

**STATE ASSETS (PUBLIC OWNERSHIP) IN THE
FEDERAL REPUBLIC OF GERMANY**

ANNUAL REPORT - 2011 - GERMANY

(July 2011)

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1. LEGAL PROVISIONS

A characteristic of state assets in Germany is their lack of systematic statutory regulation. The Constitution of the Federal Republic of Germany—the *Grundgesetz für die Bundesrepublik Deutschland (GG)*—does not contain a general state assets law, just like its predecessor, the so-called Weimar Constitution of 1919. There are but scattered sections concerning separate and specific issues of the topic. Efforts on creating a general regulation did not lead to success. Due to its federal system, Germany consists—apart from the federal level as a whole (hereinafter referred to as Federation = *Bund*)—of sixteen constituent states (*Länder*), each of which has a constitution of its own. The aforesaid deficiency of an encompassing statute regulating the state assets is present in both the constituent states and the Federation.

The *Grundgesetz* contains state assets rules fragmentarily. The articles 134, 135, 135a concern the transition of the pre-constitutional³ assets into the estate of the *Bund*, the *Länder*, the local authorities or other public corporations. Art. 89 (1) and art. 90 (1) of the *Grundgesetz* determine the *Bund* as the owner of the waterways, highways and roads of the former German *Reich* (Empire).

Below the constitutional level, a major legal framework for state assets both of the *Bund* and the *Länder* is established by the respective budgetary law. It provides, inter alia, the terms and conditions under which state assets shall be administered and can be privatised or alienated. Besides, there are innumerable non-constitutional statutes regulating separate and specific issues.

³ I. e. the time before May 24, 1949 (effective date of the *Grundgesetz*) concerning primarily the assets of the former German Reich.

2. STATE ASSETS SYSTEMATICS

1.1 Distinction between the two main forms of state assets

In German law, there is a generally accepted classification of state assets which can be traced back to *Lorenz von Stein*'s idea of a dualism in the state's asset base.⁴ According to this dichotomy, state assets are differentiated into fiscal assets and administrative assets:

- Administrative assets encompass the entire property supplying the state with the resources necessary to accomplish its public tasks and to comply with its public obligations.⁵
- Fiscal assets do not serve public purposes immediately. In many cases they are “dormant capital” which can help meeting the implementation of the state purposes in the future.

The distinction frequently proves difficult, especially because there is a fluent passage and an overlapping between the two concepts. Hereafter, the outlining of examples and legal consequences may provide a clearer comprehension of the two different categories.

1.2. Administrative assets

The components forming the administrative assets have the distinctive feature of directly serving a public mission by means of physical utilisation. The purpose to be answered is determined by an act of dedication (*Widmung*) carried out by the respective proprietor (i.e. the Federation [*Bund*] or the constituent state [*Land*]). The specific dedication legally binds the proprietor to the declared purpose.

⁴ *Lorenz von Stein*, Lehrbuch der Finanzwissenschaft (Finance Textbook), 1871, p. 154 ff.

⁵ The “state inventory” according to *Paul Laband*, Das Staatsrecht des Deutschen Reiches (Constitutional Law of the German Empire), vol. II, 1891, p. 854.

The dedication may be subject to statutory regulation, though this is not necessary. It may be done in a formal way, as for instance the dedication of a street to public use by an administrative act. An object can be dedicated, however, by implied conduct as well. An official vehicle or building, for example, is subjected to the public purpose by simply being taken into use.

Within the administrative assets there is a subdivision into internal and external administrative utilisation:

- internal administrative assets serve to accomplish administrative tasks within the administration;
- external ones are placed at the disposal of the public for the specific purpose delineated by the dedication. Examples of external administrative assets are public streets and squares or schools, museums, theatres, hospitals, etc. It is the state's obligation to ensure the public access to these institutions.

1.3. Fiscal assets

Fiscal assets bear merely a mediate relation to public tasks and duties. Here again a subdivision is made:

- The first group contains the entirety of economically utilised assets which improve the functioning and efficiency of the state's actions, thus enabling the state to pursue objectives of structural and social policy. Examples are publicly owned companies, stocks, cash and bank balances or loan claims. In this regard the state competes with the private economy sector; a fact which runs the risk of having a significant effect on the constitutional commitment to free enterprise and fair competition.
- The second group of fiscal assets comprises real estate (e.g. forests) and movable property as long as they have not been dedicated to a specific public use.

1.4. State assets under civil law

The issue of ownership both of the fiscal and the administrative assets itself is regulated by German civil law. In this respect, the state or another public corporation is the owner, tenant, hirer, etc. of its assets just as a private person would be. As to the administrative assets, however, public law supplements and superimposes the strict application of the civil law as far as the commitment to the specific public purpose or duty is concerned.

3. STATE ASSETS DEVELOPMENTS

3.1. Financing function of fiscal assets

In comparison with past centuries, the function and utilisation of fiscal assets have fundamentally changed. In former times, the fiscal assets were of central significance to the provision of the state's revenue (or, even earlier, of the income of the monarch). Since the early 20th century the public expenditure has been increasing immensely. Nowadays, the benefits obtained from fiscal assets are marginal with respect to the state's overall budget. The major source of revenue has shifted to taxes, contributions and fees.

3.2. Guiding function of fiscal and administrative assets

The financing function of fiscal assets has been successively replaced by the idea of political guidance, a key item also of administrative assets. The targeted use of the financial resources can help the state to resolve political issues, above all by means of public enterprises (control over monopolies, services for the public such as transport or the Sparkassen, i.e. municipal banking establishments in the financial and lending business). As already mentioned, economical interventions by the state face criticism since they tend not only to lack consistence with the constitutional idea of free market economy but also are questionable in terms of effectiveness.

3.3. Privatisation

The administrative assets are a plain necessity to keep public processes running. Yet, as from the nineteen-eighties, Germany has adopted the anglo-american trend towards privatisation. Transferring services of general interest from the public sector to the private sector has become a way the state increasingly chooses in order to fulfil original governmental functions.

Privatisation involves several problems. One of them is the tendency of privatised companies to hive off governmental control. Enterprise policy and state policy tend to drift apart because private corporations are constrained by the plain economical circumstances whereas the state is subject to its constitutional and statutory obligations. The latter are usually not in accord with the “laws” of the free market.

Prominent privatisations on the federal level have been the transition from the Deutsche Bundesbahn (German Federal Railways) to the Deutsche Bahn AG (German Railways) or from the Deutsche Bundespost (German Federal Post Office) to Deutsche Post AG (German Postal Service), Deutsche Telekom AG (German Telecommunications plc), and Deutsche Postbank AG (German Postbank).⁶

3. FISCAL ADMINISTRATION

Administrative assets are under the rule of the public body in charge of the connected task or duty. Fiscal assets, however, are controlled by the fiscal administration which is also the administration responsible for the imposition and collection of taxes. The fiscal authorities in the Federal Republic of Germany are divided into the federal level (*Bund*) and the level of the constituent states (*Länder*). These levels are in principle strictly separated and independent from each other. This structure results from art. 108 of the *Grundgesetz* and the *Finanzverwaltungsgesetz* (German Financial Administration Act).

⁶ All of them are by now stock corporations/public limited companies.

Within the fiscal administration of the Federation (*Bund*), the Federal Ministry of Finance (*Bundesministerium der Finanzen*) is the highest authority. Under its supervision there is a number of upper authorities which carry out specific tasks for which the federal government is responsible. As for the immovable fiscal property, the federal government founded the *Bundesanstalt für Immobilienaufgaben* (Federal Agency for Real Estate Management—in abbreviated form BImA) in 2005. The BImA replaced the former management conducted by different authorities within the fiscal administration. As an independent outsourced agency the BImA is expected both to increase productivity and to cut costs. The BImA derives immediately from the state, but is by no means as affiliated in the administrative structure as a regular state authority. Although it is not a case of privatisation but a decentralisation, the BImA is nevertheless another example of how the state keeps disposing of his original tasks and duties.

The administration of the fiscal assets of the *Länder* resemble the federal pattern in principle but feature differences in detail.