

ALTERNATIVES TO PRIVATISATION IN LOCAL SELF-GOVERNANCE IN BULGARIA

These days we are witnessing a process where local self-governance authorities world-wide begin to restrict the wide scope of economic activities they had until recently, focusing increasingly on their governance functions. The coverage and the contents both of the governance functions of the municipalities and of their economic activities are described by the respective national legislation. Nevertheless, while it would be impossible for a municipality to abdicate its governance functions under any circumstances, it is possible to assign the direct performance of activities that by their very substance have a business character to external entities, which may be controlled up to various extents.

No municipal activities that represent the exercise of governance prerogatives can be delegated to other parties. These are the governance decisions that are within the sole competency of the Mayor or of the Municipal Council. The delegation of such decisions is inadmissible, because it would constitute a misrepresentation of the voters' will.

However, municipalities also exercise a number of purely business functions, some of which are assigned to them by law. Such functions are, for example, water supply and sewerage, waste disposal, maintenance of street lighting, etc. A municipality may withdraw from the exercise of such activities up to various degrees through outsourcing them to external service providers insofar as efficient control mechanisms are envisaged.

The issue as to the choice of activities that a municipality may decide to retain for itself and to outsource to external providers is a matter of assessment related to the profitability of the activity, the traditions of the sector, the human resources potential for investment in new practices, etc.

In certain cases, the municipalities divest the responsibility for the hitherto provided services and owned real estate through privatisation, against which they obtain fresh money.

As mentioned above, however, not everything is subject to privatisation. Where privatisation is impossible, while direct municipal commitment is unprofitable, a municipality may choose one of the following options:

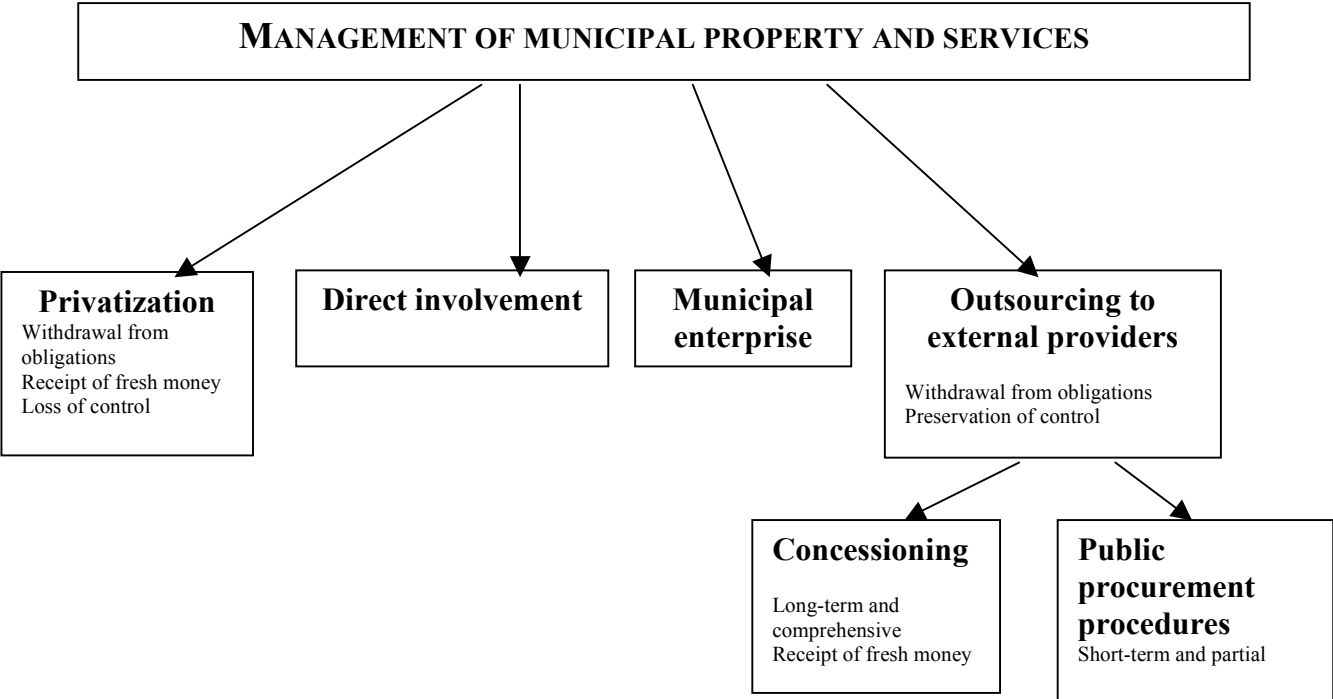
- ◇ Creation of a specialised municipal enterprise;
- ◇ The entire activity is outsourced to an external service provider through the conclusion of a long-term concession contract;
- ◇ Separate activities are outsourced to external providers on a short-term basis through public procurement procedures.

The specialised municipal enterprises can be created for a specific service activity or for a group of services, for instance, a municipal enterprise for waste collection only, or for a waste disposal site, or both for waste collection and waste disposal. In this respect, the joint enterprises of several municipalities have proven themselves to be particularly useful for the maintenance of a common waste disposal site, because this is a specific activity, which requires considerable investment.

The concession contracts are used when the municipality wishes to withdraw completely from the direct exercise of activities, which are burdensome for it, but it is obliged to retain the control. In this case, as in the case of privatisation, fresh money is brought into the municipal budget, but in contrast to privatisation, where the termination of the activity leads to the loss of control, the concession contract secures the preservation of control. The concession contract has many similarities and differences with the other classical legal instruments, as well as to the different methods used for the divesting of municipalities from business functions that in principle are not inherent to them.

The public procurement method is also used for the outsourcing of activities to external providers, but it generally involves a contract of a more short-term nature, as well as provisions about partial execution. For instance, the public procurement method can be used for the outsourcing of an ancillary activity related to water supply, while water supply in general is a particularly complex and serious matter. Therefore, if a municipality decides to outsource it to an external provider, this needs to be done by means of a long-term concession contract, which should describe all responsibilities in great detail.

The concise chart below illustrates clearly the general options available to a municipality:



Particular attention will be paid to the concession contracts, which, as mentioned earlier, are notable with their long-term character. Generally, the beneficiary of the concession pays a concession fee and this is the fresh money in revenues to the municipal budget. Control here is of particular importance and needs to be secured both in the field and on the basis of supporting documents, while the control's efficiency must be guaranteed explicitly by the concession contract.

The concession contract has to secure an immediate start of the activity, its unbreakability and the return rendition of the equipment in the appropriate decent state. For example, a two-month delay in case of a long-term contract for 25 years might be considered insignificant according to the classical legal non-performance standards, but if we take into account that in this case the city's residents would be deprived from water supply, street lighting or waste disposal services for a period of two months, we can see the absolute importance of accurate performance. In addition, the winding up of a long-term contract of the order of 25 years involves the risk that the concessionaire, who in general intends just to make a profit out of this activity, may refrain from investing in the maintenance of the equipment and may be tempted to return it in an unusable condition. Therefore, the strict control and the adequate penalties envisaged in the concession contract are the only guarantee for the protection of the public interest.

The non-performance modalities and the consequences of non-performance need to be explicitly regulated by the concession contract. Again, for instance, the classical legal standards of non-performance due to war or earthquake are a good illustration of force-majeure circumstances that would exonerate the nonperforming party from its obligations. Nevertheless, when the contract concerns the 25-year concessioning of the drinking water supply of a city to a contractor, there is no justification for a refusal to perform the obligations even in case of war. Both a municipality and the concessionaire must continue their work under extreme circumstances. Such legal controversies emerged during the Yugoslavia wars and they revealed the inapplicability of the classical legal instruments in the new environment, as well as the need to elucidate exhaustively and accurately the obligations of the parties under these long-term contracts in areas that are vital to the public at large.

Each one of the options that the local authorities may select for their decision-making on the management methods for their municipal property and services has its own strengths and weaknesses that have to be taken into consideration. For example, there are good waste collection practices both when the service is directly provided by the municipality and when this activity may have been granted to a concessionaire. What matters is that the local authorities need to have the required knowledge about the available options for their choice in order to make the most appropriate decision in a specific sphere in view of the particular circumstances of each municipality.

Anna Gotzeva

Tel/fax (+359) 931 05 76
Mobile (+359) 888 917 423
45, Antim 1 St.
1303 Sofia, Bulgaria