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28 Challenges for Establishing a Municipal Heating Company from a Research Project

Summary: QUARREE100 is an innovative research project with an integrated, long-term implementation. The aim is to transfer investment-based research components into an economically active municipal heating company. A closer legal look reveals complex links between tax law, municipal law, state aid and subsidy law due to the different legal entities of the subsidy recipient for research and the heating company. These must be comprehensively assessed during the foundation process in order to avoid possible financial risks and also to maintain the QUARREE100 objective during the operational phase. QUARREE100 combines the claim to be both an example and a template for an integrated and sustainable energy supply for existing urban districts.

28.1 Introduction

QUARREE100 is an innovative research project with integrated implementation that takes on the challenge of establishing an integrated, sustainable energy supply in the heterogeneous built-up district “Rüsdorfer Kamp” in Heide. The project is divided into extensive modelling and research for the creation of an energy concept under the requirements of sustainability, resilience and system efficiency on the one hand, and implementation with a long-term oriented energy supply in the district on the other. In its special feature as a built-up district, QUARREE100 interlinks district development with regenerative energy, with redevelopment and neighbourhood management as well as with urban planning approaches. While the work on modelling and drawing up the energy concept can be assigned to research and thus to non-economic activities, the subsequent operation with the new energy supply is of an economic nature at the latest.

The network partners in QUARREE100 are not in a position to take on a subsequent operator role. This requires a third party. Following a decision by the Heide town council, the establishment of a new, independent heat supply company for QUARREE100 is being examined and initiated. The intention is to create the option of allowing other companies to participate in the municipal company at a later date in order to set it up and operate it.

Note: This technical article is not a substitute for legal advice.

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28.2 Basics

In principle, the establishment of a municipal company for energy supply is not new. What is challenging in the context of QUARREE100, however, is that, on the one hand, economic viability can probably only be achieved in the long term due to the highly innovative, technical system. On the other hand, investment funding is available for research, whereby these research components are to be integrated later into the overall economic system in the sense of sustainability. In this context, funding recipients and later operators are different legal entities. This creates a complex linkage of tax law, municipal law, state aid law and subsidy law.

It is also open whether the operator function will generally be carried out by a 100% municipal company, an external third party or a mixed-economy company consisting of a municipal company with the participation of a third party. This in turn is closely linked to public procurement law.

28.2.1 Establishment of a Municipal Company

The establishment of a municipal company is governed by the Schleswig-Holstein Trade Regulation Act (SHGO).

If the municipal of Heide wishes to engage in economic activities or participate in an economic enterprise, the provisions of §§101, 101 a, 102 SHGO must be observed. In addition, the project must be reported to the municipal supervisory authority (§108 SHGO).

According to §101 SHGO, “the municipality” may establish, take over or substantially expand economic enterprises if: (1) a public purpose is paramount, (2) the economic activity is proportionate to its capacity and that of the enterprise, and (3) if the purpose cannot be fulfilled better or more economically in another way.

According to § 101a SHGO, the production or distribution of heat as an economic activity generally serves a public purpose. According to § 101a paragraph 1 sentence 2 SHGO, the highest municipal supervisory authority is responsible for the approval according to § 101 paragraph 3 sentence 2. (Dr. Krohn/Dr. Reese/Dr. Jensen-Nissen/Thiesen 2021)

An intention to make a profit is not required. A distinction has to be made above all from sovereign activities. In terms of the Municipal Code, this means activities which, according to public law, can only be carried out by a public authority.

The municipality has the right under section 101(5) to use third parties to perform its functions.

28.2.2 Funding and Conditions of QUARREE100

The funding decision, including its general and special ancillary provisions for the Development Agency Region Heide (EARH), contains specifications for handling the investment research components after the end of the

approval period. (Projektträger Jülich 2017)¹

This states that insofar as items exceed a value of 410 EUR in an individual case, the EARH must submit a proposal for further use to the Project Management Organisation Jülich (PtJ), which is involved by the Ministry, with the submission of the proof of use. The PtJ then decides which measure is to be taken.

The grant notice specifies the following options:

- a) The investment components remain with the EARH and are used there for other scientific work.
- b) The components are transferred to the Confederation or to a third party
- c) The components are sold and the PtJ participates in part of the proceeds, which corresponds to the ratio of total grant to total expenditure, or the residual value of the items is compensated. (Projektträger Jülich 2017)¹

The cooperation agreement concluded between the partners of the QUARREE100 project also regulates how the knowledge gained is to be handled, in particular whether or under what conditions it may be used by a partner or a third party for economic purposes. (EARH 2018) The latter may be relevant for the licensing of the control software, which in turn was developed by individual partners in the collaborative project.

According to this, a municipality can in principle take charge of a heat supply, such as is planned in QUARREE100, with a municipal company, provided it complies with the requirements of §101 SHGO. The prerequisite is that the municipal supervisory authority does not object to this.

28.3 Legal Provisions

In addition to the legal norms for the establishment of a municipal energy supply company for QUARREE100 described in Section 28.2 and the requirements from the law on subsidies, there are various other legal provisions of public economic and tax law that are relevant to an evaluation of the following options (Section 28.5) for the establishment of a municipal energy supply company and the transfer of the research components to it.

¹ Source: Project QARREE100 internal document (not publicly available).

28.3.1 Public Commercial Law

As relevant provisions of public economic law, the requirements of public procurement law and EU state aid law are of particular importance. These must be evaluated in the context of QUARREE100 and a possible transfer of subsidised capital goods as well as a tendering of an operating task.

28.3.1.1 Requirements of Public Procurement Law

Public contracts and concessions must be awarded in competition and through transparent procedures (§ 97 (1) GWB).

Relevance of Public Procurement

The award of public contracts by contracting authorities above the EU thresholds is governed by the provisions of the Act against Restraints of Competition (GWB) and – in the case of services that are relevant here – by the Public Procurement Ordinance (VgV).

Below the EU thresholds (ABSTSH 2019) the Public Procurement Act of Schleswig-Holstein (VGSH) in conjunction with the corresponding Public Procurement Ordinance (SHVgVO) and the Sub-Threshold Public Procurement Ordinance (UVgO) are relevant. The award of public contracts with sectoral relevance by so-called sector contracting authorities is governed above the EU thresholds by the Sectoral Procurement Ordinance (SektVO) and can be carried out below the EU thresholds in a so-called freely structured procedure according to §3 paragraph 3 VGSH.

Public contracts are in principle relevant for the award of public contracts. According to § 103 (1) of the ARC, this is the case if the following conditions are met:

- the contract must be a contract for pecuniary interest, the concept of pecuniary interest being understood broadly (Pünder/Scheffenberg),
- this must have been concluded between a contracting authority or sector contracting entity and an undertaking, and
- it must have the procurement of services as its object.

Relevance of Concessions to Procurement

So-called concessions are also relevant to procurement. Concessions – in this case limited to service concessions – are contracts for consideration by which a grantor entrusts a company with the provision and administration of services. The consideration consists of the right to exploit the services, plus a payment if necessary (§ 105 (1) GWB). In contrast to the award of public contracts, the operating risk for the exploitation of the services is transferred to the concessionaire when a service concession is awarded.

The awarding of concessions above the EU thresholds is governed (ABSTSH 2019) by the award of concessions above the EU thresholds, governed by the Ordinance on

the Award of Concessions (KonzVgV), and below the EU thresholds may also be awarded in a free procedure pursuant to § 3(3) of the VGSH.

If a third party is to be commissioned by the municipality with the construction and operation of an energy supply system, as was developed in QUARREE100 for example, the selection of this third party is subject to mandatory public procurement law in accordance with the corresponding threshold values due to the clear procurement elements.

In the case of a newly founded municipal company, which is thus a subsidiary of the municipality, the procurement relevance of the operator task could be significantly reduced.

28.3.1.2 Requirements from the EU's State Aid Legislation

EU Relevance of Transmission Operations

The above-mentioned public procurement law in the narrower sense only addresses procurement processes of the public sector – not bidding activities. Asset sales and transfers of use by the public sector are subject to other competition law requirements: those of EU state aid law. The requirements arising from EU state aid law were clarified by the Commission in a 2016 notice:

If the sale of assets, goods and services takes place through a competitive, transparent, non-discriminatory and unconditional tendering procedure that complies with the TFEU rules on procurement, this transaction can be considered to be in line with market conditions – market conformity. (EU-Commission, 2016)

This means: If the recipient of the benefit is a company and the concrete inflow of assets could affect interstate trade (investment or demand competition), state aid conformity can in principle only be ensured if the exchange takes place in conformity with the market. (Dr. Krohn/Dr. Reese/Dr. Jensen-Nissen/Thiesen 2021)

Particularly with regard to the question of the transferability of the research components (“service”) to a third party or a municipal enterprise (“recipient”) and the consideration to be provided in the course of this, there is a high relevance to EU state aid. This can be countered by ensuring that the exchange of services conforms to the market, e.g. in the form of a regular tender or company evaluation. (Dr. Krohn/Dr. Reese/Dr. Jensen-Nissen/Thiesen 2021)

28.3.2 Tax Law

With regard to the question of the transferability of the research components to a (municipal) company, various aspects of tax law must also be taken into account in any case. If benefits flow freely to a company, the circumstances and effects of this transfer must be examined carefully and the resulting tax obligations must be observed. If tax

aspects come into play, it can be assumed that these will then have an effect on the investment costs and thus also, depending on the amount, directly on consumer prices.

28.3.2.1 Gift Tax Law

Although it is possible in principle, with the consent of the PtJ, to transfer the investment research components to a third party in accordance with the conditions of the Development Agency's Heide Region grant notification described in Section 28.2.2, the Inheritance and Gift Tax Act stipulates that every free gift *inter vivos*, insofar as the recipient is enriched by it at the expense of the donor, is deemed to be a gift *inter vivos* (Section 7, paragraph 1, sentence 1, Inheritance Tax Act). According to §9, para. 1, sentence 2, a tax arises on this.

Transfers of assets between public administration bodies free of charge are typically not covered by this provision; they are regularly not made freely. Due to the fact that the executive power is bound by law, it can usually be assumed that public administration bodies act in the performance of their duties and thus not freely. The transfers of assets are regularly offset by the fulfilment of the tasks incumbent on the public administration agencies. (BFH 2014).

The only decisive factor is the link between the transfer of assets and the performance of public duties, which may also be at the discretion of the donating body.

In its ruling of 29 March 2006, the Federal Finance Court (BFH) decided that these principles also apply to a gratuitous transfer of assets by a district to a limited liability company of which the district is the sole shareholder. If the transfer of assets is made by the district for the fulfilment of its public duties, the donation is not gratuitous'. (BFH 2006) As a result, this is not only conceivable between public administration bodies, but also for transfers from a public administration body to a private legal entity.

The same would apply if the EARH procured research components and transferred them to a third party or to the municipal company for the supply of the neighbourhood with renewable and affordable energy, since at that moment it would be fulfilling its tasks and thus no generosity would be apparent.

28.3.2.2 Income Tax Law

Pursuant to Section 1 (1) no. 6 KStG, commercial operations of legal persons under public law are subject to corporate income tax. According to the legal definition in § 4 (1) KStG, commercial operations are established by institutions that serve a sustainable economic activity to generate income – outside of agriculture and forestry –, stand out economically within the overall activity of the legal persons and do not constitute sovereign enterprises according to § 4 (5) KStG. (Bürstinghaus)

A legal person under public law therefore establishes a business of a commercial nature if the following facts are cumulatively fulfilled:

- Sustainable activity
- Economic activity
- Revenue generation
- Economic stand out within the overall operation
- No asset management
- No sovereign activity
- No agriculture and forestry

For an income tax assessment, it must therefore be evaluated whether the activity of the EARH as a procurer and transferor of the research components in relation to the coordination of the QUARREE100 project constitutes a business of a commercial nature.

This, in conjunction with the precise tax classification of the transfer of the research assets, would make it unlikely that income tax would be due in the event of a gratuitous transfer to a third party. If the transfer of the EARH were to take place to a (related) municipal company, where the sponsors are the same, it could be expected that the income tax would be due.

The determinant described above thus determines all income tax legal consequences.

28.3.2.3 Value Added Tax Law

By Article 12 of the Tax Amendment Act 2015 of 02 November 2015, the

Entrepreneurial status of legal persons under public law fundamentally changed. In the process, § 2 paragraph 3 UStG – the restrictive link to the KStG – was repealed and § 2b UStG was newly inserted. The amendment came into force on 01 January 2017 with an extended transitional period until 31 December 2022. As of 1 January 2023, legal persons under public law are only not deemed to be entrepreneurs within the meaning of VAT law if they carry out activities that are incumbent upon them within the scope of public authority.

In this context, it cannot be assumed that the transfer is subject to VAT, since if VAT had been due in the course of the transfer, the entitlement to deduct input tax would also have existed and the amounts would have been due in the same amount. (Dr. Krohn/Dr. Reese/Dr. Jensen–Nissen/Thiesen 2021)

28.3.3 Civil Law

28.3.3.1 Possession

The owner of a thing is the person who owns a movable or immovable thing. The essential regulations on possession are found in §§ 903–924 BGB. This is relevant for the evaluation of the design options that assume a transfer of ownership of the components (see chapter 28.5).

28.3.3.2 Ownership

Compared to the owner, the possessor of an object is the person who can actually exercise control over the movable or immovable object at the moment (§ 854 BGB). The owner thus has the power of disposal. The main regulations on ownership are found in §§ 854 to 872 BGB. Possession may only be used within the limits set by the owner.

This differentiation from ownership (see chapter 28.3.3.1) is also decisive for the design options (see chapter 28.5), in which no ownership transfer is described, but only a transfer under ownership law, e.g. in the case of lease models, thus keeping the research components in the ownership of the EARH.

28.3.4 Conclusion on Legal Design

For projects such as QUARREE100, which in addition to scientific research approaches also provide for investment funds for their demonstration and thus real implementation in an existing neighbourhood by the public sector, it is crucial to deal intensively with the legal determinants of long-term ownership and operation of the demonstrators in order to secure the future of the facilities and thus achieve sustainability of the research without a central profit motive in real space. The decisive factor here is the condition that the public sector does not seek long-term ownership and cannot afford to operate the facilities, so that a third party (e.g. private sector or municipal company) must take over these tasks. Depending on the recipient of the research components to be transferred and the planned operator model, this must first and foremost be possible under funding law. Subsequently, the prerequisites under public procurement law, EU state aid law and tax law must be examined for the transfer process. For QUARREE100 it can be stated that the incurrence of additional taxes in the event of a transfer is considered very unlikely, EU state aid law in the context of public procurement law is challenging but can nevertheless be solved, and municipal law also provides the option for a newly founded company to be responsible for the research components in municipal hands. Further explanations on the assessment of the financial risks arising from the above-mentioned determinants can be found in chapter 28.5.3.3.

Since the legal effect depends heavily on the relationship (under company law) between the actors (here EARH and third party or municipal enterprise), no generalisation can be made at this point. However, it can be stated that the determinants leave a lot of scope for development and design and thus do not represent “show stoppers” as such.

28.4 Regional Decisions

28.4.1 QUARREE100 Network

With the unanimous decision (Eckhard 2019)² of the QUARREE100 partner assembly on the technical concept and its implementation for the entire built-up district, there is at the same time the challenge that the investments granted to the EARH (“Property 1”) are not sufficient for this. This means that further investments (“Property 2”) have to be borne.

For local anchoring, the local partners come into consideration first and foremost (see Figure 28.1): EARH as a subsidiary of the municipal of Heide, Stadtwerke Heide as a subsidiary of the municipal of Heide and the municipal of Heide. However, in order not to define the possibilities too narrowly, the option of a third party is also touched upon. The various design options involving the actors mentioned here are examined in chapter 28.5.

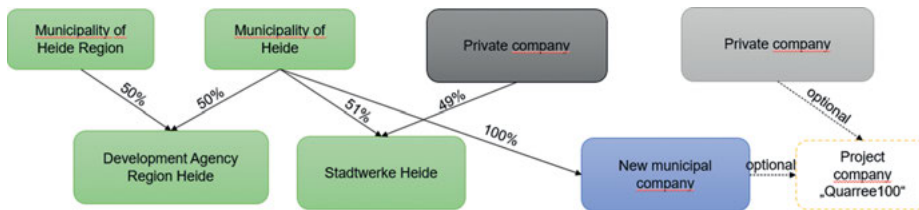


Figure 28.1: relationship of Stakeholder.
(source: own illustration)

28.4.2 Development Agency Heide Region

EARH was the project initiator and is responsible for the overall coordination and implementation of the research project. Since its original tasks are in the field of economic development and the promotion of cooperation between the city and the

² Source: Project QARREE100 internal document (not publicly available).

surrounding area, EARH will not take over the technical operation of the energy system after the end of the research project, nor will it take on any further investments in the context of QUARREE100.

The EARH would like the investment research components to be handed over to the potential operator after the end of the project with the obligation to implement the objectives of QUARREE100 and to continue to pursue research approaches in the long term in the sense of a real local laboratory.

There are no plans for the EARH to participate in an energy supply company in Rüssdorfer Kamp.

28.4.3 Municipal Utility Stadtwerke Heide

Stadtwerke Heide is a partner in the QUARREE100 project and a 51% subsidiary of the municipal of Heide. As a local energy supplier, an active role in the realisation and operation has therefore been intensively discussed. Within the framework of a supervisory board resolution, it was decided that Stadtwerke Heide would neither assume the operator function nor make additional investments for this purpose. (Sieber 2021)

28.4.4 Municipal of Heide

The council of the municipal of Heide considers the goals and orientation of the project to be important and decisive for a climate-friendly heat supply. It therefore gives the city administration a mandate to examine the establishment of a municipal heat supply company for QUARREE100. (hps 2021) This company can be 100% municipal or structured as a mixed-economy company.

28.4.5 Private Sector

Since the municipal of Heide does not yet have its own heating company, the participation and cooperation of a third party that can contribute know-how and experience is also being considered.

28.5 Design Options

With regard to the design of a solution for the operation of the innovative energy supply of QUARREE100, both the corporate law structure of the company to be founded and the intended transfer of the research components must therefore be considered.

28.5.1 Corporate Law Structure of the Supply Company

The energy supply company for QUARREE100 can either be a 100% company of the municipal of Heide (public company), a mixed-economy company with the public shareholder City of Heide together with another company under private law, or a purely private-law company of a third party.

28.5.2 Transfer of the Components

The transfer of the possible components of the EARH to the energy system can be carried out either within the framework of a divestment model (with transfer of ownership) or a lease model (without transfer of ownership) according to Section 28.3.3 both models in turn can take place in return for payment or free of charge.

In order to secure the project's objectives in the long term, the respective form of this transfer can be designed with or without conditions for the assumption of operator obligations.

28.5.3 Scenarios

With regard to the open options concerning the transfer of the investment research components of the EARH as well as the corporate structure, there are a variety of scenarios, which in turn are complex with regard to the legal aspects of item 2 and item 3 and must be comprehensively evaluated. The aim is to avoid possible financial risks and to maintain the objectives of QUARREE100.

In order to securely maintain the objective of QUARREE100, it appears necessary that a sufficient operator obligation is also formulated with a transfer of the components.

28.5.3.1 Evaluation of the Corporate Law Structure

Public Society

The establishment of a public company in the context of district energy supply is measured according to §§ 101, 106 a SHGO. The process requires a long-term positive economic plan to fulfil the requirements of the economic principles according to § 107 SHGO and thus for approval by the municipal supervisory authority, as well as a willingness to invest on the part of the municipal of Heide, which must be decided by the political bodies.

The prerequisite for opening the scope of application of §§ 101, 108 SHGO is the existence of an economic activity. Such an activity is assumed if services or goods are

continuously and systematically offered on the generally accessible market. (VG Ansbach 2005) An intention to make a profit is not required.

Due to the public sponsorship, the objectives of the project can also be directly included in the company statutes, in particular also under the aspect that the municipal of Heide is an association partner and has thus also signed the project's own cooperation agreement with regard to the rights of use.

Advantageous: Fulfilment of conditions under subsidy law, in particular for the assumption of operator obligations, no sustainable operating profit has to be achieved.

Disadvantages: No operational experience on the municipal side, long-term start-up process, public willingness to invest necessary.

Since the local municipal utility has rejected the operator and investor role, but the city is nevertheless striving to implement the project, the establishment of a new municipal utility company is being pushed. This path is ultimately open to every municipality, as long as this company meets the requirements (see chapter 28.2.1). It provides comprehensive scope for influencing and shaping the local promotion of an affordable energy transition and sets the tone for political decision-making with regard to the future development of a municipality.

Private Company

By transferring the project to a private company, an experienced company could be gained which, through its expertise in implementation and subsequent operation, would achieve cost savings, e.g. through synergies with other projects, corporate structures or other activities in the segment. On the other hand, taking over the operator duties in the context of achieving the goals of QUARREE100 appears attractive only to a limited extent if this is not accompanied by sufficient profitability. In order to consolidate the business foundation, this can lead to private-sector companies not fully implementing the technical concept in the research sense.

Advantageous: Experienced companies possibly with synergy opportunities, no public investments – private sector risk

Disadvantage: Difficult contractual assurance of QUARREE100 target achievement commitment.

Mixed Economy Company

A mixed-economy company could combine the advantages of both previous possibilities. Nevertheless, the establishment process is much more complex, since the participation of a private company in a public company can already be relevant for the award of contracts. In addition, the shareholding ratios must be coordinated.

Advantageous: Public shareholder can ensure the interests of the city, private shareholder can contribute experience and synergies.

Disadvantages: High coordination effort in the foundation with regard to tasks, investments and company shares. Private-sector participation can be relevant to procurement.

Solution Approach for QUARREE100

When considering the pure implementation (“operation”) of QUARREE100, a purely municipal company is favoured. However, the option of a mixed-society solution is not out of the question. In the case of a purely municipal implementation option favoured by the municipalities, a strict implementation period specified by the project would result in a greater weighting of the disadvantages mentioned, especially with regard to the establishment process and operating experience. This can be overcome by a private-sector partner. The perspective of participation by the municipal company should be given here.

If precisely these limiting factors (timeschedule, know-how) are not decisive, the path via a newly founded municipal company can be pursued further.

Irrespective of the special funding context and the importance of QUARREE100, the local public utility or a private sector company is usually used for the implementation of such supply concepts, so that a municipality does not have to deal directly with the realisation of an energy supply itself.

28.5.3.2 Evaluation of the Conditions of the Grant Decision

In principle, the funding decision evaluates the investment funds analogously to the funding of research equipment. These investments are funded at 100% under the aspect of research funding and are not subject to a commitment period. However, in accordance with Section 28.2.2, at the end of the project, the project management organisation must be informed of how these investments will be used. The focus here is on further use in the sense of research, i.e. sufficient access to research should be maintained in any case.

This can be done, for example, as part of a long-term validation of the technical system with an evaluation of the modelling. Furthermore, it is possible to use the research components in thematically related projects in the Heide Region, such as SYSTOGEN100 or WESTKÜSTE100, or in the university-based education of students at the West Coast University of Applied Sciences in combination with the new teaching and exhibition building.

If income is generated with the project within the project term, this would have to be offset against the funding. (AnBest-P 2016)

Advantageous: No commitment period with 100% funding, further possible use in terms of research is available also with participation of EARH.

Disadvantage: Final decision is incumbent on the PtJ or the approving ministry, with a binding statement only after the end of the project.

28.5.3.3 Evaluation of Financial Risks

The financial risks that may arise from a transfer of the research components from the EARH to a third party and from the legal aspects mentioned in chapter 28.3 can be minimised as follows:

Award of Public Contracts

The procurement regulations for public contracts must be applied to procurements in accordance with the specifications in Section 28.3.1.1. The public procurement law of the anti-trust law regulates the procurement of services above the EU thresholds by contracting authorities. It therefore only covers cases in which contracting authorities act as purchasers of services above the EU procurement threshold.

Circumstances in which the EARH offers services as a provider on the market are at most subject to EU state aid law (see below). However, caution is required if a sale, rental or leasing transaction imposes ancillary obligations which have procurement character (so-called “encapsulated procurement transactions”). Unless these are completely subordinate, they infect the contract, which is actually contract-exempt, and turn it into a public contract relevant for award. (Pünder/Schellenberg) This could be the case if the investment components take place under the condition to take over the operator obligations.

However, insofar as the components are owned or possessed by the EARH to a public company of the municipal of Heide (as one of the shareholders of EARH), this is not relevant to the award. This is because public contracts awarded by a controlled legal entity which is also a contracting authority within the meaning of the restrictions of competition Act (GWB), § 99 No. 2 GWB (EARH) to another legal entity controlled by the controlling contracting authority (the municipal of Heide) are not relevant for award (§ 108 (3) GWB) (Hofmann 2016).

If a transfer from the EARH to private sector actors – including mixed-economy actors – is to take place, an extensive procurement procedure for the heat supply will most likely be necessary with regard to procurement regulations.

Advantageous: Transfer to public company of the municipal of Heide

Award of Concessions

The award of a concession is necessary if the future operator or owner acts under his or her own economic responsibility (§ 105 (1) GWB). The concession then includes permission to supply heat to the district in the city, possibly linked to rights of way. As this is not the sovereign task of EARH, but lies with the municipal of Heide, any transfer to a private company would be complex and a trilateral agreement between EARH, the municipal of Heide and the concessionaire would have to be put out to tender.

Advantageous: Transfer to public company of the municipal of Heide

EU State Aid Law

EU state aid law must be considered in particular if, as a result of a transfer of the investment funds, an economic enterprise receives a market-economy advantage through a subsidy, i.e. the components are made available free of charge or at non-market conditions and the EARH can no longer fulfil its obligation to use the components for research. This must be carefully examined and a valid argument must be made in the case of possible aid.

Advantageous: Sale for a consideration at market price or free lease model with guarantee of earmarking on the research side by EARH as owner

Gift Tax Law

Gift tax applies when investment components are transferred to a third party free of charge as property of the EARH.

Advantageous: Sale against payment at market price or lease model, so that the EARH remains the owner.

Income Tax

Income tax liability is to be expected if the components are sold by EARH at a profit. It is not clear whether a profit will be made, as the income would have to be transferred to the funding agency in accordance with Section 2.2, paragraph 2, (c). (Projektträger Jülich 2017)

Advantageous: Transfer free of charge

Sales Tax

Turnover tax is to be expected if the EARH generates turnover with the components. These can arise from sales or leasing.

Advantageous: Transfer free of charge

28.6 Design of a Concrete Implementation Model Operator Model within the Framework of QUARREE100

For an organisationally efficient operation of the energy supply system to QUARREE100, it appears important that, while maintaining the objectives of QUARREE100, the economic operation is transferred into one hand at the end of the project.

In this context, the investment components of QUARREE100, together with other investments, are to represent the technical energy supply system. Furthermore, it is important to maintain the objectives of the research project with the developed technical and climate-relevant objectives of the technical system, which means that with the transfer of the investment components from QUARREE100, an operator obligation is also established in this regard.

Model I

Based on the preconditions described at the beginning (in particular, EARH procures research components and makes them available to an operator or transfers them) and on the large number of possible transmission variants, the following implementation recommendation would be considered, taking into account the scenarios described in Section 28.5 and their evaluation:

- Foundation of a public company for energy supply in QUARREE100 by the municipal of Heide
- Free lease of the investment research components from EARH to the new municipal company. The EARH thus remains the owner and continues to guarantee research access to the investment components from QUARREE100.
- Use of the work results achieved from QUARREE100 within the framework of the cooperation agreement by the municipal of Heide
- Procurement and construction of the other necessary components for the energy system by the new company. For this purpose, the company should obtain further funding. The total financing could be provided, for example, by a shareholder loan from the city, a loan with a guarantee from the city, or a financing concept consisting of both.

This implementation model seems to be the best way to fulfil the requirements of the law on subsidies and the simplest way to fulfil the requirements of the law on public procurement, as well as to minimise the possible tax obligations.

Model II

Due to the increasingly strict timeline and the ongoing foundation process, the implementation recommendation outlined above had to be re-evaluated and finally further developed. For a quick realisation of the project goals as well as preservation of the granted subsidies, the path is now taken via a mixed-economy company:

The city is sticking to the foundation of a new municipal energy supply company. For a quick and competent realisation of the project goals, which cannot be achieved by the municipal company alone, a private partner is to be involved. This partner is to be sought on the market at the initiative of the project and entrusted with the task of implementing the research approaches, e.g. via a separate project company. To ensure this, this actor should become part of the project with its own role and budget responsibility and thus a partner in the project consortium. The search for this third party can take place, for example, through an open approach to potential companies to determine concrete expressions of interest in the implementation of QUARREE100 and cooperation with the municipal company. This opens up the possibility for a municipal company to participate in a project company of the private actor at a later stage (duration of the foundation process) in order to secure the municipal interests and influence.

If both companies are finally partners in the project with their own role, the set project goals of QUARREE100 could be implemented in consensus with the consortium, the work results already achieved could be used jointly to realise the goals and the necessary research components could be procured together with the private partner.

This differentiation from ownership (see chapter 28.3.3.1) is also decisive for the design options (see chapter 28.5), in which no ownership transfer is described, but only a transfer under ownership law, e.g. in the case of lease models, thus keeping the research components in the ownership of the EARH.

28.7 Final Consideration

It should be noted that the transfer of the research project, particularly with regard to the subsequent systemic integration of the investment research components into an economic supply system, raises complex legal issues that were not apparent to this extent when the application was submitted and approved.

It is important that with a final decision to found the public energy supply company for QUARREE100, a first building block is established around which all other circumstances for the transfer and use of the research components as well as the overall operation for the sustainable supply in the built-up district can be arranged. An open multitude of possibilities fundamentally inhibits the decision-making process.

It is also evident that in the context of public procurement and tax law foundation processes, decisions by local politicians and the necessary preparations by the administration have to be planned more comprehensively in terms of time than is to be expected in the private sector.

Even if a number of scenarios have already been considered here, it is urgently recommended that the formation and transfer processes be resolutely accompanied under the legal requirements outlined. Particularly in the context of tax law, legal support will be able to adequately assess the possible obstacles, but will not be able to provide clear certainty, as ultimately discretionary decisions by the tax authorities cannot always be clearly determined in advance.

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