EASTERN EUROPEAN JOURNAL OF TRANSNATIONAL RELATIONS

The possibility for municipal subsidiaries to seek in-house public contracts and EU funding for local and regional development projects

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Abstract. The aim of the article is to analyse the issues of establishing and functioning of municipal subsidiaries and the lawfulness of such companies applying for EU funding for local and regional development projects. In this article, the author attempts to answer the following questions: what limitations are there in the procedure for founding municipal subsidiaries?; can municipal subsidiaries seek public contracts within the framework of in-house procurement?; can municipal subsidiaries apply for EU funding? The study was conducted using the legal-dogmatic method and it was based on an analysis of legislation and selected decisions of the Court of Justice of the European Union and the Polish National Appeals Chamber relating to the awarding of in-house public contracts and the founding of municipal subsidiaries. Further analysed were the legal possibilities for such companies to be awarded in-house public contracts and to apply for EU funding to invest in their projects. The study allowed to answer the questions posed. The concept of new business entities, or municipal subsidiaries, being founded by local authorities or their municipal companies is not only permitted by law, subject to certain statutory restrictions, but it may also turn out to be advantageous when it comes to awarding public contracts on an in-house basis or seeking EU funding for local and regional development projects. The study allowed for the creation of legal grounds for the practical use by local government units of the concept of municipal subsidiaries, in particular in terms of in-house public contracts and applying for EU funding for local and regional development projects.

Keywords: municipal company, municipal subsidiary, municipal services management, regional and local authorities, EU funds, EU loans.

JEL Classification: K22, K23.

Citation: Brzozowski, P. (2023). The possibility for municipal subsidiaries to seek in-house public contracts and EU funding for local and regional development projects. *Eastern European Journal of Transnational Relations*, *7*(1), 19-27. https://doi.org/10.15290/eejtr.2023.07.01.02

Academic Editors: Rafał Poździk & Marek Martyniuk

Publisher's Note:

INTRODUCTION, SUBJECT MATTER AND AIM, RESEARCH METHODS APPLIED

One of the principal tasks of local self-government authorities is to manage municipal services. As defined in Art. 1 of the Municipal Services Management Act, municipal services management is where local authorities perform their own tasks on a regular and uninterrupted basis in order to satisfy the collective needs of the self-governing community, by way of providing generally available services. Activities that fall within the scope of municipal services management include mainly local authorities' tasks in the public utility area. However, this scope should also be extended to include certain tasks that do not belong to this area but are intended to satisfy the collective needs of the self-governing community. Entities performing tasks related to satisfying the collective needs of self-governing communities are municipalities, districts and voivodeships. Their main advantage is the proximity to the inhabitants of a given territory, which allows for a more effective and flexible approach to their problems than the central one (Nagy, 2018, p. 68). They have certain pre-defined rules for and forms of municipal services management that were established by the legislator in order to provide a general and universal framework in that respect. Therefore, local self-government authorities may, in accordance with Art. 2 and 3 of the Municipal Services Management Act, carry out municipal services management in particular though local budgetary establishments or commercial companies, or to entrust those tasks to individuals, legal persons or unincorporated organisations based on civil law contracts.

It has become a common practice in Poland to manage municipal services through commercial companies in which local authorities are members, known as municipal companies. Their role in the sector of national economy entities is growing in importance: between 2011 and 2021 the number of municipal companies in Poland increased from 2806 to 3083, and single-member municipal companies – from 1891 to 2392. The principal advantages of managing municipal services through municipal companies include, but are not limited to: separate balance sheets; advantageous taxation regimes; better operational efficiency (at least in theory), including sourcing external funding; or the option to award single-source contracts to those companies – within the framework of in-house procurement (Łajewski, 2021, p. 7; Owczarczuk, 2022, 151-165; Reśko et al., 2016, p. 227-232; Mosionek-Schweda, 2015, p. 236).

The concept of municipal subsidiaries, which will be elaborated on hereinafter, involves the establishment of a vertical ownership structure, where a local authority owns a commercial company (known as a municipal company), and this company holds all or a majority of the shares in another company (known as a municipal subsidiary). In this article, the author attempts to answer the following questions: what limitations are there in the procedure for founding municipal subsidiaries?; can municipal subsidiaries seek public contracts within the framework of in-house procurement?; can municipal subsidiaries apply for EU funding?

The author has analysed EU and Polish legislation that governs the conditions for the award of in-house public contracts to municipal companies, including municipal subsidiaries. The review is also supported with an analysis of the decisions of the Court of Justice of the European Union and the Polish National Appeals Chamber ['Krajowa Izba Odwoławcza']. Presented in brief are also regulations concerning primary and secondary possibilities of founding municipal subsidiaries and the lawfulness of such companies seeking EU funding for local and regional development projects. The article aims to point at the key legal aspects in the area researched and to formulate conclusions that will provide answers to the questions posed above.

The study was conducted using the legal-dogmatic method and it was based on an analysis of legislation and selected decisions of the Court of Justice of the European Union and the Polish National Appeals Chamber relating to the awarding of in-house public contracts and the founding of municipal subsidiaries. Further analysed were the legal possibilities for such companies to be awarded in-house public contracts and to apply for EU funding to invest in their projects.

DIRECT AWARD OF PUBLIC CONTRACTS TO MUNICIPAL COMPANIES ON AN IN-HOUSE BASIS, SET AGAINST THE BACKGROUND OF DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The institution of in-house public procurement originated at the turn of the 20th and 21st centuries, when the Court of Justice of the European Union issued a number of judgements concerning the award of single-source public contracts to entities strictly controlled by the contracting authority. In the breakthrough case of *Teckal Srl v. Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* (C-107/08, 18.11.1999), the Court held that for the contracting authority to become obliged to launch a procedure for the award of a public contract, it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority.

However, the position can be otherwise in a situation where 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. Then, in the case of *Stadt Halle and RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* (C-26/03, 11.01.2005), the Court decided that this procedure may not be used where a private company has a holding, even a minority one, in the capital of a company in which the contracting local authority also has a holding. Furthermore, the most recent judicial decisions hold that Member States may set out their own terms and conditions for the award of in-house contracts, however, those have to be implemented in their respective legal systems with due regard to the principle of transparency, based on precise and clear regulations, so as to avoid any risk of arbitrariness (Case *Kauno miesto savivaldybė and Kauno miesto savivaldybės administracija,* C-287/18, 3.10.2019).

The EU legislator decided to regulate the in-house public procurement institution in Art. 12 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (known as the Classic Directive), which was implemented in the Polish legal system through an amendment to the Public Procurement Law of 29 January 2004. Currently, in-house public procurement is regulated by Art. 214.1(11 to 13) of the new Public Procurement Law of 11 September 2019. The legislator set out three forms of in-house public procurement: vertical, reverse and sister, and joint-control (Czerwiński, 2001, p. 29).

The basic variant of this type of procurement, or vertical in-house procurement, involves the option to award a public contract to a legal person (such as a municipal company) where three basic conditions are met: the contracting authority exercises a control over the entity concerned which is equivalent to that which it exercises over its own departments (involving a dominant influence on such legal person's strategic objectives and significant decisions concerning the management of its affairs); more than 90% of such legal person's activities concern the performance of tasks entrusted to it by the contracting authority (or another legal person controlled by that contracting authority); there may be no direct private capital participation in the controlled legal person.

The award of in-house public contracts is a model example of public contracts being awarded by local authorities to their municipal companies. The crux of the relations by which the entities are interconnected is the control mentioned in Art. 214.1(11)(a) of the Public Procurement Law. In practice, the dominant influence on the strategic objectives and significant decisions concerning the management of that legal person's affairs is a result of capital and legal ties. It is not possible to define in advance how strong the capital ties a local government unit should have in the controlled municipal company – depending on the provisions of the articles of association of the company, it might be a holding of 50% plus one share or a higher holding in some other cases (e.g. where management board members are elected by a qualified majority vote). Legal ties, in turn, are based on the provisions of the articles of association of the company, which may define the rules for the appointment of the legal person's management board (e.g. a qualified majority of votes of the management board or supervisory board members is required in order to make certain decisions that go beyond the ordinary course of business). In accordance with the decisions of the Court of Justice of the European Union (C-458/03, 13.112005; C-324/07, 13.11.2008; C-573/07,

10.11.2009; C-182/11 and C-183/11, 29.11.2012), "equivalent control" exists where a legal person is subject to such control that the contracting authority can effectively influence its decisions. What is meant here is the contracting authority's potential decisive influence on such legal person's strategic objectives and its significant management decisions (Jaworska et al., 2022; Lemke & Piasta, 2006).

In the context of the other Court's decisions (C-340/04, 11.05.2006; C-458/03, 13.10.2005), fulfilment of the control requirement must be examined thoroughly, with due regard to all regulations and circumstances, so that there is no doubt that the public authority has a decisive influence on the strategic objectives and essential decisions made by the undertaking to which the contract is awarded. It ought to be noted that the control exercised by the contracting authority must be full and indisputable, effectively unlimited. As can be seen in the doctrine, a situation is even possible where the management board of the company has full authority to handle all affairs that fall within the ordinary course of business as well as any affairs that are outside that course, yet the prerequisites for the application of the in-house procedure are not fulfilled. The Court set out a very precise catalogue of instances which materially weaken the control exercised by the contracting authority over the municipal company to be awarded a contract. Signs of the company's excessive independence in the context of in-house transactions might include: transformation of the company into a company limited by shares; extension of the company's operations to new fields; obligatory opening of the company to other capital, even if in the short term; expansion of the geographical area of the company's activities; or conferral of considerable powers on the management board, which can exercise that power by it on an autonomous basis (Nowicki & Nowicki, 2010, p. 120-121).

The second prerequisite that has to be fulfilled for a municipal company to be able effectively to seek a public contract on an in-house basis is that more than 90% of the company's activities concern the performance of tasks entrusted to it by its controlling contracting authority or by another legal person controlled by that contracting authority. The Polish legislator opted for stricter legal requirements than the guidelines set out in the Classic Directive, which requires that 80% of the activities concern the performance of tasks entrusted by the contracting authority. The Polish Public Procurement Law also defines how to examine the fulfilment of this prerequisite. Art. 214.5 and 214.6 of the Law state that the said percentage of activities shall be calculated on the basis of the average income generated by the legal person from services, supplies or construction works for the 3 years preceding the award of the contract. Where, because of the date on which the legal person or contracting authority was created or commenced activities or because of a reorganisation of its activities, the average income figures for the 3 years preceding the award of the contract are unavailable or inadequate, the percentage of activities shall be determined by means of credible business projections (KIO 625/17, 24.04.2017). Although the legislator did not define the concept of "credible business projections", it is reasonable to assume that it covers a broad catalogue of documents, with due regard to the fact that the burden of proof lies with the contracting authority in this respect (KIO 3621/21, 17.01.2022). The business projections that confirm fulfilment of the economic dependence prerequisite have to be credible or based on rational grounds. The sources of income or the areas of activities ought to be specified in a manner that enables some sort of verification. A projection may be drafted by a specialised entity or by the parties involved themselves. Furthermore, the percentage requirement is not fulfilled where the reorganisation of activities, as set out in Art. 214.6 of the Public Procurement Law, was conducted for the sake of appearances only. What is essential is that the prerequisites for the award of an in-house contract have to be fulfilled throughout the term of the public contract, which is why the percentage of activities related to the performance of tasks entrusted by the contracting authority may not become lower even temporarily (Sieradzka, 2022).

The last prerequisite, or the prohibition of any private capital involvement in the company which is to be awarded an in-house contract, derives from the judgement of the Court of Justice of the European Union in the case of *Stadt Halle*…, which was mentioned above. It argued that a procedure involving a private capital investment would offer a private undertaking with a capital presence in a semi-public (public-private) company an undue advantage over its competitors.

Envisaged in the Public Procurement Law are two exemptions concerning the prohibition of private capital investments in a company seeking an in-house contract, specifically the instance of legal persons with the participation of a private partner selected in accordance with the Public-Private Partnership Act and the instance of the participation of employees representing jointly up to 15% of the company's share capital or shares and holding jointly up to 15% of votes in the meeting of shareholders. The option to establish national exemptions is envisaged in the Recitals to the Classic Directive, in particular in recital 32, which states that in view of the particular characteristics of public bodies with compulsory membership, the prohibition in question may be exempted where the participation of specific private economic operators in the capital of the controlled legal person is made compulsory by a national legislative provision, provided that such participation is non-controlling and non-blocking and does not confer a decisive influence on the decisions of the controlled legal person.

THE LAWFULNESS AND THE FORM OF SUBSIDIARIES FOUNDED BY MUNICIPAL COMPANIES AND AWARDED IN-HOUSE PUBLIC CONTRACTS

The trend to found municipal subsidiaries is not currently widespread among Polish local authorities. The concept is based on a double-layered ownership structure: a municipal company is founded by a local authority and another commercial company is founded by this company. This solution is permitted under the laws of Poland, which follows from an analysis of the general regulations and also directly from Art. 10b of the Municipal Services Management Act, to name but one regulation. Certain limitations imposed by the applicable regulations must be taken into consideration, however.

It must first be noted that in accordance with Art. 151.2 and Art. 301 of the Code of Commercial Partnerships and Companies, neither a limited liability company nor a company limited by shares may be founded by another single-member limited liability company. According to the legislator, this was intended to protect the company's creditors and to prevent founding vertical groups of companies, however, with the simultaneous repealment of Art. 151-3, which prohibited the existence of single-member limited liability companies throughout the term of their operation, it is pointless (Szulc, 2018, p. 270).

It is emphasised in the doctrine that the nature of these regulations is regrettably superficial (Dumkiewicz & Kidyba, 2023), for three reasons. First, the regulation concerns the "foundation" of a company only, so any subsequent acquisition of all the shares in a limited liability company or a company limited by shares by a single-member limited liability company should be considered permitted under law (Bieniak, 2022). Second, the prohibition applies to single-member limited liability companies or companies limited by shares being founded by a single-member limited liability company, therefore, a single-member company limited by shares may found a limited liability company or a company limited by shares and become its only member without any legal restrictions. It must also be noted that it is not an invalid act nor a circumvention of law if a limited liability company or a company limited by shares is founded by a single-member limited liability company and its single member or a single-member company limited by shares and its single member (Jara, 2023).

When the above is translated into the context of municipal services management, it is prohibited, under Art. 151-2 and Art. 301 of the Code of Commercial Partnerships and Companies, for a limited liability company or a company limited by shares to be founded by a municipal limited liability company alone. It is not impossible, however:

1) for a municipal limited liability company or a municipal company limited by shares to acquire all the shares in a previously founded limited liability company or a company limited by shares;
2) for a new municipal limited liability company or a new municipal company limited by shares to be founded by another municipal single-member company limited by shares;

3) for a new municipal limited liability company or a new municipal company limited by shares to be founded by another municipal single-member limited liability company or a municipal single-member company limited by shares and the local authority being its single member;
4) for a new municipal limited liability company or a new municipal company limited by shares to be founded by two other municipal single-member limited liability companies or companies limited by shares owned by the same local authority

It must be noted that where a new municipal company is founded with the participation of another municipal company owned by the same local authority and afterwards some or all of its shares are sold to that authority, the restrictions set out in Art. 12.2 of the Municipal Services Management Act do not apply (Banasiński & Jaroszyński, 2017), although doubts about that matter have also been voiced in the doctrine (Zięty, 2017). The regulation states that any sale of shares in companies described in Art. 9 of the Act (that is companies with the participation of local authorities) shall be governed by the provisions of Art. 11 to 16 of the State Property Management Principles Act applied accordingly. In the instance described above, however, the shares being sold would not be shares in a company owned by a local authority but in a company owned by another municipal company.

Commercial companies founded or acquired by municipal companies must also comply with certain requirements related to their business objects. As was mentioned before, local authorities ought, in principle, to manage municipal services through the performance of tasks in the public utility area. Only exceptionally, pursuant to Art. 10 of the Municipal Services Act, can municipalities and voivodeships (districts do not have this kind of powers) found or join commercial companies outside the public utility area, provided that certain statutory requirements are met. As those are not formulated precisely, they give rise to numerous practical controversies, and because the rules for their applicability are vague, the stability of local authorities' initiatives becomes challenged (Malarewicz-Jakubów & Brzozowski, 2022).

Where municipal companies found and run their own municipal subsidiaries, it produces an indisputable advantage: the controlling local authority may grant them public contracts on an in-house basis. As was pointed out before, the vertical in-house public procurement system requires that three prerequisites are fulfilled: the contracting authority has to exercise a control over the contractor which is equivalent to that which it exercises over its own departments; more than 90% of the contractor's activities have to concern the performance of tasks entrusted to it by the contracting authority (or another legal person controlled by that contracting authority); there may be no direct private capital participation in the controlled legal person.

Where a municipal subsidiary is awarded a public contract on an in-house basis, the first premise may be considered fulfilled, albeit indirectly. For it is not to be denied that the local authority (through its municipal company) exercises a control over the municipal subsidiary which is equivalent to that which it exercises over its own departments, involving a dominant influence on that legal person's strategic objectives and significant decisions concerning the management of its affairs. However, in order to prevent any doubts, the legislator decided to add the second sentence to Art. 214.1(11)(a) of the Public Procurement Law, which states that this requirement is also fulfilled where such control is exercised by another legal person controlled by the contracting authority in the same manner. This provision applies directly to the case at issue.

A major advantage of municipal subsidiaries is that it is very easy for them to meet the requirement that at least 90% of their activities have to concern the performance of tasks entrusted by the contracting authority. Where a municipal company directly controlled by a local authority fails to meet this requirement, it may choose to found a subsidiary. In this way, it does not have to restrict its own activities that fall outside the scope of the tasks entrusted to it, but it can seek the contract in question through its subsidiary. This procedure might be described as delegating participation in the seeking of an in-house public contract to a subsidiary.

The third prerequisite, being the prohibition of any direct private capital participation in the municipal subsidiary, poses no particular difficulties. As was mentioned above, such a company can be founded for example

by two municipal companies or a municipal company and a local authority. Thus, there is no need for any private capital to be involved.

The above leads to the conclusion that it is not only possible for local authorities to award public contracts to municipal subsidiaries on an in-house basis but it is also in certain cases very advantageous for the local authority and the controlling municipal company to be able to delegate participation in the award procedure to a subsidiary.

THE POSSIBILITY FOR MUNICIPAL SUBSIDIARIES TO SEEK EU FUNDING FOR LOCAL AND REGIONAL DEVELOPMENT PROJECTS

The topics described above, in particular the possibility for municipal companies to found subsidiaries and for such municipal subsidiaries to seek public contracts on an in-house basis, lead to new opportunities in the area of seeking EU funding for local and regional development projects. Despite the fact that both the doctrine and jurisprudence strongly emphasize the need for property independence of local authorities, their own funds are not sufficient to cover both their daily tasks and development projects, particularly in view of personal income tax changes resulting in a reduction of local authorities' revenues (Ofiarska, 2020, p. 100; Kik et al., 2017, p. 36; Surówka, 2020, p. 14).

As the Ministry of Development Funds and Regional Policy informs, in the perspective of 2021-2027 EU funding is expected to enable local authorities to carry on their development plans, in particular in the areas of transport infrastructure (voivodeship roads, local roads), community services (education, healthcare), water supply and sewage disposal, waste management, labour market, digitalisation, renewable energy sources or tourism. Local authorities have for years been using their municipal companies to organise and implement local and regional development projects, and the companies gladly take advantage of various forms of subsidies, in particular from European Union funds (Barwacz, 2016, p. 181). Aid from the Structural Funds and the Cohesion Fund is a principal external source of financing for those companies. The types of funding include non-refundable instruments (most frequently: subsidies) and refundable instruments (e.g. loans). The role of the latter type of aid is expected to increase in successive EU financial perspectives, which is supposed to enable reusing "the same" EU money for multiple projects (Dworakowska, 2018, p. 52-53).

The primary reason why local and regional development projects are assigned to municipal companies is that the debts incurred by municipal companies for the purpose of such projects are not added to the debts of local authorities themselves, which enables them to keep within the set limits, in particular those set out in Art. 243 of the Public Finance Act. In the case of non-refundable aid (chiefly subsidies), this argument is indisputable but the situation becomes more complex where a municipal company seeks refundable aid. In this situation, the problem is that it is sometimes difficult for municipal companies, in particular ones that generate low incomes or losses, to build sufficient creditworthiness. It could be solved if the local authority provided a guarantee for its own municipal company, however, such a guarantee would have an effect on the local authority's debt figures.

It is a much more advantageous solution for local authorities to make agreements with their municipal companies for the assignment of the performance of a public task (known as executory agreements or entrustment agreements), whereunder local authorities reimburse their companies in order to cover their expenses related to the performance of tasks for the local authority. In order to make sure that a municipal company succeeds when seeking a public transaction involving an executory agreement, and to make the whole procedure shorter and simpler, it is helpful to follow the in-house scheme. Where a local authority and a municipal company or a municipal subsidiary make an executory agreement for a term at least equal to the period over which the company is supposed to repay its refundable aid debt, the bank that grants the aid (being a refundable aid intermediary) can establish a security interest in such reimbursements, which boosts the company's creditworthiness (Kwiatkowski & Zawadzka, 2012, p. 5; Gołaszewski, n.d.).

The above procedure may also be applied between a local authority as the contracting party and a municipal subsidiary as the contractor. As was pointed out above, it is even easier for this type of company to meet the statutory criteria that enable application of in-house public procurement. The above is evidence that the potential of municipal companies still remains to be tapped when it comes to seeking refundable financial instruments from the EU budget.

CONCLUSIONS

The author's analysis of EU and Polish legislation and selected decisions of the Court of Justice of the European Union and the Polish National Appeals Chamber provides answers to the questions first posed above. The concept of new business entities, or municipal subsidiaries, being founded by local authorities or their municipal companies is not only permitted by law, subject to certain statutory restrictions, but it may also turn out to be advantageous when it comes to awarding public contracts on an in-house basis or seeking EU funding for local and regional development projects.

In this context, the principal advantages of municipal subsidiaries include, but are not limited to the fact that the controlling municipal company is no longer required to maintain its activities that concern the performance of tasks entrusted to it by the local authority at a level of more than 90%, yet it has the option – through a municipal subsidiary – to seek in-house contracts. By awarding such contracts and the related reimbursements to municipal subsidiaries, local authorities can also positively contribute to their creditworthiness in the context of them seeking refundable aid to finance local and regional development projects.

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