

The Role of Banks in PPP Procurement Procedures – Existence and Scope of an unwritten Prohibition of “Simultaneous Participation” after the ECJ’s “Assitur”-Case

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I. Introduction: Risks and benefits

Public budgets around the world hit new, inconceivable record-deficits, to a great extent due to the world financial crisis.¹ That leaves public authorities often no or only little (financial) leeway to fulfil their public tasks. Furthermore, banks often refuse to give loans not only to the private but also to the public sector, although credits are desperately needed for urgent investments in infrastructure projects, public services etc. Public private partnerships are often seen as an equitable answer to this dilemma.²

Amid these difficult times, a discussion emerged in Germany regarding the role of banks in financing public private partnerships. In times of declin-

ing reputation of banks, it is perhaps little wonder that some procuring agencies postulate that in public private partnership tendering procedures a financial institute may only be available for one economic operator, unless it is secured through certain appropriate means that the so called principle of “secret competition” is not violated. So far, the discussion in Germany³ has resulted in two main concerns. On the one hand, it is said that “secret competition” is at risk, if one financial institute is involved in the tendering procedure of two or more economic operators (so called simultaneous participation⁴). On the other hand, the risk of potential damages claims and the potential challenge of contract awards by tenderers that were excluded for unjustified reasons should not be underestimated as a potential threat for procuring public authorities.

This article tries to cut through the confusion on simultaneous participation. For that purpose this article will – after this introduction (I) – elaborate the involvement of financial institutes (II) in public private partnerships in Germany. Following that, it will examine the legal problems of simultaneous participation against the background of the ECJ’s “Assitur” judgment⁵ (III). The article then demonstrates that an accurate case by case examination (IV) might be a suitable solution for the problem. Some concluding remarks (V) will complete this article.

II. Involvement of banks in PPP in Germany

Different from the conventional self-execution of public tasks, within the framework of public private partnership projects public authorities neither procure separate parts of an envisaged project (e.g. design, completion, implementation, funding) nor

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1 For the U.S.A., see “\$100 Billion Increase in Deficit Is Forecast”, New York Times of February 1, 2010; for France see www.spiegel.de/wirtschaft/unternehmen/0,1518,672232,00.html; in Germany the impact of the world financial crisis is felt particularly severe on the local level, see Ude, “Globale Krise – lokale Wirkung”, *Der Städtetag* 2009, p. 1. Some German cities are close to being incapable of fulfilling their public tasks, see press release of the German Association of Cities from February 2, 2010, available on the Internet at <http://www.staedtetag.de/10/pressecke/presseDienst/artikel/2010/02/02/00674/index.html>.

2 See, e.g., Traupel, “PPP in the Current Financial Situation: Challenges and Chances”, *EPPPL*, Vol. 4, No. 2, 2009, pp. 71 et sqq. However, recourse to public private partnerships cannot generally be presented as a miracle solution for a public sector facing budget constraints, see European Commission, Green Paper on public-private partnerships and Community law on public contracts and concessions, COM/2004/0327 final.

3 For a general overview (without taking the latest decision of the ECJ on that issue into account though) see Ehrig, “Die Doppelbeteiligung im Vergabeverfahren”, *Vergaberecht* 2010, pp. 11 et sqq. and Dirksen/Schellenberg, “Mehrfachbeteiligungen auf Nachunternehmerebene”, *Vergaberecht* 2010, pp. 17 et sqq.

4 See Arrowsmith, Sue, *The Law of Public and Utilities Procurement*, London 2005, pp. 776 et sqq.

5 ECJ, Case C-538/07, 19 May 2009, *Assitur*.

is it common to award lots. Instead, procuring agencies call for tenders for the completion of the project as a whole. Usually, it is – inter alia – up to the private partner (often an ad hoc project-entity specifically founded for the duration of the project, so called Special Purpose Vehicle or SPV⁶) to provide a financing concept which is tailored to the individual needs and requirements of the sponsoring public agency and the project. Accordingly, funding of the project constitutes one of the essential elements of the various duties of the private partner during the planning and realisation of the project. Upon the question how the relation between the financial institute and the ad hoc project entity can be qualified it normally depends, if and to which extend, the financing institute has knowledge of the tender or fundamentals of the calculation of the tenderer. Upon the extent of that knowledge it depends if competition is likely to be falsified or restricted or not.

Typically the involvement of banks takes place in one of the following three modes: Either the financing institute is a subcontractor of the tendering entity or bank and tenderer build a bidding consortium.⁷ The third option involves the creation of a project-entity (SPV) which is held jointly by the bank (or one of its subsidiaries) and the private partner. For a detailed analysis of the complex arrangements between the various players it is necessary to look at each individual case. In most cases banks act as subcontractors though. However, the involvement of banks in the funding of public private partnership projects differs essentially from the usual constellations of simultaneous participation situations (outside funding public private partnership situations) on which German courts had to decide so far and which are usually cited as precedence in order to exclude banks from simultaneous participation. This is, because in those constellations already decided upon by German courts one economic operator tendered on its own and simultaneously in cooperation with another economic operator. Meanwhile, banks usually do not tender on their own in public private partnership projects. However, at the end of the day it makes not a big difference if the bank acts as a subcontractor, in a bidding-consortium or as a shareholder of the project-entity, because in order to assess credit risks financing institutes are usually only willing to invest in the funding of a public private partnership if all critical information has been disclosed to

them. That includes all project details and calculations (“The bank knows everything.”). From the aforementioned considerations the conclusion can be drawn that it is generally possible for financing institutes in simultaneous participation constellations to have knowledge of the calculations of several economic operators. Therefore and due to collusive behaviour of a bank and single economic operators an infringement of the principle of free and unfalsified competition cannot be excluded. But the existence of an (absolute) prohibition of all constellations of simultaneous participation can neither be concluded, which is demonstrated in the next part.

III. No general ban on simultaneous participation

There is no explicit statutory prohibition of simultaneous participation neither in European nor in German procurement law. Nonetheless, in German case law a number of cases can be found in which economic operators have been excluded because of their involvement in different constellations of simultaneous participation. Therefore the question arises whether a ban of simultaneous participation derives from an interpretation of statutory procurement provisions or the procurement principles.

The origin of the prohibition of simultaneous participation lies in the coaction of a number of different procurement rules: Those provisions that oblige the contracting agency to deal confidentially with tenders (especially the provisions concerned with the opening of the tenders, see § 22 VOL/A⁸) and those provisions that explicitly prohibit competition-restricting agreements in tender procedures (see, e.g., §§ 25 Nr. 1 para. 1 lit. c VOB/A⁹ and 25 Nr. 1 para. 1 lit. f VOL/A).¹⁰ From the interaction of

6 See Arrowsmith, (*supra*, note 4), p. 408 and 776.

7 For a general overview on the participation of subcontractors and consortia, see Arrowsmith, (*supra*, note 4), pp. 406 et sqq. and pp. 775 et sqq.

8 Procurement Regulations for Supplies and Services (VOL/A).

9 Procurement Regulations for Public Works (VOB/A).

10 § 25 Nr. 1 para. 1 lit. c VOB/A reads: “The following are excluded: ...c) tenders from tenderers who have colluded with respect to the invitation to tender in a way which constitutes an inadmissible restriction of competition.” § 25 Nr. 1 para. 1 lit. f VOL/A reads: “The following are excluded: ... f) tenders by tenderers who have made an inadmissible, non-competitive agreement with regard to the award.”

these provisions with the principle of competition (see Recital 2 Directive 2004/18/EC¹¹ and § 97 para. 1 GWB¹²) follows the so called principle of "secret competition". It is considered as inconsistent with that principle if a tenderer has knowledge of the content of the tender or the calculation (or parts of it) of a competitor participating in the same procedure for the award of a public contract.

Tangible impacts of that principle can be seen in different constellations of simultaneous participation that German courts had to deal with so far: The participation of an individual tenderer who simultaneously tenders as a member of a bidding consortium in a tendering procedure (with or without the subdivision of lots of the tender¹³), the participation in a tendering procedure as an individual tenderer on the one hand and as a subcontractor on the other hand,¹⁴ moreover, the participation of two economic operators affiliated in a group of companies ("Konzern").¹⁵ Furthermore, under certain circumstances the burden of proof is reversed: Generally it is incumbent upon the procuring agency to produce evidence for competition-fixing agreements, but in the case of simultaneous participation in the form that an individual tenderer is also a member of a bidding consortium the courts *presume* that the principle of "secret competition" is violated.¹⁶

When interpreting the relevant procurement statutes the principle of competition functions as a directive,¹⁷ which indeed suggests inferring a competition-fixing from the knowledge of one tenderer of the tender-documents of another tenderer. That

corresponding knowledge existed can be presumed for the whole public contract in cases of simultaneous participation involving an individual tenderer and a bidding consortium to which the individual tenderer is also a member. In all other cases prohibited knowledge *can* exist, but it is – like with any other competition-fixing – incumbent upon the procuring agency to produce evidence of the prohibited knowledge. An absolute prohibition of all constellations of simultaneous participation by deduction from the principle of competition would exceed its function as a mere directive for interpretation. For a direct application, however, there is no necessity. That means that a superior rule called "duty to secret competition" does not exist.¹⁸

Recently, the ECJ has confirmed this view by stating that Community law precludes a national (Italian) provision which lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure.¹⁹ The court also established that a mere finding of a relationship of control between the undertakings concerned, by reason of ownership or the number of voting rights exercisable at ordinary shareholders' meetings is not sufficient for the contracting authority to automatically exclude those undertakings from the procedure for the award of the contract, without ascertaining whether such a relationship had a specific effect on

11 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, pp. 114–240.

12. Act against Restraints of Competition (GWB).

13 *OLG Düsseldorf*, 16.9.2003, *Vergaberecht* 2003, pp. 690 et sqq. (Obligatory exclusion of a tenderer who participates with his own offer and additionally tenders as a member of a bidding consortium.).

14 *OLG Düsseldorf*, 13.4.2006, *NZBau* 2006, pp. 810 et sqq. (Submitting a tender while also being a subcontractor of another tenderer does not automatically lead to an exclusion from the tendering procedure. Additional facts that lead to the conclusion that the tenderer has gained an unjustified competitive advantage must be presented. Nature and scope of the subcontracting must be taken into account in order to find out whether the subcontractor had knowledge of the calculation of the tender of the main contractor.).

15 *OLG Düsseldorf*, 27.7.2006, *Vergaberecht* 2007, pp. 229 et sqq. (If two consolidated companies that also have infrastructural and interweavements hand in tenders simultaneously (and these ten-

ders show conformities) that a "secret competition" did not take place. The concerned tenders have to be excluded without further investigation. Therefore, in such cases it is incumbent upon the tenderer to produce evidence that and due to which suitable measures the principle of "secret competition" remains unaffected nonetheless.).

16 *OLG Düsseldorf*, 13.9.2004, *Vergaberecht* 2005, pp. 117 et sqq. (If an individual tenderer is simultaneously a member of a bidding consortium it has to be presumed that the "secret competition" is affected. The tenders have to be excluded unless the tenderers meet their obligation to prove that a "secret competition" took place nonetheless.).

17 Critical towards a too broad conception of the principle of competition Burgi, "Die Bedeutung der allgemeinen Vergabegrundsätze Wettbewerb, Transparenz und Gleichbehandlung", *NZBau* 2008, pp. 29 et sqq.

18 Burgi, see *supra*, note 17, pp. 29 (33).

19 ECJ, Case C-538/07, 19 May 2009, *Assitur*, paras. 28 et sqq.; for a review of the case see Hölzl, "Assitur: Die Wahrheit ist konkret!", *NZBau* 2009, pp. 751 et sqq.

their conduct in the course of the tendering procedure concerned.²⁰

In addition the ECJ found that an *a priori* exclusion only because of a *presumed* competition-fixing (without any actual evidence for such behaviour) would be disproportional. Most recently, in another similar judgement the court went further and found that Community law must be interpreted as precluding national legislation (again an Italian statute), which provides that, when a public contract is being awarded, with a value even below the threshold laid down in Article 7(c) of Directive 2004/18/EC, but of certain cross-border interest, both a permanent consortium and its member companies are automatically excluded from participating in that procedure and face criminal sanctions where those companies have submitted tenders in competition with the consortium's tender in the context of the same procedure, even if the consortium's tender was not submitted on behalf and in the interests of those companies.²¹

That view is supported by a comparison with other German statutory provisions that provide reasons for the exclusion of tenderers (see, e.g., § 8 Nr. 5 para. 1 lit. c VOB/A²²). Those provisions (based on Article 45 Directive 2004/18/EC) always require a severe, *proven* misconduct to exclude a tenderer.²³

Furthermore, it would run counter to the effective application of Community law and considerably reduce competition at Community and national level to exclude systematically all legally possible affiliations of undertakings from participating in the same procedure for the award of a public contract. That would be in diametrical opposition to the aims of European and national procurement rules. It is Community interest to ensure the widest possible participation by tenderers in a call for tenders. A systemic rule of exclusion would go beyond what is necessary to achieve the objective of ensuring the principles of equal treatment and transparency.²⁴ Especially in a market environment like the funding of public private partnerships with only a very limited number of tenderers anyhow, such a solution could lead to significant restrictions of competition. In summary, an absolute prohibition of simultaneous participation does not exist, neither in European nor German procurement law. However, German courts presume a violation of the principle of "secret competition" if an individual tenderer who is also part of a bidding-consortium submits his own tender simul-

taneously. As a consequence the burden of proof is reversed in those constellations and it is incumbent upon the tenderers to present facts showing that the relationship had no specific effect on their conduct in the course of the tendering procedure and that competition had not been restricted.

IV. Necessity of case by case examination

Simultaneous participation of banks in public private partnership projects is neither explicitly regulated nor does any case-law dealing with that issue exist. A one-to-one application of the existing case-law dealing with different simultaneous participation constellations is also inappropriate because of the structural differences between simultaneous participation situations involving banks. These structural differences exist mostly for one reason: Banking confidentiality functions as an additional protector of secrecy and competition. Although banking confidentiality has not yet been subject to legislation in Germany, practitioners and scholars alike agree on its scope and content.²⁵ Its core content is the duty of the finance institutes to keep silent about all facts and assessments it got to know in the course of the business relationship with a customer (here the ad hoc project-entity).²⁶ Banking confidentiality results from an accessory obligation (§ 241 para. 1 BGB²⁷) of the main contract. Additionally, it is mentioned in the general terms and conditions of all banking contracts. The con-

20 ECJ, see *supra*, note 19, para. 32.

21 See ECJ Case C-376/08, 23 December 2009, *Serrantoni Srl*, operative part.

22 Which reads: "Contractors may be excluded from participating in the contest, ...c) who have demonstrably engaged in severe misconduct which casts doubt on their reliability as candidates ..."

23 For which the procuring agency carries the burden of proof, see Clahs, in Kappelmann/Messerschmidt (eds), VOB Teile A und B, 2nd ed. 2007, § 8 VOB/A margin no. 58.

24 See ECJ Case C-376/08, 23 December 2009, *Serrantoni Srl*, para. 40 and ECJ, C-538/07, 19 May 2009, *Assitur* paras. 26 to 29.

25 See Beckhusen, in Derleder/Knops/Bamberger (eds), *Handbuch zum deutschen und europäischen Bankrecht*, 2009, pp. 153 et seqq.

26 BGH, Wertpapiermitteilungen 2006, p. 380 (384).

27 German Civil Code.

tent of banking confidentiality does not only comprehend facts but also appraisals of customers. Banking confidentiality entails the duty not to confess any information about customers to third parties unless it is required by law. This duty does not even end with the termination of the business relation but applies indefinitely. Furthermore, in case of any unjustified violation of banking confidentiality the affected customer is entitled to damages under German Civil Law.²⁸

Against that background, a competition-fixing agreement respectively a violation of the principle of "secret competition" by banks passing on knowledge to affiliated tenderers cannot be presumed because that would equal to imputing a breach of banking confidentiality to the bank. That, in turn, would equal to imputing a breach of law to the bank. That a bank might have knowledge of the financing conditions and calculations of different tenderers does not constitute a restriction of competition alone. Only if the bank does not keep that knowledge for itself, free competition might be endangered. Thus, an *a priori* exclusion of tenderers that cooperate with banks that simultaneously cooperate with other tenderers is not due. That would amount to an unnecessary reduction of potential competition.

Having regard to the foregoing considerations, it should be pointed out that only if additional indications for a potential restriction of competition appear, exclusion of tenderers should be considered. The examination and assessment of such indications must follow the regular rules of procedure, i.e. if indications or irregularities appear, the procuring agency must investigate these indications and – if the suspicion is substantiated after the investigation – exclude the tenderers or annul

the tendering procedure if necessary (see §§ 25 Nr. 1 para. 1 lit. f VOL/A, 25 Nr. 1 para. 1 lit. c VOB/A and 26 Nr. 1 lit. c VOB/A, 26 Nr. 1 lit. d VOL/A).²⁹ Thereby the procuring agencies can act on the assumption that a potential competition-fixing agreement is the more likely the closer the relationship is designed between bank and tenderer (e.g. bidding consortium instead of subcontracting). A high profit of the bank in question might be another indicator for an increased risk of a restriction of competition.

A reasonable tool to safeguard "secret competition" in simultaneous participation situations might be an additional confidentiality undertaking which financing institutes could be asked to submit to procuring agencies in case that free competition is questionable. Such a confidentiality undertaking would be entered into by the bank and its partner. It should contain two main agreements. First, it should include a definition of what is considered as sensitive information for the purpose of the business relation in question. Second, it should highlight that confidential treatment of all sensitive information is essential for the participation in the tendering procedure and that accordingly the bank will not disclose any sensitive information to a third party, unless required by law or if agreed on beforehand (e.g., the passing on of information to consultants or lawyers). If any information has to be disclosed the other party will be informed instantly.

Such a confidentiality undertaking would concretise and strengthen banking confidentiality in the context of public private partnerships and thereby act as a strong deterrent against any potential disclosure of delicate information and hence, in turn strengthen free and unrestricted competition.

V. Conclusion

Simultaneous participation of banks in public private partnership projects bears risks as well as benefits for competition. Applying a too strict approach and systematically excluding tenderers affiliated to a bank that also cooperates with another economic operator that participates in the same procedure for the award of a public contract would run counter to the effective use of competition as a tool to get "best value for taxpayers' money".³⁰ In

28 § 280 para. 1 BGB in conjunction with the contract and general terms and conditions; § 823 para. 1 BGB; § 823 para. 2 BGB i.V.m. §§ 28, 29 BDSG (Federal Data Protection Act).

29 For §§ 25 Nr. 1 para. 1 lit. f VOL/A and 25 Nr. 1 para. 1 lit. c VOB/A see *supra*, note 10; § 26 Nr. 1 lit. c VOB/A and § 26 Nr. 1 lit. d VOL/A alike read: "The invitation to tender may be cancelled, if: ... if there are other serious reasons."

30 See Federal Acquisition Regulation of July 2007 (FAR), 1.102-2 (a) und FAR 1.102-2 (1) and Econom, "Confronting the Looming Crisis in the Federal Acquisition Workforce", 36 *Public Contract Law Journal* 2006, p. 171 (183). For the (yet) different approach in Europe, see Burgi/Gölnitz, "Die Modernisierung des Vergaberechts als Daueraufgabe – Lessons from the US", *DOV* 2009, p. 829 (831).

particular, in times when economic operators struggle to find banks funding their projects a too harsh approach could be counterproductive for competition. Furthermore, neither European nor German procurement law does provide for the systematic exclusion of tenderers involved in simultaneous participation. Accordingly, the ECJ has declared unequivocally that Community law precludes national legislation, which – even while pursuing

legitimate objectives like transparency – lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure. However, free competition is one of the core principles of Community law and because not every risk of competition-fixing can be excluded public authorities must remain careful. If suspicions arise, procuring agencies should ask for a confidentiality undertaking.