

Translation from German  
(Translated by Claudia Blech, Berlin)

## **Legal Opinion**

concerning the permissibility under constitutional and local laws of concluding a Host City Contract for hosting the XXIII Winter Olympic Games and XII Winter Paralympic Games in 2018 by and between the State Capital of Munich and the International Olympic Committee (IOC)

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## 1. Subject of the opinion

The State Capital of Munich (hereinafter referred to as “the City”), supported by the Federal Republic of Germany, the Free State of Bavaria, the Market of Garmisch-Partenkirchen, the Administrative District of Berchtesgadener Land, and the German Olympic Sports Confederation (Deutscher Olympischer Sportbund, DOSB), applies for hosting the XXIII Winter Olympic Games and XII Winter Paralympic Games in 2018 (hereinafter referred to as “the Games”). This application requires the willingness of the State Capital of Munich to enter into a so-called Host City Contract (hereinafter referred to as “the Contract” or, in connection with contract passages cited, “HCC”) with the International Olympic Committee (IOC) and the National Olympic Committee (NOK, with the DOSB being the NOK in Germany). This Contract provides for the City to plan, organise, and hold the Games. The terms of the Contract will be specified by the IOC and can be modified by the IOC unilaterally until the Contract has been signed. The Contract is to be treated confidentially (Para. XII. 18. HCC). Therefore, the legal and political review is based on draft contracts. The present opinion is based on a draft contract dated 8 July 2010.

Pursuant to the Contract, the City assumes wide-ranging organisational, financial, and non-financial obligations. To prevent the City’s application for hosting the Games from being foredoomed to fail, the City has to accept the draft contract submitted by the IOC as it is. The Contract is a contract under private law and is not tuned to German national law. In fact, Swiss law is declared applicable (XII. 20. HCC).

The question of whether or not the City is allowed under German law to enter into the Contract and whether or not the regulatory authorities should take action against concluding the Contract or should refuse to give their approval, if required, is the subject matter of this opinion. This opinion focusses on the questions listed below:

- Is the conclusion of such a contract part of the City’s own scope of action (Art. 7, 57 of the Bavarian Municipal Code - Bayerische Gemeindeordnung, BayGO, Art. 83 (1) of the Bavarian constitution - BV)? If not, would concluding the Contract only be admissible on a special legal basis within the assigned scope of action (Art. 8, 58 BayGO, Art. 83 (3) BV)?
- Is the conclusion of the Contract consistent with the budgetary principles stipulated in the Bavarian municipal code (Art. 61 BayGO, Art. 72 BayGO)?
- Would the conclusion of the Contract be subject to approval and approvable?
- Are the regulatory bodies authorised and obliged to take legal supervisory measures against the City after due assessment of the circumstances?

Questions not specifically related to local law (financial consequences to the Free State of Bavaria and the Federal government, reservations against the Games for ecological reasons) are not subject of this opinion. Due to time constraints, we were unable to look into the question of whether or not the City’s behaviour violates the requirement for transparency, which is stipulated in the Bavarian municipal code (Art. 52 BayGO). A sign of such a violation could be that, at the IOC’s will, the City is treating the draft contracts confidentially without any good reasons for this being identifiable. Notably, the terms of the Contract cannot be accessed on the City’s web page. Apparently, the City wants to avoid any public discussion on the terms of the Contract. If there were a violation of Art. 52 BayGO, decisions taken by the city council to approve the conclusion of the Contract would be ineffective.

For some time, the Bavarian Higher Administrative Court (Verwaltungsgerichtshof, VGH) has increasingly emphasised the particular importance of the principle of publicity to democratic openness and decision-making processes in the municipalities (see *BayVGH*, judgement dated 26 January 2009, BayVBl. 2009, 344 et seq.; *Widtmann/Grasser/Glaser*, Bayerische Gemeindeordnung (Bavarian Local Law), Art. 52 GO marginal no. 14, loose-leaf edition (rev.: May 2010)).

## **B. Application for the Games and the City's own scope of action**

### **I. Statement of the problem**

Basically, the City as a local authority may only act within its area of legal responsibility. Pursuant to rulings made by the German Federal Constitutional Court (Bundesverfassungsgericht, BGH), matters of local communities include needs and interests grounded in or specifically related to the local communities, i.e. which are shared by the inhabitants because such needs and interests are related to the communal life of the people living in the municipality.

Cf. BVerfGE 8, 122/134; 52, 95/120; 79, 127/151.

Usually, it is understood that the promotion of sports, including hosting of major sporting events, within the territory of a municipality, is part of the local authority's own scope of action acc. to Art. 7 GO.

As for the integration of the promotion of sports in the broadest sense into the municipality's own scope of action see *Brych*, Möglichkeiten und Grenzen der gemeindlichen Förderung des Berufssports aus rechtlicher Sicht (Opportunities and Limits of the Promotion of Professional Sports by the Municipalities from a Legal Point of View), Thesis, Regensburg, Germany, 2004, p. 40 et seq.

Art. 7 GO reads as follows:

"Matters of the municipalities' own concern

(1) The municipalities' own scope of action includes all matters of the local community (Art. 83 (1) of the constitution).

(2) <sup>1</sup> The municipalities exercise their own discretion in matters falling within their own scopes of action. <sup>2</sup> They are bound by legal provisions only."

The guaranteed right to regulate all local affairs on their own responsibility, which is granted to the municipalities and protected by Art. 28 (2) 1 of the German Basic Law (Grundgesetz, GG), is only applicable "within the limits prescribed by the laws". The areas of responsibility of the municipalities and, thus, the City are mainly subject to the legal allocation of powers and responsibilities. Matters assigned to other public authorities by virtue of law do not fall within the municipalities' own scopes of action.

BVerwGE 87, 228/230.

## II. Terms of the contract which are questionable as to the site (Examples)

The HCC includes several provisions which, by far, go beyond the matters of the City's own scope of action:

- I. 7. The City is jointly and severally liable for all obligations assumed or commitments made by any national, regional, or local authority towards the IOC (as well as all promises made by the NOK and the bidding committee). Apparently, this is not permitted. Each public authority is authorised to act and make promises towards the IOC within its area of responsibility only. The City may not commit itself to keep promises made by the state government or the Federal government within their areas of responsibilities.
- I. 11. The Olympic identity and accreditation card is to give its holder the right to enter and stay in the host country. Holders of these documents will be exempted from all labour law-related restrictions applicable acc. to the laws of the Federal Republic of Germany. Evidently, entry into the territory of the Federal Republic of Germany (and, thus, into the whole Schengen area) is none of the matters to be dealt with by the City of Munich but by the Federal government and the Federal police (see Art. 2 of the German Federal Police Act (Bundespolizeigesetz, BpolG). Both the law relating to residence (Art. 74 (1) 4 GG) and the labour law (Art. 74 (1) 12 GG) are subject to the Federal government's legislative power.
- I. 12. Entry formalities for certain employees, goods, and animals: Same as for I. 11. These matters are in no way part of the City's own scope of action.
- II. 4. e) Invitations or accreditations in connection with the Games may not be issued to prominent representatives of foreign governments or other leading politicians without the IOC's prior written permission. Taken to its logical conclusion, if Mrs. Merkel wishes to invite Mr. Sarkozy to the opening ceremony, she needs the IOC's permission and the City of Munich undertakes to ensure that this procedure will be observed. Such a procedure is beyond the City's own scope of action.
- II. 9. Ensuring co-operation of the Federal government with regard to the anti-doping regulations adopted by the IOC. The City is not in a position to determine the actions and behaviour of the Federal government.
- VII. 2. a) There is a requirement to protect IOC trademarks in the host country. This requirement has been met by the Act on the Protection of the Olympic Symbol and Olympic Words (OlympSchG dated 31 March 2004, BGBl. I p. 479) passed by the Federal government, however, the City is not in a position to commit itself to do so or to maintain this act, since the City is not the legislator.
- VIII. 6. f) and g) Coin and banknote programmes as well as stamp programmes to be initiated in the host country require the IOC's permission. Such programmes are beyond the City's responsibility. (Coin and banknote programmes fall within the responsibility of the European Central Bank (ECB) and the German Federal Bank (Deutsche Bundesbank); coins, in addition, fall within the responsibility of the Federal Ministry of Finance (BMF). Stamps are issued by the Federal Ministry of Finance and sold by the Deutsche Post.)
- VIII. 7. f) Tax exemptions for employees, officials, and members of the IOC and other persons. This matter falls within the Federal legislator's and fiscal authority's - not the City's - responsibility.

The above list could be continued. The HCC includes other obligations which are to be fulfilled by the City but are clearly beyond the City's own scope of action.

Possibly, one could argue that the City does not act within the City's own scope of action but within a scope of action assigned to the City (Art. 8 GO). The provision reads as follows:

“Assigned matters

(1) The scope of action assigned to municipalities covers all matters assigned by law to the municipalities for being managed by the municipalities on behalf of the government or other public corporations.

(2) The competent government authorities can give instructions to the municipalities concerning the execution of matters assigned.

(3) <sup>1</sup> Matters can also be assigned to municipalities, including but not limited to municipalities not belonging to a rural district, for being managed by the municipalities independently. <sup>2</sup> Art. 7 (2) shall apply mutatis mutandis.

(4) Upon assigning matters, the funds and resources required have to be provided.”

The assignment of a task to a municipality requires a law in a formal sense (Parliament Act). Due to the provisions in Art. 84 (1) 7 GG, this has to be a Land law. The provision reads as follows:

“(1) <sup>1</sup> If the Länder implement Federal laws as a matter of their own concern, the Länder regulate the establishment of authorities and the administrative procedure. <sup>2</sup> If Federal laws stipulate otherwise, the Länder may make different regulations. <sup>3</sup> If a Land has made a different regulation according to sentence 2 above, related regulations concerning the establishment of authorities and the administrative procedure which are made under Federal law at a later date will take effect in this Land not earlier than six months following the promulgation of the Federal law, unless otherwise provided and approved by the Federal Council (Bundesrat). <sup>4</sup> Art. 72 (3) 3 shall apply mutatis mutandis. <sup>5</sup> In exceptional cases, if there is a particular need for a regulation which is uniform throughout the Federal Republic, the Federal government may regulate the administrative procedure without the Länder being allowed to derogate from this regulation. <sup>6</sup> These laws are subject to approval by the Federal Council. <sup>7</sup> Tasks must not be assigned to municipalities and associations of municipalities by way of a Federal law.”

The Bavarian Land Parliament has passed an Act on Warranties in Connection with the Application for and Hosting of the XXIII Winter Olympic Games and XII Winter Paralympic Games in 2018 (Olympic Games Act, OlympiaG).

Act dated 21 December 2010, BayGVBl. 2010, 847.

This Act, however, is important for reasons of budget law only. This Act authorises the State Government, State Ministry of Finance, and State Ministry of Food, Agriculture and Forests to make certain representations and warranties with financial effect. It does not include an assignment of tasks to the City of Munich according to Art. 8 BayGO.

### **III. Extending the City's responsibility by way of agreement (MPA)**

The reasons why the City will act outside its own scope of action when entering into the Contract are obvious and, apparently, were also seen by the Federal government, the Free State, and the City. In order to protect the City when signing the Contract, on 15 December 2010 a supplementary agreement was entered into by and between:

- the German Olympic Sports Confederation (DOSB);
- the Federal Republic of Germany;
- the Free State of Bavaria;
- the State Capital of Munich;
- the Market of Garmisch-Partenkirchen;
- the Administrative District of Berchtesgadener Land.

Source:

<http://www.bundesregierung.de/Content/DE/Artikel/2010/11/2010-11-02-olympiabewerbung-muenchen.html>.

This agreement is hereinafter referred to as "Multi-Party Agreement" or "MPA". The parties involved confirm in this agreement that all necessary measures are taken for the City to be able to completely fulfil its obligations. Any promises falling within the area of responsibility of another party than the State Capital of Munich require such other party's permission. Above all, the MPA includes the obligation to compensate for any deficit in the so-called OCOG budget. The OCOG budget (which, according to the present planning, amounts to €1,300,500,000) covers the net costs of hosting the Games without infrastructure projects (equipment, staff, administration, temporary building work, technical equipment, transport, ceremonies, cultural programme, without sports venues, accommodation, transport routes, environmental and sustainability concept, in part safety and security costs, etc.) A possible deficit in the OCOG budget is to be borne by the City, the Free State, and the Federal government at one-third each.

The MPA confirms the objections raised in section B. II. above against the assignment of the conclusion of the contract to the municipality's so-called own scope of action. The City has sole responsibility to make decisions and enter into agreements within its own scope of action. Apart from exceptional cases prescribed by law, the City does not have to obtain the permission of other public authorities or organisations within its own scope of action. However, the MPA can in no way meet the requirements of the proviso of legality concerning an assignment of tasks to the City. The assignment of a task to the City would require a formal parliament act. The MPA is an agreement under public law and can be concluded within the legal allocation of competences only without being able to make any changes to such allocation.

In conclusion, we can say already at this point that the conclusion of the Contract by the City would be unlawful. The City would be outside the tasks and competences legally assigned to the City. The MPA has no influence on this opinion.

#### **IV. Lack of venues for the Games in the State Capital of Munich**

The concept for the Games provides for the competitions being held at three locations: the ice sports competitions in the Ice Park in Munich, the snow sports competitions in the Snow Park in Garmisch-Partenkirchen, and the bobsleigh, luge, and skeleton competitions in Schönau am Königssee. This means that most of the Olympic competitions will not be held on the territory of the City of Munich but outside the city boundaries. This is another indication of the fact that hosting the Games is no local matter of the City of Munich. Two other municipalities are substantially involved. The fact that the State Capital of Munich appears as the applicant city to the outside world may be owed to the common Olympic practice and the requirements set by the IOC for the application. This procedure does not comply with the Bavarian municipal code. The City of Munich is not in a position to hold Olympic competitions in other municipalities as part of the City's own scope of action.

The regulations concerning the financial burden raise concerns, too. The smaller partners, i.e. the Market of Garmisch-Partenkirchen and the Administrative District of Berchtesgadener Land, are not to share in the settlement of any deficit pursuant to the MPA. According to the basis of allocation, deficits sustained due to the hosting of the Games are to be borne by the City of Munich at one-third. If it were right that hosting of Olympic Games is part of the municipalities's own scopes of action, the City of Munich would take responsibility for costs incurred in the performance of duties belonging to the City's own scope of action in, for instance, Garmisch-Partenkirchen, which would clearly be unlawful. The City may use its financial resources for the City's own duties only.

This outcome cannot be questioned even by arguing that Munich as the official host of the Games will gain the special increase in image and awareness resulting from such an award. The promotion of image and awareness is one of the duties included in the municipalities' own scopes of action.

For more details on the so-called municipal self-formation see *Manssen, Stadtgestaltung durch örtliche Bauvorschriften (Urban Planning under Local Building Regulations), 1990, p. 139 et seq.*

The above objective may only be pursued using funds allocable to the municipality's own scope of action. This is not applicable to major sporting events which are substantially held outside the municipal territory.

For instance, the City of Munich would also not be allowed to buy the rights in and "host" the German soccer league (Bundesliga) arguing that some of the matches take place in Munich.

#### **V. Conclusion concerning the local scope of action**

Winter Olympic Games are one of the biggest sporting events of the world. In the final analysis, hosting Winter Olympic Games is a matter of national concern. The diverse requirements imposed by the IOC on the applicants can be met only if the Federal government bears the main legislative, administrative, and financial responsibility. Awarding the Games to a city which is obliged to take measures beyond its competences is a procedure which is completely inconsistent with the applicable local law.

This does not mean that it would not be possible to lay the foundations for applications for Olympic Games on a legal basis. It would be conceivable, by way of exception, to grant a city the permission under Land law to assume such obligations provided that the other parties involved, above all the Federal government, have agreed with legally binding effect. However, such an authorisation does not exist in the applicable Bavarian law. One of the reasons why the conclusion of the Contract by the State Capital of Munich is unlawful is that the City exceeds its scope of action clearly and undoubtedly.

## **C. Host City Contract and municipal budgetary law**

### **I. Preliminary remark**

The costs to be borne by the State Capital of Munich in connection with the Games are one of the main objections raised in the political discussion against the application for the Games. According to the above, hosting the Games under the provisions of the HCC does not fall within the municipalities' scopes of action. Hence, it is established that municipal funds and resources must not be used for hosting the Games. Therefore, the considerations below are given only alternatively on the assumption that hosting the Games and, thus, the conclusion of the Contract are to be considered as falling within the municipality's own scope of action.

### **II. Financing of the Games**

When discussing the financing of the Games, it is distinguished between the so-called Organising Committee budget (OCOG budget) and the infrastructure expenditures (non-OCOG budget). The infrastructure expenditures are divided into measures taken only if and when the Games have been awarded (i.e. some kind of specific infrastructure, e.g. sports facilities, media village) and measures to be realised - possibly at a later date - even if the Games will not be awarded (general infrastructure such as roads and rails). According to the City's own information, the costs are estimated as follows:

- Organising Committee budget: €1.3bn
- Specific infrastructure budget: €0.65bn
- General infrastructure budget: €0.95bn

The considerations below focus on the Organising Committee budget. This OCOG budget includes sunk costs. No long-lived assets will be created which can be used when the Games are over. It is the expenditure for the days of the Games.

Source:

[http://www.muenchen2018.org/files/2011\\_03\\_18\\_fakten\\_zusammenfassung\\_150dpi.pdf](http://www.muenchen2018.org/files/2011_03_18_fakten_zusammenfassung_150dpi.pdf)

The OCOG budget is calculated by receipts and expenses based on the City's own information:



A	Receipts	€ (k) 2010	%	B	Expenses	€ (k) 2010	%
1	IOC contribution	318,700	25	1	Sports facilities	120,200	9
2	TOP sponsoring	143,000	11	2	Olympic Villages and other villages	157,700	12
3	National sponsoring	409,000	31	3	MPC & IBC	38,200	3
4	Outfitter	27,600	2	4	Employees	119,900	9
5	Tickets	178,000	14	5	Information systems	142,400	11
6	Licences	30,800	2	6	Telecommunication & other technologies	66,900	5
7	Lotteries	0	0	7	Internet	4,000	0
8	Donations	2,000	0	8	Ceremonies and culture	62,500	5
9	Sale of assets	9,800	1	9	Medical care	13,700	1
10	Subsidies	35,000	3	10	Catering	19,100	1
	- Federal government	15,000	1	11	Transport	81,500	6
	- Land	15,000	1	12	Safety and security	31,800	2
	- State Capital	5,000	0	13	Paralympic Games	73,400	6
11	Others	146,600	11	14	Marketing & Promotion	41,400	3
				15	Administration	78,600	6
				16	Pre-Olympic events	12,200	1
				17	Others	237,000	18
	Deficit	0			Surplus	0	
	TOTAL	1,300,500	100		TOTAL	1,300,500	100

### III. Permissibility under local law of taking over financial obligations arising out of the OCOG budget

#### 1. Items included in the financing plan which are particularly problematic

##### a) IOC Contribution

Within the framework of the legal opinion to be given here, it is not possible to look deeply into every single item. However, it is obvious that the financial funds provided by the IOC are supported by a weak legal basis.

According to the estimate, the IOC will contribute €318.7m which is an essential component of financing. The HCC is the legal basis for this contribution and contains the following terms:

##### I.14. Contribution at the IOC's discretion

"Notwithstanding any rights and benefits contemplated in section 13 of this *Contract*, the IOC, at its own discretion, may make a financial contribution (hereinafter referred to as "IOC Contribution") to the OC to which the restrictions and conditions below apply:

- i) The IOC is under no binding obligation towards the OC or any third party to make the *IOC Contribution*. The IOC, at its own discretion and on the basis of completely

independently selected and defined criteria and factors, is completely free to decide whether or not it will pay such an *IOC Contribution*.

- ii) If the IOC decides to pay an *IOC Contribution*, the IOC, at its own discretion, will determine the date and amount of such a contribution as well as the terms and conditions related to such contribution and its payment.

Notwithstanding the rights of the IOC pursuant to this Article 14, the IOC, without any obligation to do so, points to the fact that such an *IOC Contribution* is subject to the successful completion of the *Games* and the receipt of all necessary financial documents, audit reports, and other reports and information by the IOC as well as to the confirmation that (a) the *Games* were planned, organised, financed, and held to the IOC's full satisfaction and (b) the *City*, the *NOK*, and the *OC* have completely fulfilled all of their obligations under this *Contract*."

Actually, this clause is bizarre from a legal point of view. It reveals the IOC's monopolistic, uncontrolled, and unlegitimised position which enables this organisation to dictate contract terms to the applicant cities. Hosting the 2018 Winter Olympic Games is a common concern to the contracting parties. The *City* and, in the background, the *Free State* and the *Federal government* are going to assume financial burdens in the amount of several billion euros, whereas the financial contribution made by the IOC is subject to a number of conditions which the *City* as a contracting party is partly unable to influence. The IOC determines the amount and date of payment and attaches to the payment the conditions that the *Games* have taken place to the IOC's full satisfaction and the *City*, the *NOK*, and the *Organising Committee (OC)* have completely fulfilled all of their obligations. Such a request should be considered to be contrary to public policy. Under German law, a transaction is contrary to public policy pursuant to Art. 138 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*), if it is in contradiction to the "feeling of decency of all people thinking just and equitably".

The above quotation is the famous wording used by the Supreme Court of the German Reich, RGZ 80, 219/221, cf. *Armbrüster*, *Müncher Kommentar zum BGB (Munich Commentary on the Civil Code)*, 5<sup>th</sup> edition 2006, Volume 1, 1<sup>st</sup> issue, Art. 138, marginal no. 14 et seq.

The HCC to be concluded is to be governed by Swiss law. However, contracts which are contrary to public policy are ineffective under Swiss law, too.

Cf. Art. 20 OR, and in more detail, *Böhringer/Hunger/Kasper/Münch/Waltenspühl*, *Prinzipien des Vertragsrechts (Principles of Law of Contract)*, 2006, 3.15.

A closer review of the effectiveness of the HCC under civil law is not subject of this opinion.

However, the HCC contains an arbitration clause (XII. 20) for the Court of Arbitration for Sport (CAS) in Lausanne. It can only be guessed what the arbitral award made by the CAS on a dispute between a sports association and a foreign public authority would be. Therefore, the evaluation of the financial risks has to be based on the assumption that the *Contract* is considered to be effective.

The *City* does not even be entitled to the IOC's financial contribution if all contractual obligations have been fulfilled. This agreement stipulated in Art. 14 of the HCC is supplemented by other clauses which further worsen the *City's* position. Pursuant to Art. VIII. 8. HCC 5% of the contribution to be made by the IOC will be allocated to a reserve fund. The IOC will dispose of the reserve fund at its

own discretion, i.e. the IOC can pay invoices which the City or the OC is unwilling or unable to pay and the IOC, at its own discretion, may take all amounts withheld as penalty.

## **b) Other receipts and expenses items**

As far as the other receipts are concerned, the estimate appears to be very optimistic. The only receipts that can be considered safe should be the €35m contributed a priori as grants by the Federal government, the Free State, and the City. All other receipts and expenses items are estimates. As experience gained with previous Olympic Games teaches, significant deficits cannot be excluded.

## **c) Breach of contract; Damages**

The IOC, to a great extent unilaterally, imposes any risks resulting from a breach of contract on the City or the OC. Particularly noticeable are the terms mentioned below:

- I. 9. a) and b) HCC: Release of the IOC, IOC members, and other persons affiliated with the IOC from liability for any incidents attributable to acts performed by the OC or the City and for the case that taxes will be imposed. The IOC will not pay damages to third parties, not even for acts performed by the IOC.
- I. 9. c) HCC: Release from liability in case of breach of contract or non-performance or termination of the Contract by the IOC, except for wilful or grossly negligent misconduct by the IOC.
- VIII. 8. HCC: Highly severe penalty clause stipulating that the IOC, for the IOC's own account, shall be allowed to withhold any amounts deposited in the general reserve fund as penalty without notification, if the Games do not take place as contractually agreed for reasons which are directly or indirectly attributable to the performance or non-performance of any obligations under the Contract by the City, the NOK, or the OC.
- XI. 1. HCC: Waiver of any claims against the IOC in case of withdrawal of the Games or termination of the Contract.
- I. 5. HCC: Extremely tightened liability due to the fact that the City, the NOK, and the OC are responsible for the performance of any obligations of third parties such as the government, regional and local authorities, and other municipalities.

## **2. Legal basis under municipal budgetary law**

Apparently, the State Capital of Munich will assume considerable financial risks by entering into the Contract. The City shall be responsible at one-third for any deficit the amount of which seems to be difficult to estimate. The Bavarian municipal code provides for the assumption of such risks to a limited extent only.

Art. 61 (3) BayGO reads as follows:

“<sup>1</sup> In its budget management, the municipality is obliged to minimise any financial risks. <sup>2</sup> An aggravated risk exists if particular circumstances, including but not limited to a gross disproportion in the spreading of risk to the disadvantage of the municipalities, create the risk of a considerable financial damage.”

This provision has been included in the Bavarian municipal code with a view to so-called US Cross Border Transactions. See *Hölzl/Hien/Huber, Gemeindeordnung mit Verwaltungsgemeinschaftsordnung, Landkreisordnung und Bezirksordnung für den Freistaat Bayern* (Municipal Code including Association of Administrations Regulations, Rural District Regulations, and District Regulations), commentary, loose-leaf edition, Art. 61 GO 4.1, loose-leaf edition (rev.: November 2010). However, the field of application of this provision is not limited to such transactions. It applies to all transactions carrying a financial risk.

In the interpretation of the conditions stipulated in Art. 61 (3) BayGO the particularities of each municipality have to be taken into consideration. Being the biggest Bavarian municipality, the State Capital of Munich is undoubtedly of particular financial strength. On the other side, the conditions for assuming an aggravated risk pursuant to Art. 61 (3) 2 BayGO exist. As for the spreading of risk under the Contract there is a complete disproportion for the benefit of the IOC and to the disadvantage of the City. This becomes clear when merely reading the Contract. Rightly, the review of a comparable host city contract concluded in connection with the application of the city of Salzburg for the 2014 Winter Olympic Games by local legal experts has shown:

The HCC is characterised by a set of maximum obligations and liabilities of the Host City, the NOK, and the OC and a set of minimum obligations and liabilities of the IOC.

See letter no. 20801-48.177/93-2003 dated 19 September 2006 by the Department of General Financial Affairs of the Province of Salzburg to the Province Governor

The municipal corporation of the city of Salzburg arrives at a similar result.

See letter no. MD/00/50893/2006/001 dated 5 October 2006: As for the liability, the risks to be assumed by the city are of hardly assessable diversity.

Even the Bavarian Olympic Games Act mentioned above makes clear that the potential financial damage threatened to be sustained by the City when concluding the Contract is not quantifiable.

Act dated 21 December 2010, BayGVBl. 2010, 847.

Herein, Art. 39 (1) of the Bavarian Financial Regulations (Haushaltsordnung, BayHO) are declared applicable insofar as the amount of the authorised guarantee has to be identified. The reason behind this is that it is not possible to estimate the financial burden to be borne by the Free State due to the assumed guarantee for one-third of any deficit. The invalidation of Art. 39 (1) BayHO relates to the deficit guarantee assumed by the Free State pursuant to Art. 2 (1) 1 OlympiaG.

See statement of the reasons for the act, LT-Drs. 16/5873, p. 6, referring to Para. 1 (2): Limiting the amount of the deficit guarantee is not possible without affecting the chances of success of the application.

In the interest of the application for the Games, the Bavarian Parliament invalidates a budgetary provision which is natural and, in fact, inevitable for proper budget management. However, there is no amendment of law for the municipalities and, in particular, the City. The Bavarian municipal code

has not been amended. If the Free State of Bavaria, which has a much stronger financial strength than the State Capital of Munich, were, under its own budgetary law, not allowed to assume an unlimited deficit guarantee, the logical conclusion is that the municipalities, all the more, would not be allowed to do so under their municipal budgetary law.

Hence, the conclusion of the HCC is clearly inconsistent with Art. 61 (3) BayGO. There is a gross disproportion in the spreading of risk to the disadvantage of the municipalities and for the benefit of the IOC.

In addition, the HCC has to be consistent with the credit system provisions of the municipal code. Pursuant to I. 4. HCC, the City assumes the joint and several liability for any and all guarantees, promises, statements, warranties, and other obligations and duties under the Contract as well as all for any indirect losses and damages, costs, and liability claims. This liability does not only apply to the City's own obligations, but also to the obligations of the NOK and the OC. Here again, it is doubtful if this provision is consistent with the Bavarian municipal code, including but not limited to Art. 72 BayGO.

The provision of Art. 72 BayGO reads as follows:

“Credit-like obligations; Securities

(1) The conclusion of legal transactions having the same economic effect as the raising of a credit is subject to permission.

(2) <sup>1</sup> The municipality may assume guarantees, guarantee agreements, and obligations from related legal transactions which include taking the responsibility for third-parties' liabilities or the occurrence or non-occurrence of certain circumstances only for the performance of the municipality's own duties. <sup>2</sup> Legal transactions are subject to permission if they are not concluded as part of routine administration work.

(3) The municipality has to obtain the permission for the provision of securities for the benefit of third parties.

(4) <sup>1</sup> Art. 71 (2) 2 and 3 and, for the provisional budget management, Art. 69 (4) 2 and 3 apply mutatis mutandis for the permission. <sup>2</sup> Permission has to be refused if the legal transaction does not have an investment for subject but is aimed at receiving economic advantages by the municipality obtaining inland tax privileges for the benefit of a third party.

(5) The State Ministry of the Interior in agreement with the State Ministry of Finance, by way of a statutory instrument (Rechtsverordnung), may exempt legal transactions from the requirement of a permission if such transactions:

1. are assumed by the municipalities for the performance of certain duties; or
2. are of no major importance to the municipalities; or
3. due to their nature, occur at regular intervals.”

The City is required to take the responsibility for third parties' (e.g. the OC's) liabilities. According to criteria under civil law, total liability is the City's own liability, too. However, the objective of Art. 72 (2) BayGO has to be interpreted as to cover joint and several liabilities, too. Otherwise, a municipality could evade the requirement of a permission for taking the responsibility for third parties' liabilities by taking the liabilities as its own joint and several liability.

Furthermore, the question arises whether or not taking responsibility for the occurrence or non-occurrence of certain circumstances is required. Essential aspects of the diverse terms stipulated in

the HCC are beyond the City's competence. It cannot be foreseen if the Contract will be observed by all other parties possibly indirectly involved such as the Federal government or the Free State. This situation creates a risk for the City which is subject to the reservation of permission stipulated in Art. 72 (2) BayGO.

Therefore, permission by the competent legal supervision authority (Rechtsaufsichtsbehörde), i.e. the Government of Upper Bavaria, would be required for several reasons (Art. 72 (1), 117 (1), 110 (2) BayGO). Granting such a permission would not be allowed. The provision of Art. 72 BayGO would be violated since hosting the Games on the whole and taking responsibility for any deficits mainly sustained on the territory of other municipalities are non of the City's duties (Art. 72 (2) 1 BayGO). Apart from this, assuming such liabilities violates Art. 61 BayGO, as already discussed above.

As far as is known, a permission for the conclusion of the Contract by the Government of Upper Bavaria does not exist. Such a permission cannot be granted at all since the IOC reserves the right to unilaterally amend the draft contract until the signing of the Contract. That means that the final version will be known only when the Contract is submitted for signature. If the Mayor (Oberbürgermeister) signs the HCC after the Games have been awarded, if applicable, to Munich the provision of Art. 117 (2) BayGo will apply:

“Municipal decisions as well as transactions under civil law will become legally effective only after the permission required by this law has been granted.”

However, under legal competence regulations, the Bavarian legislator may enact regulations concerning the authority to represent only, and not regulations attributable to civil law.

For a comparable problem with Art. 38 (2) GO see *Prandl/Zimmermann/Büchner*, Kommunalrecht in Bayern (Municipal Law in Bavaria), Art. 38 GO 4., loose-leaf edition (rev.: August 2010); *Widtmann/Grasser/Glaser*, Bayerische Gemeindeordnung (Bavarian Municipal Code), Art. 38 GO marginal no. 11, loose-leaf edition (rev.: May 2010); see also *BGH*, judgement dated 10 May 2001, NJW 2001, 2626 (2626), in addition *Sensburg*, NWwZ 2002, 179 et seq.

Should the Munich Mayor sign the HCC without permission he would act as an “unauthorised agent”. Due to the large number of violations of the Bavarian municipal code, granting a subsequent permission would not be allowed. A permission granted in spite of that would be unlawful and void (Art. 44 (1) of the Bavarian Administrative Procedure Act (Verwaltungsverfahrensgesetz, BayVwVfG)).

Art. 44 (1) BayVwVfG reads as follows:

“(1) An administrative act is void if it suffers from a particularly grave defect which becomes apparent by a prudent assessment of all relevant circumstances.”

Both conditions for invalidity exist. As described above, the violations of the Bavarian municipal code are grave. Principles of rule of law, above all observance of the legal allocation of competences, are disregarded in the interest of the sole key objective to be the successful bidder for the Games. With the conclusion of the Contract, the municipality would act outside its responsibility within the association and outside the applicable municipal budgetary law.

The violations described above are obvious. They are known to both the City and the regulatory authorities and have been discussed at a public meeting.

Cf. Discussion of the City Council of Munich, minutes of the meeting of 6 October 2010, [http://www.muenchen.de/cms/prod1/mde/\\_de/rubriken/Rathaus/11\\_politik\\_str/Sitzungsprotokolle/34.pdf](http://www.muenchen.de/cms/prod1/mde/_de/rubriken/Rathaus/11_politik_str/Sitzungsprotokolle/34.pdf), accessed at 12:03 on 18 June 2011.

Accordingly, when granting the permission the authorising body would act just as outside the legal order as the City does when signing the Contract. The Contract cannot be approved. Any other outcome of the review would be outside the scope of interpretation and would only be guided by the intent to legally support the conclusion of the Contract somehow. The unlawfulness of a permission possibly granted for the Contract by the Government of Upper Bavaria would be all too obvious.

See *Kopp/Ramsauer*, VwVfG, 11<sup>th</sup> edition 2010, Art. 44 marginal no. 12; *Manssen*, Allgemeines Verwaltungsrecht (General Administrative Law), 2005, p. 77.

Every average citizen is able to realise that granting the permission is in pursuance of the apparent purpose to permit behaviour which is beyond the City's area of responsibility. It is obvious that the City will assume financial risks which are difficult to quantify and which are inadmissible under municipal budgetary law because they would not even be admissible for the state budget. The principle of the lawfulness of administration as a central part of the principle of rule of law would be sacrificed for the aim of becoming the successful bidder for the Games.

Hence, the Mayor's signature of the Contract would not be binding to the City. The City would not be obliged to anything. The IOC should be made aware of the fact that, under applicable Bavarian local law, it is not possible to effectively assume obligations stipulated in the HCC. The IOC would not have the right contracting party for the HCC. A different result would be subject to amendments in the legal regulations which would provide for special arrangements for the application by municipalities for a major sporting event such as the Games. It is not until then that an effective permission for the Contract and, thus, a legally binding obligation of the City would be possible. However, such an act is not in preparation.

#### **D. Local supervision**

The State Capital of Munich is under the legal supervision authority of the Government of Upper Bavaria and, at a higher level, of the State Ministry of the Interior. Pursuant to Art. 109 (1) BayGO, the legal supervision authorities are responsible for supervising the lawfulness of administration. Legal supervision is a necessary correlate of self-government and is to ensure that laws and justice are observed (Art. 20 (3) GG).

See BVerfGE 78, 331/341; see also *Becker*, in: *Becker/Heckmann/Kempen/Manssen*, Öffentliches Recht in Bayern (Public Law in Bavaria), 5<sup>th</sup> edition 2011, marginal no. 560.

Signing of Contract, as known today, by the City of Munich would be unlawful. Pursuant to Art. 112 (1) BayGO, decisions taken by the city council to accept the HCC could be disapproved by the government.

Art. 112 BayGO reads as follows:

“Right to disapprove

<sup>1</sup> The legal supervision authority may disapprove of unlawful decisions taken and orders made by the municipality and demand such decisions or orders being set aside or amended. <sup>2</sup> In the case of non-fulfilment of any duties or obligations under public law, the legal supervision authority may request the municipality to take the necessary measures.”

Disapproval, however, is at the government’s discretion. The government may take action, but is not obliged to do so. Accordingly, the government may acquiesce unlawful behaviour of a municipality. A so-called limitation of discretion to zero would be an exception. In this case, the government would be obliged to take action. Such an obligation can also be considered within the scope of local supervision.

*Bauer/Böhle/Ecker*, Bayerische Kommunalgesetze (Bavarian Municipal Laws), Art. 112 GO marginal no. 7, loose-leaf edition (rev.: September 2010); *Prandl/Zimmermann/Büchner*, Kommunalrecht in Bayern (Municipal Law in Bavaria), Art. 112 GO 2., loose-leaf edition (rev.: August 2010); *Widtmann/Grasser/Glaser*, Bayerische Gemeindeordnung (Bavarian Municipal Code), Art. 112 GO marginal no. 2, loose-leaf edition (rev.: May 2010).

In view of the severity of violation of the principles under constitutional and local laws (including but not limited to acts outside the scope of action, obvious financial risk), it is reasonable to assume that the government has an objective legal obligation to take action.

Accordingly, the government must not grant the permissions required for the legal transactions which are subject to approval pursuant to Art. 72 BayGO, as shown above.

However, in the light of the political decision to support the City’s application for the Games it cannot be expected that the Government of Upper Bavaria, which is subordinate to the Bavarian Ministry of the Interior, will disapprove of related decisions. The political support of the application by the State Government is free of doubt and will result in the government not taking action against the obvious violations of law which would be associated with the signing of the Contract. The necessary permissions will be granted claiming the legally non-tenable argument of Special Case.

Individual citizens cannot appeal against this situation. They are not entitled to take legal supervisory action.

See *Bauer/Böhle/Ecker*, Bayerische Kommunalgesetze (Bavarian Municipal Laws), Art. 112 GO marginal no. 11, loose-leaf edition (rev.: September 2010); *Becker*, in *Becker/Heckmann/Kempfen/Manssen*, Öffentliches Recht in Bayern (Public Law in Bavaria), 5<sup>th</sup> edition 2011, marginal no. 562; *Widtmann/Grasser/Glaser*, Bayerische Gemeindeordnung (Bavarian Municipal Code), Art. 112 GO marginal no. 2, loose-leaf edition (rev.: May 2010).

German law does not provide for a right of individual citizens to lawful behaviour of state bodies. Therefore, the Government of Upper Bavaria can only be made aware of the unlawfulness of the contracts. Legal enforcement of supervisory measures is not possible.



## **E. Conclusion**

1. Hosting the XXIII Winter Olympic Games and XII Winter Paralympic Games falls neither within the City of Munich's own scope of action nor within the scope of action assigned to the City of Munich. For this reason alone, the City may not enter into a host city contract which would bind the City to host the Games.
2. The HCC is a tying contract. In concluding this Contract, the IOC uses its uncontrolled monopoly position to establish regulations which are partly legally bizarre, burden the contracting party unilaterally and, thus, are inconsistent with any feeling of decency and justice. Any IOC's own obligations are at the IOC's own discretion. The Contract loads virtually all risks onto the City and grants almost all rights to the IOC.
3. The Host City Contract contains elements which are subject to approval under the Bavarian municipal law. This applies to, including but not limited to, the financial consequences of the Contract. Since the IOC reserves the right to modify the Contract unilaterally, permission cannot be granted prior to the signature of the Contract. Should the Munich Mayor sign the Contract he would act as an unauthorised agent.
4. Curing the lack of authority by a permission granted by the Government of Upper Bavaria is not possible without an amendment of law. A permission granted in spite of that would be grave and obviously unlawful and, thus, void because the reasons hindering the granting of a permission are known to both the City and the regulatory authorities. That means that the City would not be legally bound by the Mayor's signature.
5. Legal supervision authorities, including but not limited to the Government of Upper Bavaria, are obliged to disapprove of decisions taken by the city council to approve the conclusion of the Contract. Legal enforcement "from outside" is not possible.
6. The Land Parliament failed to pass a law to charge the City of Munich with the hosting of the Games and relieve the City from any statutory provisions preventing the signing of the Contract.

Final remark: The end does not justify the means in a state governed by the rule of law. Whoever wishes that the 2018 Games will be held in Munich and other Bavarian municipalities has to create the conditions under local law for the conclusion of a host city contract. The Bavarian Parliament has not fulfilled this duty. Therefore, the City of Munich may not assume a legally effective obligation to host the 2018 Games in accordance with the IOC's notion of the Contract.