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Legal framework REScoop Municipality approach

RESCOOP MECISE
Mobilizing European Citizens to Invest in Sustainable Energy

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Author(s)	REScoop MECISE consortium
Project Coordination	Ecopower cvba Posthoflei 3 bus 3 B-2600 Berchem Belgium Karel.Derveaux@ecopower.be 0032 476 63 04 76
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Content

1 Introduction

An objective of REScoop MECISE-project is to create the possibility for local authorities to co-invest and co-own sustainable energy projects. This could be considered as an indirect way of mobilizing citizens to invest in sustainable energy.

In the light of this, Ecopower subcontracted a legal office with expertise in public procurement legislation and in setting up legal entities and contracts with the purpose to manage and operate sustainable energy projects, in which REScoops and local authorities co-invest, and that comply with the (national) public procurement legislation.

Ecopower awarded the subcontracting to DLA Piper, a multinational law firm located in more than 40 countries throughout the Americas, Asia Pacific, Europe, Africa, and the Middle East.

Based on 5 case studies of public-private cooperation with municipalities, they developed a model (the 3CO RESponse model) for categorizing and structuring cooperation between municipalities and a private partners such as Ecopower.

A Memorandum, explaining tha 3CO RESponse approach, can be found on the next page.

2 Memorandum 3CO RESponse model

I. INTRODUCTION

Ecopower ("***EP***"*)* has requested a model for categorising and structuring cooperation between municipalities and a private partner such as Ecopower for renewable energy projects that would be valid across Belgium and valuable across Europe, in the framework of the MECISE REScoop project.

Based on our presentation with an overview of the legal possibilities, the case scenarios and the e-mail and call discussing the proposed methodology, we have developed an approach to categorise scenarios of possible cooperation between a private energy development company or cooperative and municipalities, to review them from a legal perspective and to provide initial predictions of what would be an optimal structure for the cooperation. We refer to this approach further as the "3CO RESponse" approach (named to align with the REScoop project and the cooperative partners). It consists of two main pillars: the characterisation of the intended cooperation based on the level of involvement sought by the municipality and facilitated by the developer (categorisation in accordance with the "3CO" matrix), and the review of the most important legal points of attention for the structuring of the project (review of structuring options taking into account the categorisation of the project; this phase referred to as the "RESponse" phase). The further goal, beyond promoting this analysis of a cooperation project with the municipality as part of a "due diligence" exercise, is to see whether certain extrapolations can be made, whereby based on the outcome of the categorisation of the intent of the municipality with the project (under the 3CO Framework) the optimal project structure can already be devised (taking into account the legal disciplines to be respected by that structure, as listed as part of the "RESponse" exercise) before double-checking this through a more thorough legal analysis.

In order to categorise the proposed cooperation scope based on the intent of the municipality to achieve a certain level of "involvement", we have set out three criteria or parameters that allow for rationalisation and grouping of (cooperation) projects, and have identified for each such criterion or parameter three to four different levels or types for the public-private cooperation and included them in a matrix. (*Since the three criteria to properly assess the intended involvement of the municipality in the cooperation all start with "co-", we refer to the "3CO" parameters.*) The parameters, the relevant levels and the set of possible combinations that can be made across the three parameters are the following:

Level of intended **control**: (i) municipality just exercising its standard regulatory competences in the remit of zoning, environmental regulations, granting servitudes or dominial or road permits, …; (ii) the municipality laying down concrete requirements or specifications for the development and operation of the renewable energy project (e.g. requirements in respect of tariff levels, greening of productions, priorities of connection or obligations to connect, etc.); (iii) the municipality participates in the day-to-day business of the renewable energy installation;

Level of intended **contribution**: (i) the municipality does not intend to make any contribution to the project; (ii) the municipalities seeks to contribute (the rights to use) terrains pertaining to its (public or private) domain useful for the project; (iii) the municipality contributes capital to the cooperation project; (iv) the municipality contributes subsidies to the project;

Level of intended **consideration** that the project would need to offer the municipality in return: (i) the municipality does not seek any specific advantage, it merely wants the presence of the renewable energy investment on its territory; (ii) the municipality seeks the off-take of the generated electricity or heat/cold, whether or not against a reduced price; (iii) the municipality wants to share in the yield or profits of the commercial business of the wind energy development; (iv) the municipality seeks to become the owner itself of (part of) the renewable energy project and make all relevant decisions, including sale decisions, in respect of the installation by itself.

We have sought to schematise these three parameters with the relevant level of "involvement" in the following 3CO matrix:

Control	Regulatory	Requirements	Day-to-day	
Contribution	None	Terrain	Capital	Subsidies
Consideration	Mere realisation	Off-take	Yield	Property

After categorisation of the type of intended cooperation has been done on the basis of the 3CO matrix, an analysis needs to be made assisted by this categorisation on how the main legal questions in respect of the given type of public-private cooperation play out and on what this means for the proper structuring of this cooperation. We have also developed a framework for this reactive analysis under the applicable legal concepts, referred to as the RESponse phase of the examination of the cooperation. The relevant RESponse parameters are the following:

Contractual or participative (i.e. through a separate dedicated legal entity, e.g. SPV or an existing cooperative) partnering between the municipality and the project developer in the project;

Legal figure for granting user rights to the private partner or the project company on **the terrains of the municipality**;

Requirement for a **prior transparent and objective public consultation procedure, or for a public procurement procedure** in order to appoint the private partner with whom the municipality will contract and/or cooperate;

Review on whether the projected cooperation meets the **applicable State aid rules**.

In the following chapters II to VI of this note we will test this 3CO RESponse model in practice by applying this to the case scenarios for municipality-EP cooperation and draw some conclusions on what would be a good structure for such cooperation on this basis.

In chapter VII of this note we will then try to extrapolate some of the results of the case studies to try to come to some general observations and predictions on what could generally be deemed as the appropriate structure for cooperation only depending on how the cooperation project can be categorised under the three parameters of control, contribution and consideration.

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II. APPLICATION OF MODEL TO EXAMPLE SCENARIO: WIND PROJECT AMEL-BÜLLINGEN

5. Main elements of the project:

- Public tender process, jointly managed by two municipalities as contracting authorities;
- Wind turbines to be erected on terrain owned by the municipalities;
- Municipalities wish to co-invest for 50%.

6. For this scenario we envisage two possible manners of construing the cooperation.

7. **First option**: public-private development corporation with participation of 2 municipalities

Control	Regulatory	Requirements	Day-to-day	
Contribution	None	Terrain	Capital	Subsidies
Consideration	Mere realisation	Off-take	Yield	Property

8. ***Contractual or participative partnering*** - In this scenario there is effectively a joint development and operation of the wind turbines by the municipalities together with EP.

The fact that the two municipalities intend to invest on an equal footing along with EP in turbines on their own terrain could be seen as a willingness to be a close and durable partner in the development of the project.

A **participative** construction whereby a public-private project corporation (SPV) is set up to manage the investments and the operation would seem the best fit for such a scenario.

It firstly needs to be ascertained from a strict public law perspective whether and how municipalities can directly participate in such an SPV.

In the present case the applicable rules for the Walloon Region, as contained in the *Code de la démocratie locale et de la décentralisation* need to be examined.

Direct participation by the municipality itself would not seem possible. If each municipality would want to participate separately in the SPV, they will have to establish an "autonomous municipal company" (***AMC***) (*régie communale autonome)* for industrial or commercial purposes first. Subsequently, the two AMCs could then participate in an SPV (which could be a normal limited liability company or a cooperative entity) together with EP. Generally an AMC can participate in another legal entity provided the statutory goal of this third entity is compatible with that of the AMC. Nevertheless, the other essential condition makes clear that such a structure would be fully controlled by the municipalities and would effectively require the creation of 2 SPVs. This is the case because the above-mentioned *Code* would only allow for such participation of AMCs on the condition that each AMC disposes of the majority of votes and assumes the presidency in the decision-making bodies of the corporation. This will not only mean that a private partner such as EP will be subordinate to the decision-making by the municipality, but also that it is not possible to establish an SPV in which both municipalities' AMCs hold shares (instead, two separate SPVs, each relating to one turbine and having the AMC of one of the municipalities as shareholder or member, will need to be established). Accordingly, this would make this option suboptimal.

For that reason, it may actually be more effective for the municipalities to establish an intermunicipal company first before participating in an SPV. The Walloon *Code* does foresee that intermunicipal companies, which can take the form of a limited liability company or a cooperative entity and who can also have private shareholders (provided the intermunicipal company is still controlled by the municipalities), can participate in other legal entities such as an SPV for a wind project provided that the statutory goal of such an SPV corresponds to the statutory goal of the intermunicipal company (Art. L1512-5 of the *Code*). There would be not a regulatory requirement that the intermunicipal company needs to exercise control over such an SPV.

So, in order to set up a public-private legal entity that will operate the wind turbines and that is not solely controlled by the municipalities, an intermunicipal company will need to be set up by the two municipalities and subsequently this intermunicipal company should set up, together with EP, a new private law legal entity (this could be a cooperative entity).

9. ***Contribution by the municipality*** - In such a construction, the control of the municipalities over the project will amount to participating in the day-to-day business decision-making over the wind development. What the municipalities would contribute, would consist of investments both in terrain and in capital (this last part as far as necessary to achieve the 50% co-investment level). In return, the municipalities will partake in 50% of the profits and losses realised by the SPV established to operate the two turbines.

10. ***Transparent and objective consultation procedure*** - There are various grounds in the presented scenario requiring the municipalities to organise a public procurement procedure, or at least, a competitive market consultation procedure before EP could be appointed.

This would be the case as a result of the specific operational tasks that EP will perform for the newly created public-private SPV (this would require a full-fledged public procurement procedure) as well as a result of the transfer of the terrains into the SPV (which would require at least an objective market consultation procedure).

In the case at issue this would not seem a problem since the municipalities had already performed a joint public procurement procedure to appoint the entity who would be the private 50%-developer in this public-private project.

11. In terms of the transfer of the terrain into the SPV, it is also to be noted that where the lands transferred would pertain to the public domain, the fact that they are transferred to a public-private SPV must not be manifestly irreconcilable with the current purposes of the terrains at issue.

12. ***Application of State aid rules*** - In terms of State aid, no immediate issue would seem to arise to the extent that the appointment of the private partner was the outcome of a sufficiently transparent public procurement procedure. However, the value of the contribution of the terrains into the public- private SPV should have been properly assessed so that this is not underestimated so as to grant lesser investment obligations and greater profit rights to the private party appointed pursuant to the procurement procedure (presumably EP).

13. **Second option**: granting of domain concession and co-investment in exchange for shared property of 1 turbine

Control	Regulatory	Requirements	Day-to-day	
Contribution	None	Terrain	Capital	Subsidies
Consideration	Mere realisation	Off-take	Yield	Property

14. ***Contractual or participative partnering*** - A fundamentally different option that would also achieve the apparent goals of the project for the municipalities while remaining interesting to EP, would be a merely **contractual** cooperation whereby the municipalities would facilitate the realisation of the two turbines by EP and subsequently become the owner of one of the two wind turbines.

In this manner, the municipalities could grant a *domain concession* to EP for one of the terrains, while not granting any rights to the other terrain. For this other terrain however, the municipalities could jointly procure the realisation of a wind turbine by EP. This could be in the form of a relatively straight-forward works contract or through a more comprehensive services contract, whereby EP would not only construct the turbine but also arrange the permits and the grid connection and would continue to be responsible for the operation and maintenance on a long-term basis after construction. Both the domain concession and the works / services contract could be linked through some type of framework cooperation contract.

When the turbine would be ready to operate, the full property and control over this wind turbine would transfer to the municipalities. For that turbine of the municipalities, EP would only remain involved as a contractor, e.g. for operating & maintaining the turbines. One could also foresee that certain contractual arrangements would apply for joint PPAs for the electricity produced both by the turbine owned by EP and the turbine owned by the municipalities.

15. ***Contribution by the municipality*** - In this scenario, the control over the wind turbine developments of the municipalities will encompass the setting of concrete requirements for the realisation of both turbine sites. In respect of the single turbine that will be fully owned by the municipalities, the control will evidently relate to the day-to-day business decision-making.

In terms of the contribution of the municipalities, they will deliver the rights on the terrain but will have to receive a market remuneration for the turbine that will be exploited by EP. On the other hand they will contribute the construction cost for the second turbine themselves, thus leading to the conclusion of a 50% investment in the wind turbine development. As a consideration for this 50% investment, they will become full owner of one of the two turbines and be able to take all further decisions and profits, including a decision to further sell the turbines if they choose to do so.

16. ***Transparent and objective consultation procedure*** - Also in this scenario it is clear that this cannot be lawfully implemented unless a public procurement procedure has been followed through. This is warranted by i) the concrete and detailed requirements laid down as specifications for the realisation of the turbines; and ii) the fact that the municipalities actually procure and pay for one wind turbine (and related O&M services), meaning that this is effectively a public contract.

It will be important that the full structure of the cooperation (including any continuing service contracts to be entered into between the municipalities and the contractor for the wind turbine owned by the former) is clearly advertised in the contract notice so that all interested companies can form a clear assessment of the full benefits and risks associated with the contract.

17. In terms of the transfer of the terrain (public domain of one of the municipalities) for the private-owned turbine, this would seem most easily be done by a domain concession. This would seem in line with the fact that besides certain specifications on the development to be realised, no further specifications will be laid down on the concrete manner of operation of the turbine by EP once the turbine is operational. A similar result could also be achieved by granting a right *in rem* (such as a right of *superficies* or an *emphyteutic* right) to EP for this one turbine, provided that the turbine development on this terrain is not manifestly irreconcilable with the current purposes of the terrains at issue. In terms of bankability, there would be no clear distinction between the granting of a domain concession or a right *in rem*.

18. ***Application of State aid rules*** - In terms of State aid, most concerns would be dispelled insofar as the appointment of EP was the outcome of a sufficiently transparent public procurement procedure. Nevertheless, close attention needs to be paid that the periodic payments for the domain concession (or the rights *in rem*, as the case may be) for the use of the terrain for the one EP turbine correspond to the effective market price for the use of such terrain. If this price would be lower, it could be deemed that there is overcompensation for EP and thus an unfair advantage (State aid) granted to EP. One solution for this could be to have the tenderers in the procurement procedure not only quote a price for the construction of the turbines but also for the periodic payments for the domain concession (or the right *in rem*) since in that case this period payment price will be deemed to have made the subject of fair competition as well.

III. APPLICATION OF MODEL TO EXAMPLE SCENARIO: WIND PROJECT LANAKEN

19. Main elements of the project:

- Public procurement procedure has been launched by the municipality of Lanaken;
- Request for development of a wind turbine project on the whole territory, including on property owned by the municipality;

- Municipalities wish to co-invest in the full investment over the full territory but unclear how.

20. Also for this scenario two ways of construing the cooperation can be identified.

21. **First option**: services concession awarded by the municipality

Control	Regulatory	Requirements	Day-to-day	
Contribution	None	Terrain	Capital	Subsidies
Consideration	Mere realisation	Off-take	Yield	Property

22. ***Contractual or participative partnering*** - A durable partnership that can be valid for an infinite number or projects on the territory of the municipality, can take the **contractual** form of a services concession.

As we will explain further, this may be the most appropriate structure if the municipality is only interested in increasing the presence of renewable energy projects on its territory and on setting some of the development conditions, but is not interested in the risks and return of the commercial operation of the turbines or would not wish to off-take the electricity produced by the turbines.

The subject of this services concession would be for the concession holder to be the appointed contracting party for any wind turbine project in Lanaken for which the municipality (or its autonomous municipal company or AMC) takes the initiative or is a directly involved party.

The question applies to what extent this concession granted to - presumably - EP for wind turbine projects on the territory of the municipality can be exclusive, so that the municipality could refuse projects from other developers in the municipality that would not have EP on board. From a legal perspective such exclusivity would not be allowed - the municipality cannot refuse to grant any permits or authorisations for private projects that do not include EP. However the municipality can perfectly apply as a policy that it will not grant any rights *in rem* or domain concessions on its terrain to any projects that are not driven or supported by EP as its services concession holder[1].

In order to provide the relevant incentives and return for the private concession holder, it would seem that the municipality would need to provide for (i) commitments to create rights of use (where they are key for a project, in the form of rights *in rem* or a domain concession) on terrain owed by it (or its AMC) that would be necessary for a wind turbine development of EP, insofar as the current application of the public domain would allow for such implantation; and /or (ii) a minimum guarantee of a number of MWs of wind energy capacity that will receive a construction and operation permit (*omgevingsvergunning*) that will become available for the concession holder EP, in return for a lump-sum compensation (alternatively, a scheme whereby EP would only need to pay a lump-sum concession fee for each permitted project could also be foreseen[2]). By being disposed to provide a beneficial arrangement in relation to the granting of use rights over the municipality's terrain or

[1] It must however be clear that the municipality would still not be able to just refuse to grant more limited and less intrusive rights of use to its public domain which are also addressed in specific regulations, such as servitudes or dominial permits (*domeinvergunningen*) or road permits (*wegvergunningen*).

[2] In our view this would not be deemed to detract from the nature of the concession whereby a substantial part of the market risk is to be borne by the concession holder. Whereas it is true that in such arrangement the concession holder will only be required to pay when a project has received the basic permits, it still bears the full construction and operational / market risk.

by enabling a partial bail-out for EP in the event that it would not succeed to have a certain minimum capacity of wind energy permitted, the municipality effectively invests in the project.

23. ***Contribution by the municipality*** - With this structure of a services concession, typically the type of control exercised by the municipality would go beyond the mere regulatory oversight in relation to permitting and authorisation of use of public domain but would require the setting of effective development criteria for the projects, as contractual conditions under the services concession contract. It would nevertheless fall short of an involvement of the municipality with the effective (day-to-day) commercial and planning decisions of EP as developer / concession-holder.

In relation to the contribution by the municipality this would be difficult to pinpoint in the absence of concrete projects as from the outset, but the necessary investments can be construed as providing binding beneficial arrangements for the concession holder to use the necessary public terrains of the municipality or as a guarantee in the form of compensation for a certain minimum capacity permitted, or even in the forsaking by the municipality of any payment of concession fees by the concession holder in the absence of projects that have been permitted under the scheme. In terms of return, the municipalities would only expect the fact that a certain given number of wind projects are effectively realised in the municipality, whereby there could also be a (fixed periodical or permitted capacity-based) minor return in terms of a predetermined concession fee payable by the concession holder.

24. ***Transparent and objective consultation procedure*** - The selection of the concession holder would take the form of a public procurement procedure (as warranted at EU level by Directive 2014/23/EU). We understand that such procedure has effectively been launched by the municipality. The municipality would have to take great care that the scope of the concession is clearly spelled out in the contract notice and that all available information on prospects for wind energy projects in the municipality is equally made available to all interested candidates. Furthermore, a thorough analysis would need to result in the application of (mainly qualitative) award criteria that would be relevant for all types of projects possibly covered by the concession so as to overcome the uncertainty of the identity and set-up of individual projects.

25. In terms of the transfer of the terrain to the concession holder, it needs to be noted that where the lands transferred would pertain to the public domain, the fact that they are transferred to the concession holder for a private wind energy project must not be manifestly irreconcilable with the current purposes of the terrains at issue.

26. ***Application of State aid rules*** - In terms of State aid, no immediate issue would seem to arise to the extent that the appointment of EP was the outcome of a sufficiently transparent public procurement procedure. However, in the event that the municipality would opt to provide for a guarantee (in the form of a lump sum compensation) in the event that within the given timeframe a certain amount of MW of wind energy capacity has not been permitted, this may be considered as well as a State guarantee under the State aid rules. This will mean that the municipality should substantiate that the guarantee does not detract from a market conform arrangement.

27. **Second option**: participation in a new public-private company via the municipality's externally devolved agency in private form

Control	Regulatory	Requirements	Day-to-day
Contribution	None	Terrain	Capital	Subsidies
Consideration	Mere realisation	Off-take	Yield	Property

28. ***Contractual or participative partnering*** - Another construct that the municipality could apply in order to achieve its goal of realising and co-investing a number of wind turbine projects on its territory, is engaging in a **participative** partnership with an experienced private partner (presumably EP) whereby a dedicated public-private company would be set up.

Two sub-scenarios can be envisaged. In the first sub-scenario EP would directly become a shareholder in a newly created "*externally devolved agency in private form*" *(extern verzelfstandigd agentschap in private vorm)* or "*EDAPF*". This EDAPF could take the legal form of a limited liability company or a cooperative entity. In the second sub-scenario the municipality would first found a EDAPF (unless one would already exist competent for energy investments) and then this EDAPF would need to become a shareholder or a member, alongside the private shareholder or member, of a newly established SPV (limited liability company or cooperative entity).

In both sub-scenarios the EDAPF with private shareholders or the public-private SPV with the EDAPF as shareholder or member must reserve the majority of the votes in the general assembly and the Board of Directors to the municipality (as represented by the EDAPF, as the case may be). In this respect there would be no difference between direct participation in an EDAPF or indirect participation in the EDAPF. Still it would seem that allocating the wind turbine investments directly with the EDAPF would be less attractive because the EDAPF is directly governed by the rules of the Flemish Decree on Local Government, and would thus be subject to greater regulatory risk.

As such structuring the wind turbine investments in an EDAPF may be a feasible option but the "majority rule" whereby in all scenarios the corporate control must remain with the municipality, may actually be a commercial impediment to EP.

29. ***Contribution by the municipality*** - In this scenario, the control by the municipality would by default amount to the day-to-day decision-making of the wind investments. In terms of the contribution of the municipality, it will invest the necessary terrains and capital, and may need to continue to do so on a rolling basis based on the actual projects that are undertaken. As a consideration for their investment, they will be the principal beneficiary of a profitable operation of the EDAPF or of the SPV as they will be the majority shareholder or hold the majority of membership rights.

30. ***Transparent and objective consultation procedure*** - Once again this would seem a scenario whereby prior to the establishment of the EDAPF with private shareholders or of the public-private SPV a public procurement will need to be followed. This would be the case because the private partner (presumably EP) will on an exclusive basis carry out certain services (e.g. permitting preparations and feasibility studies, construction of the wind turbines, operation and maintenance of the wind turbines,…) for the public-private company, and this would render the procurement regulations applicable to the selection of the private shareholder or cooperative member. Also the transfer of the terrains owned by the municipality to the public-private company should, in the

absence of any other objective circumstances justifying the transfer of the terrains to the private company, be preceded by a transparent call for interested companies in the market.

As was the case for the first option for the plans of Lanaken, also in this scenario it will be important that when the public procurement procedure is organised for the selection of a private partner, the full scope of the possible projects in which the public-private company could participate in needs to be described as closely as possible, with full disclosure of relevant (potential) project information to all interested candidates.

31. In terms of the contribution of terrains of the municipality into the EDAPF or the SPV, it is also to be noted that where the lands transferred would pertain to the public domain, the fact that they are transferred to a public-private company must not be manifestly irreconcilable with the current purposes of the terrains at issue.

32. ***Application of State aid rules*** - In terms of State aid, no immediate issue would seem to arise to the extent that the appointment of the private partner was the outcome of a sufficiently transparent public procurement procedure. However, the value of the contribution of the terrains into the public- private EDAPF or SPV should have been properly assessed so that this is not underestimated so as to grant lesser investment obligations and greater profit rights to the private party appointed pursuant to the procurement procedure (presumably EP).

IV. APPLICATION OF MODEL TO EXAMPLE SCENARIO: DISTRICT HEATING GRID EEKLO

33. Main elements of the project:

- Public procurement procedure has been completed by City of Eeklo, awarded to a consortium of Ecopower and Veolia;
- Subject of the procedure is a concession to use the subsoil of the public domain of the municipality and this for the purpose of construction and exploitation of a district heating network;
- Offer of the municipality to co-invest up to 5% (unclear how) - Reduction to heat supplied to public buildings of the municipality;
- Offer made to intermunicipal company IVM (19 municipalities) to co-invest but unclear how.

34. This scenario of a services concession with off-take guarantee to an SPV in which the intermunicipal company participates renders the following results under the 3CO characterisation matrix:

Control	Regulatory	Requirements	Day-to-day	
Contribution	None	Terrain	Capital	Subsidies
Consideration	Mere realisation	Off-take	Yield	Property

35. ***Contractual or participative partnering*** - This scenario could involve a mix of **contractual** and **participative** cooperation between EP and the municipality.

Strictly speaking the municipality could have granted the rights to use the subsoil of its public domain insofar as it is limited for placing the pipelines and any heat exchanger (and not e.g. a large scale heat generation installation) on the basis of the granting of a servitude (*erfdienstbaarheid*) or a dominial or road authorisation (*domeinvergunning - wegvergunning*)[3].

The fact that the City has opted for a concession procedure would result in the fact that the EP-Veolia consortium has been vested with a right of use of the underground of the public domain as a domain concession (*domeinconcessie)*.

However, the fact that the EP-Veolia consortium has been vested with a domain concession does not fully exhaust the qualification of this procedure. It is not that merely a domain concession has been tendered, but the municipality has chosen to contract for a services concession. Different from what would be the case for a standard domain concession, the municipality has not limited itself to granting a specific right to use, but has also devised the specific programme for the use authorised, i.e. the development of a district heating network that must be able to supply certain buildings of the municipality with heat (and any other specifications present in the concession tender). It is because of these output-related specific requirements attached to the rights given to the subsoil that the right granted by Eeklo must be qualified as a services concession.

The qualification as (services) concession would stand only if any guaranteed off-take of heat (or cold) from the municipality's public buildings would not remove all substantial market or commercial risk for the project. If that would be the case, the whole structure should be re-qualified as a public contract for services.

In order to operationalise the intended 5% co-investment by the municipality, which presumably would be in exchange for the reduction to the heating/cooling price, this may just be taken as an allocation principle for any future projects invested in by the private consortium. Currently it is not clear what the scale of the district heating projects - and consequently of investment - is that EP and Veolia will undertake in Eeklo. So a principle may be agreed whereby for specific approved projects or extensions of the district heating network over the concession period, a 5% share will be paid for by the municipality. In turn EP and Veolia would correspondingly grant an estimated equal amount of reduction to the heating / cooling price for the municipality's buildings that are being supplied by the network. It is to be noted though that at this stage it is difficult to establish a specific valid market price for heating / cooling that may serve as the benchmark for the reduction offered to the municipality. It may be an idea that as long as no acceptable market price exists for these products, the contractual arrangement could be inspired by the "not more than usual" (*niet meer dan anders*) principle which sets off the district heating price against the price of heating by a standard natural gas connection. As applied to the project, a given percentage reduction to the market heating price, would then take the form of that percentage reduction compared to the "usual price", i.e. the natural gas connection price.

[3] It is to be noted hereby that from a private developer's perspective, the granting of a servitude would be preferable from a bankability perspective since such right (which is a contractual right *in rem*) is much more difficult to revoke or terminate than the merely administrative authorisation of a dominial or road authorisation.

In order to also allow for the participation of the intermunicipal company IVM (representing 19 municipalities) a participative arrangement would need to be set up. This participative structure is to be conceptually and legally separated from the contractual link between the City of Eeklo and its contracting partner the EP-Veolia consortium, which may subsequently be any newly created public-private SPV with IVM. EP-Veolia and IVM could decide to jointly set up a new dedicated legal entity ("SPV") provided that (i) the statutory goal of this entity corresponds to the own statutory goal of IVM, (ii) the public procurement regulations are complied with, (iii) IVM gets to appoint at least one director and (iv) the Flemish Government has provided its prior consent (or has failed to object within the regulatory timeframe) (Art. 472 of the Flemish Decree of Local Government). We note that IVM is currently an intermunicipal mandated company (*intergemeentelijke opdrachthoudende vereniging*), which has been mandated in relation to waste management. It would not have received a mandate from its municipalities in relation to energy generation and supply. However, there would not seem an impediment for the intermunicipal mandated company to additionally, not pursuant to its mandate, provide services to the municipality in terms of contributing to the development of district heating projects provided this would be covered by its statutory goal.

We hereby assume that the participation of IVM would not relate to a controlling interest and that it would not want to take the strategic business decisions of the district heating network development (in spite of the regulatory requirement of holding a seat in the Board), in part due to the fact that IVM is deemed to represent 19 municipalities while the scope of the project is limited to the territory of Eeklo.

36. ***Contribution by the municipality*** - We have already explained that in this structure of a services concession, the control that the municipality seeks over the project would extend further than the mere regulatory oversight in relation to permitting and authorisation of use of public domain (as it would do when merely recognising servitudes or granting dominial or road permits) and would require the setting of effective development criteria for the projects, stretching not only from an obligation to construct and operate a heating network with the subsoil rights received but apparently also containing a supply obligation to be given to public buildings of the municipality. This would not amount to involvement with the (day-to-day) commercial and planning decisions of EP-Veolia (or the public-private SPV as may be established) as developer / concession-holder. Even in the situation whereby IVM would participate in such SPV, it is unlikely they will require a controlling interest so this may also fall short of day-to-day control over the SPV's decision.

In relation to the contribution by the municipality this would be difficult to quantify in the absence of concrete projects as from the outset, but the principle of a 5% co-investment comprises a commitment to remain responsible on a continuous basis for some of the capital as the district heating project would expand in Eeklo. As for the subsoil rights given over the public domain for the grid's pipelines and, these cannot be taken into account as separate contributions since these rights are granted on a relatively routine basis as per the regulatory/administrative competence of the municipality and accordingly their issuance does not bring substantial added value to the private partners. As for the intermunicipal companies their contribution to the private partner's project will take the form of the capital that they make available to the public-private SPV. In terms of return, the municipalities would obviously expect the fact that a district heating network would effectively be realised in the municipality, but in addition the benefit they would directly obtain from this grid is the fact that (some of) their buildings would be supplied by the network and this even against discounted prices.

37. ***Transparent and objective consultation procedure*** - The selection of the concession holder would take the form of a public procurement procedure (as warranted at EU level by Directive 2014/23/EU), as seems to have been the case here. Since it seems relatively essential to determine the economic equilibrium between the municipality and the concession holder, the principles of the co- investment in projects by the municipality and the extent of the price reductions to be given to the public buildings (including the necessary corollary of an effective obligation on the concession holder to over time connect and supply these buildings) would need to have been laid down already in the course of the procurement procedure.

Where there would be an arrangement implemented between EP-Veolia and IVM so as to set up an SPV that would be tasked with developing the district heating network in Eeklo, this must in principle also have foreseen and announced in the procurement procedure. This is not only the case because this participation by IVM may effectively disrupt the economic equilibrium between EP-Veolia and the City of Eeklo, but also because it is an autonomous requirement of the Flemish Decree of Local Government. The fact that this apparently has not been included in the procurement procedure pursuant to which the consortium between EP-Veolia has been appointed, may effectively make it more difficult for this participative arrangement with IVM to be fully implemented without legal risk.

38. The question applies to what extent this concession granted to - presumably - EP for wind turbine projects on the territory of the municipality can be exclusive, so that the municipality could refuse projects from other developers in the municipality that would not have EP on board. From a legal perspective such exclusivity would not be allowed - the municipality cannot refuse to grant any permits or authorisations for private projects that do not include EP. However the municipality can perfectly apply as a policy that it will not grant any rights *in rem* or domain concessions on its terrain to any projects that are not driven or supported by EP as its services concession holder.

39. ***Application of State aid rules*** - In terms of State aid, no immediate issue would seem to arise to the extent that the appointment of EP-Veolia was the outcome of a sufficiently transparent public procurement procedure. However, since it would seem that the full amount that will have to be co-invested by the municipality could not have been foreseen at the time of the procurement procedure and that also, as a result of this, it cannot be determined what would be a fair reduction to the heating/cooling price for the public buildings supplied by the district heating network to establish the economic equilibrium in the contracting relationship between the municipality and the concession holder, a State aid scrutiny may be in order to ensure that the effective investments made and the effective price reductions granted in the course of the concession period meet the economic equilibrium as emerged from the public procurement process. This will mean that the effective amount of reduction to the market price cumulated from the heating/cooling supply should be benchmarked to the amount of investments in the projects the municipality has taken for its account.

V. APPLICATION OF MODEL TO EXAMPLE SCENARIO: STRATEGIC PARTNERSHIP WITH THE CITY OF LEUVEN

40. Main elements of the project:

- Request of the City of Leuven to make a proposal to become a "strategic partner" to make the municipality climate-neutral;

- Unclear which privileges or obligations this entails, e.g. would the City of Leuven grant a priority right for EP to invest on its terrains?

41. There is very little information presented in this case study on how this "strategic partnership" role is conceived by the City of Leuven. It was indicated that further information on the specifications and requirements by the City of Leuven for the selection of such a private partner would be communicated, but we have no further information at our disposal at this moment.

Currently this would seem that all the "involvement" options in the 3CO characterisation matrix could equally be applicable, so it would not seem possible to draw up a meaningful case study at this stage. We can set out to run the 3CO RESponse model for this case study once more details on the specifications set by the City of Leuven for such partnership become available.

VI. APPLICATION OF MODEL TO EXAMPLE SCENARIO: GREEN HEATING INSTALLATION FOR SCHOOL IN LEUVEN IN PARTNERSHIP WITH THE CITY

42. Main elements of the project:

- Heating/cooling installation based on Dyle river water in order to supply a school (not run by the municipality), whereby it is examined whether other developments can be supplied with heating and cooling by this installation as a district heating network;

- City of Leuven has received a large project subsidy from the *Stedenfonds* but is, pursuant to the subsidy conditions (which we have not been able to verify), not allowed to provide these subsidies to its "strategic partner" EP nor to the school itself;

- Hence a structure is contemplated whereby a public-private company would be established whereby the municipality's contribution would consist of the subsidies and that would proceed with managing the installation, the operation and the sale of the heating/cooling energy;

- The City would nevertheless have clear intention not to seek profit from the project.

43. We believe that on the basis of this information, the following characterisation under the 3CO model emerge:

Control	Regulatory	Requirements	Day-to-day	
Contribution	None	Terrain	Capital	Subsidies
Consideration	Mere realisation	Off-take	Yield	Property

44. ***Contractual or participative partnering*** - We have not seen the specific subsidy conditions, which can differ from project to project, as laid down in the subsidy decision of the Flemish Government. We nevertheless understand on the basis of the case details provided by you that the subsidy amount cannot just be transferred to the school or to a private partner like EP with a view to have them make that actual investment in the project with the subsidies, even where they would have been appointed following a public procurement procedure. In that case, it would indeed seem a good

solution to have the municipality (or an devolved emanation of it) directly invest the subsidies for the project as the municipality's contribution to a public-private legal entity specifically dedicated to the realisation of the subsidised project (with the help of a lawfully appointed private party). Evidently, it would still need to further reviewed on the basis of the subsidy conditions whether such investment via a contribution to an (partially-owned) dedicated project company would be allowed.

It should nevertheless also be taken into account that the municipality has the clear intent not to reap profit from its participation in the heating installation and network SPV. Therefore an immediate exit possibility for the municipality (or the autonomous emanation thereof) needs to exist so that the municipality can step out the SPV once the investment is made and so that it does not bear the construction and operation risk (such an arrangement once again to be subject to review of compliance with the applicable subsidy conditions). This would thus mean that a fair system must be in place whereby the municipality would transfer its shares to the other shareholder (or member) in the SPV.

In terms of the administrative requirements (as contained in the Flemish Decree on Local Government) it would seem that direct participation of the municipality itself into the SPV would not be a feasible option, because then the SPV could not operate on a for-profit base (which would not seem an acceptable outcome for EP in view of the extent of the activities, including the sale of the heat and cold, planned to be carried out by such an SPV). So it would seem inevitable that the public partner to join the SPV should be an (existent or newly to be founded) autonomous municipal company (AMC) or an externally devolved agency in private form (EDAPF) of the City of Leuven. The SPV's statutory goal should then be covered by the statutory goal of the AMC and the EDAPF and should foresee at least one seat on the Board for a representative of the AMC or the EDAPF, respectively.

45. ***Contribution by the municipality*** - If we then explore how such set-up would rank on the 3CO matrix, it becomes clear that the controlling power of the municipality will not extend to the day- to-day decisions of the SPV (since it plans to step out of the SPV anyway) but will amount to setting upfront a number of requirements for the heating/cooling installation and network, if only to ensure that the project is still compliant with the subsidy conditions as imposed by the Flemish Government. At the same time, the municipality's contribution would be limited to the subsidies. In return the Flemish Government would not seek specific consideration other than seeing the (subsidised) project be realised in its territory.

46. Due to the structuring of the project no specific issues arise in respect of terrains owned by the municipality on which the project is to be realised.

47. ***Transparent and objective consultation procedure*** - The biggest issue in crafting a response on optimisation of structures to this intended project involvement by the municipality is to keep ensuring compliance with the procurement procedure. Since the remuneration consists in being able to realise a project with investment of a substantial subsidy from a public authority, the public procurement rules will have to be applied.

48. ***Application of State aid rules*** - Also the shares must be bought for a fair share price. This will also be a consideration relevant to avoid any qualification of an insufficient buy-out price to the municipality quitting the SPV as unlawful State aid.

VII. CONCLUSION: ELEMENTS THAT CAN BE EXTRAPOLATED FROM THE CASE STUDIES AS APPLIED TO THE MODEL

49. In terms of the RESponse parameters identified, it would seem that there is no clear guideline on what type of project would be best served by a contractual or participatory structure. Very often a manner of structuring the cooperation that involves a mere contractual relationship and another manner which requires the set-up of a separate legal entity (often referred to as SPV) can both be envisaged. For this a clear analysis of the characterisation of the intended cooperation by the municipality based on the 3CO model may bring some further light on in which of the cases a participatory structure may be in order.

Almost invariably (or it must be for exceptional reasons, such as may be the case for the City of Leuven's indirect participation into a SPV so as to correctly apply the subsidy regulations) when a choice is made for a participative structure, this will be prompted by a willingness of the municipality to obtain the yield or profits of the energy project (and, also, a willingness to also share in the corresponding commercial risk).

Also the setting up of a participatory (i.e. corporate) structure of the cooperation will in many cases mean that the municipality is willing to take up a day-to-day decision making role in respect of the energy project.

50. In respect of the arrangements to ensure that the necessary terrains owned by a municipality are correctly made available to the private party, it is clear that - unless pre-existing objective conditions would justify a direct contracting arrangement - any transfer of rights *in rem* or of any domain concession needs to be preceded by a transparent and objective market consultation procedure. Also there cannot be scope of any overcompensation to the benefit of the private partner where the municipality would contribute its terrain to a public-private company in exchange for its shares (or membership rights) in such company. As a final point, insofar as rights *in rem* are granted on the public domain to a private contracting partner or an SPV in order to realise a renewable energy project, it should be ensured that this new purpose for the terrain is not irreconcilable with the current purposes of the terrains at issue.

51. As relates to the public procurement law requirements, it would seem that depending on where a project qualifies in terms of "control" under the 3CO matrix, a strong case can be made that a public procurement procedure is in order in the following two instances. Firstly, where the level of control would be such that the municipality is not just acting from its regulatory prerogatives in terms of the zoning or environmental rules to be respected or to ensure proper policing and order, but is actually determining project-based construction and operational requirements or specifications, it becomes clear that in principle such determination of conditions makes that the procurement rules on contracting entities become applicable. Secondly, where the municipality would itself engage in direct day-to-day decision making on how a given service or development is being carried out, the required level of control would seem to exist that a public contract or concession is triggered because this would

then effectively relate to a service being performed or a work constructed fully in line with the operation requirements of a contracting entity.

A similar reasoning can be applied to the type of contribution that a municipality would make to the private partner or SPV mainly charged with development and execution of the renewable energy projects. Where such contribution would exist in subsidies, the likely result would be that a public procurement procedure would need to be followed in any event. This may not be the case for a contribution in capital, since in principle contracting authorities (including municipalities or rather their autonomous emanations) can engage in financial participations in other companies without that this is subject to a public procurement procedure - however, where the resulting public-private company would then appeal to and/or contract the private shareholder or member to perform certain works or services, the obligation to would re-apply. Furthermore, as explained above, where the contribution would consist of the transferring or the granting of rights on terrains owned by the municipality, as a default at least a transparent and objective consultation of the market must be carried out so as to identify the private beneficiary thereof.

Finally, in terms of the return obtained from the project for the municipality, an obligation to have the partner selected via a public procurement procedure would seem to be implied where the municipality would become a direct off-taker of the power (including in the form of heat or cold) produced by the renewable energy project. This is the case because this would then constitute a supply contract to a contracting authority as is standard situation in which a public procurement procedure needs to be carried out.

It needs to be noted here that all these potential triggers for a public procurement procedure are cumulative. Where the level of involvement of the municipalities on one of the 3CO parameters meets the relevant threshold for that parameter to require a public procurement procedure to appoint the private party, the conclusion that such a procedure must be organised is fixed regardless of how involved or active the municipality is on the other parameters.

52. In analogy with the seminal *Altmark* decision of the Court of Justice of the EU relating to public service obligations, many State aid concerns in respect of a municipality partnering with a specific private partner for the realisation of renewable energy projects are solved to the extent that a transparent and non-discriminatory market consultation or, where required, a fully-fledged procurement procedure has been carried out. However, for elements not covered by the public procurement procedure, a review of compliance with the applicable State aid rules is still relevant so as to ensure that a market conform solution is applied and the private partner is not, due to its contractual arrangements or partnership in a company with a given municipality, receiving overcompensation for the assistance it provides to the municipality's renewable energy goal.

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