

Overview

- Privatization
 - Transfer of shares and of activities
 - to private companies
- Quasi-In-House
 - Tasks not performed by own means as In-House
 - in contrast to In-House legal personality

Quasi-In-House

- 100%
 - Stricto sensu not a PPP as there is no partner
- Public-Public-Partnership [gemischt-öffentlich]
- Public-Private-Partnership (=Semi-public company [gemischt-wirtschaftlich])

Main Actors – provision of services

- vertically: bottom-up, provided to controlling entity
 - e.g. daughter to mother
- vertically (inversely): top-down
 - e.g. mother to daughter

For each

- direct: between daughter and mother
 - indirect: between (great-)grandmother and daughter
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- horizontally
 - between sisters
 - between cousins

Quasi-In-House: Case-law

- 100% Parking Brixen (C-458/03)
ANAV (C-410/04)
- Public-public
 - direct Teckal (C-107/98)
 - indirect Carbotermo (C-340/04)
- Semi-public
 - indirect Stadt Halle (C-26/03)

Case-law: chronology

C-107/98	Teckal	18 November 1999
C-26/03	Stadt Halle	11 January 2005
C-458/03	Parking Brixen	13 October 2005
C-410/04	ANAV	6 April 2006
C-340/04	Carbotermo	May ? 2006

Basis: Teckal

- management of the heating services
- municipality to AGAC
- AGAC: consortium of municipalities
- in principle, directives are applicable, except in case 2 criteria are met

Teckal-Criteria

- Entity exercises over the person concerned a **control** which is similar to that which it exercises over its own departments
- that person carries out the essential part of its **activities** with the controlling local authority or authorities

Parking Brixen: facts

- 'Stadtwerke ': legal person, provides local public services for the municipality of Brixen (*i.a.* management of car parks and garages)
- Stadtwerke converted into a company limited by shares (= **100% daughter**)
- Brixen entrusts that company the management of a car park

Parking Brixen: judgment

- Public service concession
- Not the directives but primary law, e.g, fundamental freedoms
- derogation from primary law if Teckal-criteria are met
- Court examines first Teckal-criterion only

Parking Brixen: judgment

General assessment

- All legal provisions and circumstances
- influence over strategic objectives and significant decisions

Parking Brixen: judgment

Assessment of the specific case

- legal form: company limited by shares
- broadening
 - objects (e.g. information technology, telecommunications)
 - expansion of the geographical area
- obligatory opening to private capital
- Broad independence vis-à-vis Brixen
 - Considerable powers of the Adm. Board
 - Control limited to rights assigned to the majority

ANAV: facts

- Municipality of Bari has a
 - 100% daughter in form of a joint stock company (AMTAB) which provides public transport services in Bari
 - concluded a contract with AMTAB without tender
 - originally, 80% of the shares should be transferred to private shareholders
 - in January 2005, Bari altered its intention

ANAV: judgment

- national court shall determine whether Bari intends to open capital
- decisive if capital is open to private shareholders for the duration of the contract

Stadt Halle: facts

- Plan on the treatment of waste
- Municipality Halle has
 - 100% daughter which has a
 - 100% daughter which has a
 - 75,1% daughter (great-granddaughter), rest held by a private limited liability company (= Semi-public company)

Stadt Halle: judgment - control

Semi-public company does not fulfil criterion

for 2 reasons

- Private capital investment follows considerations proper private interests and pursues objectives of a different kind than public entities
- Would interfere with the objective of free and undistorted competition (private undertaking would have an advantage over competitors)

Carbotermo: facts

(judgment awaited soon)

- heating: provide energy and services
- municipality entrusts grand-daughter
- granddaughter: 100% daughter of a 99,98% daughter
- Several public 'mothers'

Teckal-criteria: meaning

- Legal certainty only for first criterion and only for facts already decided by the ECJ
- open:
 - horizontal (between sisters)
 - inversely vertical
- Control
 - Semi-public companies never fulfill
 - Other facts: specific circumstances, even with regard to 100%

2nd Criterion: activities

- Market (existence?, conditions to determine)
- factual circumstances, not powers according to the entity's statute
- 'essential'
 - activities taken into account
 - only object of contract?
 - only activities provided to partner of contract or to all shareholders?
 - relevant who pays the service?
 - which geographical area?
 - turn-over, net-income, ...?
 - which period?

Teckal-Criteria fulfilled: Consequence?

- Not the directives but primary law are applicable
- except similar derogation applicable

Violation of EC law

- by awarding a contract without a sufficient degree of advertising
- Consequences:
 - obligation to terminate?
 - Only if contract not totally fulfilled ?
 - ex tunc or ex nunc ?
 - MS has to take measures to conform with judgment after a declaration of infringement