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Dear Reader

Our third newsletter for 2010 reports on the first successful real-life application of the procurement-law competitive dialogue to a complex major urban investment project. Last week procurement, planning and building law also saw a number of important changes. In addition we have reports from those company-oriented areas of law our firm specialises in, i.e. on rulings from the fields of commercial, property and zoning law.

In the hope that this newsletter will provide you with new insights, I remain

Yours sincerely

Dr Johannes Grooterhorst
Attorney at Law

A. Current News

Procurement Law: First successful application of the competitive-dialogue procedure within the context of a major project

The competitive-dialogue procurement law procedure introduced by the Public Private Partnership (PPP) Acceleration Act in 2006 has passed its first major test in the city of Hanau. After two years of intensive project work the City Council Assembly of the city of Hanau, following a unanimous recommendation of the municipal authorities and after applying the EU procurement-law procedure known as the competitive dialogue, accepted a tender on 31.05.2010. The new urban-development approach thereby taken by the city of Hanau has thus proved to be a success.

Complex inner city project

In the summer of 2008 the city of Hanau issued a Europe-wide invitation to tender for a complex inner city project involving the erection of a shopping center, a multiplex cinema, a four-star hotel, the implementation of a housing project in the centre of town and the restructuring of public traffic spaces. The contract awarding method chosen by the city of Hanau was that of the competitive dialogue.

The Competitive Dialogue

Pursuant to Section 3a Subsection 4 No. 1 VOB/A (German contracting rules for the awarding of building contracts) the competitive dialogue method can be applied if the public client is objectively incapable of specifying the technical means needed to meet his goals and requirements or if the client is not in a position to spell out the legal and financial conditions pertaining to the project. Such a so-called qualified inability obtains if for example the client is seeking to access innovative concepts that are beyond the scope of existing standardised ones. To cope with this situation the Competitive Dialogue provides for a number of so-called rounds of dialogue in which the client is given the option of discussing with the various tenderers chosen the range of possibilities that exist for meeting the client's requirements in the best possible way. By its very nature this is a cooperative endeavour, comparable to those developed in the private sector within the context of the building team or prefair approach.

Three phases of dialogue

The Competitive Dialogue procedure has three phases: The competition to take part in the tendering process following a Europe-wide invitation to tender (37 calendar days), the dialogue phase, which can be subdivided into several steps, and the final tendering phase.

The competition and the rounds of dialogue

Therefore the city of Hanau after announcing its adoption of the Competitive Dialogue procedure in the Official Journal of the European Union (2008/S 118-156842) engaged in several rounds of dialogue with four different investors. Following a decision by the municipal authorities of the city of Hanau on 26.10.2009 the city of Hanau continued to negotiate, after the rounds of dialogue had been completed, with two of the tenderers up to a point where two different ready-to-be-signed offers and contracts were drawn up, which were to be submitted to the Office for Awarding Contracts by 10.05.2010.

Practical considerations:

The Competitive Dialogue is a flexible procedure that ensures competition between economic participants while doing justice to the requirement that the public client is put in a position to discuss all aspects of the contract with all tenderers. The pro-

cedure adopted in Hanau seems to show that this fairly young mode of awarding contracts has left its teething troubles behind and appears to be an appropriate means for municipalities to achieve the "best possible" solution to their contract awarding problems. Given that throughout the Federal Republic some 50 inner-city shopping center projects are currently being planned the Hanau procedure is unlikely to remain an isolated case. In the case above Rechtsanwälte Grooterhorst & Partner advised the tendering party that eventually prevailed.

Dr Rainer Burbulla

B. Commercial and Company Law

Commercial Transactions: Higher rate of interest in the event of late payment in claims-for-payment cases

I. According to Section 288 Subsection 2 of the German Civil Code (BGB) the rate of default interest in the case of legal transactions to which a consumer is not a party is 8 percentage points above the basic rate. In contrast the default interest rate of consumers amounts to 5 percentage points above the basic rate. Having said that, however, the law fails to define when a claim for payment meets the criteria spelt out in Section 288 Subsection 2 BGB.

The claims for payment concept

A recent ruling of the Federal Supreme Court (BGH) gives additional information on the claims for payment concept involved (judgement dated 21.04.2010 – 7 ZR 10/08).

Section 288 BGB translates an EU directive on combating late payments into German law

As a first step the Federal Supreme Court pointed out that Section 288 Subsection 2 BGB had been introduced as a means of translating the European Directive on Combating Late Payments in Commercial Transactions (2000/35/EG) into German law. The object of the directive was to combat late payments in commercial transactions, as these were considered to be one of the main reasons for corporate insolvencies, the court noted. The directive was hence restricted to payments undertaken in the course of commercial transactions and did not extend to either transactions involving consumers or payments of interest in connection with other payments, the court went on to say. Within the context of the directive the term commercial transaction referred to business transactions between companies or between companies and public bodies that led to the supplying of goods or the rendering of services against payment. The term service here was not to be restricted in its meaning to that of service contract as defined in Section 611 BGB, the court observed. Thus in this context the granting of credit or the giving of a loan amounted to a service, the court stated. Summing up its position the Federal Supreme Court declared that the condition for there being a claim for payment was that the claim amounted to consideration for performance rendered or to be rendered by the creditor. The duties obtaining within the reciprocal relationship had to be determined with respect to the will of the parties and with an eye to the specific conditions of each individual case, the court concluded.

Ralf-Thomas Wittmann

Compliance: Criminal liability arising from the giving of benefits – pharmaceutical industry

II. The body of judicial rulings in compliance cases is steadily growing (see our Newsletter 2/2010): On 23.02.2010 (File No.: Ws 17/10) the Higher Regional Court in Brunswick ruled that the granting of benefits to physicians in private practice by pharmacists, pharmaceutical companies or other persons or entities belonging to the pharmaceutical industry amounts to a taking or giving of bribes in commercial practice as defined by Section 299 of the German Criminal Code (StGB). The ruling classifies physicians in private practice as agents of statutory health insurance funds.

Section 299 of the German Criminal Code

Section 299 StGB states that anyone who as, for example an "agent of a business, demands, allows himself to be promised or accepts a benefit for himself or another in a business transaction as consideration for according an unfair preference to another in the competitive purchase of goods or commercial services shall be liable to imprisonment of not more than three years or a fine." This statutory offence restricts the threat of punishment in public officials-related cases involving the taking or giving of benefits or bribes to private persons.

But even below the threshold of criminal liability presents and invitations (such as one to experience the spectacular regatta known as the Kieler Woche close up [see the current press release]) merit more intense scrutiny. Criminal liability considerations extent to what to date have been fairly common forms of additional "income" provided by business partners to employees: the bottle of Bordeaux given as a Christmas present to the head of the department or the sailing trip in the Mediterranean enjoyed by the CEO. Even those gifts to which no criminal liability attaches are important because they have the potential of being abused as instruments of corruption, of serving – even in the absence of anything given or done in return – as a "starter drug" or "bait".

Practical considerations:

It is thus advisable within the context of an efficient compliance system to set the level below which gifts are acceptable very much lower than the threshold established by criminal law – and in so doing nip any attempts to subvert the system in the bud. This serves both the purpose of maximising the number of employees sensitised to the topic and minimising the number of gift/benefit cases in the company to which the provisions of criminal law apply. In pursuit of such a strategy the following points have proved to be effective:

- A binding set of rules such as a code of conduct.
- The establishment of a threshold beyond which gifts/benefits are unacceptable.
- The establishing and explanation of a limited set of criteria for making the distinction between permitted and prohibited gifts/benefits – chief among these: "relation to business" and "(social) adequacy".
- The introduction of a duty of documentation and the examination of all received and given gifts/benefits beyond a certain threshold value.
- The creation of a compliance-violation reporting system that encompasses inadmissible gifts/benefits.

The sanctions at the disposal of the company in the event of an inappropriate gift/benefit being nonetheless accepted extend from disciplinary and other labour-law measures to informing the public prosecutor's office about the incident.

Conclusion: In the context of the fight against corruption gifts and invitations are an important compliance topic. Of primary importance is the raising of employees' awareness of the link between gifts/benefits and corruption as well as the establishment of easy-to-make distinctions between admissible and inadmissible gifts/benefits. Thus the odd bottle of beverage might be acceptable as a gift with a clear conscience; while with regard to the sailing trip this is probably not the case; whether it is permissible to invite an employee to the Kieler Woche is currently being investigated.

Dr Lutz Kniprath

Investment law: No duty to inform on the part of freelance investment advisers

III. The kind and extent of the duty to inform that investment advisers have or do not have towards their customers has been a subject of litigation for many years now. Especially the question if and to what extent investment advisers are obliged to reveal their commissions to their customers has sparked numerous actions for damages against banks and other institutions advising on investment.

The banks' duty to inform

Following the much commented on opinion of the Eleventh Senate of the Federal Supreme Court (BGH) expressed in its ruling of 19.12.2006 (XI ZR 56/05) that banks when advising customers on equity funds have a duty to reveal to their customers the otherwise invisible commissions they receive from the issuing party or parties, the BGH had subsequently extended these principles to advice given by banks to customers on investing in closed funds (see BGH ruling dated 20.01.2009 – XI ZR 510/07).

No such obligation on the part of freelance investment advisers

Now the Federal Supreme Court – this time its Third Senate – has issued a further landmark decision on the topic of reimbursements in an investment advice context. Thus the BGH in its judgement of 15.04.2010 (III ZR 196/09) made it clear that its previous rulings do not apply to freelance investment advisers. In the opinion of the court the interests when providing advice of a freelance adviser not affiliated with a bank were not identical to those of an adviser working for a bank. At least in such cases in which the customer himself did not pay a commission to the adviser, with the adviser receiving his commission from a third party, there was no duty on the part of the freelance adviser to inform his customer about the commission, the court found. The BGH made an explicit distinction between customer relationships designed for the long term, of the kind that typically exist between banks and their customers, and those generally of a short-term nature between a freelance adviser and his customers.

Practical considerations:

The Federal Supreme Court's ruling of 15.04.2010 highlights the fact that the judicial approach to reimbursements and commissions in investment law continues to be in a state of flux. So-called investor advocates are fighting for a general duty to inform. It would thus seem advisable for freelance advisers to keep a critical eye on the developments in the judicial realm while at the same time making sure that the investment prospectuses they use are precise with regard to the funds' equity-capital acquisition costs. From the point of view of the banks it would appear to make sense to see, on a case-by-case basis, whether it might not be possible in lawsuits for damages revolving around allegations of negligent advice to use some of the arguments propounded by the BGH in its ruling of 15.04.2010 to their advantage.

Johannes Pitsch

C. Labour Law

Notice of termination pending a change of contract – degree of specificity of the modification

Notice of termination pending a change of contract in a rescue scheme context

I. In its judgement of 10.09.2009 (2 AZR 822/07) the Federal Labour Court (BAG) has adjudicated on the validity of a set of notices of termination pending a change of contract.

In the case in question an employee had received five regular notices of termination pending a change of contract from his employer in the form of five separate letters. The subject of each one of these was the changed contractual circumstance arising from a personnel-related measure that was part of a previously agreed upon rescue package. All of the notices of termination ended with the following passage:

"Your other employment contract terms remain unchanged. We take the liberty here, however, of pointing out that you will be receiving further four identically dated notices of termination pending a change of contract."

Specific or ascertainable offer required

The BAG noted that the termination was already invalid on the grounds that the employer in his notice of termination had failed to submit a sufficiently specific or ascertainable offer of modification to the contract to the employee. Even if he had taken all circumstances known to him at the time of the termination into account it would not have been possible for the employee to ascertain clearly from the five notices of termination sent to him what the nature of the employment relationship following the termination would have been, the court declared. The notices in particular failed to indicate unambiguously that the employment relationship would only continue to exist if the employee in question agreed to all of the changes sought by the employer.

Practical considerations:

With its ruling the Federal Labour Court has again made it clear that a modification offer contained in a notice of termination pending a change of contract must – in line with the conditions that apply to a normal contract offer – be specific or ascertainable. From the point of view of the employer the degree of specificity is primarily important for the following reason: In the absence of a sufficiently specific and hence legally acceptable modification offer and provided that statements by the employer and the conditions that pertain indicate that the employer is primarily interested in changing the terms and conditions of employment and not in a termination of the employment relationship independent of the modification offer, reinterpreting the notice as a notice of termination of employment is generally excluded as an option. The employment relationship would consequently continue with the conditions unchanged.

Johanna Noßke

Sideline activity and the scope of the prohibition to compete

II. In its judgement of 24.03.2010 (10 AZR 66/09) the Federal Labour Court (BAG) detailed the scope of the prohibition to compete as it exists within the framework of an employment relationship.

In the case in question a female employee's approximately-6-hours-a-week sideline was delivering newspapers, for which her gross monthly income amounted to about € 350. The employer had subsequently prohibited the employee from carrying out this sideline activity for a competitor.

The prohibition to compete and the occupational freedom guaranteed by Section 12 of the Basic Law: The overall picture now the decisive factor

Within the framework of its decision the BAG noted that when determining the scope of the prohibition to compete that existed in principle the occupational freedom of the employee guaranteed by Section 12 Subsection 1 of Germany's Basic Law (GG) had to be taken into account at all times. Thus when evaluating all circumstances of an individual case it was essential to determine whether – given the type of principal and secondary employment and the nature of the companies involved – there was or was not a threat to or interference with the interests of the employer, the court declared. In auxiliary activity cases there was much to be said for denying a connection to competition, the BGA observed. That was especially the case if an employee's secondary employment activity was merely part-time and an indispensable ingredient in the securing of that employee's livelihood.

The approach of the courts until recently

By espousing these principles the Senate of the Federal Labour Court has cast doubt on whether the adjudicative approach the courts have hitherto taken with regard to the evaluation of competitive activity can be maintained. According to that approach the manner in which an employee supported a competitor operating in the same field as his or her principal employer was beside the point, unless that is the sideline could be shown right from the start to be devoid of any supportive effect. The courts likewise chose to disregard the function played by the employee in the competitor's operations; any kind of service rendered to the competitor by the employee was considered prohibited.

Practical considerations:

From a practical point of view the decision of the BAG means that employers will no longer automatically be permitted to put a stop to an employee's sideline activity in a competition-protected area. Rather, an employer will henceforth be obliged to evaluate all circumstances of the individual case and in so doing have to determine whether – given the type of principal and secondary employment and the nature of the companies involved – there is or is not a threat to or interference with his interests. As the case in question did not depend on a decision by the BAG, observers can only wait and see if the Federal Labour Court will in future consolidate its critical position towards the current adjudicative approach to the scope of the prohibition to compete.

Johanna Noßke

D. Property Law

Private Construction Law: Tacit acceptance of planning work

Only in very rare cases is planning work subject to a formal acceptance procedure. However, such a formal acceptance can be decisive when for example it comes to deciding on whether a client's claims to performance are still outstanding and, not least, when claims for defects towards the planning party fall under the statute of limitations. As no such thing as a formal acceptance report exists, the parties have to rely on the specific circumstances for clues as to whether – and if so when – an acceptance procedure occurred.

Implied acceptance following payment and the expiry of a certain period of time

In its ruling of 25.02.2010 (VII ZR 64/09) the Federal Supreme Court declared that such a tacit or implied acceptance could consist of the client failing to complain about defects after the work has been completed and the invoice paid and after he or she has been living in the almost completed building for several months.

Claims to performance resulting from changes to the architect's plans?

In the case decided by the BGH a client had commissioned a structural engineer (AN) in 2001 to draw up a plan for the load-bearing structure of a building based on the architect's plan for the same. The client had paid the structural engineer's final invoice towards the end of 2001. An acceptance procedure was carried out only with regard to the work done by the prime contractor not with regard to all work done on the building. In 2002 the client moved into the not yet completed house. In the following year the structural engineer handed some static calculations and a number of position plans over to the client. These consisted of the complete plans for the load-bearing structure that had formed the basis of the actual building work undertaken. As the static calculations handed over were not based on the later changes made to the architect's plans the client argued that it was the duty of the structural engineer to provide him with the appropriate calculations, plan drawings included.

The Federal Supreme Court rejected this line of reasoning. In the opinion of the court the client had at the very latest by the end of 2003 tacitly accepted the planning done on the load-bearing structure as generally in accordance with the terms of the contract.

The notion of implied acceptance

A client tacitly accepts work done by a contractor if he without explicitly saying so indicates to the contractor that he considers the latter's work as generally in accordance with the terms of the contract. According to the rulings of the courts this requires actual behaviour on the part of the client that is capable of conveying – in an unambiguous and convincing manner – to the contractor his will to accept the work done. In the case of work done by a structural engineer implied acceptance is present if the client receives the plans given to him by the structural engineer while indicating to the engineer that it is his intention to approve of the work done as generally in accordance with the terms of the contract. In such cases however the courts have found an adequate inspection period indispensable. In the opinion of the Federal Supreme Court the three months that in the case in question would have been available to inspect the work were an adequate period. A decisive factor in the court's reasoning was the fact that the client had been living in the house for quite

some time before the plans were handed to him. Having failed to assert claims for defects the client had thereby in the view of the Federal Supreme Court tacitly accepted the work done by the structural engineer. This being so any claims to performance by the client towards the structural engineer were excluded, the court stated.

Practical considerations:

Implied acceptance can also consist of the unconditional and unreserved payment of a final invoice; a fact the judgement of the BGH does not go into. If the circumstances point to implied acceptance, the client who knows about specific defects should reserve his rights. Otherwise he runs the risk of forfeiting them.

Ralf-Thomas Wittmann

E. Commercial Tenancy Law

The written form – extension of the period for acceptance – "outward appearance" and Sec. 126 Subsec. 2 BGB

I. In its judgement of 24.02.2010 (XII ZR 120/06) the Federal Supreme Court has made its views known on two important and hotly disputed tenancy-law issues concerned with the written form. Firstly, the BGH noted that an extension of the period for acceptance of a statement aimed at concluding a long-term lease agreement need not abide by the written-form requirements outlined in Section 550 of the German Civil Code (BGB). And secondly, the court declared that if the terms of an implied lease agreement were contained in a document that "in outward appearance" conformed to the requirements of Section 126 Subsection 2 of the German Civil Code this would serve to meet the requirements of the written form laid down in Section 550 BGB.

Written extension of the period for acceptance

In the case in question the parties concluded a 15-year lease agreement on as-yet-to-be-built non-residential premises. The lease period was to begin following the handover of the premises. Regarding the countersignature to the contract, both parties had agreed that the party to sign the lease agreement first would be bound to the offer pertaining to the agreement for one month following the receipt of the agreement by the other party. This period for acceptance the lessor who had signed the contract first extended by two weeks with the aid of a separate letter. The lessee subsequently signed the lease agreement towards the end of the extended period for acceptance, i.e. after a period of six weeks.

Period for acceptance no essential condition of the lease agreement

In the final analysis the BGH came out in favour of the lease agreement having a legally binding written form, thereby dismissing the action of the lessee aimed at showing that the lease agreement had been signed – not for 15 years – but rather for an indefinite period of time. The basis of the action was the fact that in the case of lease agreements the period for acceptance is two to three weeks (compare the decision of the Higher Regional Court Brandenburg of 18.03.2009 – 3 U 71/08). Such a period was not complied with here. In the opinion of the BGH however the particular period for acceptance and the compliance with the same were not essential conditions of the agreement that would have made them subject to the requirements of the written form. Rather, these had had to do with the coming into existence of the lease agreement, the court declared. That the granting of the extension of the period for acceptance of the lease agreement had been done with the help of a separate let-

ter was thus considered by the Federal Supreme Court to have no detrimental effect upon the written form.

Implied acceptance of a belated declaration of acceptance pursuant to Sec. 126 Subsec. 2 BGB suffices

It was likewise of no detrimental effect to the written form, if a signed lease agreement belatedly reached the party to have signed it first, the BGH went on to say. In this case the handing over of the premises was tantamount to an implied acceptance of the belated declaration of acceptance, which had to be considered a new offer, the court observed. The court moreover considered a belatedly received lease contract's adherence to the "outward appearance" requirement sufficient for the legal requirement of the written form to have been complied with.

Practical considerations:

To a certain degree the Federal Supreme Court's decision takes the sting out of the hotly debated issue of the written form. The BGH thus seems to have shifted towards the pragmatic camp who consider a lease contract's adherence to the "outward appearance" requirement tantamount to compliance with the requirement of the written form. The opposite position, according to which the proper form is indispensable if contractual validity is to be achieved (see Higher Regional Court Berlin, judgement dated 25.01.2007 – 8 U 129/06) has been rejected by the BGH.

Dr Rainer Burbulla

II. Combination of clauses requiring a lessee to run and keep a business open and sell a specified range of goods – but without contractual competition and range-of-goods protection

In its ruling of 03.03.2010 (XII ZR 131/08) the Federal Supreme Court has made it clear that it does not believe that a combination of lease clauses obliging the lessee to run and keep the business open and sell only a specified range of goods while at the same time failing to enjoy contractual competition and range-of-goods protection inherently and unreasonably discriminates against the lessee. Rather, the BGH explicitly considers such a combination of clauses as generally valid.

The case in question involved a food discounter located in a shopping mall. With the vacancy rate in the mall going up, the lessee filing the action wanted to have the option of closing the shop whenever she considered such a move appropriate. To obtain this option the lessee claimed that the lease clauses obliging the lessee to run and keep the business open were invalid.

Utilising the premises profitably within the lessee's sphere of risk

The BGH declared the request of the lessee to be without foundation. The lessee alone bore the risk of utilising the leased premises profitably, the court observed. That being so the lessee was not in a position to claim unreasonable discrimination on account of a duty imposed to run the business in conjunction with an obligation to sell only a specific range of goods and in the absence of competition and range-of-goods protection (for a contrary opinion see Higher Regional Court Schleswig, judgement dated 02.08.1999 – 4 B 24/99), the Federal Supreme Court went on to say.

Competition protection unreasonable for the lessor if specification of range of goods is kept vague

For in the case in questioned the specification of the range of goods the lessee was obliged to sell had been kept fairly vague. In consequence competition and range-of-goods protection, if agreed as a complement to the specified range of goods, would have led to the lessor being discriminated against unreasonably. For this would have severely impaired the rentability of the other premises in the shopping

mall. As this was the case the BGH refrained from finding fault with an arrangement that combined an obligation to run the business with an agreed range of goods and excluded any kind of competition or range-of-goods protection.

Practical considerations:

By itself the coexistence of an obligation to run and keep open a business with an agreed range of goods and the exclusion of any competition and range-of-goods protection does not in principle amount to an unreasonable burden on the commercial tenant. What therefore needs to be shown in each individual case is the actual existence of an adverse effect on the commercial tenant.

Dr Rainer Burbulla

Tenant's claim on account of unjust enrichment based on value-enhancing investments in compulsory auction cases

III. If a lessee undertakes value-enhancing investments in the property rented and subsequently terminates the tenancy before the end of the agreed rental period he or she has a claim on account of unjust enrichment towards the lessor. This is because the lessor would in the event prematurely – i.e. before the end of the agreed rental period – enjoy the benefits of the value-enhancing investments of the lessee.

If the property is sold the claim is towards the successor to the lessor (buyer)

In its ruling of 05.10.2005 (XII ZR 43/02) the Federal Supreme Court had already made it clear that in the event of the property being sold the claim on account of unjust enrichment is not towards the party that was the lessor at the time the investments were made but towards the buyer who as the new lessor now has the property back before the end of the contractually agreed rental period and is therefore in a position to lease it to another party for a higher rent.

Acquisition by compulsory auction no effect on claims on account of unjust enrichment

In its judgement of 16.09.2009 (XII ZR 71/07) the Federal Supreme Court has consistently extended its previous approach by explicitly noting that the above principles also apply in cases in which the property has been acquired by way of compulsory auction. Whether the change of lessor was the result of the property being bought or acquired by way of compulsory auction had no effect on any claims on account of unjust enrichment, the court declared. The decisive element was that in both cases the lessor regained the leased premises before the end of the contractually agreed rental period and was thus in a position to subsequently rent them out at a higher rate, the court stated.

Practical considerations: Unjust enrichment of the lessor the decisive factor

The claims on account of unjust enrichment the lessee may have on account of investments made do not put the lessor at a disadvantage, however, because these only arise if it can be shown that the investments allow the lessor to enhance his rental income. Should the subsequent income not exceed that generated by the previous contract, no unjust enrichment occurs, and hence no claims on account of unjust enrichment are possible. In the event of claims on account of unjust enrichment based on investments undertaken being lodged against him a lessor should therefore as a first step check whether the value-enhancing investments of the lessee have in actual fact allowed him to raise his rental rate.

Johanna Noßke

F. Public Law

Public Procurement Law: Municipal property sales not subject to procurement law regulations – the end of the Ahlhorn approach

The original case

I. Since the so-called Ahlhorn ruling of the Higher Regional Court (OLG) Dusseldorf (ruling of 13.06.2007, VII Verg 2/07; on the topic see also Newsletter 3/2007, page 4) sales of plots of land by the Federal Republic, the German federal states and the German municipalities burdened with an obligation (however indirect) to build on them have been considered subject to competitive tender. This adjudicative approach has led to considerable uncertainty among municipalities, investors and project developers.

Lawmakers intervene

Within the context of the reform of public procurement law in 2009 this uncertainty led to a new legal definition of public construction contract (Sec. 99 Subsec. 3 GWB) and building concession (Sec. 99 Subsec. 6 GWB). The object was to undermine the Ahlhorn interpretation of public procurement law.

The OLG Dusseldorf's decision to submit its ruling to scrutiny by the ECJ

Prior to the coming into force of the reformed public procurement law (GWB 2009) on 24.04.2009 the OLG Dusseldorf – in the certiorari procedure Helmut Müller vs. Bundesanstalt für Immobilienaufgaben [Federal Office for Real Estate Administration] (Rs.C-451/08) – submitted a catalogue of questions pertaining to the obligation to subject contracts on the sale of plots between private investors and municipalities to competitive tender to the European Court of Justice (ECJ), thereby in effect subjecting the amendments to public procurement law (GWB 2009) to scrutiny from a European law perspective.

ECJ rejects unconditional obligation

In its judgement of 25.03.2010 the ECJ answered these questions and in so doing rejected the adjudicative approach of the OLG Dusseldorf regarding the obligation to issue an invitation to tender when it comes to sales of property by public authorities. In the final analysis the ECJ came out in favour of regarding the amendments to Section 99 Subsections 3 and 6 of the Act Against Restraint of Competition (GWB 2009) as compliant with European law. The ECJ's ruling noted that a European-wide invitation to tender cannot exclusively hinge on the circumstance of physical or corporeal procurement.

Direct economic benefit a prerequisite for obligation to issue an invitation to tender

What was required, the court declared, was – in line with Section 99 Subsection 3 GWB – for the client to "benefit directly economically" from the construction work. Against this background the ECJ chose to distinguish various groups of cases.

The mere sale of real property does not suffice

Thus the ECJ explicitly stated that the (mere) sale of developed or undeveloped real property to a company by a public authority does not amount to a public construction contract that would render the sale subject to competitive tender. The precondition for a public construction contract coming about was that the public authority

act as "a buyer not a seller" and that the carrying out of construction work be the subject of the contract; conditions not met in the case of mere sales of real property, the court observed.

A direct economic interest

In addition the ECJ made it clear that the public client must have a direct economic interest in the construction work undertaken, hence be in pursuit of a procurement goal. Such an economic interest obtained, the court remarked, if the public client became the owner of the construction work or the building constructed or was given the opportunity to dispose of the building. It could likewise consist of economic benefits gained by the public client through the future use or sale of the building. The mere exercising of town-planning powers with a view to realising goals of general public interest, such as for example promoting urban development or bringing about the coherence of a district, did not suffice, the court went on to say.

Obligation to build indispensable

The ECJ also answered in the affirmative the question tied to the lively debate on the Ahlhorn approach about whether the term public construction contract presupposes an explicit obligation to build. Thus a public construction contract is (no longer) the case if the contractor is not directly or indirectly obliged to perform construction work. Into the bargain this obligation must be legally enforceable.

The notion of the building concession

The European Court of Justice moreover also looked at the building concession concept as defined in Section 99 Subsection 6 of the amended version of the Act Against Restraint of Competition (GWB). After scrutinising the concept the ECJ declared it to be (only) a temporary right of use. A building concession cannot therefore consist of the transfer of the ownership of the property and the buyer's right of use of the property included therein. Rather, a public client can only transfer a "right of use" of a building if the client itself can dispose of the use. This however is missing as a matter of principle if the right of use is solely based on the proprietary right of the buyer of the property. The ECJ thus expressly and in principle rejected any open-ended granting of use.

Practical considerations:

The ECJ's decision has helped resolve numerous questions and by confining applications of public procurement law to a core area has put a stop to their apparently unlimited proliferation. Because a large number of property sales are now no longer subject to public procurement law regulations municipalities henceforth have added leeway when it comes to applying public procurement law in pursuit of town-planning objectives. The question yet to be resolved conclusively however is: When does a public client have a "direct economic interest" in the construction work undertaken? The further development of procurement law in response to the ECJ's decision is thus not likely to be lacking in suspense. For its part the OLG Dusseldorf, whose Ahlhorn ruling three years ago set the ball of controversy rolling, recently did an about face, stating in its ruling of 11.06.2010 (VII Verg 9/10) that an obligation to issue a Europe-wide invitation to tender with regard to sales of properties involving public authorities and private investors only existed if the public client had a direct economic interest in the construction work to be procured.

Dr Rainer Burbulla

Retail planning: An end to regional planning objectives in NRW – municipalities' scope for planning increases

II. In its ruling of 14.04.2010 (4 B 78/09) the Federal Administrative Court (BVerwG) has confirmed the judgement of the Higher Administrative Court Munster dated 30.09.2009 (see Newsletter 4/2009) (File No.: 10 A 1676/08) according to which the rules that underlie the policy of the German federal state of North Rhine-Westphalia (NRW) toward large-area retail establishments (Section 24a of the State Development Programme [LEPro] NRW) do not contain objectives that are binding on municipalities (so-called regional planning objectives). This gap in the law provides municipalities with additional scope for planning.

Land-use planning despite gap in the law

It needs to be pointed out here that the absence of binding federal state planning rules pertaining to large-area retail establishments does not affect the existing powers of municipalities to plan such projects. The municipalities are thus not required to wait until the lawmakers of the federal state have come up with a new set of rules, but can instead, notwithstanding the gap in the law, continue to pursue their land-use planning activities (see the recent ruling of the BVerwG dated 29.04.2010 – 4 CN 3.08). Now that Section 24a LEPro NRW does not contain strict land-use planning objectives, the scope of planning of municipalities in North Rhine-Westphalia has expanded.

The limits of land-use planning

This scope of planning is not without its restrictions however. The general land-use planning limits still apply, notably Section 2 Subsection 2 BauGB, according to which all land-use planning must accommodate important urban planning issues of neighbouring municipalities. Moreover account must still be taken of federal state planning rules. Besides binding regional planning objectives there are so-called regional planning principles, whose sets of rules are of a less specific nature. Although such regional planning principles do not impose strict limits on the planning engaged in by municipalities, they do create issues that have to be weighed in the balance and as such may influence the results of the planning process.

Section 24a LEPro NRW a regional planning principle?

Whether Section 24a LEPro NRW can be reinterpreted as such a regional planning principle is a question that has yet to be answered definitively. However, given that the Higher Administrative Court Munster in its judgement of 30.09.2009 has tended to view Section 24a Subsection 1 LEPro as not regulating regional planning issues and consequently as unconstitutional and therefore null and void, the answer is unlikely to be yes.

The federal state's lawmakers will in all likelihood make an attempt to amend the federal state planning rules – with a view to closing the gap in the law – before the year is out. When a new binding regulation might emerge and what its content might be is impossible to predict at present.

Once a sufficiently concrete draft proposal for such a new regulation has been drawn up, it will – as a so-called "regional planning objective in preparation" – be able to exert a major influence on pending planning procedures. Land-use planning has to take such regional planning objectives in preparation into consideration because they can in special cases have an effect similar to that of a development freeze, i.e. have a binding effect prior to being passed.

Practical considerations:

The ruling of a supreme court, that of the Federal Administrative Court, has now made it clear that federal state planning objectives must not be based on central service areas that have been defined by the municipalities. This puts all regional planning objectives throughout the Federal Republic that like Section 24a LEPro refer to central service areas and permit a subordinate definition of these areas by the municipalities into question. Similar rules to those that obtain in North Rhine-Westphalia can also be found for example in the State Development Programme of the German federal state of Rhineland Palatinate. Following the decision of the Federal Administrative Court the binding force of these regulations – to the extent that they aim at central service areas – would appear to be compromised.

Niklas Langguth

III. Dilution of planning guidelines through repeated breaches of the town-planning concept

In its ruling of 29.01.2009 (4 C 16.07), which was not published until 19.04.2010, the Federal Administrative Court made a number of statements on the relative importance of urban development concepts in individual cases.

Urban development concept pursuant to Sec. 1 Subsec. 6 No. 11 BauGB an issue to be duly weighed

Pursuant to Sec. 1 Subsec. 6 No. 11 of the Federal Building Code (BauGB) the results of an urban development concept passed by a municipality are to be duly weighed when drawing up a legally binding land-use plan. Although the statements of an urban development concept may on account of their failing to function as binding preliminary decisions within the context of the weighing of all urban development issues be put aside, a land-use plan that implements the town centre concept of a municipality is not, because the municipality has earlier deviated from the said concept in other cases, per se deficient with respect to the weighing of issues.

Deviating from development concepts by green-lighting areas will diminish the weight accorded these concepts by Sec. 1 Subsec. 6 No. 11 BauGB the more frequent and lasting these breaches are

In the case in question a municipality had prior to the decision-related weighing of issues and in a departure from its development concept promoted plans for the establishment of a large-area hypermarket with 4,000 m² of sales space and a food discounter, without taking these developments into account within the context of the weighing of issues pertaining to the procedure of creating a legally binding land-use plan. In the opinion of the Federal Administrative Court the municipality would have been obliged to do so, however. For it is the degree to which an urban development concept is breached that – independent of any justification such a breach might have in urban development terms – determines the weight of the concept. Thus the loss of weight of an urban development concept when viewed as an issue to be weighed in line with Sec. 1 Subsec. 6 No. 11 of the Federal Building Code was all the more greater, the more frequently and lastingly the concept had already been breached, the Federal Administrative Court declared.

Practical considerations:

Towns and municipalities are thus well advised to stick rigorously to the urban development concept they have passed. Otherwise they run the risk of progressively diluting the aims of these planning guidelines.

Isabel Gundlach

News and Events

1. 30 October to 03 November 2010 in Istanbul (Turkey)
   UIA (Union International des Avocats) Congress – Istanbul (Turkey)
   Contributor: Dr Johannes Grooterhorst, Grooterhorst & Partner Rechtsanwälte

2. 24 October 2010 in Hanover, Nord/LB Forum, Friedrichswall 10, 30159 Hanover
   Heuer Dialog GmbH: Handels Dialog
   Retail properties:
   Retail Projects – Do recent court decisions provide more or less room to manoeuvre?
   Speaker: Dr Johannes Grooterhorst, Grooterhorst & Partner Rechtsanwälte

3. 04 November 2010 in Dusseldorf, Industrieclub, Elberfelder Straße 6, 40213 Dusseldorf
   German Council of Shopping Centers
   Forum Law and Legal Advice
   Moderator: Dr Johannes Grooterhorst, Grooterhorst & Partner Rechtsanwälte

4. 09 to10 November 2010 in Frankfurt
   Crenet Deutschland e.V., Autumn Conference

Should you be interested in taking part in an event, please contact the speaker in question at: www.grooterhorst.de

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