



## **Position of the Bundesarbeitsgemeinschaft der Freien Wohlfahrtspflege concerning the Design of Competition in the Provision of Social Services in Germany**

Short version

The call for more competition in the provision of social services in Germany is not new. The legislator complied with this call by changing social security law several times in the past. Nevertheless the competition model under social security law still differs from the competition model under tendering law with respect to some central issues. This mainly applies to the role of the various actors in the design and control of the supply of services.

The call for more competition in Germany finds its equivalent at European Level, under the heading of modernisation and the debate on compatibility of service provision with the internal market, while ensuring at the same time, the accessibility, the quality and the financing.

With this position the German Welfare organisations would like to link the German debate with the European debate and raise awareness within the EU institutions about discussions in Germany on the best and most effective way to provide social services for the benefit of beneficiaries.

The key issue is to demonstrate that the competition model under social security law in Germany is transparent, non-discriminatory and compatible with the internal market. This would imply that the EU avoids any policies that hamper this way of organising competition among service providers in Germany. Moreover service providers from other EU Member States who want to deliver services in Germany should benefit from it under the same conditions as German service providers.

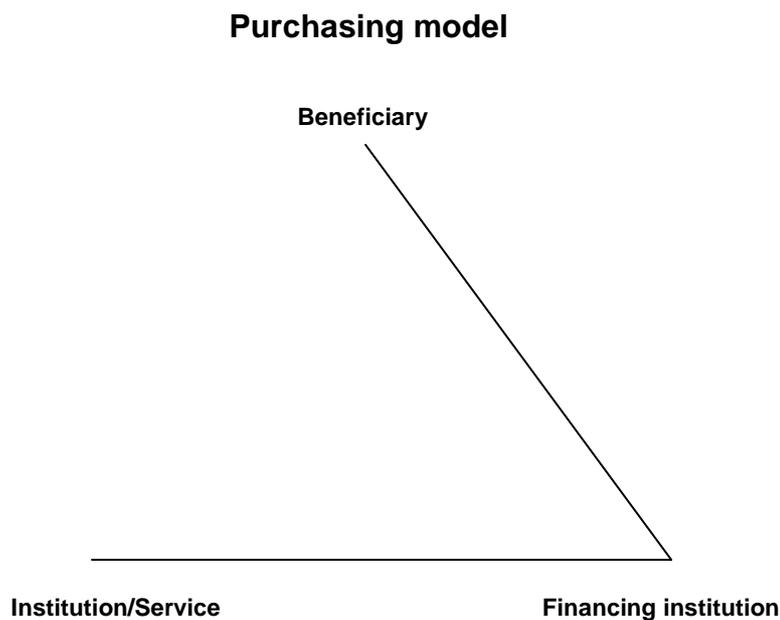
### **1. Possible forms of competition in the provision of social services**

#### **1.1 Public procurement under tendering law**

Public contract placing authorities procure goods, construction work and services by way of transparent tendering procedures. Bidders include expert, efficient and reliable companies, and different or additional demands may be made on contractors only if stipulated by federal or state law. The contract is awarded to the most cost-

efficient bidder.<sup>1</sup>

The public procurement law applies to the procurement activities of public contract awarding authorities. Under this law, social services have to be procured by the social security institutions (purchasing model). The social security institutions purchase the services they provide to the beneficiary from the service provider. The institution decides upon the places to be purchased and the design of the services. There is no contractual relationship between the service provider and the beneficiary. The service provider only acts as the agent of the social security institution.



If social services are contracted out, the contractor is normally guaranteed certain occupancy levels.<sup>2</sup> As a result, the public contracting authority bears the risk of occupancy. It “purchases” care places and must pay for the services purchased.

The purchasing model under tendering law is an **object-related** financing method. The social security institution controls the supply. The beneficiaries can only choose among the places purchased and paid for. In short: The human beings are subordinated to the money.

## 1.2 Licensing in the triangular relationship under social security law

In the triangular relationship under social security law, social services to be provided by the social security institutions may generally be contracted out to those

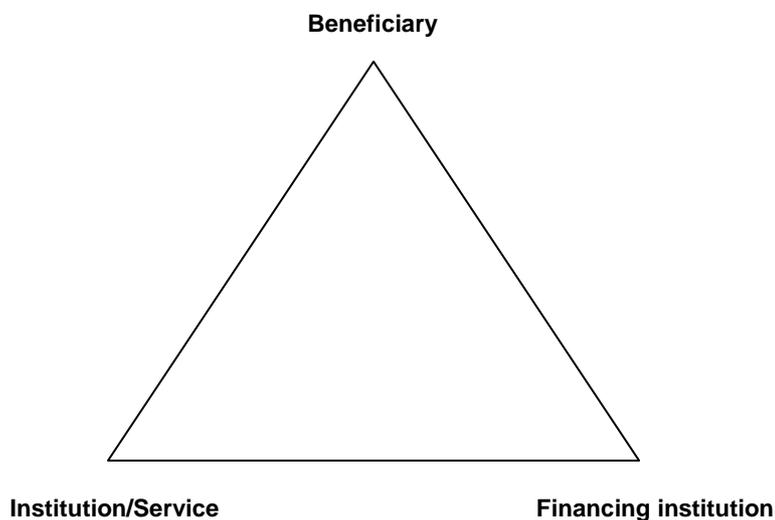
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<sup>1</sup> Details of the tendering procedure are regulated by the Tendering Ordinance (Vergabeverordnung - VgV) and the contracting rules - with respect to services, by the contracting rules for award of public services (Verdingungsordnung für Leistungen - VOL) which are referred to in the Tendering Ordinance.

<sup>2</sup> Cf., e.g., Düsseldorf OLG (higher regional court) 09/06/2004, ref.no. VII Verg 18/04: A guaranteed occupancy of only 70 % constitutes a violation of VOL/A Section 8 No. 1 (3) under which the contracting authority is not allowed to burden the contractor with an unusual risk for circumstances or events which are beyond his control and the price effects of which he cannot estimate in advance.

institutions or services only which have an accreditation as service providers. However, such institutions or facilities must be licensed beyond the demand forecast. Service agreements under social security law do not stipulate guaranteed occupancy levels, the operator of the institution bears the occupancy risk in this case. As a consequence, the service agreement does not qualify as procurement. It is rather comparable to a license. The social security institution does not incur costs in the event of excess capacities because it only pays for places actually occupied. When examining the provision of benefits, it will decide on a case-to-case basis whether or not the statutory entitlement conditions are met (i.e. “whether or not” the benefits are granted). This decision has to take the beneficiary’s right of preference and of choice into account subject to the excessive cost clause<sup>3</sup>. As a result, the beneficiary decides, by exercising his right of preference and of choice, which institution will provide the service (i.e. “where” the service will be provided).

### Triangular relationship



The beneficiary will also sign the private-law contract with the institution for the concrete provision of services. As a result, the non-statutory service provider becomes a party to the contract with the beneficiary in the triangular relationship under social security law. It does not act as an agent of the social security institution. The licensing model in the triangular relationship under social security law is a **subject-related** financing method. The beneficiaries may choose among all licensed service providers. Supply is not controlled by the social security institution. The service provider has no exclusive right to perform services. In short: The money is subordinated to the human beings.

### 1.3 Advantages of licensing over public procurement

#### 1.3.1 *Licensing as a more liberal and flexible form of competition; competition in price and performance for the beneficiaries*

Compared to tendering, licensing is a more liberal and flexible way of designing

<sup>3</sup> The excessive cost clause implies the right of the of the social security institution to reject the beneficiary’s choice if the costs of the chosen service exceeds a certain limit.

competition in the provision of social services.

Tendering social services requires long lead times. The necessary services have to be planned. Only the services tendered and contracted can be granted. If the actual need differs from the planning (which will be the rule rather than an exception, as shown by experience), too many performance units of a type of service will be purchased whereas other service types will be available in insufficient numbers only. Achieving a balance at short term is not possible. For this reason, and in contrast to the underlying idealistic theoretical assumptions, the purchasing model does not result in the provision of made-to-measure assistance to beneficiaries. In reality, they rather receive what had been bought.

Under the purchasing model, economic success does not depend on the satisfaction of the beneficiaries but upon who won the contract. Experience made in the field of social security during the past few years has shown that this is not subject to the quality of the service, but rather to its price. Tendering procedures thus result in a predominance of *price competition*. This cannot be balanced by quality assurance methods and client surveys.

Instead of relying on government planning and control, the licensing model is based on the initiative of the operators of institutions and the beneficiaries' rights of choice. By granting the license the social security institution maintains its influence on the quality and prices of the services.

The licensing model promotes the autonomy of the beneficiaries who turn into clients determining by their choice which service provider is able to maintain its position and who has to leave the market. This leads to a *competition in performance* among the institutions and services to attract the beneficiaries.

The exercise of a right of choice is dependent upon a diversified supply. The diversity of the types of social services offered corresponds to a liberal society and a liberal constitution. This also includes the possibility to choose social services based on specific values which are provided by the non-statutory welfare organisations. Under the licensing model, it is not the government (represented by the social security institution) that decides about the necessary degree of plurality and the organisations performing the service. This decision is rather made by the system controlling itself: All suitable service providers may offer services. Whether or not they are accepted is not determined by the social security institutions but by the beneficiaries exercising their right of choice.

The licensing model promotes the autonomy of the service providers. It is up to them whether or not they want to offer certain services. The license only depends on their capability to provide the services rather than a demand forecast by the social security institution. This freedom is inseparably linked to the assumption of the full occupancy risk by the service provider.

A diversified range of services enables the provision of the intended tailor-made assistance to the beneficiaries. Any excess capacities will not result in additional spending by the social security institution, but to *price competition* among the institutions. After all, if there are alternatives at hand, the institution offering the lowest rates has the highest chances of being fully occupied in view of the excessive

cost clause.

### **1.3.2 The role played by non-statutory welfare organisations**

In Germany the non-statutory welfare organisations are not agents of the government or the social security institutions. Accordingly, the public welfare organisations are required to respect the independence of the non-statutory organisations regarding their aims and the implementation of their tasks. When calling for tenders for services through open procedures, there is no room for independence of non-statutory organisations regarding their aims and the implementation of their tasks. The specification of services is unilaterally prepared by the public contract awarding authority, the contract for the performance of services is attached to the call documents and has to be accepted by the service provider without the possibility of making changes.

By contrast, under the licensing model, it is possible to include non-statutory organisations in the design of the services. Non-statutory organisations are involved in the definition of services and the way in which they are performed. In this way, the state/communal tasks of the social security institution are brought in alignment with the inherent tasks of the non-statutory organisations.

### **1.3.3 Covering demand through market mechanisms**

Government planning leads to optimum coverage of demand in theory only. In practice, it leads to misallocation and deficiencies in supply. It is highly attractive for social security institutions to prevent applications for assistance by making sure that supply is scarce.<sup>4</sup> The practice of supply control is very wide-spread for this reason.

With a view to covering demand, it is much more promising to grant the beneficiaries the power to demand the services they are entitled to and to leave the supply to the initiative of potential service providers. Despite all justified criticism about deficiencies in the concrete design, this is proven by the experience made with outpatient care under Social Security Law.

It is the task of social planning to identify any gaps that may nevertheless arise in this process, for example due to an inadequate potential demand in rural areas, and to close these gaps through the initiative of the social security institution. The social security institutions are responsible for initiating this kind of suggestions. This must be strictly distinguished from social planning in the form of supply control where the admission of service providers is subject to the demand previously identified.

The admission of institutions regardless of need cannot result in an unjustified extension of services in the system of social security because the social security institution decides in each individual case whether or not the statutory requirements are met.

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<sup>4</sup> Cf., e.g., *VGH Bayern* 13/07/2005, ref. no. M 18 K 04.6551

## **Conclusions**

The competition model under tendering law differs from the competition model under social security law with respect to some central issues. This mainly applies to the role of the various actors in the design and control of the supply of services. However, regarding social services it is superior to the model under tendering law because it strengthens competition by allowing a plurality of providers and abandoning supply control, it focuses on the beneficiary and his demand and it respects the autonomy of the service providers.

The competition model under social security law is transparent, non-discriminatory and compatible with the internal market of the EU.

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