Outsourcing of public-services – forms and limitations

Michael Muench

Abstract

Purpose of the article is to show how public services can be outsourced from communities and what legal, organizational or other limitations may have to be taken into account.

Methodology used for this article is literature research, analysis and comparison. An in-depth look into the present status of research and literature will be interconnected to the basic research in this matter that has been done from the 1970's to the 1990's.

Scientific aim is to show the potential of the process as being important and helpful in creating better community-service and meanwhile relieve the communities from organizational and financial burdens that are more difficult to carry than ever before.

Findings are that we have to determine between the different municipal economic activities and the legal basis of these activities. The intervening public-service is a prominent example for the restrictive regulatory system it is set in but also is seen as having a big potential for cooperation and outsourcing by contracting-out. Contrary to that the service-rendering public-service is less regulated and more open to a market approach.

There are different spheres for these economic activities to take place. Different reasons for outsourcing depend on the specific sphere a certain task belongs to and can include economic, fiscal and political aspects. Two big groups of tasks are annex-tasks from within the public-service and characteristic public-services. There can be outsourcing by commissioning or by using submissions.

With different legal forms of the outsourced entities and the legal limits that are set for every different kind of structure, it is clear that there is no solution that always fits all the needs and that this has to be carefully taken into account.

Conclusions are that there is a high potential and big successes when outsourcing is done well planned and as a strategic activity. A number of legal issues and other limitations always has to be respected.

Keywords: public-service, outsourcing, public private partnership, subsidiarity principle, make or buy decision, public-law

JEL Classification: H41, H42, H44

Introduction

The German communities are at the basis of a federal state-building but they play an important role within the public policy (see 1.2. for more a more detailed definition of communal tasks). A strained finance situation of the communities and a fast growing specialization and complex task management lead to problems in the executive task management (Canibol, H.-P. and Student, D. 1992). The following will contain a close look up how the administration of communities can be simplified and relieved while different parts are being outsourced.

The first part will show types and tasks of the local government. Then we will see reasons, areas and types of outsourcing (Bitrolff, D.K.P. (2007) p.61) and before the conclusion there will be a close look at the limits of outsourcing. The discussed parts of outsourcing contain legal and organized aspects but not the regional ones.

1. Types and tasks municipal administration

1.1 Types of municipal administration

1.1.1 Intervention by public administration

Intervention by authorities is the part of the administration that exercises the organizational function of the state. This administrative function expects that legal, organizational and institutional assumptions are given for an orderly coexistence within the state. The intervention by authorities is on the one hand appointed with authority and coercive power, on the other hand there are many duties of disclosure and provisions on permissions which ensure that there will be no actions that exclude the authority (Becker, H 1989). A good example for this situation is the concept of defining overall building plans for a district and the following construction permits for houses. The administrative actions of the intervention by authorities acts directly into the citizen's privacy.

1.1.2 Services by public administration

The service rendering process of public services is also known as the conceiving authority. It has the function of providing and redistribute services. The task fulfillment is attended by administrative decisions. The function of redistribution consists out of charging duties of any kind, which include taxes, charge fees, contributions and special contributions. These earnings can be distributed as monetary subsidies to the socially disadvantaged. Good examples for these subsidies are social welfare benefit, housing benefit or cultural funding (for a detailed description of tasks, legal basis and public charges see: Gern, A. 1992). The service function of the administration has numerous dimensions: most prominent ones are schools, child-care units and homes for the elderly. It also includes hospitals, parks, public roads as well as sporting centers and theaters among many others. Probably the biggest importance is on the public utility companies, the waste management companies and public transport. The clearly defined fields of activities simplifies the separation and individual examination of these parts of the public service (Becker, U. 1989).

1.2 *Tasks of communal public administration*

1.2.1 *Own communal sphere*

The own sphere of the community is also called the local autonomy or local self-government and this very basic right is defined and secured in several state-constitutions as well as in article 28 of the federal constitution of Germany (Kühn, W. 1971). Although there is no explicit definition of individual tasks, the constitution grants the right to the local government to take care, fulfill and regulate all necessary public-affairs that are identified on that local level (Gern, A. 1998).

Further on, there is another separation of the affairs by voluntary or mandatory tasks. Voluntary tasks are an additional service for the citizens like museums, sporting-centers, public pools or parks (Scholler, H. 1990 p.92). Contrary to that are the mandatory tasks that the communal administration has to fulfill since this is laid out in federal or state law (Deutscher Städtetag 1990 p.50, Scholler, H. 1992 p.93). Examples for the so called services of general public interest are utility services for electricity and water, public transport, community-roads and basic social care. The construction and maintenance of public schools is also considered part of the self-government (Deutscher Städtetag 1990 p.68).

1.2.2 *Assigned communal sphere*

Assigned sphere includes all tasks that are carried out from the communal public-service based on a request or as a substitute for state or federal public-service and it can include mandatory and voluntary tasks (Gern, A. 1998 p.99, Neu, C. 2009 p.9-24, Reichard, C. and Schröter, E. 2009 p.19). The legal basis for transferring the tasks is article 83 of the federal constitution and examples are building supervision, citizens registration, civil defense and the organization of federal and state elections (Deutscher Städtetag 1990 p. 50). One reason for assigning these tasks is the close relation and proximity of the local public-service to the community and therefore a better and more detailed knowledge of the situation that has to be dealt with. Because of this decentralization, there is no necessity for another big and expensive additional administration level (Deutscher Städtetag 1990 p.62-64).

2. *Reasons for, types and possibilities of outsourcing*

2.1 *Reasons for outsourcing*

2.1.1 *Regional economic aspects*

When outsourcing tasks it is expected to realize a higher efficiency in providing the service, especially based on the expectation that a more flexible behavior in adaptation of personnel and capacity results from the change (Bogumil, J. (2010) p.12 and Bremeiner, W. (2006) p.15). Another advantage is considered to be based on the economies of scale in producing the services and having a better factor-efficiency due to specialization and learning-curve effects in the organization (Budäus, D 1982 p.94). Similar effects result due to the transfer of responsibility when decentralizing tasks. One reason for that is seen in the property rights theory. When clearly separating the property rights, the acting persons will try to reach a cost-efficient and resource-preserving production process out of their own motivation as they will directly profit from their effort in form of higher profits (Metzger, M. 1990 p.48). The theory of competition is also seen as applicable as it

describes a pareto-optimum situation with other market-actors and the resulting tasks of all actors to reach their personal optimum leading to the total situation being optimized. This function is only existent in a market environment, not in an administrative environment. The general rules for this market-optimization process are laid out by the law and the detailed control is exercised by an „invisible hand“ (Metzger, M. 1990 p.50).

Another important aspect is the promotion of small/medium-sized companies, as these companies represent the majority of companies in Germany and these companies are considered the reason for the economic success and flexibility of the german economy (Metzger, M. 1990 p.38). The change towards smaller and decentralized units that are more cost-efficient, more flexible, more innovative and can act and react much faster on their market has a strategic dimension (Peter, T. and Waterman, R. 1984 p.15 and 306). A prominent example for the advantages of decentralization is the split-up of IG Farben, a huge conglomerate in 2nd world-war in Germany, into the historical pre-war units of BASF, Bayer and Hoechst. After only a short period, every successor by itself was much bigger and more successful than the whole conglomerate before (Engels, W. 1976 p.40).

The outsourcing of public-services can also raise the quality-level of the services. The service is being rendered closer to the user, in smaller and easier to reach units that have longer opening hours and better communication policies towards the customer. The definition of quality-proximity is that the service is in-line with the expectations of the user. (Dichtl, E. 1993 p.127).

2.1.2 Fiscal aspects

Since the financial situation of the communities is very tight, outsourcing is a possibility to relief the situation by privatizing tasks. The community can have a private company provide the service on the community's behalf and pay the company the exact amount the administration has cost before (Bachmann, P. (2009) p.13 and p.32). As a result, the community will only have the running expenses but not the associated investments with the immediate need for capital. Another possibility would be to privatize services that have not been covering their expenses and therefore reducing the deficit of the community (Metzger, M. 1990 p. 45, Deutscher Städtetag 1986 p.25).

Changing the legal form of the company providing the service can also lead to substantial savings: the cost of personnel is reduced since the public-service usually has higher wages and side-effects. When rendering service as a privatized company, the possible deduction of value-added-tax from the expense-side will result in a 19% saving (Gerlach-Mach, R. 2010 p.85, Cronauge, U. 1992 p.48).

Savings will also result from a more target-group related and focussing market-segmentation that leads to concentration of the relevant market in three steps: by defining the business the relevant market-segment is identified and scaled. Defining the mission is setting its own role and mission in the market and finally defining the plan results in strategies for production. market studies and an analysis of the range of products/services (Abell, D.F. and Hammond, J.S. 1980 p.9). Contrary to that, public-service can not select products/services because it has the restraint to contract with every market-actor (Raffée, H. and Fritz, W. and Wiedmann, K.-P. 1989 p. 948).

2.1.3 Political aspects

Regulatory policies are that in a social market democracy the economic impact of the state is to be reduced and as many public services as possible should be privatized (Deutscher Bundestag 1983). Only the regulatory frame for private economic action is to be set by the government. Liberal economic theory promotes competition as the best correction possibility and that this should always be used whenever possible (Hayek, F. 2004 p.58 and Diebäcker, M. and others 2009 p. 2). All legislation to promote small-medium sized firms requires the communities to privatize as many tasks as possible (Metzger, M. 1990 p.77).

The principle of subsidiarity, that has its roots in the catholic social dogma, has been included in several communal constitutions (Gromoll, B. 1982 p.76). It is an advantage of outsourcing, that it will reduce bureaucracy. In any democratic country the organizational form of bureaucracy should only be applied when there is no other alternative (Engels, W. 1976 p.18).

2.2 Outsourcing of tasks

2.2.1 Annex-tasks

Annex-tasks are internal jobs within the public-service that are not directly provided for the citizens. These consist out of preparatory efforts and services for the final service and to keep the internal processes running. Examples for these annex-tasks are cleaning and printing services, qualification courses, building protection, kitchen and catering-services, lawyers, repair-shops and winter-services on the roads (Hauser, H. 1984 p.22).

The requirement of outsourcing annex-tasks results from the assumption that vertical integration in public-service exceeds the economic sound level and the vertical range of manufacture is too wide (Hauser, H. 1984 p. 23). Outsourcing is regularly done by placements of orders under the condition, that quality, stability and availability of services must not be endangered. In publicly owned companies with big and numerous capital assets, changes are only possible when there are substantial changes, e.g. with new buildings and as a result, investment could be reduced and minimized (Metzger, M. 1990 p. 151). When cleaning buildings, for example, a privately owned company is not required to employ its employees on the same level as public-service and would use cheaper assistant employees that are not subject to social-security premiums. In a comparison that the city of Hildesheim initiated, the findings were EUR 1,24 per square-meter when public-service does the cleaning towards EUR 0,73 when a private company does the same (Budäus, D. 1982 p.106).

In education for public-service officials, there is a split strategy while the specific public-service issues are dealt with internally, the general IT-courses are being outsourced to commercial companies (Metzger, M. 1990 p.147).

2.2.2 Characteristic public services

The core sovereign mandatory public-services (Bogumil, J. and Holtkamp, L. 2006 p.29) like waste-management, education, child-care, theaters and so on are usually organized as publicly-owned companies or organizations (Cronauge, U. 1992 p.116, Eichhorn, P. and others 2004 p.187). In the United States of America there was great success in privatizing public schools by having a private company run the school

(without author 1992 p.9). The legal spin-off of the hospital in Hildesheim resulted in a then profitable organization. Privately run hospitals in general have a 30% advantage in their operating costs (Schnitzler, L. 1992 p.34-37). Social tasks are often taken over by charitable organizations or they are organized in a separate legal organization (Frahm, J. and Kölbl, T. 1989 p.166). A new trend is that building areas are planned and developed by private construction companies as it is well known in the United States of America for a long time. This public-private partnership first started in 1992 in Germany (Friedmann, J. 1992 p.39 and without author 1992 p.39).

Other areas of characteristic public services are gas- and electrical companies (Knaus, W. 2007 p.793) which are often organized in private form or the supply is provided by regional private companies (Bogumil, J. 2007 p. 89). Regarding public transport it is easy to outsource parking-garages or harbors but it is difficult with tramways and bus-systems. Most often, big infrastructure companies now try to get the right to provide public transport on behalf of the community as a service provider after they have won the tender exercise (Eichhorn, P. 2007 p.67). Even for planning, constructing and operating airports the first serious offers from privately owned companies have been made with regard to the renewal of Berlin airport after the reunification of Germany (without author 1992 p.23). For a lot of additional areas like fairground-services and general service-companies the communities have the right to freely choose the legal form in which they operate it, therefore making it easily possible to privately organize and operate these services as well (Cronauge, U. 1992 p.119).

2.3 Types of outsourcing

2.3.1 Commissioning

There are two types of commissioning public-services. The system of granting concessions is based on licensing a private partner and transferring the organizational and financial responsibilities into the private sector (Struschka, R. 2009 p. 32-34). The licensing partner is contracting directly with the user or consumer and carries out pricing policy, calculation and accounting himself while carrying the financial risk of the operation (Kuhlmann, S. 2009 p.63). The community as licensor only regulates the legal framework and the kind of service to be delivered. Furthermore the licensor will have extensive control-rights in order to secure uninterrupted service (without author 1984 p.26). In case of licensing a publicly-owned organization, the control mechanisms are even more stringent (Sander, O. and Weiblein, W. 1981 p.54). In all cases, also when licensing a privately owned and operated company, the licensor arranges a regional monopoly for the service and defines exactly what the service will have to include. As compensation for that, the licensee will have to pay a predefined license fee (Sander, O. and Weiblein, W. 1981 p.56). The duration of such contracts usually runs between 10 and 30 years and due to the long duration, the contracts have to be prepared accurately (Knappe, R. 2010 p.64). As a result of the long duration, potential depreciation on one-time investments is stretched over a longer period and results in less costs being taken into account when calculating the user-fees. Good examples for this kind of outsourcing are patient transports, collection of paper-waste or the setup of collection-boxes for glass.

The second possibility to outsource services is a submission (Wegener, A. 2007 p.29, Wohlfahrt, N. 2011 p.90). In this case the community initiates a tender process and invites all interested companies to submit their tender. The community will keep the

financial responsibility and will remain contracting partner with the user. The operative business and management is nevertheless done by the private company that receives a certain amount for rendering the services. This is often done by having churches operate child-care centers, private waste-management companies dealing with the waste and football clubs operating the municipal stadium.

2.3.2 Outsourcing in public-law forms of organization

Public-law organizational forms can be differentiated into those who have an own legal entity and those who have not. Those with an own separate legal entity are either public associations or public institutions (Mahr, S. 2010 p.11, Miller, M. 2010 p.34). There are also public-foundations but they are not relevant for this article. A public association is the typical type of cooperation (Bitrolff, D.K.P. (2007) p.225) between multiple communities in the field of providing water and energy to the citizens (Cronauge, U. 1992 p.64). The articles of association define the inner and outer relationships of the association towards its members and users, as well as the legal definition of the compulsory use and the fees. There are no legal definitions regarding bookkeeping or management organization. The members of the association have to guarantee the funding of the association, although there is no defined or fixed capital required. This is also the reason for public associations being only partly accepted in the business environment, as they have no self-contained credit-worthiness and therefore can only (financially) act when supported by its members. (Sander, O. and Weiben, W. 1981 p.71).

A public institution in contrary is an entity of objects, means, personnel and assets that is destined to promote a certain public aim. In case that this is done without profit orientation and for the well-being of all citizens not excluding a certain group, this might be considered a charitable organization and therefore receive the status of being tax-exempt. The articles-of-institution define the elements of management individually (Schulte, U. 1976 p.52). The most common form of public institutions in Germany are the public banks called „Sparkasse“ which is usually formed by a community and is – because of being a bank – further regulated in very strict form by the state public-banking laws (Bremen, B. 2011 p.101, Cronauge, U. 1992 p.54).

Legal forms without an own legal-entity are known as government-owned systems or owner-operated municipal enterprises (Zeiss, F. 1984 p.154). A government-owned system is the typical form for an operation that is directly and deeply integrated into the public-service and it can hardly be seen as an own organizational enterprise from outside. Owner-operated municipal enterprises is the typical legal form for community owned enterprises. This alternative organizational form consists out of a closed set of assets that has been created as an own entity with separate organization. They have an own management and bookkeeping and as a „net-organization“ they only show in the communities' household plans and balance-sheets with their own separate profit or loss (Zeiss, F. 1989 p.289). They set up their own financial and personnel planning for every period and are included into the general budget planing with this. The controlling and bookkeeping can be organized either as cameralistic (Eichhorn, P. 1999 p.12) or double-entry bookkeeping but usually the yearly balance-sheet is created equal to the private-sector companies (Sander, O. and Weiblein, W. 1981 p. 74 and Bachmann, P. (2009) p.32). The companies articles define the relation between the municipal enterprise and the community, which is the highest management level and sets the rules and standards for the operative management and the financial resources and credits. The

operative management is the interconnection between city-parliament and the municipal enterprise. The function is split between the operative management within the company that is responsible for the every day tasks and the city-council that sets the more strategic frame for the operation (Zeiss, F. 1984 p.161). These owner-operated municipal enterprises are not allowed to hold shares in other companies and they can also not be created as joint enterprises by multiple communities. The management has only very limited and restricted options and there is a big dependance from the town or district council that sets the budget. Another big restriction is, that these enterprises are dependent on the public-services collective Labour agreement and personnel-policies.

2.3.3 Outsourcing into private-law legal entities

In these alternative forms of legal organization for public economic action, it is considered useful to be able to apply private-sector principles of management, financing and human-resources policies with direct responsibility of the management within the company and a higher level of independence from the city-council. The legislation for the communities does not allow any community to engage into a partnership or a limited-liability partnership because the communities should not run the risk of any uncontrollable liability from such an involvement (Sander, O. and Weiblein, W. 1981 p.68).

The form of an incorporation or stock company is the most widely used legal form and there are clear and easy rules to realize such a company. The liability is always limited to the companies assets and for the shareholder the possible maximum loss is its own investment. The annual shareholders' meeting decides about strategic and very basic management issues, while the executive board does all the operative management and associated decisions. The supervisory board is actively controlling the directors throughout the business year. This system guarantees an independent management of the company without the danger of permanent influence and conflicts of goals between the company and the municipality.

Similar to that but with less initial capital requirements there is the limited-liability company, where the shareholder only has to provide 50% of the minimum paid-in capital of EUR 25.000,-. As with the stock company, there is a strict limitation of liability to only the companies assets. The basic advantages of the stock company apply to the limited-liability company as well but it is possible to further create an individual set of rules to influence the relation between the company and the shareholder. It is a common habit to name specific business or management decisions, that the director of the company can not or must not exercise without approval of the shareholders. This means that there are more and easier possibilities to influence business policy from outside than in a stock company. Also, there is no mandatory board of directors until the company exceeds the limit of 500 employees.

Both forms of formal privatization by outsourcing tasks into companies with a private-law legal entity do not take away the task from the community by means of organizational responsibility or financial risk (Möltgen, K. and Pippke, W. 2009 p.201). The advantages are a more professional management and bookkeeping system and more flexibility and a stronger commitment to strategic and performance in management (Nentwig, V. 2008 p.80, Schmalz, T. 2005 p.13). The possible influence of the community is being strongly reduced by that (Eichhorn, P. and Loesch, A. 1989 p.1307).

3. *Limitations for outsourcing*

3.1 *Legal limitations*

Regulative tasks of public-service can be outsourced and privatized but there are deep concerns towards the legal possibilities and the constitutional restrictions (Deutscher Städtetag 1986 p.57). It is considered acceptable to include private companies in providing the services under the condition, that they do not only and not permanently take over the responsibility from the community (Gromoll, B. 1982 p.154). Tasks and services from the general public-service can be outsourced with less restrictions. The most prominent prerequisite is usually, that the municipal influence has to be guaranteed in order to maintain the principles of rule-of-law, democracy and a social state (Gromoll, B. 1982 p.156). Article 20 of the German constitution constitutes the right and the responsibility for the support of socially disadvantaged persons and grants the right for qualitative and inexpensive public-services. There is no regulation, so far, on how these prerequisites have to be fulfilled. This leaves the judgment about public or private organization, production and distribution of public services with every community. The community has to make sure that every citizen has the right and the possibility to use the public services without restrictions or barriers and when organizing services by using private companies, adequate contracts should be concluded with the service provider (Haupt, K.-J. 1988 p.95).

The legal limitations of entering private-law entities have already been discussed under 3.3.3. and we have seen that the main restrictions result from possible liability-threats depending on the type of company that is used.

3.2 *Microeconomic and macroeconomic limitations*

One danger of outsourcing on a microeconomic level is the possible creation of a regional monopoly and thereby creating a competitive threat to privately organized companies in the same or similar field of business. This threat raises the necessity to carefully design and implement legal or organizational limitations to prevent crowding-out effects (Wahl, J. 1992 p.251). The quality of service should not be endangered by outsourcing and when dealing with very complex tasks it is often necessary to join resources from different departments which results in complex organizational structures (Deutscher Städtetag 1990 p.54).

Another problem can result from creating unwanted dependency when outsourcing core-competences and very specialized know-how or services (Deutsch, C. 1992 p.50). Further on there are limitations on fields that contain high sunken costs. A good example would be clarification plants. Such sewage works represent a very high capital investment and a long-lasting asset for the community. Due to long-term character of the investment, it is not easy to privatize it.

In general, the privatization of public-services will lower the public expenditure quota and it will raise the gross-domestic-product. When the services are transparently produced in the private sector, the whole value-creating process will be reflected in the macroeconomic calculation for gross-domestic product. When the same process is being hidden in public-service, this is not fully reflected in national accounting. The privatization of former public-services can lead to massive growth in the relevant business fields. Although not a community-service, the privatization of telecom-companies has created a fierce competition and a sharp drop in prices for the user. Parallel to that the number of employees

in the old public-companies dropped while numerous new companies were created and the number of employees in the whole sector rose sharply.

3.3 Political limitations

Most political limitations of the outsourcing process are focused on the privatization side of it. The trade-unions naturally oppose the process of outsourcing because they expect from their organizational point of view that profit-orientation and competition are not good for their clientele and the working environment. Usually any outsourcing will be denied due to the anticipated danger of losing acquired rights in public-service and further on it is considered that the public-service has a piloting-function for social progress in the labor market (Gromoll, B. 1982 p.35).

Depending on the political orientation, there are also different ideas towards the privatization or outsourcing of public-services. The conservative parties usually object the outsourcing of core-public-services like police, schools and regulating-authorities. Liberal parties are permanently claiming to search for privatization-possibilities in every field of public-service in order to fulfill their claim for an economic environment with no state-influence except for the general rules. Socially oriented parties do oppose any form of outsourcing and would like to see only cooperation or publicly owned private companies as an acceptable form (Naumann, M. 2011 p.68, Metzger, M. 1990 p.19).

The communities themselves sometimes do not like the idea of outsourcing, as this will reduce their influence as well as political and financial power. It is often postulated, that only public-service itself would be able to provide the necessary level of quality and quantity at a socially acceptable price for the citizens. They also see the legislative and political mandate in the state and federal constitution as a general approval for their own economic activity (Deutscher Städtetag 1986 p.30). They only see the democratic and political influence and control through the city council as secured when a public-law legal entity is used or the task is directly performed within the public-service structures.

Conclusion

The areas and problems for outsourcing are numerous and complex. The creation and expansion of commercial companies by communities is limited: without justification by a public purpose there is no right for the municipality to engage in a company. If the community wants to create a company, it has to make sure that the kind of company and the size of it does not interfere with private economic market participants and always has to respect the principle of subsidiarity. There is no need and no acceptance of ever growing and expanding public-services or publicly-owned companies in a social and democratic market economy (Flieger, H. 1989 p.433).

The limitations for outsourcing are not set by law. The extent of outsourcing is often not determined by rational criteria but it is a compromise between all related and involved groups of society, economy and politics. A review of the system is difficult as criteria like social-acceptance are entered into the discussion and decision-making process. This criterion is non-quantifiable. This is especially important with questions like reducing the personnel in public-service and realizing direct cost-savings because of reduced labour costs.

A very successful but also progressive way of lean-public-service has been realized in a city in the Netherlands where the city council only sets the political goals and the annual

budget. The management of public-service departments have all options and responsibilities to realize the specific goals. There is a given maximum price for every public-service product or service and stringent internal quality-, price- and service level supervision. The result was, that the budget was reduced and over 8 years the public-service shrunk from 350 personnel to 29. Further on, this city now is offering to neighboring communities to take over their public-service for less (Canibol, H.-P. and Student, D. 1992 p.30).

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PhDr. Dipl.-Kfm. Michael Muench

Im Huettenbuehl 32
69124 Heidelberg, Germany
Phone +49-6221-187750
michael.muench@web.de