

# **In house provision and the case law of the European Court of Justice**

Kris WAUTERS<sup>1</sup>

## **I. INTRODUCTION**

Preceding the constitution of the European Economic Community public authorities in the different member states had their own objectives to fulfil the needs of public interest. Within each member state public authorities had their own way to obtain these objectives. Government policy was free or only restricted by own national rules.

In 1957 some European countries constituted the European Economic Community. Major economic competences were transferred from a national to a supranational level. The goals of this supranational community were merely economic. The founders of the community sought an economic integration of several national markets. Fundamental behind these objectives was the idea that it was in the general interest of the different member states to collaborate in order to prevent new wars on European soil.

These higher goals would have their influence on actions and decisions of national public authorities. These goals have been concretized in the European Economic Treaty. Actions and decisions from public authorities which could endanger these supranational goals should be set aside. The negative approach of the European Economic Treaty seemed to be insufficient to achieve the postulated goals. It was necessary to harmonise certain national legislation to obtain an optimal integration. An important example of this harmonisation are the European directives on public procurement which determine the way public authorities in the different member states under certain circumstances must seek the necessary help to fulfil their tasks.

The (local) government policy is influenced by European supranational rules. Not only the public procurement directives themselves have an impact, also the way the

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<sup>1</sup> Lawyer Monard-D'Hulst Hasselt (Belgium), Phd Student University of Glasgow, Phd Student University of Maastricht.

European Court of Justice (ECJ) interprets these rules restricts the freedom of national public authorities. The ECJ case law on in house provision, based on the public procurement directives, holds such a restriction. This case law is important to determine to which extent a government is free to externalise her tasks without being bound by the public procurement rules. This will be made clear in the next pages.

This study does not concern the activities of the public authorities themselves, but the way public authorities fulfil their tasks. The intervention of third parties to help authorities happens in different ways. The thesis focuses on the assistance authorities get to execute works, to supply goods or to provide services. For their activities public authorities need buildings, products or people. It is these kind of situations which are relevant to this study.

## II. FRAMEWORK

### II.1. EC TREATY

#### *II.1.1. Intro*

In the Stadt Halle case <sup>2</sup>, which will be discussed in detail later on, the ECJ clearly stated the fundamental reasons of her findings on in house provision: *“the principle objective of the Community rules in the field of public procurement...should be recalled, namely the free movement of services and the opening-up to undistorted competition in all the Member States. That involves an obligation on all contracting authorities to apply the relevant Community rules where the conditions are satisfied”* (para. 44).

Thus, in order to understand and clarify this case law one needs to examine the goals of the European Community, the relevant dispositions of the European Treaty (principle of non discrimination, the free movement within the EC and the competition rules) and the goals and relevant dispositions of the public procurement directives.

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<sup>2</sup> Case C-26/03, *Stadt Halle and RPL Lochau* (2005), ECR I-1.

Although it seems at first sight only pure economic reasons are the basis of the in house case law, the Stadt Halle-decision seems to have included also other considerations which are fundamental: *“A public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. In such a case, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority. There is therefore no need to apply the Community rules in the field of public procurement”* (para. 48)<sup>3</sup>. One should also examine those rules on a European level which confirm the freedom for public authorities to organise their own services.

### *II.1.2. Goals*

The first goal expressed in article 2 of the European Union Treaty tends to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty. A comparable objective was already mentioned in article 2 EEC and now in article 2 EC: *“The Community shall have as its task, ..., to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection...a high degree of competitiveness and convergence of economic performance...”*.

Article 2 EC also briefly mentions the means by which these objectives should be achieved: *“by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4”*. These main objectives have been specified in article 3 EC. We enumerate those

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<sup>3</sup> See also Case C-324/07, *Commune d’Uccle et Région Bruxelles Capital*: *“Such a result, however, would not be consistent with Community rules on public procurement and concession contracts. Indeed, a public authority has the possibility of performing 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 departments”* (para. 48).

which seems the most relevant for this study: the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect, a common commercial policy, an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital, a system ensuring that competition in the internal market is not distorted, the approximation of the laws of Member States to the extent required for the functioning of the common market, the strengthening of economic and social cohesion. Article 4 EC additions to this: *“For the purposes set out in Article 2, the activities of the Member States and the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition”*.

Two objectives found in article 3 are relevant for this study: the accomplishment of an internal market and the insurance of competitiveness. These were the two main objectives recalled in the Stadt Halle finding, before the ECJ explained in more detail the first Teckal criterion. Those objectives do not confer legal rights to individuals, but according to the ECJ they constitute an important factor for the interpretation of Community law.<sup>4</sup>

### *II.1.3. Internal Market*

As already explained the establishment and functioning of the internal market are crucial for the achievement of the objectives found in articles 2 TEU and 2-4 EC. In an internal market member states are dependent on each other. It enforces them to be in peace terms.

The internal market is an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured<sup>5</sup>. The aim of the Treaty provisions is

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<sup>4</sup> Case C-149/96, *Portugal v. Council* (1999) E.C.R. I-8395. para. 86.

<sup>5</sup> Article 14.2 EC

to eliminate all obstacles to intra-community trade in order to merge the national markets into a single market binging about conditions as close as possible to those of a genuine market<sup>6</sup>. Possible obstacles are custom duties, quantitative restrictions and other measures having equivalent effect. Every market participant should be able to deploy his or her labour and capital, sell or buy goods and perform or receive services across the Community's "internal" frontiers without being impeded by national rules maintaining or reintroducing frontiers by means of trade restrictions<sup>7</sup>.

Four freedoms concretise the internal market. Two of them are relevant in the field of public procurement: free movement of goods<sup>8</sup> and the freedom of establishment<sup>9</sup> and freedom to provide services<sup>10</sup>.

#### *II.1.4. Competition*

EC competition law is contained in Chapter I of Part III of the EC Treaty, which consists of Articles 81 to 89. These provisions must be read in combination with the principles found in Articles 2 and 3. The rules on competition comprise rules prohibiting distortion of competition by undertakings (Art. 81 – 86) and rules restricting State aid granted to undertakings (Art. 87 – 89).

EC competition law is applied with the issue of single market integration in mind: a *"degree of competition necessary to ensure the observance of the basic requirements and attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market"*<sup>11</sup>. The Community is based on an open market economy with free competition favouring an efficient allocation of resources. (Art. 98 and 105 (1) EC)

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<sup>6</sup> Case 15/81 *Schul* [1982] ECR 1409, para 33

<sup>7</sup> K. LENAERTS and P. VAN NUFFEL, *Constitutional law of the European Union*, London, Sweet and Maxwell, 2005, 140, 5-072

<sup>8</sup> Article 28 EC

<sup>9</sup> Article 43 EC

<sup>10</sup> Article 49 EC

<sup>11</sup> Case 26/76 *Metro v Commission* [1977] E.C.R. 1875.

Article 81 EC is designed to deal with restrictive agreements or practices involving a degree of collusion between undertakings that are economically independent of each other. The situation where a single undertaking or a group of undertakings has reached a position of such strength on a given moment that the normal constraints of the competitive process no longer applies to it is prohibited in article 82 EC. Article 83 – 85 are procedural provisions. Problems arising from relationships between governments, on the one hand, and public undertakings or undertakings which have been entrusted with the performance of certain tasks in the public interest, on the other, are the subject of Article 86. This last provision is the most relevant one for the scope of this study.

## II.2. Public procurement directives

### II.2.1. In general

The subject of this research falls into the scope of Directives 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors<sup>12</sup> and 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts<sup>13</sup>.

Article 1 of directive 2004/18/EC determines the field of application of the public procurement regime: “ *‘Public contracts’ are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directives*”. We can distinguish as a characteristic: a contract, for pecuniary interest, concluded in writing, the presence of an operator and a public authority and the execution of works, the supply of products or the provision of services.

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<sup>12</sup> of the European Parliament and of the Council of 31 march 2004; OJ [30.04.2004] L 134/1.

<sup>13</sup> of the European Parliament and of the Council of 31 march 2004; OJ [30.04.2004] L 134/114.

For the purpose of this research, it is submitted that the relevant criterion is the existence of a contract.<sup>14</sup> The in house concept is characterised by the absence of two really independent wills. Only in the presence of a contract will Directive 2004/18/EC apply. It is this difference which is the main subject of the research: to which extent are a public authority's actions subject to competition law, i.e. public procurement law, when it seeks assistance from another source ?

Special attention will be paid to arrangements made between public authorities. As mentioned in the preamble to Directive 2004/18/EC: *“Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers”*. The application of the public procurement rules are not excluded in those kind of situations.

## II.2.2. Contract

The rules on public procurement don not define what is meant by a 'contract'. Like other concepts the Court of Justice gives its own explanation with regard to the goals of the European Community and of the directives on public procurement. The findings are independent of any specific definition in any national legal system. By examining the case law of the Court of Justice it will not be possible to give a consistent definition of the concept 'contract'. For a lot of concepts used in the public procurement directives the case law of the Court of Justice is evolutive<sup>15</sup> and functional<sup>16</sup>.

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<sup>14</sup> E. FATOME, and L. RICHER, “Procédures de passation des contrats et pouvoir d’organisation du service public”, *AccP*, 2002, nr 12, 61; K. WELTZIEN, “Avoiding the procurement rules by awarding contracts to an in-house entity – scope of the the procurement directives in the classical sector”, *PPLR*, 2005, 239-240; T. KAARRESELO, “Procuring in-house: the impact of the EC procurement regime”, *PPLR*, 2008, 244; A.L. Durviaux in her Phd-thesis categorizes the in house case law under the personal characteristics of the notion ‘public contract’: A.L. DURVIAUX, *Logique de marché et marché public en droit communautaire*, Brussels, Larcier, 2006,...

<sup>15</sup> A.L. Durviaux characterizes the concept ‘public contract’ as ‘une notion en “devenir”’: A.L. DURVIAUX, “La ‘logique de marché’ dans les relations contractuelles entre le secteur public et le secteur privé: développements récents”, in N. THIRION (ed.), *Le marché et l’Etat à l’heure de la mondialisation*, Brussel, Larcier, 2007, 42.

<sup>16</sup> Case 130/87, *Beentjes*, (1988) E.C.R. I-4635.

In its case law the Court of Justice did not give any complete definition. It limited itself to characterize a contract as an agreement between two separate persons.<sup>17</sup> Even if the public authority has no choice with whom it will enter into a relationship, we can be in the presence of a contract.<sup>18</sup> An entire freedom of choice is not necessary to have a contract under the public procurement directives. The mere fact that a company has no choice as to the acceptance of a demand made by a public authority or as to the tariff for its services cannot automatically entail that no contract was concluded between the two entities.<sup>19</sup>

On the contrary if the partner has no choice, either as to the acceptance of a demand made by the competent authorities in question, or as to the tariff for its services, the requirement for the application of the directives concerned relating to the existence of a contract is not met.<sup>20</sup> It is only if the agreement between a company and public authority were in actual fact a unilateral administrative measure solely creating obligations for the company that it would have to be held that there is no contract.<sup>21</sup>

There must be a binding obligation between two or more parties, where the parties have a margin of negotiation. The extent of the freedom of choice for the parties and the exchange of these choices (wills) between parties determines whether we are in the presence of a contract.

There is no exchange of different wills when the two persons making arrangements are interrelated. It will be examined below the degree to which the two persons must be interrelated to exclude the agreement from the application of Directive 2004/18/EC. An arrangement is a contract falling into the scope of the public procurement directives, if there is an exchange of wills between two different persons. The presence of two different persons fails, when an public authority provides itself the necessary goods and services.

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<sup>17</sup> Case C-107/98, *Teckal Srl v Comune di Viano* (1999) E.C.R. I-8121, para. 49.

<sup>18</sup> Case C-399/98, *Ordine degli Architetti delle province de Milano e Lodi v Comune di Milano* (2001) E.C.R. I-5409.

<sup>19</sup> Case C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v. Administración General del Estado*, para. 53.

<sup>20</sup> Case C-295/05, *Asemfo v Tragsa* para. 54.

<sup>21</sup> Case C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v. Administración General del Estado*, para. 54.



### III. IN HOUSE PROVISION

#### III.1. Introduction

When a public authority creates itself an organ to provide certain needs or it makes agreements with other (semi) public bodies, the question arises if these 'situations' must be regarded as a public contract. To which extent can we speak about an in house provision, which excludes the market principles, when we are in the presence of two different persons. According to the ECJ the public procurement regime does not apply when certain criteria are fulfilled. In those cases there is not really an independency between the public authority and the organ that provides certain needs. In that case there are not two different wills and the conditions to be in the presence of a contract fail.

The question on in house-provision arises where public authorities use their own resources to perform public tasks, create themselves separate legal personalities or cooperate with other public authorities for the execution of works, the supply of products or the provision of services. To which extent these kind of operations fall into the scope of Directive 2004/18/EC. The Directive itself does not provide any definition on in house-provision. None of the previous directives did define their scope of application with regard to in house-arrangements. We had to wait until the Court of Justice had to examine such questions. The Court of Justice is the principle source of developing the concept of in house provision.

Through the examination of the case law the reader will also encounter decisions of the ECJ which concern public service concessions. These kind of contracts fall outside the scope of the public procurement directives.<sup>22</sup> Nevertheless, it has generally been accepted that these cases are also relevant to determine the scope of the directives.

#### III.2. Case law

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<sup>22</sup> Article 17 Directive 2004/18/EC. Case C-358/00 *Buchhandler Vereinigung*, ..., para. 27-28;...

### *III.2.1. Teckal-case*

Only in 1999 the ECJ had the opportunity to determine if the public procurement regime is applicable when a public authority has recourse to an undertaking which is related to itself.

In the Teckal case the ECJ had to express itself about a contract placed by the municipal Council of Viano in Italy concluded with a consortium of municipalities, called AGAC, of which Viano itself was a member.<sup>23</sup> The AGAC consortium had been set up by several municipalities, including Viano, to manage energy and environmental services. Viano Council entrusted to AGAC the management of heating installations at municipal buildings, together with the supply of fuel to those buildings. The council failed to hold any competitive tendering procedure involving third parties.

Teckal, being a private company active in the supply of heating products and services, alleged that the council, before placing the contract with AGAC, should have followed the tendering procedures for public contracts required under Community legislation.

The ECJ said it was for the national court to determine whether the relationship between the municipality of Viano and AGAC constituted a public supply contract and in particular whether there had been an agreement between two separate persons. The ECJ noted that it is sufficient in principle 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 ECJ could have limited itself to this affirmation and then conclude that public procurement rules must be applied. Instead the ECJ went on possibly realizing that otherwise authorities in several member states would be strongly limited in their liberty of action. The ECJ had to find criteria which expressed, in the presence of two

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<sup>23</sup> Case C-107/98, *Teckal v Comune di Viano* (1999) E.C.R. I-8121.

distinct legal persons, an interrelation between those two persons excluding the market rules. The two legal persons could not be really independent and the legal person receiving the task could not be acting like a private undertaking according to the ECJ.

The only exemption to the competition rules would be 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”*. The use of the term ‘departments’ derives from the original reason for setting up autonomous bodies, which was to move particular departments out of house.

In this case the ECJ outlines the two substantial criteria to distinguish an in-house provision and a public contract. These are the so-called Teckal criteria: the control-criterion and the activity-criterion. The criteria are of a cumulative nature.<sup>24</sup> The two criteria must be met “at the same time”.<sup>25</sup> The ECJ did not give any further explanation to these criteria or did not apply them to the concrete situation. We had to wait for several years before the ECJ could explain the two criteria. Since 2005 the ECJ had in several cases the opportunity to analyse them.

### *III.2.2. Control-criterion*

#### Intro

As mentioned above the ECJ did not explain in the Teckal-decision what it meant by exercising over another person a control which is similar to that which an authority exercises over its own departments.

Advocate General Stix Hackl distinguished in her opinion to the Stadt Halle case three different ‘quasi-in-house scenarios’: awards to wholly owned companies, owned 100% by the contracting authority or entities which may be equated with that

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<sup>24</sup> P DELVOLLE, “Marchés publics: les critères des ‘contrats-maison’”, *RDUE*, 2002,55; P. NIHOUL, “Les marchés publics dans l’Union européenne (2003-2005)”, *JDE*, ..., 270; C. DUBOIS, “To be or not to be ‘In house’? Observations relatives à l’exception ‘In house’ après l’arrêt Carbotermo”, *CDPK*, 2007, 219.

<sup>25</sup> Case C-107/98, Teckal

authority; awards to joint public companies whose shares are held by a number of contracting authorities; and awards to semi-public companies, in which genuinely private parties hold a stake.<sup>26</sup> In the first scenario the public authority has full control and it is clear the first criterion is met. According to the ECJ a similar control was sufficient to realise the first criterion. This scenario does not need any further explanation. Questions arose in the case law of the ECJ about the two other scenarios. These scenarios will be dealt with: private input and public input.

### Private input

The first question which arose before the ECJ was the situation where a public authority has recourse to a public entity which is constituted part by private capital. Since the '80 public authorities all over Europe started to evaluate alternative models of financing and operating of national and regional public infrastructure Public Private Partnerships (PPP) were increasingly used. A lot of public authorities saw in the Teckal decision a possibility to set up PPP's as a manner of escaping the public procurement rules.

One of the possible means of cooperation was the creation by public and private persons of an independent structure to provide the needs of the public authorities. The question arose whether or not those kind of arrangements between public authorities and bodies created between the public and the private sector were public contracts falling into the scope of Directive 2004/18/EC. At the beginning of 2005 the ECJ examined this question in the Stadt Halle-case.

In December 2001, the City of Halle in Germany decided to award a contract for waste disposal to a company called RPL Lochau. Of that company's capital, 75.1 per cent was owned by the City of Halle itself and the remaining 24.9 per cent by a private limited liability company. A third party interested in providing the same waste disposal services objected to the fact that the City of Halle had not followed a competitive procedure under EU procurement law, and so commenced an action before the regional Procurement Board. The City countered that, since it controlled

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<sup>26</sup> Opinion of Ch. Stix-Hackl case C-26/03, *Stadt Halle and RPL Lochau*, para. 58.

Lochau, the arrangement was an “in-house operation” to which the EU procurement rules did not apply. This problem was then submitted to the ECJ.<sup>27</sup>

The Court started with recognising that a public authority *“has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical or other resources, without being obliged to call on outside entities not forming part of its own departments”*. In this kind of situation an authority is not obliged to follow the rules outset in Directive 2004/18/EC.

As public authority and supplier were interrelated the ECJ had recourse to the Teckal-finding. But, according to the ECJ 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.

The ECJ advanced two motives for this finding. First, whereas the relationship between a public authority and its own departments is governed by public interest considerations, any private capital investment in an undertaking follows private interest considerations. Second the award of a public contract to a semi-public company without calling for tenders would interfere with the objectives of undistorted competition and equal treatment, in particular because *“such a procedure would offer a private undertaking an advantage over its competitors”*.

The first consideration is rather strange. It seems that any relationship linked up with a public authority is governed by considerations and requirements proper to the pursuit of objectives in the public interest. Every public procurement agreement, which is also a kind of relationship, pursues objectives in the public interest. One could derive from this finding that the pursued objectives and the available capital are important elements to fulfil the control criterion. With these considerations the ECJ gave a more restrictive interpretation to the concept control than it is used to do in competition cases.

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<sup>27</sup> Case C-26/03, *Stadt Halle and RPL Lochau* (2005), ECR I-1.

These findings can be found in more brief considerations in the *Coname*<sup>28</sup> and the *ANAV*<sup>29</sup> case: in so far as the undertaking is a company which is open, even in part, to private capital, that fact precludes it from being regarded as a structure for the ‘in-house’ management of a public service on behalf of the controlling local authority. As a result, the mere existence of a private shareholder in an undertaking excludes right away the application of the in house exemption.<sup>30</sup>

In May 1999, the Austrian town of Mödling decided to create a wholly owned but legally independent body, called *Abfall GmbH*, to supply services in the waste management and disposal sector.<sup>31</sup> On September 15, 1999, Mödling made *Abfall* exclusively responsible for the collection and treatment of its waste, by means of an indefinite contract which entered into force with retrospective effect as from July 1, 1999. On October 1, 1999, the authority decided to sell 49 per cent of *Abfall*'s shares to a private undertaking, *Saubermacher AG*. Although the share transfer took place on October 13, 1999, *Abfall* did not begin its operational activities until December 1, 1999.

For reasons of legal certainty it is, in general, appropriate to consider the contracting authority’s possible obligation to arrange a public call for tenders in the light of the circumstances prevailing on the date on which the public contract at issue is awarded. The particular circumstances of this case require the events which took place subsequently to be taken into account.

The meaning of the Mödling decision was made clear very recently by the ECJ in the case *Commission v Italy*.<sup>32</sup> The mere possibility for private persons to participate in the capital of an ‘operator’ is not sufficient. This participation has to be effective at the moment of the conclusion of the contract. Only in the presence of special circumstances, such as described in the Mödling case, a public authority must taken

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<sup>28</sup> Case C-231/03 *Coname* (2005) E.C.R. I-7287.

<sup>29</sup> Case C-410/04 *Associazione Nazionale Autotrasporto Viaggiatori (ANAV)* (2006) E.C.R. I-3303.

<sup>30</sup> F. AVARKOTI, “The application of EU Public Procurement Rules to “In-house” Arrangements”, *P.P.L.R.*, 2007, 28.

<sup>31</sup> Case C-29/04, *Commission v Austria* (2005) E.C.R., I-

<sup>32</sup> Case C-371/05, *Commission v Italy* (2005) E.C.R., I-

into account facts occurring after the conclusion of the contract. The Mödling case has to be considered as an exceptional finding.

Although this case law has been criticised for several times the ECJ seems to stick to its point of view when private capital is present in the operator providing services to a public authority. This has recently been confirmed by the ECJ in the Coditel-case even if at that moment the factual circumstances did not ask for such a finding. The position of the ECJ is very clear: *“that, where a private undertaking holds a share of the capital of a concessionaire, this precludes the possibility for a concession-granting public authority to exercise over that concessionaire a control similar to that which it exercises over its own departments”*.<sup>33</sup> It's very unlikely that the ECJ will change this point of view in the near future.

### Public input

The ECJ had the opportunity for the first time to give an answer in the Parking Brixen case.<sup>34</sup> The municipality of Brixen in Northern Italy owned an undertaking called Stadtwerke Brixen (SB), to which it entrusted the management of public car parks within its area. In December 2002, the municipality and SB concluded an agreement which granted to SB the management of a car park for a nine-year term. The agreement was awarded without a public call for tenders. Parking Brixen, which also manages car parks in the area, commenced an action in the Administrative Court for the Province of Bolzen, challenging the municipality's award to SB.

The ECJ had two possible ways to encounter the problem. On the one hand it could create a presumption like it did in the Stadt Halle-case: When a subsidiary is fully owned by public capital, it could have concluded to a 'similar' control. On the other hand it could examine all elements of the case and decide if on basis of these elements one can speak about a 'similar' control. The ECJ chose the second option and followed the strict interpretation given in its former decisions on private input. An authority must take account of all the legislative provisions and relevant circumstances. It must follow from that examination that the operator in question is

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<sup>33</sup> Case C-324/07, *Commune d'Uccle et Région Bruxelles-Capital* (2008) E.C.R. I- , para. 30

<sup>34</sup> Case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen* (2005) E.C.R. I-

subject to a control enabling the public authority to influence the operator's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions.

According to the ECJ, SB is market-oriented. Five main factors attested to SB's independence from its parent municipality:

- The conversion of SB into a company limited by shares;
- The extension of SB's activities into new fields, such as transport, IT and telecommunications;
- The obligatory opening of the company, in the short-term, to other capital;
- The expansion of the geographic area of SB's activities to the whole of Italy and abroad;
- The considerable powers conferred on SB's Administrative Board and the lack of management control exercised over SB in practice by the municipality.

It made no difference that the municipality retained the right to appoint the majority of SB's board members since. According to the referring court, the municipality's control was limited essentially to those measures which company law assigns to the majority of shareholders. This decision confirms the very strict interpretation of the Teckal exemption.

The ECJ made a further restrictive step in the *Carbotermo* decision.<sup>35</sup> At first the Court repeated the general considerations of the *Parking Brixen* decision. 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. The court noted that the day-to-day management of AGESP by its board of executives was not constrained by any special supervision by or powers of veto of the authority. It was also significant that the company concerned was only indirectly owned by the authority through an

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<sup>35</sup> Case C-340/04, *Carbotermo SpA Consorzio Alisei v Comune di Busto Arsizio AGESP SpA* (2006) E.C.R. I-



intermediary holding company. This could weaken any control exercised over AGESP.

Authorities feared that these decisions of the ECJ would limit them to cooperate with other authorities or to create an independent legal person, without being obliged to apply public procurement tendering. It would restrain their liberty to organise their own services with the possibility to search some collaboration outside their own entities.

This fear has for the first time been tempered by the ECJ itself in the *Asemfo* case.<sup>36</sup> *Tragsa* was a public company under Spanish law, whose shares were held by the Spanish state and a number of regional authorities.

The most important part of this decision is the consideration that for the evaluation of the 'similar control'-criterion the subsidiary has to be regarded as a whole. If the subsidiary as a whole meets the mentioned criterion: a contract concluded by one of the members, independent of his shareholdership in the subsidiary, will fall outside the scope of the public procurement regime. To evaluate the 'similar control'-criterion two elements seem to be important for the ECJ: the presence of public capital and the influence on the subsidiary by the public bodies.

The ECJ followed this more open interpretation of the *Teckal* exception in the latest *Coditel*-decision.<sup>37</sup> By decision of 23 November 2000, the Municipality of Uccle decided to become a member of *Brutélé*, entrusting the latter with the management of its cable television network. *Brutélé* is an inter-municipal cooperative society whose members are municipalities and an inter-municipal association whose members in turn are solely municipalities. *Brutélé* is not open to private members. Its governing council consists of representatives of the municipalities (a maximum of three per municipality), who are appointed by the general assembly, which is itself composed of representatives of the municipalities. The governing council enjoys the widest powers.

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<sup>36</sup> Case C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa)*

<sup>37</sup> Case C-324/07, *Commune d'Uccle et Région Bruxelles-Capital* (2008) E.C.R. I-

The ECJ reconfirms the Parking Brixen finding: to examine the 'similar control'-criterion it is necessary to take into account all of the legislative provisions and relevant circumstances. The ECJ found three relevant facts which could enable the examination of the 'similar control'-criterion: the holding of capital, the composition of the decision-making bodies and the extent of the powers conferred on the governing council. Even in the presence of extended powers for the governing council, the 'similar control'-criterion can be met if a certain degree of independence is not met by the operator.

The most important contribution by *Coditel Brabant* is found in the answer to the following question: Must the 'similar control' criterion be met by the public authority alone or is it sufficient that this criterion is met by all the public authorities together composing the operator? The ECJ found a jointly exercised control sufficient. To require the control exercised by a public authority in such a case to be individual would have the effect of requiring a call for competition in the majority of cases where a public authority seeks to join a grouping composed of other public authorities, such as an inter-municipal cooperative society. This would be inconsistent with the Community rules allowing public authorities to perform the public interest tasks conferred on them by using their own administrative, technical and other resources, «without being obliged to call on outside entities not forming part of its own departments». The procedure which is used for adopting decisions – such as adoption by majority – is of no importance.

### *III.2.3. Activities-criterion*

The Teckal exemption exists if besides the control criterion the following condition is fulfilled: the person controlled by the authority carries out the essential part of its activities with the controlling authority or authorities. (activities criterion) Simply establishing the existence of structural dependence in relation to the local authority that is to award a public contract is not of itself sufficient to make the services

provided by the bodies in question comparable to the services that would be available to the local authority were it to use its own internal resources.<sup>38</sup>

This criterion was not object of many case law of the ECJ. A first explanation is the fact that the ECJ always begins to check the control criterion. The most cases submitted to the ECJ failed this first criterion.

The *Carbotermo* case brought the opportunity to the ECJ to explain itself on the activities criterion.<sup>39</sup> At first the ECJ explains the ratio legis of the second Teckal criterion. The accomplishment of this criterion is necessary to determine if the separate undertaking is not competing through his activities with third parties. The public procurement rules seek to give equal chances to all parties who exercise the concerned activities on the market. A disadvantage would be created if one of the competitors, who for a relevant part of his activities is not dependent on a authority, is certain to obtain contracts without being afraid of competition.

In the next stage the ECJ made clear in what way the activities criterion should be understood. The undertaking's activities must principally be devoted to an authority and any other activities are only of marginal significance. In order to determine if that is the case, the competent court must take into account all the facts of the case, both qualitative and quantitative.

As to the issue of whether or not it is necessary to take only into account in that context the turnover achieved with the supervisory authority or that achieved within its territory, it should be held that the decisive turnover is that which the undertaking in question achieves pursuant to decisions to award contracts taken by the supervisory authority, including the turnover achieved with users in the implementation of such decisions. The activities of a successful undertaking which must be taken into account are all those activities which that undertaking carries out as part of a contract awarded by the contracting authority, regardless of who the beneficiary is: the contracting authority itself or the user of the services. It is also irrelevant who pays the undertaking in question, whether it be the controlling authority or third-party users of the services provided under concessions or other

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<sup>38</sup> Opinion of Leger, C-94/99, *Arge Gewässerschutz*, para. 70.

<sup>39</sup> Case C-340/04 *Carbotermo*

legal relationships established by that authority. The issue in which territory those services are provided is also irrelevant.

If, in the main proceedings, the share capital of the successful undertaking is held indirectly by several authorities, it may be relevant to consider whether the activities to be taken into account are those which the successful undertaking carries out with all of the controlling authorities or whether only the activities carried out with the authority which in the present case acts as the contracting authority. It should be born in mind in this connection that the Court has stated that the legally distinct person in question must carry out the essential part of its activities with 'the controlling local authority or authorities'. It thus envisaged the possibility that the exception provided for could apply not only in cases where a single authority controls such a legal person, but also where several authorities do so. Where several authorities control an undertaking, the condition relating to the essential part of its activities may be met if that undertaking carries out the essential part of its activities, not necessarily with one of those authorities, but with all of those authorities together. Accordingly, the activities to be taken into account in the case of an undertaking controlled by one or more authorities are those which that undertaking carries out for all of those authorities together.

The Court concluded: account must be taken of all the activities which that undertaking carries out on the basis of an award made by the contracting authority, regardless of who pays for those activities, whether it be the contracting authority itself or the user of the services provided. The territory where the activities are carried out is irrelevant.

Since the *Carbotermo* decision just once the ECJ had the opportunity to apply the 'activities criterion'. The 'control criterion' being fulfilled in the *Asemfo* case, the ECJ could there also take the second step.<sup>40</sup>

The ECJ recalled its recent *Carbotermo* finding, where it held that the condition is met where several authorities control an undertaking, and where that undertaking carries out the essential part of its activities, not necessarily with any one of those authorities, but with all of those authorities together. The Court then considered the

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<sup>40</sup> Case ...

facts of the present case and found that Tragsa carries out more than 55 per cent of its activities with the Autonomous Activities and nearly 35 per cent with the State. From these considerations, the Court concluded Tragsa carried out an essential part of its activities with the public authorities and bodies which control it.

It results from these two cases that although the ECJ formally stated that quantitative and qualitative elements are equally important to determine the activities criterion, she uses in her practical analysis mostly quantitative elements. This can also be detected in the 'Asociacion Profesional de Empresas'-case.<sup>41</sup> The quantitative aspects were sufficient there to conclude to the absence of the 'activities criterion'.

## **CONCLUSION**

Under EC law government action is also submitted to the competition rules. According to the ECJ the public procurement rules must also be applied when an public authority signs a contract with another public authority, even if this second public authority has been created by the first one.

The only exemption to application of these rules would be 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. The ECJ gave a rather strict interpretation to the 'similar control' criterion. 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. Even if the capital is fully owned by public bodies, the application of the public procurement rules is not excluded.

With its case law on in house provision the ECJ has influence on the way public bodies organise their own services. It obliges them under certain circumstances to

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<sup>41</sup> Case C-220/06 ...

use a contract and tendering procedures. The question arises if this kind of intervention was wished by the member states who signed the public procurement directives.

A good balance has to be found between the principle of competitiveness and the liberty of action for public authorities in the general interest.