Federal Union of Local Government Central Associations

(German Association of Cities) (German County Association) (German Association of Towns and Municipalities)

Position paper on the Public Hearing on "Review of the Workings and Effectiveness of the Public Procurement Directives" in the European Parliament on April 20, 2006

At the moment, different developments in European legislation endanger an efficient task completion of local authorities.

Inter-communal cooperation and Public Procurement legislation

As local authorities have an interest in an urgently required legal security, it has to be provided that inter-communal cooperation, which is part of the internal administrative structure of local authorities, are not implied in the European Public Procurement legislation.

At the moment, German as well as other European local authorities can agree upon the conjoint compliance of tasks, which they realise voluntarily or due to national legislation. The conjoint compliance of public tasks is indispensable for the citizens, as it allows an efficient local range of services offered. According to German legal provisions, which exist for decades, the main legal possibilities of inter-communal cooperation especially are local authority consortia ("Zweckverbände") and agreements of public law ("öffentlich-rechtliche Vereinbarungen").

Now, the European Competition and Public Procurement legislation is more and more caving the inter-communal cooperation model as a form of internal state organisation. The question is, to what extent the different forms of inter-communal cooperation is to be seen as public contract in the sense of the European Public Procurement legislation. According to Public Procurement legislation, a "public contract" is existent, if a contracting authority and one or several undertakings enter into nongratuitous contracts. Pursuant to the jurisdiction of the European Court of Justice, "third party of public law" can also be seen as "undertakings".

This fundamental point of view of a third party, that can also be another local authority as soon as tasks are transferred, illegally restricts the local authorities' sphere of influence when providing public services. The point is, that inter-communal cooperation is not a purchase on the market, there is no procurement process. It only is an internal rearrangement of public competences and warrants. There is no space for applying the Public Procurement legislation in this context. Therefore, the main concern facing European institutions is the possibility for European local authorities to freely and on their own responsibility decide, how far the tasks, which they fulfil for their citizens and for the economy, are fulfilled by the local authorities themselves or through inter-communal cooperation, which is free of public procurement. Or these tasks are fulfilled by external third parties after a tender procedure.

Therefore, restrictions regarding inter-communal cooperation is especially to be rejected out of the following reasons:

- The proportion of the member states' competence in designing the administrative organisation and the European competence for Public Procurement are reversed.
- The local authorities' exclusive organisational competence, which is protected by European as well as national constitutional law, is caved.
- If there is no possibility to conjointly fulfil a task with other local authorities or without the procurement regime, an automatic enforcement to privatise is created.

Regarding this, the freedom of procurement for inter-communal cooperation should be clarified in the European Public Procurement legislation as follows:

"The transfer of tasks between local authority institutions on the basis of acts, decrees, agreements of public law or by creating an local authority consortium is a topic belonging to the organisational competence of the member states and does not contain a procurement transaction according to European Public Procurement Directives. The completeness or irrevocability of the task transfer is not deciding."

Reasons:

The European Community is continuously extending the legal frame for the tendering of public contracts. As a consequence, it is challenging the local authorities' exclusive organisational competence, especially in the scope of inter-communal cooperation. The existence of a procurement transaction is decisive for the application of the Public Procurement legislation. This means that a service on the market is provided by a third party. This is not the case when tasks exclusively are transferred between local authorities. It only is an internal rearrangement of public competences and warrants. One state institution is assigning a task to another state institution in the same member state. This right of the local authorities' exclusive organisational competences is protected by the constitution in many member states. On the European level, it also is guaranteed as a general principle of law by the Charta of Local Self-Government, ratified by all EU-member states, and by the Treaty establishing a Constitution for Europe (article I – 5). This fixture gives the local authorities the right to self-responsibly fulfil tasks, also by cooperating with other local authorities.

„In-house" Procurement

Taking into account the Public Procurement legislation, one has to think about the question if the award of public contracts of local authorities to companies of private law whose shareholders are all local authorities require a public procurement procedure, or if it is an own business, which is free of procurement (In-House-Business). In its so called Teckal-Decision, the European Court of Justice explained that an In-House-Business which is free of procurement is existent, if the public contract is awarded to a company

- which is controlled by the local authority, similar to a control exercised over an own department.
- which substantially performs its tasks for the local authority or authorities, that hold their shares.

There are different issues concerning both criteria:

a) A control similar to a control exercised over an own department under participation of several local authorities

In its fundamental decision of 18th November 1999, the European Court of Justice acted on the assumption that several local authorities participate. Therefore, a control similar to that

exercised over own departments, also is possible for an inter-communal association composed out of several local authorities. The control is practised by a “common operation” of all local authorities joint in this association. According to this, a single operation through a single local authority can naturally not be decisive in such cases.

b) Criteria of the participation of private third parties

Regarding the control similar to a control exercised over an own department, one has to wonder if a minority interest of private partners in private companies of public authorities annihilates the “In-House-characteristic”. In its decision of 11th January 2005, the European Court of Justice adjudicated that an In-House-Business, which is free of a public tendering procedure, only is existent, if its shares are entirely held by the public authority. This decision especially concerns those public-private partnerships, whose private partner had already been chosen through a competitive public procurement procedure. In this case, the purpose of this company sails in ballast, if a follow-up public contract can not be given to such a company, but has to be put out to tender. On the other hand, the decision comprises a lot of cases in which the private partner does not have a holding in the completion of the task fulfilled by the company, but only has a participation in nominal capital. Such questions of financial participation, however, do not belong to the legal community regulations on Public Procurement.

As to promote public-private partnerships, that result in a gradual privatisation, legal procurement wattles are to be avoided. Therefore, an explicit secondary legal regulation is to be aimed at, which allows the assignment of mixed-economic companies under certain conditions and reasonable limits.

As a starting point, one could revert to the In-House-definition of the European Parliament, which was suggested during the negotiations of the Public Procurement legislation (proposal of the EP concerning article 18a: the “classical” Directive - 2004/18/EC). This proposal envisions that a control can also be existent, if the state, local authorities or other institutions of public law predominantly finance the institution concerned; if its management is supervised by the beforehand mentioned; or if its administrative, management or supervisory body majoritarian is composed out of members, who have been appointed by the state, local authorities or several institutions of public law. The design of the company (control) agreement is decisive.

Hence, the proposal for an amendment could have the following wording:

“This Directive does not apply to contracts awarded by a public contractor to an entity legally distinct from it, if the public contractor 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 person carries out the essential part of its activities [at least 80 %] with the controlling public authority or authorities. A control which is similar to that which the public contractor exercises over its own departments exists, if the entity is controlled by one or several public contractors according to Article I Paragraph 9 Phrase 2 lit. c. In case of an association of several local authorities, a control similar to that exercised over own departments exists irrespective of the influence of every single local authority. In such case, an overall control of the associated local authorities is sufficient.”

Public-Private Partnership

One also has to include public-private partnerships (PPPs) in this entire complex. There also are issues of delimitation in the scope of PPPs. They are institutionalised in the form of common companies or are accomplished through contractual agreements for certain projects. According to the decision of the European Court of Justice of 11th January 2005, all public contractors have now to tender public contracts pursuant to Public Procurement legis-

lation, even if these contracts are tendered to a mixed economic financial holding company which is dominated by them and at which the private partner only holds any shares. With this decision, the European Court of Justice clarifies the criteria of control as similar to a control exercised over an own department, which was defined in the Teckal-decision. Until then, it has been indistinct in which case a public contractor controls his contract partner, that is the financial holding company, as if it was an own department. The Court now ascertains that the (even only low) share of a private company in the capital of an enterprise, at which the public contractor participates, in every case excludes that the public contractor controls the company similar to a control exercised over an own department.

Therewith, a private participation at local companies and projects in practice is excluded in many cases. In the scope of public-private partnerships, the dominance of Public Procurement legislation is going to lead to remunicipalisations on a larger scale, which can already be observed in practice. Through this it thwarts the use of possible efficiency profits by including private persons.