

## **SERIES OF ARTICLES FOR MUNICIPAL JOURNAL ON SHARED SERVICES**

### **Article 4 - THE CORPORATE MODEL IMPLICATIONS OF SHARED SERVICES**

**By Mike Mousdale**

In a previous article we explored administrative arrangements which authorities employ for joint working. This fourth article considers the use of corporate vehicles to deliver services, including an analysis of the procurement position where a shared company is used, which is another main option.

Local authorities frequently form and participate in companies but usually do so either with non-local government parties, for example, from the voluntary sector or private sector or individually, without any form of joint venture. The creation of a joint venture company with other local authorities is relatively uncommon, yet, with the experience which many authorities have gained of service delivery through a separate corporate entity and the potential benefits which might arise from service delivery outside of the formal local government structure, many Councils are exploring this option as an alternative to either purely administrative or contractual collaboration.

Historically, many authorities have been reluctant to embrace the company model as a alternative model, due perhaps to concerns over powers to participate and the highly regulated environment under Part V of the Local Government and Housing Act 1989. But these should not be a concern today, since powers exist (by common consent) through the well-being powers in s2 of the Local Government Act 2000 and, with the repeal of Part IV of the Local Government and Housing Act 1989, controlled and influenced companies have, for the most part, been "deregulated".

However, what has not changed is the prohibition on delegation of functions to companies, which limits the scope of arrangements that can be made. A company would therefore need to be engaged under a service contract.

An earlier article in this series considered the Teckal Case (Case C -107/98), which established that a company set up by a local authority, would not need to compete in procurement for work or services from its parent authority. To benefit from this exemption, it is necessary for the company to behave as if it was an in house department. Subsequent cases have confirmed this approach but also narrowed the scope of Teckal. This was most recently reviewed by the ECJ in Carbotermo SpA (Case C -340/04), from which we can establish the following relevant principles: -

- the authority must exercise a control similar to that which it exercises over its own departments
- the exercise must be "a power of decisive influence over both strategic objects and significant decisions of the company"
- any activities undertaken for bodies other than the controlling authority can have no more than marginal significance
- Teckal exemption confirmed as applying to a multiple authority controlled company.

This case provides a positive message that local authorities may jointly set up a company into which they might divert services without the impact of the procurement rules applying. However, there is a clear warning given about the degree of autonomy to be granted to the management of that company, since without restrictions being placed, so as to reserve major decisions to the shareholders, then usual company law provisions

may negate the procurement exemption, because too much power would rest in the board.

This view is consistent with the view in Teckal that the company must behave like an in-house department, but potentially means that some of the benefits of a company structure cannot be realised. A company route is often attractive because of the freedom it has from authority interference and for its commercial outlook. Authorities need to be cautious, therefore, when entering into such arrangements and cognisant of the limitations which will apply if they wish their vehicle to be able to provide services without procurement.

Authorities contemplating using a corporate vehicle for joint service delivery need to be clear about their objectives. If they are to launch an outward looking entity, with a board of directors vested with freedom and latitude to manage, they will need to recognise that there will be little scope to award work to this company "as of right". However, if the purpose is to provide a convenient arrangement for joint service delivery but with the authorities exercising overall control, the corporate route might be a viable alternative to the merely collaborative or contractual alterations.

**Mike Mousdale is a Partner with Eversheds and chairs its Procurement Group. Eversheds are running a series of seminars on shared services for local authorities around the country in May and June. Email [nicolaarmstrong@eversheds.com](mailto:nicolaarmstrong@eversheds.com) for more details.**

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