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***Social Security as “social service provision”
in the Internal Market:
not an appropriate concept for Europe***

Joint Position Paper

***of the Umbrella Organisations
representing the German Social Security System***

submitted April 2005

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Summary:

Loss of Social Objectives

as the Consequence of Market Integration of Social Insurance

- The safeguarding and use of the European law principle of subsidiarity in the area of social security requires a fundamental re-adjustment of the relationship of Member State sovereignty in questions of social and societal policy on the one hand and the dominance of the market orientation in European law in all societal areas on the other hand. The umbrella organisations of the German Social Security System (DSV) want to set such a discussion in motion with this position paper.
- The role of European law in the design of Europe’s future has been reduced more and more in the last few years to a purely market-oriented/economic consideration of all areas of societal life. One of the main concerns of European legal development is the radical opening of markets for accomplishing tasks that until now have been directed by public entities.

- As a result, the path is prepared for attempts of interested parties to **liberalise** social security and finally to **privatise** it, regardless of any possible added value, or even accepting additional burdens on the people affected.
- Until now, social security as such has not been considered an economic-entrepreneurial activity. In principle, however, the dynamic being supported not least by the European Court of Justice of an understanding under European law of “**entrepreneurial trading**” encompasses all public sectors – even including sovereign activities.
- At the same time the European Court of Justice – supported by the freedom to provide services anchored in the EU Treaty – has introduced a legal development which **opens up the free market** precisely for such public sectors, which until now (still) have been considered “non-economic”. In this way the structure of competence anchored in the EU Treaty is deliberately circumvented. The future European Constitution as well will restrict European authority to regulating those services in the general interest that are of an “economic” nature.
- The “rough outline” of the market-oriented development of law is flanked by corresponding law-generating extensions of **special areas of European Internal Market and competition law**. Here the concern is above all for developments in the fields of law concerning public procurement (awarding of public contracts), law concerning state aid and the freedom to provide services.
- The obligation of **public procurement** is being systematically extended to tasks that the public authorities took care of themselves until now. Here as well it is the judicial decisions of the ECJ, which - in an unconventional interpretation of the European public procurement directives - forces a market opening in situations where Member States have not stipulated it. The Commission goes a step further and would like to draw even “in-house service providers” into general competition. In the final analysis this will lead to a situation where a public institution will have to compete on the market if it wants to execute by itself its own responsibilities and tasks. At the same time the judicial decisions force public contractors for their part to grant sub-contracts in a formal tendering process. This systematically puts public undertakings at a disadvantage in comparison with private suppliers.

- The **prohibition of state aid** under European law is also being successively extended in such a way that services provided by public entities until now (and traditionally) are being privatised. If it wants to provide public services on the market, a public agency has to act like a private undertaking. This forces it above all to connect its dealings with a profit motive, because renouncing profit customary in the market represents state aid. Aiming at the customary profit making will often fail, however, because a public establishment must grant sub-contracts in a formal procedure and additional costs arise from this, which private competitors do not have to bear. As a result the public authorities find themselves in a situation under European law that is forcing them out of the market.
- This consequence is definitely desired on the part of the Commission. Within the framework of the EU concept of “**public-private partnerships**” an altered understanding of its role is intended for the State: It will distance itself from its function as a direct actor and reduce its tasks to organisation, regulation and control.
- This trend is being confirmed and accelerated by the current debate on the future of “**services of general interest**”. In this connection a concept for “social and health services of general interest” (social services) has been developed by the Commission, which claims that with full consideration of the objectives of social policy in principle all social services can be provided by commercial enterprises in competition throughout Europe or respectively world-wide. Relating to social security this would mean replacing compulsory insurance with an obligation to insure, which besides would entirely comply with the ECJ in the ‘Freskot’ legal case.
- The European **freedom to offer services** as well is meant to set clear limits on the autonomous organisation of social services. Characteristics of the service object, quality standards and questions of liability will still be regulated if need be, but in the interests of the Internal Market no longer at national level, but rather through EU regulations.

On the other hand, the freedom to offer services has given essential stimulation to patient mobility. The growth of rights and possibilities requires an increased responsibility on the part of all participants, though, in order to control quality standards and prices. The most recent EU legal initiative on “Services in the Internal Market” on the other hand aims at an improvement in supply side market access. Here above all care

will have to be taken to ensure that the proven cost-controlling and quality-assuring monitoring elements are maintained.

- Social protection, social security and public health are not marketable, economic on which - if at all - public welfare obligations are imposed, but they are themselves the expression and concretisation of the public welfare. The market-oriented concept of social services would contribute to an **erosion of the “objectives of social policy”**, combined with a **loss of democratic control**. Therefore it is not only a matter of the method of organisation (close to or far from the market), but in the end, of the content and extent of publicly guaranteed social protection. The choice of the means to be used is in no way neutral with regard to the social policy objectives that are being pursued.

0. Background

According to the EU Treaty, developing their own social protection and health care systems is within the sole competence of the Member States. The European Constitution treaty does not provide for any explicit change in the national responsibilities. Because of the indisputable interactions with different spheres of economic life, however, the Europeanisation or respectively globalisation of the economy does not leave social security untouched either.

To a certain degree this is unavoidable with the progress of the European integration process. In the last few months, however, intensified activities can be observed at EU level, which - definitely driven by the judicial decisions of the European Court of Justice - will have as consequences not only a creeping but rather, if they are successful, a galloping substantial undermining of the competence of the Member States in the organisation of their social protection. It is in particular the concept of “**services of general interest**” respectively “services for the public”, with which such services are meant to be made subject to European economic law at European level as well which until now had not yet been opened up to cross-border competition through special Community legal acts. The future Art. III-122 of the European Constitution treaty, which strengthens the competencies of Europe in the organisation of the outlines and conditions for the functioning of services of general economic interest, would also fit into this picture. Now obviously social security, including its provisions respectively its insurance function, is meant to be considered among these services.¹

In the debate about the future of services for the public quite a few other - including older - strands of European legal and political development run together. Therefore the debate is not moving in a vacuum, but rather has been anticipated through a series of trends that are taking place in fields for which Europe clearly has competence. Nevertheless the direction of movement toward a purely market-oriented “European Society and Social Model” that has now begun was not foreseeable from the start. The further steps therefore should not take place without conscious political decision, taking into consideration the consequences connected with them.

The umbrella organisations of the German Social Security System are therefore not restricting themselves in the following position paper to reminding all participants of the extent and the limits or their competencies and responsibilities. It is much more a matter of becoming aware

¹ Green Paper of the European Commission on “Services of General Interest” of 21 May 2003, COM (2004)270 final; White Paper of the EU Commission on “Services of general interest”, COM (2004) 374 final of 12. 5. 2004; “Social Services of General Interest - Questionnaire”; “Background Document Legal Framework”.

of the contours and consequences of the upcoming decisions; above all, however, it concerns highlighting the options for action, insofar as they are framed and guided by the instruments of the Internal Market and competition law.

1. ECONOMIC ACTIVITY AND ENTREPRENEURIAL CHARACTER AS GATEWAY FOR THE EUROPEAN INTERNAL MARKET AND COMPETITION LAW

Relating to social protection the European Court of Justice has repeatedly confirmed that public social security agencies are **not “undertakings”** in the sense of European competition law. This happened last in the “AOK” - ruling of 16.03.2004² concerning upper limits for the reimbursement of cost for medicines. There the Court determined that the legal health insurance schemes and their associations are not exercising an economic activity in the determination of fixed maximum amounts for medications and therefore are not undertakings, so that European cartel law is not applicable.

Because of the same considerations, which exclude the economic nature of an activity, it is also out of the question to rule that the result of these activities is a marketable product in the sense of basic European freedoms, for instance as **“service”**.³

Notwithstanding this the differentiation between **“economic”** and **“non-economic”** services is more and more controversial and its meaning in the framework of the discussion about the future of services for the public has in part already been openly called into question. The problem of every differentiation that is selective but still indispensable for the time being, is already contained within the formula according to which every activity is “economic” that consists of “offering goods or services in a given market”. Often not only production and delivery, but every purchase of goods is viewed indiscriminately as an economic and therefore an entrepreneurial activity - notwithstanding a decision of the Court of First Instance⁴ which clearly ruled the opposite, but without having settled the topic for good. However, the remaining question concerns the perspective under which it will be decided **whether a market “exists”**: a national or a European perspective. Corresponding to the “dynamic approach” represented by the Commission – and latently also by the European Court of Justice – a global perspective is decisive: The decisive factor is whether a particular activity “at least in principle could be exercised by a private party with the intention of profit making”. At the same time in

² ECJ, Ruling of 16.03.2004 (“AOK -Bundesverband”) in the joined legal cases C-264/01, C-306/01, C-354/01 and C-355/01.

³ ECJ, Ruling of 22. 5. 2003, C-355/00 (Freskot’)

⁴ Ruling of the Court of First Instance of 4 March 2003, T-319/99 (‘Fenin’),

the opinion of the Commission⁵ it is not even a matter of the financing: even when no payment or fee at all must be paid by the user, because the service provider is compensated through public funds, there could be an economic activity. In this way the Court tries to connect entrepreneurial activity with the idea of solidarity.

Corresponding to this European idea of society, which views every activity as “economic” and “entrepreneurial” which could take place on the market, the global environment built on market integration and easing trade restrictions will claim the ability to organise broader and broader sectors. Entirely in this sense the Commission has repeatedly emphasised – last in the Green Paper on services for the public⁶ – that “the distinction between economic and non-economic activities has been dynamic and evolving, and in recent decades more and more activities have become of economic relevance.”

The umbrella organisations of the German Social Security System are aware that it is not only the area represented by them that is affected by the developments described, but rather that these activities are part of a larger problem. Therefore a sector-specific solution approach limited to social security does not seem sufficient. The best and the most self-consistent solution at this point, is a fundamental revision of the European law understanding of the boundaries between “market-related”, “economic” respectively “entrepreneurial” activity under the undisputed influence of the European legal framework for economic policy on the one hand, and on the other hand activities which, because of their general societal connection with a simultaneous absence of private profit making are subject to the exclusive discretionary power of the Member States to organise. This implies in the non-liberalised sectors a **re-adjustment of the concept of an undertaking**. According to this new understanding only those activities, which are exercised on the market with private profit making intentions, would be considered economic activities. Other Activities, which correspond to a legally defined task, which are financed mainly by public resources including social contributions and which are not pursued with a profit making intention, would not be viewed as entrepreneurial respectively economic in the sense of European law. The same is true for the assessment of an activity as (economic) “service provision” in the sense of the EU Treaty. Such a definition would leave unaffected the competence of each individual Member State to undertake liberalisation measures that go further in its area of responsibility.

⁵ European Commission DG Competition, Services of general economic interest and state aid – Non-Paper – 12. 11. 2002, note 79.

⁶ COM(2003)270 final of 21. 5. 2003.

2. “GUIDELINES” OF THE ECJ FOR A REORGANISATION OF PUBLIC SECTORS IN CONFORMITY WITH THE MARKET

In a ruling from the year 2003⁷ the ECJ pursues a completely new approach compared with its judicial decisions until now. The question of the admissibility of a (social-) insurance “monopoly” is no longer tested formally against the standard of competition law, but rather against the standard of freedom to offer services.⁸ Here – and this is the new factor – two limits are opposed at the same time to the freedom of organisation of the Member States. In a first step it is asked whether the insurance in dispute is a “service” in the sense of the EU Treaty. This question is answered in the negative, whereby the arguments used for it are already familiar to a great extent from the judicial decision of the ECJ in the “*Poucet-Pistre*”⁹ case, even though the latter case was about the application European competition law. In a second step, however, now it is being questioned whether the “establishment of a statutory insurance as such” could represent an obstacle for the free provision of services. At the heart of the matter is the question of whether these systems could not also be **organised differently**, i.e. **in conformity with the market** – and whether they must.

At the same time the ECJ is thoroughly aware that the risks covered by statutory insurance cannot necessarily all be insured by private insurance companies as well, since the profitability of such an insurance account could be doubtful. On the other hand, however, it could turn out that the system also encompasses “insurable risks”; in this case and to this extent it could represent an obstacle for the free provision of service, which then could be justified only through a compelling argument in the general interest. The justification would have to be evaluated against the standard of the “socio-political objectives” pursued with the system, for instance the matter of a general, “appropriate” insurance protection with uniform contributions, whose amount is independent of the individual risk. But then as well the “principle of proportionality” would have to be safeguarded. In this connection the ECJ is questioning in particular the scale of insurance protection, or in other words, whether a lower level of protection would not also suffice. Thus the Court implies for instance that compulsory insurance, in order to be proportional, should offer only “minimum cover” and therefore leave room for complementary private cover. Furthermore, according to the ECJ, the question must be examined within the framework of the principle of proportionality, as to whether the financing of

⁷ Ruling of the European Court of Justice of 22 May 2003 in the “*Freskot*” legal case (C-355/00)

⁸ The fact that the conformity with the Treaty is being tested here against the standard of freedom to offer services could be an accident; the approach could just as well have been to refer to a possible “restriction of competition”; cf. ECJ, Ruling of 19 February 2002, C-309/99 (“*Wouters*”), note 86, where in this case the initial cartel law constellation prejudged a test from the point of view of the infringement of competition.

⁹ ECJ, Ruling of 17. 2. 1993, “*Poucet et al. ./ Assurance générale de France*”, C-159/91 and 169/91.

the system and as a result the fulfilment of its tasks, essentially social, would be endangered, if the people affected were allowed to insure themselves with private insurers against specific risks covered by the compulsory insurance, and to be free accordingly from the payment of the charge to the statutory insurance. The obligation to justify market-exemptions created by Art. 86 of the EU Treaty for market-related services for the public good is in this way extended to all public services of general interest, and in fact, bypassing the EU-Treaty, completely independently of their “economic character”.

The ruling of the ECJ in the “Freskot” case that was mentioned did not explicitly target a traditional system of social security. The ruling rather left open the question of whether it was a matter of such a system in the present case, because it would not change anything in the result anyway. However, the Court intimates that under certain conditions the European basic freedoms could conflict with an organisation of public welfare remote from the market, independently of whether the components were classified as “social security” or not. Regrettably the judicial decisions until now, according to which social security as such was not subject to European market right because of its solidarity character, are put into question in this way. Because henceforth the question will be posed as to whether social security does not have to be organised in such a way that it is subject to market law. Then it will no longer be sufficient to prove that the social security agencies do not exercise any economic activity, and therefore are neither “service providers” nor “undertakings”, but it is possible that in a further step the question will have to be examined as to whether compulsory insurance could be replaced fully or at least partially with an obligation to insure with the admission of competition through commercial suppliers, without the “objectives of social policy” being (“disproportionately”) touched.

3. THE LAW CONCERNING PUBLIC PROCUREMENT

With the help of European Public Procurement Law as well works carried out under public control until now are supposed to be liberalised and opened up to the cross-border market. This is expressed first in the extremely restrictive guidelines of the European Court of Justice concerning the admissibility of **transferring public tasks** to those **external establishments** that are **essentially supported by public funds**. In its “Teckal”¹⁰ ruling the European Court of Justice already set tough requirements for the admissibility of awarding contracts without tendering to a unit legally separate from the client (“in-house-assignment”): The public client

¹⁰ ECJ, Ruling of 18 November 1999, C-107/98.

must exercise control over the establishment in question similar to the control it exercises over its own departments, and this establishment must perform its activities for the most part for that client(s) that hold its shares. This exception, however, according to the latest relevant decision of the ECJ¹¹ is not transferable to agreements between separate administrations (different public agencies); here in principle there is an obligation to tender. In addition, according to a further current decision of the ECJ¹² any participation, no matter how small, of private capital in the establishment commissioned rules out an “in-house-transaction”. Even cooperation of public agencies without any participation of private capital is being attacked by the Commission before the ECJ from the point of view of tendering law (“Hinter” case – local ad hoc groups). The fact that the direct fulfilment of public tasks is concerned does not change the result. Even the direct preparation for and exercise of sovereign duties (here: expropriation) is being seen by the Commission in the meantime as an activity that requires tendering, even if the rules and decisions generated in this way remain state rules and decisions, and as such are not measured against the regulations of the EU Treaty directly applicable on undertakings.¹³

Finally, public authorities increasingly are denied the competence to the to fulfil the tasks they are responsible for under **their own control** respectively by having recourse to their own human and property resources. Certainly the Directorate General for “Competition” of the European Commission still attributed to the Member States in 2002 the right to make decisions themselves in the sectors that were not yet liberalised, concerning the form in which a service is provided for the public welfare, i.e. whether the state guarantees the provision or transfers the task to public or private enterprises”.¹⁴ However, already in the White Paper “Services of General Interest” the EU Commission expressed its conviction according to which “in-house” service providers, i.e. own establishments, must not be handled differently in European competition than any other enterprise. In this way it is announcing its intention to further limit the field of the authorities of the EU Member States exercised under direct public control. At its core the Commission’s hypothesis means that public departments are no longer allowed to take care of the tasks they have responsibility for themselves, but rather must “out-source” them and call for tenders in a transparent way. They are definitely allowed then to apply for their own contract, but then in “competition free of discrimination” with other sup-

¹¹ ECJ, Ruling of 13 January 2005, C-84/03 (“Commission vs. Spain”).

¹² ECJ, Ruling of 11 January 2005, C-26/03. (“City of Halle”).

¹³ ECJ, Ruling of 19 February 2002, C-309/99 (“Wouters”), No. 68.

¹⁴ European Commission DG Competition, Services of general economic interest and state aid – Non-Paper – 12. 11. 2002, note 67.

pliers. Because completely in harmony with the functional concept of the enterprise it can no longer be a matter of whether a public agency takes care of specific work itself or if it has taken care of by an establishment controlled by it: In every case an economic activity would be present, that not only “can”, but rather “must” be provided in the market.

With the Green Paper “on public-private partnerships and Community law on public contracts and concessions”¹⁵ of 30.04.2004 as well the EU Commission tries to subject co-operation, (service concessions or institutionalised co-operation) which until now has not been covered by public contract law, to the obligation of public and above all cross-border calls to tender.

On the other hand, since a more recent decision of the European Court of Justice¹⁶ a “special right” is in effect for public establishments that place themselves in competition and receive the bid in a public tendering procedure. Unlike their commercial competitors they cannot freely grant sub-contracts, but must put them to tender. In this respect it makes no difference whether they have a legal form under public or private law.¹⁷ This legal situation will in many cases make the offer submitted to competition more expensive and creates an unsolvable dilemma for the public authority: On the one hand it must behave like a private investor with a customary expectation of profit (see below no. 4), on the other hand, however, as a public client (calling for tender) it must keep to costly procedures to which a private company– if it “puts out to tender” a sub-contract at all – would not be bound. This contradiction could only be solved through a consistent privatisation, i.e. by the surrender of the public participation to an *enterprise*.

The alternative to such a privatisation would consist in a consistent concentration of public tasks in the central state, comparable to a “merger” of private firms. The judicial decisions of the European Court of Justice hardly leave room for anything in between. As a result once again the sovereignty of the Member States to decide themselves about the organisation for dealing with public tasks using democratic structures is being infringed upon. Organisation of public administration, assignment of contracts and responsibilities and co-operation of public agencies and administrations are subjects for which Europe does not have competence, nor should it appropriate such competence for itself.

¹⁵ Green Paper of the EU Commission “on public-private partnerships and Community law on public contracts and concessions”; COM(2004) 327 final of 30.04.2004

¹⁶ ECJ, Ruling of 18. 11. 2004, C-126/03

¹⁷ ECJ, Ruling of 13. 01. 2005, C-84/03

4. FREEDOM TO PROVIDE SERVICES AND DRAFT OF A SERVICES DIRECTIVE

With the presentation of a proposal for a directive on ‘Services in the Internal Market’¹⁸ the EU Commission is pursuing a further reinforcement of the Internal Market, which primarily pursues a deregulation of rules, national until now, concerning access to and practice of professions up to quality standards. The instruments used are in particular the “country of origin principle”, harmonisation at an extremely low level as well as trust in the self-regulation of the industry. It is characteristic that now Commission President Barroso as well considers the services directive an instrument for the “**liberalisation**” of services, i.e. for opening up the market. In this way - in contrast to early statements - inevitably the question of the justification of so-called “state monopolies” will also be revived.

Regardless of this, the umbrella organisations of the German Social Security System assume that the **quantity-related control elements** in the authorisation of medical service providers for treating patients at the expense of the social security agencies will remain unaffected by the expansion of the freedom to provide services that is planned and will be admissible in the future. The objective should be to keep the expenses side controllable in order to avoid an additional burden of contributions on insured parties and the economy. In addition, for various reasons, the necessity for a restriction of the patients’ freedom of choice between different doctors can arise, which likewise may not be affected by the broadening of the freedom to provide services. Above all the “grey list” of the “requirements to be examined” involves unforeseeable risks for the control instruments mentioned. This is all the more true since not only will the already existing requirements be subject to continual “screening” by the EU Commission, but new requirements of this kind can only be justified by “altered circumstances”.

Care must be taken in connection with the directive on services in the internal market that is on the agenda as well with a draft directive on professional recognition that

- an obligation to register with the authorities is introduced for the exercise of a service in the health area for service providers from other EU Member States,
- licensing requirements can be made for the exercise of activities that are financed by public funds and in particular by a social security agency,

¹⁸ Proposal for a Directive of the EU Commission on ‘Services in the Internal Market’, COM(2004) 2 final of 13.1.2004

- the matter of financial stability of public services is also recognised as a compelling reason in the general interest for an exception from the principle of the freedom to provide services and freedom of establishment,
- a legally certain boundary is set between the temporary exercise of a service and the establishment of a business, e.g. by setting a time limit of 16 weeks for the temporary exercise of the service,
- the differentiation of hospital treatment occurs according to the law of the insuring state,
- the reimbursement of costs is limited to the amount of the costs that actually arise, but with the contractual rate as the maximum.

Until now this concern has been taken into account either not at all or only partially. Cosmetic corrections to the reasons for consideration cannot replace clear regulations in the text of the directive itself. Against this background and in view of the fact that the regulations suggested in the proposed directive stand in contradiction to the EU Treaty and the European Constitution Treaty and interfere deeply in the sovereignty of the Member States, the removal of the social health area from the services directive is absolutely required.

In addition in the view of the umbrella organisations of the German Social Security System **patient mobility** is in the foreground. The possibilities for the cross-border use of services with a temporary stay in another EU State have been considerably expanded. Nonetheless, insured people require advice from their health insurance fund in order to be able to choose the most favourable from among the available treatment options. In order to be able to advise the insured parties about a cross-border use of services in an optimum way, in particular more transparency regarding the kind and extent of the services as well as the quality of the medical services and the service providers in the other EU States is necessary.

5. LAW CONCERNING STATE AID

In a basic decision and under narrowly limited conditions the European Court of Justice did not view as “state aid” **state compensatory payments** for the fulfilment of public service obligations¹⁹. As a result, a delicate balance has been created between the application of European competition law and the Member States’ requirements for the optimum public fulfilment of tasks. Taking this jurisdiction into consideration, the former EU Commission pre-

¹⁹ ECJ-Ruling of 24.07.2003 in the “Altmark Trans” legal case (C -280/00).

pared several initiatives that have become known as the ‘Monti Package’, which are meant to provide for more legal certainty.²⁰ In fact the package, which has not been adopted until now, allows certain public contributions under conditions that are eased. The prerequisite in every case, however, is a clearly legally defined public supply contract and above all an entrusting act.

In any event, in the opinion of the Commission²¹ the most transparent procedure for the determination of the additional expenditure caused by the public obligation consists in a call for tenders for the service in the public service or public welfare obligation. The contract is then given to the enterprise that asked for the smaller compensatory payment; in this case the amount of the compensation corresponds to the ‘market price’. The European Court of Justice contradicted this approach though, and does not consider compensatory payments of the State for the operation of the public obligation to be a ‘state aid’, as long as only the additional costs actually incurred due to the obligation are compensated.

Neither the decision of the European Court of Justice nor the expected “exemption package” represent *carte blanche*, however, for state subsidies of any kind for the fulfilment of social purposes. Apart from the considerable bureaucratic hurdles, the definition of the “additional costs” points to a dilemma, which opens up completely new gateways in another aspects of European competition law. In the calculation of the “additional costs” an “**appropriate return**” is to be estimated, so the Court. But from this results directly that public tasks and obligations in principle can always be carried out with a profit orientation and in this way automatically establish an economic activity, which in turn leads to the “character of a undertaking”. Nonetheless, according to the Court the public service tasks and obligations are not meant to be subject to compulsory tendering in every case. Here tension arises between European State aid and public procurement law, whose solution remains pending.

Independently of the solution approaches still to be found, however, the way European state aid law is developing is a further element in the undermining of the competence of the Member States in the organisation of their social protection. The underpinning logic opens up any fulfilment of public tasks to the market, in that it transforms a defined public task into a concrete public supply contract, awarded to profit-oriented firms on the market.

²⁰ In particular draft of 16 respectively 18 January 2004 of a “Draft Commission Decision on the application of Article 86 of the Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest”, as well as a “Draft Community Framework for state aid in the form of public service obligation”.

²¹ European Commission DG Competition, Services of general economic interest and state aid, – Non-Paper – 12. 11. 2002

In fact a public establishment can definitely also compete “as an enterprise” for the fulfilment of the public supply contract. However, it is not allowed to use its only advantage in the competition, namely the lack of striving for profit, because the “**renunciation of possible profit**” alone represents state aid. The behaviour of a public establishment is measured here against the standard of a private, commercial investor (“private investor test”). State aid therefore is already present according to the Commission’s interpretation when the State “does not receive dividends from the undertakings in which it has holdings, under the same conditions as private investors”.²²

In addition, from the point of view of state aid law there seem to be indications of long-term effects for the Social Security self-employed people. Several ongoing proceedings²³ before the ECJ discuss the question of whether state support of social security systems for specific groups of self-employed people represents state aid that is in violation of European law. Obviously the idea at the base of these complaints is that solidary financing of the social security of self-employed people is suited to creating a competitive advantage for them. Against the background of the differentiation between dependent and independent employment, which is becoming more and more questionable, solidary Social Security at the whole is being called into question in this way. The ECJ has not yet ruled. The explanations in the *Freskot*²⁴ legal case, though, give little reason for hope for judicial restraint. Without definitively committing itself, the Court has quite considered the possibility of state aids in these kinds of cases.

6. SERVICES OF GENERAL INTEREST AND PUBLIC-PRIVATE PARTNERSHIPS

More clearly than in the “construction sites” of European economic and competition law, which are seemingly harmless when observed in isolation, the developing European understanding is expressing itself in broader positions and questions using political terminology. For example, in its Green Paper on “public-private partnerships”²⁵, the Commission postulated a **changed understanding of the role of the State**: It will refrain from its function as a direct actor/operator and turn to organisation, regulation and control. As a starting point among other things health care was explicitly named. The role of the government is reduced to that of a “regulatory authority”, i.e. to the following functions:

²² European Commission DG Competition, Services of general economic interest and state aid, – Non-Paper – 12. 11. 2002, RdNo. 39, 76.

²³ Cases C-266/04 to C-270/04

²⁴ Ruling of the European Court of Justice of 22 May 2003 in the “Freskot” legal case (C -355/00).

²⁵ Green Paper of the European Commission “on public-private partnerships and Community law on public contracts and concessions” of 30 April 2004 [COM(2004)327 final]

- determination of the tasks for the public good (= definition of the services of general interest in concrete individual cases);
- market regulation;
- determination of the quality level of the services;
- clarification and allocation of costs incurred;
- “control”, i.e. guaranteeing that the actors involved perform the duties for the public good that are transferred to them.

The question of which of the functions named will be performed at national and which at European level remains open.

However, most important are the observations on the organisation and provision of the public services. Here, the decisive statements are found in the Commission’s White Paper on Services of General Interest: Providing services must be organised “in co-operation with the private sector” or transferred to “private or public undertakings”, and in fact “to ensure a level playing field for all providers”. The protection of “services of general economic interest” anchored in the EU Treaty (Art. 86 para. 2) protects only public and social tasks, but under no circumstances the provision under direct public control: “missions are protected rather than the way they are fulfilled.”

Precisely in this sense the “Social Services of General Interest – Questionnaire” contains the following question in a prominent place right at the end (in No. 15):

“Should (European) legislative acts set general standards for social services that make it possible that EU regulations such as those on the internal market are applied, whereby the social policy objectives must be taken fully into consideration?”

The concept concealed behind the question is obviously once again inspired by the ruling of the ECJ in the “*Freskot*”²⁶ case and can claim to sketch the core of a “new European Social Model” in a few broad lines. This would essentially consist of the following elements:

1. Definition of the objectives of social policy at EU level applying the open method of co-ordination. Objectives going behind this can – taking into account the Growth and Stability Pact - if necessary still be defined at national level as well.

²⁶ Ruling of the European Court of Justice of 22 May 2003 in the “*Freskot*” case (C -355/00).

2. Personal services (dedicated to the citizens) required for achieving the public objectives are designed and organised in such a way that they can be provided by commercial undertakings in Europe-wide or respectively worldwide competition, possibly (but by no means obligatorily) using the instrument of a “public service obligation”.
3. Insofar as necessary, the subject matter of the service, quality standards, questions of liability, etc. are regulated publicly, but in the interests of the Internal Market not at national level, but rather through EU regulations.
4. In principle, the services are to be paid for by the users themselves. In harmony with the “objectives of the social policy” however, people from whom full coverage of the costs cannot or should not be expected will receive targeted subsidies. This solution intervenes the least in market and competition, and it complies to the greatest extent with the model favoured in the Green Paper on “Services of General Interest”, according to which social compensatory payments should not be directed to a single service provider, but should be made accessible as widely as possible (competition in the market rather than competition for the market). - This concept would at the same time give an answer to the question about an optimum “way of financing” (question 22 in the “services of general interest” Green Paper) with regard to social protection and social security.

With regard to social security, this concept implicitly pursues a policy of replacing **compulsory insurance** with an **obligation to insure**, whose extent and range would still have to be discussed. In the medium to long term, the tasks and functions of public social security agencies would have to be transferred to private service providers. In the end, private financial industry would market-driven define the precise features of insurance products including contingencies and entry conditions; individual people left without appropriate insurance cover then could be subsidised from tax resources.

For the following reasons, however, such a concept would ultimately not by any means restrict itself to achieve given social policy objectives of public social security systems “more efficiently” using market and competition elements, but rather this would lead to a gradual change in the concrete content of various elements of social policy and overall policy objectives:

- Inevitably a loss of democratic control possibilities would ensue. The changing ideas about values and priorities in the democratic process require adapted and flexible regulations, which often cannot be established at all, or only at unreasonable cost, through contractual relationships with outsiders, for example in the framework of public-private partnerships.
- The **pressure for uniformity and harmonisation on product standards** exercised for the purpose of the integration of the internal market would not remain without effects on the “social policy” objectives themselves. Because an ambitious definition of concrete standards would not be very realistic against the background that European policy aims at a widening of cross-border supply-oriented competition, and therefore must set the “external” normative guidelines as low as possible or, at the most, leave them entirely to the economy (cf. the draft of a European Services Directive). It is probable that the private operators themselves would become de facto “regulators”, by determining in practice the specifications and through this in the end the content of the “social objectives”.
- The re-orientation of social protection to a pure competition model will as a result have effects on the fundamental organisation of social policy and social protection. Public social protection financed by taxes or social security contributions would be limited to a **basic level**, and social services going beyond this would be offered according to the laws of “market and competition”. The “basic supply” would also be organised in the market; the **subsidies to those people** from whom full coverage of premiums calculated in accordance with the risks could not be expected would be re-determined according to the budget situation. As a result, certainly the concerns of the internal market and competition would be served. From the social policy point of view, however, solidarity is reduced to the mere **avoidance of poverty** and in addition made directly subject to the respective budget situation. Solidarity would no longer be an integral component of social protection systems, which are geared typically to special life situations and elementary life risks and contingencies and as a result uphold the consciousness of the necessity of “redistribution” – different from any redistribution through higher taxes.
- As a result the model would not produce any improvement in care and supply of “Social Services”, but no doubt additional costs (e.g. investor returns). In the principles

and in the details it would lead to unforeseeable and drastic changes in the content and the costs of social protection to be financed by individuals.

Therefore, any decision about following the path described above is not only a matter of the method of organisation (close to or remote from the market), but in the end also of the content and extent of publicly guaranteed social protection. The choice of the means to be used is not at all neutral with regard to the “social policy objectives” pursued.

7. CONCLUSION OF THE UMBRELLA ORGANISATIONS OF THE GERMAN SOCIAL SECURITY SYSTEM

The services provided by social security are overwhelmingly financed from taxes or social contributions and not “paid for” by the user in the concrete instance. This is the expression of the special public responsibility for achieving the social policy objectives connected with social security. Social protection, social security and health are not economic goods tradable on the market, on which - if at all - public welfare obligations are imposed, but rather they are themselves the expression and symbol of the public welfare. As a result, therefore, the market driven framework conditions for product design and pricing do not apply. An organisation of social security “in the internal market” would not be possible without a fundamental mutation and lost control of each of the social objectives pursued. If on the other hand, one actually wanted to organise social security “in competition”, fully safeguarding all its elements and social policy objectives, then an artificial, extremely severely regulated environment would have to be created with an extreme reduction of entrepreneurial freedoms, which furthermore would have to be flexible enough to implement a democratically legitimated change of social policy objectives at any time in practice. It is not apparent what advantages such a system would be meant to have for the participants, on the contrary: The “organisation” and “simulation” of competition is connected with several costs and risks (tendering, concession, public-private partnerships), and the returns for the operators acting on the market would have to be financed.

For the organisation of “social services” in general, and social security in particular, recourse to the market and competition is not an end in itself, but rather one among many instruments for achieving more efficiency. Whether and when this instrument is used must be decided at the level that is responsible for the organisation and financing. According to the European allocation of competencies this level continues to be the Member States, for good reasons.

In this opinion the German Social Security System sees itself confirmed in principle by the European Court of Justice as well. Thus the Court, in its “AOK -Bundesverband-ruling”²⁷ accepted the price-controlling instruments of the German health insurance. Those instruments are bringing in interaction elements of competition with risk structure compensation and self-government and ensure that care can be financed and is appropriate to the need – a model that has decisive advantages in comparison with a purely market and competition-oriented solution.

Nonetheless it is not very satisfying constantly to find oneself struck into a European law debate that is guided by special interests but which in reality concerns fundamental policy decisions. Even though from case to case the European Court of Justice sets limits on these kinds of advances, this does not always happen with the clarity that would be desirable in order to avert further doubts from the outset. On the contrary, in rulings on individual cases the room for manoeuvre to develop and organize social security systems is again called into questions by decisions in other cases that are in principle oriented to privatisation and competition. In view of the continuing pressure from the economic sphere and its actors this is to be continuously expected in the future. As a result, however, the allocation of competence of the EU Treaty, as it is expressed above all in Art. 137, 152 and 295, is successively being repealed.

In legal terms therefore, as already explained in chapter 1, a re-adjustment is required of the boundaries between “market-related”, “economic” or respectively “entrepreneurial” activity underlying the European legal framework for economic policy on the one hand, and activities on the other hand that because of their relationship to society in general, with a simultaneous absence of private profit making, are subject to the exclusive organisational discretion of the Member States.

Such a distinction can, however, easily run into its limits, if the new tendency in judicial decisions should become firmly established, of deriving from the EU Treaty an obligation of organisation in conformity with the market, and as a result, for privatisation in “non economic” services provided under public control and in the general interest. A legal development of this kind cannot by any means be compellingly derived from the wording of the Treaty. However, it cannot be overlooked that the barriers placed against such a development in the Treaty are no longer functioning. The preservation and use of the Member States’ sovereignty over the area of social security will therefore have to be one of the concerns in the further development

²⁷ ECJ, Ruling of 16. 3. 2004, C-264/01, C-306/01, C-354/01 and C-355/01 (“AOK -Bundesverband”)

of the European Constitution. With this position paper the umbrella organisations of the German Social Security want to set such a discussion in motion.

This position paper has the support of all umbrella organisations of the German Social Insurance System:

- AOK-Bundesverband**
- Bundesverband der Betriebskrankenkassen**
- Bundesverband der Innungskrankenkassen**
- Bundesverband der landwirtschaftlichen Krankenkassen**
- Verband der Angestellten-Krankenkassen**
- Arbeiter-Ersatzkassen-Verband**
- Bundesknappschaft**
- See-Krankenkasse**
- Hauptverband der gewerblichen Berufsgenossenschaften**
- Bundesverband der landwirtschaftlichen Berufsgenossenschaften**
- Bundesverband der Unfallkassen**
- Gesamtverband der landwirtschaftlichen Alterskassen**
- Verband Deutscher Rentenversicherungsträger**