iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

PUBLIC BODIES AND PUBLIC ENTERPRISES

ANNUAL REPORT - 2011 - Germany

(April 2011)

Univ.-Prof. Dr. Stefan STORR[1] and Mag. Elke WILDPANNER[2]

INDEX

[1] Professor for Public Law and Economic Law at the Institute for Austrian, European and Comparative Public Law, Political Science and Administrative Studies, Karl-Franzens-University of Graz, Austria.

[2] Research Associate at the Institute for Austrian, European and Comparative Public Law, Political Science and Administrative Studies, Karl-Franzens-University of Graz, Austria.

1. PUBLIC BODIES

1.1 Administrative authority, executive body, organ, organizational power

Administrative authorities ("*Verwaltungsträger*") are those entities which are entrusted with administrative functions. These can be the federation (*"Bund"*), *Länder*, districts (*"Bezirke"*), counties (*"Landkreise"*), communes (*"Gemeinden"*) as well as other public corporations, institutions and trusts. Administrative authorities consist of executive bodies ("*Behörden*") and organs.

An *executive body* is a public authority which executes public functions;[3] an *organ* is the entity within the public authority that enables it to act. Executive bodies and organs are not legally capable and therefore act solely on behalf of the administrative authority. Hence, only the administrative authority has the capacity to sue and be sued.[4]

In the German federal state in which both the federation (*"Bund"*) and the *Länder* are states, the *organizational power*, i.e. the ability to establish and furnish public authorities, is divided between federation and *Länder*-states (Art 83 et seqq. GG).

1.2 'Direct' Administration ("unmittelbare Verwaltung")

As a general principle, public administration is exercised 'directly' or 'indirectly' by either the federation or a province. '*Direct' Administration* is

[3] Para. 1 sec. 4 Administrative Procedures Act (Verwaltungsverfahrensgesetz).

[4] Para 78 Administrative Court Procedures Act. (Verwaltungsprozessordnung).

exercised directly by a state authority that is attributed to either the federation or a province, without the intervention of another (legally capable) administrative authority. Hence, 'direct' administration by the federal state is executed for instance by the federal ministries and the federal agencies.

‚Direct' administration is exercised by supreme executive bodies (*"oberste Behörden"*), for instance the ministries, upper executive bodies (*"Oberbehörden"*), intermediate executive bodies (*"Mittelbehörden"*) – executive bodies within an administrative structure comprising upper and lower executive bodies – and lower executive bodies (*"Unterbehörden"*) (with upper and intermediate executive bodies).

As a general rule, the superior executive body is entitled to *give instructions* to a lower body which is then obliged to comply with them. Independent government agencies affect the principle of democratic legitimacy and are allowed only in exceptional circumstances.

1.3 'Indirect' Administration ("mittelbare Verwaltung"

‚Indirect' public administration is exercised by legally capable administrative bodies, i.e. by public corporations ("*Körperschaft*"), institutions ("*Anstalt*) and trusts ("*Stiftung*"). The local administration of a municipality (*"Gemeinde"*) is 'indirect' because the municipalities are public corporations and therefore legally capable.

A *public corporation* is a legally capable organization based on membership which exists independent of the change of the individual members. One distinguishes between person-based corporations (*"Personalkörperschaften"*) whose members are particular natural or artificial persons (e.g. professional associations), territorial corporations (*"Gebietskörperschaften"*) which are defined by the location of a head office or place of residence (e.g. municipality), real

corporations (*"Realkörperschaften"*) whose membership is defined by property rights or other real rights (e.g. hunting association) and organizational corporations (*"Verbandskörperschaften"*) whose members are predominantly artificial persons (e.g. communal administrative unions). Corporations in 'indirect' state administration often have rights of self-governance.

The legal term '*institution*' (*"Anstalt"*) was coined by Otto Mayer as a quantity of material and personal means in the hands of a public authority which is permanently dedicated to a special public interest. Institutions have users instead of members. One must distinguish between institutions which are legally capable and those which are not.

A *trust* is a unit which serves a specific purpose defined by the founder by means of utilizing the endowment fund. There are public and private trusts; they are either legally capable or not.

1.4. Principle of formal legal reservation

The foundation and establishment of legally capable corporations, institutions and public trusts must be carried out through or based on an act of legislation. According to the so-called *principle of formal legal reservation* (*"institutioneller Gesetzesvorbehalt"*), the act of legislation must explicitly set out the body's specifications such as the assigned tasks, the relevant characteristics for membership, obligatory or optional membership, basic provisions concerning the body's organs, their responsibilities and capacity to act as well as state supervision. On the contrary, issues exclusively concerning the body's internal sphere are dealt with not by an act of parliament, but by statute.[5]

[5] Storr/Schröder, Allgemeines Verwaltungsrecht, 2010, p. 45.

2. PUBLIC ENTERPRISES

2.1 Legal structure

The term *Public Enterprise* is not defined in German Law and is essentially interpreted by scholars following the functional approach of European Law as positively expressed in the Transparency Directive.[6]

Though not enacted in legal form, the public administration is granted the freedom to choose whether to establish public enterprises under public or private law, to confer legal capability upon them and to involve private parties ("*Formenwahlfreiheit der Verwaltung"*).

Public enterprises established under public law do not have legal capability if organized as a special fund ("*Sondervermögen"*) or as part of the local administration of a municipality ("*kommunaler Regiebetrieb*") as in both cases departments of public administration are set up for commercial purposes. A self-run enterprise (*"Eigenbetrieb"*) is usually owned by a municipality but not set up as part of its administration, lacks legal capability, is commercially managed and can have its own organs. The German *Länder* have passed relevant legislation (*"Eigenbetriebsgesetze"*). Moreover, *public corporations, institutions and trusts* can be public enterprises, as can be legal entities established under

[6] Art. 2 lit b Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJEU L 318, 17. 11, 2006, p. 17.

private law, i.e. capital and private companies (*"Kapital- und Personengesellschaften"*) such as stock companies and limited partnerhips.

2.2 Scholarly classification

The capability of public enterprises to *hold fundamental rights* is disputed, but predominantly rejected among academics with reference to the fact that public enterprises are - even if partly owned by private parties – necessarily controlled by the state which fundamental rights are directed against. Prevailing opinion is thus that being tied to the state's unique authority to legitimately use force, public enterprises cannot at the same time hold rights in its defense.

The question if and to which extend public enterprises are *subject to fundamental rights* is also disputed. According to the jurisdiction of the German Federal Court[7], the fundamental rights do not protect against competition in business. At the most, public entrepreneurism can be prohibited if private commercial activity is made impossible or is unacceptably affected.

An *enterprise established under public law* is free to operate under public as well as private law (*"Handlungsformenwahlfreiheit der Verwaltung"*), an *enterprise established under private law* can in principle operate only under private law unless it has been authorized by the state to issue acts of sovereignty. When the state operates under private law, the rules of private law apply. Additionally, according to the concept of Administrative Private Law (*"Verwaltungsprivatrecht"*), the basic rules of public law and the essential

[7] BVerwGE 39, p. 329, 336.

requirements of the fundamental rights must be adhered to. The existence of a separate set of rules regarding private administration must be rejected.[8]

The *financial regulations* of the Federation (*"Bund"*) and the *Länder* and the *municipal regulations* contain special provisions concerning commercial activities of the public bodies.[9] However, in principle they do not affect third parties. These provisions establish legal requirements on the admissibility of such activities, for example by defining a valid public interest, specifying the conditions under which the outsourcing of a public service to an enterprise is suitable to fulfill the public interest, demanding that the nature and scope of the enterprise be proportionate to the capacities of the municipality, limiting liability and finally, making it subject to the condition that the task at hand cannot be fulfilled better or more efficiently in any other way, for instance if performed by a private body.[10] Some provisions also require the public body to maintain an adequate level of control over the operations.

8 Schröder, Verwaltungsrechtsdogmatik im Wandel, 2007, p. 223.

9 E.g. para 55 Federal Budget Code (Bundeshaushaltsordnung).

10 For an overview of the problems surrounding third-party effects, see Ruthig/Storr, Öffentliches Wirtschaftsrecht, 2nd edition, 2008, p. 334 f.