

1 Summary

Chapter 2 contains an overview of the questions discussed in the report, including how free the municipalities are in choosing forms of collaboration in the ICT area.

This report must be seen in the context of the report “ICT collaboration in the municipal sector – Models for organisation, control and financing”, prepared by PwC (2015)¹. The PwC report weighs the pros and cons of some organisational and management models based on some specific criteria.

In this report, we take a legal approach and offer a summary of some important legal frameworks, which the municipal authorities must comply with when choosing their form of cooperation on ICT. In our opinion, ICT collaboration raises few specific issues that entail framework conditions differing from what applies otherwise to intermunicipal cooperation. The report will therefore be highly relevant to intermunicipal collaboration also in other areas.

Generally, the question of how much freedom the municipal authorities have in organising intermunicipal collaboration undertakings will depend on their subject matter. With respect to exercising public authority and performing statutory tasks, the municipalities have very limited freedom of action. Outside of this area, the municipal authorities have in principle great scope for organising their activities the way they consider appropriate. Here the municipal authorities can make use of the special organisational forms only municipalities can participate in as well as most other forms of organisation available to private legal entities.

However, this is only a point of departure. As a municipality is not a private legal entity, but a public body, special rules apply that will in practice limit their freedom to choose how to organise intermunicipal collaboration. It is in particular the public procurement regulations that represent such a limitation. If the municipality acquires services in the ICT area from an intermunicipal organisation it participates in, this will in principle be considered as a procurement contract that must comply with public procurements regulations. However, there are exceptions in the rules for “extended in-house procuring”. In practice, these rules constitute the most important legal framework for and limitation to the municipalities’ freedom to establish intermunicipal collaboration in the ICT area. The account given of this is therefore the most central part of the report. The rules for in-house procuring are discussed in chapter 4.

We underline that establishing the form of intermunicipal cooperation – both in the ICT area and otherwise – must be subject to a specific assessment in each individual case. This report provides an overview of a number of key legal issues. The importance of these legal issues to each collaboration venture will always depend on such a specific assessment. A further assessment must therefore be made before establishing any form of collaboration. This assessment should include both the form of organisation that will be most appropriate and what legal issues such an organisation will raise. The objective of this report is to provide an overview that may help ensure that such preparatory work includes an assessment of the questions that should be raised.

¹ KS R&D project no. 144016

Chapter 3 contains an overview of the various alternative organisational forms the municipalities may choose when they consider an ICT collaboration.

We only describe collaboration with an organisational superstructure. The report provides detailed information about five different organisational forms: Collaboration with a separate board pursuant to section 27 of the Local Government Act, host municipality collaboration pursuant to chapter 5A of the Local Government Act, collaboration in the form of an intermunicipal company² (IKS), cooperation in the form of a limited liability company (AS) owned by municipalities and collaboration in the form of a cooperative (SA).

We give an overview of the most important features of these organisational forms, such as who can participate, the participants' liabilities, the organisational structure and the situation in respect of the Public Administration Act, the Freedom of Information Act, etc. We also mention which of these organisational forms can participate in the others.

The report also provides an overview of the legal framework for corporate governance that applies to the different collaboration models. To some extent, the advantages and disadvantages of various forms of corporate governance are also mentioned.

In **Chapter 4**, we have assessed various forms of intermunicipal ICT collaboration and the situation in respect of the regulatory framework for public procurement. The question we have examined in greater detail is whether municipalities can receive services directly from such ICT collaboration without complying with the procurement regulations. This will largely depend on whether the requirements for an exemption for vertical and horizontal cooperation have been fulfilled.

Our conclusion is that none of the organisational forms excludes the possibility that the exemption for vertical and horizontal cooperation may have been fulfilled. However, we underline that it will be easier for some organisational forms to fall within the scope of these exemptions than others. We also underline that we have only made a general assessment of whether the organisational forms facilitate compliance with the exemptions. A specific assessment must always be made on whether the substantive issues of each case show that the requirements for the respective exemptions have been fulfilled.

Generally, we assume that a collaboration venture organised pursuant to section 27 of the Local Government Act (where the cooperating body is a separate legal entity) is well suited to ensuring compliance with the exemption for vertical cooperation. We also think that a collaboration organised pursuant to section 27 of the Local Government Act (where the cooperating body is not a separate legal entity) may fulfil the requirements for the exemption for horizontal cooperation, provided that all participating municipalities have influence and contribute to resolving tasks in the collaboration venture.

Cooperatives are a little-used form of organisation in intermunicipal collaboration, but we think this model could well fulfil the exemption for vertical cooperation.

We also think that the exemption requirements for vertical cooperation may be fulfilled in collaboration ventures organised as an intermunicipal undertaking under the Act relating to Intermunicipal

² Unauthorized translation from lov om interkommunale selskaper av 29. januar 1999 nr. 6.

companies. However, we underline that this would be a little more uncertain if one of the owner municipalities has a large ownership interest. In such cases, measures should be considered that would ensure that also municipalities with a small ownership interest would have a minimum of influence over the undertaking. This is to ensure fulfilment of the control criterion.

Correspondingly, we think that the requirements for an exemption for vertical cooperation might be met for limited liability companies under the Limited Liability Companies Act. The assessment of limited liability companies is quite similar to the assessment of intermunicipal companies under the Act relating to Intermunicipal companies, but more “control mechanisms” are incorporated in this Act compared with the Limited Liability Companies Act. To make sure that the control criterion has been fulfilled also for limited liability companies, it may therefore be advisable to introduce some steering possibilities that exceed the “normal model” of the Limited Liability Companies Act. Also for limited liability companies, uncertainties may arise as to whether the control criterion has been fulfilled if one of the shareholders has a large ownership interest. As for intermunicipal companies, measures should then be considered that would ensure that also municipalities with a small ownership interest would have a minimum of influence over the limited liability company.

Finally, we cannot exclude the possibility that host municipality collaboration pursuant to Chapter 5A of the Local Government Act may fulfil the requirements for an exemption for horizontal cooperation. Of the organisational forms we have assessed, however, host municipality collaboration is the model that is generally most uncertain if the objective is to avoid having to apply the procurement regulations. The reason for this is that it is doubtful whether host municipality collaboration will fulfil the requirement of reciprocity/actual cooperation, which is one of the requirements for making use of the exemption for horizontal cooperation. One measure that may help ensure compliance with the requirement of reciprocity/real cooperation is to make sure that all cooperating municipalities take an active part in performing tasks in the collaboration venture.

In **Chapter 5**, we look at some special issues arising if municipalities taking part in ICT collaboration wish to be included in an existing agreement. We have good reason to think that there is no absolute prohibition against including a new municipality in an existing agreement. Nevertheless, this will often be unlawful because it would be considered as a substantial change of the agreement.

The scope for amendments may be somewhat greater if the agreement has a clause stating that other municipalities may be included in the agreement. If the agreement does not have an amendment clause, the amendment would have to be examined pursuant to the doctrine of substantial changes. Relevant aspects in this assessment will be whether the amendment would make it possible for other suppliers to participate in or win the tender procedure, whether the agreement is extended to include more or different services, and the economic balance of the agreement is changed in the supplier’s favour, whether the amendment shows signs of circumvention, the causes of the amendment, and the consequences of conducting a new tender procedure.

For framework agreements for which tenders have been invited pursuant to part III of the Public Procurement Regulations (acquisitions exceeding the EEA threshold value), the scope of action will be more restricted because section 15-1 (3) of the Regulations stipulates that only the original parties can enter into contracts under the framework agreement.

Chapter 5 also contains a separate assessment of issues relating to the use of municipal joint components and whether this can be done directly without having to apply the procurement regulations. This is generally a more detailed discussion of the issues raised in chapter 4.

In **Chapter 6**, we discuss some issues under contract law arising in connection with intermunicipal ICT cooperation. We focus on the importance of the organisational and steering model to the status of the collaboration venture and in connection with the conclusion of contracts on the market, besides the importance of proximity and short decision-making routes between the participating municipalities and their cooperation.

We have reviewed important elements of the Standard Government Agreement Forms. Generally, they place the customer in a better position than various other terms and conditions from suppliers, and we recommend using these agreements where possible. Furthermore, we give a rough outline of the types of computer program licences and call attention to circumstances of particular importance when concluding licence agreements that are to include several municipalities. Finally, we show an example of how ICT collaboration could be organised and comment briefly on cloud services.

In **Chapter 7**, we give an overview of some issues relating to taxes. The starting point is that an undertaking that is part of a municipality's legal entity is exempt from tax, but an undertaking operated as an independent legal entity is liable to tax. If the undertaking does not have commercial purposes, tax exemption may be granted.

As a rule, the sale of goods and services is subject to VAT. The undertaking must be registered in the VAT register. Voluntary registration is also possible if the undertaking considers this economically expedient.

Tenancy agreements may be VAT sensitive.

In **Chapter 8**, we present the requirements for application of the Working Environment Act's rules on the transfer of undertaking. For these rules to apply there must be a transfer from one legal entity to another. The transfer must include an autonomous unit that must be carried on chiefly in the same way as before the transfer.

This chapter includes some guidelines on how to carry out a transfer of undertaking to meet the requirements laid down in the statutory framework and agreements. There are three parties to a possible transfer of undertaking: the employee and the new and old employer. The system of agreements imposes a duty on the employer to discuss any transfer of undertaking with employee organisations. In this chapter, we comment on matters employers are obliged to discuss. We offer advice on how to resolve practical challenges. The employee has a right of reservation and may object to being transferred to a new employer. This means that the employment relationship will be terminated. In certain cases, the courts have ruled that the employment relationship with the original employer is to continue. This is conditional upon the employee demanding it, so-called right of choice.

This chapter discusses agreements on preferential rights with the former employer. Such agreements may be challenging in respect of the statutory preferential right and the non-statutory "qualification principle" in connection with appointments. We do not recommend this type of agreements.

We also provide advice in this chapter on how employer's liability should be exercised. This should be placed in the collaboration venture. The board is responsible for the general manager and the general manager is responsible for all the other employees.

In **Chapter 9**, we review the main rules of the Archives Act. The Act distinguishes between public and private archives. With respect to the relevant organisational forms, the archives of limited liability companies and cooperatives are private. Nevertheless, such companies are advised to observe the rules that apply to public archives. This is to ensure continuity in the keeping of records in the event that the undertaking should be retransferred to the municipality.

The Archives Act has strict rules for transferring records and scrapping documents. We generally recommend consultations with the Director General of the National Archives to ensure that archives are correctly handled.

The archives will contain personal data, and we underline that the rules of the Personal Data Act must be observed.

Chapter 10 contains an overview of some central issues which state aid rules may have on intermunicipal ICT collaboration. The concept of state aid includes in this context municipal and county subsidies. The main rule is that state aid are forbidden. In practice, the subsidies are unlawful if six criteria have been met. We provide a brief outline of the content of these six criteria.

If all the criteria have been met, the aid cannot be granted until it has been notified to and approved by ESA, unless it comes under the scope of one of the exemptions from this notification obligation.

In principle, intermunicipal collaboration on ICT will not raise any special issues that would place such collaboration in a position differing from that of intermunicipal collaboration generally. If the undertaking is aimed at conducting an economic activity, partly or fully, it will in principle be covered by the state aid rules. If also the other criteria mentioned above have been fulfilled, any economic benefit the undertaking receives from the public authorities on terms that do not represent market value will be prohibited in principle. For the undertaking to be lawful under the rules for state aid, it must in such cases either be approved by the ESA following notification or be adapted to one of the exemptions.

We underline that in the same way as when creating any intermunicipal collaboration, also on ICT, an assessment must be made of the procurement regulations' exemption for in-house arrangements, a closer assessment should also be made of the rules for state aid.

Chapter 11 deals with who formally represents the various collaboration forms in judicial processes. For the municipality, this will be the mayor, and for companies, it will be the chairman of the board of directors.

This chapter includes some thoughts on how the owner should relate to collaboration ventures involved in a legal process. The owner should abstain from intervening in labour law actions, but considering the scope of the economic consequences, the owner might more appropriately take an interest in disputes concerning contracts applying to the collaboration venture.

This chapter provides advice on how the owners can resolve disputes among themselves. Mediation is considered a good tool if the parties are unable to resolve their differences.