



EUROPEAN COMMISSION

Brussels, 4.10.2011
SEC(2011) 1169 final

COMMISSION STAFF WORKING PAPER
concerning the application of EU public procurement law
to relations between contracting authorities
('public-public cooperation')

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1. INTRODUCTION

In 2009, public contracts worth around €420 billion were advertised in accordance with the EU Public Procurement Directives. The aim of these rules is to ensure that the relevant public purchasing contracts are open to competition for suppliers across the internal market.¹ At the same time, EU law does not restrict the freedom of a contracting authority to perform the public interest tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own structure.

There has been an ongoing debate about whether the EU Public Procurement Directives also apply to various types of situations where contracting authorities together seek to ensure the performance of their public tasks. The Court of Justice of the European Union (hereafter the "Court") has confirmed that contracts between contracting authorities cannot be automatically presumed to fall outside the application of EU public procurement law. However, the Court's case law also showed that certain forms of cooperation between contracting authorities cannot be regarded as public procurement contracts.

Therefore, a distinction has to be drawn between, on the one hand, procurement activities which should benefit from open competition among economic operators as ensured by the EU procurement rules and, on the other hand, other arrangements which contracting authorities may use to ensure the performance of their public tasks and which do not fall within the scope of the EU Public Procurement Directives.

Currently, contracting authorities wishing to cooperate often find it difficult to distinguish when the EU Public Procurement Directives apply and when they do not.

The need to bring some light to bear on this issue has been emphasized in the European Parliament report, which called "*on the Commission and the Member States to make information about the legal implications of these judgments [on public-public cooperation] widely available*".²

The present document seeks to respond to this demand. It aims to provide a broad overview of the existing case-law of the Court of Justice. It consolidates and summarises this case-law, and draws some conclusions from it, insofar as the findings of the Court allow. It does not create any new rules or requirements. Instead it aims to contribute to the better understanding and application of the existing legal environment. It is intended to benefit all stakeholders in the field of public procurement, in particular public

¹ The whole public procurement market in the EU is worth around 17% of EU GDP. The EU public procurement directives regulate only the award of those contracts which exceed a certain threshold. In 2009, the value of such contracts amounted to 3.6% of EU GDP. For the remaining part of the procurement market Member States have to observe the EU law principles of non-discrimination, equal treatment of tenderers etc. insofar as the contract to be awarded is of interest to undertakings established in a different Member State.

² Own initiative Report by MEP Heide Rühle on "New Developments in Public Procurement" (European Parliament resolution of 18 May 2010 on new developments in public procurement (2009/2175(INI))

authorities at all levels of the administration.³ The guidance in this document is limited to the area of public procurement and is without prejudice to the EU rules on competition and state aid.

After recalling that public contracts between contracting authorities are subject to the EU Public Procurement Directives (section 2), the document looks at different forms of cooperation between contracting authorities which can be exempted from the scope of these rules (section 3) and subsequently other types of relations in the light of EU public procurement law (section 4).

This staff working paper is an indicative document of the Commission services and cannot be considered to be in any way binding on this institution. It should be noted that, in any event, the interpretation of EU law is ultimately the role of the Court of Justice of the European Union.

2. GENERAL PRINCIPLE: EU PUBLIC PROCUREMENT LAW APPLIES TO CONTRACTS BETWEEN CONTRACTING AUTHORITIES

The EU Public Procurement Directives apply when contracting authorities and entities conclude contracts for pecuniary interest with a different legal entity. If such an arrangement is entered into, it makes no difference whether the contractual partner is private or public. This emerges clearly from the relevant provisions of the directives, as well as the case-law of the Court.

Article 1(8) of Directive 2004/18/EC⁴ ("Public Sector Directive") provides as follows:

*"The terms "contractor", "supplier" and "service provider" mean any natural or legal person or **public entity** or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services."* (emphasis added)

Article 1(7) of Directive 2004/17/EC⁵ (the "Utilities Directive") states that:

*"The terms "contractor", "supplier" or "service provider" mean either a natural or a legal person, or a **contracting entity** within the meaning of Article 2(2)(a) or (b), or a group of such persons and/or entities which offers on the market, respectively, the execution of works and/or a work, products or services."* (emphasis added)

³ A public consultation has been launched by the "Green Paper on the modernisation of EU public procurement policy - Towards a more efficient European Procurement Market" (COM(2011) 15 final, Brussels, 27.1.2011) the aim of which is to establish how the area of public procurement should be redesigned for the future. Pending the adoption and implementation of any new legislation, this staff working paper aims at clarifying the existing legal situation.

⁴ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114–240)

⁵ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1–113)

Accordingly, the Court found that "*the fact that the service provider is a public entity distinct from the beneficiary of the services does not preclude the application of the [Directive]*".⁶ For the application of the EU public procurement rules, "*it is sufficient, in principle, if the contract was concluded between a local authority and a person legally distinct from it*".⁷ It therefore constitutes an incorrect transposition of the EU Public Procurement Directives to exclude from the scope of national procurement law "*relations between public authorities, their public bodies and, in a general manner, non-commercial bodies governed by public law, whatever the nature of those relations*".⁸

3. PUBLIC TASK PERFORMED BY OWN RESOURCES - PUBLIC-PUBLIC CO-OPERATION WHICH CAN FALL OUTSIDE THE SCOPE OF EU PUBLIC PROCUREMENT RULES

3.1. Overview of the different concepts developed in the case-law

The case-law of the Court in the area of public procurement showed that EU law does not restrict the freedom of a contracting authority⁹ to perform the public interest tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own structure¹⁰.

If a contracting authority performs a public task by using its own resources in such a way that no contract for pecuniary interest is concluded because the situation is internal to one and the same legal person, i.e. all necessary resources for the performance of the task are available to the contracting authority within its own organisation, EU public procurement law does not apply. Example: a city council provides the transport services in its territory through its internal transport department.

Moreover, the possibility to perform public tasks using own resources may also be exercised in cooperation with other contracting authorities. Several contracting authorities may mutually assist each other. If this does not involve remuneration or any exchange of reciprocal rights and obligations, there is no service provision within the meaning of EU public procurement law. In these circumstances, EU public procurement legislation does not apply. Example: a general understanding between neighbouring

⁶ Case C-480/06, Commission v Germany, [2009] ECR I-04747, para. 33.

⁷ Case C-107/98, Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, [1999] ECR I-08121, paragraph 50.

⁸ Case-84/03, Commission v Spain, [2005] ECR I-00139, para 40.

⁹ Given the subject - public-public co-operation - this note only addresses the behaviour of "contracting authorities" within the meaning of Directive 2004/18/EC, not "public undertakings" within the definition of the Utilities Directive or private undertakings operating on the basis of special or exclusive rights as defined under Directive 2004/17/EC. Concerning "contracting authorities" that fall within the definition of "contracting entities" as defined in the Utilities Directive, it should be noted that their particular situation in respect of public-public co-operation has never been examined explicitly by the Court of Justice. The conclusions drawn for "contracting authorities" in general should, MUTATIS MUTANDIS, hold also when they act in their capacity of "contracting entities", except where there might be significant differences in the applicable rules. It should also be observed that the Utilities Directive contains provisions for certain types of public-public cooperation in Art. 23 (even triangular situations possible).

¹⁰ Case C-26/03, Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna, [2005] ECR I-00001, para 48.

municipalities that their respective music ensembles would perform at each other's city celebrations.

Where contracting authorities conclude contracts for pecuniary interest (i.e. involving reciprocal rights and obligations) with one another, the question arises as to whether these may be excluded from the scope of the EU Public Procurement Directives, despite the general rule by which contracts between different legal persons are covered. According to the case-law of the Court, this is indeed possible under certain circumstances. Where contracting authorities co-operate with a view to jointly ensuring the execution of public interest tasks, then this may involve the award of contracts without triggering the obligation to apply EU public procurement law. Such co-operation can take the form of jointly controlling a third entity entrusted with the performance of the task ("vertical/institutionalised co-operation"). Alternatively, it can be undertaken without the creation of a new or specially appointed entity ("horizontal/non-institutionalised co-operation").

3.2. Cooperation via separate legal entities ("Institutionalised/Vertical cooperation", "in-house case-law")

It is well established that EU Public Procurement Directives apply if contracting authorities enter into public contracts, i.e. contracts for pecuniary interest concluded in writing with a third party and having as their object the execution of works, the supply of products or the provision of services within the meaning of the Directives. They also apply if contracting authorities conclude works concessions under the Public Sector Directive.

In the *Teckal*-case¹¹, the Court interpreted this rule in a functional manner. It laid down two cumulative criteria for the exemption from EU public procurement rules of a relationship between a contracting authority and another legal person. According to the Court, such a relationship falls outside the scope of EU public procurement law if:

- (1) the contracting authority exercises over the legal person concerned a **control which is similar to that which it exercises over its own departments** and,
- (2) at the same time, that legal person **carries out the essential part of its activities with the controlling contracting authority or authorities**¹²

Thus, in line with **contracting authorities' power of self-organisation**, the Court found that EU public procurement law (i.e. not only the Directives, but also the Treaty principles) does not apply if a contracting authority concludes a contract with a third party that is only **formally, but not substantially, independent from it**. This case-law

¹¹ Case C-107/98, *Teckal*, para 50. "As to whether there is a contract, the national court must determine whether there has been an agreement between two separate persons. In that regard [...] it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local **authority exercises over the person concerned a control which is similar to that which it exercises over its own departments** and, at the same time, **that person carries out the essential part of its activities with the controlling local authority or authorities.**"

¹² Following the judgment of the Court, the Italian Consiglio d'Etat came to the conclusion that AGAC was an in-house company of Viano (Consiglio di Stato, Sezione Quinta, judgment n° 2605 of 9 May 2001).

covers situations in which there is **no private capital** involved in the third party and **it depends in both organisational and economic terms** on the contracting authority. Example: a city council provides for the transport services in its territory by using its wholly owned and controlled transport company.

In subsequent judgments,¹³ the Court specified that the in-house concept is also available for public-public cooperation by providing that the two *Teckal*-criteria can be fulfilled jointly by several contracting authorities. Example: two city councils providing for the transport services in their territory through their jointly held and controlled transport company.

For the purposes of this document, this cooperation is qualified as 'institutionalised' or 'vertical', because it involves contracting authorities who contract the performance of a task to a separate, jointly owned and controlled entity that acts as the provider.

This in-house exception has been recognized by the Court in relation both to public contracts and works concessions covered by the EU Public Procurement Directives, and to service concessions otherwise covered by the Treaty principles.

In this context it should be observed that while the relationship between the controlling contracting authority or authorities, on the one hand, and the controlled entity, on the other, might be exempt from EU public procurement law due to the in-house situation, a body that qualifies as an in-house entity would normally also qualify as a "body governed by public law", with the obligation to respect EU public procurement law as regards its own procurement activities.

The following sections describe in detail the relevant conditions of the Court's in-house case-law that need to be assessed when deciding whether or not EU public procurement law applies.

3.2.1. *Holding of the capital of an in-house entity*

According to the case-law, a contracting authority cannot exercise in-house control over an entity when one or more private undertakings also participate in the ownership of that entity.¹⁴ That is the case even if the contracting authority is able to take independently all decisions regarding that entity, regardless of the private holding. The Court reasoned that the relationship between a contracting authority and its own departments is governed by considerations and requirements proper to the pursuit of objectives in the public interest. By contrast, any private capital investment in an undertaking follows considerations proper to private interests and pursues objectives of a different kind.¹⁵ This holds true also for 'pure capital injections' by a private company into the in-house entity (meaning

¹³ Cases C-324/07, *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale*, [2008] ECR I-08457 and C-573/07, *Sea Srl v Comune di Ponte Nossola*, [2009] ECR I-08127.

¹⁴ "By contrast, the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments." (Case C-26/03, *Stadt Halle*, para 49.)

¹⁵ Case C-26/03, *Stadt Halle*, para 50.

e.g. the buying of shares, not the provision of standard loans¹⁶), even if this does not involve any operational contribution.

- The relevance of the potential future participation of private capital

As a general rule, the determination of the existence of a private holding in the capital of the company to which the public contract at issue is awarded must be undertaken **at the time of the award**^{17, 18}. The future opening of the company's capital is taken into account only if there is a real prospect of such opening in the short term at the time of the award of a contract to the company.¹⁹

The mere theoretical possibility of a private party participating in the capital of an in-house entity does not in itself undermine the in-house relationship between the contracting authority and its company.²⁰

However, **if** a contract were to be awarded to the company without being put out to competitive tender on the basis of the in-house exception, the subsequent acquisition of a stake in the company by private investors at any time during the period of validity of the contract would constitute an **alteration of a fundamental condition** of the award of the contract. Under these circumstances, the contract has to be put out to competitive tender.²¹

- 100% public sector participation in the capital of the in-house entity

Conversely, the sole ownership by contracting authorities should be regarded as an indication of the existence of the control required for the in-house exception, but not as a factor which is decisive *per se*.²²

This indication is rebutted where contracting authorities establish a profit-making company which is fully independent of them. This is also illustrated by the *Parking Brixen*-case, in which the entity was, at the time of the award, owned by one contracting authority but enjoyed a degree of independence²³ (cf. next section) which led the Court to deny the in-house status.

¹⁶ It would not be considered as 'standard' if e.g. the loan could be turned into shares of the in-house entity as a possibility of paying it back.

¹⁷ Cases C-26/03, *Stadt Halle*, paras 15 and 52; and C-573/07, *Sea*, para 47

¹⁸ Exceptionally, special circumstances may require events occurring after the date on which the contract in question was awarded to be taken into consideration. Such is the case, in particular, when shares in the contracting company, previously wholly owned by the contracting authority, are transferred to a private undertaking shortly after the contract at issue has been awarded to that company by means of an artificial device designed to circumvent the relevant EU rules (see, to that effect, Case C-29/04 *Commission v Austria* [2005] ECR I-9705, paragraphs 38 to 41).

¹⁹ *Sea*, para 50

²⁰ See IPPP Communication, footnote 14. This position has meanwhile been confirmed by the ECJ in case C-371/05, *Commission v Italy*, [2008] ECR I-00110, para 29.

²¹ *Sea*, para 53

²² Case C-340/04, *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA.*, [2006] ECR I-04137, para 37: "*the fact that the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer tends to indicate, without being decisive, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments*".

²³ Case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG.*, [2005] ECR I-08585, para 70.

3.2.2. First Teckal-criterion: The necessary control over the in-house entity (organisational dependence)

The contracting authority has to exercise over the in-house entity "a control which is similar to that which it exercises over its own departments"²⁴. The manner in which control is exercised is irrelevant, i.e. this may be **by means of private or public law powers**. The assessment of the "similar control" requirement "must take account of all the legislative provisions and relevant circumstances. [...] It must be a case of a power of decisive influence over both strategic objectives and significant decisions."²⁵

In this respect, the following elements are to be considered.

- Joint control by several contracting authorities over an in-house entity

The Court established new arguments relating to the first *Teckal*-criterion in its *Coditel*-judgment. The Court clarified that, although control exercised over an in-house entity must be effective, it is not essential that it be exercised individually. It therefore confirmed the principle that **control within the meaning of the first Teckal-criterion can be exercised jointly**.

The Court has justified this broader interpretation essentially on the basis that a stricter reading of this criterion would render the *Teckal*-exemption inapplicable in the majority of cases which involve co-operation between contracting authorities. In the same spirit, the Court has determined that the **procedure used by the controlling authorities in adopting collective decisions is immaterial**. For example, the use of majority voting will not negate the establishment of (joint) control by all participating contracting authorities.²⁶ It follows that, "if a public authority becomes a minority shareholder in a company limited by shares with wholly public capital for the purpose of awarding the management of a public service to that company, the control that the public authorities which are members of that company exercise over it may be classified as similar to the control they exercise over their own departments when it is exercised by those authorities jointly."^{27,28}

- The necessary extent of powers over the in-house entity

In order to meet the first *Teckal*-criterion, the contracting authority must retain a sufficient degree of control so that it has the possibility to restrict the freedom of action of the entity in question.

In the *Coditel* case, the fact that the **decision-making bodies** of the concessionaire were **composed** only of representatives of the contracting authorities participating in the co-operation was considered as a strong indication of the existence of in-house control.

²⁴ Case C-107/98, *Teckal*, para 50.

²⁵ Case C-458/03, *Parking Brixen*, para 65; Case C-371/05, para 24.

²⁶ C-324/07, *Coditel*, para 51.

²⁷ C-573/07, *Sea*, para 63.

²⁸ In case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti*, [2005] ECR I-07287, the Court considered that a minority interest of 0.97% was so small as to preclude a municipality from exercising in-house control over the concessionaire. However, in subsequent findings the Court accepted the possibility of joint control by several contracting authorities which individually might only have a small minority shareholding over the in-house entity.

The **corporate form** of the in-house entity *as such* is not decisive, but it can serve as an indication. For example, in the *Coditel* case, the Court emphasized that the in-house entity did not take the form of a joint-stock company "*which is capable of pursuing objectives independently of its shareholders, but of an inter-municipal cooperative society*". According to the relevant national law, the latter cannot have a commercial character.²⁹

In the *Carbotermo*-case³⁰, the Court found that the control by one contracting authority of another entity, which consists only of the **latitude conferred by company law** on the majority of the shareholders, might not be sufficient to constitute control within the meaning of the first *Teckal*-criterion. In such a case, considerable limits are placed on the powers of the contracting authority to influence the decisions of the entity in question.³¹ Similarly, if the contracting authority influences the entity's decisions only through a **holding company**, this may weaken any control that may be exercised by the contracting authority. Consequently, the first *Teckal*-criterion may not be met.³²

In the *Sea*-case³³, the in-house entity was a company limited by shares. While this corporate form did not exclude the possibility of in-house control, the Court examined in detail the specific powers enjoyed by the contracting authorities – in particular those which would allow them to control the managing bodies of the in-house entity and which go beyond the normal rules applicable to such control in a company limited by shares.

- The potential independence/market orientation of the in-house entity

In *Coditel* and in *Sea*, the Court considered that, if the controlled entity became market-oriented and enjoyed a degree of independence which would render tenuous the control exercised by the contracting authorities, the first *Teckal*-criterion would no longer be met. In this respect, for example, the **material and geographical scope** of the controlled entity's activities and its **opportunity to establish relations with undertakings in the private sector** need to be taken into account.³⁴ A lack of market orientation on the part of the controlled entity could be deduced where the **geographical scope** of the controlled entity's activities is restricted to the territory of the contracting authorities which own it, and the **range of its activities** (in other words the aims pursued by it)³⁵ is limited to the performance of tasks for those contracting authorities. This test resulted in a finding that in-house control existed in the *Coditel* and *Sea* cases, while the opposite applied in the case of *Parking Brixen*.

The controlled entity may **establish relations with undertakings in the private sector**, provided these remain incidental to the entity's core activity, i.e. the management of public services.³⁶ A complete ban on relations with private sector undertakings would render the 2nd *Teckal*-criterion useless.

Example: if the in-house entity's main activity is waste collection for the controlling

²⁹ Coditel, para 37.

³⁰ See footnote 22.

³¹ Carbotermo, para 38., Parking Brixen 70.

³² Carbotermo, para 38 and 39.

³³ See footnote 27.

³⁴ C-324/07, Coditel, para 36, C-573/07, Sea, para 73.

³⁵ Coditel, para 38, Sea paragraphs 74-76.

³⁶ C-573/07, Sea, paras 79-80.

contracting authorities and the selective sorting of waste, this might require, as an ancillary activity, the selling of some specific categories of recovered waste to specialist private sector bodies in order to have it recycled.³⁷

3.2.3. *Second Teckal-criterion: The essential part of the in-house entity's activities have to be confined to the tasks conferred by the controlling entity/entities (economic dependence)*

In order to benefit from the in-house exception, the controlled entity must carry out the **essential part of its activities** with the controlling contracting authority or authorities. This criterion is aimed at ensuring that EU public procurement law remains applicable in the event that an entity controlled by one or more contracting authorities is active in the market and therefore likely to be in competition with other undertakings.³⁸

In *Carbotermo*, the ECJ found that the turnover-based threshold of 80% provided for in the Utilities Directive, above which contracts awarded to affiliated undertakings may fall outside the scope of application of that Directive, cannot be used as a reference for the purposes of the Public Sector Directive.³⁹

However, in the same judgment, the Court provided substantial clarifications concerning the term "essential part of activities".⁴⁰ In the Court's view, this criterion is met only if the activities of the in-house entity are devoted **principally** to the contracting authority. Any other activities should only be of **marginal significance**.

Relevant for this assessment are **all those activities which the in-house entity carries out as part of a contract awarded by the contracting authority. This consideration is relevant** regardless of the identity of the beneficiary (whether it be the contracting authority itself or the user of the services), of the entity who pays the contractor (whether it be the controlling authority or third-party users of the services) or of the territory on which those services are provided.

Where the in-house entity is jointly controlled by several contracting authorities, the condition relating to "the essential part of its activities" may be met if that in-house entity undertakes those activities, not necessarily with one of those contracting authorities, but with all of those authorities together. Accordingly, **the activities to be taken into account in the case of an in-house entity controlled by several contracting authorities are those which it carries out with all of those authorities together.**⁴¹

3.2.4. *Additional open questions regarding in-house scenarios*

The following questions have not yet been directly addressed in the case-law of the Court, but they could arise in practice:

³⁷ C-573/07, *Sea*, para 78.

³⁸ *Carbotermo*, para 60.

³⁹ *Carbotermo*, para 55. (This judgment concerned the "old" Utilities Directive (93/38). However, Article 23 of the "new" Utilities Directive (2004/17/EC) provides, similarly, for a turnover-based threshold of 80% above which the contracts awarded to so-called affiliated undertakings may fall outside the scope of application of that Directive.)

⁴⁰ *Carbotermo*, paras 63-68.

⁴¹ *Carbotermo*, paras 70-71.

- Is it possible to have private capital in the controlling entity?

The question about potential private capital in the controlling entity may arise in the case of bodies governed by public law and it cannot be excluded that they would still be in a position to exercise an in-house control over another entity.

- Is a "bottom-up contract award" (controlled entity awarding a contract to the parent) possible?

In the case of a 'bottom-up contract award', it can be observed that the in-house logic, i.e. the lack of two entities with independent wills, would still be pertinent.

- Is it possible to have contracts between "in-house sisters" (i.e. contracts between two in-house entities controlled by the same parent)?

In the case of "contracts between in-house sisters" neither entity controls the other, but both are controlled by the same parent entity. The 'in-house' case-law does not seem to exempt normal public contracts between these entities (the "in-house sisters") from the scope of the procurement rules, since neither of them controls the other. However, it could formally comply with the in-house case-law if, for example, a contracting authority which has two in-house entities that it owns and controls orders certain goods from one of its in-house companies and directs deliveries to the other.

3.3. Non-institutionalised/Horizontal co-operation to jointly fulfil public tasks⁴²

3.3.1. The substantial characteristics of horizontal cooperation among contracting authorities falling outside the EU public procurement rules

In its *Hamburg*-judgment,⁴³ the Court accepted also public-public cooperation outside the concept of using jointly controlled in-house entities. The Court stressed that EU law does not require contracting authorities to use any particular legal form in order to jointly carry out their public service tasks.⁴⁴ For the purposes of this document, this type of cooperation is qualified as 'non-institutionalised' or 'horizontal', involving different contracting authorities.

Until now this has been the only judgment of the Court on public-public cooperation that has not involved jointly controlled in-house entities. The Court appears to have relied on many individual circumstances which were relevant to this particular case in order to arrive at its conclusion.

Nevertheless, considering the aspects of the judgment which could be of general relevance, it appears reasonable to conclude from it that contracting authorities may establish horizontal co-operation amongst themselves (without creating a jointly controlled "in-house" entity) which involves the conclusion of agreements not covered by EU public procurement law, if at least the following conditions are met:

⁴² The Court did not specifically define this term when referring to it in its judgment, thus it is left open if it refers to tasks (i) actually carried out by the contracting authority, (ii) which it can legally perform, or (iii) which it has the legal obligation to perform. In the view of the Commission services, it is possible to interpret this notion in a broad sense.

⁴³ See footnote 6.

⁴⁴ *Idem*, para 47.

- the arrangement involves only contracting authorities, and there is no participation of private capital;⁴⁵
- the character of the agreement is that of real co-operation aimed at the joint performance of a common task, as opposed to a normal public contract; and
- their cooperation is governed only by considerations relating to the public interest.

3.3.2. *Distinguishing genuine 'cooperation' from a normal public contract*

On the basis of the *Hamburg*-judgment, the aim of cooperation is to **jointly ensure the execution of a public task which all the cooperation partners have to perform**. Such joint execution is characterised by the participation and mutual obligations of the contractual partners, which lead to mutual synergy effects. This does not necessarily mean that each of the cooperating partners participates equally in the actual performance of the task – the cooperation may be based on a division of tasks or on a certain specialisation. Nevertheless, the contract needs to address a **common aim**, namely the joint performance of the same task.

Example: if the cooperating partners pursue the treatment of waste as a common aim, they could divide up the relevant tasks, so that one ensures collection and the other incineration of the waste.

A general reading of the case-law also suggests that the character of the agreement needs to be that of real co-operation, as opposed to a normal public contract where one party is performing a certain task against remuneration.⁴⁶ Such a unilateral assignment of a task by one contracting authority to another cannot be considered as cooperation.

Example: the supply of electricity to the administrative buildings of a city by a utility of another city without a prior procurement process.

Cooperation is governed by considerations relating to the pursuit of objectives in the public interest. Thus, while it may involve mutual rights and obligations, it must not involve **financial transfers** between the public cooperating partners, other than those corresponding to the reimbursement of **actual** costs of the works/services/supplies: service provision against remuneration is a characteristic of public contracts subject to the EU public procurement rules.

3.3.3. *Possible restrictions regarding activities on the commercial market*

The Court stated that the cooperation should only be governed by public interest considerations. Thus, it would not be exempt if it was guided, i.e. principally determined, by other considerations, especially commercial ones. Therefore, in principle, the cooperating partners should not perform activities on the market as part of the

⁴⁵ In the *Hamburg*-judgment, the Court referred to 'public authorities', but in the Commission services view, such horizontal cooperation could be open for all categories of contracting authorities, i.e. also for bodies governed by public law. On the other hand, the logical consequence of the criterion that no private capital should be involved in such horizontal cooperation is that it would not be available for such bodies governed by public law in which there is private capital involved.

⁴⁶ Cf. Case C-275/08, *Commission v Germany*, [2009] ECR I-00168.

cooperation. In other words the cooperation agreement should not include activities to be offered on the open market.⁴⁷

Example: if the cooperating partners in the *Hamburg*-case had built a waste incineration plant with a capacity exceeding their needs, with the aim of selling the spare capacity at a profit on the open market, their cooperation would not have been governed solely by considerations and requirements relating to the public interest.

3.4. Summary

In the light of the above, it can be established that normal public contracts between contracting authorities continue to be subject to the procurement obligations (e.g. the purchase of certain services from another contracting authority). However, contracting authorities can establish structures to cooperate with each other, whether they are institutionalised or not.⁴⁸

In the view of the Commission services, the two forms of vertical and horizontal public-public cooperation are two equally available means for contracting authorities to organise the performance of their public tasks outside the scope of application of EU public procurement law. The Court clearly confirmed that EU law does not require contracting authorities to use any particular legal form in order to carry out jointly their public service tasks. While there are structurally two different types of public-public cooperation outside EU public procurement law, they share some common characteristics.

- Use of own resources in cooperation with others

A contracting authority may perform the public interest tasks with its own resources, without recourse to entities outside its own departments, and it may do so in cooperation with other contracting authorities⁴⁹, either in an institutionalised cooperation through a jointly controlled in-house entity or without establishing such an institutionalised form.

- Only contracting authorities participate; no private capital is involved

⁴⁷ Where, for practical reasons, such complete exclusion would go against the general public interest governing the cooperation (e.g. economically reasonable use of resources), a strictly ancillary and marginal activity with entities not participating in the cooperation might be acceptable (e.g. reasonable use of incidental spare capacities).

⁴⁸ It has been argued that the entry into force of the Lisbon Treaty puts this case-law of the Court into a different light. It is true that with the Lisbon Treaty major changes affect the EU legal system as a whole, which should be taken into account also when interpreting secondary EU legislation. One of the relevant modifications introduced by the Lisbon Treaty is the acknowledgement of local and regional self-governance (Article 4(2) TEU). Furthermore, Article 1 of Protocol (No. 26) on Services of General Interest acknowledges the essential role and wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users. These provisions confirm authorities' right to decide how to execute services which they are obliged to provide for the public. On the other hand, while the existence of this right was not disputed even in the past, it is clear that it needs to be exercised in accordance with other provisions of EU law. Thus, certain choices taken by contracting authorities might imply the need to comply with EU public procurement law. EU law does not force contracting authorities to externalise, but to ensure that if contracting authorities decide to involve a separate entity – public or private – on a commercial basis, this is done in a transparent and non-discriminatory manner.

⁴⁹ Coditel, paragraphs 48 and 49; Hamburg, para 45.

Second, it seems clear from the case-law of the Court⁵⁰ that in order to be exempted from the application of the EU public procurement rules any public-public cooperation must remain purely public. The participation of private capital in one of the cooperating entities will thus prevent the cooperation from being exempted from public procurement rules.⁵¹

- No market orientation

If the cooperating entities are market oriented, they are in direct competition with private operators having the same or similar commercial objectives and instruments. Cooperation which is exempt from the procurement rules and aimed at fulfilling a public task should only involve entities which are principally not active on the market with a commercial purpose. This results primarily from the fact that the co-operation partners must be contracting authorities. The status of public authorities entails limits to their activities, while bodies governed by public law have to be "established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character".

Furthermore, in vertical co-operation, the in-house entity has to perform the essential part of its activities for the contracting authorities which control it. Any activity performed on the market has to remain incidental to these core activities, because a possible market orientation would weaken the joint control required in vertical cooperation.

As regards horizontal cooperation, the Court stated that, where cooperation between public authorities is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest, it does not undermine the principal objective of the EU rules on public procurement, namely the free movement of services and the opening-up of undistorted competition in all the Member States.⁵² This is the case if the cooperation does not involve any commercial considerations.

- Type of connection between the cooperation partners

In the *Hamburg* judgment, the Court stressed that EU law does not require contracting authorities to use any particular legal form in order to carry out jointly their public service tasks. Although there is no such requirement, looking at the two forms of vertical and horizontal public-public cooperation it should be noted that the type of connection between the cooperating entities is different and needs to be addressed.

In an institutionalised cooperation, it is the presence of a (joint) in-house control that could lead even an agreement being exempted from the scope of the procurement regime that would normally be covered by it. In other words, the in-house exception relates to an otherwise covered public procurement contract for the performance of a task against remuneration.

By contrast, in the case of non-institutionalised cooperation, in order to distinguish it from a normal public contract, it seems to be important that the character of the former is that of cooperation involving mutual rights and obligations going beyond "performance of a task against remuneration" and that the aim of the cooperation is not of a commercial nature.

⁵⁰ Case Case C-26/03., Stadt Halle.

⁵¹ Stadt Halle; Hamburg, paragraphs 44 and 47.

Summary table

I. Public contract between independent contracting authorities → application of procurement rules

II. Public task performed jointly by contracting authorities using own resources

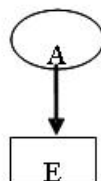
a) In-house control (award of a contract by a contracting authority to its in-house entity)

3 common conditions:

- no private capital in the in-house entity
- control is exercised by the contracting authority (or authorities jointly) over the in-house entity which is similar to the control which a contracting authority would have over its own departments
- the in-house entity carries out the essential part of its activities for the controlling contracting authority or authorities

Single contracting authority controls its own in-house entity

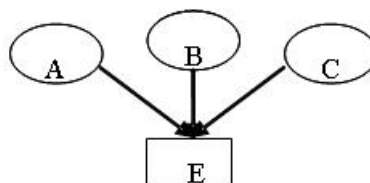
A is a contracting authority and E is a separate legal entity which is dependent on A in



both organizational and economic terms

Several contracting authorities jointly control an in-house entity

A, B and C are contracting authorities and E is a separate legal entity which is both in organizational and economic terms dependent on all three contracting authorities



b) Cooperation among contracting authorities without creating a specific structure

3 conditions:

- the arrangement involves only contracting authorities, there is no participation of private capital;
- the character of the agreement is that of real co-operation aimed at the joint

performance of a common task, as opposed to a normal public contract and

- the cooperation is governed only by considerations relating to the public interest.

4. PUBLIC TASK PERFORMED BY EXTERNAL RESOURCES - OTHER PUBLIC-PUBLIC RELATIONS

This section deals with situations in which the public interest task conferred on a contracting authority is ultimately carried out by resources external to the contracting authority. This can be the case where the **competence** for the given public task is transferred as such to another public authority. The **performance** of a given task may also be entrusted to another entity. This may be done (i) without establishing contractual links, or (ii) by calling on another contracting authority which enjoys an exclusive right, or (iii) through joint procurement with other contracting authorities or through central purchasing bodies.

4.1. The redistribution of competences between public authorities

Legal competence for a public task could be understood as the exclusive obligation and right to fulfil this task by own administrative, technical and other means or by calling upon external entities. The term 'competence' for a given public task includes the official authority necessary to establish the regulatory framework for fulfilling the task at the level of the authority concerned.

The organisation of national administration as such does not fall within the competence of the EU. Consequently, it is up to each Member State to (re-)organise its administration and – as part of such re-organisation – to allow for the transfer of competences for given public tasks from one public authority to another. (By its nature, the process described here does not involve any private or mixed-capital entities.)

The objective of public procurement rules is to regulate situations where a contracting authority procures goods, services or works, i.e. purchases the output of certain economic activities in order to satisfy its own needs or those of its citizens. A contracting authority transferring all competences for a given public task does not purchase any service for its own purposes. Instead, it hands over the responsibility for a certain task to another entity.

The transfer of competence for a given public task from one contracting authority to another is not governed by public procurement rules which are based in part on Article 56 TFEU (ex Article 49 TEC), i.e. the freedom to provide services.

Transferring competence for a given public task from one public body to another involves transferring both the official authority and any associated economic activities. In the area of waste management, for example, the transfer of all competences means transferring the right to set tariffs, to fix rules for collecting, sorting, storing and treating waste, as well as the right to manage and ultimately to carry out the task according to these rules. All these rights constitute official authority. Part of these rights is the right to determine how the actual economic activities which need to be performed in order to fulfil the public task (e.g. the collection, transport, storage, disposal and recycling of waste) are to be performed: either by the public body itself or by a third party mandated by it.

Although situations where competence is transferred occur in Member States, neither EU legislation nor the case-law of the Court of Justice explicitly recognise such situations.

The Court has referred, in one case,⁵³ to the transfer of official authority when a Member State invoked the transfer of competences from a public body to a third person. According to this case-law, a transfer of competences has **not** taken place if

- the public entity that is originally competent remains primarily responsible for a project, because it has a legal obligation not to withdraw from its task;
- the new entity may only take legally relevant actions after the public entity that is originally competent has given its approval, and
- the new entity is financed by the public entity that is originally competent to fulfil its tasks, with the result that it has no room for manoeuvre.

On this basis, the distinctive feature of transferring competences from one public body to another as part of the re-organisation of public administration is the comprehensive nature of the transfer. The body transferring competence does not retain any responsibility. The beneficiary of the transfer must exercise the competence independently and on its own responsibility.

In particular, the transferring body does not retain the right to determine the performance of economic activities undertaken in the context of the respective public task. Such economic tasks are performed under the authority of the beneficiary of the transfer.

However, this does not exclude the possibility that the transferring body might have some influence on the practical organisation of the performance of the public task in question. In fact, officials of the transferring public body could be members of the executive or management bodies of the authority to which competence for the public task in question was transferred. The transferring authority may also retain the right to receive certain information.

On this basis, it can be concluded that if, for example, several public authorities decided to create a new entity to which they completely transfer a particular competence, or if a public authority decided to transfer its competence to an already existing entity, and the public task was then performed by the transferee in full independence and under its own responsibility and the transferring public authorities did not retain any control over the service, then EU public procurement law would not be applicable .

4.2. The non-contractual attribution of tasks

The EU Public Procurement Directives presuppose the existence of a contract, which necessitates at least two, legally distinct entities which are independent of each other in regard to decision-making.⁵⁴ A contract is essentially a meeting of wills, whereby the parties to it are able to decide whether they wish to initiate or to terminate the contractual

⁵³ Case C-264/03, *Commission v France*, [2005] ECR I-08831, para. 54. See also the opinion of Advocate-General Maduro of 24 November 2004, para. 39-41.

⁵⁴ *Teckal*, para 51.

link⁵⁵. Other indications of the existence of a contract are the ability of the parties to negotiate on the actual contents of the services to be rendered and the tariffs of those services⁵⁶. A contract implies a synallagmatic relationship. If there is no contract, the EU Public Procurement Directives do not apply. The Court's case-law finds that if an entity carries out an activity on account of its obligations resulting from national legislation, rather than on a contractual basis, it is not covered by the EU Public Procurement Directives.

More specifically, in the *Tragsa*-case⁵⁷ the Court found that, on the basis of the relevant national law, Tragsa - a public undertaking - had no choice as to the acceptance of an assignment, or the tariff for its services, but was obliged by law to execute the demands of the contracting authority, insofar as it was an instrument and technical service of that authority. The Court held that Tragsa's relations with the contracting authorities using its services were not contractual, but internal, dependent and subordinate in every respect.⁵⁸ Consequently, the EU Public Procurement Directives did not apply to this relationship.

However, it should be noted that the application of the Treaty on the Functioning of the EU does not depend on the existence of a contract. The Treaty applies whenever a contracting authority "*entrusts the supply of economic activities to a third party*"⁵⁹. By contrast, the Court also recognises the in-house exception in the context of the Treaty.

4.3. The relation between public procurement rules and certain exclusive rights

If a contracting authority enjoys an exclusive right in terms of Article 18 of Directive 2004/18/EC, other contracting authorities can only award the respective services contracts to this entity. The key reason for introducing this provision was to avoid competitive award procedures in cases where – due to the existence of an exclusive right – only one entity could ultimately be awarded the contract in question.

In the general debate, the term "exclusive rights" could refer to quite different phenomena ranging from reserving a whole economic sector to public authorities to the exclusive assignment of one specific task to one specific undertaking. However, not every exclusive right justifies the exemption of the award of a public service contract. Article 18 stipulates that the respective exclusive right needs to be granted by a law, regulation or administrative provision which is published and compatible with the Treaty. Furthermore, **Article 18 only concerns rights granted to particular public sector bodies to provide certain services, on an exclusive basis, to the public sector.** The limitation of this exception to contracts awarded to entities which are themselves contracting authorities ensures competitive procurement on downstream markets, since the contracting authority enjoying the exclusive right has to comply with the EU Public Procurement Directives for its own purchases.

- Compatibility with the Treaty

⁵⁵ Case C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado*, [2007] ECR I-02999, para 54 and Case C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado*, [2007] ECR I-12175, para 55.

⁵⁶ See *Ibid.*

⁵⁷ Case C-295/05, *Tragsa*

⁵⁸ Case C-295/05, *Tragsa*, para 51.

⁵⁹ *Parking Brixen*, para 61.

The published law, regulation or administrative provision must be compatible with the relevant rules of the Treaty, in particular Articles 49 (ex Article 43 TEC) and 56 (ex Article 49 TEC) of the TFEU and the rules and principles that flow from these articles. These rules and principles include non-discrimination, transparency, proportionality, mutual recognition and the protection of the rights of individuals.

An exclusive right, which by definition restricts the freedom of other entities to provide services, is justified only under certain conditions.⁶⁰

Thus, the exclusive right must be justified either by a derogation expressly provided for by the Treaty (exercise of official authority (Article 51 TFEU (ex Article 45 TEC)), grounds of public policy, public security or public health (Article 52 TFEU (ex Article 46 TEC)) or, in accordance with the case-law of the Court, by imperative requirements in the general interest, which must be appropriate for achieving the objective which they pursue, not go beyond what is necessary in order to attain it and must in any event be applied without discrimination^{61 62}.

- Does the requirement of non-discrimination require the granting of the exclusive right on a competitive basis?

As indicated, Article 18 concerns rights granted to particular public sector bodies to provide certain services, on an exclusive basis, to the public sector. If the justification for the restriction of the freedom to provide services is an imperative requirement in the general interest, one of the conditions to be met is that the measure in question must be non-discriminatory. This means that, in general, no private entity should be placed in a more advantageous position than its competitors. Therefore, if an exclusive right were to be awarded to a contracting authority involving private capital (which may arise in the case of a body governed by public law), it is difficult to see how this principle could be complied with in the absence of a transparent procedure that ensures equal treatment.⁶³ On the other hand, in view of the history and purpose of Article 18, as well as recent case-law on comparable situations, this might not be necessary if the beneficiary of the exclusive right is a state body, such as a contracting authority without private capital.⁶⁴

⁶⁰ Case 203/08, *The Sporting Exchange Ltd, trading as Betfair v Minister van Justitie*, [2010] not yet published, paragraphs 23-25; C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjät (Jyväskylä) and Suomen valtio (Finnish State)*, [1999] ECR I-06067, paragraphs 29-31; C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, [2009] ECR I-07633, paragraphs 52-55

⁶¹ Case C-243/01, *Gambelli*, [2003] ECR I-13031, para 65; C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media*, [1991] ECR I-04007

⁶² Furthermore, decisions to award exclusive rights to undertakings can amount to an infringement of the Treaty, where the public service requirements to be fulfilled by the service provider are not properly specified (Case C-66/86, *Silver Line Reisebüro*, [1989] ECR I-803), where the service provider is manifestly unable to meet the demand (Case C-41/90, *Höfner*, [1991] ECR I-1979) or where there is an alternative way of fulfilling the requirements that would have a less detrimental effect on competition (Case T-266/97, *Vlaamse Televisie Maatschappij*, [1999] ECR II-2329). Also, the condition that the granting of the exclusive right is compatible with the Treaty is not fulfilled if the measure by which it is awarded is incompatible with secondary EU legislation (C-220/06, *Correos*, para 64-66.)

⁶³ See, by analogy Case C-203/08, *Sporting Exchange Ltd.*, paragraphs 47 and 50.

⁶⁴ *Idem*, paragraphs 59-60.

4.4. Relations between contracting authorities in the context of joint or central purchasing agreements

Joint procurement may take many different forms, ranging from organising one specific common call for tenders to systematic recourse to specialisation (e.g. one contracting authority being responsible for certain types of procurements to be used by all entities concerned, another carrying out a different type of procurement etc.) to setting up a specific structure (body) for joint procurement. The relationships between the various participants themselves may or may not be subject to EU rules on public procurement depending on the method chosen.

In the case of simple administrative cooperation in drawing up common specifications that does not necessitate any contracts for pecuniary interests between the parties, i.e. when public authorities limit themselves to organizing a common call for tenders, they are applying the public procurement rules together but their cooperation is not subject to these rules. Article 1(9) of Directive 2004/18/EC defines contracting authorities *inter alia* as associations formed by one or several such authorities, meaning one or several regional or local authorities or bodies governed by public law. This provision might be of interest in the context of public-public co-operation.

Furthermore, certain centralised purchasing techniques have been developed in the Member States. Central purchasing bodies are contracting authorities responsible for making acquisitions or awarding public contracts/framework agreements intended for other contracting authorities. Article 11 of Directive 2004/18/EC explicitly provides that contracting authorities may purchase works, supplies and/or services from or through a central purchasing body. A central purchasing body may operate either as a wholesaler (it purchases so that other authorities may purchase *from* it), or it may act as an intermediary which handles the award procedures and the administration of contracts so that other authorities may purchase *through* it. In neither case does a procurement procedure need to be organised in respect of the relationship between the central purchasing body and the authorities having recourse to it, as long as the central purchasing authority has itself awarded its contracts in accordance with the relevant EU Public Procurement Directive.

ANNEX I

List of cases

Case C-480/06, Commission v Germany, [2009] ECR I-04747

Case C-107/98, Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, [1999] ECR I-08121

Case-84/03, Commission v Spain, [2005] ECR I-00139

Case C-26/03, Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna, [2005] ECR I-00001

Case C-324/07, Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale, [2008] ECR I-08457

Case C-573/07, Sea Srl v Comune di Ponte Nossa, [2009] ECR I-08127

Case C-29/04 Commission v Austria [2005] ECR I-09705

Case C-340/04, Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA., [2006] ECR I-04137

Case C-458/03, Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG., [2005] ECR I-08585

Case C-371/05, Commission v Italy, [2008] ECR I-00110

C-231/03, Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti, [2005] ECR I-07287

Case 275/08, Commission v Germany, [2009] ECR I-00168

Case C-264/03, Commission v France, [2005] ECR I-08831

Case C-295/05, Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado, [2007] ECR I-02999

Case 203/08, The Sporting Exchange Ltd, trading as Betfair v Minister van Justitie, [2010] not yet published

C-124/97, Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State), [1999] ECR I-06067

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Case C-243/01, Gambelli, [2003] ECR I-13031

C-288/89, Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media, [1991] ECR I-04007

Case C-66/86, Silver Line Reisebüro, [1989] ECR I-803

Case C-41/90, Höfner, [1991] ECR I-1979

Case T-266/97, Vlaamse Televisie Maatschappij, [1999] ECR II-2329

Case C-220/06, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado, [2007] ECR I-12175