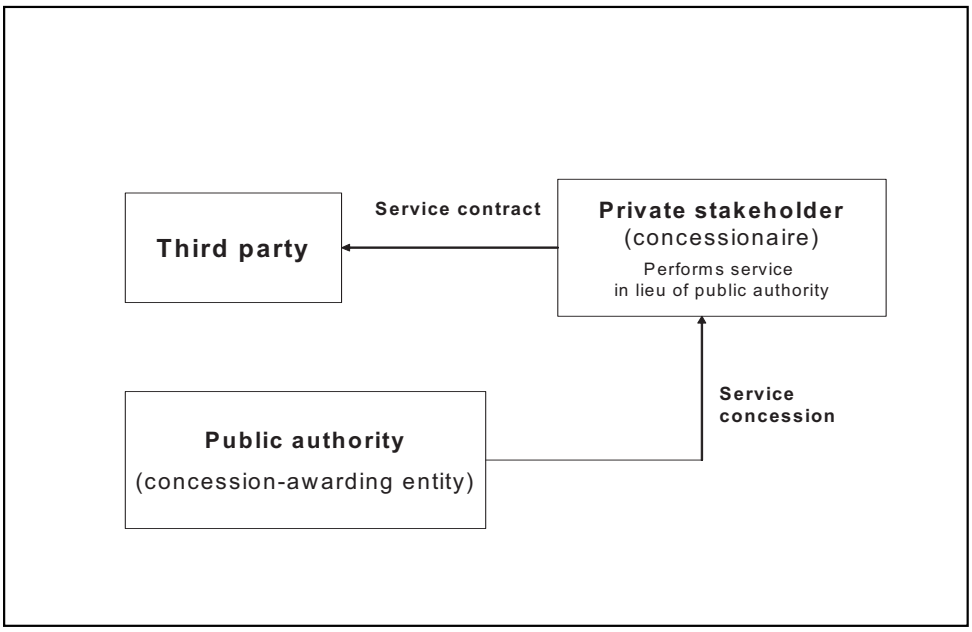


Figure 4 Service concession



Case 4 – A6 motorway in Spain, connections with Segovia and Ávila and Villalba-Adanero section[14]

In 1999, the Spanish authorities organised a call for tender for a concession for the construction, maintenance and exploitation of two connections of the A6 motorway with Segovia and Ávila as well as for the maintenance and exploitation of the Villalba-Adanero section of the same motorway. The call for tender related exclusively to these works and services, but not to further infrastructure works, which were directly awarded without a call for tender and whose sum was equivalent to that of the two publicly tendered parts of the concession. The additional infrastructure works (construction of a new reversible lane including a new tunnel between San Rafael and El Valle de los Caídos; construction of new lanes on two other sections; construction of a new tollgate area as well as other works) were not provided for in the first and second concession notices nor in the administrative specifications.

The Spanish authorities argued that the changes made when awarding the concession were based on two clauses in the specifications, which lay down that tenderers must indicate in their bids the measures to be taken for the overall management of the traffic in the area concerned by the construction of the new sections.

The European Commission, however, considered that the abovementioned clauses cannot themselves allow a substantial change in the subject-matter of the concession, particularly as these clauses explicitly refer to the area concerned with the construction of the two new sections. Moreover, nothing in the specifications permits concluding that tenderers could submit proposals relating to work other than the two sections referred to.

For this reason, the principles of transparency and equal treatment were infringed, as the omission of publishing all elements of the services to be rendered excluded potential tenderers from submitting suitable bids.

The Commission must now decide whether or not the arguments brought by the Spanish authorities constitute sufficient justification for the infringement.

Joint company model (referring to a form of co-operation under company law, as joint company contracts under public law are often concession contracts, and joint company contracts under civil law are either hire-purchase, leasing or simple supply contracts or service contracts with some co-operative elements)

The State and its private partner establish a project management company or a joint venture for a specific purpose. Public tasks are then assigned to this private-law

14 Press release of the European Commission, IP 02/1154, 25 February 2002.

undertaking. The municipality normally holds the majority of the shares in such undertakings, which may i.e. conclude a supply contract with the municipality and a management contract with the private partner. However, the project management company may also construct a building and rent it to the municipality on a long-term basis. This form of co-operation under company law is regularly supplemented by collateral agreements, such as hire-purchase clauses, leasing or concession agreements.

Figure 5 Joint company model 1

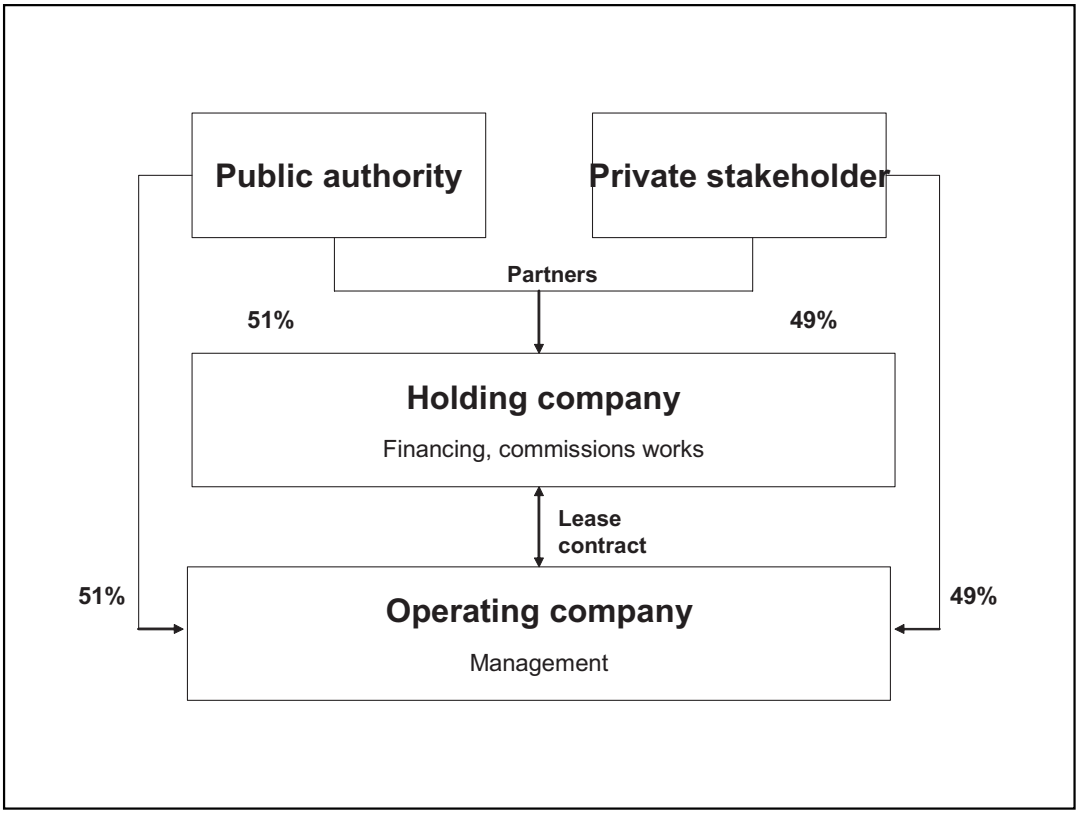
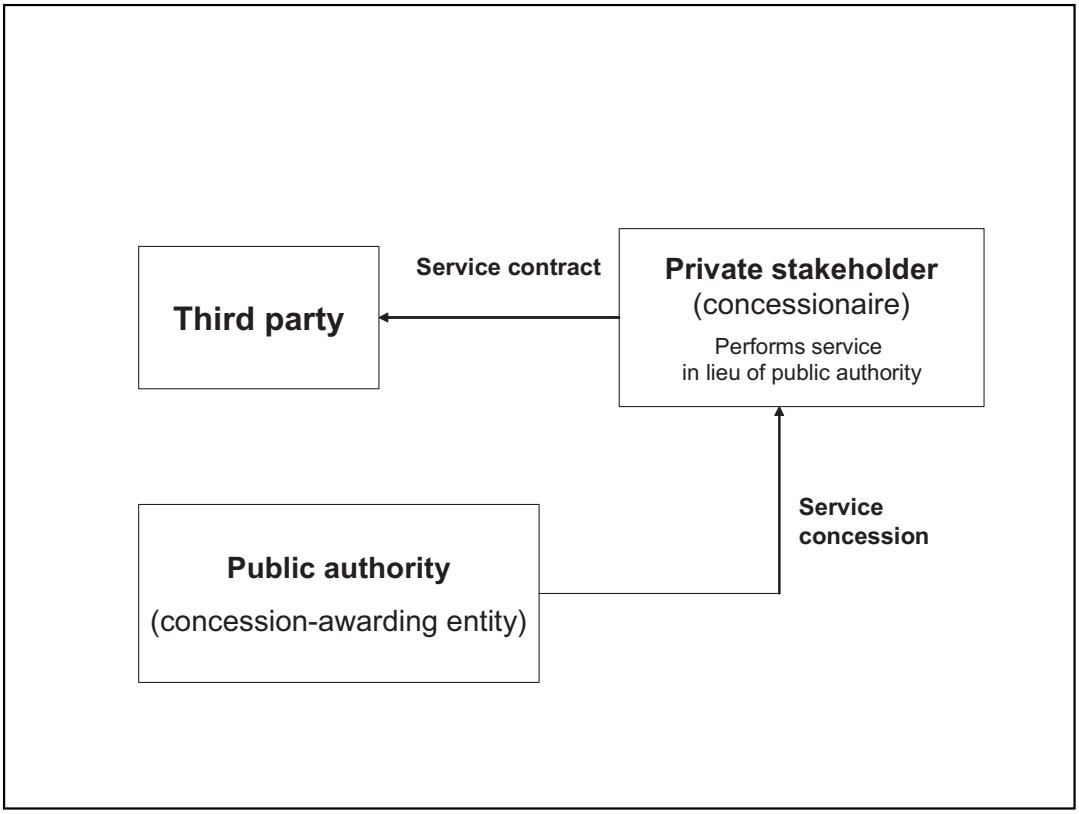


Figure 6 Joint company model 2



This model can be easily distinguished from operator models because the difference clearly lies in one single element, without necessitating an in-depth analysis of the provisions of the contract between the public authority and the private undertaking: the joint company model is characterised by the fact that a mixed entity is established, while in the case of the operator model, the service is performed by an undertaking involving only private stakeholders.

Joint company models are primarily used for waste disposal, water supply and wastewater disposal.

Participation model

This model enables private financing companies to acquire a participation in a municipally-owned undertaking as silent partners. Silent participations are part of the liable equity capital; most specifically, they are chosen to reduce the tax burden.

Case 5 – Sea airport in Cuxhaven/Nordholz [15], Germany

The military airport of Nordholz (Lower Saxony) is owned by the State. In the early 1990s, it had been proposed to use the airport for civil aviation as well, in particular because the nearby airports of Bremen and Hamburg were already working at full capacity. In 1992, following a private initiative of the Administrative District of Cuxhaven, the City of Cuxhaven and the Municipality of Nordholz it was decided to take on a majority share in the privately planned airport holding company FBG. FBG was financed via municipal bodies, subsidies by the State, the Land of Lower Saxony and the EU as well as privately financed capital. The project development plans were completed in 2000. To keep FBG solvent, it proved necessary to increase the equity capital several times. In the end, no further operators for the airport were found; the Administrative District of Cuxhaven thus purchased the airport site, took over the majority of the operating company and carried out investments to build the entire necessary infrastructure for a civil airport. The start-up phase entailing financial losses should be concluded by 2005.

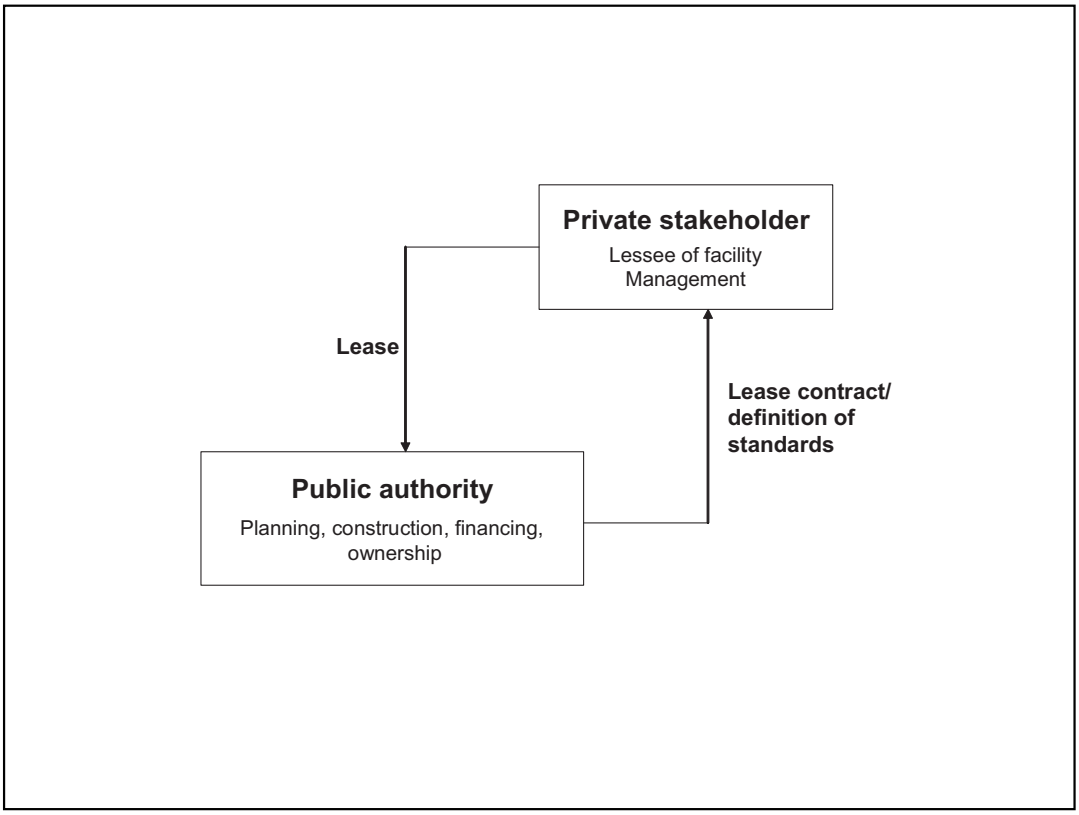
The State evaluated this project as a positive one, claiming that the interaction of public decision takers and private operators decisively favoured its implementation. The key point was in particular the influence exerted by private-sector economic principles on the holding company via the private, silent partner.

[15] Deutscher Städte- und Gemeindebund, Documentation No. 28, Public-Private Partnerships.

Management model

In this case, the State only assigns facility management to the private partner and compensates it by paying some form of consideration for its activities.

Figure 7 Management model



4.2.3 From contractual PPPs to institutionalised PPPs

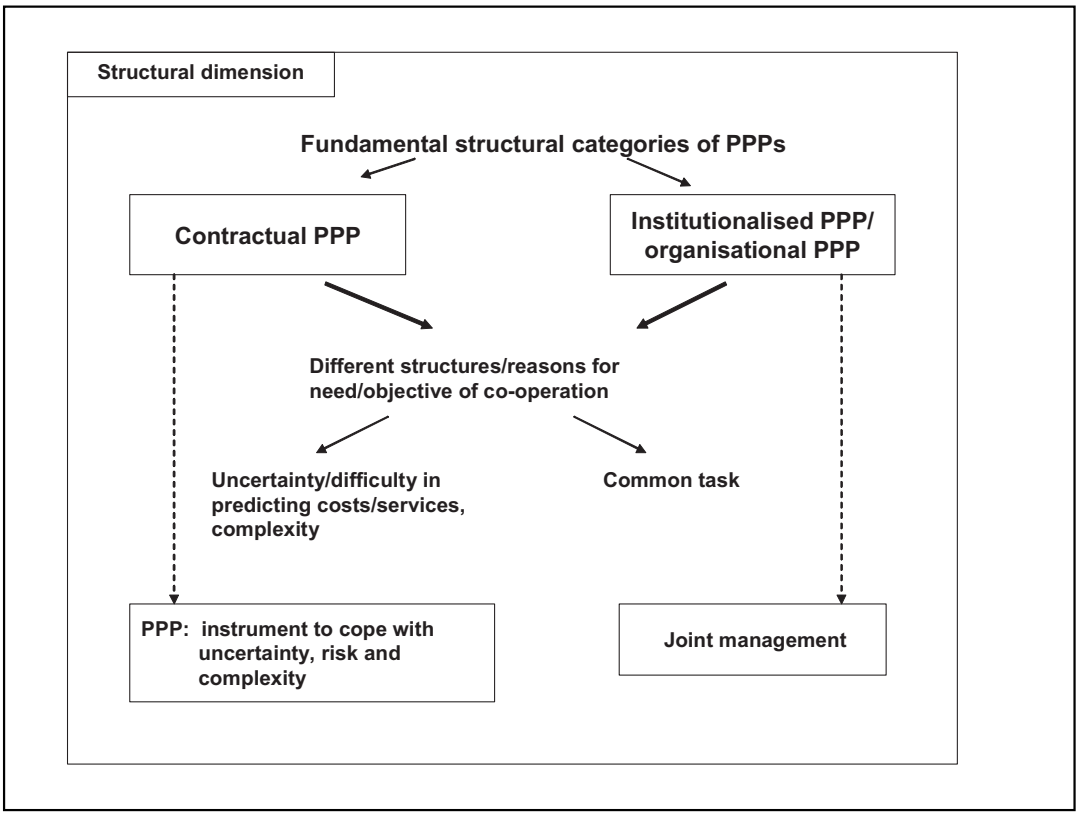
The relevant literature[16] distinguishes PPPs also on the basis of their structural dimension. This relates to the manner in which the co-operation between State and private stakeholder is organised and to the framework for the co-ordination of the reciprocal activities. The two PPP types differ fundamentally from each other with respect to their structures and objectives. Contractual PPPs call for co-operative adjustment and adaptation because of the uncertainty and difficulty of predicting costs, activities and risks as well as the complexity of such contracts. Institutionalised or organisational PPPs aim at managing a pool of resources to deliver common

16 Budäus, Public-Private Partnership – Ansätze, Funktionen, Gestaltungsbedarf, Beiträge zur öffentlichen Wirtschaft 21, illustration, p. 16.

tasks. The analysis of PPP-related problems contained in the Green Paper of the European Commission[17] likewise takes account of these two types of PPPs.

The Commission justified its decision by stating that this distinction is based on the observation that the diversity of PPP practices encountered in the Member States can be traced to two major models. Both raise specific questions regarding the application of Community law on public contracts and concessions, the analysis of which is undertaken in the following chapters. Thus the distinction does not take account of the legal interpretations made under national law and in no way prejudges the interpretation in Community law of these types of setups or contracts. The sole purpose of the following analysis is to make a distinction between the setups generally termed PPPs, in order to decide, in a second phase, which rules of Community law on public contracts and concessions should apply to them.

Figure 8 Contractual PPP – Institutionalised PPP



17 Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, COM (2004) 327 final.

4.2.4 Private Finance Initiatives – PFIs

In its response to the first question of the Green Paper of the European Commission regarding the types of purely contractual PPP setups in the different Member States, the British government[18] defined PFIs as follows, "The most commonly used form of contractual PPP in the UK is the Private Finance Initiative (PFI), where the public sector contracts to purchase quality services on a long-term basis so as to take advantage of private-sector management skills incentivised by having private finance at risk. This includes concessions and franchises, where a private-sector partner takes on the responsibility for providing a public service, including maintaining, enhancing or constructing the necessary infrastructure."

PFIs originate from the Private Finance Panel established in the United Kingdom in 1994. In the meantime, 20% of all public investments in the United Kingdom are handled by way of PFIs. PFI projects fall into two categories[19]: the first are projects where the users of an infrastructure provided by a private investor pay a fee to this investor (free-standing projects, roads or leisure facilities); the second is composed of projects where the State pays the private investor some consideration for the use of the infrastructure in question (penal institutions, information technology). As in other financing models mentioned above, the consideration is paid to compensate the private investor for its actual performance with respect to the agreed service.

Case 6 – Penal institutions in Bridgend and Fazakerley, United Kingdom – PFI

The project comprised the design, planning, operation and financing of two penal institutions in the United Kingdom. The 25-year contracts were originally awarded after using the restricted procedure. However, since no bid submitted corresponded to the project specifications, the contracting authority opted for a negotiated procedure and was thus finally able to award the contract. An interesting aspect of this unusual project was the way in which the criteria for awarding the contract were weighted: the bids submitted were evaluated for feasibility, price, quality and innovation. These criteria were taken account of in the evaluation as follows: 20% were assigned for safe custody of inmates; 15%, for adequate facilities and arrangements to meet the needs of inmates; 15%, for an adequate administrative system; 12%, for a convincing regime to deal with offences committed by inmates;

18 Response of the British government to the questions raised in the Green Paper on the homepage of the European Commission, Internal Market and Services Directorate-General, www.europa.eu.int.

19 For detailed remarks on PFIs and the penal institution projects in Bridgend und Fazakerley, cf. Trybus, PFI – Private Finance Initiative in Großbritannien, Business Circle, publication of conference contributions for the seminar "Vergaberecht und Beschaffungspraxis", 23/24 October 2003.

12%, for assistance in reintegrating inmates into society; and 6%, for sensitivity towards the local environment of the penal institutions.

According to the terms of the contract, the building was to pass into State ownership after expiry. The operation of the institution will be re-tendered in 25 years.

Remark:

At first glance, it may seem somewhat unusual to assign the operation and administration of a penal institution to a private third party. However, this example has even been imitated: e.g. in North Rhine-Westphalia[20], it was envisaged to carry out a market profiling to establish the potential for setting up penal institutions as PPPs in the Municipality of Ratingen.

Case 7 – School building in Espoo, Finland – PFI, concession contract [21]

Espoo was the first Finnish city to embark on a PFI project. Its objective was the planning, construction and financing of a school building by a private undertaking, while the City of Espoo, after completion of the project, acquired the right of using the school's premises and moreover safeguarded operation, cleaning, security as well as the provision of meals. The Official Journal of the European Communities published a notice on the project. For example, the award documents already contained a draft concession contract. The contract was awarded to the economically most advantageous bid. The City of Espoo signed a 28-year concession contract with the project undertaking (award by negotiated procedure).

The City of Espoo was satisfied with the progress of the project and is planning to implement further PFIs. It was, however, noticeable in Finland that above all the banking sector is still rather wary of such projects; Finnish banks tend to place more trust in securities turned over by public authorities than in those put up by private consortiums. For this reason, Finnish municipalities find financing more easily and at lower rates in the capital market than private consortiums do.

20 Immobilien Zeitung, No. 16 of 29 July 2004.

21 This PFI was presented by Leena Karjalainen, Head of the Legal Council of the City of Espoo (Finland), on the occasion of a seminar organised in Brussels on 21 October 2004, inter alia, by the Architects' Council of Europe on "The New EU Public Procurement Directives: European Harmonisation of Procurement Practices in the Sector of Engineering Consultancy and Architectural Services".

4.3 The Green Paper of the European Commission on Public-Private Partnerships

4.3.1 The Green Paper of 30 April 2004 [22]

In April 2004, the Commission published its Green Paper on PPPs and invited interested parties to share their experience and know-how regarding PPPs as well as to communicate whether there was need for special rules for PPPs or whether the applicable legislation offered sufficient legal certainty.

Background

In addition to private economic stakeholders, the European Parliament, too, had invited the Commission to clarify whether a draft directive on the uniform regulation of concessions and PPP types might constitute an option. The European Economic and Social Committee was convinced as early as in 2002 that a legislative initiative was called for. The Commission had therefore envisioned a Green Paper on PPPs already for late 2003; the publication date was extended to spring 2004 in the first report on the implementation of the Internal Market Strategy[23]. Finally, the document was made publicly available on the Internet on 4 May 2004 in order to invite comments.

PPP: an attempt for a definition at the EC level

The term “PPP” was introduced into scientific discourse as late as in the mid-1980s.

Community law does not contain any specific rules generally applicable to the innumerable embodiments of PPPs. Rather, the principles of the EC Treaty (transparency, proportionality and equal treatment), the internal market freedoms or the Procurement Directives should be applied in the individual case. For an attentive reader versed in the specifics of the matter, this statement may not require any further explanation since it is part and parcel of “general knowledge” among procurement specialists.

Still, it does seem justified at this point to request both a definition of PPPs as well as clarity regarding the question of whether the rules in force can, in specific cases, be at all applied to PPPs, and if so, which of these rules should be best followed.

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22 Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, COM (2004) 327 final.

23 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM (2004) 22 final, 21 January 2004.

The Commission was aware of the difficulties inherent in the attempt to describe PPPs comprehensively and yet conclusively with respect to their nature and characteristics. In particular, it should be borne in mind that the current 25 EU Member States have developed individual PPP types based on specific national legislations. This is why the attempt at definition given in the Green Paper is very appealing – it limits itself to the essential and is yet broad enough to comprise as many PPPs as possible:

"In general, the term refers to forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service."

However, this very broad definition is delimited by key elements the Commission regards as characteristic of PPPs:

- long-term co-operation between public and private partner;
- the project is in part funded by the private sector;
- the public partner concentrates primarily on defining the objectives and takes responsibility for monitoring compliance with these objectives, the quality of the services provided and the pricing policy;
- distribution of risks between public and private partner.

Thus it is a partnership between public authorities and private economic stakeholders aimed at rendering the delivery of public tasks more efficient and economical than in the past.

Structure of the Green Paper

The aim of the Green Paper does not lie in pondering the question of whether public authorities may or should outsource service provision to third parties. Article 295 of the Treaty leaves this decision to the discretion of the Member States. The Green Paper in fact relates to the subsequent development phase, i.e. when the contracting authority has already taken a decision and it is already clear that a specific service or infrastructure will be outsourced to a third party or third parties. The aim thus lies in rethinking the application of Community law on public contracts and concessions in force with respect to the various types of PPPs.

Remark – Discussion of Article 295 of the Treaty

"The Treaty shall in no way prejudice the rules in Member States governing the system of property ownership", Article 295 of the Treaty says. This provision ensures that the Member States – as well as any private stakeholder – can act independently

and at their own discretion. The Commission is definitely not authorised to intervene in the system of property ownership.

In his lecture on public services delivered on 18 October 2002 at the University of Paris UX Dauphine, former Commission President Romano Prodi stated that the Commission adheres absolutely to three principles, one of which concerns compliance with Article 295 of the Treaty:

"First and utmost, neutrality on the subject of private or public ownership of undertakings (Art. 295 Treaty). Regardless of whether an undertaking is in private or public ownership, it has the same rights and the same obligations. Above all, we do not – we cannot – force the privatisation of public enterprises, nor do we want to."

Thus it is left for the Member States to decide in which manner they will choose to award services. The range is broad and extends from the delivery of a specific service by municipal departments, publicly operated or owned undertakings to its delivery by private-law undertakings wholly or partly owned by public authorities.

Irrespective of the legal structure chosen for the undertaking, however, the Member States must clarify which rules at Community level are to be applied; procurement rules may possibly come into play at this point.

In the public discussion, it is important not to confuse the competences of the Commission regarding liberalisation with the neutral position it must take with respect to privatisation decisions.

The former Member of the European Commission responsible for Competition, Mario Monti, in 2000 remarked on the concepts of privatisation and liberalisation[24]*: Privatisation and liberalisation are two terms that are not synonymous although they aim at processes that are often closely and inevitably linked. The European Commission has the institutional obligation to safeguard those undertakings – no matter whether public or private – are confronted with rights and duties that are rigorously identical, in particular with respect to the applicable State Aid regime. However, with regard to the liberalisation process, the Commission does not assume a neutral position but encourages it in those sectors where restrictions to competition exist that are superfluous with a view to solutions in the general interest.*

24 Monti, Libéralisation des services publics et croissance économique dans l'Union européenne, Revue du Droit de l'Union européenne, 2/2000, p. 245.

4.3.2 Contributions and comments by third parties regarding the Commission Green Paper on Public-Private Partnerships – The Commission Report of 3 May 2005 [25]

Charlie McCreevy, Member of the European Commission responsible for the Internal Market and Services, presented the report with the following words:

"The number of responses received confirms the growing importance of public-private partnerships. PPPs are now widely used in large infrastructure projects and public services, and can make a major contribution to the growth of the EU economy. The Commission needs to ensure that the selection of private partners is transparent and that there is fair competition, not least because it is those principles which ensure value for money for taxpayers. The consultation revealed many arguments both for and against EU initiatives in this area. We will consider all these views and report on possible next steps before the end of 2005."

A total of 195 contributions[26] were received by the Commission. The authors are authorities including the national governments of 16 Member States as well as associations of private and/or public bodies, public and private undertakings and private individuals. A particularly high number of responses originated in Germany, France, the United Kingdom, Austria and Italy. A clear majority advocated legislative or other measures with respect to concessions, which are currently not covered by the comprehensive EU procurement rules. The contributors requested that the term "concession" and the provisions for concession awards be clarified and that a clear line be drawn between legal norms applicable to concessions on the one hand and "classic-style" contracts on the other hand.

Many contributions queried how EU rules should be applied in the selection of the private partners of institutionalised PPPs, i.e. of undertakings that provide public services and whose capital was raised jointly by public and private partners.

Many contributors were interested in the distinction between "in-house" partners and third parties. In general, the public sector advocated a wider definition of the "in-house" concept, while the private sector wishes to keep the narrower interpretation recently confirmed by the European Court of Justice in the C-26/03[27] Stadt Halle case.

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25 Commission staff working paper, Report on the Public Consultation on the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, SEC (2005) 629.

26 The report contains a detailed list of all contributions submitted as well as the contributions themselves unless these were qualified as confidential by the authors.

27 ECJ, judgment of 11 January 2005, C-26/03, Stadt Halle and RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna.

4.3.3 What will come after the Green Paper?

The Commission is planning to publish a communication before the end of 2005[28] as a next step. This was also confirmed on 15 June 2005 by a Commission representative on the occasion of a panel discussion on “Perspectives for local and regional Services of General Interest“ at the EU representative office of the Land of Baden-Württemberg.

Fair competition can be increased through a variety of means, e.g. by means of legislation, interpretative communications, initiatives to improve the co-ordination of national practice or the exchange of good practices between Member States. Now, after the Commission has closely analysed the contributions made by third parties and published its report, it is in a position to propose a further approach on this basis and to state its preferences in a communication.

4.4 The Commission’s considerations on PPPs in the Green Paper – A detailed examination seen against the background of the results of the public consultation

Structuring PPPs into two groups – contractual PPPs and institutionalised PPPs –, the Green Paper sketches the problems relating to the two PPP types and raises questions to invite comments. In the following, the considerations outlined in the Green Paper will be presented, enriched where necessary by thematic remarks and expert opinions expounded in the relevant literature, illustrated by means of typical cases and complemented by references to the third-party contributions received by the Commission after publication.

4.4.1 Contractual PPPs

In this PPP model, the partnership between the public and the private sector is based solely on contractual ties. The point distinguishing the various PPP types of this category defined by the Commission is the type of contract: a distinction is made between “classic-style” public contracts and concessions. The contracting authority may assign the design, funding, execution, renovation or exploitation of a work or service to the contractual partner.

[28] Cf. the relevant comments on the homepage of the Internal Market and Services Directorate-General of the European Commission, www.europa.eu.int.

Public contracts

The EC Procurement Directives[29] determine the individual parameters and procedural steps for the "classic-style" award of contracts, where the contracting authority may draw up a checklist, as it were, of elements to be observed whenever a new contract is awarded. The element of any award procedure highlighted not only by the Commission but also by the European Court of Justice as essential – irrespective of whether it concerns a public contract or a concession – is transparency: transparency must be ensured in every phase and should enable all interested parties to participate in an award procedure[30]:

"Consequently, the aim of the directives is to avoid both the risk of preference given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones."

After all, the principles of equal treatment and transparency have also been introduced into the new EC Procurement Directive on "classic-style" contracts, 2004/18/EC, as shown in Article 2:

"Principles of awarding contracts
Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way."

Open, restricted and negotiated procedure

In selecting a private contractual partner, the contracting authority may usually choose between the open and the restricted procedure. The negotiated procedure is admissible in exceptional cases only, which are expressly enumerated in the

29 Directives 92/50/EEC, 93/36/EEC, 93/37/EEC and 93/38/EEC relating to the coordination of procedures for the award of public service contracts, coordinating procedures for the award of public supply contracts, coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sector. The directives were replaced by Directive 2004/18/EC of the European Parliaments and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134 of 30 April 2004, p. 114, as well as by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134 of 30 April 2004, p. 1.

30 ECJ, judgment of 3 October 2000, C-380/98, The Queen v. The University of Cambridge [2000], I-8035.

Procurement Directives[31], i.e. "*when the nature of the works, supplies, or services or the risk attaching thereto do not permit prior overall pricing".* This applies e.g. to works to be discharged in a geologically unstable or archaeological zone, whose scope is not foreseeable at the outset of the procedure. In no case is it admissible to conduct negotiations on prices under the pretext of a negotiated procedure, not even in case of financially or legally complex projects.

Case 8 – Wastewater collection in Bockhorn and waste disposal in Brunswick, Germany

ECJ, joined cases European Commission v. Federal Republic of Germany, C-20/01 Bockhorn and C-28/01 Braunschweig[32]

The Municipality of Bockhorn concluded a 30-year contract with the energy company Weser Ems AG for wastewater collection on the basis of direct negotiations. In its turn, the City of Brunswick concluded a long-term contract for the thermal treatment of residual waste with Braunschweigische Kohlebergwerke by negotiated procedure, without prior publication of a contract notice.

The ECJ stated that the Municipality of Bockhorn had violated EC law because it should have awarded its wastewater collection contract according to the provisions of the Service Procurement Directive 92/50/EEC. Conversely, the City of Brunswick should not have invoked Article 11(3) of the Services Procurement Directive 92/50/EEC in awarding the waste disposal contract, as the provision determining the negotiated procedure must be interpreted narrowly and because the burden of proving that extraordinary circumstances justifying the exemption apply lies with the party wishing to invoke the exemption.

Remark – Case still pending before the ECJ[33]

In October 2003, the Commission sent a letter of formal notice to Germany, asking it to provide information on the measures it had taken to comply with the Court's judgment. However, the German authorities replied by simply repeating previous arguments which the Court had not accepted. Its judgment established that the breach of procurement law continues throughout the period of the contracts awarded illegally. As the current contracts will continue to produce effects for decades, the Commission considers that it is not sufficient to avoid breaches in future procurement

31 Article 7 of Directive 93/37/EEC, Article 11 of Directive 92/50/EEC, Article 30 para. 1(b) of Directive 2004/18/EC (negotiated procedure).

32 ECJ, judgment of 10 April 2003, C-20/01 and C-28/01, Commission v. Federal Republic of Germany.

33 Press release of the European Commission, IP 04/428, 31 March 2004.

procedures. To comply with the judgment, measures to end the actual infringements are required.

But while Germany pledged to avoid similar breaches in future procurement procedures, it continues to claim that no steps are required concerning the specific contracts in Braunschweig and Bockhorn, as Germany civil law does not require ending them. However, the Commission has emphasised repeatedly that the Court's judgment confirmed that the adverse effect on the freedom to provide services arising from a breach of Directive 92/50/EEC subsists throughout the entire length of the contracts concluded in breach of EU law (30 years). The Commission has therefore decided to refer the case a second time to the Court of Justice. The ECJ may then impose a penalty payment on Germany[34].

Remark – Distinguishing between works and service contracts[35]

In keeping with the opinion of the Commission, the ECJ has established that the contract in the Bockhorn case is of a mixed nature in the sense that the subject-matter of the contract is both a service (wastewater treatment) and the construction of facilities for wastewater collection. However, it is claimed that the construction works are of minor importance and do not truly constitute the subject-matter of contract; thus the contract concluded does not qualify as a works contract but as a service contract. This legal opinion of the ECJ is, however, challenged in the relevant literature with the argument that the life-cycle costs – i.e. the costs of physical construction and reinvestment vis-à-vis the operating costs of waste treatment plants – are 50%:50%. As a result, it seems problematic to allege that the works are of only minor importance, as this would imply that all contracts awarded in connection with built structures utilised against payment are in reality ancillary to service contracts, unless the operator is at the same time the public contracting authority[36].

Competitive dialogue

As none of the above-mentioned three procedures enabled the contracting authority to discuss design, materials used or innovative technologies with tenderers to make up for a lack in technical, legal or financial knowledge, the Commission was interested in introducing an extended "version" of the negotiated procedure for complex PPPs. In the future, negotiations between contracting authorities and contractors are legally admissible: the competitive dialogue[37] permits contracting

34 Press release of the European Commission, IP 04/1294, 25 October 2004.
35 Prachner, Mögliche Abgrenzung von Bau- und Dienstleistungsaufträgen bei der Entsorgung von Müll und Abwasser – Kritische Anmerkungen, RPA 2003, 117.
36 Koman, Die Funktionalität des Auftraggeberbegriffes neuerlich bestätigt durch den EuGH, ZfBR, 02/2003, p. 127.
37 Detailed presentation of the competitive dialogue, cf. Kullack and Terner, ZfBR 04/2004, p. 348.

authorities to enter into a dialogue with applicants in order to identify solutions tailored to meet concrete requirements. This dialogue may also be described as a mix of a restricted procedure leading into a negotiated procedure to again result in a restricted procedure. Detailed provisions are contained in Article 29 of Directive 2004/18/EC:

(1) In the case of particularly complex contracts, Member States may provide that where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract, the latter may make use of the competitive dialogue in accordance with this Article.

A public contract shall be awarded on the sole basis of the award criterion for the most economically advantageous tender.

(2) Contracting authorities shall publish a contract notice setting out their needs and requirements, which they shall define in that notice and/or in a descriptive document.

(3) Contracting authorities shall open, with the candidates selected in accordance with the relevant provisions of Articles 44 to 52, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue.

During the dialogue, contracting authorities shall ensure equality of treatment among all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

Contracting authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement.

(4) Contracting authorities may provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document. The contract notice or the descriptive document shall indicate that recourse may be had to this option.

(5) The contracting authority shall continue such dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs.

(6) Having declared that the dialogue is concluded and having so informed the participants, contracting authorities shall ask them to submit their final tenders on the

basis of the solution or solutions presented and specified during the dialogue. These tenders shall contain all the elements required and necessary for the performance of the project.

These tenders may be clarified, specified and fine-tuned at the request of the contracting authority. However, such clarification, specification, fine-tuning or additional information may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect.

(7) Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or the descriptive document and shall choose the most economically advantageous tender in accordance with Article 53.

At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination.

(8) The contracting authorities may specify prices or payments to the participants in the dialogue.

In order to make recourse to the dialogue, the contracting authority must be confronted with a particularly complex contract. Article 1(11)(c) of Directive 2004/18/EC indicates a definition of what may be considered a particularly complex contract:

For the purpose of recourse to the procedure mentioned in the first subparagraph, a public contract is considered to be "particularly complex" where the contracting authorities

- are not objectively able to define the technical means in accordance with Article 23(3)(b), (c) or (d), capable of satisfying their needs or objectives, and/or

- are not objectively able to specify the legal and/or financial make-up of a project.

Concrete applications of this rule that are mentioned in recital 31 of Directive 2004/18/EC include integrated transport infrastructure projects, large computer networks and projects involving complex and structured financing.

The fact that the contracting authority wishes to make innovative solutions possible or is not objectively able to judge the technical solutions available in the market is

likely to justify the choice of competitive dialogue as well, e.g. where the contracting authority cannot objectively decide from the outset whether public funding, a risk distribution model or a solution entirely handled by the private sector would constitute the most economically advantageous solution[38].

Despite a greater degree of flexibility for the contracting authority, it must be made sure in applying this procedure that the principles of transparency and equal treatment are complied with during the three phases of the procedure: the invitation to the dialogue phase, the dialogue phase per se and the moment of contract awarding. It is obvious that flexibility is limited by the traditional, structured selection method, which is continued since it ensures objectivity and integrity of the procedure in selecting the private contractual partner. The competitive dialogue proves particularly useful in situations where the contracting authority does not yet dispose of all information of relevance for its decision that enables it to choose definitely "to award" the PPP by applying the traditional awarding rules: while the contracting authority today must have decided to award a PPP as a "classic-style" contract or a concession already before publishing a contract notice, contracting authorities may take recourse to the dialogue phase as of 31 January 2006 at the latest in order to choose the contractual option best suited to its requirements. Today, the approach chosen – contract or concession – must be continued to the end of the procedure, or the procedure must be interrupted and a new one initiated, should the contracting authority realise that it has made a mistake regarding the type of contract. If a new procedure is initiated, it harbours the almost inevitable danger of violating the principle of equal treatment, as tenderers that participated in the first procedure enjoy an information edge over new tenderers.

If the procedure is to be distinguished from the negotiated procedure, it will be most useful to take recourse to the negotiated procedure with prior publication of a contract notice, which may be introduced in exceptional cases concerning construction works, supplies or deliveries whose very nature or the risk attaching thereto do not permit prior overall pricing. One may assume that in those cases where the element of complexity is the predominant characteristic at the starting-point of an awarding procedure, competitive dialogue will enjoy priority of application vis-à-vis the negotiated procedure.

THE RESULTS OF THE CONSULTATION ON THE GREEN PAPER

Many contributors consider the competitive dialogue a useful instrument for contract awarding. A majority advocates distinguishing the areas of application of both the negotiated procedure and the competitive dialogue clearly and unequivocally. Several stakeholders argue that the Commission interprets the rules applicable to the negotiated procedure too restrictively (Federal Republic of Germany). In this context,

38 Braun, Neue Tendenzen im europäischen Vergaberecht – Ein Ausblick, NZBau 2002, p. 1.

the Republic of Austria claimed that the preconditions for application of the negotiated procedure without prior publication of a contract notice might be in place in case of particularly complex PPPs. In particular, this may be the case in situations where the competitive dialogue simply is not the procedure best suited for the award of the contract in question.

In particular, third parties, anticipating possibly problematic situations, request the Commission already now – i.e. at a moment when the competitive dialogue is not yet in place – to develop detailed rules for its scope of application, the concept of complexity, cost-related consequences and questions of intellectual property.

Concessions

The distinctive feature of a concession is the direct link between private service provider and beneficiary of the service/built structure, i.e. the end user: in lieu of the public partner but under its supervision, private stakeholders provide the public with services/works. Contrary to "classic-style" contract awarding, consideration for the services/works derives from the right to exploit the services/works or from this right together with payment[39]. Private stakeholders receive compensation through fees directly levied from end users. If required, concession-awarding authorities may make additional payments to private stakeholders and thus balance the difference between the charge levied and cost coverage (or financial consideration under market conditions) for the delivery of a specific service.

However, the right of exploitation also carries the responsibility of exploitation[40]. Contrary to traditional contractors, concessionaires thus assume the economic risks resulting from the nature of exploitation. This responsibility relates to technical and financial aspects on the one hand and to the management of the services/works on the other hand. According to the Commission Communication, concessionaires are responsible for making the necessary investments so that e.g. the works will be available to users. Likewise, concessionaires assume the risk of amortisation of the works as well as the risks resulting from management and use.

The awarding of concessions is often linked to entrustment of a party with the delivery of Services of General Economic Interest.

39 Commission interpretative communication on concessions under Community law, OJ. C 121, 29 April 2000, p. 2.

40 For further considerations regarding the interpretation of the concept of economic risk, cf. R. Passerieux and J.-M. Thouvenin, Le Partenariat Public/Privé à la croisée des chemins, entre Marché et Concession, Revue du Marché commun et de l'Union européenne, No. 487, April 2005, p 232.

Works concessions

At the level of secondary legislation, the available provisions are exclusively rules on works concessions to be found in Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts. According to the directive, the contracting authority is free to choose the procedure for the award of the concession as Directive 93/97/EEC does not stipulate any relevant rules. Despite this, the contracting authority is obliged to comply with a minimum of procedural elements that also characterise traditional award procedures: publishing a notice of the concession, compliance with the stipulated periods and publication of the successful award of the public works concession. Irrespective of this, the contracting authorities are obviously fully subject to all rules of the Treaty, in particular to the non-discrimination clause (Article 12 of the Treaty).

Distinguishing between works concessions and service concessions is of relevance because different legal regimes must be applied, resulting, however, in an obligation incumbent on both types of concessions, i.e. to comply with the principles of the Treaty.

Case 9 – Hydraulic works[41] in Stintino, Italy

The Commission has decided to bring Italy before the Court of Justice in connection with the award of a contract for a series of hydraulic works in the Municipality of Stintino (Sassari). A negotiated contract was concluded in 1991 for these works and followed by eleven further agreements, most recently in 2001. The Commission considers that the direct award of this contract without prior competition constitutes an infringement of Directive 71/305/EEC, which was applicable at the time of the original contract.

Service concessions

It was the Member States and not the European Commission – a fact forgotten by the advocates of a possible concession directive in the often very intense discussions regarding such an instrument – that at the very last moment proved notably unable to agree on a definition of service concessions, which is why the Directive relating to the coordination of procedures for the award of service contracts[42] does not contain any relevant provisions. The Commission in fact

41 Press release of the European Commission, IP 05/314, 16 March 2005.

42 Communication from the Commission to the European Parliament on a Common Position of the Council on the proposal for a Directive relating to the coordination of procedures for the award of public service contracts, SEC (92) 406 final:, 5 March 1992.

expressed its regret during the legislative process, which ultimately led to the adoption of the Services Directive, by arguing as follows:

The Council decided not to adopt the rules relating to the award of service concessions in the Articles and Appendix V of the amended proposal, because the allocation of the task of public service delivery is handled very differently and is subject to highly diverse legal regulations in the individual Member States. This offered cause for concern in that the rules might not entail the same effects in all Member States and that they might in particular not extend to specific forms of service delivery by third parties based on an administrative decision, not on a concession. It duly proved impossible to find a suitable solution to eliminate these concerns.

The Commission regretted this because unimpeded access to public service concessions could thus not be implemented. Although it is indisputable that concessions are used more frequently in some Member States than in others, the Commission maintained that the present development of concession would ensure the emergence of corresponding possibilities in all Member States.

However, the Commission recognised that concerns about the diverse scope of concessions and the different forms of allocating tasks should be eliminated. For this reason, it agreed to the deletion of the corresponding rules in the proposal. Following further analyses, it decided to return to this issue at a later point, should the necessity arise.

Conversely, Article 1(4) of the new Procurement Directive 2004/18/EC[43] contains a definition of service concessions covered by the prohibition of discrimination (Article 3), even if Article 17 again exempts it from the scope of application of the directive:

"'Service concession' is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit this service or in this right together with payment."

Here, too, it is worthwhile to return to a point already emphasised at the beginning of the section on public contracts: the lack of detailed legal provisions in the Procurement Directives regarding the award of concessions should not be interpreted to imply that these may be awarded "over-the-counter", as it were. The

43 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134 of 30 April 2004, p. 114.

ECJ has taken an unequivocal position in the matter by expressly confirming the approach taken by the Commission in its Communication on concessions[44].

In the *Telaustria case*[45], it established that for *"[…] contracts for pecuniary interest concluded in writing between a contracting authority (in the specific case, this concerned a public undertaking and the a priori applicability of Directive 93/38/EEC) and a private undertaking […], where the consideration provided by the contracting authority to the private undertaking consists in […] the right to exploit for payment its own service, such a contract is excluded from the scope of the Procurement Directives. […] Notwithstanding [this fact], the contracting entities […] are bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular, that principle implying, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with. That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed."* Although the ECJ in this pioneering judgment did sketch the basic principles of primary-legislation tendering (prohibition of discrimination, obligation of transparency and opening of the services market to competition), it did not provide any precise information on how to interpret the concept of transparency in connection with service concessions in detail. For this purpose, the contracting authority may follow the principles of the Treaty and must at least ensure sufficient advertising and impartiality during the entire procedure[46].

Case 10 – Operation of public car parks in Brixen/Bressanone[47], Italy

ECJ C-458/03, Parking Brixen GmbH

Service contract/concession, in-house

The Italian Administrative Court, Autonomous Division for the Province of Bolzano, made reference to the ECJ for a preliminary ruling on the following questions:

44 Commission interpretative communication on concessions under Community law, OJ C 121, 29 April 2000, p. 2, in particular 3.1.2.

45 ECJ, judgment of 7 December 2000, C-324/98, Telaustria, [2000], I-10745.

46 Since these principles must even be complied with in awarding services that a) are below the threshold (ECJ, judgment of 3 December 2001, C-59/00, Vestergaard, [2001], I-9505; ECJ, decision of 30 May 2002, C-358/00, Deutsche Bibliothek, [2002], I-4685) and hence excluded from application of the Procurement Directives and b) are not priority services, they at least apply to concessions as well.

47 Conclusions of the Advocate General of 1 March 2005, C-458/03, Parking Brixen GmbH.

In 2001 and 2002, the City of Brixen/Bressanone transferred – in both cases without public tender – the operation of two public car parks to its subsidiary, Stadtwerke Brixen AG. The car parks are situated on different lots: for parcel 491/11, the City of Brixen granted Stadtwerke Brixen AG the right to construct parking slots for vehicles but not the right of exploitation; for parcel 491/6, which houses 200 parking slots, Stadtwerke Brixen AG may charge a fee from users and additionally receives a fixed sum for the operation of the car park, which amount increases proportionally with the increase of the parking fees. Stadtwerke Brixen AG is the legal successor to Stadtwerke Brixen, a former undertaking (also referred to as "special undertaking") of the City of Brixen. This undertaking was made a legal entity with full entrepreneurial discretion to act on 1 January 1999 and in October 2001 was transformed by the City of Brixen into a joint-stock company called Stadtwerke Brixen AG pursuant to Article 115 of Legislative Decree 267/2000. The range of tasks of Stadtwerke Brixen AG includes services belonging, in the widest sense of the term, to the category of Services of General Interest, in particular in the areas of water supply and wastewater disposal, heating and energy supply, road construction, waste disposal, passenger and goods transport as well as informatics and telecommunications, at the local, national and international levels. The operation of car parks and garages with all concomitant activities likewise is part of its tasks. At the moment of transfer of the two car parks as well as afterwards, the only shareholder of Stadtwerke Brixen AG was the City of Brixen.

Stadtwerke Brixen AG is managed by an administrative council composed of three to seven members and appointed by the company assembly; the City of Brixen is in any case authorised to designate the majority of administrative board members. The administrative board has powers of routine administration of the company although these powers are subject to several restrictions and, in particular, in some cases allow for a maximum value of Euro 5.000,000 per transaction. The supervisory board is composed of three effective members and two substitute members, out of which the City of Brixen appoints at least two effective members and one substitute member. The former special undertaking Stadtwerke Brixen was in fact charged with similar tasks as the present Stadtwerke Brixen AG, but these were restricted to the territory of municipal competence and to co-operation with other undertakings beyond this territory. Its range of tasks already comprised the management of car parks and garages but not yet the area of informatics and telecommunications. At that time, the administrative board of Stadtwerke was elected by the municipal council and in its activities was subject to guidelines established by the municipal council.

The Administrative Court, Autonomous Division for the Province of Bolzano, tried to clarify whether the award of the right to operate a car park concerns a service contract or a concession and, if so, whether this contract may be awarded without a public invitation to tender if it is awarded to a joint-stock company set up by converting a special undertaking of a municipality, whose share capital at the time of

the award was held 100% by the municipality itself but whose administrative board enjoys all extensive powers of routine administration up to a value of Euro 5.000,000 per transaction (this concerns the “in-house“ relationship between the parties).

On the basis of these facts, the Advocate General stated regarding the first question that the consideration for the operation of the cark park on lot 491/6 lies exclusively within the permission granted to Stadtwerke Brixen AG to levy a fee from car park users. Stadtwerke Brixen AG may thus benefit economically from the services performed by it, i.e. from the operation and maintenance of the car park. At the same time, however, it assumes the economic risk of car park operation, since it must finance not only the running costs but moreover the maintenance of the car park area as well as the annual compensation to be paid to the municipality from the fees received from users. All this contradicts the assumption of a public service contract and indicates that a service concession is involved.

With respect to the second question, the Advocate General remarked that a municipality that entrusts the operation of a public car park whose use is subject to payment of a fee without prior tender procedure to a joint-stock company whose sole shareholder it is does not violate Articles 43, 49 and 86 of the Treaty if the control exercised by the municipality over the public limited company is similar to that which it exercises over its own departments and if, at the same time, the joint-stock company carries out the essential part of its activities with the municipality.

The exercise of a form of control similar to that exercised over its own departments is not excluded merely because the municipality has the legal obligation to open up the capital of the joint-stock company within a specified future period to the participation of third parties or because the organs of the joint-stock company enjoy extensive powers of routine administration.

An activity essentially carried out within the municipality is not excluded merely because the potential field of activity pursuant to the statutes of the joint-stock company is both technically and geographically a wide one – what counts is the activity actually carried out.

It will be interesting to see how the ECJ will rule in the matter.

Case 11 – Concession for the management of a public gas-distribution service[48]**, Italy**

ECJ C-231/03, Consorzio Aziende Metano (Coname) v. Comune di Cingia de' Botti

Coname had concluded with the Comune di Cingia de' Botti a contract for the award of the service covering the maintenance, operation and monitoring of the methane gas network for the period from 1 January 1999 to 31 December 2000. By letter of 30 December 1999, that municipality informed Coname that, by decision of 21 December 1999, the municipal council had entrusted the service covering the management, distribution and maintenance of the methane gas distribution installations for the period from 1 January 2000 to 31 December 2005 to Padania. The latter company's share capital is predominantly public, held by the province of Cremona and almost all the municipalities of that province. The Comune di Cingia de' Botti holds a 0.97% share in the capital of that company. The service at issue in the main proceedings was entrusted to Padania by direct award pursuant to Article 22(3)(e) of Law No 142/1990. Coname, which claims that the referring court should, inter alia, annul the decision of 21 December 1999, submits that the award of that service should have been made following an invitation to tender.

The Court of Justice indicated that in so far as the concession in question may also be of interest to an undertaking located in a Member State other than the Member State of the Comune di Cingia de' Botti, the award, in the absence of any transparency, of that concession to an undertaking located in the latter Member State amounts to a difference in treatment to the detriment of the undertaking located in the other Member State. In the absence of any transparency, the latter undertaking has no real opportunity of expressing its interest in obtaining that concession. Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality. With regard to the case in the main proceedings the Court stated that it is not apparent from the file that, because of special circumstances, such as a very modest economic interest at stake, it could reasonably be maintained that an undertaking located in a Member State other than that of the Comune di Cingia de' Botti would have no interest in the concession at issue and that the effects on the fundamental freedoms concerned should therefore be regarded as too uncertain and indirect to warrant the conclusion that they may have been infringed. With regard to the objective circumstances that could justify such a difference in treatment, it must be pointed out that the fact that the Comune di Cingia de' Botti has a 0.97% holding in the share capital of Padania does not, by itself, constitute one of those objective

[48] ECJ, Judgment of 21 July 2005, C-231/03, Consorzio Aziende Metano (Coname) v. Comune di Cingia de' Botti

circumstances. Even if the need for a municipality to exercise control over a concessionaire managing a public service may constitute an objective circumstance capable of justifying a possible difference in treatment, it must be pointed out that the 0.97% holding is so small as to preclude any such control, as the referring court itself observes.

At the hearing, the Italian Government submitted, in essence, that, in contrast to some large Italian cities, most municipalities lack the resources to provide, through in-house structures, public services such as that of gas distribution within their territory, and are therefore obliged to resort to structures, such as that of Padania, in the share capital of which several municipalities have holdings. The Court submitted that it must be held that a structure such as that of Padania may not be treated in the same way as a structure through which a municipality or a city manages, on an in house basis, a public service. As is apparent from the file, Padania is a company open, at least in part, to private capital, which precludes it from being regarded as a structure for the 'in-house' management of a public service on behalf of the municipalities which form part of it.

Another aspect that Commission had hoped would be clarified on the basis of the responses received concerns the question of whether it is at all useful to subject concessions to the same rules as those applicable to the award of contractual PPPs.

Although there exists uncertainty regarding the rules to be applied in concession awarding, only few Member States wish harmonised rules at the European level. In order to ensure greater legal certainty and in view of the opening-up of the procurement market in order to truly transform Europe into the *most dynamic knowledge-based economy in the world* by 2010, but also in order to ensure optimised use of the payments made by taxpayers to national budgets, it is worthwhile to reflect whether it might be desirable after all to consider a proposal for a directive on the award of concessions.

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The difficulty of clearly distinguishing between the different types of public contracts and concessions and the related lack of legal certainty were identified as the main problems. The discrimination of concession models by the regional policy of the European Community and the advantages of national undertakings, too, were singled out as problematic. A majority of contributors advocates placing concession arrangements under a separate legal regime. There is broad consensus that public contracts and concession contracts should not be subject to identical award arrangements. Conversely, some contributions – e.g. from the *United Kingdom* – favour harmonisation of the rules applicable to works and service concessions but consider a new legal instrument for concessions generally unnecessary (e.g. *RWE*

Thames Water[49]). The French government argues that the Commission should publish guidance on service concessions, since the applicable rules are not sufficiently clear and precise. However, a major argument brought against an initiative relating to concessions is the absolute need for flexibility of concession award procedures. Finally, many stakeholders advocate a horizontal initiative in this field, while a small majority oppose this.

Private-initiative PPPs

Some Member States have legislation stipulating that the private sector may itself initiate PPPs, while this practice has developed in other Member States given the lack of relevant legislation (usually for construction projects, e.g. car parks or infrastructure operation, etc.). The private partner thus develops a detailed project proposal with or without being requested to do so by the administration, which makes it possible at an early date to recognise interest in investments and the development of technically innovative solutions in the market.

Private-initiative PPPs are still public projects. As a result, depending on the design of the contract concluded between the public and private partner, either the rules of the Procurement Directives or the key steps for concession awards must be complied with. An essential aspect is compliance with the principle of transparency, which is to enable all stakeholders to gain access to such schemes. Transparency is safeguarded by way of adequate advertising of the invitation to develop a project. After the contracting authority has decided in favour of a project proposal, it must organise a procedure in which all stakeholders interested in the execution of the project may participate. Only this will ensure that the contract or concession is awarded impartially. The practice of creating incentives for investors adopted by the Member States meets with problems wherever the competitive advantages granted to the project initiator might jeopardise equal treatment for all tenderers.

Case 12 – Covered car parks in Constance[50], Germany

The City of Constance participated in three covered car parks involving different forms of financing in order to create a uniform system of parking space management. The covered car parks are operated by private operating companies.

In 1985, one of the car parks, Parkhaus Altstadt, was not only financed privately; rather, planning, financing, construction and subsequent operation were all safeguarded by a private undertaking. In due course, a 40-year hereditary building

49 RWE Thames Water is the third-largest water service provider worldwide and part of the energy and water group RWE. In particular, RWE Thames Water owns and operates the water and wastewater services of London.

50 Deutscher Städte- und Gemeindebund, Documentation No. 28, Public-Private Partnerships

right was granted for the municipal lot, and an operating contract was concluded with the operating company. Some non-public parking slots are dedicated to the City of Constance.

Although another car park, Parkhaus Fischmarkt, is another operator model, the parcel itself is owned by a private real-estate company. An easement was established for the benefit of the City of Constance. The city obtained a percentage participation in the cost/revenue of the covered car park. The car park was leased to an operating company.

The third car park, Augustinergarage, was built on a municipal property, with a private undertaking participating in the costs. An easement was established for the benefit of the private party, which obtained a percentage participation in the costs/revenue, and the covered car park was finally leased to an operating company.

This model of car park management was judged effective by the public authorities, since it entailed the uniform management of the covered car parks, rendered tariffs more transparent for customers and led to partnership-based relations between operators and city administration.

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There is broad consensus that also non-national providers and operators are guaranteed access to private-initiative PPPs and that advertising is adequate to inform all interested operators about such schemes. There exists obviously no need to encourage private-initiative PPPs.

Dexia Crédit locale reports about the experience made in connection with PPP financing through its subsidiary Dexia Credicop in Italy and suggests to further improve the Merloni Law in order to simplify the very complex procedure in Italy, create greater legal certainty and ultimately reduce costs for providers.

Phase after selection of the private partner

Secondary legislation does not contain harmonised rules for the phase after contract/concession awarding. Here, too, it is worthwhile to repeat that the principles of equal treatment and transparency embodied in the Treaty prohibit any intervention by the public partner after selection of the private partner.

The execution phase is frequently characterised by situations that might endanger the implementation of a project: period between selection of the private partner and signing of the contract/concession, long duration of project, subcontracting. In such situations, it should be possible to find an effective solution to these problems within the scope of what is legally permitted.

Contractual framework

Principally, the contractual framework under civil law is a competence of the Member States. However, the clauses included in a contract/concession awarded must not violate the fundamental principles of the Treaty. Although individual contractual provisions do not have to be included in a PPP notice, the award documents are considered to be of great importance in this context. They must contain the contractual terms and modalities as well as relevant explanations in order to ensure that not only all interested private stakeholders will have knowledge of the contractual framework but that the framework will be identically interpreted by all parties as well.

The same holds for PPPs as for any other project, irrespective of whether it is financed exclusively by public or private means: its success is ultimately largely contingent on whether the contractual framework is comprehensive and the elements of importance for execution were defined unambiguously and clearly. In particular, in concession awarding, the optimum distribution of risks between public and private partner, in keeping with the respective ability to control these risks, is of decisive significance.

The responsible use of taxpayers' money means, in particular for PPPs involving large contract volumes, that the performance of the private partner must be regularly reviewed and the progress made in project implementation measured.

As already said above, PPPs are based on long-term contractual relationships. During the duration of the contract/concession, changes in the technical or macroeconomic environment are frequent. Public interest, too, may change. Such developments may be taken account of if this is done in accordance with the principles of transparency and equal treatment. This is the case where contractual clauses are formulated with sufficient clarity to ensure that all stakeholders can interpret them identically in the partner selection phase. Concretely, it is possible to include clauses that a) permit automatic adjustment (for price indexing, setting of charges) or b) provide for review (terms for contractual relation adjustment).

The Commission takes a critical view vis-à-vis the so-called "intervention clauses", which in case of specific PPPs reserve the right of financial institutions to take over project management or appoint new project managers if cash-flow problems emerge. In such cases, the original private partner can be exchanged without organising a new tender, and the contracting authority is excluded from all influence on the choice of the new partner. Intervention clauses should be evaluated most accurately for their conformity with Community law.

Changes introduced both during the phase of concluding a contract[51] and during the duration of a PPP and not covered by contract documents are viewed critically by the Commission, since a violation of the fundamental principles of the Treaty may occur in any case. For example, any change of the subject-matter of the contract must be equated with the conclusion of a new contract, which duly is possible only after a new call for competition. Primary legislation stipulates that "non-covered" changes are only admissible if they are necessitated by an unforeseeable occurrence or justified on grounds of law and order, security or health (Article 46 of the Treaty on restriction of the freedom of establishment). In their turn, the Procurement Directives contain exemptions[52] to permit the direct allocation – without tender – of additional works or services not mentioned in the original project or originally concluded contract. However, these exemptions must be interpreted restrictively: it is not permitted to extend an existing motorway concession to cover the costs of construction of a new section; the practice of combining "profitable" and "non-profitable" economic activities in one concessionaire must not lead to a new economic activity being allocated to an existing concessionaire without a call for competition.

The duration of a project should be defined in the contract so as to make sure that free competition is restricted only to the degree necessary to safeguard amortisation of investments and adequate interest on the capital employed. The internal market principles[53] (in particular, the principle of proportionality) and the competition rules of the Treaty preclude the excessive duration of contracts.

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Few stakeholders are aware of cases where the conditions of execution had a discriminatory effect or represented an unjustified barrier to the freedom to provide services or freedom of establishment. There is broad consensus that the duration of the contract is not a source of discrimination in current PPP practice and that adjustments to long-term PPPs are needed over time. However, those contributors who perceive discriminatory effects complain in particular about the different treatment of private and public undertakings. Step-in clauses are considered of crucial importance. A majority say that an EU initiative on the contractual framework of PPPs is not needed; however, some sort of clarification concerning the framework would be considered useful.

51 ECJ, judgment of 5 October 2000, C-337/98, Commission v. France, [2000], I-8377.

52 Article 11(3)(e) of Directive 92/50/EEC, Article 7(3)(d) of Directive 93/37/EEC and Article 20(2)(f) of Directive 93/38/EEC. The new Directive 2004/18/EC provides for a similar exemption for works concessions, cf. Article 61.

53 Commission interpretative communication on concessions under Community law, OJ C° 121 of 29 April 2000, p. 2.

Subcontracting

Pursuant to the Procurement Directives, it is left to the private partner to decide whether or not to subcontract part or all of the contract/concession. This freedom is only restricted inasmuch as tenderers in public procurement procedures may be requested to state in their bids which part of the contract they intend to subcontract to third parties[54]. For works concessions whose value exceeds Euro 50 million, the awarding authority may moreover obligate the concessionaire to subcontract a minimum of 30% of the overall value of the concession to third parties[55].

It has been shown that the contractual relations between the project management company awarded the contract or concession and its associates often raise legal questions:

- In principle, if a project management company assumes the role of awarding body on its own, it must award the contracts or concessions in accordance with the applicable rules, irrespective of whether they go to its own associates or not. This does not apply in the sole case where a project management company entrusts its associates with a service or work already tendered by the public partner before establishment of the project management company[56].

- If a project company management does not award contracts, it is principally free to conclude contracts with third parties.

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A majority of stakeholders do not perceive problems in relation to subcontracting. Problems reported by contributors relate to the weak position of subcontractors and uncertainties regarding applicable EC law. There is broad consensus against new initiatives in the area of subcontracting, especially as regards to the potential extension of tendering requirements to such contracts. However, additional rules in this area are considered useful, in particular to guarantee fair competition.

4.4.2 Institutionalised PPPs

The Commission defines institutionalised PPPs as involving *"… the establishment of an entity held jointly by the public partner and the private partner"*. It is the task of this

54 Article 17 of Directive 93/36/EEC, Article 20 of Directive 93/37/EEC, Article 25 of Directive 92/50/EEC and Article 27 of Directive 93/38/EEC. Cf. also Article 25 of Directive 2004/18/EC and Article 37 of Directive 2004/17/EC.

55 Article 3(2) of Directive 92/37/EEC. Cf. also Article 60 of Directive 2004/18/EC.

56 Article 13 of Directive 93/38/EEC provides for an exemption if a contracting entity operating a network subcontracts services to an affiliated undertaking. Article 23 of Directive 2004/17/EC extends this exemption to subcontracts for supplies or construction works.

joint entity to ensure the delivery of works or services for the benefit of the public. Over the past 10 years, contracting authorities at the local and regional level have increasingly taken recourse to institutionalised PPPs for the provision of Services of General Interest (water supply, waste disposal).

According to the Green Paper, institutionalised PPPs can take two forms – either through the establishment of a mixed-capital entity (ex-novo) or through capital participation of a private actor in an existing public entity (ex-post)[57]. Both types are not covered by the applicable legal rules for the award of contracts or concessions. In any case, the prohibition of discrimination on grounds of nationality in general and the principle of the free circulation of capital in particular must be observed: pursuant to Article 56 of the Treaty, all restrictions on the movement of capital between Member States are prohibited. With its Golden Shares judgments[58] handed down over the past two years, the ECJ has taken a very clear-cut position on when participations and related rights of public authorities in entities are no longer compatible with the fundamental principles and freedoms, and what conditions would justify restrictions.

PPP involving the creation of an ad-hoc entity held jointly by the public and the private sector (ex-novo)

Whenever a public and a private partner establish a joint entity, this will obviously not merely exist as a legal body per se but be entrusted with a task. For this reason, the establishment of the entity – even if this is not evident at first glance – is made up of two phases: the incorporation of the undertaking proper and the entrustment of the undertaking with a specific task (waste collection, public works construction, wastewater disposal, etc …). What is essential here is the sequence of the two phases: even if the incorporation of the entity is not subject to the rules applying to contracts/concessions, the conditions governing its incorporation must be agreed on before entrusting the task in question to the entity.

Finally, the task is assigned pursuant to the applicable rules: for example, the public partner awards a contract or concession for performing the service of waste collection on its municipal territory. However, the public partner may not select a private partner performing the service exclusively on the basis of the quality of its

57 The Green Paper does not discuss the participation of existing mixed-ownership undertakings in public contracts/concessions. These undertakings come under the respectively applicable legal regulations, except where they meet the criteria characterising an in-house award according to the Teckal judgment of the ECJ, in which case no contract was established.

58 Cf. the ECJ judgments of 4 June 2002, C-367/98, Commission v. Portugal, I-4731; C-483/99, Commission v. France,. I-4781; and the judgments of 13 May 2003, C-463-00, Commission v. Spain, I-4581; C-98/01, Commission v. United Kingdom, I-4641. For possible grounds of justification in this context, cf. ECJ judgment of 4 June 2002, C-503/99, Commission v. Belgium, I-4809.

capital contribution to the mixed entity or experience. The bid submitted must be evaluated according to unambiguous, clear and objective criteria, as any other approach would constitute a breach of law.

In some Member States, however, national legislation allows mixed entities to participate in a procedure for the award of a public contract or concession, although these entities are still in the process of being incorporated. By the same token, it was noticed that public contracting authorities sometimes confuse the phase of incorporating the entity and the phase of allocating the task, e.g. outlining the subject-matter of the contract as "establishment of a mixed entity and awarding of a waste collection contract"[59].

Experience made in recent years has shown that the conclusion of this type of PPP entails massive legal uncertainty, that the incorporation of the entity does not always guarantee effective competition, and that the tasks to be allocated to the newly incorporated undertaking are not sufficiently defined and covered by contractual provisions. Frequently, the duration of the contract/concession differs from the duration of the entity, and renewals are agreed without a prior call for competition.

Finally, the public partner is often tempted to claim – after participating in a mixed entity – that the allocation of tasks to such an undertaking is in any case not subject to the legal rules governing contracts/concessions. The Commission has emphasised that the applicability of Community law on contracts/concessions is not contingent on whether or not the contractual partner of the contracting authority is of a private or mixed character: *Community law applies whenever a public contracting authority decides to entrust a task to a third party, i.e. to an independent entity. The position can be otherwise only in the case where the local authority exercises over the entity concerned a control which is similar to that which it exercises over its own departments and, at the same time, that entity carries out the essential part of its activities with the controlling local authority or authorities* (Teckal[60] judgment of the ECJ). If the last two conditions are complied with, the legal relationship is an "in-house" one, a relationship extensively covered in the relevant literature. At this point, it should be pointed out that this ECJ ruling is applicable not only to the Supplies Directive, but to the Services and Works Directives[61] as well.

59 The standard forms contain no column for "incorporation of an undertaking". The incorporation does not have to be published in the S series of the Official Journal of the European Communities. However, the Commission in most cases agreed to the publication of a notice because the incorporation of an undertaking was normally tied to the allocation of a task (mingling of incorporation with contract/concession).

60 ECJ, judgment of 18 November 1999, C-107/98, Teckal, [1999], I-8121.

61 Conclusions of the Advocate General of 1 March 2005, C-458/03, Parking Brixen GmbH, lit. 45.

Case 13 – Construction of a thermal waste disposal and recovery plant for residual urban waste in Halle, Germany

ECJ, C-26/03, Stadt Halle and RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna [62]

The City of Halle entrusted RPL Lochau, a majority of whose capital is held by the City of Halle and a minority by a private company, without a prior formal public tender procedure, with the development of a project for the construction of a thermal waste disposal and recovery plant for residual urban waste. RPL Lochau is a mixed undertaking, 75.1% of whose capital are held by the City of Halle indirectly through a subsidiary (whose sole shareholder it is) and another, wholly-owned subsidiary of the latter. The remaining shares are held by a purely private company. At the same time, the City of Halle decided, again without calling for tenders, to enter into negotiations with RPL Lochau with a view to concluding a contract concerning the management of residual urban waste.

The actions scrutinised by the ECJ from the "in-house" angle included the decision by the City of Halle to entrust RPL Lochau both with the planning and construction of a waste recovery plant and with the performance of waste management services per se.

The ECJ stated that in cases where a private company has a holding, even a minority one, in the capital of the undertaking in which the respective contracting authority likewise has a holding, the possibility is definitely excluded that the contracting authority might exercise a control over this undertaking which is similar to that which it exercises over its own departments (a criterion that must absolutely be complied with according to the ECJ judgment in the Teckal case if an "in-house" relationship is to apply). Thus the awarding of a public service contract to an undertaking with, in part, private capital does not, irrespective of the extent of the holding, constitute an "in-house" transaction exempted from Community law on public procurement and therefore must be subject to a public tender procedure. Any other approach would impair the objective of free and undistorted competition and the principle of equal treatment, since an award without prior tender would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors.

62 ECJ, judgment of 11 January 2005, C-26/03, Stadt Halle and RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna.

Remark – "In-house" relationships and the related question of whether or not to apply the awarding rules to mixed entities and the service contracts relating to their activity[63]

Regarding in-house transactions, there exist innumerable texts, legal opinions and speculations on how big the public share in a mixed undertaking must be to ensure that the undertaking will still be considered a dependent entity and hence not subject to the legislation on public contract awarding.

Although neither the Procurement Directives nor the ECJ case law have so far produced a definition of in-house transactions, the concept is well-known. Considerations regarding the substance of this concept should best start with the literal meaning of the term: it concerns an "internal" exchange of services or works between a contracting authority and a provider, i.e. legally speaking, the provider is part of the same legal person as the contracting authority (the provider is either a department of the same local or regional authority, a municipal department or an owner-operated municipal or regional undertaking without legal personality). Not even a contract is signed between contracting authority and provider.

To this day, the ECJ has never used the term "in-house transaction" in its decisions pertaining to the issue. However, some guidance is provided by the conclusions of the Advocate General in the *Arnhem case*[64]: it was found that the Municipalities of Arnhem and Rheden, which had decided to combine their municipal waste collection systems and entrust a new legal person, the public limited company ARA, with this service, exercised a right of life and death, as it were, over that undertaking. The Advocate General concluded his considerations regarding the position of ARA by stating that ARA is not a third party in relation to the municipalities, adding that the case in point constitutes a sort of "internal delegation of tasks" (i.e. in-house) that does not go beyond the scope of municipal administrative activity. The assignment of activities to ARA was in no sense motivated by the intention to privatise these activities.

The decision on RI.SAN. Srl v. *Comune di Ischia, Italia Lavoro SpA (formerly GEPI), Ischia Ambiente SpA*[65] is equally unsatisfactory for the purpose of clarifying the concept of in-house transactions. Again, the Advocate General addresses the in-

63 Koman, Von Teckal zu Halle: Die jüngste Vergaberechtsjudikatur des EuGH und deren Auswirkungen auf die aktuelle Diskussion zu „In-house" Rechtsverhältnissen und institutionellen Public Private Partnerships, ZfBR 04/2005, p. 349.

64 ECJ, Conclusions of the Advocate General, C-360/96, Arnhem v. BFI Holding, judgment of 10 November 1998, [1998], I-06821, lit. 35.

65 ECJ, C-108/98, RI.SAN. Srl v. Comune di Ischia, Italia Lavoro SpA (formerly GEPI), Ischia Ambiente SpA, judgment of 9 September 1999, [1999], I-05219.

house issue: in this specific case, the municipal council of Ischia had decided to establish a mixed-capital company under the Italian law on local autonomy for the purposes of waste management. 49% of the shares in this company, Ischia Ambiente, were held by GEPI, while the remaining 51% were held by the Municipality of Ischia. GEPI is a financial company established under Italian law with the object of assisting in maintaining and increasing the level of employment. Its shares are held practically in their entirety by the Italian Treasury Ministry. The Advocate General stated[66] that it is ultimately for the national court of law to determine the influence of public administration on the company thus established. Since the Italian state holds 100% of GEPI SpA, the conclusion is admissible that GEPI constitutes part of the Italian State, even without full knowledge of the internal organisation of GEPI. The Italian State has a holding in Ischia Ambiente through GEPI. As a result, Ischia Ambiente is controlled by the Municipality of Ischia and the Italian State. However, in order to qualify as an in-house service, in addition to being financially interrelated, tasks must also be clearly assigned internally (for example if the municipality provides additional funds for the activities of Ischia Ambiente or if the municipality sets the charges for urban waste collection).

The *Halle* judgment of the ECJ thus principally put an end to speculations regarding the interpretation of the *Teckal* judgment, at least with a view to interpreting the first criterion: the ECJ presents its legal opinion in 11 concise and clear-cut paragraphs. It should be emphasised at this point that the ECJ in its remarks does not use the term “in-house transaction” at all, but merely paraphrases it.

Referring to the key objective of the EU Procurement Directives, i.e. to guarantee the free movement of services and to open up the procurement market to undistorted competition, the ECJ drew attention to the obligatory character of tenders and the restrictive use of the negotiated procedure. Even awards to institutions that are public contracting authorities themselves[67] are generally covered by the concept of public contracts, must be publicly tendered and hence do not constitute an exception.

Moreover, the ECJ also remarks on the objectives of private investors based on considerations relating to private interests[68], while the relationship of a public body, in its capacity of contracting authority, with its departments is determined by requirements and considerations relating to the pursuit of objectives in the public interest.

66 Conclusions of the Advocate General, C-108/98, RI.SAN. Srl v. Comune di Ischia, Italia Lavoro SpA (formerly GEPI), Ischia Ambiente SpA, of 18 March 1999, [1999], I-05219.

67 ECJ, C-94/99, ARGE Gewässerschutz, judgment of 7 December 2000, [2000], I-11037, lit.58.

68 Cf. also Vera Gäde-Butzlaff, PPP im Entsorgungsbereich: Ein interessantes Modell für die Übergangszeit bis zur Herstellung voller Konkurrenzfähigkeit der kommunalen Unternehmen, p. 143, in: Beiträge zur öffentlichen Wirtschaft (Vol. 21).

With a reference to the *Teckal* judgment and the subsequent conclusion that the rulings of the ECJ do not exclude that further circumstances may arise where a tender may not be obligatory, even in cases where the contractual partner is an entity legally distinct from the contracting authority, the ECJ concluded its deliberations and stated that in cases where a private company has a holding, even a minority one, in the capital of the undertaking in which the respective contracting authority likewise has a holding, the possibility is definitely excluded that the contracting authority might exercise a control over this undertaking which is similar to that which it exercises over its own departments.

The ECJ has not taken any position regarding the second criterion, i.e. the "essential part of activities".

The Advocate General, however, introduced the percentage of 80% into the discussion, explaining that it is at the discretion of the national courts of law to determine the "essential part of activities" on the basis of quantitative and qualitative elements. While a fixed percentage might be objective or appropriate, it could yet prove too rigid for an appropriate solution, excluding moreover the possibility of taking account of qualitative elements, it was argued. The adoption of the 80% rule of Article 13 of the Utilities Directive 93/38/EEC does not seem applicable, the Advocate General continued, since this is an exemption provided for in a directive extending only to specific sectors; moreover, the contracting authorities are under the obligation to communicate specific facts to the Commission. Yet the ECJ did not stipulate such an obligation in the *Teckal* case.

Case 14 – Waste disposal[69] in Cologne, Germany

This case concerns a 33-year waste disposal contract awarded by the City of Cologne to AVGmBH without public tender. The City of Cologne holds 75% of the shares of AVG, while 25% are owned by a private undertaking. The European Commission decided to initiate proceedings because the City of Cologne had not conducted a transparent and competitive award procedure. Germany argued that the contract awarded to AVG was exempted from Community rules, since the City of Cologne, with a 75% share in AVG, exercised a level of control over AVG which constituted an "in-house" relationship. However, the Commission believed that the conditions required under ECJ case law for an exemption from European procurement rules were not met, as the control exercised by the City of Cologne over AVG is not similar to that which it exercises over its own departments. Therefore the direct award of the contract, in breach of the general principles of the EC Treaty (freedom of services, freedom of establishment), does not appear to be justified.

69 Press release of the European Commission of 25 October 2004, IP/04/1294.

Furthermore, in the 1992-1993 period, AVG awarded waste disposal contracts directly to three undertakings that are mainly privately owned. Since AVG is to be considered a public contracting authority, these awards also violate Community law.

At this point, it should also be recalled that a mixed entity, in its capacity as contracting authority, is also required to meet the legal provisions governing contracts/concessions if it assigns tasks to the private partner that had not been taken into consideration before the incorporation of the undertaking.

PPPs involving the private sector taking control of an existing public undertaking (ex-post)

The inflow of private capital into public undertakings does not come under the procurement rules but rather under the rules on the free movement of capital and the competition rules of the Treaty. Conversely, the rules on the freedom of establishment pursuant to Article 43 of the Treaty apply whenever a public authority decides to transfer shares in an originally public undertaking to third parties, thus granting the latter influence over this undertaking, which performs economic activities formerly discharged exclusively by public bodies. If in such a case the private partner is entrusted with the performance of public contracts previously performed directly or indirectly by State authorities/undertakings, the principles of transparency and equal treatment must be complied with in order to grant access to all interested parties.

As for PPPs established ex novo, the Commission is aware that capital transfers often serve as a pretext for the direct assignment – i.e. without public tender – of public contracts or concessions to private partners. Such circumvention of the law may in particular be suspected whenever the sequence of the individual actions taken inevitably implies the conclusion that specific tasks were directly allocated to an entity before the capital transfer, without any form of procedure, in order to render the capital transfer more appetising.

Case 15 – Waste collection and disposal[70] in Mödling, Austria

ECJ Advocate General, C-29/04, European Commission v. Republic of Austria[71]

A complaint had informed the Commission about the direct award of waste disposal services by the Municipality of Mödling to Saubermacher AG. After all stages in a Treaty infringement procedure under Article 226 of the Treaty had been exhausted and the reasoned opinions submitted by the Republic of Austria did not, in the view

70 Press release of the European Commission of 18 December 2003, IP/03/1763.

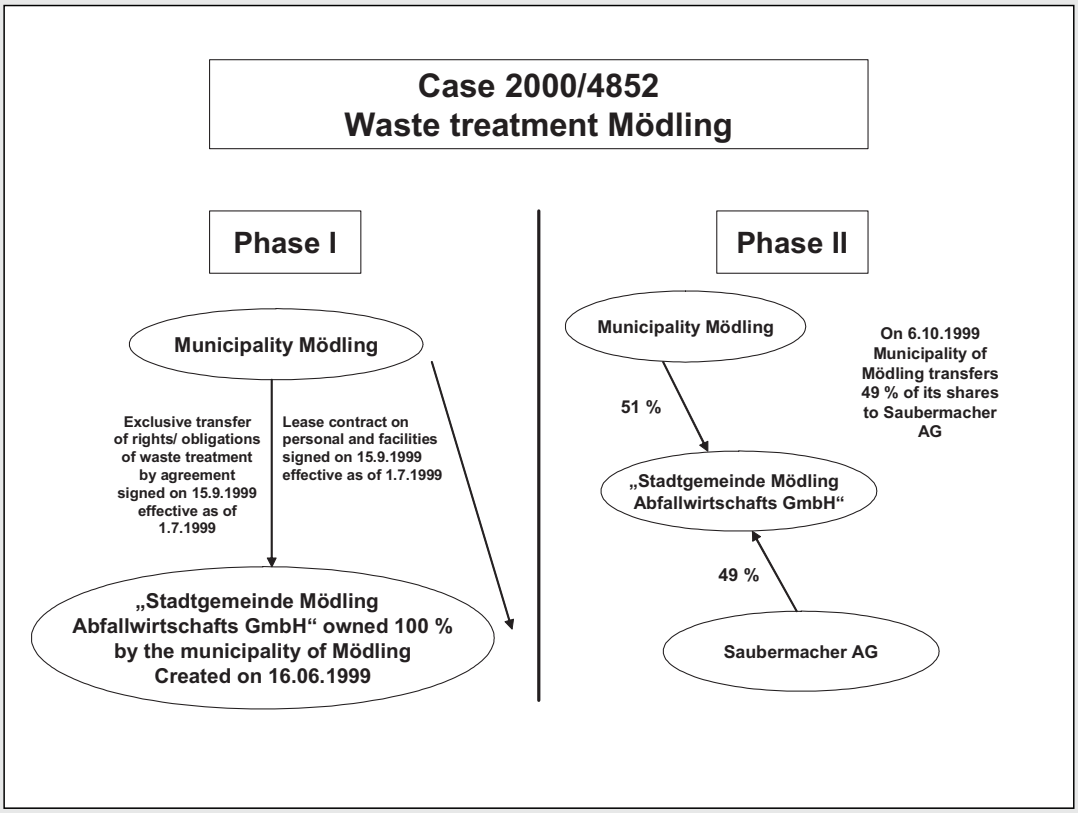
71 Conclusions of the Advocate General, C-29/04, Commission of the European Communities v. Republic of Austria,, 21 April 2005.

of the Commission, constitute sufficient justification for the direct award of the contract, the Commission decided to bring the matter before the ECJ.

The waste disposal contract was concluded on 15 September 1999 for an unlimited period with an undertaking previously established and fully owned by the Municipality of Mödling. Parallel to the award of the service contract, the Municipality of Mödling sold 49% of the company's shares to a private investor. The Austrian authorities argued that ECJ case law on in-house awards applies in this case. The case law stipulates that the award to entities over which a contracting authority exercises control similar to that exercised over its own internal departments does not fall under European public procurement law. The Commission considered that the Municipality of Mödling does not exercise such control over the said company, of whose shares it owns only 51%. Therefore the Municipality of Mödling should have put the contract out to tender in accordance with the Directive on the public procurement of services (92/50/EEC).

The Advocate General is of the opinion that the decision to conclude an agreement between the Municipality of Mödling and the AbfallGmbH at the date when the AbfallGmbH was still owned to 100% by the Municipality of Mödling does not change the conclusion that the contract should have been awarded according to Article 8 and Article 11 paragraph 1 and Article 15 paragraph 2 of Directive 92/50/EEC in line with the provisions of chapters III to VI. The knowledge that the AbfallGmbH would be awarded the contract by the Municipality of Mödling increases the interest of third parties to acquire a participation in this company. However these forms of external independence by which the independent entities are rendered attractive for private investors with the award of a contract of unlimited duration may not decrease the effect of Directive 92/50/EEC. The Directive remains applicable on such types of constructions.

Figure 9 Mödling



THE RESULTS OF THE CONSULTATION ON THE GREEN PAPER

Interestingly, there is no agreement among the contributors to the report on whether or not current institutionalised PPP practice actually complies with Community law on contracts and concessions. Public authorities, public companies and associations of public bodies from various Member States tend to assess compliance positively. Many contributors from the private sector perceive current compliance with Community law on contracts and concessions as deficient in certain respects and point to circumvention of public procurement law and distortions of competition. A clear majority favour an EC initiative on institutionalised PPPs, primarily to provide clarification on applying existing public procurement rules to setting up these PPPs. The French Caisse des dépots et consignations, which holds participations in over 500 mixed-ownership undertakings, emphasises the necessity of transparency in setting up institutional PPPs with a view to protecting territorial authorities having less experience with market mechanisms than their private partners. Despite this, however, it seems inappropriate to subject institutionalised PPPs to the same rules as contractual PPPs. In particular, there are calls to clarify the definition of the term

"in-house", favouring guidelines or an interpretative communication rather than legislation. Conversely, many contributors are opposed to any initiative at EC level.

Speaking about PPPs in general, a clear majority opposes too many and too strict rules. For example, the Commission received 3,000 letters referring to the same issue, which clearly expresses the conviction that the existing regulatory framework is fully sufficient and e.g. provides the basis for reliable, sustainable and well-priced services in the water sector.

Conversely, there is broad support for some sort of collective consideration of PPP issues at EC level to discuss best practices. Many referred to the document by the Regional Policy Directorate-General containing case studies and view this as a good example to foster the exchange of experience on PPPs at EC level.

4.5 Recent developments

On 8 July 2005, before this contribution was going to print, the German Bundesrat debated on a Law accelerating the implementation of public-private partnerships and improving the legal frame conditions for public-private partnerships[72]. This law is to create legal frame conditions to eliminate obstacles and unclear aspects that hitherto had complicated the implementation of public-private partnerships (PPPs) in Germany. This concerns a number of open questions relating to contract awarding, contract design and PPP arrangements as well as certain fiscal problems and the financial market. It is planned to amend the Law against restrictions of competition and the public procurement rules. Competitive dialogue is to be introduced as a new, separate procedure. Moreover, it is planned to exempt properties transferred by the State for a specific period in the context of a public-private partnership from property tax. The same exemption is envisaged for property conveyance tax in those cases where retransfer to the State within a specific period is foreseen. Furthermore, changes are planned for the Law on investments in order to allow for more extensive holdings in and by public-private project management companies.

The following *committee recommendations* were voiced: the leading Committee on Economics and Labour, the Finance Committee, the Committee on Internal Affairs and the Committee on Urbanism, Housing and Regional Development recommended to the Bundesrat to invoke the services of the Mediation Committee for a comprehensive revision of the planned legislation. It was suggested to cancel several articles. This concerns changes in the Law against restrictions of competition and the public procurement rules. The planned changes in the Law against restrictions of competition are the object of a comprehensive revision of public procurement rules necessitated by Community law. It is hardly effective, it was argued, to partially modify PPP arrangements if these will have to be re-modified in the near future. The

72 For details, cf. the homepage of the German Bundesrat, www.bundesrat.de.

tendering of PPP arrangements is also possible under currently applicable public procurement legislation, it was added. The public procurement rules embody an erroneous legislative approach, since they upend the applicable cascade system in public procurement and thus prepare the ground for the – highly controversial – system change in public procurement intended by the Federal Government. Moreover, the Committees recommended refraining from introducing an exemption from property tax and property conveyance tax in the context of public-private partnerships.

The Transport Committee recommended that the Bundesrat approve this law.

One question will certainly arise for many Member States: Will it be sufficient to modify existing public procurement regulations, or should a new legal instrument on PPPs be adopted? If so, what should be the timeframe for introducing such an instrument? Now or when the European Commission has taken a final decision?

4.6 Additional Information

For further details concerning the Green Paper of the Commission on Public-Private Partnerships and Community Law on Public Contracts and Concessions, 30 April 2004, COM (2004) 327 final, please consult the following website:

http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004_0327en01.pdf

For further details concerning the Report on the Public Consultation on the Green Paper of 3 May 2005, SEC (2005) 629, please consult the following website:

http://europa.eu.int/comm/secretariat_general/regdoc/rep/2/2005/EN/2-2005-629-EN-1-0.Pdf

For further details concerning the ECJ judgment, C-107/98, Teckal, 18 November 1999, please use the following link to the homepage of the Court of Justice of the European Union (http://curia.eu.int):

http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-107%2F98&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

For further details concerning the ECJ judgment, C-26/03, Stadt Halle and RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna, 11 January 2005, please use the following link to the homepage of the Court of Justice of the European Union (http://curia.eu.int):

http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-26%2F03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

For further details concerning the conclusions of the Advocate General, C-29/04, European Commission v. Republic of Austria, 21 April 2005, please use the following link to the homepage of the Court of Justice of the European Union (http://curia.eu.int):

http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-29%2F04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

4.7 Appendixes

APPENDIX 1

Commission interpretative communication on concessions under Community law (Official Journal C 121 of 29.04.2000, p. 2).

- Note : Footnotes are set in brackets ( ).

On 24 February 1999 the Commission adopted and published a Draft Commission interpretative communication on concessions under Community law on public contracts (1) and submitted it to a wide range of bodies for consultation. Taking into account the substantial input (2) it has received following publication of the initial draft in the Official Journal of the European Communities, the Commission has adopted this interpretative communication.

1. INTRODUCTION

1. Concessions have long been used in certain Member States, particularly to carry out and finance major infrastructure projects such as railways and large parts of the road network. Involvement of the private sector has declined since the first quarter of the 20th century as governments began to prefer to be directly involved in the provision and management of infrastructure and public services.

2. However due to budgetary restrictions and a desire to limit the involvement of public authorities and enable the public sector to take advantage of the private sector's experience and methods, interest in concessions has been heightened over the last few years.

3. First of all, it should be pointed out that the Community does not give preference to any particular way of organising property, whether public or private: Article 295 (ex Article 222) of the Treaty guarantees neutrality with regard to whether enterprises are public or private.

4. Given that this form of association with operators is being used more and more frequently, particularly for major infrastructure projects and certain services, the Commission feels this interpretative communication is needed to keep the operators concerned and the public authorities informed of the provisions it considers apply to concessions under current Community law. Indeed, the Commission is repeatedly faced with complaints concerning infringements of Community law on concessions when public authorities have called on economic operators' know-how and capital to carry out complex operations. It has thus decided to define the concept of .concessions. and set out the guidelines it has followed up to now when investigating cases. This interpretative communication is therefore part of the transparency required to clarify the current legal framework in the light of the experience gained when investigating the cases examined up to now.

5. In the draft version of this interpretative communication (3), the Commission had stated that it also intended to deal with the other forms of partnership used to call upon private sector financing and know-how. The Commission decided not to consider the forms of partnership whose characteristics are different from those of a concession as defined in this interpretative communication. Such an approach was also favoured in the input received. The wide range of situations, which are in constant flux, as revealed in the feedback on the draft interpretative communication, calls for an indepth consideration of the characteristics they have in common. The discussion set off by the publication of the draft interpretative communication must therefore continue on this matter.

6. The comments on concessions have enabled the Commission to refine its analysis and define the characteristics of concessions which distinguish them from public contracts, in particular the delegation of services of general interest operated by this kind of partnership.

7. The Commission wishes to reiterate that this text does not seek to interpret the specific regimes deriving from Directives adopted in different sectors, such as energy and transport. This interpretative communication (hereinafter referred to as the “communication”.) will specify the rules and the principles of the Treaty governing all forms of concession and the specific rules that Directive 93/37/EEC on public works contracts (4) (hereinafter “the works Directive”) lays down for public works concessions.

2. DEFINITION AND GENERAL PROBLEM OF CONCESSIONS

Concessions are not defined in the Treaty. The only definition to be found in secondary Community law is in the works Directive, which lays down specific provisions for works concessions (5). However, other forms of concessions do not fall within the scope of the directives on public contracts (6).

However, this does not mean that concessions are not subject to the rules and principles of the Treaty. Indeed, insofar as these concessions result from acts of State, the purpose of which is to provide economic activities or the supply of goods, they are subject to the relevant provisions of the Treaty and to the principles which derive from Court Case law. In order to delimit the scope of this communication, and before specifying which regime applies to concessions, their distinctive features must be described. To this end, a brief review of the concept of works concessions as found in the works Directive should prove useful.

2.1. WORKS CONCESSIONS

2.1.1. Definition as given in Directive 93/37/EEC

The Community legislator has chosen to base its definition of works concessions on that of public works contracts.

The text of the works Directive states that public works contracts are “contracts for pecuniary interest concluded in writing between a contractor and a contracting authority (. . .) which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work (. . .), or the execution by whatever means of a work corresponding to the requirements specified by the contracting authority!” (Article 1(a)).

Article 1(d) of the same Directive defines a public works concession as “a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment”.

According to this definition, the main distinctive feature of a works concession is that a right to exploit a construction is granted as a consideration for having erected it; this right may also be accompanied by payment.

2.1.2. Distinction between the concepts of “public works contract” and “works concession”

The Commission believes that the right of exploitation is a criterion that reveals several characteristics which distinguish a works concession from a public works contract.

For example, the right of exploitation allows the concessionaire to demand payment from those who use the structure (e.g. by charging tolls or fees) for a certain period of time. The period for which the concession is granted is therefore an important part of the remuneration of the concessionnaire. The latter does not receive remuneration directly from the awarding authority, but acquires from it the right to obtain income from the use of the structures built (7).

The right of exploitation also implies the transfer of the responsibilities of operation. These responsibilities cover the technical, financial and managerial matters relating to the construction. For example, it is the concessionaire who is responsible for making the investments required so that it may be both available and useful to users. He is also responsible for paying off the construction. Moreover, the concessionaire bears not only the usual risks inherent in any construction . he also bears much of the risk inherent in the management and use of the facilities (8).

From these considerations, it follows that, in works concessions, the risks inherent in exploitation are transferred to the concessionaire (9). The Commission notes that more and more public works contracts are the subject of complex legal arrangements (10). As a result, the boundary between these arrangements and public works concessions can sometimes be difficult to define. In the Commission's view, the arrangement is a public works contract as understood under Community law if the cost of the construction is essentially borne by the awarding authority and the contractor does not receive remuneration from fees paid directly by those using the construction.

The fact that the Directive allows for a payment in addition to the right of exploitation does not change this analysis. Such situations have occurred. The State therefore bears part of the costs of operating the concession in order to keep prices down for the user (providing “social prices” (11)). A variety of procedures are possible (guaranteed flat rate, fixed sum but paid on the basis of the number of users, etc.). These do not necessarily change the nature of the contract if the sum paid covers only a part of the cost of the construction and of operating it.

The definition of a concession allows the State to make a payment in return for work carried out, provided that that this does not eliminate a significant element of the risk inherent in exploitation. By specifying that there may be payment in addition to the right to exploit the construction, the works Directive states that operation of the

structure must be the source of the concessionaire's revenue. Even though the origin of the resources . directly paid by the user of the construction . is, in most cases, a significant factor, it is the existence of exploitation risk, involved in the investment made or the capital invested, which is the determining factor, particularly when the awarding authority has paid a sum of money.

However, even within public works contracts, part of the risk may be borne by the contractor (12). However, the duration of concessions makes these risks more likely to occur, and makes them relatively greater. On the other hand, risks arising from the operation's financial arrangements, which could be considered .economic risks., are part and parcel of concessions. This type of risk is highly dependent on the income the concessionaire will be able to obtain from the amount of use of the construction (13) and it is a significant factor distinguishing concessions from public works contracts.

In conclusion, the risks arising from the operation of the concession are transferred to the concessionaire with the right of exploitation; specific risks are divided between the grantor and the concessionaire on a case by case basis, according to their respective ability to manage the risk in question. If the public authorities undertake to bear the risk arising from managing the construction by, for example, guaranteeing that the financing will be reimbursed, there is no element of risk. The Commission considers such cases to be public works contracts, not concessions (14).

2.2. SERVICE CONCESSIONS

Article 1 of Directive 92/50/EEC on public service contract (hereinafter referred to as the ”Services Directive”) states that this Directive applies to “public services contracts”, defined as “contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of (. . .)”. Unlike the works Directive, the services Directive does not define “service concessions” (15). With the sole intention of distinguishing service concessions from public services contracts, and therefore limit the scope of the Communication, it is important to describe the essential characteristics of concessions.

For this purpose, it would seem useful to work on the basis of factors deriving from the above-mentioned concept of works concessions which take into account the Court's case law on the subject (16) and the *opinio juris* (17). Works concessions are assumed to serve a different purpose from service concessions. This may lead to possible differences in terms of investment and duration between the two types of concessions. However, given the above criteria, the characteristics of concession contracts are generally the same, regardless of their subject.

Thus, as with works concessions, the exploitation criterion is vital for determining whether a service concession exists (18). Application of this criterion means that

there is a concession when the operator bears the risk involved in operating the service in question (establishing and exploiting the system), obtaining a significant part of revenue from the user, particularly by charging fees in any form. As is the case for works concessions, the way in which the operator is remunerated is a factor which helps to determine who bears the exploitation risk.

Similarly, service concessions are also characterised by a transfer of the responsibility of exploitation. Lastly, service concessions normally concern activities whose nature and purpose, as well as the rules to which they are subject, are likely to be the State's responsibility and may be subject to exclusive or special rights (19).

It should also be pointed out that, in the Lottomatica judgment mentioned above, the Court clearly distinguished between a transfer of responsibility to the concessionaire as concerns operating a lottery, which may be considered to be a responsibility of the State as described above, and simply supplying computer systems to the administration. In that case it concluded that without such a transfer the arrangement was a public contract.

2.3. DISTINCTION BETWEEN WORKS CONCESSIONS AND SERVICE CONCESSIONS

Given that only Directive 93/37/EEC provides for a special system of procedures for granting public works concessions, it is worth determining exactly what this type of concession is, especially if it is a mixed contract which also includes a service element. This is virtually always the case in practice, since public works concessionaires often provide services to users on the basis of the structure they have built.

As for delimiting the scope of the provisions in the works and services Directives, recital 16 of the latter specifies that if the works are incidental rather than the object of the contract they do not justify treating the contract as a public works contract. In the Gestión Hotelera Internacional case the Court of Justice interpreted these provisions and stated that “where the works [. .] are merely incidental to the main object of the award, the award, taken in its entirety, cannot be characterised as a public works contract” (20). The problem of mixed contracts was also addressed by the Court of Justice in another case (21) which determined that, when a contract includes two elements which may be separated (e.g. supplies and services), the rules which apply to each should be applied separately.

Although these principles have been established for public contracts, the Commission considers that a similar approach should be taken to determine whether or not a concession is subject to the works Directive. Its field of application *ratione materiae* is effectively the same in the case of both works contracts and works concessions (22).

In view of this, the Commission maintains that the first thing to determine is whether the building of structures and carrying out of work on behalf of the grantor constitute the main subject matter of the contract, or whether the work and building are merely incidental to the main subject matter of the contract. If the contract is principally concerned with the building of a structure on behalf of the grantor, the Commission holds that it should be considered to be a works concession. In this case, the rules laid down by the works Directive must be complied with, as long as the Directive's application threshold is reached (EUR 5 000 000), even if some of the aspects are service-related. The fact that the works are performed or the structures are built by third parties does not change the nature of the basis contract. The subject matter of the contract is identical.

In contrast, a concession contract in which the construction work is incidental or which only involves operating an existing structure is regarded as a service concession. Moreover, in practice, operations may be encountered which include building a structure or carrying out works at the same time as the provision of services. Thus, alongside a public works concession, service concessions may be concluded for complementary activities which are, however, independent of the exploitation of the concession of the structure. For example, motorway catering services may be the subject of a different service concession from that involving its construction or management. In the Commission's view, if the objects of these contracts may be separated, the rules which apply to each type should be applied respectively.

2.4. SCOPE OF THIS INTERPRETATIVE COMMUNICATION

As already stated, even though concessions are not directly addressed by the public contracts directives, they are nonetheless subject to the rules and principles of the Treaty, insofar as they are granted via acts that are attributable to the State and their object is the provision of economic activities. Any act of State (23) laying down the terms governing economic activities, be it contractual or unilateral, must be viewed in the light of the rules and principles of the Treaty, in particular Articles 43 to 55 (ex Articles 52 to 66) (24).

This communication therefore concerns acts attributable to the State whereby a public authority entrusts to a third party - by means of a contractual act or a unilateral act with the prior consent of the third party - the total or partial management of services for which that authority would normally be responsible and for which the third party assumes the risk. Such services are covered by this communication only if they constitute economic activities within the meaning of Articles 43 to 55 (ex Articles 52 to 66) of the Treaty.

These acts of State will henceforth be referred to as “concessions”, regardless of their legal name under national law. In view of the above, and without prejudice to

any provisions of Community law which might be applicable, this communication does not concern:

- acts whereby a public authority authorises the exercise of an economic activity even if these acts would be regarded as concessions in certain Member States (25);

- acts concerning non-economic activities such as obligatory schooling or social security. On the other hand, it should be noted that, when a concession expires, renewal is considered equivalent to granting a new concession, and is therefore covered by the communication.

A particular problem arises in cases where are forms of interorganic delegation between the concessionaire and the grantor which do not fall outside the administrative sphere of the contracting authority (26). The question of whether and to what extent Community law applies to this kind of relationship has been addressed by the Court (27). However, other cases currently pending before the Court could introduce new elements in this respect (28).

On the other hand, relationships between public authorities and public enterprises entrusted with the operation of services of general economic interest are, in principle, covered by this communication (29). It is true that, according to the Court's established case law (30), nothing in the Treaty prevents Member States from granting exclusive rights for certain services of general interest for non-economic public interest reasons whereby those services are not subject to open competition (31). Nonetheless, the Court adds that the way in which such a monopoly is organised and carried out must not infringe the provisions of the Treaty on the free movement of goods and services, nor the competition rules (32). In addition, the way in which these exclusive rights are granted are subject to the rules of the Treaty, and may therefore be covered by this communication.

3. REGIME APPLYING TO CONCESSIONS

As mentioned above, only works concessions for an amount equal to or greater than the threshold specified in Directive 93/37/EEC (EUR 5 000 000) are subject to a specific regime. Nonetheless, like any act of State laying down the terms governing economic activities, concessions are subject to the provisions of Articles 28 to 30 (ex Articles 30 to 36) and 43 to 55 (ex Articles 52 to 66) of the Treaty, and to the principles emerging from the Court's case law (33) -notably the principles of non-discrimination, equality of treatment, transparency, mutual recognition and proportionality (34).

The Treaty does not restrict Member States' freedom to grant concessions provided that the methods used to do so are compatible with Community law. The Court's case law holds that, even if Member States remain free under the Treaty to lay down

the substantive and procedural rules, they must respect all the relevant provisions of Community law, and particularly the prohibitions deriving from the principles enshrined in the Treaty concerning right of establishment and freedom to provide services (35). Moreover, the Court emphasised the importance of the principles and rules enshrined in the Treaty by specifying in particular that the public procurement directives were intended to "facilitate the attainment within the Community of freedom of establishment and freedom to provide services" and "to ensure the effectiveness of the rights conferred by the Treaty in the field of public works and supply contracts" (36).

Certain Member States have sometimes thought that concessions were not governed by the rules of the Treaty in that they involved delegation of a service to the public, which would be possible only on the basis of mutual trust (intuitu personae). According to the Treaty and the Court's established case law, the only reasons which would enable State acts which violate Articles 43 and 49 (ex Articles 52 and 59) of the Treaty to escape prohibition under these Articles are those referred to in Articles 45 and 55 (ex Articles 55 and 66). The very restrictive conditions specified by the Court for the application of these Articles are described below (37). There is nothing in the Treaty or in the Court's case law which implies that concessions would be treated differently.

In what follows, the Commission will refer to the rules of the Treaty and the principles deriving from Court case law that are applicable to concessions covered by this communication.

3.1. THE RULES AND PRINCIPLES SET OUT IN THE TREATY OR LAID DOWN BY THE COURT

As has already been stated above, the Treaty makes no specific mention of public contracts or concessions. Several of its provisions are nonetheless relevant, i.e. the rules instituting and guaranteeing the proper operation of the Single Market, namely:

- the rules prohibiting any discrimination on grounds of nationality (Article 12(1) (ex Article 6(1)));

- the rules on the free movement of goods (Articles 28 (ex Article 30) et seq.), freedom of establishment (Articles 43 (ex Article 59) et seq.), freedom to provide services (Articles 49 (ex Article 59) et seq.) and the exceptions to those rules provided for in Articles 30, 45 and 46 (ex Articles 36, 55 and 56) (38);

- Article 86 (ex Article 90) of the Treaty might help to determine if the granting of these rights is legitimate.

These rules and principles arrived at by the Court are clarified below. It is true that the case law cited refers in part to public contracts. Nonetheless, the scope of the principles which emerge from it often goes beyond public contracts. They are therefore applicable to other situations, such as concessions.

3.1.1. Equality of treatment

According to the established case law of the Court "the general principle of equality of treatment, of which the prohibition of discrimination on grounds of nationality is merely a specific enunciation, is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified" (39).

Moreover the Court asserted that the principle of equality of treatment, of which Articles 43 (ex 52) and 49 (ex 59) of the Treaty are a particular expression, "forbids not only overt discrimination by reason of nationality [. . .] but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result" (40).

The principle of equality of treatment implies in particular that all potential concessionaires know the rules in advance and that they apply to everybody in the same way. The case law of the Court, in particular the Raulin (41) and Parliament/ Council (42) judgments, lays down that the principle of equality of treatment requires not only that conditions of access to an economic activity be non-discriminatory, but also that public authorities take all the measures required to ensure the exercise of this activity.

The Commission considers that it follows from this case law that the principle of open competition must be adhered to. In the Storebaelt und Walloon Buses judgments, the Court has the occasion to set out the scope of the principle of equality of treatment in the area of public contracts, by asserting on the one hand that this principle requires that all offers conform to the tender specifications to guarantee an objective comparison between offers (43) and, on the other hand, this principle is violated, and transparency of the procedure impaired, when an awarding entity takes account of changes to the initial offers of one tenderer who thereby obtains an advantage over his competitors. Moreover, the Court notes that "the procedure for comparing tenders had to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency, so as to afford equality of opportunity to all tenderers when formulating their tenders" (44).

The Court has therefore specified in this case law concerning application of the Directives that the principle of equality of treatment between tenderers is quite separate from any possible discrimination on the basis of nationality or other criteria.

The application of this principle to concessions (which is obviously only possible when the awarding authority negotiates with several potential concessionaires) leaves the grantor free to choose the most appropriate award procedure, for example by reference to the characteristics of the sector in question, and to lay down the requirements which candidates must meet throughout the various phases of a tendering procedure (45). However, this implies that the choice of candidates must be made on the basis of objective criteria and the procedure must be conducted in accordance with the procedural rules and basic requirements originally set (46). Where these rules have not yet been set, the application of the principle of equality of treatment requires in any event that the candidates be chosen objectively.

The following should therefore be considered to contravene the above-mentioned rules of the Treaty and the principle of equality of treatment: provisions reserving public contracts only to companies of which the State or the public sector, whether directly or indirectly, is a major, or the sole, shareholder (47); practices allowing the acceptance of bids which do not meet the specifications, or which have been amended after being opened or allowing alternative solutions when this was not provided for in the initial project. In addition the nature of the initial project must not be changed during negotiation with regard to the criteria and requirements laid down at the beginning of the procedure.

Furthermore, in certain cases, the grantor may be unable to specify his requirements in sufficiently precise technical terms and will look for alternative offers likely to provide various solutions to a problem expressed in general terms. In such cases, however, in order to ensure fair and effective competition, the specifications must always state in a non-discriminatory and objective manner what is asked of the candidates and above all the way in which they must draw up their bids. In this way, each candidate knows in advance that he has the possibility of proposing various technical solutions. More generally, the specifications must not contain elements that infringe the abovementioned rules and principles of the Treaty. The requirements of the grantor may also be determined in collaboration with companies in the sector, provided that this does not restrict competition.

3.1.2. Transparency

The Commission points out that in its case law the Court has emphasised the connection between the principle of transparency and the principle of equality of treatment, whose useful effect it seeks to ensure in undistorted competitive conditions (48). The Commission notes that in virtually all the Member States the administrative rules or practices adopted with regard to concessions provide that bodies wishing to entrust the management of an economic activity to a third party must, in order to ensure a minimum of transparency, make their intention public according to appropriate rules.

As confirmed by the Court in its most recent case law, the principle of non-discrimination on grounds of nationality, implies that there is an obligation to be transparent so that the contracting authority will be able to ensure it is adhered to (49). Transparency can be ensured by any appropriate means, including advertising depending on, and to allow account to be taken of, the particularities of the relevant sector (50). This type of advertising generally contains the information necessary to enable potential concessionaires to decide whether they are interested in participating (e.g. selection and award criteria, etc.). This includes the subject of the concession and the nature and scope of the services expected from the concessionaire.

The Commission considers that, under these circumstances, the obligation to ensure transparency is met.

3.1.3. Proportionality

The principle of proportionality is recognised by the established case law of the Court as .being part of the general principles of Community law. (51); it also binds national authorities in the application of Community law (52), even when these have a large area of discretion (53).

The principle of proportionality requires that any measure chosen should be both necessary and appropriate in the light of the objectives sought (54). In choosing the measures to be taken, a Member State must adopt those which cause the least possible disruption to the pursuit of an economic activity (55). When applied to concessions, this principle, which allows contracting authorities to define the objective to be reached, especially in terms of performance and technical specifications, nonetheless requires that any measure chosen be both necessary and appropriate in relation to the objective set.

Thus, for example, when selecting candidates, a Member State may not impose technical, professional or financial conditions which are excessive and disproportionate to the subject of the concession. The principle of proportionality also requires that competition and financial stability be reconciled; the duration of the concession must be set so that it does not limit open competition beyond what is required to ensure that the investment is paid off and there is a reasonable return on invested capital (56), whilst maintaining a risk inherent in exploitation by the concessionaire.

3.1.4. Mutual recognition

The principle of mutual recognition has been laid down by the Court and gradually defined in greater detail in a large number of judgments on the free circulation of goods, persons and services. According to this principle, a Member State must

accept the products and services supplied by economic operators in other Community countries if the products and services meet in like manner the legitimate objectives of the recipient Member State (57).

The application of this principle to concessions implies, in particular, that the Member State in which the service is provided must accept the technical specifications, checks, diplomas, certificates and qualifications required in another Member State if they are recognised as equivalent to those required by the Member State in which the service is provided (58).

3.1.5. Exceptions provided for by the Treaty

Restrictions on the free movement of goods, the freedom of establishment and the freedom to provide services are allowed only if they are justified by one of the reasons stated in Articles 30, 45, 46 and 55 (ex Articles 36, 55, 56 and 66) of the Treaty.

With particular reference to Article 45 (ex Article 55) (which allows restrictions on the freedom of establishment and the freedom to provide services in the case of activities connected, even occasionally, with the exercise of official authority), the Court has on numerous occasions stressed (59) that “since it derogates from the fundamental rule of freedom of establishment, Article 45 (ex Article 55) of the Treaty must be interpreted in a manner which limits its scope to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect”. Such exceptions must be restricted to those activities referred to in Articles 43 and 49 (ex Articles 52 and 59), which in themselves involve a direct and specific connection with the exercise of official authority (60).

Consequently, the exception included in Article 45 (ex Article 55) must apply only to cases in which the concessionaires directly and specifically exercises official authority. This exception therefore does not automatically apply to activities carried out by virtue of an obligation or an exclusivity established by law or qualified by the national authorities as being in the public interest (61). It is true that any activity delegated by the public authorities normally has a connotation of public interest, but this still does not mean that such activity necessarily involves exercising official authority.

As an example, the Court of Justice dismisses application of the exception under Article 45 (ex Article 55) on the basis of findings such as:

- the activities transferred remained subject to supervision by the official authorities, which had at their disposal appropriate means for ensuring the protection of the interests entrusted to them (62),

- the activities transferred were of a technical nature and therefore not connected with the exercise of official authority (63).

As stated above, the principle of proportionality requires that any measure restricting the exercise of the freedoms provided for in Articles 43 and 49 (ex Articles 52 and 59) should be both necessary and appropriate in the light of the objectives pursued (64). This implies, in particular, that in the choice of the measures for achieving the objective pursued, the Member State must give preference to those which least restrict the exercise of these freedoms (65).

Furthermore, with regard to the freedom to provide services, the host Member State must check that the interest to be safeguarded is not safeguarded by the rules to which the applicant is subject in the Member State where he normally pursues his activities.

3.1.6. Protection of the rights of individuals

In consistent case law on the fundamental freedoms guaranteed by the Treaty, the Court has stated that decisions to refuse or reject must state the reasons and must be open to judicial appeal by the affected parties (66). These requirements are generally applicable since, as the Court has stated, they derive from the constitutional traditions common to the Member States and enshrined in the European Convention on Human Rights (67).

They are therefore also applicable to individuals who consider that they have been harmed by the award of a concession within the meaning of the communication.

3.2. SPECIFIC PROVISION OF DIRECTIVE 93/37/EEC ON WORKS CONCESSIONS

The Commission considers it worthwhile to point out that the rules and principles explained above are applicable to works concessions. However, Directive 93/37/EEC also provides a specific system for these which includes, among other things, advertising rules. It goes without saying that, for concessions whose value is below the threshold laid down by Directive 93/37/EEC, only the rules and principles of the Treaty are applicable.

3.2.1. The upstream phase: choice of concessionaire

3.2.1.1. Rules on advertising and transparency

Awarding authorities must publish a concession notice in the Official Journal of the European Communities according to the model laid down in Directive 93/37/EEC to put the contract up for competition at the European level (68). A problem

encountered by the Commission involves the award of concessions between public entities. Some Member States seem to consider that the provisions of Directive 93/37/EEC applicable to works concessions do not apply to contracts concluded between a public authority and a legal person governed by public law.

Nevertheless, Directive 93/37/EEC requires a preliminary advertisement for all contracts for public works concessions, irrespective of whether the potential concessionaire is private or public. Furthermore, Article 3(3) of Directive 93/37/EEC expressly states that the concessionaire can be one of the awarding authorities covered by the directive, which implies that this type of relation is subject to publication in accordance with Article 3(1) of the same directive.

3.2.1.2. Choice of type of procedure

As far as works concessions are concerned, the grantor is free to choose the most appropriate procedure, and in particular to begin negotiated procedures.

3.2.2. The downstream phase: contracts awarded by the contract holder (69)

Directive 93/37/EEC lays down certain rules on contracts awarded by public works concessionaires for works for a value of EUR 5 000 000 or more. However, they vary according to the type of concessionaire.

If the concessionaire is an awarding authority within the meaning of the Directive, the contracts for such works must be awarded in full compliance with all the Directive's provisions on public works contracts (70). If the concessionaire is not an awarding authority, the Directive stipulates that he must comply only with certain advertising rules. However, these rules are not applicable when the concessionaire awards works contracts to affiliated undertakings within the meaning of Article 3(4) of the Directive. The Directive also stipulates that a comprehensive list of such firms must be enclosed with the application for the concession and must be updated following any subsequent changes in the relationship between firms. Since this list is comprehensive, the concessionaire may not cite the non-applicability of the advertising rules as grounds for awarding a works contract to a firm which does not figure on the abovementioned list.

Consequently the concessionaire is always obliged to make known his intention to award a works contract to a third party whether or not he is an awarding authority. Lastly, the Commission considers that a Member State is in breach of the provisions of Directive 93/37/EEC on works carried out by third parties if, without any invitation to tender, it uses as an intermediary a firm with which it is linked to award works contracts to third-party firms.

3.2.3. Rules applicable to review

Article 1 of Directive 89/665/EEC provides that “Member States shall take the necessary measures to ensure that [. . .] decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible” in the conditions set out in the Directives, “on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law”.

This provision of the Directive applies to works concessions (71). The Commission also draws attention to the requirements of Article 2(7) of Directive 89/665/EEC, which stipulates that “the Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced”. This implies that the Member States must not take any material or procedural measures which might render ineffective the mechanisms introduced by this Directive.

As for concessionaires who are awarding authorities, in addition to the obligations already mentioned above, public contracts awarded by them are subject to the obligation to state reasons laid down in Article 8 of Directive 93/37/EEC, which makes it compulsory for the awarding authority to give the reasons for its decision within fifteen days, and to the review procedures provided for by Directive 89/665/EEC.

3.3. CONCESSIONS IN THE UTILITIES SECTORS

Directive 93/38/EEC on contracts awarded by entities operating in the water, energy, transport and telecommunications sectors (hereinafter referred to as the “utilities Directive”) does not have any specific rules either on works concessions or on service concessions. In deciding which rules apply, the legal personality of the grantor as well as his activity are therefore decisive elements. There are several possible situations.

In the first case, the State or other public authority not operating specifically in one of the four sectors governed by the utilities Directive awards a concession involving an economic activity in one of these four sectors. The rules and principles of the Treaty described above apply to this award, as does the works Directive if it is a works concession.

In the second case, a public authority operating specifically in one of the four sectors governed by the utilities Directive decides to grant a concession. The rules and principles of the Treaty are therefore applicable insofar as the grantor is a public entity. Even in the case of a works concession, only the rules and principles of the Treaty are applicable, since the works Directive does not cover concessions granted

by an entity operating specifically in one of the four sectors governed by Directive 93/38/EEC.

Lastly, if the grantor is a private entity, it is not subject to either the rules or the principles described above (72). The Commission is confident that the publication of this communication will help to clarify the rules of the game and to open up markets to competition in the field of concessions. Moreover, the Commission wishes to emphasise that the transparency which the publication of this communication provides in no way prejudices possible future proposals for legislation on concessions, if this becomes necessary to reinforce legal certainty. Lastly, the Court, which currently has preliminary matters before it (73), may further clarify elements deriving from the rules of the Treaty, the Directives and case law.

This communication may therefore be supplemented in due course in order to take these new elements into account.

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(1) OJ C 94, 7.4.1999, p. 4.
(2) The Commission wishes to thank the economic operators, representatives of collective interests, public authorities and individuals whose input helped to improve this communication.
(3) See point 2.1.2.4 of the Commission communication on public procurement in the European Union, COM(98) 143, adopted on 11 March 1998.
(4) Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199, 9.8.1993, p. 54).
(5) Council Directive 93/37/EEC, mentioned above.
(6) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209,
24.7.1992, p. 1). Council Directive 93/36/EEC of 14 July 1993 coordinating procedures for the award of public supply contracts (OJ L 199,
9.8.1993, p. 1). Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, 9.8.1993, p. 84).
(7) The best-known example of a public works concession is a contract whereby a State grants a company the right to build and exploit a motorway and authorises it to earn revenue by charging tolls.
(8) Verification will have to be on a case by case basis, taking account of various elements such as the subject matter, duration and the amount of the contract, the economic and financial capacity of the concessionaire, as well as any other useful element which helps establish that the concessionaire effectively carries risk.

(9) If recovery of expenditure were guaranteed by the awarding authority without the risk involved in the management of the construction, there would be no element of risk and the contract should be regarded as a works contract rather than a concession contract. Moreover, if the concessionaire receives whether directly or indirectly during the course of the contract or even when the contract comes to an end, payment (by way of reimbursement, covering losses etc.) other than connected with exploitation, the contract could no longer be regarded as a concession. In this situation, the compatibility of any subsequent financing should be considered in the light of any relevant Community law.
(10) For example, the Commission has already been faced with cases where a consortium composed of contractors and banks undertook to carry out a project to meet the needs of the awarding authority, in exchange for reimbursement by the awarding authority of the loan taken out by the contractors with the banks, together with a profit for the private partners. The Commission interpreted these as public works contracts since the consortium did not undertake any exploitation, and therefore bore no attendant risk. The Commission came to the same conclusion in another case where, although the private partner carrying out the work was ostensibly exploiting the construction, the public authority had in fact guaranteed that he would receive compensation. The terms of this guarantee were such that the public authority in effect bore the exploitation risks.
(11) For example, if the toll for a motorway is set by the State at a level which does not cover operating costs.
(12) For example, risks arising from changes in legislation during the life of the contract (such as changes in environmental protection which make it necessary to modify the construction, or changes in tax law which disrupt the financial arrangements in the contract) or the risk of technical obsolescence. Moreover, this type of risk is more likely to arise in the context of concessions, bearing in mind that these normally extend over a relatively long period of time.
(13) It should be noted that economic risk exists where income depends on the amount of use. This holds true even in the case of a nominal toll, i.e. one borne by the grantor.
(14) In a case investigated by the Commission, although the private partner was ostensibly exploiting the construction, the public authority had guaranteed that he would receive compensation. The terms of this guarantee were such that the public authority in effect bore the exploitation risks.
(15) The absence of a reference to the concept of service concessions in the services Directive calls for some comment. Although, when preparing this Directive, the Commission had proposed including a special arrangement for this type of concession similar to the existing arrangement for works concessions, the Council did not accept this proposal. The question of whether the granting of service concessions falls entirely under the arrangements introduced by the services Directive was therefore raised. As specified above, this Directive applies to .contracts for pecuniary interest concluded in writing between a service provider and a contracting authority., with certain exceptions which are described in the Directive

and which do not include concession contracts. A literal interpretation of this definition, followed by certain authors, could lead to inclusion of concession contracts within the scope of the services Directive, since these are for pecuniary interest and concluded in writing. This approach would mean that the granting of a service concession would have to comply with the rules set out in this Directive, and would hence be subject to a more complex procedure than works concessions. However, in the absence of Court case law on this point, the Commission has not accepted this interpretation in the actual cases it has had to investigate. A preliminary matter pending before the Court raises the question of the definition of service concessions and the legal arrangements which apply to them (Case C-324/98 Telaustria Verlags Gesellschaft mbH v. Post & Telekom Austria (Telaustria)).

(16) Judgment of 26 April 1994, Case C-272/91 Commission v. Italy (Lottomatica), ECR I-1409.

(17) Conclusions of Advocate-General La Pergola in Case C-360/96. Arnhem. Conclusions of Advocate-General Alber in Case C-108/98, RI.SAN Srl v. Comune d'Ischia.

(18) In its judgment of 10 November 1998 in Case C-360/98 (Arnhem), para. 25, the Court concluded that it could not be a public service concession on the grounds that the remuneration consisted solely of a sum paid by the public authority and not of the right to operate the service.

(19) Conclusions of the Advocate-General in the Arnhem case; Conclusions of the Advocate-General in the RI.SAN Srl case; both referred to above.

(20) Judgment of 19 April 1994, case C-331/92, Gestión Hotelera, ECR I-1329.

(21) Judgment of 5 December 1989, Case C-3/88, Data Processing, ECR, p. 4035.

(22) Moreover, the Court has already applied the same principle in order to delimit supply contracts and services in its judgment of 18 November 1999 on Case C-107/98, Teckal Srl v. Comune di Viano and AGAC di Reggio Emilia (Teckal).

(23) In the largest sense, i.e. the acts adopted by all public bodies belonging to the organisation of the State (local authorities, regions, departments, autonomous communities, municipalities) as well as any other entity which, even if it has its own legal existence, is linked to the State in such a tight manner that it is to be considered to be part of the State's organisation. The notion of acts of State also comprises acts which are attributable to the State, that is acts for which the public authorities are responsible, even though not adopted by them, given that the authorities can intervene to prevent their adoption or impose amendments.

(24) A similar line of reasoning should be followed for supply concessions, which must be viewed in the light of Articles 28 to 30 (ex Articles 30 to 36) of the Treaty.

(25) For example, taxi concessions, authorisations to use the public highway (newspaper kiosks, café terraces), or acts relating to pharmacies and filling stations.

(26) Similar to .in-house. relationships. The latter issue was first analysed by Advocates-General La Pergola (in the Arnhem case referred to above), Cosmas (in the Teckal case referred to above) and Alber (in the RI.SAN case referred to above).

(27) In the abovementioned Teckal case, the Court laid down that, for Directive 93/36/EEC to apply, .it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority., and added .The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities. (recital 50).
(28) Cases C-94/99 ARGE and C-324/98 Telaustria referred to above.
(29) In the audiovisual sector, account should be taken of the Protocol on the system of public broadcasting in the Member States, annexed to the Treaty of Amsterdam, amending the Treaty on European Union (in force since 1 May 1999).
(30) Judgments of 30 April 1974, Case 155/73, Sacchi, and of 18 June 1991, Case C-260/89, Elleniki Radiophonia.
(31) Elleniki Radiophonia judgment mentioned above, point 10.
(32) Elleniki Radiophonia judgment mentioned above, point 12.
(33) It is worth pointing out that in the transport sector, the relevant rules on freedom to provide services are set out in Article 51 (ex Article 61)
which refers to Articles 70 to 80 (ex Articles 74 to 84) of the Treaty. This is without prejudice to the fact that as the Court has consistently held, the general principles of Community law are applicable to the sector (see the judgments of 4 April 1974, Case C-167/73, Commission v. France, of 30 April 1986. Joined Cases 209/84 and 213/84, Ministère Public v. ASJES e. al., of 17 May 1994, Case C-18/93, Corsica ferries, of 1 October 1998, Case C-38/97 Autotrasporti Librandi snc v. Cuttica). Moreover, transport services by rail, road and inland waterway are covered by Regulation (EEC) No 1191/69, as amended by Regulation (EEC) No 1893/91, which set out the mechanisms and procedures that public authorities can employ to ensure that their objectives for public transport are met.
(34) Obviously, acts and behaviour of the concessionaire to the extent that these are attributable to the State within the meaning of the case law of the Court of Justice are governed by the above rules and principles.
(35) Judgment of 9 July 1987 Joint Cases 27/86; 28/86 and 29/86, Bellini.
(36) Judgments of 10 March 1987, Case 199/85, Commission v. Italy, and of 17 November 1993, Case C-71/92, Commission v. Spain.
(37) Lottomatica judgment mentioned above. In this judgment, the Court of Justice ruled that, in view of the facts, the tasks of the concessionaire were limited to activities of a technical nature and, as such, were subject to the provisions of the Treaty.
(38) The Commission points out that restrictive but non-discriminatory measures are contrary to Articles 43 (ex Article 52) and 49 (ex Article 59) of the Treaty if they are not motivated by overriding reasons of public interest worth protecting. This is the case when the measures are neither appropriate nor necessary for achieving the objective in question.
(39) Judgment of 8 October 1980. Case 810/79, Überschär.

(40) Judgment of 13 July 1993, Case C-330/91, Commerzbank; also see Judgment of 3 February 1982, Joined Cases 62 and 63/81, Seco and Desquenne.
(41) Judgment of 26 February 1992, Case C-357/89.
(42) Judgment of 7 July 1992, Case C-295/90.
(43) Judgment of 22 June 1993, Case C-243/89, Storebaelt, point 37.
(44) Judgment of 25 April 1996, Commission v. Belgium, Case C-87/94. Walloon Buses. See also Judgment of the Court of First Instance (hereinafter referred to as the .CFI.) of 17 December 1998, T-203/96, Embassy Limousines & Services.
(45) In this respect, it is worth emphasising that this Communication does not prejudge the interpretation of specific transport rules provided for by the Treaty at in current or future regulations. (46) Thus, for example, even if the specifications provide for the possibility for candidates to make technical improvements to the solutions proposed by the awarding authority (and this will often be the case for complex infrastructure projects), such improvements may not relate to the basic requirements of a project and must be delimited.
(47) Data processing, judgment mentioned above, point 30.
(48) Walloon Buses Judgment, referred to above, point 54.
(49) Judgment of 18 November 1999, Case C-275/98, Unitron Scandinavia, point 31.
(50) Transparency can be ensured, among other means, by way of publishing a tender notice, or pre-information notice in the daily press or specialist
journals or by posting appropriate notices.
(51) Judgment of 11 July 1989, Case 265/87, Schröder, ECR p. 2237, point 21.
(52) Judgment of 27 October 1993, Case 127/92, point 27.
(53) Judgment of 19 June 1980, Joined Cases 41/79, 121/79 and 796/79, Testa et al., point 21.
(54) This is for example the case concerning the obligation to achieve a high level of environmental protection regarding application of the precautionary principle.
(55) See for example the judgment of 17 May 1984, Case 15/83, Denkavit Netherlands or the judgment of the CFI of 19 June 1997, Case T-260/94, Air Inter SA, point 14.
(56) Cf. the CFI's recent case law according to which the Treaty is applicable .when a measure adopted by a Member State constitutes a restriction of the freedom of establishment of nationals of other Member States on its territory and at the same time provides advantages to an enterprise by granting it an exclusive right, unless the aim of the measure taken by the State is legitimate and compatible with the Treaty and is permanently justified by overriding considerations of general interest [. . .].. In such cases, the CFI adds that “it is necessary that the measure taken by the State be suited to ensuring the objective it is pursuing is achieved, and does not go beyond what is required to achieve that objective”. (Judgment of 8 July 1999, Case T-266/97, Vlaamse Televisie Maatschappij NV, point 108).
(57) This principle derives from case law relating to freedom of establishment and freedom to provide services (in particular in the Vlassopoulou Judgment of 7 May 1991 (Case C-340/89) and the Dennemeyer Judgment of 25 July 1991 (Case C-76/90). In the first Judgment, the Court of Justice found that .even if applied without

any discrimination on the basis of nationality, national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in exercising their right of establishment guaranteed to them by Article 43 (ex Article 52) of the EC Treaty. That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State.. In the Dennemeyer Judgment the Court stated in particular that .a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishments and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services.. Lastly, in the Webb case (of 17 December 1981, Case 279/80), the Court added that the freedom to provide services requires that "[. . .] the Member States in which the service is provided [. . .] takes into account the evidence and guarantee already produced by the provider of the services for the pursuit of his activities in the Member State in which he is established".

(58) For example, the Member States in which the service is provided must accept the equivalent qualifications already acquired by the service provider in another Member State which attest to his professional, technical and financial capacities. Apart from applying the technical harmonisation directives, agreements on mutual recognition of voluntary certification systems can constitute proof that the qualifications of enterprises are equivalent; these agreements can be based on accreditation, which provide proof that the conformity assessment body is competent.

(59) Judgment of 15 March 1988, Case 147/86, Commission v. Greece.

(60) Judgment of 21 June 1974, Case 2/74, Reyners.

(61) Conclusions of Advocate-General Mischo in Case C-3/88, Data Processing, referred to above.

(62) Judgment of 15 March 1988, Case 147/86, referred to above.

(63) Cases C-3/88 and C-272/91, Data Processing and Lottomatica, referred to above.

(64) Case T-260/94, Air Inter SA, referred to above. For example, the Court rejected the application of the exception relating to public policy when it was supported by insufficient reasons and the objective could be achieved by other means which did not restrict freedom of establishment or freedom to provide services (recital 15 of the Judgment C-3/88, Data Processing, referred to above.)

(65) Judgment of 28 March 1996, Case C-272/94, Guiot/Climatec.

(66) Judgment of 7 May 1991, Case C-340/89, Vlassopoulou, point 22.

(67) Judgment of 15 October 1987, Case 222/86, Heylens, point 14.

(68) In order to meet the Directive's aim of ensuring development of effective competition in the award of public works contracts, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts. (Judgment of 20 September 1988, Case 31/87, Beentjes, point 21).

(69) It should be reiterated that, under Article 3(2) of the Directive, the contracting authority may require the concessionaire to award to third parties contracts representing a minimum percentage of the total value of the work. The contracting

authority may also request the candidates for concession contracts to specify this minimum percentage in their tenders.
(70) This is also the case for service concessionaires who are awarding authorities under these Directives. The provisions of the Directives apply to procedures to award concession contracts.
(71) In this context, it should be noted that Advocate-General Elmer, in Case C-433/93, Commission v. Germany, found that according to the case law of the Court (the Judgments of 20 September 1988, in Case 31/87, Beentjes, and 22 June 1989, in Case 103/88, Constanzo) .the Directives on public contracts confer on individuals rights which they may exercise, in certain conditions, directly before the national courts, vis-à-vis the State and awarding authorities.. The Advocate-General also maintainted that Directive 89/665/EEC, adopted after this judgment, did not seek to restrict the rights which case law confers on individuals vis-à-vis public authorities. On the contrary, the Directive sought to reinforce .the existing arrangements at both national and Community levels . . . particularly at a stage when infringements can be corrected. (second recital of Directive 89/665/EEC).
(72) Nonetheless, insofar as the concessionaire has exclusive or special rights for activities governed by the Utilities Directive, he must comply with this Directive's rules on public contracts.
(73) For example, the Telaustria case referred to above.

APPENDIX 2

List of the relevant legal instruments of European law

1. EU Public procurement legislation (current directives until January 2006)

There are three “classic” directives :

- Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts amended by Directive 97/52/EC

  OJ N° L 199 of 9.8.1993, p. 1
  OJ N° L 328 of 28.11.1997, p. 1

- Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts

  OJ N° L 199 of 9.8.1993, p. 54
  OJ N° L 328 of 28.11.1997, p. 1

- Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts. Amended by Directive 97/52/EC.

  OJ N° L 209 of 24.7.1992, p. 1
  OJ N° L 328 of 28.11.1997, p. 1

Furthermore: Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (known as the Utilities Directive). Amended by Directive 98/4/EC

OJ N° L 199 of 9.8.1993, p. 84
OJ N° L 101 of 1.4.1998, p. 1

Communication of the Commission pursuant to Article 8 of Directive 93/38/EEC:
List of services regarded as excluded from the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors pursuant to Article 8 thereof.

OJ N° C 156 of 3.6.1999, p. 3

2. New EU public procurement legislation (Directives to be transformed into national legislation until 31 January at the latest)

„Classic“ Public Sector Directive

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

OJ N° L 134 of 30.4.2004, p. 114

Utilities Directive

Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

OJ, N° L 134 of 30.4.2004, p. 1.

Commission Decision 2005/15/EC of 7 January 2005 on the detailed rules for the application of the procedure provided for in Article 30 of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

OJ. N° L 7 of 11.1.2005, p. 7

Directives on remedies

Regarding "classic" public procurement:

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts

OJ N° L 395 of 31.12.1989, p. 33

Regarding public procurement in several sectors:

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts

OJ N° L 76 of 23.3.1992, p. 14

3. Communications of the Commission

- Commission Interpretative Communication on concessions under Community law

  OJ N° C 121 of 29.4.2000, p. 2

- Commission Interpretative Communication COM (2001) 274 final on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement of 4.7.2001

  OJ N° C 333 of 28.11.2001, p. 12

- Interpretative Communication COM (2001) 566 final of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement of 15.10.2001

  OJ N° 333 of 28.11.2001, p. 27

4. Legal principle

“Consequently, the aim of the directives is to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones.”

(Judgment of the Court of Justice, Case C-380/98, The Queen and H.M. Treasury ex parte University of Cambridge of 3.10.2000, recital 17).

5 Local authority experience of compulsory competitive tendering[73]

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This article draws very heavily on a research summary (Findings: Local authority experience of compulsory competitive tendering) published in 1995 by the Joseph Rowntree Foundation. The full summary is available from their website http://www.jrf.org.uk/knowledge/findings / government/G38.asp or hard copies can be obtained free of charge by emailing 'publications@jrf.org.uk'. The views expressed in the article are not necessarily those held by the Local Government International Bureau.

Local authorities in the UK have been adapting to a new climate of competitiveness since the introduction of Compulsory Competitive Tendering (CCT) following the Local Government Acts of 1988 and 1992. This has since been superseded by the introduction of Best Value, which goes beyond the remit of CCT in terms of considering not only the cost of local authority services but also other non-cost factors. The introduction of CCT heralded a number of far reaching changes in management processes, manager behaviour and organisations culture. The information below provides a view on the effects of CCT on UK local government, based on research by the Joseph Rowntree Foundation. This study reviews existing evidence on the impact of CCT and presents a discussion of a series of visits to ten local authorities in England, Wales and Scotland, carried out during the summer of 1994 and draws upon interviews with officers and councillors in those authorities.

The early 1990s have seen a remarkable process of transformation in local government. Local authorities have 'shaped up', reluctantly or otherwise, for working in a competitive environment, finding new skills and adopting new working practices. Those with responsibility for purchasing have had to change from 'doers' to advisers, controllers and forward thinkers. Similarly, managers of Direct Service Organisations (DSOs) have had to acquire a whole new range of competencies while developing greater commercial acumen. Where contracts have been won in-house, DSOs have slimmed down, become more cost-conscious and responsive and have improved productivity and quality of service. But change has spread more widely as commercial approaches have come to be applied to the authority at large and to the relations between its parts.

Becoming competitive has meant confronting restrictive practices leading to over-manning and reducing staffing levels to compare more closely with those prevailing in the private sector. Moving towards a competitive environment has also required authorities to relinquish many of their long-established practices and habits in the allocation and costing of work. These changes of approach are a prerequisite of any sustainable improvements in productivity and working practices. However, local authorities can rarely achieve the flexibility of a private contractor, who can engage

[73] Status quo as per June 2005

and release workers on a seasonal basis as the demands of the work dictate. Councils have found it difficult to become competitive due to the constraints of national pay and conditions of service, which are more expensive than those of the competing contractor. Interviews for the study suggest that - while a few authorities might have continued to experiment with new models of organisation - these changes would not have come about had local authorities not been compelled by law to submit defined services to compulsory competition under strict conditions. One officer interviewed confessed:

"The benefits were we saved money and the services were no worse. Broadly it is the same service at less cost. But we would never have done it without compulsion - it was done with a lot of pain and human cost."

However, despite the element of compulsion behind the initial changes, interviews revealed that the new disciplines of cost-conscious management which CCT imposed are valued. They have driven a process of cultural change in which customer requirements are made explicit, activities properly priced and customer satisfaction prioritised. It seems likely that the removal of the competition requirements would not see a reversal of the competitive process, as these new ways of working have become embedded in practice and their benefits are now recognised and valued.

The effects of change

A few authorities still find the process of competition disruptive and unsettling because of the degree of change involved. Others at the cutting edge of change are encountering new problems and raising new issues at the further reaches of the competitive environment, for example, where internal markets have been pushed so far that the sense of the authority's overall strategic direction becomes difficult to secure. Most, however, including some of the most hostile and reluctant entrants into the service marketplace, have begun to realise more immediate benefits. In one authority visited it was admitted that

"street cleaning and refuse collection services used to be a disaster with members getting a lot of complaints. Since it has gone out to external contractors, members are delighted with the services."

Those interviewed felt the gains have been greater clarity in lines of responsibility, the removal of confusion between service commissioning and service provision, explicitness in service specifications, heightened client awareness of performance, greater precision in performance measurement and the identification of hidden costs.

Increasing competition

The experience of the market appears highly variable between services, between different parts of the country, and over time. The trends, however, are all towards greater competition, with the introduction of CCT for white collar work already presenting a substantial and attractive market to the private sector. DSO managers are also likely to face increased competition from large, experienced and well-resourced firms, increasingly from Continental Europe, which are gearing up for the UK market.

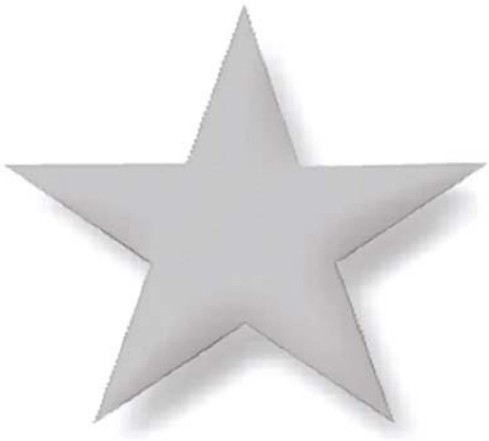
Creating private service organisations

Some councils have explored 'externalisation' - the wholesale transfer of a service and its workforce to a private company. Externalising services by negotiation effectively places them outside the CCT arena, provided it can be affected before the appointed day. It is seen as a way of maintaining job security of staff at least in the medium term, by transferring them to a company with guaranteed contracts for a period of time, while scope for extending operations into other local authority areas provides an expanding market. A range of considerations - legal, service, political, market and organisational - underpin the moves towards externalisation.

Implications for councillors

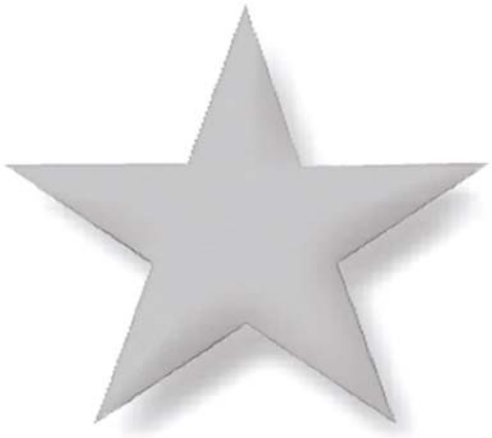
The effect of CCT has been to enhance the power of officers at the expense of that of the councillors. Some councillors had worked within the old system for so long that they did not want change and found themselves sidelined. Others, having recently sought and won election for quite other reasons, found themselves confronted with an experience which was unexpected and totally alien to them. It seems likely that many councillors, finding it hard to get to grips with the competitive regime, fell in with officer plans in the early stages of CCT.

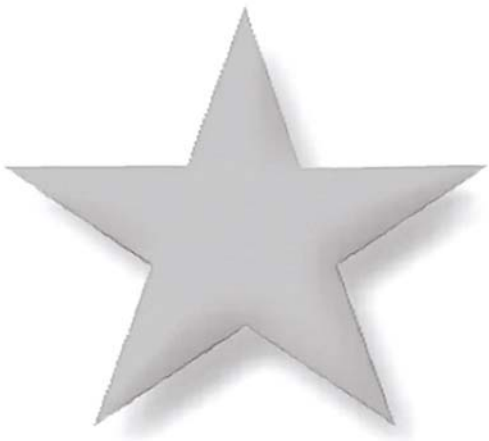
The study concludes by considering the future of competition and states that some councillors and officials believed that the competitive regime would disappear and price would no longer be the determining factor in the award of contracts. This belief was based on a perception that private sector management is swinging away from producing a basic product at a minimum price, towards the development of a quality product. However, the study suggests that competition would remain as “the dynamics of competition have proved powerful beyond all expectation and that Britain is unlikely to see the old patterns of public service management again.” In the last ten years, this research has been born out with Best Value becoming the successor to CCT and several other evaluation processes being introduced to the management and delivery of local government services.



CHAPTER III

Public Sector reform strategies





1 Public Governance as a new chance for modernising and further developing the public sector

Christine Mösenbacher – KDZ Centre for Public Administration Research, Vienna

1.1 Introduction

In today's fast-moving world, governments need to rethink their role to meet the challenges posed by forces such as globalisation, decentralisation, new technologies, and the changing needs, expectations and influence of citizens. Good governance principles transform not only the relationship between governments, citizens and parliaments, but the effective functioning of government itself[1].

Before Public Governance started to become an eventual management strategy for the public service, New Public Management (NPM) was introduced in the late 80s / early 90s of the 20th century. NPM was and still is a reorganisation strategy for states and public administrations.

Although there are strengths of the reforms after the implementation of NPM there are also several weaknesses that were found by a number of international evaluations, researchers and partly the estimation of representatives of practical politics.

The weaknesses of NPM after several years of the implementation can be described as the following[2]:

- Dominance of managerial behaviour (resulting in a difficult relationship between politics and administration);
- Signs of blockade of participation and other democratisation potentials;
- Low involvement rate of administrative staff;
- Difficulties of the social welfare system;
- Lack of pronounced awareness of the administrative culture (lack of soft modernisation factors);
- Consideration of human resources a cost factor – potentials of employee development are often not fully exploited, employee orientation is of secondary importance in case of conflict with cost saving constraints;
- Tensions between economic control through managers in the administration and political control by the responsible political entities – public tasks cannot be managed according to a system of business-operational efficiency and effectiveness logics.

Public Governance as a new modernisation strategy can catch up with some of these weaknesses and can be seen as a development of former reform strategies where

1 http://www.oecd.org (2005-07-14), © OECD, about Public Governance
2 Logon Reader – Public Management and Governance, p. 12

the stakeholders and sustainability as well as transparency, accountability and equal treatment are becoming more important aspects in the public sector.

On the following pages the concept of Public Governance will be further described and examples of improving public administrations will be shown.

1.2 Public Governance

There are several reasons why Public Governance has been discussed more often lately and why it is considered to be the new instrument for modernising the public sector:

- Responsible persons in the public sector realised that there are insufficient political control and shortcomings in the implementation of administrative modernisation.
- Traditional problems of the public sector continue to occur such as high unemployment rates, more demands for communication and participation from citizens and medium-term EU-targets of the Lisbon strategy (from the year 2000).
- The ability of measuring quality in every field of activity is lacking.
- The influence of the media is growing.
- Continuous communication, strengthening and developing of moral and ethical values is getting more important.

Public Governance therefore wants to fulfil the following aims:

- Securing social freedom and cohesion in the community through political action.
- Special emphasis on the issue of equal treatment of various segments of the population.
- Accelerated cooperation between public and private actors on an equal partner-like footing to solve social problems.
- Increasing the faith in democracy.

According to the White Paper of the European Union on «Good Governance» and Bovaird/Löffler (2003), the following principles are considered by public governance:

Figure 10 Principles of Public Governance

Transparency	Decision-making processes and public institutions should be transparent, e.g. cost comparisons for individual products and performances.
Participation	Extensive participation in addition to politics results in more trust, higher process-related and output qualities.
Equal treatment	Abolishment of discrimination of groups based on sex, race, religion or age.
Accountability	Responsibility for the quality of services, efficiency, sustainability etc. towards stakeholders.
Effectiveness	Requirements need to be met and problems need to be solved based on objectivity and evaluation.
Coherence	Policies and actions must match and be coherent; political and administrative actions must be coordinated; qualification measures must correspond to the respective outcomes.
Sustainability	Estimation of the effects of public action in the long term, usually including economic, social and ecological aspects.
Evaluation	The implementation of all the listed principles is evaluated periodically.

Some of the above mentioned principles will be further regarded with the help of case studies and best practices.

1.3 Case studies concerning aspects of Public Governance from Hungary, Latvia and Canada

Case study on the improvement of the client service at the local government level in the 13th district in Budapest (H)[3]

The office management in the 13th district of Budapest realized that the contentment of citizens is often influenced by their first impression. Therefore, the primary tasks were to cease the queuing and to diminish the time needed by the administration for the implementation of single proceedings. A modern, citizen- and child-friendly, efficient local public administration was desired. In order to bring the administration closer to the citizens, client officers were out placed; new offices were established outside the Mayor's Office in different locations of the district nearby the main public transport stations.

The office in Budapest was among the first ones in the 1990s which was certified with ISO 9001. Furthermore – next to specific aims concerning quality – a benchmarking programme has been launched in order to improve the performance and efficiency of the office.

In 1999 a Quality Management Handbook was formulated and the 13th district was also the first one to implement the concept of a one-window administration and carried out the continuous traceability of the administration processes.

This case study shows that with the actions taken in the 13th district, the responsible persons took charge of the quality of the delivered services, which is one of the principles of public governance.

Case study concerning matters of sustainability and equal treatment in projects by the Association of Rural Municipalities in Latvia[4]

The first project among others were the summer and winter sports games in «Berzes krasti» where the main goal was to use the values conceived by sports activities so that young people may gain social skills such as teamwork, tolerance and respect for the rules.

3 Logon Reader – Public Management and Governance, p. 17
4 Logon Reader – Public Management and Governance, p. 29

Project tasks or specific goals were to

- contribute to the cooperation among parish self-governments, educational institutions and sporting organisations in order to hold different sports activities that correspond to the needs of informal education and provides successful experience exchange;
- organise joint sports activities involving self-governments, educational institutions and sporting organisations;
- enable all parish inhabitants to take part in sports activities;
- integrate the values conveyed by sport into the educational sphere and
- promote a healthy and active life style.

The aim of another project (Slavic Ethnic Culture Values to Unite Various Nationalities) was

- to contribute to mutual understanding and cooperation among different nations individuals in the parishes;
- to contribute to the development of minorities' culture and ethnics' identity awareness as well as
- to preserve and develop their cultural properties.

The Management Accountability Framework in Canada

Public Service Sector in Canada is one of the best known and serves as good practice for many fields of management modernisation in the public sector. Now the Treasury Board of Canada introduced a new tool next to another great variety of management tools. The Management Accountability Framework[5] has the aim to help managers to demonstrate progress in their fields of activities and provide deputy heads and all public service managers with a list of management expectations that reflect the different elements of current management responsibilities.

The Management Accountability Framework is about strengthening accountability to

- manage the organisations effectively,
- serve ministers and government and
- deliver on results to Canadians.

5 http://www.tbs-sct.gc.ca/maf-crg/maf-crg_e.asp Treasury Board of Canada - Management Accountability Framework (2005-07-14)

The Framework consists of ten different fields, which are shown in the figure below:

Figure 11 Management Accountability Framework - expectations

Source: Treasury Board of Canada 2003

Leadership is necessary for the application of the framework because only leadership creates the conditions for sound management and is responsible that the 10 elements are all in place and working well together. The 10 fields of expectations rely on each other and show practically how management is an interdisciplinary field.

In order to measure progress, there are indicators (Figure 12) and measures defined for each of the ten expectations in the Framework.

Figure 12 Indicators in the Management Accountability Framework

Source: Treasury Board of Canada 2003

It is recognized, however, that not all 10 expectations can be achieved at once. The expectations may differ for different types of departments and so certain departments and agencies will have to focus more on some areas and less on others. Nonetheless all of the departments should show some effort and progress in each of the ten fields. Managers should use the Framework at all levels to improve the functioning of their accountable department and motivate and engage their staff on the desired outcomes of a well-functioning organisation. Of course the Framework underlies constant development process and will grow and change according to the changes in the public sector environment.

The Framework is a tool to promote a modern public service

- *whereby services are focused on citizens,*
- *public service values (e.g. democratic, professional, ethical, and people values) are clearly articulated and continually applied,*
- *effective support is provided to ministers and strategic direction is translated into results, through high organisational performance,*

- *decision making is transparent and accountable,*
- *employees are valued, and human and intellectual capacities are developed,*
- *spending is responsible, with sound stewardship of taxpayers' resources, risks are identified and corporately managed and*
- *organisational performance is continually enhanced through innovation, transformation, and learning.*

1.4 Conclusions

Public Administration Reforms are at different stages in the various European countries. Some of the modernisation strategies proved to have weaknesses, while others are not yet accepted as tools for public administration reform.

Especially Public Governance will still have to overcome certain shortcomings in its practical implementation in the future, like the following examples show:

- Political decisions are not always based on comprehensive target definitions or on measurable results. More often the political discourse ends with announcements with no expert evaluations and conclusions in sight.

- Political-administrative management strategies, strategic planning and strategic controlling are still underrepresented, but would be necessary for a good functioning modernisation.

- There is a general lack of willingness in participating at decision-making processes among the citizens – political governance in municipal governments relies on voluntary participation.

These were only few of the possible shortcomings in the practical implementation of governance.

Uncountable information activities among the public administrations will be necessary to keep up with the modernisation needs as well as exchanging ideas with similar organisations and especially learning from others.

2 Human Resource Management – challenges and needs in the 21st century

Christine Mösenbacher – KDZ Centre for Public Administration Research, Vienna

2.1 Introduction

The public sector in Europe as well as in other countries like Canada or the United States is facing different challenges in the 21st century. Not only is the accelerating European integration process a key factor for changing management attitudes but also budgetary constraints, legal and organisational regulations, increasing competition between the regions and the modernisation process of the public sector require new skills for organisational structures and the employees.

Managers have to go through a change in their management behaviours and are now playing a key role in the modernisation process just as in the private sector. The key competences for managers in the public sector should include now the following skills:

Figure 13 Required competences for managers

➢ knowledge	➢ management, political science, finances, HRM, law, economy, social science
➢ technical abilities	➢ application of management methods and instruments e.g. project planning and calculation
➢ social abilities	➢ communication, leadership, motivation, conflict management, coaching, negotiations
➢ analytical abilities	➢ risk evaluation, systematic thinking, problem awareness
➢ personal skills	➢ motivation, independence, flexibility, learning aptitude, creativity, critical faculty

Source: Logon Reader 2004, p. 11

But not only are there different skills required for managers but also for their personnel. Managers have to identify their needs regarding the ability of their

workforce and lead the employees in the right direction which means that employees should take on more responsibility and work more independently in the future. Furthermore it is necessary for the staff to focus on efficiency and quality of service provision as well as to become more customer orientated, take active participation in the management process and in general respond appropriately to the environmental changes.

One instrument to help managers deal with this new challenges and needs is Human Resource Management (HRM). HRM is about

- the introduction of new organisational structures (in particular decentralization), involvement of employees in decision making processes, teamwork and management by objectives,
- providing the organisation with personnel and
- the creation of organisational incentives for better staff motivation.

In order to put the focus on the changing needs in skills, another managerial task is needed: Human Resource Development (HRD). According to the Department of Human Resources and Skills Development Canada, this is as a profession an interdisciplinary field. HRD is focussed on systematic training and development, career development, and organisation development to improve processes and enhance the learning and performance of individuals, organisations, communities, and society[1].

2.2 Human Resource Development

HRD is meant to achieve goals like the improvement of qualifications and the increase in organisational know-how. It should also help the organisation to adapt to changes in organisational environment and to stimulate a customer care orientation. Regarding the employees HRD has as aims to develop the sense of responsibility and quality among the managers and staff, develop an ability to take on responsibility and create methods to motivate the staff.

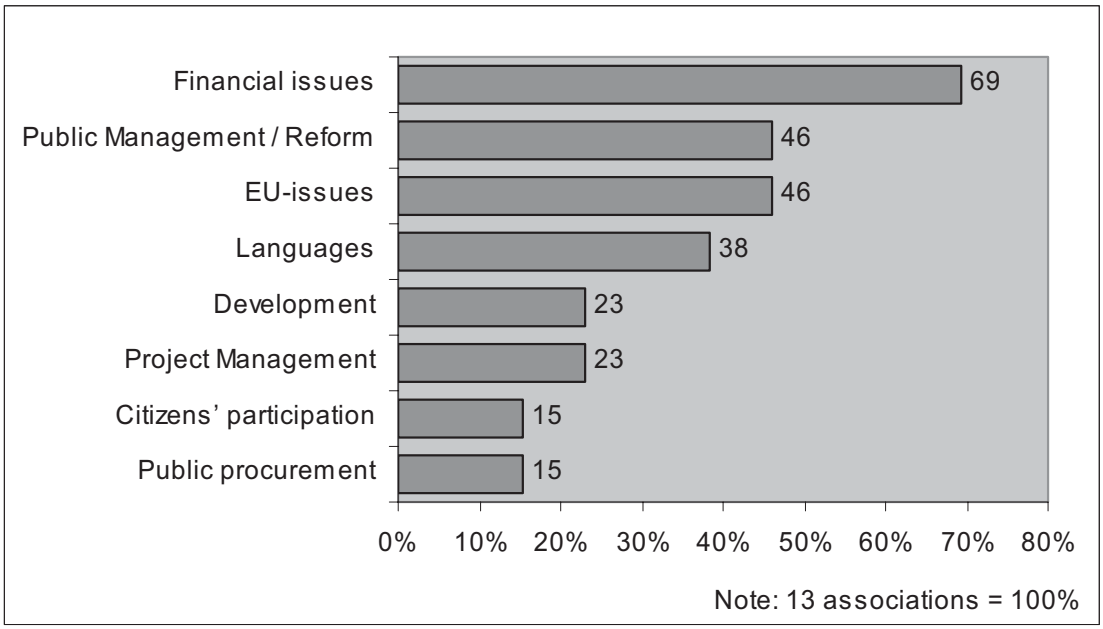
Increased job satisfaction and the improvement of learning opportunities as well as the enforcement of team work and the development of a shared organisational culture are results of HRD in an organisation.

Concerning the public sector modernisation, there is a large focus on training in public administrations to catch up with the ongoing changes in the public sector environment. The results of a survey among the Logon partners (18 associations

1 http://www.hrsdc.gc.ca (2005-07-14) Human Resources and Skills Development Canada, (2005-07-10)

participated in the survey between summer 2003 and spring 2004) show the current fields of training in the associations of the Logon partners (see the following figure):

Figure 14 Topics of current trainings

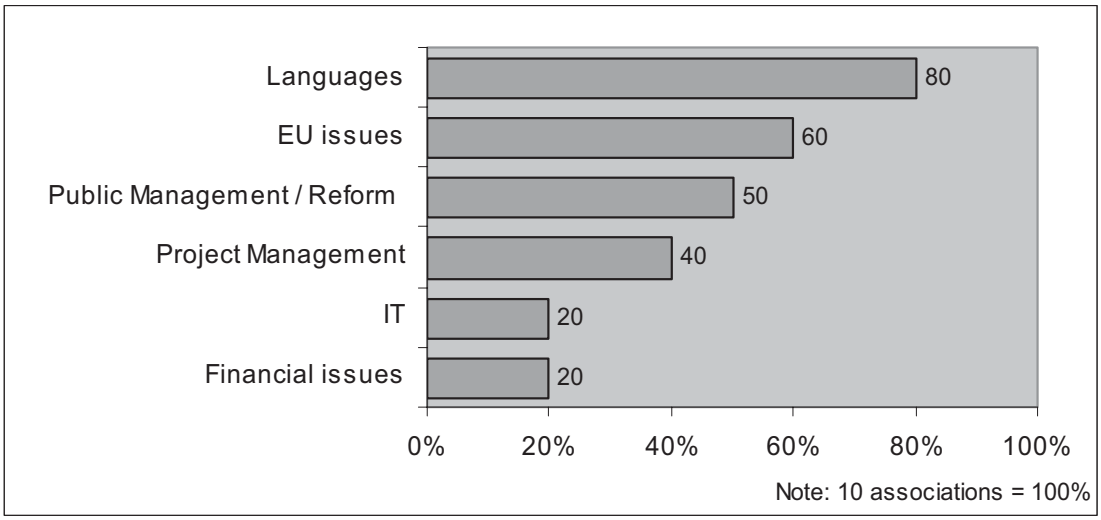


Source: Logon Reader 2004, p. 32

The figure shows that currently the main focus in the trainings is put on financial issues, next to Public Management/Reform and EU-issues. Important training subjects like project management, languages and development as well as citizens' participation and Public procurement are right now underrepresented in the trainings of the employees in the associations.

The following figure shows the training needs in the associations according to the questioned persons.

Figure 15 Topics of necessary trainings



Source: Logon Reader 2004, p. 33

It is noticeable that only ten out of the 18 questioned associations recognized topics of necessary trainings in the future. Again EU issues and Public Management/Reform were amongst the main topics needed. In addition it is necessary – in the point of view of the associations – to get trained in foreign languages in order to compete with the enlarging Europe.

Other key topics for training can be identified as: IT, public relations, exchange programs, development indicators, quality management, team building, local development strategies, urban policy, human resources, public services, communication and conflict management.

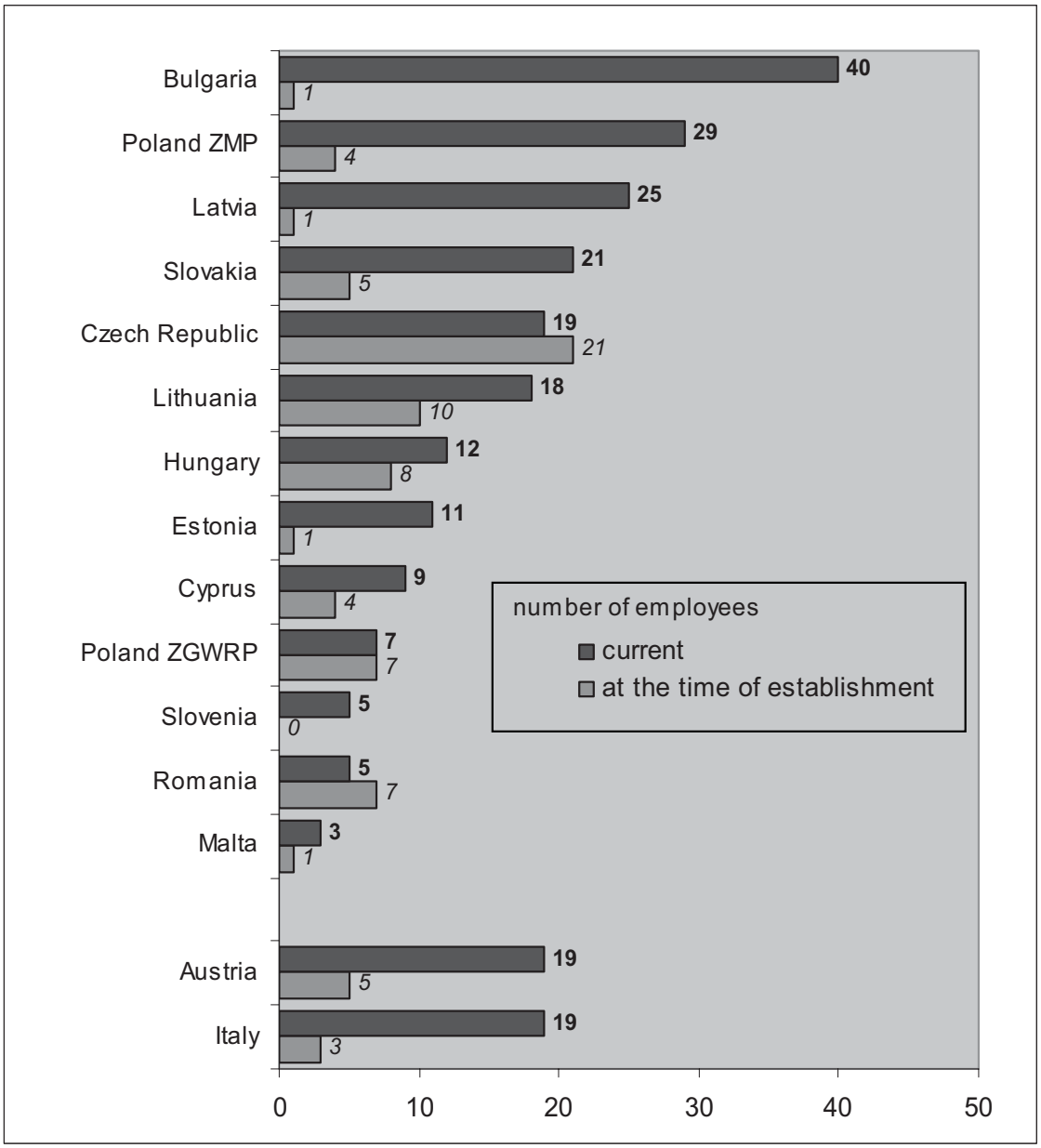
Concerning the training, there exist different types of training in general:

- Induction Training (into the job training),
- On the Job Training,
- External Training (off the job training),
- Learning by doing.

Although the employees can choose between the wide range of trainings offered, it is necessary to coordinate these trainings under the point of view of Human Resource Management and Development. Therefore it is necessary to have staff/managers responsible for HRM to get the best out of the different actions and achieve the organisational goals.

The figure below shows the number of employees in the associations of the Logon partners.

Figure 16 Number of employees



Source: Logon Reader 2004, p. 29

Even though there are some associations with a small number of employees, it is still important to conduct the different actions concerning the personnel development and management. Especially when looking at the number of employees at the time of

establishment of the association and the current number of employees it is clear that the growth of the organisation has to be coordinated in form of Human Resource Management – apparently this is not the only managerial task when expanding the organisation but it definitely belongs to one of the most important tasks of managers.

On the following pages we present a best practice from Canada concerning the improvement of Human Resource Management.

2.3 The Canadian approach: Framework for Good Human Resources Management in the public service[2]

The Framework for Good Human Resources Management was first introduced in February 1998 and had the aim to help managers improve their Human Resources Management in their organisations. Human Resources Management practices that have a positive impact on business performance in general and which have been demonstrated by researchers are included in the Framework. The Framework also includes practices that are unique to the public service environment. The idea of the Framework is that it is used for assessing departmental Human Resources Management regimes and serves as a basis for well-informed strategic decision making.

Human resources programs and services must continue to meet the needs of the organisations they serve, both by advising managers in their application of human resources practices and policies, and by providing strategic advice to management.

Good human resources management is about managing people well to achieve organisational goals. We see over time that there are certain practices in human resources management that contribute to high performance in organisations. This is as true for the Public Service as it is elsewhere.

The Human Resources Management Framework draws the attention of managers to four key results areas. It reflects the legislative, financial and operational realities of the Public Service. Using desired outcomes and performance indicators given here, as well as a variety of measurement tools and sources of information, managers can identify, assess and measure progress in the human resources practices that are specific to their organisations. While doing so, they will also be working towards the realization of a vision of human resources management that is shared across the Public Service.

When starting with Good Human Resources Management you ask the following questions which correspond to four key results areas:

2 http://www.hrma-agrh.gc.ca/hr-rh/hrtr-or/hr_references/Framework/FRAME_e.asp Human Resources Management Framework Canada (2005-07-14)

Figure 17 Key results areas for Good Human Resources Management

Questions	Key results areas
Are people well led?	Leadership
Is the organisation becoming more productive?	A Productive Workforce
Does the work environment bring out the best in people?	An Enabling Work Environment
Do peoples' competencies match the anticipated need of the organisation?	A Sustainable Workforce

Source: Public Service Human Resources Management Agency of Canada, 2005

The four key results areas can be further specified by the topics in the following table, which shows the interdisciplinarity of the Human Resource Management field:

Figure 18 Key results areas – fields of activities

Leadership - Mission and Vision - Managing for Results - Values and Ethics - Effective Relationships	**A productive workforce** - Service Delivery - Clarity of Responsibilities - Organisation of Work - Employment Strategies
An enabling work environment - Supportive Culture - Respect for the Individual - Communication - Well-being and Safety	**A sustainable workforce** - Human Resources Planning and Analysis - Learning and Development - Workload Management - Compensation

Source: Public Service Human Resources Management Agency of Canada, 2005

The Framework is constructed in such a way that there are defined desired outcomes and performance indicators for each key result area. The tables below show selected examples for desired outcomes and performance indicators for the four key results areas. The tables do not contain an exhaustive coverage of all defined outcomes and indicators.

2.3.1 Leadership

Leadership is the ability to establish necessary relationships, mobilise the energies and talents of staff, and manage for results, while respecting public service values and ethics.

Figure 19 Leadership

Desired outcome	Performance indicators
Mission and vision - The energies and talents of staff are mobilised to realize the vision and accomplish the mission.	- Everyone understands the mission and vision statements and makes them his or her own. - Employees know where the organisation is heading over the next few years; they understand its purpose, how they and their work fit in, and what is expected of them. - The mission and vision statements are used as a compass for decision making. - Mission and vision statements are used to guide behaviour and performance.

Source: Public Service Human Resources Management Agency of Canada, 2005

2.3.2 A productive workforce

A productive workforce is one that delivers goods and services in an efficient manner and continuously strives to improve.

Performance indicators for a productive workforce can be for example the participation of the employees in the development of service standards, definition of targets for service and productivity and the measurement of performance against these targets as well as initiatives to improve the quality of service to clients and productivity.

Figure 20 A productive workforce

Desired outcome	Performance indicators
Service delivery - Programs are designed and delivered to meet the needs of citizens.	- Employees participate in the development of service standards. - Targets for service and productivity are set and performance is measured against these targets. - Initiatives are undertaken to improve the quality of service to clients and productivity. - Employees receive ongoing feedback on their performance and use it to improve their productivity.

Source: Public Service Human Resources Management Agency of Canada, 2005

2.3.3 An enabling work environment

An enabling work environment provides the necessary support, tools, systems and equipment to enable employees to provide client-focused delivery while reaching their full potential.

Figure 21 An enabling work environment

Desired outcome	Performance indicators
Supportive cultures - The organisation enables employees to attain their full potential and encourages a balance between work and personal life	- Employees have opportunities to practice intelligent risk-taking and exercise initiative. - Employees make use of a range of policies, programs and benefits to balance work and personal responsibilities.

Source: Public Service Human Resources Management Agency of Canada, 2005

2.3.4 A sustainable workforce

A sustainable workforce is one in which the energies, skills and knowledge of people are managed wisely, and plans are in place to provide for the organisation's viability.

Figure 22 A sustainable workforce

Desired outcome	Performance indicators
Human resources planning and analysis - The organisation's human resources needs are a key consideration in strategic and operational planning.	- Competencies required for high performance are identified. - Appropriate recruitment and retention strategies are linked to business requirements and based on proper demographic analysis.

Source: Public Service Human Resources Management Agency of Canada, 2005

In addition to the four key results areas there is one more field that is important for Good Human Resources Management – the Human Resources Management Capacity. This means that managers have access to the tools, advice and support provided to them by their human resources professionals and use them in the management of their human resources.

The Canadian Human Resources Management is part of a whole modernisation process which started several years ago. Canadian public services are known to be among the best in the world and so this example of Good Human Resources Management can be an aim for other countries on their way to modernising public sector activities.

3 Local e-government in the European Union

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3.1 E-government today

E-government can be defined as “usage of modern information and communication technologies (ICT) to integrate citizens, business and other public sector organisations in acts of governments and public administrations”. The European Union has developed an internal e-government standard in the eEurope initiative which was launched by the eEurope 2002 Action Plan endorsed by the Feira European Council in June 2000. It was strengthened by the eEurope 2005 Action Plan which sees e-government as a part of the measures to make the European Union the most competitive and dynamic knowledge based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.

This leads to an approach of e-government which concentrates on the “availability of public services”. The e-government benchmark of the European Union indicates the “percentage of basic public services available online” (eEurope Action Plan 2002) and the “number of basic public services fully available online” (eEurope Action Plan 2005). Following this emphasis, the levels of e-government are:

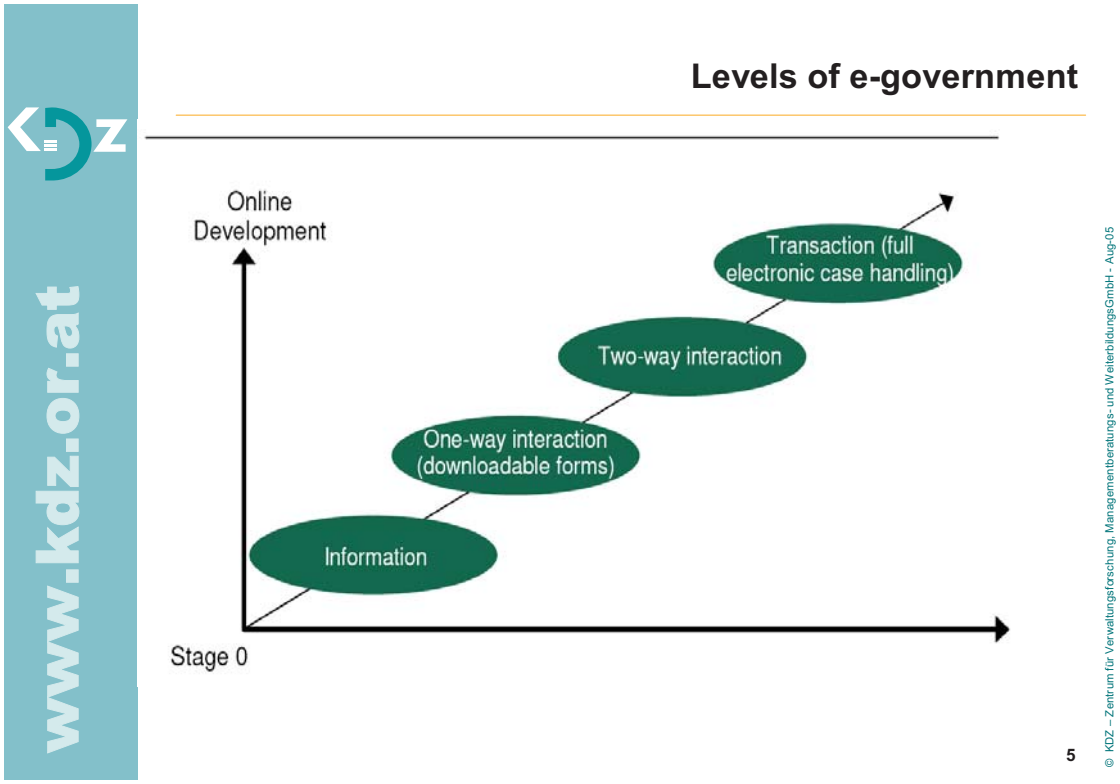
- Information: This covers simple information on websites with a description of laws and procedures as well as the offering of guidelines, office-hours and telephone numbers.

- One-way interaction offers mainly downloadable or internet forms for tax declarations, business permissions, registration in kindergardens, ordering tickets etc.

- Two-way interaction is more sophisticated because a direct interaction between citizen/customer and the authority is possible. This covers on the one hand internet application with specific responses like control or failure messages. On the other hand two-way interaction summarizes e-mail-communication or discussion panels.

- Transaction is the most developed level of e-government which includes online applications with fully integrated business processes, electronic payment and delivery.

Figure 23 Levels of e-government

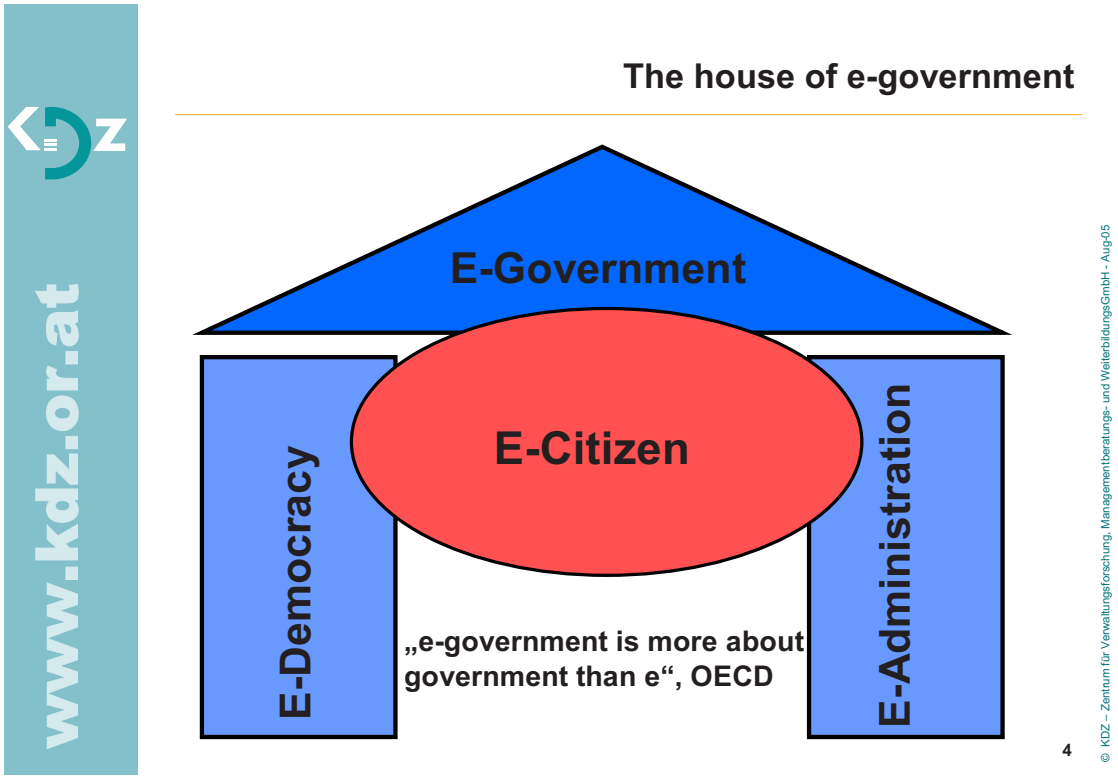


3.2 The future of e-government: From e-administration to e-democracy

Especially local governments have to broaden the approach to e-government when starting with the implementation of an own e-government strategy. The view on "online public services" can be seen as central focus point but modern e-government means more. Modern e-government stimulates the relation from citizens to administration and government according to the new concept of "Good - Public – Governance". This means that local governments planning e-government should fulfil the "EU-requirements" based on the indicator of "online public services" but further more include governance issues like transparency and participation into their e-government concept.

Following this thesis, e-government consists on the one hand of an administration related part with the objective to raise efficiency and customer orientation in electronic service delivery (e-administration). On the other hand e-government more and more should be seen as e-democracy. E-democracy guarantees a broad access to e-government with citizens and the relation of citizens to administration and politics in the main focus of interests.

Figure 24 The house of e-government



Seen chronologically, e-government has started in the 1990s with e-administration activities based on the theory of New Public Management. Today we have to realize that e-administration is a core element of e-government. But more and more e-democracy based on Good Governance takes over the dominating position of e-government.

In this definition, e-administration initiatives increase governmental efficiency and is seen through the lens of business management with clear measurable key indicators for efficiency like cost reduction, reducing duplications and faster proceedings. All in all, these indicators have to be seen as impartial and neutral. The main concern is that the exclusive stressing of e-administration could - in the end – also foster e-government's efficiency in authoritarian regimes. It is e-democracy which defines the democratic and citizen-oriented values of e-government. Examples for indicators are e.g. increasing information, transparency and citizens' participation – all in all covered by Good – Public - Governance.

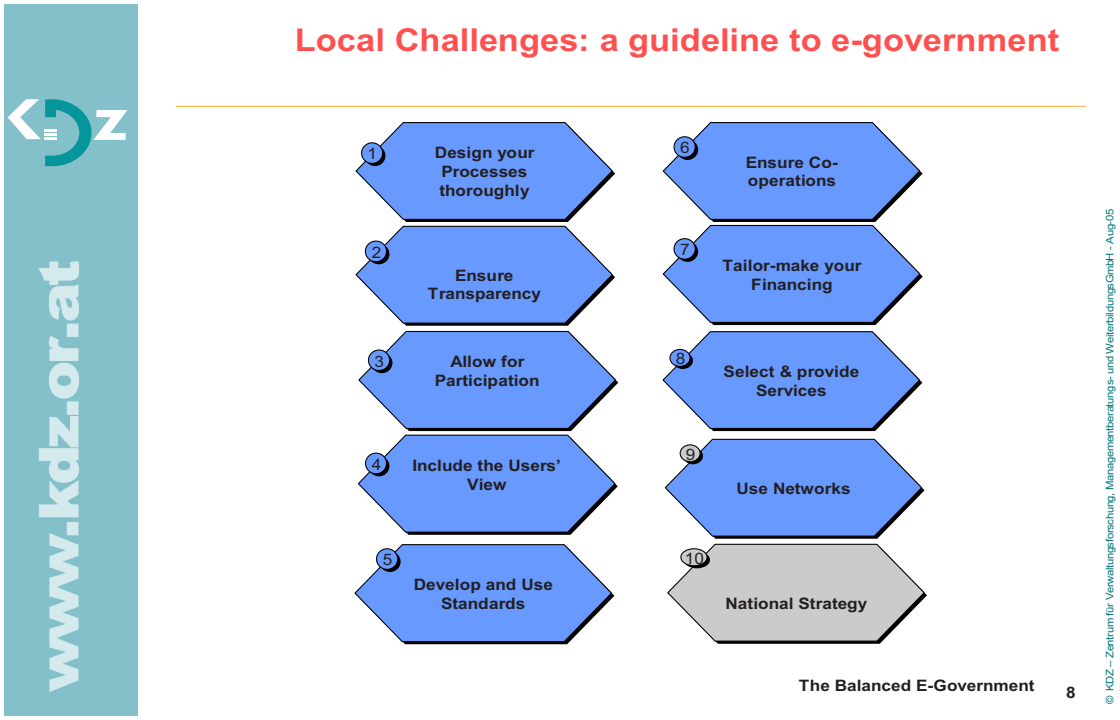
On the one hand these indicators suffer from limited measurability compared to e-administration. On the other hand they guarantee the presence of democratic values in e-government and increase the legitimacy of the political and administrative systems. Legitimacy will be one of the core issues of democratic development in the

European Union and its neighbour-countries. In the EU, legitimacy touches questions of disenchantment with politics and trust. But also the fight against corruption, the construction of citizen-oriented administrations and the strengthening democratic values with e-democracy based on Good Governance have to be stressed.

3.3 The implementation of local e-government

Concerning the implementation of e-government in cities and municipalities no “best way or best practice” can be recommended (see article “How to bring about public administration reforms with e-government” by Klaus Lenk). Nevertheless some key elements have to be taken into consideration (based on the Balanced E-Government, Bertelsmann Foundation):

Figure 25 Local challenges: a guideline to e-government



First of all it has to be stressed that e-government is a managerial function. The overall responsibility is settled by the heads of the city administrations. The usage of

modern project-management instruments is highly recommended. All key elements mentioned below have to be part of a local e-government strategy which is broken down to measures with responsibilities and time schedules.

1. Design your processes thoroughly: E-government always starts with business process reengineering. First you have to manage the internal business integration before you start to develop cooperative external processes. Otherwise the output will be very poor and e-government gets expensive because of unplanned additional interventions after the actual implementation.

2. Ensure transparency: Based on Good Governance, transparency has to be guaranteed during the implementation process but also for the running e-government system.

3. Allow for participation: Participation means on the one hand the inclusion of the administrative employees in the process of e-government implementation. On the other hand it demands future oriented tools of online-participation.

4. Include viewer's view: E-government always has to be developed for the citizens and customers. Therefore, right in the beginning, their view needs to be part of the e-government implementation. Questionnaires, workshops, interviews etc. are helpful in finding out the viewer's view.

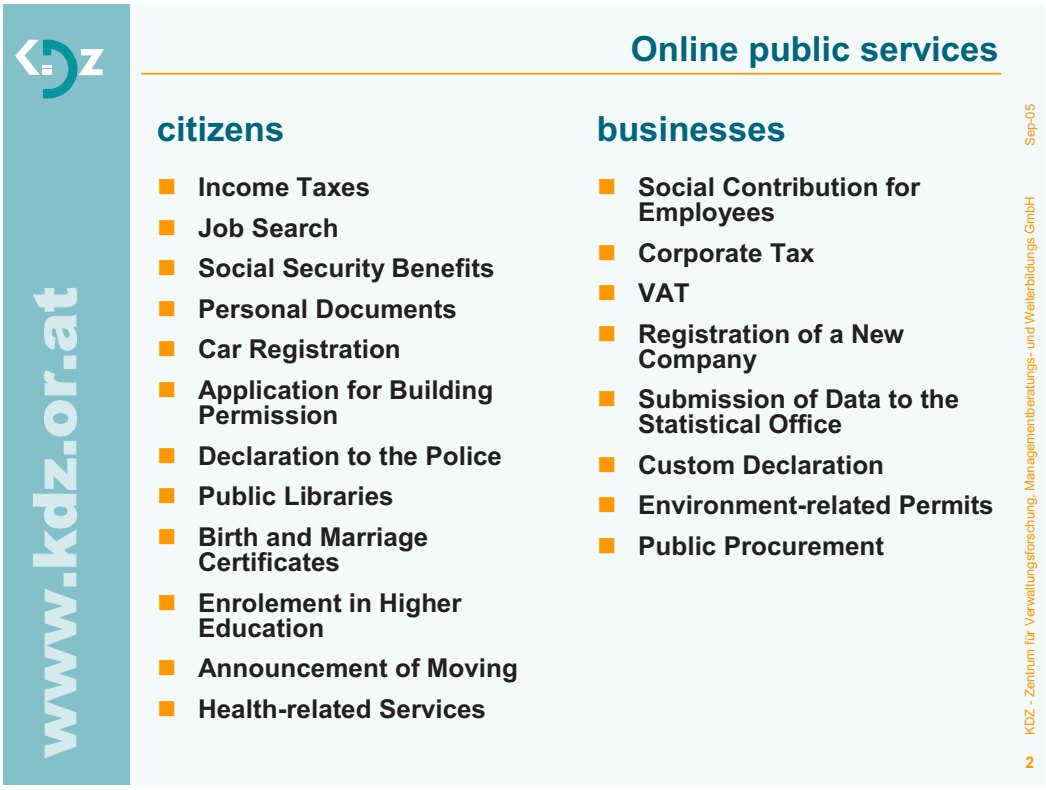
5. Develop and use standards: E-government needs open and common standards. The optimum conditions can be found in countries with national standards where the municipalities simply orientate their e-government standards according to these national preconditions. If national standards do not exist, the local e-government development has to stress the use of open standards in their own developments or by procuring e-government software.

6. Ensure cooperation: E-government needs a new view on co-operations with the private sector and between administrations. To offer different online services these co-operations will be essential. Otherwise high costs, low frequencies or complex responsibilities lead to a reduction of (online) service of local governments. E-government or ICT-centres for a union of municipalities can be one answer to these challenges.

7. Tailor-make your finances: Of course the implementation of e-government is based on the available budget for the next years. Because e-government touches all levels and aspects of the organisation, a detailed and honest financial plan is the foundation of the e-government strategy.

8. Select and provide services: Based on the own experiences in the municipalities the e-government services have to be defined. Main criteria for the selection of the services should be: frequency of procedures; complexity of procedures; accountability – responsibility of procedures; citizen – company needs; front-end and back-end facilitation. Furthermore the European Commission and the Member States have defined a list of twenty basic public services which can be used as orientation for the own selection of services:

Figure 26 Online public services



9. Use networks: Networks like CEMR, Elanet and Telecities build the European level of e-government cooperation. But also within each country networks for mutual support and transfer of experiences facilitate the implementation of e-government. The associations of municipalities and cities can act as key network in the fields of e-government.

10. National strategy: A national strategy for e-government has to be developed. Although this is not the prior task of cities and municipalities, it is crucial that the associations and experts from municipalities take part in the definition of a national e-government strategy.

As mentioned above, these key elements have to be filled with content and life by the single local governments. The elements can be seen as thread running through the e-government implementation and they show once more that the “best solution, the best way, the best practice” does not exist. Nevertheless the experiences of others can be used to prevent own errors.

4 How to bring about public administration reforms with e-government

Klaus Lenk – University of Oldenburg, Oldenburg

Three statements stand central in this contribution:

1. *There is no "one best way" of administrative reform.*
2. *E-government is now becoming the most important driver for administrative reform.*
3. *A good management of change is crucial for reform success.*

4.1 Introduction

The era of stable government institutions ruling in a "top-down" way is now drawing to an end. Globalisation "from above" and the strengthening of civil society "from below" are joining forces to change the structure of national societies in Europe. These changes are reflected in the concept of *Governance*. This concept refers to a new style of polycentric and multilevel government institutions, as well as to a negotiated approach to governing our societies.

The structure of public administration, as it has developed in the framework of the Nation-state for about two centuries, is bound to change in ways which we do not foresee entirely. The changeover from a traditional bureaucratic structure towards more outcome-oriented and responsive types of public organisations has already started under the label of "New Public Management", and it will accelerate with e-government[1]. So far, a structure of "silo" organisations was dominant. These organisations cooperated among themselves only to a limited extent. From a financial perspective this inherited structure is increasingly suspected of being too costly and delivering public services in inefficient ways. From a societal perspective, there is more and more concern about responsiveness, accountability and transparency of these inherited structures.

These observations apply to all European countries, although progress in reforming the traditional structures is quite uneven across Europe. There is at present much hesitation about which direction to take in promoting administrative reforms. Recommendations abound, and public managers are looking for orientation in an increasingly complex landscape of management recipes, where serious recommendations are mixed up with fads and fashions.

Over the last decades, there has been a steady stream of reform efforts across many European public administrations. Territorial reforms and the re-shuffling of tasks

1 Christine Leitner (ed.), eGovernment in Europe: The State of Affairs. Maastricht: European Institute of Public Administration, 2003

among public bodies are traditional reform approaches. They remain highly attractive for many politicians, since they can satisfy and reconcile divergent interests, such as regionalism and efficacy. Another widespread approach are civil service reforms. In general, they address structural problems only, instead of planning for a cultural change. And New Public Management as the most aggressive reform movement of the last twenty-five years sought to introduce a broad range of principles from business management, above all with a view to creating incentives for efficient action. New Public Management has not always delivered according to the high expectations which accompanied its introduction. It has contributed to introducing cost-conscious behaviour in the public sector, but perhaps at the price of increased parochialism and of turf-protection, as well as of a greater danger of corruption.

The expectations raised now with the propagation of e-government in Europe and elsewhere are high. It is to be feared that they may become frustrated soon, if some lessons from past reform movements are not learned. E-government, which is now potentially the most powerful agent of administrative reform, is still characterised more by talk than by reform action. It remains confined to a relatively modest, technology-driven role, unrelated to desirable and realistic visions about how the public sector should perform in the future. Ongoing case study research points to a recurrent pattern of "e-government projects"[2]. Their characteristics are strong political support, obtained by ably mobilising e-government rhetoric and hype, and lavish funding, often coupled with a desire to promote certain technological systems for their own sake, such as chip-card based electronic signatures, or e-voting systems. Politicians expect quick returns, and they indulge in presenting themselves as promoters of "high tech". This pattern is in sharp contrast with the stepwise development of the infrastructure for the informatisation of public administration, which preceded the present e-government wave for several decades. In a sense, this ongoing informatisation is now being rediscovered from a bird's eye perspective. Moreover, the concept of e-government appeared at a time when the role of the state was mainly perceived as subservient to the economy, forgetting about the wider role of public services for making societies function in peaceful ways. The report to the EU Conference at Como in 2003[3] urged a departure from such a narrow conception of e-government.

Besides such a narrow focus, the way in which many projects are carried out also jeopardises their success. The promises of e-government often serve as blinders, as far as the implementation of projects is concerned. There is a widespread belief that technology will make its way in any case, and that no lessons have to be learned from past successes and failures. But quite like in the past, and perhaps even more

2 See various case studies of the Research Project "Organisatorische Gestaltungspotenziale durch E-Government", soon available (in German) at http://www.orggov.de

3 Cf. footnote 1.

often than in the past, well-intentioned reform projects fail because of an inadequate management of change. Especially human and organisational factors are neglected.

To sum up this introduction, we propose the following three general theses, which are further expanded in the following sections:

- *There is no "one best way" of administrative reform, which can be deduced from international best practice.*
- *E-government is now becoming the most important driver for administrative reform, provided that this concept is becoming broader and less technology-centred.*
- *A good management of change is crucial for reform success.*

4.2 Reforming public administration is a demanding task

It is widely agreed now that public administration reforms are not just about more efficiency and cutting red tape[4]. The mixed results of reforms in the spirit of the New Public Management wave have made us more cautious about formalised approaches and about simple blueprints for reform taken from business management. After two decades characterised by the leadership of some Commonwealth countries which have inherited the British model of public administration, there is now a new consciousness of the contextual variables which influence success or failure of determined reforms in a given country. Many factors contribute to making countries very different one from another, so that uniform blueprints will often not work[5]. Even though the public administrations of European countries are getting more similar to each other, visions about the proper reform goals and ways to reach them are still mostly a national concern. Policy windows for reform open up at different times, and the traditions and culture of the public sector vary greatly, even among neighbouring countries, which shared common experiences in the past. Especially the divide between the British and North American administrative models and the main continental European traditions which developed in the aftermath of the French revolution (French, German, Austro-Hungarian) is still very marked. Obedience to legal rules and a reliable civil service are among the strengths of these continental types of public administration. It is misleading therefore to suggest that European countries will have to adopt uniform systems of public administration. In the words of the OECD Policy Brief quoted above: *"The mistaken perception that countries share a common problem is often accompanied by the idea that there is a [range] of solutions available, any or all of which will be beneficial. This misconception, peddled under the label of "best*

4 OECD, Public Sector Modernisation, OECD Policy Brief, Paris, October 2003

5 Mark Bevir, R.A.W. Rhodes, Patrick Weller, Traditions of Governance: Interpreting the Changing Role of the Public Sector. In: Public Administration 81 (2003), pp. 1-17

practice", has had tragic consequences in some developing countries, where reforms have been pushed ahead faster than in OECD countries because they are imposed as conditions for loans and grants."[6].

Establishing reform goals is a demanding task. Internationally available experience has to be taken into account without giving in to an ideal of a totally uniform public administration all across Europe. It is necessary to have a good knowledge of where one stands at the beginning of the process and a strategy which fits into the national framework. Without such knowledge, e-government projects will hardly contribute to reform goals.

Particularly missing are rich visions of what the public sector could look like some years from now. Such visions cannot be sketched rapidly. They are the outcome of long processes of strategic reflection[7]. Strategic thinking was generally absent in reform countries which hoped to adopt blueprints from abroad. If bold visions are not developed, the temptation will persist to look at daily practice only in the light of available technical tools for reform and of management fashions. Only if well-founded visions of the future work of state and administration will be developed, will reforms lead to a coherent state of the public service in a country.

Among the central questions that have to be answered, are the following ones. Under which conditions do we want our public organisations to function in the future? Which products and services do we want them to provide? And should these be produced and/or delivered by public organisations themselves or by external actors, or in partnership with others? The lack of well-founded visions of a modernised public sector is perhaps the most important barrier to a sustainable modernisation of public administration.

Once the vision is established, a multitude of crucial decisions has to be taken. In taking them, the advice by consultants and even be colleagues from foreign countries is often not very relevant. It is the local contextual factors which count, and knowing them well is perhaps the most important asset of reformers. It is obvious that if countries with a widely differing tradition want to reach the same reform goals, they have to proceed in different ways, depending on where they stand. National traditions are generally very strong. Trying to change them may be very costly in terms of changing deeply ingrained habits and the administrative culture. Adequate training of administrators is important, in order to modernise the public sector while preserving at least part of this tradition.

6 OECD, Public Sector Modernisation, OECD Policy Brief, Paris, October 2003, p. 6.

7 J. M. Bryson, Strategic Planning for Public and Nonprofit Organisations. San Francisco: Jossey-Bass, 1988

4.3 E-Government as a driver for administrative reform

4.3.1 The potential benefits of the "Informatisation" of the public sector

In many respects, e-government is just a new name for the informatisation of the public sector, which has been going on for several decades now. Using IT in public administration and in other branches of government (including parliaments and the judiciary) has attained a high level in many countries of the industrialised world. But until recently, there was hardly any political interest in this ongoing and almost invisible process of modernising government.

This situation changed fundamentally with the announcement of a National Information Infrastructure by US Vice President Al Gore in 1993, heralding not only the potential for a renewal of society which an "Information Society" holds, but relating it directly to improving the performance of the public sector. The modernisation agenda, which is now feasible with e-government concepts and tools, is much broader than it is often acknowledged. A still prevailing view of e-government stresses the external relationships of government agencies with their suppliers, their addressees (citizens, customers, constituencies) as well as with other government agencies. This view has its merits in that it opens up the predominantly inward-looking structures of IT in government towards a focus on services rendered and on results. Yet it has rightly been observed that e-government resembles an iceberg. The nine tenths of its volume below the water surface are as important as the top. The external perspective has to be complemented by perspectives which address that part of the machinery of government which is hidden below the water surface.

A focus on the business processes of public administration is particularly important. In this perspective it becomes obvious that e-government can become the main driver of reforms in the future[8]. Unlike New Public Management, it does not address primarily the management of administrative services, but it holds the potential to reorganise and streamline the very processes in which these services are produced. A thorough reorganisation of such processes is made possible by combining several "enabling factors" of IT:

- New man-machine relationships in doing administrative work, including a partial automation of many processes;
- Re-use of information for other purposes than for which it was originally collected;
- Bridging time and space;
- Working in parallel instead of in sequential structures.

8 Klaus Lenk, Der Staat am Draht. Electronic Government und die Zukunft der öffentlichen Verwaltung – eine Einführung. Berlin: edition sigma, 2004

4.3.2 The promise of better service to citizens and to the economy

Many early projects inspired by the Information Society rhetoric focussed not yet on business processes but on politically visible fields like online citizen services. The fascination of "Information Society Technologies" was such that almost nobody asked whether the promised improvements were really catering to the most pressing needs of citizens or enterprises. Also in the field of e-commerce, early projects were launched without caring much about what the potential customers would actually need. Up to the "dot.com" crisis of the year 2000, market research and target group identification had been largely absent. But in the private sector, market forces quickly taught the right lessons.

The central innovation in delivering government services consists in what may be called "single-window" access[9]. In opening up a single window for citizens and enterprises through which they can accomplish all their dealings with public bodies, many efforts can be saved. It is no longer necessary to go to different places for obtaining all services, licenses etc., which are needed in a certain business situation or "life event". All public administrations will eventually appear no longer as a set of independent agencies which have to be approached separately, but as a collective unit with which contact can be made via one and the same "portal", or "window". This effect can materialize through different communication channels: neighbourhood agencies, self-service on the Internet, call centres, or so-called kiosks.

The momentous transformation of service delivery through new provisions for electronic access to public services will not be possible without sweeping reorganisations, which go even further than the redesign of single business processes. It has to be supported by a new architecture of government services. An adequate organisational architecture is best described by distinguishing local "front offices" from "back offices". Whilst back offices are in charge of producing services, keeping registers, etc., the front offices provide information to the citizen and they channel the contacts with citizens during an entire transaction, including the "tracking and tracing" of a transaction and Customer Relationship Management. Front offices can be organised in very customer-friendly ways, and they are not necessarily self-service Internet portals where the customer is left alone. They may materialize in physical one-stop shops as well as in Internet portals or in call centres. Re-organising public services so as to permit single-window access will eventually benefit all access channels, not just access through Internet portals[10].

9 Klaus Lenk, Electronic Service Delivery - A Driver of Public Sector Modernisation. In: Information Polity 7 (2002), pp. 87-96

10 Cf. footnote 9.

The consequences of new structures of service delivery are likely to affect the very organisation of the public sector. A central piece of the new architecture is an infrastructure consisting of an exchange platform and of standards for Web Services across all public bodies. Some functions like finding the right back office and routing and monitoring a demand, have to be assumed by a mediating structure (or "mid office"), which links front offices to back offices.

4.3.3 Further prospects: Integrated E-Government

The effects of increased cooperation and of new architectures like a separation of front and back offices will become visible only after massive investments in new e-government structures will have created many new viable e-government systems. But already now the perspective of a "virtual" administration is clearly present in administrative modernisation and, beyond a focus on public administration, in efforts to restructure systems of Governance.

One of the most promising implications of this architecture is its potential for realising an *integrated e-government*[11]. Such a situation, which will materialise in different forms in the various countries, typically involves several types of integration among the various offices:

- *Customer-driven integration:* This first form of integration consists in bringing together data from different back offices into one front office where a customer asks for several services, delivered by different back offices, which correspond to a given life event or business situation of this customer. The back offices may in this case be unaware of each other.

- *Resource-driven integration:* The second form of integration is advanced data sharing, where a dependency on common data resources is organised. Back offices use data which are stored either centrally or in a distributed manner. They may draw on the same basic data, e.g. address, place and time of birth of a person, without having to ask for it separately. Furthermore, integrated systems of document management contribute to this form of integration.

- *Process-driven integration:* Here, several back office processes are interrelated. An example is a permit which is only delivered by agency A if agency B certifies that the addressee is complying for example with environmental regulations or with regularly paying social security contributions, etc. There will be an end to involving the beneficiary in games like this, even if for material reasons, the cooperation of several agencies is still required.

11 Cf. footnote 1.

The consequences of new structures of service delivery are likely to affect the very organisation of the public sector. The fragmented and multi-layered character of present public administration will be concealed behind access structures which no longer follow the intrinsic needs of service production but rather concepts of whole person or life-event oriented service delivery. It is still an open question whether, in the long run, improved citizen service, better engineered processes, ubiquitous cooperation and knowledge management will only result in hiding the existing complexity from the eyes of the beholder, or eventually amount to a profound restructuring entailing a substantial reduction of the ever increasing complexity of the public sector.

4.4 Change Management

Regardless of whether administrative reforms are being launched on the traditional lines or whether e-government is the driver, there are considerable problems of implementing change which are often hard to solve[12]. Implementation remains the Achilles heel of administrative reforms. Launching reform initiatives often brings political advantages to actors who thereby establish a reputation of reform-mindedness. It is much more difficult to bring such reforms to a lasting success. In the various stages of a reform process, different sets of actors and stakeholders want to influence the process and its results, according to their own preferences[13].

All too often, information systems are introduced with too narrow a focus on technological capabilities and efficiency goals, paying insufficient attention to the people who have to use them. It is very dangerous to expect that by introducing new technology people can be obliged to adopt “modern” forms of behaviour. Introducing new technology is not a self-implementing movement, but quite often even aggravates the change problems. People have not only to learn new procedures and attitudes, but also to cope with technological change and with new IT systems. In e-government projects, it is often believed erroneously, that implementation difficulties are only due to an immature state of the technology and that they can be wiped out by the next generation of technology. This belief detracts attention from the crucial role of the future users of the technology who have to be mentally prepared to adopt it.

Very important is timely information of staff and the public about reform goals and steps. A culture of secrecy often works against such information. Still better than simply informing the affected persons would be to invite them to participate in the

12 OECD, The Hidden Threat to E-Government. Avoiding large government IT failures. PUMA Policy Brief No. 8, Paris, March 2001

13 Angela Dovifat, Doreen Kubisch, Martin Brüggemeier, Klaus Lenk and Christoph Reichard, Explaining Successes and Failures of E-Government Implementation with Micropolitics. In: Roland Traunmüller (ed.), Electronic Government. Third International Conference EGOV 2004, Proceedings, Berlin et al.: Springer, 2004, pp. 308-312.

elaboration of the reform project. This would not only bring their knowledge to bear on the reform process, but it can greatly facilitate implementation as well.

Perhaps the most critical role is played by senior managers and politicians. Leadership and commitment of politicians and public sector managers are crucial factors. Reforms and indeed any major organisational change always produce anxiety, and resistance to reform is normal, as long as a majority of staff members does not perceive the reform goals clearly and does not see any personal advantages in attaining them. Politicians and senior managers therefore have to devote continuous attention to the reform process over a long period of time. It is not enough to launch a reform. There has to be a continuous "feeding" of the reform movement with incentives, support and encouragement. If the impression prevails that top players are not very interested in the reform, there will be a high risk of failure.

Likewise, the "triumph of inauguration" of a reform with its publicity and with its heady speeches by senior politicians can be a very dangerous point in the trajectory of a reform. Implementation in a narrower sense of getting a system successfully to work is not enough. The ensuing routinisation is the most critical stage of a reform process[14]. Reform goals must seep into the daily behaviour of all persons concerned. More often than not, such an incorporation of new ways of doing things is taking place quite lately, at a time when politicians have already withdrawn their support, devoting interest to new problems.

To sum up, the most demanding challenges occur rather at the end of a reform process, and they have much to do with soft factors, especially the culture and qualifications of the civil service. Hence training of administrators and inducing cultural change with empathy are particularly important measures of reform, which will reap benefits even beyond the reform process in which they are embedded.

4.5 Conclusion

With regard to all three theses discussed here, the crucial lesson for reform-minded actors in central government and elsewhere is the need to acquire knowledge. Such knowledge is not primarily of a technical nature. Besides sufficient insight into the enabling potential of IT for reform, knowledge is needed about:

- Strategies and tools for reform;
- Recurring pitfalls and "stumbling stones" of innovation processes in the public sector;

[14] Klaus Lenk, Zwischen Vision und Wirklichkeit. Kritische Faktoren für das Gelingen von Innovationen in Staat und Verwaltung. In: Roland Traunmüller et al. (eds.) Von der Verwaltungsinformatik zum E-Government. Festschrift für Arthur Winter, Wien 2004, pp. 463-474

- The contextual factors which decide about success and failure in their respective countries.

Efforts to build capacity for reform should therefore be made in close cooperation between people knowledgeable of internationally relevant reform concepts and practices, on one side, and those being aware of the local contextual factors, on the other. If local or national traditions are disregarded or even disdained by consultants, the results will be less than satisfactory. Many cases of failure and of success of reforms have been investigated by academic research, and there are opportunities for learning from the results, without simply imitating so-called “best practices” which, more often than not, are not transferable easily from one country to another.

Making use of IT for modernising public administration will inevitably prompt new ideas about how the business of public sector organisations can be radically changed, and about which institutional structures of government would be adequate for coping with the challenges of the future. The present distribution of tasks among levels of government and among agencies reflects not only the structures of policy fields, which have grown over time. It also reflects the constraints, which are put on the machinery of government by paper-based modes of work and by the requirements of being locally present. With the introduction of new forms of e-government, many of these constraints are swiftly vanishing. New institutional designs will increasingly gain acceptance. Basic notions like administrative jurisdiction and the territoriality of public administration will be questioned.

A farewell to the time-honoured institutional structures of government in continental Europe is now conceivable. This would be the most radical administrative reform since the times of Napoléon. In the long run, we cannot avoid this fundamental change, since we will have to create sustainable institutions which are able to face the challenges of the future.

5 Local government communicating

Patrizio Fiorilli – Head of press and communication, Council of European Municipalities and Regions, Brussels

This is a first in the framework of LOGON: an article on (external) communication rather than on good governance, "acquis communautaire", EU funding or e-government! Yet, this is certainly not a new concept within the LOGON network. In fact, the idea of adding a communication aspect to other well-established subjects goes back several months.

Since LOGON is a CEMR network, most national associations involved in LOGON are also members of the Council of European Municipalities and Regions (CEMR). These would occasionally tell me about their members' or their own communication problems and it gradually dawned on us in CEMR that there was a demand indeed, amongst LOGON members, for communication support.

After a first introductory presentation at LOGON's meeting in Prague, in autumn 2004, CEMR asked all its LOGON national associations to fill in a questionnaire that was designed to identify their communication needs and wishes. Based on the results of the questionnaire, a first communication seminar took place in Bratislava, in February 2005. It was aimed at the staff of national associations of local governments active within LOGON.

This was followed by a seminar tailored to the expressed needs of the Czech and Slovak associations, in Brno, in April 2005. Elected representatives and staff from both the Union of Towns and Municipalities of the Czech Republic and the Association of Towns and Communities of Slovakia attended the day-long meeting that focused on communication issues of interest to Czech and Slovak local governments.

Lastly, one of the workshops at LOGON's final conference, in Warsaw, also in April, was dedicated to local government's communication. Attended by staff from national associations of local governments and elected representatives, the workshop addressed the following issues:

- Local government's communication strategy: why and how?
- Implementing your communication strategy: tools and tips
- Your website: best and worst practices

Not being 100% sure of who will read this short introduction to communication, I must assume that some of the readers will have next to no experience of working in newsrooms or communication agencies. What follows should thus be conceived as very basic vade mecum on principles of communication relevant to whom ever is

active in local government. Each of the issues addressed below could have been fifty or more pages long, while others (such as political communication, crisis communication, interview techniques) have deliberately not been included due to time and space constraints.

5.1 Why communicate?

Local governments cannot limit themselves to managing their respective municipalities and issuing bills or decrees, while assuming that their citizens will find the ways to learn about and, as importantly, understand what their local council is doing. Policies and politics without communication are not effective.

After a famous court case in Britain, several years ago, a journalist wrote: “Justice must be done, but justice must also be perceived as being done”. This idea, albeit not about justice, applies to the work of public bodies across the world, at all levels: the work must be done, but just as importantly, the work must be perceived as being done! And this is where communication plays its role.

In communication jargon, this is often referred to as “the Gauguin syndrome”, from the French painter Paul Gauguin (1848-1903) who spent the last years of his life painting masterpieces on a remote island, at a time when there were no easy communication means between Haiti and Europe. What is the point of producing anything if nobody is aware of it?

The importance of communication for public bodies has been highlighted more recently within the European Union: namely the Constitutional Treaty. On this issue, the heads of States and governments of the EU, the European institutions and the media will agree on one thing: the current situation is partly due to a succession of bad communication mistakes. In itself, this is no earth-shattering news; for years, declining turnouts at European elections and the “not too positive” image of the EU amongst European citizens have been attributed to poor communication. And with some justification too! What is true in business is equally true in communication: if you have a good product on the shelves but the customers do not pick it, then you have either a bad packaging or a bad advertising campaign … or both!

And what is true at a pan-European level or in the private sector is equally true at the local level. Though the aims and the tools may vary greatly between communicating on macro-political issues, on commercial products or on local issues, the mechanisms remain the same, since in each case it is about communicating to human beings, and human brains work in the same way, whatever the issue and whatever the place. Of course, the messages will be different depending on whether you work for an Estonian or a Bulgarian municipality; of course, some words, colours or communication tools will be more or less effective due to cultural backgrounds, or

local habits ... but the basic communication principles to apply will be the same. They are universal.

In short, national associations of local government, big cities or rural communities, need, like any other body, to look after their communication at all levels.

5.2 Who communicates?

This is an often overlooked issue: who should you entrust with the task of conveying the right messages to the right audience in the appropriate manner?

There are basically two possibilities: in-house press and communication service or outsourcing your press and communication activities.

5.2.1 Outsourcing communication

These days, countless private companies offer their services ranging from producing your publications, to updating your website, writing your press releases, running your public relations activities, raising your profile …

As for most issues, it would not be sensible to generalise and dismiss them all as useless, as a waste of money, or alternatively to claim that they are the way forward. Some of their services are always worth envisaging, others could prove useful for certain organisations in certain circumstances, yet others are rarely worth investing in them.

It all depends on your human and financial resources; it is all about assessing the skills of your press and communication officers and the priorities they should focus on, leaving the rest to a specialist private company.

I would advise against entrusting a private company with 100% of your press and communication activities. First, this leaves you in a very vulnerable position: if a disagreement arises between that company and you, if the company encounters an unexpected problem (technical, financial or other), then you find yourself unable to communicate with the outside world. Secondly, a private company will always ultimately be committed to its bank account before being committed to you. They have other clients, they must juggle with conflicting priorities, and unlike an in-house press officer, they will rarely accept to work on a press release or on your website until one in the morning in order to be able to offer your audience some fresh news the following morning.

Furthermore, a private communication company will never “have the feel” of your activities as much as your dedicated press officer. Private contractors will be far more likely to misjudge the importance of a term, of an acronym, of the timing of

some action, far more likely to misunderstand a quote or a concept as they constantly hop from one client to another.

Personally, I feel it is always worth working with a private company to produce publications. Theoretically, they will have one or several graphic experts whom no PC software or three-day Photoshop or Quark Express course will ever be able to match. These people will have studied semiotic and graphic design, they will know their software inside out, and they will have several years of experience to be able to design the best publication for your audience. Unless you are lucky enough to have one of these specialists in your press office, I would strongly recommend to use a private company.

Ideally, do not commit yourselves 100% to one single such company. These tend to "hook" you with cheap quotes for the first jobs, then once they realise you rely exclusively on them they start raising their prices. The best way is to meet representatives from three or four such companies; ask them to show you samples of their previous works, for several reasons: each company has its own style, it gives you thus the chance to find which one matches your "stylistic needs"; also, looking at their previous work enables you to get a fair idea of the sort and the range of clients they work for.

Equally important, ask them what their person/day rate is. Virtually all communication companies charge their clients on the estimated time one of their staff (man/day) will spend working on your publication. Ask them what their quotes covers (does it include looking for and improving photographs? Does it include creating a cover? Does it include the cost of printing proofs at an intermediary stage as well as the cost of delivering hundreds of publications to your office …?).

It is also always worth asking how many people work for their company; I know from experience that one- or two-persons companies, however good they might be, can put you in a difficult situation if unpredictable events occur (illness, technical break-down …).

Finally, what applies to publications equally applies to producing banners for meetings, invitations, posters and any communication support that requires a strong graphic element.

More and more small structures outsource their website management. Again, it all depends on your financial and human resources. If you are lucky enough to have one full-time webmaster, there is no need to look elsewhere, except for structural work on your website (such as redesigning all or part of the website).

If this is not the case, a number of private companies (usually the same companies that host and look after the technical aspects of your site) offer to put your stories

online at a fairly modest cost. However, bear in mind that you are not likely to be their sole customer; this implies that there will be cases when you urgent press release to be posted on your website will have to wait if other clients have more pressing emergencies to be addressed.

The bigger communication companies will also offer to look after all your communication needs (strategy, website, publications, events …). I would advise the utmost caution; on one hand, you become a virtual hostage of their goodwill and skills, on the other hand, as for previous points, you can never expect a private company to be as committed to and as knowledgeable in your organisation as a full-time press officer.

5.2.2 In-house communication

This is obviously the most desirable option, to have a dedicated, full-time press and communication unit including a webmaster, a press officer, a PR officer, an assistant and a head of unit. It is also an expensive one!

Big cities can afford press and communication services employing up to ten persons, small municipalities often have to make do with one part-time press and communication officer.

From one end of the spectrum to the other, one basic rule remains: in a press office, you need professional press and communication officers. Too often, private companies and public bodies alike tend to fill their press offices with people who know a lot about their employer's business and activities but not that much about the rules and mechanisms of communication (in terms of sociology, psychology, best practices, personal experience …). This is somewhat baffling; after all, no car manufacturer would ever consider putting one of their salesmen or a mechanics as head of accounting with the excuse that "he knows the automobile sector"; yet, what seems ludicrous for the accounting or technical departments seems perfectly reasonable for the press and communication service, i.e. put in charge of your communication people with no or very limited experience as journalists or press officers, but "who know about the local level …"

A press and communication expert with no experience or knowledge of your activity sector will only need a few weeks to learn from his new colleagues about your trade, whereas a non-communication person who would know your organisation inside-out will have nobody to learn from the basic tips and tricks of the trade … In other words: put the right person at the right place!

However, be careful: a good journalist does not necessarily make a good press officer. As a journalist, it takes specific skills to "decipher" a press release, to analyse

it and to write an article from it; it takes different skills to craft a press release in a way to attract the attention of overstretched journalists.

Also, journalists are trained to ask questions whereas a press officer's job is to answer to questions. Not to mention the inescapable fact that a journalist is meant to report in a comprehensive, accurate and objective way … whereas a press officer is paid to put his employer under the best political (or other) light. Two very different trades.

Finally remains the question of the exact role and place of a press officer; not as simple question as it looks at first sight. Some employers see their press officer as a mere "microphone": I speak, you make my words heard by other people! Others consider the press officer as a key-player, involving him/her in political planning, asking their opinion about future initiatives … The second option is obviously the best. It is often said that managers should trust their press officer as one trusts one's solicitor or doctor: if you do not give them all the information, they will not be likely to solve your problem!

5.3 How to communicate?

You have agreed that local governments must take communication seriously, you have recruited communication experts (or decided to outsource your communication), and now the real work starts: how are you going to communicate? What are you going to communicate? And to whom?

The answer to these questions is a two word concept: communication strategy.
Some researchers have written hundreds of pages on this issue, the communication strategy of many companies or organisations are 80 to 90 page documents … yet it is a very simple, though somewhat "flexible" concept. Your communication strategy can be described as: what do you want to say to whom, and what are the best tools to say it?

Just as a car manufacturer cannot develop simultaneously a new range of small city cars, a new line of family cars and a new concept of 4-4 vehicles, a municipality (or an association of local government) cannot try and portray itself as simultaneously innovative, caring, dynamic, strong on finances, environmentally friendly, efficient, focused on social issues and so on, while targeting simultaneously their citizens (or members in the case of a national association), their central government and European stakeholders.

The first step in designing your communication strategy must be to identify your "target audience(s)". In terms of political or financial criteria, who are the priority, most crucial stakeholders for your organisation?

Going back to the comparison with the private sector, companies always target a specific group, be it for a one-off campaign, for the launch of a new product, or as their main "customers". A few examples: cars such as the Renault Espace are obviously aimed at families rather than students or single people; the communication campaign will thus put forward elements likely to be relevant to parents (safety of the car, space for children and luggage, low running-cost…), and adverts will be placed in publications read by a mainly relatively well-off, grown-up, family-oriented audience. However, Gameboy/Nintendo games are aimed at children between six and fifteen; they will thus avoid focusing their communication on issues "irrelevant" to children such as value for money or educational value, and will rather stress the quality of the visuals, the thrill of the game …

An average municipality will in many cases identify its citizens as the main "target" of its communication; secondary targets could be the business community or European circles for instance. (Warning: do not mix up the audience and the tool. Local radio stations or national newspapers are not a target in themselves; they are the tool that enables you to reach the audience you have selected!!!)

Once the municipality has identified its primary target, the messages and the means to convey them come virtually effortlessly. This is when the press office must work closely with the other departments in the town-hall: what are the best and worst aspects of the municipality from the citizens' points of view? What do they expect from the municipality? What issues are less relevant to them …? Answers to these questions will help you identify the main messages (a maximum of five) you want to put across. To illustrate this principle, let us imagine a municipality that has picked four messages for its main target (its inhabitants); these messages being that the municipality is crime-free, family-friendly, promoting local tourism for economic reasons, and culturally dynamic. Its press office will thus emphasize any news story on any of these topics, and it will suggest organising events on themes linked to these messages …

The press office, aware of the habits of the citizens of that municipality will also have identified the best communication vehicle to carry these messages: is it the Internet, or free newsletters, or local newspapers and radio stations …?

Equally important in the communication strategy, the graphic charter (logo, business cards, stationery …) reinforces the image you want to give of your municipality (or association). This is a tricky issue. By definition, a graphic element carries no or few words, it is overwhelmingly, well, graphic! This in turn means that we enter a highly specialised field, that of the connotations a colour or a shape can carry.
Broadly speaking, straight lines and symmetry carry a connotation of order, of "seriousness" and efficiency, but at the same time can imply a lack of emotion, of fantasy, of "human factor"; while rounder shapes and asymmetry leave an impression of creativity, dynamism, friendliness … The same code applies for

colours and for shades of colours, whether bright, electric yellows and reds or sober, “sensible” darker blue or brown.

The graphic charter is of crucial importance and this for various reasons. First, you cannot change your graphic charter every six months or even annually. Once you have agreed on it, you will have to live with it for several years. Once you have agreed on it, it will give your municipality/association an image, a “feel” for years to come. It is thus worth investing as much time as possible, consulting as many experts as possible to avoid choosing the wrong one. Second, the graphic charter is the most visible part of your municipality; it is there on each publication, on every letter you send, on the posters, business cards, envelopes, exhibition stands …

Communication tools

Using the right communication tool, and using top quality communication tools, is of the utmost importance. Put simply, it is similar to saying that drawing up precise plans for your house, having thought through what your real needs are, is important, but if the builders you use are no good, if the material they use is second-rate, then your original plans are worthless and your house will look what it really is: a cheap construction badly built by amateurs!

Communication tools include your website, newsletters, press releases, press conferences, posters, events … They are considered as “tools” because they are not (and should never be perceived as) an end in themselves, their role is to disseminate your messages to your target audience(s).

Each of these tools has its own specifications, advantages and weaknesses, “best practice” rules … You do not necessarily need all of them (just like a carpenter does not automatically assume that he will have to use his band-saw or one should never blindly assume that to deliver a presentation you automatically need PowerPoint!); you use the right communication tool for the right job, depending on your audience.

Let us have a closer look at some of them.

5.4 The press release

This is probably one of the most important pillars of your communication efforts. The press release enables you to reach a wide audience via the newspapers, magazines and radio or TV stations. Yet, this communication tool is by far the most badly used. Unlike other tools, its strict rules to respect are not a question of mere common sense; they require a deep knowledge of journalism, journalists and of newsrooms.

Statistics show that, with very few exceptions, in virtually 100% of the cases a journalist decides to ignore a press release after having (rapidly) read, at worst just

its title, at best the title and the first paragraph. A journalist is a (wo)man in a constant hurry, eternally struggling to respect impossible deadlines while being submerged by a never-ending flow of press releases and phone calls. In short, a journalist "has not got the time"!

No time to "dig deep" in the entrails of a badly drafted press release to unearth its core news story, no time to look in books or on other websites to understand what some obscure concepts or esoteric acronyms may mean… In less than 5 seconds, the journalists will have decided whether to delete your press release or to glance at its content.

This inescapable truth leads to two conclusions:

- The two most important parts of your press release will be its title and its first two or three lines. If you do not stick to bare facts ("who did what when and how?"), in short, simple sentences … you are likely to have wasted your time and the journalist's.

- Only issue a press release if you are totally convinced that it brings a new factual and informative element.

Before even thinking about the title, you must carefully choose the angle of the press release. From it, everything else will flow (almost) painlessly. The same news story can in fact be presented from different angles.

Let us take an example: You must announce that the Minister for Local Affairs will visit your town to open a new factory. This looks like a fairly straightforward news item; however, it can be presented in different ways:

- Minister for Local Affairs to visit our town
- Minister for Local Affairs to open new factory in our town
- New factory to open in our town
- New factory will provide over 200 job opportunities in our town
- …

This is why the press office must discuss with the relevant service, to decide which angle is the most appropriate. Often there will be diverging views: the person in charge of handling the Minister's visit might consider that the visit in itself is the most important aspect, for political reasons; the press officer might claim that the opening of the factory is the angle most likely to attract the media's attention.
In many cases, it is wiser to follow the press officer's views; after all, the point of the press release is to be relayed to a wider audience by the media. The title and the first paragraph of the press release may focus on, in this case, the opening of the factory,

and the bulk of the press release may be devoted to the politically important visit of the Minister.

The title of the press release acts as the window for "your shop". Your "customers" will not come in if it does not look attractive from the outside. You must conceive it like the headlines you read in daily newspapers: short and informative. The headline must summarize the most important point of the press release ("Bordurian municipalities call on government to drop local tax bill") without throwing in details that will appear in the actual press release. Avoid headlines that give away too much ("Bordurian municipalities write an open letter to national government on 31 February, in which they express their opposition to the local tax bill"); and avoid the other minimalist extreme ("press release on local tax bill").

Ideally, one writes the headline only after the rest of the press release has been drafted. This way, it is possible to ask oneself: *What am I trying to say, in 10 to 12 words max?*

Their appetite whetted by your headline, the journalists "come in", open the press release, and find the first paragraph. At this stage, they have merely decided to give your press release a chance, they have not decided to actually read it all yet. Their final decision will depend on your first paragraph. Cram it with heavy style-background information flavoured with self satisfying commentaries … and you will reduce the lifespan of your press release to 0!

The first paragraph is really about elaborating on the title of the press release: "102 Bordurian municipalities have signed an open letter in which they urge the national government to drop the local tax bill, on 31 February 2005. This bill is bad for our municipalities and for our citizens, explains the secretary general of the National Union of Bordurian municipalities …").

Beyond this first paragraph unfolds the structure of the press release. You will decide which elements are more important (quotes, data, reasoning …). These must appear high up in the press release, each of them in a separate paragraph.
As a rough guide, the standard structure of a press release should be as follows:

Paragraph 1: the key issue of the press release in 5 lines maximum.
Paragraph 2: More information on that key issue
Paragraph 3: Second most important issue
Paragraph 4: Third most important issue … and so on.
Last but one paragraph(s): background information
Last paragraph: links (to documents, websites …)

In our "Bordurian municipalities" example, the last but one paragraph would typically look like this:

The Bordurian government announced its intention to present a bill on local tax, last January. The Prime minister said it aimed at improving the way municipalities handle taxpayers' money by submitting increases of local tax to the green light of a centrally appointed financial auditor. The parliament is expected to vote on the bill by the end of June.

Link to the bill on local tax as presented by the government
Link to the Union of Bordurian municipalities' response to the bill
Your contact at the Union of Bordurian municipalities (name, email, tel)

As important as the title and the structure of the press release is the style and wording of it. A press release is not a legal or technical document. You should never expect the journalists to know as much about the issue as you. Avoid using technical jargon and obscure acronyms. After all, a press release is not an end in itself; its aim is to convince journalists to mention you in their newspaper or news bulletin. In other words, do all you can to make the journalist's life easier, and this includes using simple terms, short sentences, and explaining any specialist's term or concept.

In every language a same idea or concept can be worded differently depending on its importance or intensity:

- Maybe I will attend your conference
- I will probably attend your conference
- I am likely to attend your conference
- Perhaps I will attend your conference
- I will most definitely attend your conference
- I will do all I can to attend your conference.

Your press officer will be familiar with the various weight and connotations of words, and (s)he will use the appropriate terms in your press release: Is your municipality or association asking/begging/urging/demanding an explanation? Do you feel that this or that legislation should, could or must be amended?

Similarly, avoid terms that tell the journalists there is nothing new since your last press release: if you "reiterate" or "confirm" … it means you are saying the same thing twice. And your press release ends up in the bin!

Finally on this wording issue, never ever use "commentary" terms in a press release: it is not for you to decide whether the meeting you had was "interesting", "useful" or "very important". Journalists have a justifiable Pavlovian reaction to such terms: they immediately conclude that you are trying to influence them (and in a not too subtle

way either!). Such adjectives can be used only in a quote *(I believe we reached an important agreement on the issue of local tax*, says the secretary general of the Union of Bordurian municipalities) as you are allowed to report on other people's statements. But you, as a press officer, should never be perceived as sprinkling suggestive non-factual elements in your press release… lest you lose your credibility.

The last stage is to send the press release. Here, each press office adapts to the situation of their "customers": do you still use the fax or would an email be enough? To whom will you send the press release, have you got up-to-date lists of the journalists (not just the editors!) working for the most important media? Have you checked the deadline (time of the day, day of the week) for daily and periodical papers?

5.5 The publication (newsletter, annual report, topical publication ...)

Despite the Internet, despite CD-ROMS, the paper remains one of the most popular communication tools. Unlike computer-based communication tools, a publication can be flicked through anywhere, anytime, in a few seconds, and it can be stored and retrieved easily and quickly.

Yet again, there are a few common sense rules to follow. The first one is to assess the need of producing a publication. After all, between the fees of the graphic agency, of the printer, and the cost of sending the publication to many stakeholders, the budget is rarely under 3.000 Euros ... Enough to take the time to wonder whether it is necessary or not. Too often, people come up with this sudden idea, "I know, let's do a publication!" without having assessed whether it is the best communication tool for what they are after.

The second rule is to invest as much time and money as possible on the cover of the publication. As seen earlier, a combination of shades, shapes, colours and words sends powerful, yet unconscious, signals to your brain. Next time you wander around a congress hall overflowing with books and publications from various stands, ask yourself why your hand picks up one magazine rather than another. Of course, the subject of the publication, and to a lesser extent its producer can be the main parameter, but often you will realise that the cover was enough to attract you.

We are yet again in the realm of the "packaging". The most interesting publication with a sad, amateur or boring cover will be less likely to be picked than an uninteresting one with a great cover. Avoid going for a certain cover because you have seen others do the same sort of thing; if others have done it before you, then you should certainly not do it again (unless you are absolutely sure that your audience has never seen and will never see the cover that inspired you in the first place!).

Talk to the graphic agency you have picked; there is no need to give them directions as to what sort of picture you have in mind, however explain in great detail the overall "feel" your cover needs, based on the content of the publication and your readership. Graphic agencies charge you for creating the cover; some will charge you for finding and using an existing illustration, others will even create an illustration out of nothing just for you (expensive!!!), others will include the cost of creating the cover in the overall quote ... Hence the need to clarify it with them beforehand, and to ask them for examples of past realisations.

The cover acts in the same way as the title of your press release (as seen above): it hooks the reader; but once "hooked", the reader must be convinced to remain with you. This is when you start thinking about the structure and the layout of the inside of the publication.

Unless you have a two to three-page publication, a table of contents is a must. It helps the readers understand where the publication is leading to; it enables them to go straight to what they are after.

In virtually 100% of the cases, you will need a foreword. You have decided to produce a publication on a subject that you fully master, whereas the readers have no idea why you have done so, they do not know its background, its "raison d'être"; the foreword will explain this to them. Finally, choose carefully who will write the foreword; obviously, the "higher" the better for reasons of prestige and credibility.

A common mistake is to conceive a publication as some sort of washing machine: cram in as much stuff as possible to the point it is close to choking! Filling every single millimetre of your publication with text will have only one consequence: most potential readers will think that they will never have the time to read it all and that such intense reading is beyond their strength. In short: let your publication breathe. Add more pages if needed, but give each page enough "white" space; readers will have the impression that the reading will be quicker and less painful.

Illustrations have the same aim: they make a page breathe. However, here another mistake is common: to be used, a photograph must be of the highest quality, and this includes reframing it to centre it on its most important part, using software such as Photoshop or Illustrator to remove unwanted elements (bottles of water, microphones, people walking behind the subject ...) and improve others (add your logo in the background, remove the drop of sweats from the subject's face ...). A bad photograph in a beautiful layout will ruin the whole page.

For the publication to be a comprehensive communication tool, do not hesitate to add a few "practical add-on" pages", towards the end; these can be to introduce your town (or association), they can include the list of your staff with their functions and their phone number and email addresses.

There is a last point that is far too often neglected: after weeks or months of delicate crafting, haggling for a darker shade of blue here, arguing over a photograph there, your publication is delivered to your offices. Indeed, it is a beautiful one, congratulations! Rightly proud of your work, you display a few copies in your office ... and store the other five hundreds copies deep in your basement!

However, the aim of your work was not to create a publication, it was to have it read by a maximum of people (remember the Gauguin syndrome?). Having it delivered to your office is only half the work done. The second half will be to send it to proper readers, in the proper way. Now, starts the frustrating part of the work: print labels with the name and address of each of the targeted readers, stick them on envelopes, write a cover letter to add to the publication, and send them all!

In many cases, it is worth issuing a press release informing the media that a new publication is available. And make sure your webmaster announces it prominently on your website too.

5.6 The Website

Fact 1: For many stakeholders, your website is the first place they will discover your municipality or association, whether they have landed on it by accident via some search engine or they were actively looking for your site.

Fact 2: Building or redesigning a website is both expensive and time-consuming.

Conclusion: Invest as much time as possible in planning your website beforehand, and in making sure it meets your needs!

How many times have you heard colleagues tell you how this or that website is “so good” or “totally useless”? Far more often than the same comments about some organisation’s publications or press releases in any case. More and more, people identify a company, municipality or association with its website. And this can be a lasting, and recurring, impression. Your website will thus have to rest on two pillars: its graphic design and its user-friendliness. One without the other is not enough.

So, let us start from the beginning again, assuming you want to create a new website.

Before you even start calling private companies for quotes, you will need to assess your needs along the lines of your communication strategy: who is it mainly aimed at? What would be its main purpose(s)?

Knowing your “customers” will already give you an idea of the graphic elements of the website (again, just like for the cover of any publication): bright colours with

flashing windows will appeal to a young audience looking surfing the Net for fun; sober colours with straight lines will have a more "serious" look. At both ends of the spectrum, see the website of the British tabloid the Sun (http://sundial.thesun.co.uk/) and the European Commission's (http://Europa.eu.int/comm/index_fr.htm). In between, lies a gulf of possibilities.

The graphic aspect of your website sends a first, powerful and lasting message about you; but it also acts as an advert: warm colours and a feeling of "breathing" on your homepage will act as an added incentive for potential users to venture towards your website rather than a competitor's.

Whatever your choice, follow two basic rules:

- Make sure the graphic design of your website does not clash with your communication strategy (see beginning of this article)!

- Keep it simple. The most popular websites in the world (such as Google) have the most sober, the plainest graphic design. "Less is better".

Once the graphic broad lines have been decided, enters the "architecture" of the website, its structure. This is the tricky part; the most important parts of your work or what you reckon will be the most popular pages of your website, must be directly visible from the homepage. In the case of a municipality, these could be: Administrative services, opening hours and days, emergency services, council meetings, legislation, contact us, press ...

As a general rule, any document or information on your website must be accessible within three clicks maximum, such as:

- Municipal services –> Official documents –> Identity cards

- Press and communication –> Press releases –> "Bordurian municipalities slam local tax bill"

The next step, after the graphic design and the structure of your website, is about the "engine". What technology do you need to run your website? Broadly speaking, there are two options, html and content management, and both have advantages and disadvantages.

Using *html* based software enables you to have a very flexible website in terms of font, pictures, etc; however the process of putting documents online can be more cumbersome since it involves using codes to "tell" your computer what you expect from it. This is the technology used by most webmasters.

The *content management* technology is more recent; it is also more user-friendly. In a few words, the html codes are hidden behind icons similar to those used by Word (bold, italic, align left …). This means that after some quick and painless training course (usually half-a-day), anyone can put anything on the website. It is quick and easy, but your website will be far less flexible. This option is ideal if you have not a full-time, fully trained webmaster.

However, the main disadvantage of content management technology is that each software works in its own way; in other words: if you opt for one such system, it will be very expensive to switch to another system were the needs to arise. Html technology, on the other hand, is universal.

Before committing yourself to anything, take the time to look at other websites, to talk to specialised companies. But whatever you do, your actual needs must be the main parameter. Just as one buys a small car, a tractor or a lorry depending on one's actual needs, you must envisage the size, technology, functioning and layout of your website on the basis of what its main function will be, regardless of what other people do or encourage you to do.

Finally, do not believe that the more you spend the better your website will be. Private companies have a vested interest in suggesting a whole range of options and facilities that you probably do not need. Better to have a basic, tidy and well thought-of website that has cost you Euros 8,000 than a gigantic, flash, but half-empty or difficult to maintain Euros 50,000 site.

5.7 The press conference

Compared to the above issues, the press conference is a relatively easy concept. There is really only one danger to avoid, and that is to organise a press conference when there is no need for it!

Let us dismiss an established yet totally wrong myth: it is not true that "the moment you offer them a drink and a snack, journalists will flock to your press conference"! Look at it from the journalists' point of view: they are sitting at their desk, overworked and overstressed, worrying that they will not meet their next deadline… why on Earth would they feel like crossing the whole town, sitting in some room waiting for people to make a few statements, and then having to rush back to the office when they could get the same statements via email?

A press conference can be organised only in a few cases:

- When a press release is not enough (a new 600 page study is released);
- To enable journalists to ask questions (meet the author of the study);
- To experience something (see the completed refurbished town-hall);

- To create an event (the mayor will announce whether she will run for a second mandate);
- To “cash in” on a prestigious event (the Prime minister is in town …)
- ….

Beyond this basic question (“Is a press conference really necessary?”), are mere logistical and practical issues. Your press service will choose a venue and a time trying to reconcile the availabilities of the speakers and the requirements of the media. Here are few criteria to keep in mind:

- Inform the media early enough. In some newsrooms, the planning of a day is decided weeks in advance.

- When inviting the journalists to the press conference (individual invitation or press release), make sure you give them enough information on the conference to attract them (names of speakers, issue covered …).

- Give journalists enough time to attend your conference and get back to the office in time for their next issue or news bulletin to include your conference.

- They won’t like to have to get up at 06:00 in the morning or to have their evening ruined simply to attend your press conference!

- Make sure background documents are available for the journalists.

- Choose a venue that is relevant to the press conference as well as for practical reasons.

- Make sure your logo, flag, stand … are visible in the room but also on pictures that will be taken.

Whatever the issue of the press conference, journalists are entitled to ask any question. Be ready for anything, and more importantly, make sure your speakers are ready for anything. Even if your press conference is about the launch of a new e-government initiative, you might have questions about the financial state of your municipality or some rumours about totally unconnected issues.

This is like playing chess: always be one move ahead of your opponent. The idea is to anticipate the trickiest questions and to prepare suitable answers; rebuking a journalist with a dismissive “This is not the theme of the press conference” is the best way to make sure the media will report on your unwillingness to answer their questions on that issue!

Who should chair the press conference? There is not one single answer. There are two schools of thought on this. The first says that your boss (politician or top civil servant) must chair it (and will often demand to chair it!). Your role is to sit next to him/her, and be ready to help with factual elements or any "side-tracking device" if and when needed. The second says that you should chair it thus acting as a "shield" for your boss. If you direct the questions, and sometimes ask a journalist to clarify the question, that also gives the speakers more time to think about their response.

Finally, be ready to issue a press release immediately after the press conference; if the meeting with the journalists did not go exactly as you had planned it, the post-conference press release will help diminish the impact of any negative report in the media!

5.8 Conclusions

There would have been much more to add to this brief introduction to communication. Most, if not all, items would have deserved more space; other issues such as internal communication, interview skills or communication at the European level could have been added. But this would not have been an article anymore, it would have become an essay that should have been written by several people, each being a specialist in one or two aspects of communication. Besides, the aim never was to produce an exhaustive essay on the concept of external communication. It was meant to be one element of LOGON's final report, to illustrate what LOGON has offered to its members in this field.

So, the best conclusion would probably be to wrap up in a few words what has been explained in some fifteen pages.

1. Communication is and must be one of the key elements of any municipality's, town's or association of local government's action plans. Elections can be won or lost due to good or bad communication; the quality of life, health and safety can be increased thanks to good communication …

2. Press offices must be filled with experienced, suitably qualified communication professionals.

3. A simple but comprehensive communication strategy must be devised, and reviewed regularly.

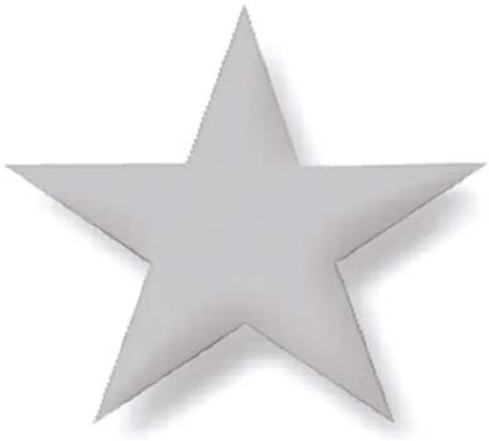
4. Choose the right communication tools for the right audience and for the right message. Do not follow blindly what others do; they might have different priorities than you, or they might be making communication mistakes!

5. Apply the number one rule of communication: adapt your message to your audience. Just as in your private life you will be talking differently about the same issue to children, relatives or vague acquaintances, your professional communication must adapt its support, layout and wording to your audience.

6. There is a difference between political, technical or legal documents on one hand, and communication documents on another. A press release announcing the adoption of some manifesto or statement must never be written with the same style as the original document and will rarely follow its structure.

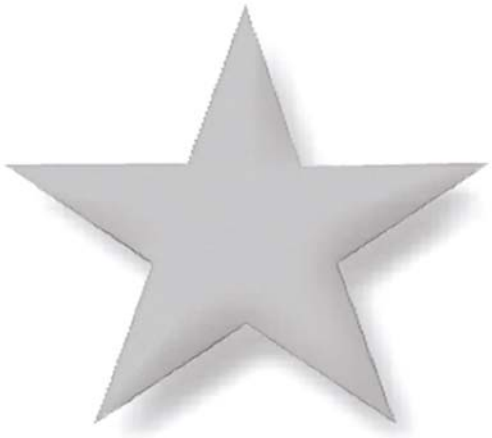
7. The rules for local government communication are exactly the same that apply to private companies, NGOs, political parties and to any organisation that is in contact with the outside world. The tools to use will vary, the messages and the topical issues will be more specific to a local audience, but a good press release will remain a good press release wherever it has been issued from, and a bad website will remain a bad website regardless of its main purpose and audience…

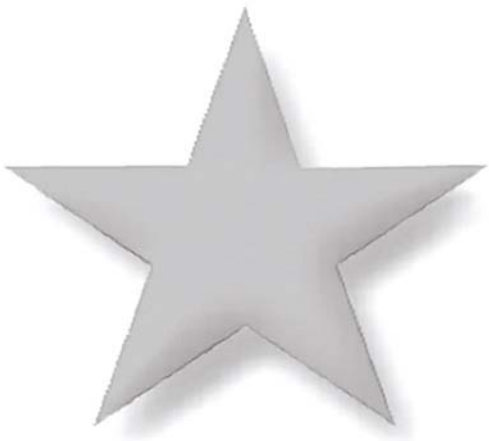
8. Remember “the Gauguin syndrome”: What is the point of producing masterpieces if you does not make them available to a wide and relevant audience?



CHAPTER IV

EU membership and EU enlargement





1 One year EU-membership – impact on the local level

1.1 CZECH REPUBLIC – EU membership and EU enlargement

Eva Maurová, Milena Jabůrková – Union of Towns and Municipalities of the Czech Republic, Prague

The European Union faced the biggest enlargement ever in 2004. The total of 10 new states entered a club whose main mission is freedom – of movement, people, goods and services. Europe, after many years, became united again.

However, 1st May 2004 was preceded by years of preparations, negotiations, top-level meetings. The governments of the ten acceding countries had to learn how to cooperate with partners. The national level that until then operated only as the local, regional and national one, was accompanied by the supranational level. The environment of public services has become much more complex, but on the other hand it has opened up new opportunities for cooperation, information sharing and connecting. In order to work on form in such an environment, public bodies have to accept new ways of implementing public services – increase transparency, become efficient and start using modern technologies. In such a complex surrounding it is necessary to pursue the principles of partnership, subsidiarity and dialogue.

The objective of the LOGON project was therefore to help municipalities prepare for the EU accession and call their attention to risks and changes resulting from the membership. The project brought this kind of knowledge on the basis of practical experience of municipalities that have been members of the Community since its establishment or those that experienced accession in 1995. Sharing experience on how relevant the EU policies are for municipalities via LOGON network has been so valuable due to the fact that the majority of the governments in acceding countries did not have enough capacities to provide municipalities with sufficient, coherent and reliable information on the practical impact of accession on the local governments. LOGON network taught participants to listen. It was not an easy task as the local government representatives from the ten accessing countries had a number of other urgent issues to be sorted out and the EU seemed so far away, without any practical relevance for the communal level. They had to work hard in order to fulfil their new tasks, increase their autonomy, strengthen the regional structures and find the most effective ways of cooperation with the national government.

It has been one year since the accession and it is interesting to have a look into how individual towns assess the one-year EU membership. A similar question was given by SMO ČR Bureau to selected elected representatives and officials of towns and municipalities in the Czech Republic. You will find the summary of the answers below:

1. Municipalities admit that becoming a part of one of the most important economic and political formations in the world has stimulated their economic development in a positive way. This has been even more supported by accessing to the EU funds. For example Head of the Office of the Town of Písek, Jiří Hořánek, said: *Considering that it was not the Town of Písek that acceded the EU, but the Czech Republic as a whole, one must take the EU impact on the municipal level in a wider context … After a one-year EU membership Písek gained deep knowledge of drawing down the structural funds.* Another advantage, as he said, is the increased number of foreign tourists.

   The City of Ostrava, the third largest city in the Czech Republic, reported that for the city the European Union became a significant impulse of growth. *Thanks to wide experience with projects we have developed an efficient system of project management that builds on certain rules and principles in the process of drawing down on the structural funds. We have already gained funds supporting the total of 13 projects*, said Head of the EU programmes of the City of Ostrava, Jiří Palička.

   There are a lot of examples of how European funds assisted individual municipalities and regions. For example, Jesenicko Region received almost 23 million Euros for two projects – one concentrating on the waste water treatment and delivery of drinking water, the other one on the support of tourism and spas in the region.

   All of the above mentioned demonstrates that without such “external” financial injection a number of projects would not have been implemented and the needful development would not have started. On the other hand, what bothers municipalities is a huge administrative bureaucracy of project designing, fragmented information sources, difficult access to funding for minor municipalities caused by the necessity of co-financing and a lack of staff for qualified project management. Again, to a major extent it is caused by insufficient preparedness of the state administration for an efficient operating in the European Union.

2. An intervention into municipalities’ operating meant adapting the EU acquis communautaire into the Czech system of law, namely with respect to public procurement, the environment and State Aid. The first complaints filed with the European Commission have appeared. For example one of them was filed by an unsuccessful company that complained against the fact that five Czech towns and one region gave an unlawful State Aid to transport companies providing for the transport in their region. Experience revealed that when preparing oneself for the EU legislation it is not safe to simply rely on the national government. The national departments have not passed through

a real reform and they have their own difficulties to comply with the modern functioning of the European bureaucracy.

3. Municipalities have significantly increased their chance to share experiences by means of building up networks with other European municipalities. Especially twinning partnerships are established not only between towns and villages, but also between schools and various social clubs.

To conclude, the Czech cities, towns and municipalities assess the one year EU membership mostly in a positive way. Local authorities quickly responded to opportunities offered by the EU, modernised operating of their offices, learned how to work in a strategic manner, improved their project management, exchanged experience, united for the purpose of designing projects and cooperated with the private sector. From the progress they have achieved in these areas, the state administration could also learn a lot.

1.2 HUNGARY - One year EU membership review – experiences and perspectives: The situation of Hungarian local authorities and the National Local Authority Associations one year after the EU accession.

Gábor Zongor – Secretary General of the Hungarian National Association of Local Authorities (TÖOSZ), Budapest

In legal terms, the Hungarian local authorities were prepared for the EU accession, as the harmonization of local government decrees and legal material to EU acquis communautaire has been completed. At the same time, general EU legal directives, basic principles, the philosophy of operation have not yet all together been integrated as practices in everyday work of the decision making bodies of local governments, mayors, bodies of representatives, general assemblies, notaries, mayor's offices. Also, local government decision-makers have to face new challenges in the coming years. It became obvious for local politicians that between 2007 and 2013, in the first complete budgeting period, the possibility of absorption of new financial sources creates a new situation that demands strategic thinking, planning and extensive partnership.

In my presentation, I would like to discuss the difficulties Hungarian local governments face as being part of an EU member country, the possible solutions to their problems and the activities and help local government associations in general and the Hungarian National Association of Local Authorities (TÖOSZ) in particular provide for local authorities in terms of EU affairs.

The European Union for Hungarian local governments is first and foremost a union that offers new and important opportunities. One of the important challenges for the country, in this sense, partially is to reach the resources offered by the EU.

Due to national experiences and international trainings, conferences, guidelines offered in the framework of networks such as LOGON, the system of call for proposals is not foreign to Hungarian local authorities. Local governments are very eager to apply for funding and in many cases are successful.

However, local authorities face an important problem because they are missing the own resources generally needed for EU funding. As a consequence of this phenomenon, it is possible that disadvantaged municipalities and micro-regions will get into an even more disadvantaged situation in the future.

A significant step in the assurance of municipal own resources for EU funding will be the creation of the Hungarian Municipal Guarantee for Loans Ltd. The creation of the limited company is foreseen for 1st January, 2006. The state, the local authorities and the banks would have the same propriety share in this company. According to the

plans, local government associations will subscribe to a one third share of local authorities.

Various trainings that started before the EU accession with the aim to prepare local decision makers for the changes incurred by EU accession continue. While it is difficult to measure the efficiency and effect of these events, they nevertheless serve as significant tools to raise the awareness of local government officials about the EU accession. Despite the fact that it would be indispensable, the training of local government officials, however, is less frequent and profound than that of state officials. Based on certain case types, local government officials would need specific, thematic training in order to facilitate the integration of the acquis communautaire in the everyday practice. Based on last year's experiences, it became also obvious that foreign language teaching would also be important for local government officials and decision-makers, as they are lagging behind in this respect. So far no harmonized, organized national action has taken place in this respect. The lack of knowledge of EU professional language in Hungarian, and the professional language in foreign languages may also decrease the competitiveness of the local governments and therefore also that of the country.

The Hungarian National Association of Local Authorities intends to initiate a tutoring system for local government officials and mayors that would cater for the above problems.

Yet another problem, mostly characteristic of small settlements, is presented by the lack of adequate IT tools and IT experts. Therefore small municipalities very often do not possess important and public data needed for their operation and development. In order to cater for this problem the Hungarian National Association of Local Authorities has started an extensive IT program just at the time of EU Accession, which continues until today.

The extensive international relation system of local authorities remains the most effective and direct form of modernisation and EU preparation. In the promotion of international relations the Hungarian National Association of Local Authorities and the other local government associations participate actively.

Local authorities and local authority associations have profited greatly from international cooperation before and as well as after the EU accession. LOGON as a network played a very important role in preparing the Hungarian local level in different domains (legal harmonization, lobbying, environmental affairs, Services of General Interest etc.) to EU accession, through presentation of best practices, of EU legal framework in the course of conferences, trainings and from guidebooks.

Local governments have learned a lot in the field of environment through foreign study-trips and also twinning relations.

Due to accession, Hungary has also become part of the European administrative area. It became very important to improve the public services and the quality of administrative services, thus, apart from law harmonization, the EU harmonization of the quality of local operation and services became primordial. It became well-accepted in an extensive circle, that the quality of public services and public administration significantly influence the competitiveness of certain settlements, micro-regions and finally the whole country. Our participation in a uniform European administrative space forces the transformation of the Hungarian local and administrative system in order to improve the Services of General Interests sooner.

Following the accession, the Hungarian local government representatives, the 12 members and 12 substitute members delegated by the Hungarian Local Government Associations to the Committee of the Regions intensified their participation in EU affairs. The effect of their work, however, is not yet in all aspects integrated in the everyday work of Hungarian local government officials. It will be the role of national associations to strengthen the communication on the work of the Hungarian delegation and therefore multiply the effect of their activities. Hence, the local government associations plan to have common forums to exchange the knowledge, information, experiences of the delegates and then inform their members about it.

Following the EU accession, the need for EU calls for proposals has increased. In order to strengthen the capacity of applicant local authorities, in cooperation with the Hungarian Chamber of Commerce and Industry, TÖOSZ set off to design an assessment system of the activities of consulting companies in order to increase the security of local authorities and the professional content of applications.

In order to increase the competitiveness of Hungarian local governments and their system of cooperation, it is important for the Hungarian local authorities to have representation in Brussels. At the moment the Hungarian regions have a representation in Brussels as well as in the Budapest capital. The former supplies Hungarians with EU news on a regular basis. This news also appears on the website of TÖOSZ. The EU lobbying of towns, counties and regions remain, however, occasional and not too efficient. TÖOSZ and the other local government associations wish to contribute to this work, by strengthening its relations to the Council of European Municipalities and Regions. The Hungarian Associations delegated members to the Policy Committee of the European organisation. TÖOSZ has been acting as a Hungarian coordinator for the twinning section of CEMR since 2004, and also delegated representatives to the CEMR Elected Women Representatives Section. The LOGON guidebook on lobbying was partially translated by the Hungarian associations to enhance the Hungarian lobbying in the EU, and international officers of the associations participated in the study tour organized by LOGON to Brussels to learn about EU lobbying.

A new challenge for Hungarian local governments and their associations is the participation of preparation of local governments of neighbouring countries to EU accession. In the preparation of neighbouring local authorities and their associations, the most significant tasks are the capacity-building of these organisations or organs and the enhancing of their law-harmonization process. Apart from the pre-accessing countries, Hungary has the most important relations with Ukraine, Yugoslavia and Bosnia-Herzegovina. The transfer of Hungarian experiences can significantly contribute to the preparation of neighbouring countries to the accession process. In this process, Hungarian associations and municipalities can make good use of experiences transferred through the LOGON network. Contacts made in LOGON and other European networks also contribute to the future success of project-preparation in this field as well as in the course of other forms of cooperation.

In order to cater for the absences of the preparedness of Hungarian local governments, the conscious, planned and practical preparation of local officials and decision-makers to EU processes has to continue for the enhancement of the smoothest accommodation to EU principles. On the other hand, with the financial and administrative reform, the Hungarian local governments will become capable of developing projects suitable for EU funding.

Today, the European Union is not to represent a challenge for Hungarian local authorities, but it is a core part of everyday life. It represents a space for cooperation that urges local authorities to compete, strengthen integration and guarantee the improvement of life standards.

1.3 LATVIA - expectations and reality: One year of Latvian self-governments in the EU

Māris Pūķis - Assistant Professor of the University of Latvia, Senior advisor of Latvian Association of Local and Regional Governments, Riga

During a long pre-accession period local governments were among facilitators of joining the EU. For Latvia the main reason was security – to prevent ambitions of a part of Russian politicians to re-establish empire. Joining the EU gives Latvian people a new level of certainty, that any disagreements will be discussed by the political, not military methods. And that has been really achieved. Now relations between Latvia and Russia are part of the EU foreign policy. That creates stability, and stability is so necessary for the local communities' development.

Before joining the Union there were many positive expectations about improving matters, concerning local and regional affairs after accession. Those expectations were met only partly, and that created new elements of political agenda for Latvian self-governments.

1. Among those expectations could be mentioned the hope that the level of salaries for employees and the level of revenues for small entrepreneurs would increase. After one year we can say, that partly that is achieved (particularly by agricultural subsidies). But at the same time we see a substantial increase in inflation, which we have not seen during more than ten years. However, the increasing prices for heavy oil products are a substantial reason for inflation. For self-governments the rapid inflation is a breaking factor for development as well.

2. Another expectation was that the accession will facilitate the development of democracy, particularly the local and regional democracy. Unfortunately, positive elements can be seen only in the new EU Constitution, but the probability of its ratification by all EU member states is now low. The Constitution is ratified by the Latvian parliament. Joining the EU comes together with increasing centralisation tendencies and concerns public administration reforms. Tendencies to unify standards and rules in the EU lead to a shift in national competencies too. The centralisation of the health care administration system is finishing; the regulation of many local government responsibilities by state laws is getting stronger and stronger.

3. There was hope, that joining the EU would facilitate regionalization and create a political and institutional basis for a balanced development of all territory of the country. Unfortunately, leading political parties in Latvia are not supporters of the decentralisation. The law “on administrative territorial reform”(1998) includes legal norms about creating large-scale regional governments as one of the main objectives of that reform. Now, by proposal from the central government, all norms about regional governments were excluded in the draft law about amendments in the above-mentioned law, during the second reading in parliament. The last local elections (March, 2005) show, that local electors in many territories demonstrated that they did not believe the national political parties and chose regional parties. Therefore now a new proposal about “transition period regional governments” with indirectly elected councilors and strong influence of the central government is under discussion.

4. There was the expectation, that EU structural funds would be available for priorities of local development. The first year shows, that this expectation was too optimistic. Local governments had prepared a large amount of projects related to basic infrastructure. At the same time only few of those were accepted. For local governments it is much simpler to get acceptance for a project about equal opportunities, than for infrastructure. Pre-financing and co-financing problems are too difficult to handle with small budgets. For starting a project a local government needs financial resources and only at the end there are chances to get funding from the EU. At the same time the annual state budget always establishes strong limits for increasing local government debts and liabilities. Therefore, too strong supervision of local budgets stability leads to strong limitations of local possibilities of development. Another problem is the shifting of all development priorities. All state resources are determined for EU priorities and there is no room for other scale requirements. Therefore, EU funds have not only a positive, but also a large negative impact, especially towards the imbalance of investment priorities.

5. There was hope that cooperation among local governments would be facilitated. During the whole pre-accession period we had signals that the cooperation between local governments is good. But during the first year in the EU cooperation is excluded from the law on public agencies. Now it is impossible to create cooperation-agencies by several local governments. That is an expression of attempts of the national government to weaken the local governments. After joining the EU, local governments are competitors to central ministries for resources.

6. Latvians expected that the increasing role of market relations would dominate. That expectation was based on EU principles about free movement of goods, persons, capitals and services. It could be regarded as paradox, but the first year shows that the EU sometimes does not support the kind of liberal rules that previously existed in Latvia. Parts of the EU residents have illusions about the positive role of quotas for production and services and about the potentially positive role of centralized planning. We in Latvia have wide experience with living in conditions of scientific based planning. Sometimes it looks like those parts of the EU politicians are ready to succeed the experiences of the Soviet Union.

7. Lastly, there was hope, that joining the EU could facilitate the modernisation of the public administration. Unfortunately, the course to strengthen the central administration capacity is moving towards the opposite direction. More and more bureaucracy is enforced. There are three negative tendencies:

    - Over-regulation, which leads to a tremendous amount of legal norms and excludes autonomous decisions from the side of self-government councils or other decision makers;
    - Splitting of responsibilities, multiplying the amount of authorities responsible for the same area of public competencies;
    - “Fighting with corruption” which is provided on the basis of an absolutely wrong theoretical background.

Only one year is too short of time for historical scale conclusions. But one thing is clear – EU matters are now internal matters for Latvian local and regional governments. Therefore Latvian self-governments are now responsible (together with other political actors) for the improvement of the EU, if something goes wrong. Another important conclusion is that the character of the majority of the above mentioned problems are domestic. We can solve them as part of the Latvian political process.

2 EU enlargement – quo vadis?

2.1 BULGARIA – National Association of Municipalities in the Republic of Bulgaria

Ginka Tchavdarova – National Association of Municipalities in the Republic of Bulgaria, Sofia

Local authorities resume a more important role in the development of the EU. In this process, the Bulgarian local authorities have the motive to find their appropriate role in the EU accession process of the country. On 25 April 2005 Bulgaria signed the Accession Treaty. The date of the actual accession is very close, but there are still problems to be solved.

What are the current problems?

- Bulgaria is a country with traditionally strong centralization;
- The access of municipalities to current information and funding is still limited;
- Further capacity building at local level is needed.

Our country is now entering a qualitatively new stage, where it faces new challenges, connected to the closing accession to the EU, such as:

- Adequate preparation of local authorities for the accession;
- Implementation of real decentralization of government;
- More active role in the legislation process.

These challenges made it necessary for the National Association of Municipalities in the Republic of Bulgaria, acting as a representative and advocate of the interests of all Bulgarian local authorities, to develop a MUNICIPAL ACTION PLAN FOR EU ACCESSION (2004 – 2007). This Plan was adopted unanimously by all Bulgarian municipalities at a General Assembly Meeting.
The objective of the plan is the successful preparation of Bulgarian local authorities for EU membership with their active participation in the process, whose successful achievement requires that the following sub-objectives are met:

- Harmonization of municipal norms and regulations with EU requirements;
- Provision of services to citizens complying with EU standards;
- Capacity strengthening at local level;
- Transparency and accountancy of local authorities (LA).

In order to carry out these activities successfully, we have to mobilize the resources and capacity of local authorities and conduct active advocacy at the European level. The policy of NAMRB for the preparation of the local authorities for the EU accession needs therefore to be implemented on two levels: national and international level (EU).

What is being done on the national level?

- Signed agreement between the government and NAMRB about the fiscal decentralization and the participation of the municipalities in the pre-accession process;
- Granted powers under over 11 laws;
- Representatives of NAMRB in over 40 intergovernmental OP Working Groups, Monitoring Committees (ISPA, SAPPARD), etc.;
- Annual agreement signed with the Ministry of Finance on State budget;
- Municipal lobby in the Parliament.

The work of NAMRB at international level will further enhance:

- Cooperation with EU institutions – CoR, Commission; and our partners from the 15 Member States and the 10 newly admitted states;
- Interaction with LA from EU member states and exchange of best practices and experiences;
- Initiation support to Bulgarian local authorities among EU Member States.

The Action Plan will be implemented in three stages that correspond to the process of accession of the country to EU: Institutional strengthening, implementation of municipal tasks during the last stage of accession (July 2005 – July 2007), and successful functioning of Bulgarian municipalities in the EU (after accession).

What has been done already by NAMRB?

A Council of EU integration was established and is already functioning at NAMRB. In parallel the municipal EU integration experts' network has been updated and enlarged. NAMRB is actively working on the capacity building of both the Council and the network as the objective is for them to disseminate the knowledge and experience to their colleagues, and especially to those from small municipalities. The Activities of the organisation include capacity building, provision of information and technology. Forthcoming is the opening of the NAMRB office in Brussels.

A priority task is the preparing of the municipalities for the successful absorption of pre-accession, the Structural and Cohesion Funds of the EU. The NAMRB works actively both with local authorities by building their capacity and with the responsible central government authorities for the timely dissemination of information. A very important problem, for the solving of which still a lot of effort is required, is the

development of mechanisms for new funding sources, providing the co-financing required from municipalities.

As a conclusion we can say that the Action Plan is the core document for the successful preparation of the Bulgarian local authorities for EU accession as equal and competitive partners of EU local authorities. Still, considering the dynamic changes taking place at EU level, it is flexible in order to meet the needs of Bulgarian local authorities and reflects the EU policies and developments.

The actual agenda of the Bulgarian local authorities includes:

- Realization of the fiscal decentralization and delegating taxation powers to the local authorities;
- Preparation of the local authorities for the accession, including capacity building for absorption of EU funds;
- Building of professional networks of experts in municipalities in different fields of activities for dissemination of municipal practices and capacity building at local level.

2.2 ROMANIA

2.2.1 Romanian local authorities coping with EU integration challenges!

Călin Chira - Romanian Association of Municipalities, Programs coordinator, Bucharest

The Romanian integration process into the European Union started in 1993 with the signing of the Europe Agreement, followed by the submission of the National Programme for Adhesion to the EU in 1995. The official start up of the negotiations of the community acquis started in February 2000 and ended in December 2004. On 25th April 2005, Romania signed under the Luxembourg presidency, the Accession Treaty, which is now under ratification process with the 25 EU member states. Nowadays, Romania has the official observer status, being close to EU membership in 2007 and preparing for the next steps in the integration process.

The reform of the public administration has been representing - during the negotiations and even now - a burning topic on the agenda of the central and local governments. The negotiation of chapter 24 from the acquis "Cooperation in the field of justice and home affairs" brought severe criticism from the EU leaders, expressed in the Country Reports elaborated annually by the European Commission and in the mean time considerable progress in the reformation of the public administration and decentralization. The reform is only possible with a closer cooperation between the central and local governance levels and a fare distribution of tasks and resources for reaching EU quality standards through a greater functionality of the public services.

The financial assistance from the European Communities through PHARE, ISPA and SAPARD of approximately 700 million Euros per year, represented a substantial aid from the EU in the adoption of the acquis, sectorial development and modernisation of the public administration. The Commission proposed a considerable and progressive increase in financial assistance for Bulgaria and Romania from the date of the first round of accessions. The financial assistance increased to an additional 20% in 2004 and will continue by 30% in 2005 and 40% in 2006 compared to the average assistance received by Romania and Bulgaria in the period 2001-2003.

Romanian local authorities are facing a great challenge and are eager to learn from their European counterparts how to improve the services provision and attend a better quality of life for their citizens. The Romanian local authorities have now green light for the Community town twinning assistance, since 4th April 2005; hopefully many Romanian local authorities will be able to access funds for implementation of town twinning projects.

The main challenges of the local authorities in the future are to prepare themselves from the institutional point of view to face the new EU legal order that will be enforced

after 2007 and strengthen their absorption capacity for the community assistance, especially for structural funds.

The Romanian local government associations will play a key role in the liaison of the local governments with Brussels and keep them connected to the main European decision makers. In this respect, the LOGON network was an in-depth resource for getting the local communities closer to the European environment and provide them with basic knowledge about how local authorities fit themselves in the broad picture of the EU.

2.2.2 Associative structures of the local public administration in Romania and their role in the European integration process

Adrian Miroiu - Projects coordinator, Romanian Association of Municipalities, Bucharest

The Romanian Federation of Local Authorities – FALR set up in 2001 with the purpose of a unique representation of the associative structures in their relations with the parliament, government, and other public authorities as well as for representing the member associations in relation with international institutions or bodies.

FALR member associations are:

- **The Association of Municipalities (AMR)**, set up in 1990
  103 members (97 municipalities out of 103 existing municipalities plus the six districts of capital city, Bucharest);

- **The Association of Towns (AOR),** set up in 1994
  180 members out of 210 towns;

- **The Association of Communes (ACoR),** set up in 1997
  1,400 members out of 2, 829 existing ones.

- **The National Union of County Councils (UNCJR)**, set up in 1993
  41 counties, all members of the union.

All these associations of local authorities are permanently supported and helped by the associative structures of the professionals working for local authorities. A number of around 20 professional associations and bodies exist in Romania, their input being extremely helpful in sustaining the local administration initiatives.

The role of the associations becomes more and more important. Local authorities and the central government are becoming very aware of the importance of these structures in the European integration process.

The national legislation foresees that every law, which concerns local authorities, should be approved only after a prior consultation of the local government associations. The Romanian central government started to implement this process, but, because of the very big number of local authorities in Romania (over 3.100), the central government decided to work with the associations of local authorities which send them feedback on each legislative issue.

Meanwhile, local authorities become aware that sending a lot of suggestions and modifications for a specific law to the line ministries does not evidently mean that they are taken into account. So, they decided to develop a common position signed by all the associations' representatives, to be sent to the government.

At the level of the Council of Europe, Romania has 10 full and 10 alternate members in the Congress of Local and Regional Authorities of the Council of Europe.

The Romanian local and regional authorities are represented at the level of the European institutions by observers at the Committee of the Regions (CoR). Romania has 15 observers as follows: 9 from the cities, town and communes level (3 per each level) and 6 from county level, until 2007; afterwards when Romania will have become a full member of the EU they will become members of CoR. Romania has also members in the Consultative Committee Romania – Committee of Regions, trying to work there in the benefit of local and regional administrations.

In order to be close to the EU institutions, UNCJR opened an office in Brussels.

The Federation and its member associations also play a very important role in delivering information to local authorities through different tools like LOGIN project – the Information Center for local authorities or through different networking projects implemented in Romania like LOGON, NALAS etc.

2.3 ALBANIA - Local and regional government in Albania and the European integration process

Enea Hoti – M.A. in Law, Legal Advisor, Albanian Association of Municipalities, Tirana

2.3.1 Albania-EU relationship, current situation

The European integration reflects the subject most spoken in the whole Albanian society, and especially in the political circles. All the political parties and their representatives have made the European integration the main slogan of their political programs. In spite of the fact that the European integration of Albania is a subject that is supported and desired by all Albanians, few of them have adequate information on the costs and profits from the integration on EU.

Seen from the historical point of view, the relations between Albania and the EU began in the year 1991. The diplomatic relations between Albania and the EU were established in this year. But the most important event in the relations between Albania and EU would be a year later, exactly on May 11, 1992, with the signing of the Agreement of Trade and Cooperation. This agreement made Albania eligible for financial aid under the EU PHARE Programme.

Some important dates that show the ongoing of the relations between Albania and EU are given below:

1992: Trade and Co-operation Agreement between the EU and Albania. Albania becomes eligible for funding under the EU PHARE Programme.
1997: Regional approach. The EU Council of Ministers establishes political and economic conditionality for the development of bilateral relations.
1999: The EU proposes a new Stabilization and Association Process (SAP) for five countries of South-Eastern Europe, including Albania.
1999: Albania benefits from autonomous trade preferences with the EU.
2000: Extension of duty-free access to EU market for products from Albania.
2000: Feira European Council (June 2000) states that all the SAP countries are "potential candidates" for EU membership.
2001: First year of the new CARDS programme specifically designed for the SAP countries
2001: The Commission concludes that it is now appropriate to proceed with a Stabilization and Association Agreement (SAA) with Albania. The Göteborg European Council (June 2001) invites the Commission to present draft negotiating directives for the negotiation of a SAA.
2002: Negotiating Directives for the negotiation of a SAA with Albania are adopted in October.

2003: On 31 January, President Prodi officially launches the negotiations for a SAA between the EU and Albania. These negotiations are presently ongoing.
Actually, Albania is at the final stage of the negotiation of SAA with the EU. From a technical point of view, the majority of the articles of this agreement are already negotiated. The near signing of the SAA between Albania and EU will establish a higher level in the relations between them, against the existing agreement signed since May 1992. 10 years transitory period is envisaged in the SAA to enable Albania to successfully fulfil the obligations set at this agreement. After that, Albania can try to take another step forward towards the process of full membership.

At the institutional aspect, the process of the European integration is led by these structures:

Inter Ministerial Committee for European Integration
The Inter Ministerial Committee for the European Integration is the highest institutional structure responsible for leading at the most upper political levels and monitoring the whole process of the European integration in Albania. This committee is led by the Prime Minister and is composed of ministers and high officials of the other central institutions.

The Ministry of European Integration
Coordinates and monitors the whole process of association and stabilization. It leads, coordinates and monitors the process of negotiations for the Agreement of Association and Stabilization. It coordinates and monitors the process of the preparation and implementation of objectives and engagements in the framework of the European integration process. It leads the joint EU-Albania working groups and monitors the activities of the working groups in the framework of the Association - Stabilization process.

The Ministry of Foreign Affairs - The Department of the European Integration
is responsible for the promotion, knowledge and support of the Association-Stabilization process at the highest political level of the European Union. In the framework of the foreign policy, the Ministry of Foreign Affairs is responsible for increasing and strengthening the political dialogue with the member states and other countries in supporting the Association and Stabilization Process.

The negotiating group for the European Integration
The Minister of the European Integration is the Chief negotiator of the Albanian Government. The negotiating group is composed of representatives of all the ministries of the line and of other central institutions. The negotiating group is responsible for coordinating, monitoring and implementing within their institutions the whole sectoral activities linked with the Association-Stabilization process.

2.3.2 Involvement of Local and Regional Authorities in Albania in the European Integration Process.

Albania has 384 self governing units of regional and local government. Seeing the necessity of the cooperation and protecting their common interests, these units have created their associations. There are three associations of the local and regional authorities in Albania; the Association of the Municipalities of Albania (AAM), the Association of the Communes of Albania and the Association of the Regions of Albania. Out of these three associations, the Association of the Municipalities was created in 1993 and has the greatest experience in comparison with the other associations of the regional and local authorities.

The regional and local powers have very limited access as far as decision making is concerned at the actual level of the developments in the process of the European integration of Albania. As it was shown above, the institutional structure that deals with the European integration does not include in its composition representatives of the regional and local authorities, but in an exclusive way the bodies of the central government lead the whole process. The lack of representation in the structures linked with the European integration is seen not only in the sphere of decision-making, but also in the spheres of consulting and informing ones. In the process of European integration the subjects that are linked with the regional and local power are represented by the Ministry of Decentralisation and Local Government that is not always in coherence with the attitude of the regional or local authorities themselves.

In order to change the actual situation, the regional and local authorities in Albania are taking adequate acting measures through their associations themselves. Many of the units of the regional and local governments in Albania take part actively in many initiatives of the trans-border and regional cooperation, which are financed by the programs of EU, e.g. INTERREG, etc. The Association of the Municipalities has organised a series of seminars and trainings that have to do with the subjects of the European integration. This association lately is also a member of the Council of European Municipalities and Regions (CEMR), where topics of the European integration are continually discussed. All the associations of the regional and local authorities in Albania are paying special attention to the subjects of the European integration and especially to the aspect, that this process will affect the local power.

In spite of the fact, that the associations of the regional and local powers in Albania have no direct access to the integration process of the country to the structures of the EU, they try to influence to this process indirectly by lobbying or by giving their official stands for the draft laws or draft regulations, that must be adapted to the acquis communautaire. We stress that each draft law or draft regulation that affects the field of activity of the local power is given for opinion to the associations of the regional and local powers and as a result also those that have to adapt the Albanian legislation with that of the EU.

As a conclusion it can be said that there is an obvious lack of access of the regional and local authorities in the process of the European integration of Albania. The government, that stands as an institutional structure that leads this process, must take adequate measures towards the increase of the access of the regional and local authorities in the process of decision-making and the consultation about the subjects of the European integration that are important for the regional and local power.

On the one hand the associations of the regional and local authorities in Albania are trying to play the role that they must have in this process, but on the other hand, the lack of appropriate experience and financial funds is felt. To solve these problems, the associations of the regional and local authorities in Albania are strengthening their cooperation with the associations of the regional and local authorities of those countries that already have successfully passed the process of the European integration and are now members of the EU with full rights. Their experience seems to be very valuable and suitable to be used also by the regional and local power in Albania.

Although Albania is in its first steps in the process of the European integration, the regional and local powers must be prepared to give its due contribution and also to successfully protect its interests.

2.4 SERBIA – European future for Serbian local governments: Introducing EU standards at local level in Serbia

Marija Šošić – Standing Conference of Towns and Municipalities, Belgrade

A topic that does not seem to be controversial in Serbian politics is the wish for Serbia to become a future EU member. This is a key foreign policy goal of Serbia and Montenegro: in April 2005 Serbia and Montenegro finally got a positive Feasibility Report on its readiness to start the process of EU accession. It has opened the doors for signing the Stabilisation and Association Agreement with the EU. Institutional obstacles seem to have been solved, and Serbian government started to show a strong will to overcome political obstacles, as well, including cooperation with the International Criminal Tribunal for the Former Yugoslavia.

So far, the process of EU integration for Serbia and Montenegro was marked by some important events: in July 2003, the Serbian government adopted the Action Plan for Approximation of draft laws with EU Regulations, in which 52 laws are designated to be aligned. In addition, the Serbian European Integration Office has drafted the Action Plan for meeting the priorities of the European partnership, adopted by the Serbian government in April 2004. In October 2004, the Serbian parliament adopted the Resolution on EU Accession. The Resolution contains guidelines for functioning of legal and executive authorities in Serbia with a view to meet the Copenhagen Criteria and states the commitment to join the EU, the readiness to meet political conditions for joining the EU, the obligation of the Serbian Parliament to prioritise the harmonisation of legislation with the acquis communautaire, as well as producing a Serbian National Strategy for Accession to the EU. Furthermore, the government has, amongst other issues, adopted a Public Administration Reform Strategy and introduced a system of Value Added Tax (VAT) in 2004. All of the above proves that Serbia is taking serious measures to ensure staying on track for EU integration.

As for the local level, one of the major problems faced by local authorities in Serbia is the incomplete fiscal decentralisation. Revenues of the local authorities are in most cases not sufficient to cover costs of upgrading local public services. These services have been transferred to local level, but investments are urgently needed in order to bring them to the level of standards desired by citizens.

One of the bottlenecks in this respect is the fact that Serbian municipalities do not have property rights over assets which they use, as the state is their owner. This shortcoming prevents municipalities from acquiring loans. Combined with the reluctance of the central government to guarantee loans taken out by municipalities, this effectively leads to a stalemate.

Through the Standing Conference of Towns and Municipalities, national association of local governments, Serbian local governments have formulated an initiative, signed by almost all mayors, for the adoption of the Law on Local Government Property. Similar to this, the preparation of a draft Law on System of Local Government Finance is in process. It is expected that this law is adopted until the end of 2005 and that it will clearly define the revenues of local governments and establish a mechanism that would enable municipalities to plan their finances for several years ahead.

From the year 2000 onwards, local governments in Serbia have benefited from support provided by many international and donor organisations, the European Union being one of the most important. Municipal support programmes that are now running in Serbia have substantially improved the overall capacity in many local governments, helping them to provide better services for their citizens. Moreover, links and co-operation with local governments from all over Europe have been of utmost significance for Serbian local authorities, providing the know-how transfer and new tools for fulfilling their responsibilities.

The main framework for defining their position, responsibilities and functioning has been the Law on Local Self Government, adopted in February 2002. It is mostly based on the European Charter of Local Self-Government.

Under the auspices of the Council of Europe, supported by international institutions such as the UNDP and the European Agency for Reconstruction, activities are under way aimed at the implementation of the National Programme for Better Local Self-Government. In this process, the Ministry for Public Administration and Local Self-Government, but also other ministries in the Serbian government, recognized the role of the Standing Conference of Towns and Municipalities as a fully equal partner. The National Training Strategy for local governments is also being developed together with the Standing Conference, as a prerequisite for further capacity building of Serbian local governments.

It is important to stress that Serbian local authorities have already achieved a lot in their struggle against inherited problems and old models of functioning: services offered to citizens have been improved, municipal employees professionalized to a certain extent, citizen participation fostered. First serious strategic plans are being adopted, municipal cooperation improved. At the national level, first serious national strategies are developed and its implementation has started, all new laws are in line with the EU legislation. The existence of the Serbian European Integration Office, as well as of the European Integration Board in Serbian Parliament shows clearly that we are already on our way to Europe.

The Standing Conference of Towns and Municipalities (SCTM) played an important role in the process of local government modernisation. It contributed by implementing

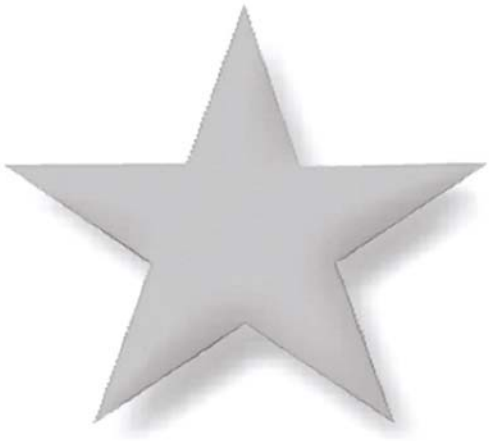
various donor-funded projects, as well as by assuring international cooperation for Serbian local officials. Being a full member of NALAS and CLRAE, and associate member of CEMR and LOGON, SCTM offers to its members a possibility to get acquainted with EU practices, but also to foster and develop new partnership relations with EU colleagues.

At the moment, there are 2 programmes financed by the European Union in Serbia that are contributing to the development of local governments capacities through their partnership and exchange with the local governments from EU countries: one of them is the New Neighbourhood Programme, which allows local governments to develop projects with cross border effect. The other is the *Exchange Programme,* with an aim to expose Serbian municipalities to EU practices through the exchange with EU municipalities.

Many challenges lay ahead of us in the near future. Some of the basic lessons have been drawn and some of the tools – institutions, rules and procedures for dealing with the challenges ahead have been acquired. We can say that Serbia and its local governments are on the right course, but still need to accelerate the pace on the road ahead and be ready to tackle many pitfalls that remain.

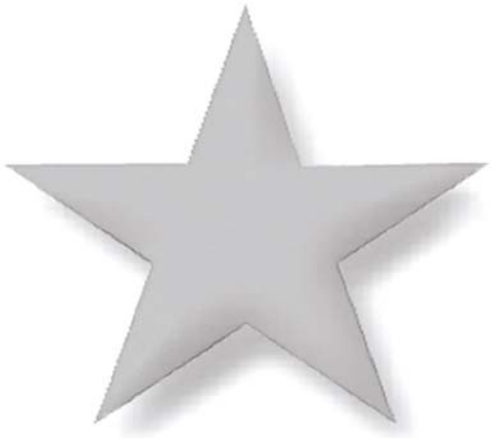
To summarize, EU standards are being introduced to the local level in Serbia constantly: Serbian towns and municipalities are getting closer and closer to the EU model. On the other hand, the constitutional crisis that the European Union is currently facing will evidently influence the process of Serbia's EU accession. In the next decade, we can expect EU to be concentrated on its internal problems and problems of its members, also working on closer integration of new EU member states – which leaves Serbia and Montenegro, as well as other so-called Western Balkan countries on the side. Also, proposed EU financial perspective for 2007-2013 clearly shows that the gap between *candidates* and *potential candidates* will get much wider, as the latter will stay without financial support to continue the ongoing reforms.

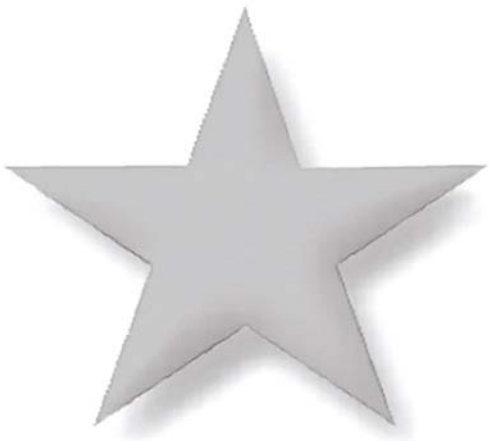
We can conclude that it is necessary that the EU and different countries within it, but also local governments from all across Europe continue to search for ways to help Serbian municipalities to address the challenges that they confront. This involves more substantial funding, but also much more intense institutional interaction, in order to allow for exchange of information, expertise, best models and practices, and thus assist Serbian municipalities in building up their capacities and be able to respond to the expectations of their citizens, but also to contribute to the overall maximising of Serbia's potential to make up for lost ground and finally secure its road towards the integration into the EU.



CHAPTER V

LOGON Network





1 The CEEC-LOGON info point on the Internet

Christine Mösenbacher – KDZ Centre for Public Administration Research, Vienna

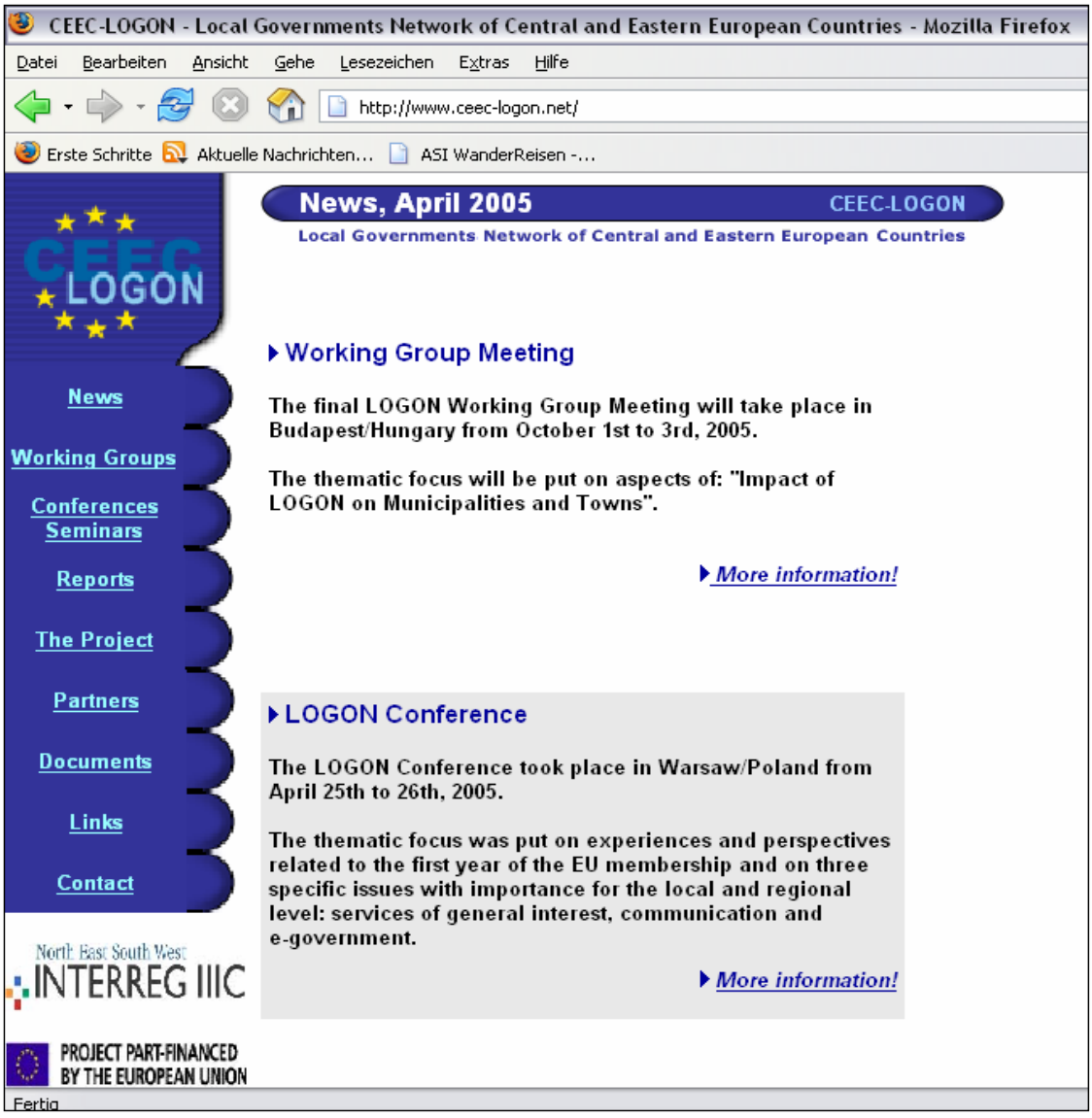
1.1 Introduction

The CEEC-LOGON Internet-site, which was launched in January 1999, aims to build a common information platform for the local and regional level in the CEEC. The website has expanded rapidly since its foundation and offers now a wide range of different information and communication like EU documents, working materials and contact lists. The content of the LOGON-site can be classified as information related to the local level in Europe, although the main focus was set on the EU-enlargement. This article gives a short overview on the main chapters and sources of facts, documentation and communication within the LOGON site.

The LOGON homepage, which can be retrieved from the Internet-address http://www.ceec-logon.net is divided into 9 main chapters: News, Working Groups, Conferences & Seminars, Reports, The Project, Partners, Documents, Links and Contact.

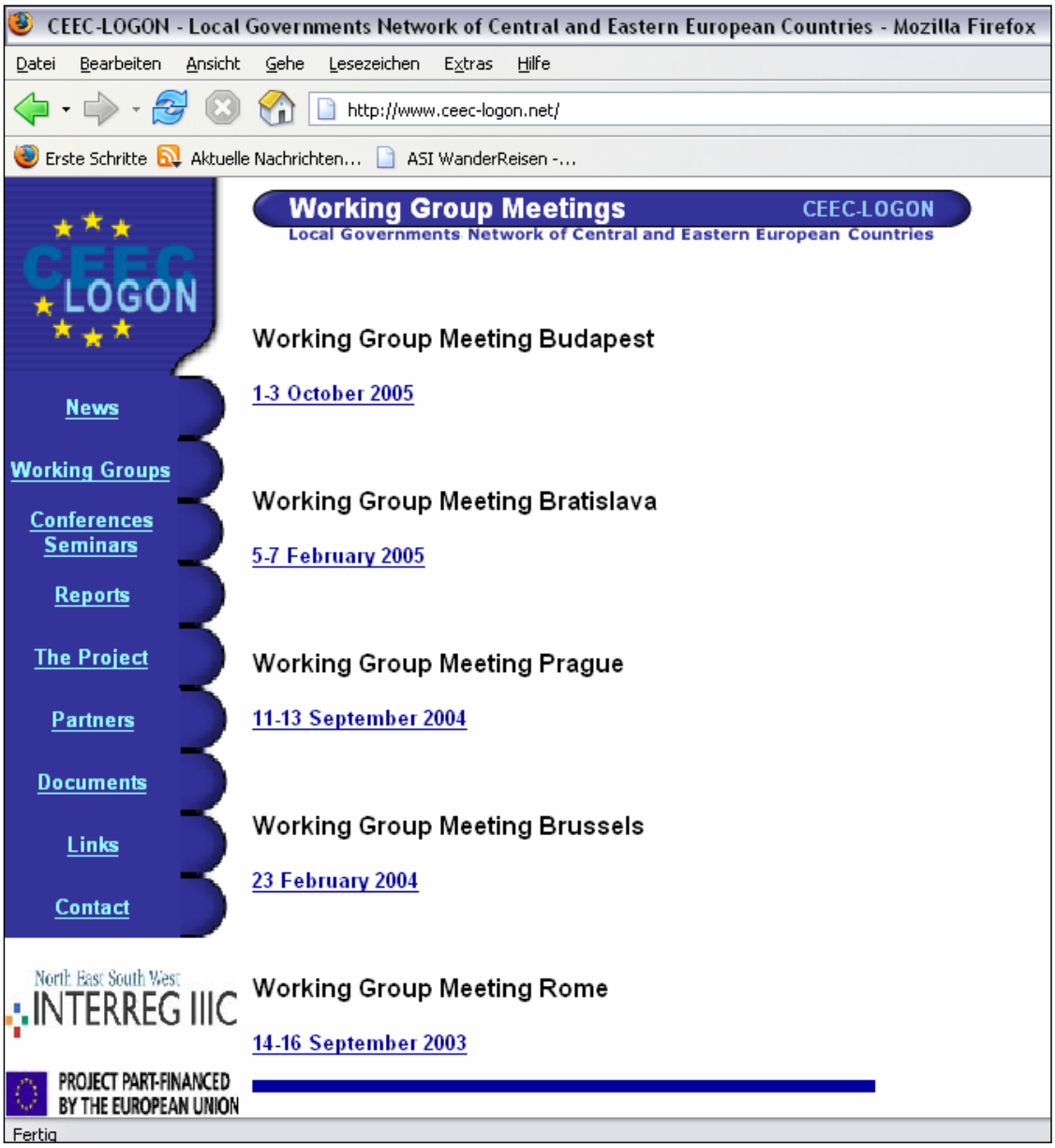
1.2 News

In the News chapter a short overview on the latest development of the LOGON Project can be found. It was created with the aim to give users the latest and most important data on the first site and primarily contains short comments about updated sectors, new documents or changes on the site and brief remarks about planned conferences and meetings with links to the chapters where the total information can be retrieved from.



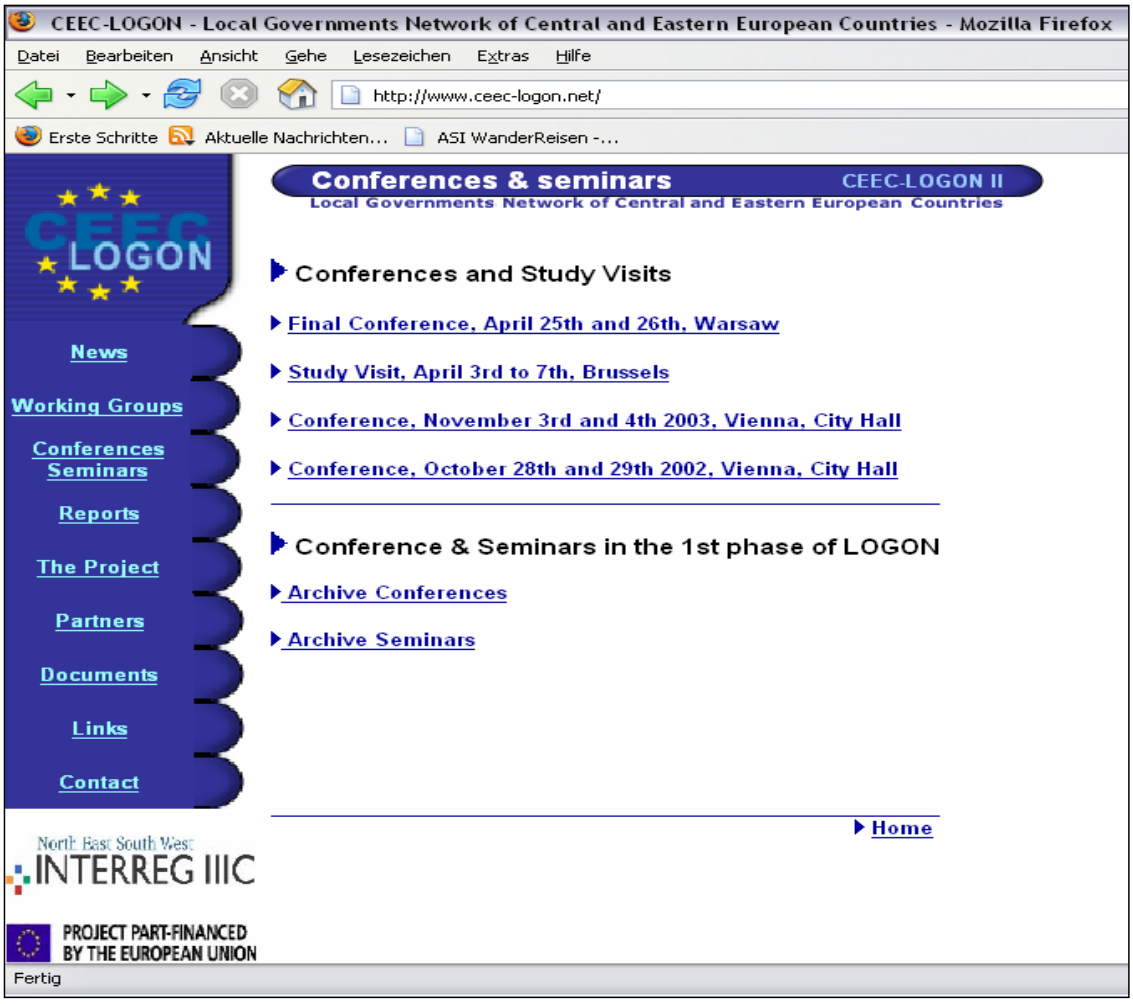
1.3 Working Groups

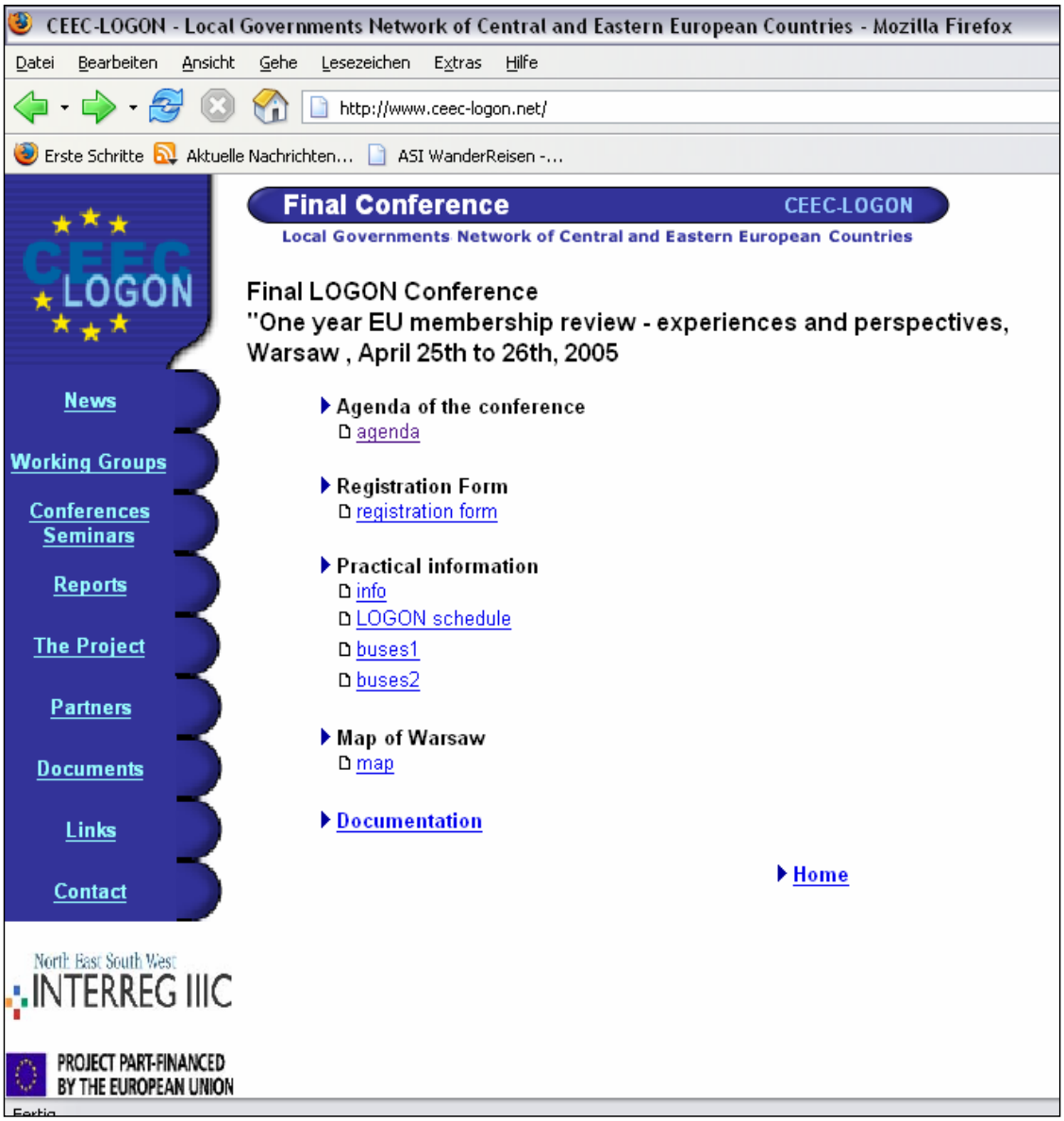
This chapter gives information both about CEMR Working Group Meetings of the first and the second phase of LOGON as well as of planned working group sessions in the future. It includes draft agendas, registration forms, participant lists and minutes of the meetings. It also gives the possibility to register online for the events; most information on this page can be retrieved as a WinWord-document or read online.



1.4 Conferences & Seminars

The Conferences & Seminars chapter combines two previous chapters: Conferences and Seminars/Study visits. This section gives a range of information about events of the first phase of LOGON and presents the current ones. In the archive one can find information about the conferences and seminars such as participant lists, agendas, minutes of conferences and meetings, documents, lectures of the speakers and final declarations concerning the Final Conference in Warsaw, as well as the study visits to Brussels and Austria. The other part of the sector, which can be retrieved on the conference sub-page, gives comprehensive information about the Final Conference in Warsaw including the short description of the event, the programme, documentation and practical tips for participants like transport, accommodation or location. It also gives the possibility to register online.




CEEC-LOGON - Local Governments Network of Central and Eastern European Countries - Mozilla Firefox
Datei Bearbeiten Ansicht Gehe Lesezeichen Extras Hilfe
http://www.ceec-logon.net/
Erste Schritte Aktuelle Nachrichten... ASI WanderReisen -...
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INTERREG IIIC
PROJECT PART-FINANCED BY THE EUROPEAN UNION
Final Conference
CEEC-LOGON
Local Governments Network of Central and Eastern European Countries
Final LOGON Conference
"One year EU membership review - experiences and perspectives,
Warsaw , April 25th to 26th, 2005
Agenda of the conference
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registration form
Practical information
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Map of Warsaw
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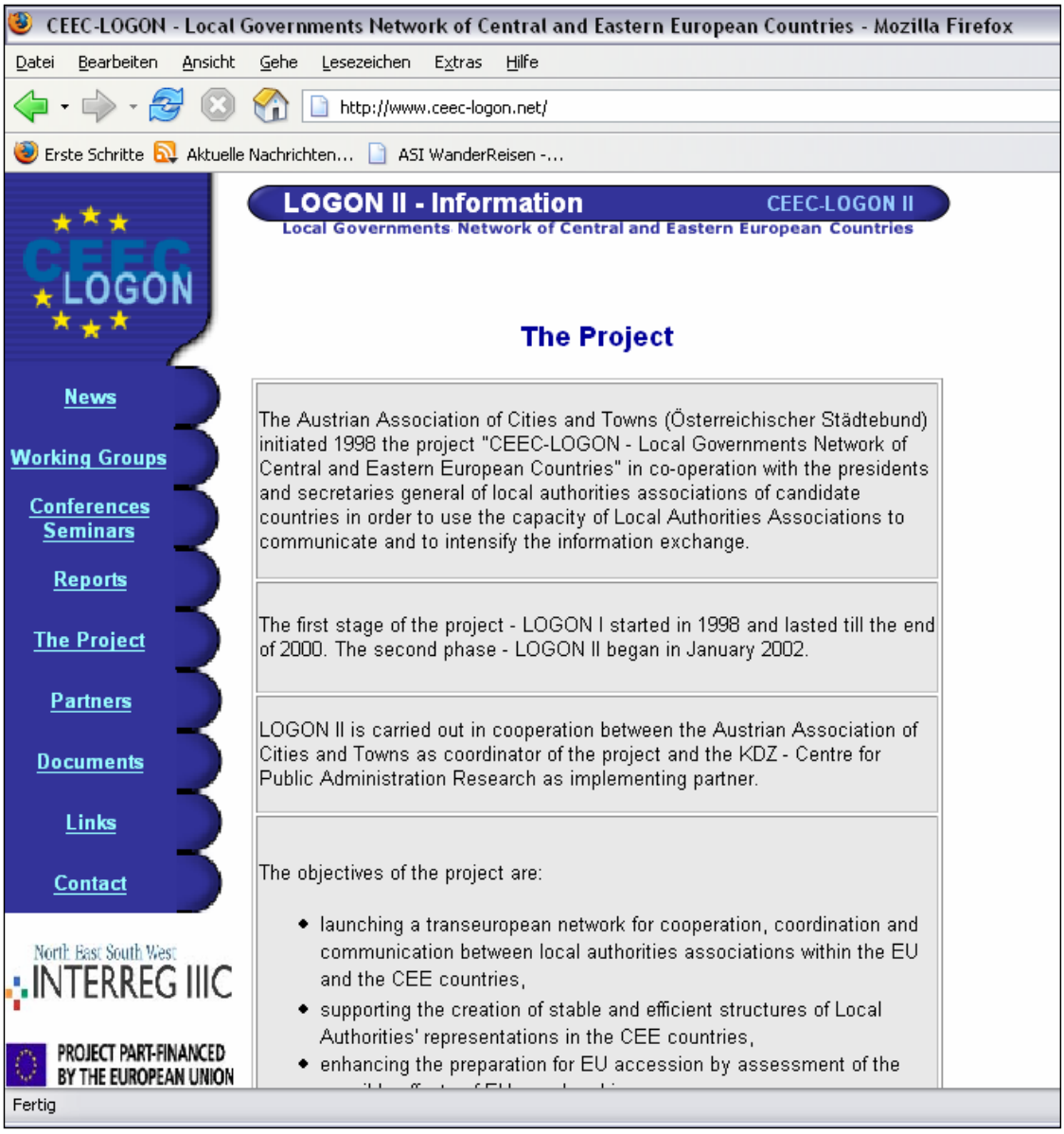
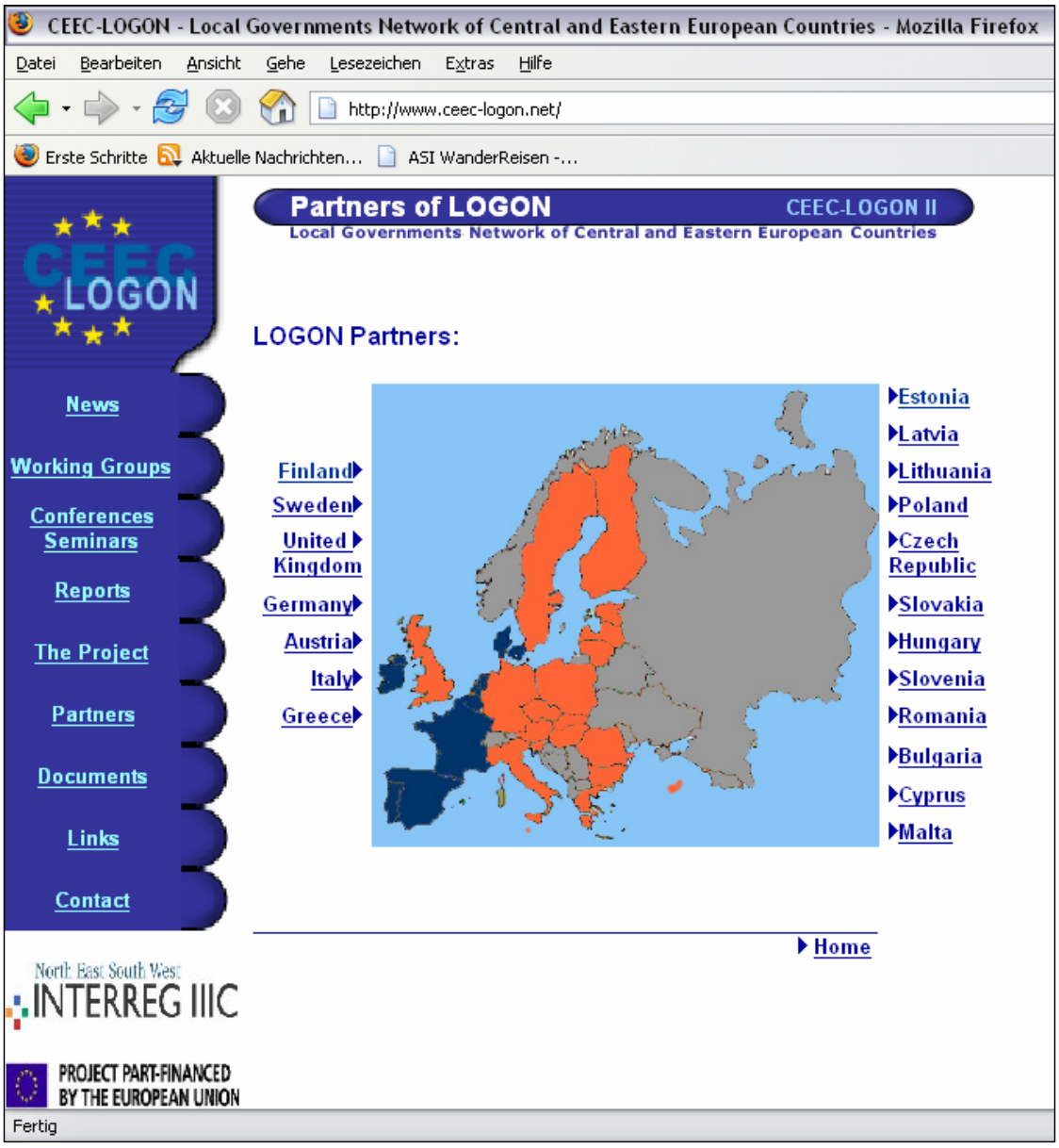
1.5 The Project

This section of the site provides information about the LOGON project for all interested people. Especially it is a source of information for people who are not project partners and who visit the site for the first time. The project information section covers the history, aims and the project coordinating organisations of LOGON.



1.6 Partners

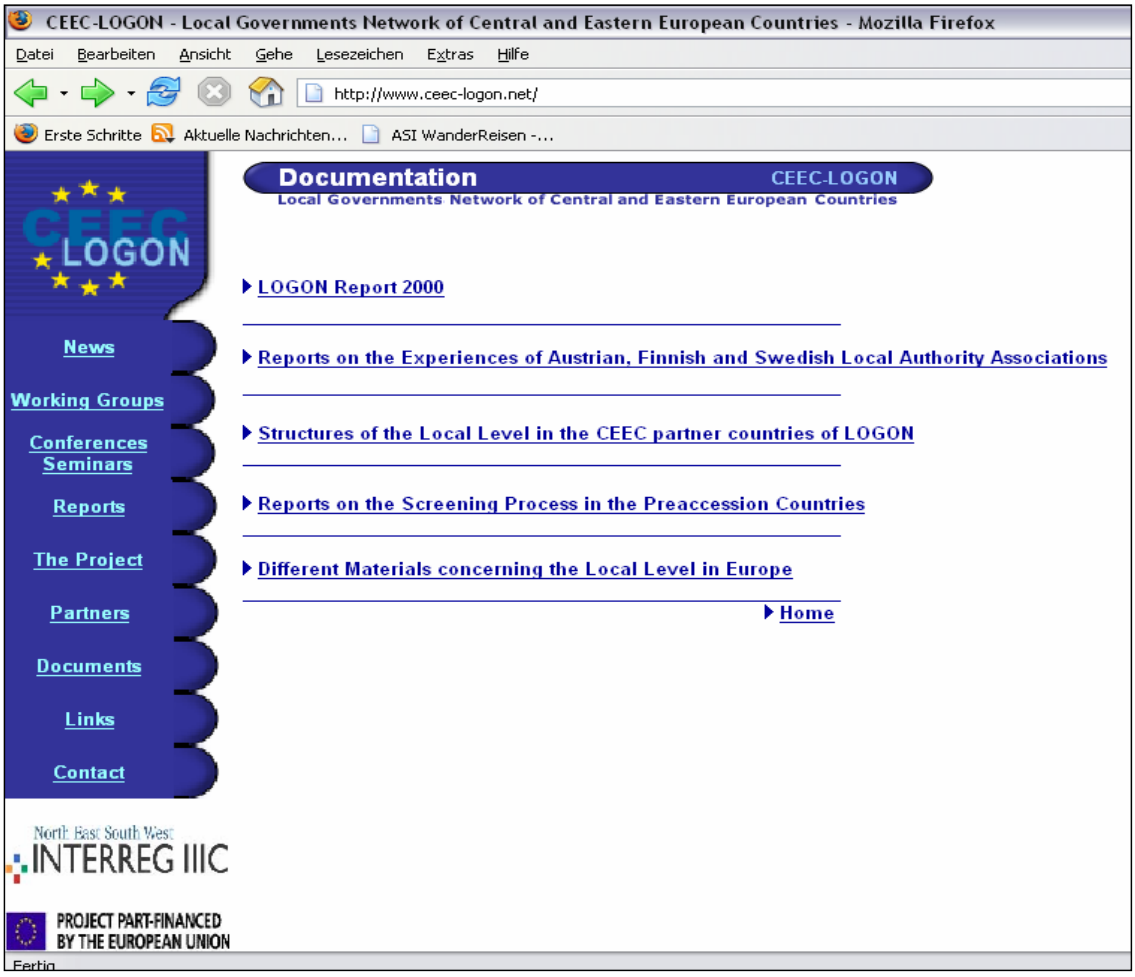
This chapter presents on the one hand the LOGON partner countries and their administrative structure, on the other it gives direct links to the local and regional authorities and organisations involved in the project and provides information on the EU-programmes that are being implemented at the moment.



1.7 Documents

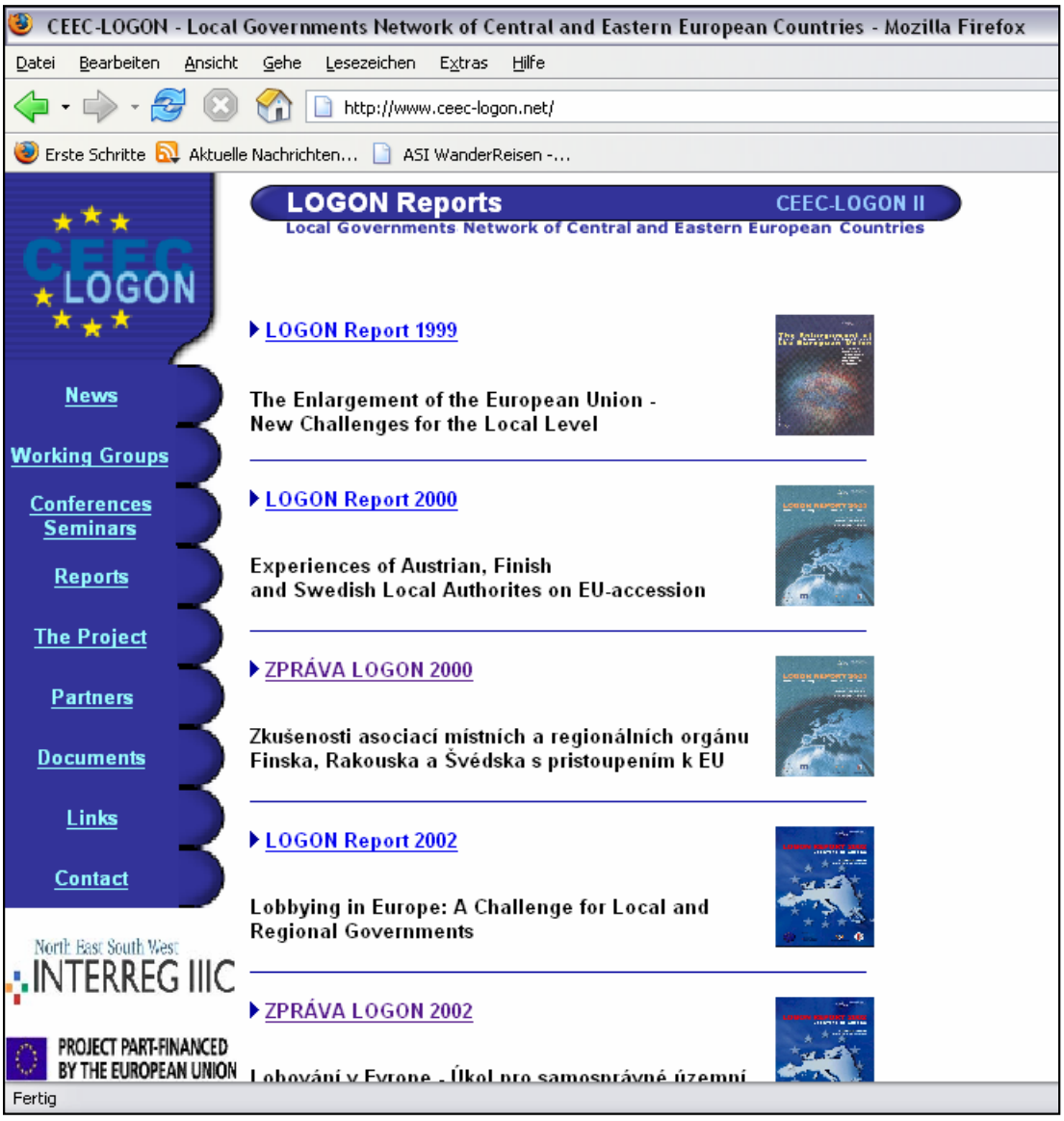
The “electronic archive” of LOGON is found in the Documents chapter. In this chapter a range of information about the enlargement process of the European Union, about the local level in the CEEC, as well as many other materials concerning the local and regional level can be found. All the documents are collected under the following categories:

- LOGON Report 2000,
- Reports on the screening process in the pre-accession countries (in the meantime Member States),
- Structures of the local level in the Central and Eastern European partner countries of LOGON and
- different materials concerning the local level in the European Union on the sub-pages.



In addition to the documents chapter there is also a chapter named “reports” on the LOGON site. This chapter contains all LOGON reports and readers as well as the translated executive summaries of the reports and the whole LOGON Report 2002 translated into Hungarian and Czech.

The Final Guide will be also available online at the LOGON site.

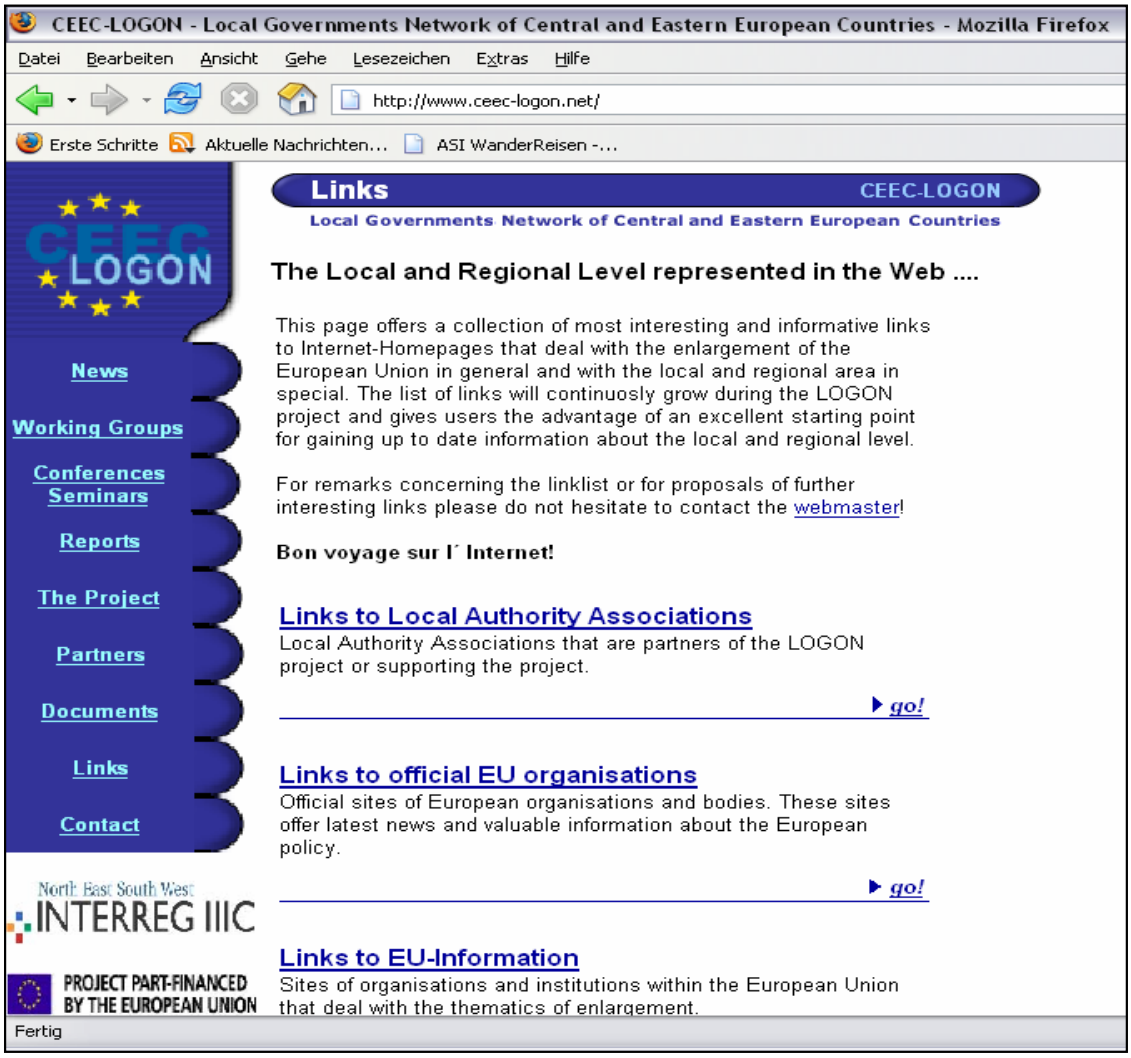


1.8 Links

The Links Chapter lists all links to homepages concerning the European Union and its enlargement process in general, as well as the local and regional area in particular.

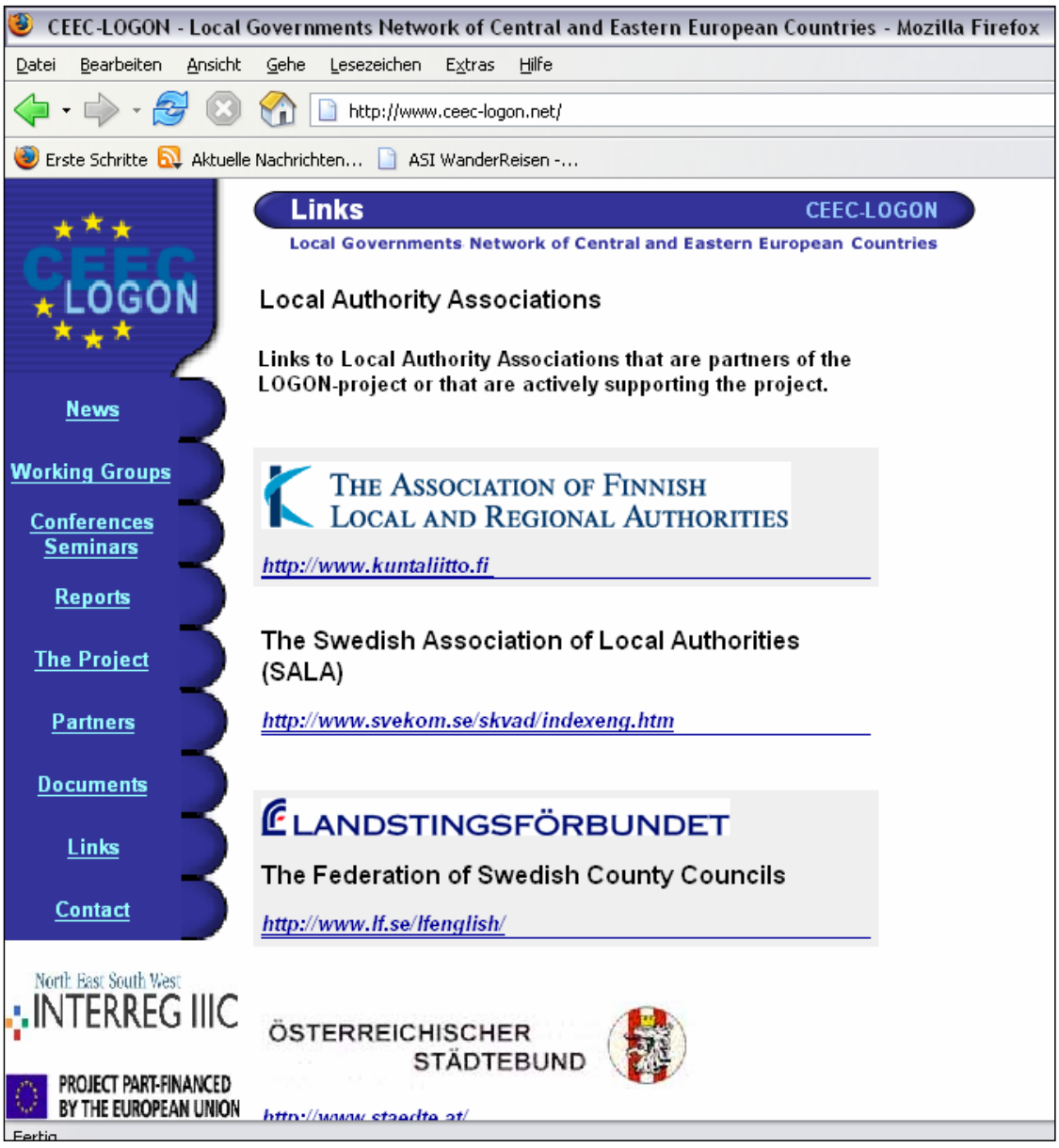
The links are divided into the following four sub-pages:

- Links to local authority associations,
- Links to official EU organisations,
- Links to EU-information and
- Links to information-services outside the EU.



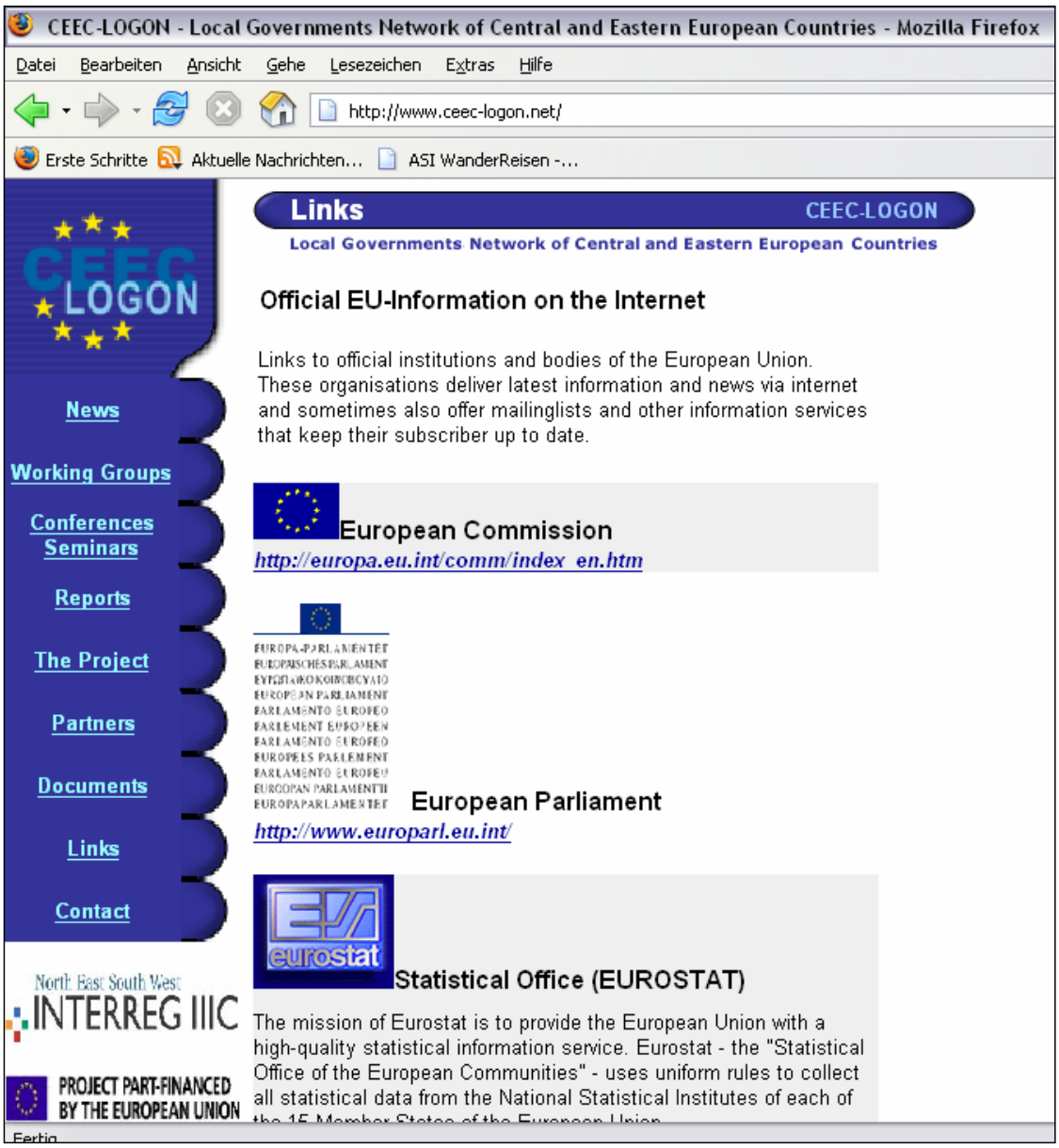
1.9 Sub-page: Local Authority Associations

A collection of links to local authority associations that are partners of the LOGON Project or that are supporting it and are actively involved in its implementation can be found in this section of the LOGON site.



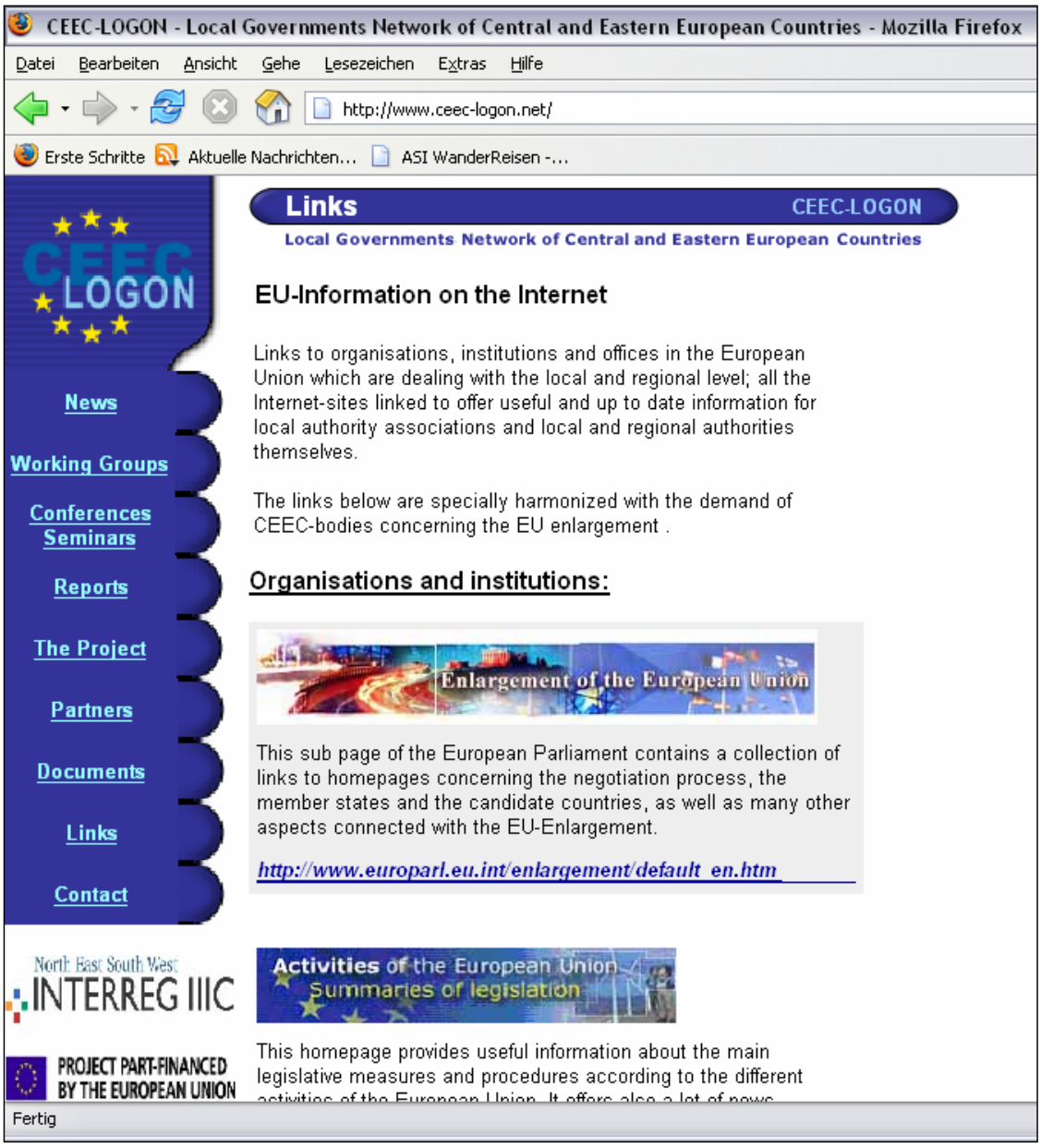
1.10 Sub-page: Official EU-organisations

All official EU-organisations, institutions and bodies are listed on this sub-page to provide useful up-to-date information about the EU policy.



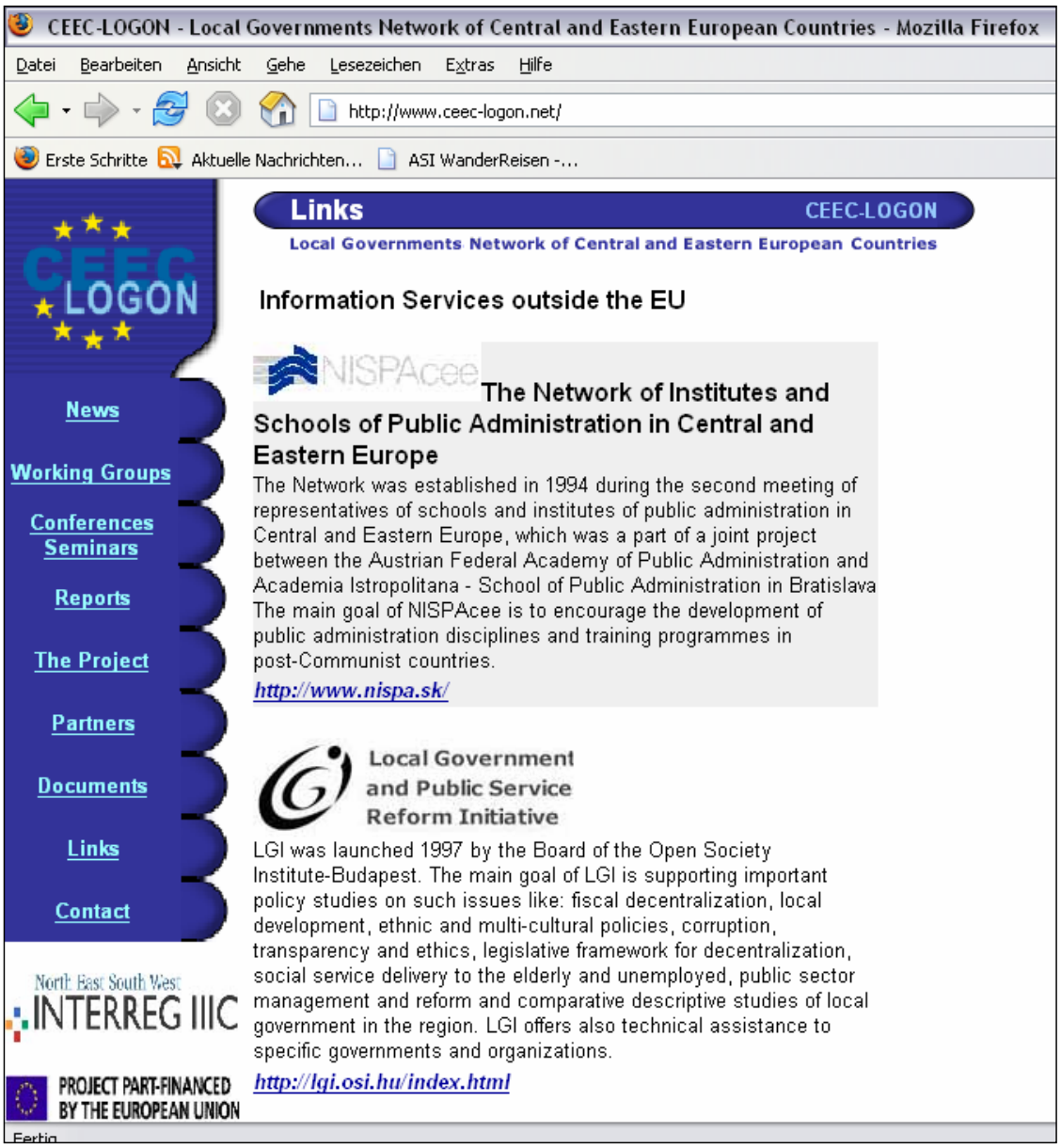
1.11 Sub-page: EU-information on the Internet

This sector is a collection of links to different institutions and organisations in the European Union that can provide the latest information especially relevant for the local and regional level. This part also offers links to basic data concerning the EU-enlargement and Good Governance.



1.12 Sub-page: Information services outside the EU

This chapter comprises a list of links to services and institutions acting outside the European Union that provide information relevant for the local and regional level organisations.



1.13 Contact

This part of the website contains the contacts and links to organisations and persons coordinating the LOGON Project.

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Figures

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