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Inter-Communal Cooperation and the Application of Community Competition Legislation (from the German Point of View)

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I, Public Investment Needs – Some Examples

- **Communal investment needs until 2009:
approx. 700 billion €**
- **Investment needs Federal Traffic Infrastructure Plan
until 2015: approx. 150 billion €**
- **Investment needs schools: approx. 110 billion €**
- **Investment needs for canal networks (except
recoupment charges for local public infrastructure):
approx. 50 billion €**

II, Forms of Organisation in Municipalities

- **Municipal trading fund**
- **Owner-operated municipal enterprise**
- **Municipal company (e.g. limited liability company / joint-stock company)**
- **Institution under public law**
- **Inter-communal cooperation / local authority consortia (Zweckverbände)**
- **Special case: mixed investment company (inhouse problem – European Court of Justice (ECJ) “Teckal” case)**

III, Municipalities' Options for Acting

1, Formal privatisation

Municipality delegates the task of sewage disposal to a municipal company

2, Material privatisation

**Transfer of ownership and responsibility
(e.g. transfer of public housing to a private party)**

3, Public-private partnership (PPP) models – an extra possibility

Municipality delegates e.g. the construction/refurbishment, financing and maintenance of public buildings to a private party

IV, Problem: EU Commission Is Continuing to Undermine Local Self-Government

- **Infringement procedure "Hinte": consortia and EU public procurement law**
- **EU Commission criticises award manners of German municipalities (e.g. so-called de facto awards)**
- **At the moment over 30 infringement procedures against Germany because of infringement of EU public procurement law**
- **Another problem:
Jurisdiction of the European Court of Justice as well as of national courts concerning inter-communal cooperation**

V, ECJ Judgment of November 18, 1999 – “Teckal” (Commission of a Municipal Company)

ECJ judgment:

Inhouse business without a public award procedure is possible, if:

- **“...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.”**

▶ VI, ECJ Judgment of January 11, 2005 – „Stadt Halle“ (Inhouse Business)

- 1, Minor shares of a private undertaking in the enterprise rules out that the contracting entity exercises control (no “inhouse business”)**
- 2, Consequence: call for tender is obligatory**
- 3, Justification: provide an undistorted competition / equal treatment**
- 4, No single case-evaluation of “control”**
- 5, Positive: legal security**

▶ **VI, ECJ Judgment of May 11, 2006 – “Carbotermo” (Inhouse Businesses)**

1, “control”:

“...the contracting authority...” must exercise

“...power of decisive influence over both strategic objectives and significant decisions of that company...”

> Ample managerial powers of the Board of Directors (supervisory board) in case of a joint-stock company rule out a control

But: In principle, it is possible that a contracting authority which holds conjointly with another contracting authority the entire capital of a company which is commissioned with an order exercises control which is similar to that which it exercises over its own departments

VI, ECJ Judgment of May 11, 2006 – „Carbotermo“ (Inhouse Businesses)

2, “Essential part of activity”:

Condition is fulfilled, if the undertaking “carries out the essential part of its activities with the controlling authority [and] if that undertaking’s activities are devoted principally to that authority and any other activities are only of marginal significance.”

> All circumstances of that special case have been paid attention to!

“It is also irrelevant who pays the undertaking in question, whether it be the controlling authority or third-party users of the services provided ... The issue of in which territory those services are provided is also irrelevant.”

VII, ECJ Judgement of October 13, 2005 – “Parking Brixen” / ECJ Judgement of April 6, 2006 – “ANAV/Bari” (Award of Service Concessions)

1, Principle:

Award of service concessions does not fall under formal procurement legislation (Directive 2004/18/EC)

2, But: “...for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition...” has to be ensured (basic rules of the Treaty establishing the European Community – transparency, equal treatment, non-discrimination)

Also: ECJ judgment of July 21, 2005, „CoNaME” case

ECJ Judgement of October 13, 2005 – “Parking Brixen” / ECJ Judgement of April 6, 2006 – “ANAV/Bari”

3, Inhouse award of a municipality to Stadtwerke-AG (joint-stock company for energy, water supply etc.) without formal procurement procedure possible, if AG not “market-orientated” and:

- Municipality holds 100% of the shares**
- “Essential” territory of activity is restricted to the grantor’s municipal territory**
- No opening for other – private – capital**
- Municipality exercises over the undertaking concerned a control which is similar to that which it exercises over its own departments, e.g. through a restricted power of attorney for the supervisory board**

VIII, ECJ Judgment of January 12, 2005 – “Spain” (Inter-Communal Cooperation)

- 1, A general – legal – non-application of procurement law for inter-communal cooperations is illegal according to EU legislation**
- 2, Article 1(a) Directive 93/36/EEC and 93/37/EEC: procurement law concerning contracts for pecuniary interest between a contracting authority and a supplier**
- 3, Reassurance of the Oberlandesgericht Düsseldorf (Higher Regional Court) (magazine for procurement law “VergabeR” 2004, page 619 and following) / Oberlandesgericht Frankfurt (“VergabeR” 2005, page 80 and following)**

IX, Inter-Communal Cooperation and Procurement Law

1, Consortia (Zweckverbände): infringement procedure „Hinte“
EU Commission demands a transparent procedure for service concessions (cp. ECJ, Parking Brixen)

and:

Usually, only in case of a full delegation of tasks, no award procedure is to be done. („delegation agreement“)

2, Agreement under public law and procurement law:

- Judgment of the Oberlandesgericht Düsseldorf of May 5, 2004**
- Judgment of the Oberlandesgericht Frankfurt/M. of August 17, 2004**
- Judgment of the Oberlandesgericht Naumburg of November 3, 2005**
- Judgment of the Oberlandesgericht Naumburg of March 2, 2006**

Inter-Communal Cooperation and Procurement Law

3, Public Procurement Tribunal Cologne March 9, 2006 (not final!)

The full delegation of the task of waste disposal, done by several municipalities, to the incorporated consortium "RegioEntsorgung" does not fall under procurement law.

The incorporation of a public enterprise in form of an institution under public law and the simultaneous delegation of the consortium's tasks to this institution does not fall under procurement law either.

(Justification: "inhouse business")

X, Conclusion of ECJ Judgments

- 1, Any private minor shares:
No inhouse, but obligatory call for tender**
- 2, Inter-communal procurements:
No general non-application of procurement law (by law)**
- 3, Solution for municipalities?**
 - **Remunicipalisation**
 - **full delegation (privatisation) without procurement**

XI, Possibilities to not apply procurement law/Local Self-Government

1, Fulfil tasks with own means

2, Merely municipal-borne company:

According to ECJ "Teckal" in principle possible:

- **Common control (see para. 36 II page 2 German Act against Restraints on Competition = Gesetz gegen Wettbewerbsbeschränkungen/GWB)**
- **ECJ January 11, 2005: undistorted competition/market**
- **Participation of mere public authorities**

Possibilities to Not Apply Procurement Law/Local Self-Government

3, Special examples for control

- **Control of a municipal company:**
Only in case of a 100% (inter-)communal control (joint-stock company: "not market-orientated")
- **Control in the case of a "sub-subsidiary" ("Enkel" – Oberlandesgericht Düsseldorf: New Administration Magazine NVwZ 2004, 254)**
- **Control in the case of "affiliate" orders („Schwester"-Aufträge): "associated to parent company" ("Mutter"-Zu-ordnung); "affiliates" ("Schwestern") are no third parties on the market**

Possibilities to Not Apply Procurement Law/Local Self-Government

- 4, Award of service concessions (but: transparency/competition, see ECJ of October 13, 2005 – “Parking Brixen”)**
- 5, Award by a contracting entity from a "special sector „ (Article 23, Directive on the "special sectors" of water, energy, transport and postal services), (para. 100 clause 2 f) and i) German Act against Restraints on Competition)**
- 6, Exception according to para. 100 clause 2 g) German Act against Restraints on Competition (exclusive right)**
- 7, Exertion of state authority (e.g. rescue service); (Oberlandesgericht Brandenburg, New Magazine for planning and building laws and procurement law NZBau, 2005, 236 and following)**

Possibilities to Not Apply Procurement Law/Local Self-Government

- 8, Material privatisation without procurement
(but – see Federal Court of Justice/BGH of February 2, 2005, magazine for procurement law “VergabeR” 2005, 328 and following: “selling” waste paper = award)**
- 9, Delegation agreement under public law:
(cp. last Public Procurement Tribunal Cologne of March 9, 2006 concerning the delegation of waste disposal to a consortium)**

XII, Perspectives/Municipalities' Demands

Bill of the former (German) Federal Ministry for Economics and Labour concerning para. 99 clause 1 page 2 German Act against Restraints on Competition (GWB) of March 29, 2005

„If a contracting authority has supply, works and service contracts fulfilled by another contracting authority according to para. 98 no. 1, 2 or 3, a public contract is not existent, as long as this second contracting authority carries out the essential part of its activities for the first contracting authority or does not carry out any activities on the market in order to fulfil the contract and as long as no private person holds its shares in the second contracting authority.“

► Perspectives/Municipalities' Demands

Decision of the Conference of the (German) Ministers of the Interior of June 24, 2005:

"Even if a delegation of tasks in the framework of an inter-communal cooperation is not accompanied by a shift of responsibilities (especially in case of a change of public duties towards third parties and the supervisory authority), this delegation of tasks to another local authority is no procurement. Completeness or irrevocability of the delegation of tasks cannot be important."



► Perspectives/Municipalities' Demands

Public Hearing in the parliamentary committee for Internal Market and Consumer Protection (IMCO) on April 20, 2006 – Proposal German Association of Towns and Municipalities:

"The delegation of tasks between municipal institutions on the basis of laws, decrees, agreements under public law or by incorporating consortia (Zweckverbände) is an issue falling under the organisational right of member states and does not imply a procurement falling under EU Procurement Directives. Completeness or irrevocability of the delegation of tasks cannot be important."

► **Perspectives/Municipalities' Demands**

- 1, Aim/approach of the German Federal Government concerning para. 99 clause German Act against Restraints on Competition (GWB):
Correct and needs to be supported**
- 2, Principle:
Guarantee of local self-government laid down in the German Constitution (Article 28 clause 2)**
- 3, Therefore:
Regulation on European level: a call for tender is not obligatory in case of inter-communal cooperations**

Perspectives/Municipalities' Demands

- 4, Incorporation or commission of a consortium: No regular relationship between contracting entity/undertaker (procurement law (-))**
- 5, Inter-communal cooperation is a mere shift of responsibility for municipal tasks, which is not to be put under procurement law.**
- 6, Inter-communal cooperation is one of those few fields, which municipalities can (and have to) still optimise in the future.**

The role of public authorities is more and more reduced to a mere function of guarantee and/or control.

Proved public service structures, built up in decades, are more and more put at risk.





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