

## COMMON MARKET LAW REVIEW

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## **Aims**

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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## **PUBLIC PROCUREMENT IN THE EU: JURISPRUDENCE AND CONCEPTUAL DIRECTIONS**

CHRISTOPHER H. BOVIS\*

### **1. Introduction**

The significance of liberalized and integrated public procurement as an essential component of the Single Market is well documented.<sup>1</sup> Public procurement regulation in the European Union has been influenced by policy developments which identified purchasing practices of Member States as a considerable non-tariff barrier and as a hindering factor for the functioning of a genuinely competitive internal market.<sup>2</sup> Economic justifications for regulating public procurement have pointed towards introducing competitiveness into the relevant markets in order to increase cross-border penetration of products and services destined for the public sector and achieve price transparency and convergence across the European Union, thus resulting in significant savings.<sup>3</sup>

In parallel to the economic justifications, legal imperatives have positioned the regulation of public procurement as a necessary condition for the accomplishment of principles such as the free movement of goods and services, the right of establishment and the prohibition of discrimination on grounds of nationality.<sup>4</sup> The need for competitiveness and transparency in

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1. See Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act*, COM(2010)608 final.

2. See Commission, *White Paper for the Completion of the Internal Market*, COM(85)310 final; also Commission *Green Paper on Public Procurement in the European Union: Exploring the way forward*, 1996; and Commission Communication on Public Procurement in the European Union, COM(98)143.

3. See Commission, *The Cost of Non-Europe, Basic Findings, Vol. 5, Part A; The Cost of Non-Europe in Public Sector Procurement*, (Luxembourg, 1988). Also the Cechinni Report 1992 *The European Challenge* (Aldershot, Wildwood House, 1988).

4. See Drijber and Stergiou, “Public Procurement Law and Internal Market Law”, 46 CML Rev. (2009), 805–846; also Bovis, “Recent case law relating to public procurement: A beacon for the integration of public markets”, 39 CML Rev. (2002), 1025–1056.

public procurement markets is considered as safeguard to the attainment of fundamental principles of the Treaties.<sup>5</sup>

The current public procurement legal regime<sup>6</sup> treats differently public sector procurement and utilities procurement. Two reasons appear to justify this development. Firstly, as a result of the positive effects of liberalization of network industries which has stimulated sectoral competitiveness, a more relaxed regime for utilities procurement, irrespective of their public or privatized ownership has been justified and accepted. Secondly, to achieve the opening up of the relatively closed and segmented public sector procurement markets, the separate regulation between public and utilities procurement resulted in a codified set of rules for the public sector which aims at producing legal efficiency, simplification and compliance<sup>7</sup> by covering supplies, works and services procurement in a single legal instrument.<sup>8</sup>

The evolution of public procurement law has been shaped by the Court of Justice. The Court's jurisprudence has influenced the interpretation of public procurement legal concepts such as contracting authorities,<sup>9</sup> the remit of selection and qualification criteria,<sup>10</sup> and the parameters for contracting

5. See Bovis, "The State, Competition and Public Services", in Birkinshaw and Varney (Eds.), *The European Union Legal Order after Lisbon* (Kluwer, 2010). Also, Joined Cases C-223/99 & C-260/99, *Agora Srl v. Ente Autonomo Fiera Internazionale di Milano* and *Excelsior Snc di Pedrotti Runa & C v. Ente Autonomo Fiera Internazionale di Milano*, [2001] ECR I-3605; Case C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, [1998] ECR I-6821; Case C-44/96, *Mannesmann Anlangenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH*, [1998] ECR I-73.

6. See Directive 2004/18 (Public Sector Directive), O.J. 2004, L 134/114, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17 (Utilities Directive), O.J. 2004, L 134/1 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

7. See Bovis, "Developing public procurement regulation: Jurisprudence and its influence on law making", 43 CML Rev. (2006), 461–495.

8. See Directive 2004/18, cited *supra* note 6

9. See Case C-237/99, *Commission v. France*, [2001] ECR I-939; Case C-470/99, *Universale-Bau and Others*, [2002] ECR I-11617; Case C-373/00, *Adolf Truly*, [2003] ECR I-193; Case C-84/03, *Commission v. Spain*, [2005] ECR I-139; *Mannesmann*, cited *supra* note 5; Case C-31/87, *Gebroeders Beentjes B.V. v. Netherlands State*, [1988] ECR 4635; *BFI Holding*, cited *supra* note 5; *Agora*, cited *supra* note 5 and *Excelsior*, cited *supra* note 5; Case C-343/95, *Diego Cali et Figli*, [1997] ECR I-1547; Case C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge*, [2000] ECR I-8035; Case C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*, [2005] ECR I-1; Case C-107/98, *Teckal Srl v. Comune di Viano*, [1999] ECR I-8121; Case C-18/01, *Korhonen and Others*, [2003] ECR I-5321.

10. See Case C-315/01, *Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) and Österreichische Autobahnen und Schnellstraßen AG (ÖSAG)*, ECR [2003] I-6351; Joined Cases C-21 & 34/03, *Fabricom SA v. Belgian State*, [2005] ECR I-1559; Joined Cases C-285 &

authorities to use environmental and social considerations<sup>11</sup> as award criteria.

The first part of this overview provides a critical evaluation of concepts developed and evolved through the case law of the ECJ, especially after the enactment of the current public procurement directives in 2006. The second part assesses the principles which underpin the public procurement remedies regime and determine the judicial review of public contracts at national level, particularly after the coming into force of the Remedies Directive in 2009. The third part exposes the exhaustive harmonization prescribed in the current public procurement directives as the cause of their porosity and the resultant ineffectiveness of the public procurement acquis.

The article's main aim is to draw upon emerging conceptual themes from the Court's case law which determine the traction of the procurement rules and prompted the European Commission to launch a Green Paper<sup>12</sup> to revise the substantive public procurement directives. The author envisages earmarking the areas of the forthcoming revision of the (substantive) directives as a result of recent case law developments. The second aim is to demonstrate that exhaustive harmonization as the main strategic shortcoming of the current public procurement directives has caused significant porosity in the directives, which has resulted in a legal lacuna. The Court has pointed at the adverse effect of porosity and the recurrent danger of limiting the effectiveness of the public procurement acquis. The author will reflect on the way the porosity of the public procurement directives is treated through the application of the transparency principle and its surrogate principle of equality and will demonstrate that the result of such treatment is to fortify the public procurement directives by supplementing their thrust with powers enshrined in primary Union law.

Finally, the article aims to provide insights to possible legal reforms of the substantive public procurement directives in the light of the EU 2020 Growth Strategy.

286/99, *Lombardini and Mantovani*, [2001] ECR I-9233; Case C-324/98, *Telaustria and Telefonadress*, [2000] ECR I-10745; Case C-126/03, *Commission v. Germany*, [2004] ECR I-11197; Case C-176/98, *Holst Italia*, [1999] ECR I-8607, para 29; Case C-399/98, *Ordine degli Architetti and Others*, [2001] ECR I-5409, para 92; Case C-314/01, *Siemens and ARGE Telekom & Partner*, [2004] ECR I-2549, para 44; Case C-57/01, *Makedoniko Metro and Mikhaniki*, [2003] ECR I-1091.

11. *Beentjes*, *supra* note 9; Case C-225/98, *Commission v. France (Nord-Pas-de-Calais)*, [2000] ECR 7445; Case C-513/99, *Concordia Bus Filandia Oy Ab v. Helsingin Kaupunki et HKL-Bussiliikenne*, [2002] ECR 7213.

12. See *Green Paper on the modernization of EU public procurement policy: Towards a more efficient European Procurement Market*, COM(2011)15/47.

## 2. The traction of public procurement directives

Two fundamental concepts are those of contracting authorities (contracting entities in Utilities procurement) and public contracts which determine the applicability of the public procurement directives.

### 2.1. *Developments in the Court's case law on the concept of contracting authorities*

#### 2.1.1. *Contracting authorities and the applicability of the public procurement directives*

The Court has developed the test of functionality, interpreting the term contracting authorities in broad and functional terms<sup>13</sup> in order to bring under the remit of contracting authorities a range of undertakings connected with the pursuit of public interest. Contracting authorities under the Public Sector Directive embrace the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.<sup>14</sup> The Utilities Directive recognizes as contracting entities public undertakings, over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of them, their financial participation therein, or the rules which govern them.<sup>15</sup> The Utilities Directive includes also as contracting entities undertakings which, although they are not contracting

13. *Mannesmann*, *supra* note 5, paras. 20 and 21; *Universale-Bau*, *supra* note 9, paras. 51–53; Case C-214/00, *Commission v. Spain*, [2003] ECR I-4667, paras. 52 and 53; and Case C-283/00, *Commission v. Spain*, [2003] ECR I-11697, para 69.

14. See Art. 1(9) of the Public Sector Directive and Art. 2(1)(a) of the Utilities Directive. A body governed by public law means any organization which satisfies, cumulatively, the following conditions First, the organization must be established for the specific purpose of meeting needs in the general interest which do not have an industrial or commercial character; secondly, it must have legal personality; and thirdly, it must be financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law. Alternatively and as part of the third criterion, a body governed by public law must be subject to management supervision by the State, regional or local authorities, or other bodies governed by public law or it must have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law. Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the three cumulative criteria for a body governed by public law are set out in Annex III of the Directive.

15. See Art. 2(1)(b) of the Utilities Directive. Contracting authorities exercise dominant influence upon public undertakings when directly or indirectly, in relation to an undertaking, hold the majority of the undertaking's subscribed capital, or control the majority of the votes attaching to shares issued by the undertaking, or can appoint more than half of the undertaking's administrative, management or supervisory body.

authorities or public undertakings themselves, operate on the basis of special or exclusive rights granted by a competent authority of a Member State through means of legislative, regulatory or administrative provisions.<sup>16</sup>

The test of dualism,<sup>17</sup> as developed by the Court refers to the ability of mixed-character undertakings to be regarded as contracting authorities, provided they pursue public interest functions of a non-industrial or commercial character. Consequently, *Commission v. Spain*<sup>18</sup> has recognized as contracting authorities private law entities and stipulated that an entity which is governed by private law but meets all the requirements of bodies governed by public law is considered to be a contracting authority. The entity's private law status does not preclude it from being considered as a contracting authority, and in particular is not incompatible with the requirement of non-industrial or commercial character of the general interest needs, since these factors must be assessed individually and separately from the legal status of an entity. An entity governed by private law as a contracting authority is also compatible with the concept of public undertakings, in accordance with the Utilities Directive.

In *Adolf Truly and Korhonen*<sup>19</sup> the Court also regarded as contracting authorities private entities for industrial and commercial development, where in particular a limited company established, owned and managed by a regional authority meets a need in the general interest which has not a commercial or an industrial character, where it acquires services for the development of business and commercial activities on the territory of that regional authority. The Court maintained in *Universale-Bau*<sup>20</sup> that entities meeting needs of general interest retrospectively are contracting authorities. Therefore, an entity which has not been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, but which has subsequently taken responsibility for such needs is considered as a body governed by public law, on condition that the assumption of responsibility for meeting those needs can be established objectively. *Stadt Halle*<sup>21</sup> concerned semi-public undertakings as contracting authorities, where in particular a company governed by private law and legally distinct from a contracting authority, but in which the contracting authority has a majority capital holding and exercises a certain degree of control is considered as a

16. See Art. 2(3) of the Utilities Directive.

17. *Mannesmann*, *supra* note 5, paras. 17–35.

18. C-214/00, *Commission v. Spain*, cited *supra* note 13, paras. 54, 55 and 60; and Case C-283/00, *Commission v. Spain*, cited *supra* note 13, para 75.

19. *Adolf Truly*, cited *supra* note 9, para 66, and *Korhonen*, cited *supra* note 9, paras. 48 and 59.

20. *Universale-Bau*, cited *supra* note 9, paras. 51–53;

21. *Stadt Halle*, cited *supra* note 9.

contracting authority. The Court also considered a state-controlled commercial company as contracting authority when it is deemed unlikely that it will bear the financial risks related to its activities, as the State would take all necessary measure to protect its financial viability.<sup>22</sup>

*Oymanns*<sup>23</sup> brought under the conceptual premise of a “body governed by public law” a statutory sickness-fund which was indirectly financed by the State without any consideration in return, but it received mandatory contributions set by law from employers and private individual members and had no discretion in setting the levels or conditions of contributions. The justification was that the statutory sickness-fund was deemed to be financed for the most part, by the State, as a result of the mandatory setting of the levels or conditions of contributions, and had the sole objective to perform interests in the general needs such as social security functions, with no industrial or commercial character. In similar vein, *Bayerischer Rundfunk*<sup>24</sup> considered the mandatory fee contributions of private individuals to a broadcasting fund, the level of which were set by law, as State financing of the relevant undertaking, thus bringing it into the category of “body governed by public law”.

#### 2.1.2. *Contracting authorities and the non-applicability of the public procurement directives*

The test of commercialism<sup>25</sup> indicates that profitability and commercially motivated decision-making on the part of an undertaking can render the public procurement directives inapplicable. It was in *Korhonen*<sup>26</sup> when the Court recognized that contracting authorities are free to set up legally independent entities if they wish to offer services to third parties under normal market conditions. If such entities aim to make profit, bear the losses related to the exercise of their activities, and perform no public tasks, they are not classified as contracting authorities. An entity which aims to make a profit and bears the losses associated with the exercise of its activity will not normally become involved in a contract award procedure on conditions that are not economically justified. In parallel, the test of competitiveness<sup>27</sup> indicates that any element of competition from private undertakings in the activities of an undertaking, dilutes the assumption that the undertaking is considered as a

22. See Case C-283/00, *Commission v. Spain*, cited *supra* note 13. See also *Adolf Truly*, cited *supra* note 9, para 42, and *Korhonen*, cited *supra* note 9, paras. 51 and 52.

23. See Case C-300/07, *Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik, v. AOK Rheinland/Hamburg*, [2009] ECR I-4779.

24. See Case C-337/06, *Bayerischer Rundfunk et al v. GEWA*, [2007] ECR I-11173.

25. See Cases *BFI Holding BV*, cited *supra* note 5 and *Mannesmann*, cited *supra* note 5.

26. *Korhonen*, cited *supra* note 9, para 51.

27. *Agora*, cited *supra* note 5; *Korhonen*, cited *supra* note 9, para 51.

body governed by public law. Therefore, proof of the competitiveness test also renders the public procurement rules inapplicable.

Finally, the test of dependency<sup>28</sup> applied by the Court in *Teckal*,<sup>29</sup> reveals two distinctive features which provide for the parameters of inapplicability of the public procurement directives: first, the similarity of control of an undertaking to that exercised by contracting authorities over their own departments and secondly, the operational connection of the undertaking's activities to the remit of the contracting authority exercising similar control over it.

### 2.1.3. *The in-house procurement arrangements*

#### 2.1.3.1. *Similarity of control and contracting authorities*

*Teckal*<sup>30</sup> brought flexibility to determining the concept of contracting authorities and established the non-applicability of the procurement rules to in-house relations. The first criterion of *Teckal* is present when control similar to that which the contracting entity exercises over one of its own departments is evident. The notion of control and the similarity requirement merit a comprehensive approach, not solely based on company law features or the level of the contracting authority's shareholding. Normally, corporate control indicates decisive influence over management actions, operational and strategic decisions in a similar manner to the concept of majority shareholder control found in company laws of Member States. Nevertheless, any appraisal of the legal position of a majority shareholder in order to assert control must be taken in conjunction with the statutes governing the relevant entity over which the control is exercised and not by sole reference to national company law provisions, as often minority shareholdings provide for rights of decisive influence, such as specific oversight and blocking rights.

The notion of control for the purposes of in-house contracts, as developed by the Court, entails much more than the ingredients of "dominant influence" as a company law notion, or as a public procurement notion which defines certain bodies as contracting authorities. In particular, control is extended beyond the "dominant influence" notion found in Utilities Directive.<sup>31</sup> For the purposes of in-house relations, the object of such control should not be

28. *Commission v. France; University of Cambridge; Teckal*: all cited *supra* note 9.

29. *Teckal*, cited *supra* note 9.

30. *Ibid.*

31. See Art. 2(1)(b) of the Utilities Directive in relation to public undertakings. A public undertaking is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. Contracting authorities exercise dominant influence upon public undertakings when directly or indirectly, in relation to an undertaking, hold the majority of the undertaking's subscribed capital, or control the majority of the votes attaching to shares

confined to strategic market decisions or procurement decisions, but should embrace individual management and operational decisions as well. Corporate control is exercised by conclusive influence on both strategic objectives and significant decisions.

In *Parking Brixen*,<sup>32</sup> the Court stated that the important point in relation to the control criterion is that there should be “a potential power of decisive influence over both strategic objectives and significant decisions”. With respect to the means of control, rights to give instructions and rights to make appointments, as well as evidence of supervisory powers, reflect upon a guiding principle which is de facto conclusive of the power to influence corporate behaviour and does not emanate from legislative provisions alone.

In *Cabotermo*,<sup>33</sup> it was maintained that joint-stock public companies exhibit similarity of control where a contracting authority holds, alone or together with other public authorities, all the share capital in an entity. However, if the board of management of that entity is vested with the broadest possible powers and in the absence of any control or specific voting powers for restricting the board’s freedom of action, the similarity of control is not present. If control exercised by a contracting authority over an entity could be viewed as consisting essentially of the majority shareholders’ rights conferred by company law, such control cannot be deemed as similar to that exercised upon the contracting authority’s own departments. Moreover, if control is exercised through an intermediary, such as a holding company, the intervention of such an intermediary may render the similarity of control requirement irrelevant or it may weaken any control exercised by the contracting authority over a joint-stock company merely because it holds shares in that company.

Nevertheless, if an entity is jointly controlled by several contracting authorities, the control criterion is satisfied if all the contracting authorities exhibit control over the relevant entity similar to that over their own departments.<sup>34</sup> In such situations, as in the case of inter-municipal cooperative societies whose members are contracting authorities themselves, if joint control is exercised by the majority of controlling contracting authorities, the similarity of control criterion is met.<sup>35</sup>

issued by the undertaking, or can appoint more than half of the undertaking’s administrative, management or supervisory body.

32. See Case C-458/03, *Parking Brixen*, [2005] ECR I-8612, para 65.

33. See Case C-340/04, *Carbotermo SpA, Consorzio Alisei v. Comune di Busto Arsizio, AGESP SpA*, [2006] ECR I-4137.

34. *Ibid.*, para 57.

35. See Case C-324/07, *Coditel Brabant SA v. Commune d’Uccle, Région de Bruxelles-Capitale*, [2009] ECR I-8457.

Therefore, the concept of control must be understood in functional and not in formal terms. There is nothing to prevent it being applied to the relationship between a contracting authority and legal persons governed by private law, such as a limited liability company. The use of the term “departments” derives from the original reason for setting up autonomous bodies, which was to entrust particular departments with a function or the delivery of a specific public service. The control exercised over an entity or an undertaking by a public authority must be similar to that which the authority exercises over its own departments, but not identical in every respect and must be effective, but it is not essential that it be exercised individually.<sup>36</sup>

However, the existence of private capital participating in an entity which has corporate links with a contracting authority negates the similarity of control requirement. *Stadt Halle*<sup>37</sup> held that private sector participation cannot emulate the pursuit of public interest objectives entrusted to public sector entities. The relationship between a public authority which is a contracting authority and its own departments is governed by considerations and requirements proper to the pursuit of objectives in the public interest. Any private capital investment in an undertaking follows considerations appropriate to private interests and pursues objectives of a different kind.<sup>38</sup> The participation, even as a minority, of a private undertaking in the capital of a company in which the awarding public authority is also a participant excludes in any event the possibility of that public authority exercising over such a company control similar to that which it exercises over its own departments.<sup>39</sup>

The category of semi-public entities or undertakings, which in their own right are regarded as contracting authorities, could not be viewed as entities upon which a contracting authority can exercise similar control to that over its own departments. The Court in *Mödling*<sup>40</sup> followed the *Stadt Halle* reasoning and, interestingly, held that if the award of an in-house public contract took place in accordance with the *Teckal* criteria, but within a very short period the controlling contracting authority transferred shares in the controlled entity to a private undertaking, this was tantamount to a device designed to conceal the award of public service contracts to semi-public companies and as a result it would prejudice the effectiveness and the principles of the public procurement directives.

36. *Parking Brixen*, cited *supra* note 32, para 62.

37. *Stadt Halle*, cited *supra* note 9.

38. *Ibid.*, para 50.

39. *Ibid.*, para 49.

40. See Case C-29/04, *Commission v. Austria*, [2005] ECR I-563.

*Parking Brixen* precludes similarity of control in situations where imminent participation of private capital in a wholly owned public undertaking or entity can be seen. Interestingly, although *ANAV*<sup>41</sup> extends the *Teckal* criteria to companies limited by shares, it appears to link prospective privatizations as a ground for not meeting the *Teckal* exception. The Court held that if, for the duration of a contract, the capital of the controlled entity which has been awarded that contract based on the *Teckal* in-house criteria is open to private shareholders, the effect of such a situation would be the award of a public contract to a semi-public company without any call for competition, which would interfere with the objectives pursued by the procurement directives and the principles of EU law.<sup>42</sup>

The combination of inferences found in *Parking Brixen* and *ANAV* should be viewed as defence mechanisms in order to prevent abuse of the *Teckal* exception, even when at the time of the award of an in-house public contract there is no private sector participation in the capital of the controlled entity. One could question that logic, as the Court reflected on situations where it invited national courts to pay consideration to future privatization exercises or opening up wholly owned public undertakings' capital to private investors, dictated by either law or regulation or selected as policy choices by the contracting authority. Emphasis was drawn on the concept of institutional public-private partnerships, where contracting authorities entrust the delivery of public services. Additionally, prospective privatizations could cause problems with the actual contractual arrangements, if *ANAV* is to apply to in-house relations, when a contract is well into its delivery.

*Sea*<sup>43</sup> appears to correct the potential problems deriving from *ANAV*. As a general rule, the existence of a private holding in the capital of the company to which a public contract is awarded must be determined at the time of that award.<sup>44</sup> Account should be taken in cases when national applicable legislation provides for the compulsory opening of that company whose entire capital it holds, in the short term, to other capital.<sup>45</sup> However, when shares in the contracting entity which were previously wholly owned by the contracting authority, are transferred to a private undertaking shortly after the award of a contract to that undertaking, the in-house exemption is not possible<sup>46</sup> because the transfer is viewed as an artificial device to circumvent public procurement rules.

41. See Case C-410/04, *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v. Comune di Bari, AMTAB Servizio SpA*, [2006] ECR, I-3303.

42. *Commission v. Austria*, cited *supra* note 40, para 48

43. See Case C-573/07, *Sea Srl. v. Comune di Ponte Nossa* ECR [2009] I-8127.

44. *Stadt Halle*, cited *supra* note 9, paras. 15 and 52.

45. *Parking Brixen*, cited *supra* note 32, paras. 67 and 72.

46. *Commission v Austria*, cited *supra* note 40, paras. 38–41.

Nevertheless, shares in a public company could be sold at any time to third parties. It would be inconsistent with the principle of legal certainty not to apply the in-house exemption on the mere possibility that the capital structure of a publicly controlled company might change in the future.

If a company's capital is wholly owned by the contracting authority, alone or together with other public authorities, when the contract in question is awarded to that company, the potential opening of the company's capital to private investors may not be taken into consideration unless there is, at that time, a real prospect in the short term of such an opening. Therefore, when the capital of the contracting company is wholly public and there is no actual sign of any impending opening of that company's capital to private shareholders, the mere fact that private undertakings, at some point in time, may hold capital in that company could not support the conclusion that the condition relating to the control by the public authority over the company is not present. That conclusion is not contradictory to *Coname*<sup>47</sup> which indicated that the fact that a company is open to private capital prevents it from being regarded as a structure for the "in-house" management of a public service on behalf of the municipalities which form part of it. In that case, a public service was awarded to a company in which not all, but most, of the capital was public, and so mixed, at the time of the award.

*Sea* made clear that if a contract were to be awarded, without being put out to competitive tender, to a public capital company, the fact that subsequently, but still during the period for which that contract was valid, private shareholders were permitted to hold capital in that company would constitute alteration of a fundamental condition of the contract. This scenario would not regard the contract as an in-house arrangement and it would require the full applicability of the public procurement directives.

#### 2.1.3.2. *Operational dependency and contracting authorities*

The *Teckal* second criterion specifies that an essential part of the controlled entity's activities must be carried out for the benefit of the controlling contracting authority or authorities. *Sea* held that the control exercised over that company by the shareholder authorities may be regarded as similar to the control over their own departments when that company's activity is limited to the territory of those authorities and is carried on essentially for their benefit. The Court maintained in *Parking Brixen* that, if the geographical area of the activities has been extended to the entire country and abroad, the essential part

47. See Case C-29/04, *Consorzio Aziende Metano (Coname) v. Comune di Cingia de'Botti*, [2005] ECR I-7287, paras. 5 and 28.

of the controlled entities' activities cannot be carried out for the benefit of the controlling public authority.

The "essential part" criterion relates to a certain minimum proportion of the total activities performed by the controlled body. However, not only quantitative elements must be taken into account in determining the term "essential". While it could be convenient to define the essential part criterion in line with a provision governing awards to undertakings affiliated with the contracting authority, namely the 80 percent criterion, such an approach has been rejected by the Court on grounds that a transposition of an exceptional provision from the Utilities Directive to the Public Sector Directive is of questionable *vires*. *Cabotermo*<sup>48</sup> provided interesting insights on operational dependency. The Court declared that the 80 percent rule of affiliated operational dependency cannot be imported into the public sector procurement because that provision is regarded as a restrictively interpreted exception applicable only to supply contracts, covering affiliated undertakings which are distinctively different than public sector procurement entities, being subject to a procedural notification regime which cannot be implemented in public sector procurement directives and finally being explicitly ignored by the EU legislature during the 2004 reform of the public procurement directives from incorporation into the Public Sector Directive 2004/18.

So, although an "essential part" indicates a quantitative measure in relation to turnover or financial quantum of the volume of activities performed by the controlled entity, qualitative factors such as strategic services, organizational planning, market analysis, the profitability of the entity in pursuit of the activities for the controlling authority and also the market dynamics under which the controlled entity operates should be taken into account. *Cabotermo* also ruled that to determine whether an undertaking carries out the essential part of its activities with the controlling authority, 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, and irrespective of being the contracting authority itself or the user of the services provided. The Court reiterated that the territory where the activities are carried out is highly relevant for determining the essential part feature of the *Teckal* exception.

If the public authority which receives an essential part of an entity's activities controls that entity through another company, the control criterion is still present, provided that control is demonstrable at all levels of the contracting authority's corporate interface, being intermediate or indirect shareholding levels.

48. *Carbotermo*, cited *supra* note 33.

### 2.1.3.3. *Public-public partnerships*

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.<sup>49</sup> That possibility for public authorities to use their own resources to perform the public interest tasks conferred on them may be exercised in cooperation with other public authorities.<sup>50</sup>

*Commission v. Germany*<sup>51</sup> provided a superb demonstration of flexibility in the hands of contracting authorities in relation to their freedom to organize and deliver public services. Cooperation between independent contracting authorities in the form of establishing an entity upon which no similar control is exercised to that over their own departments, with a contract being entrusted on behalf of the participant contracting authorities, can be deemed to meet the criteria for an in-house exception, provided the remit of such public cooperation exists in relation to a public task or service specified under Union law and there is no intention to circumvent public procurement rules and the contractual relation is not based on any pecuniary interest consideration nor any payments between the entity and the participant contracting authorities materialized. The Court used an analogy with *Coditel Brabant*<sup>52</sup> where contractual relations between inter-municipal cooperative societies whose members are contracting authorities and a jointly controlled entity can be deemed in-house.

## 2.2. *The concept of public contracts*

The existence of a public contract is a precondition for the application of the public procurement directives.<sup>53</sup> Public procurement law has configured the

49. *Stadt Halle*, cited *supra* note 9, para 48.

50. See Case C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v. Transformación Agraria SA (Tragsa) and Administración del Estado*, [2007] ECR I-2999, para 65.

51. See Case C-480/06, *Commission v. Germany*, [2009] ECR I-4747.

52. *Coditel Brabant*, cited *supra* note 35.

53. See Art. 1(2)(a) of the Public Sector Directive. 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. Art. 1(2)(b) of the Public Sector Directive specifies as public works contracts, contracts which have as their object either the execution or both the design and execution, of works, or the completion, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A work means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function. Art. 1(2)(c) of the Public Sector Directive specifies as public supply contracts, contracts having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products. A public contract having as its object the supply of

meaning of a public contract. The determining factor is not how a public contract is described in national laws, nor the legal regime (public or private) that governs its terms and conditions, nor the intentions of the parties. The crucial characteristics of a public contract, apart from the obvious written format requirement, are: i) a pecuniary interest consideration given by a contracting authority and ii) in return of a work, product or service which is of direct economic benefit to the contracting authority.

### 2.2.1. *Developments in the Court's case law related to the concept of public contracts*

A functional application of the pecuniary interest consideration requirement by the Court led to a variety of payment mechanisms being covered, such as direct or deferred payment by the contracting authority to the economic operator, commitment to lease-back an asset after its construction, asset swaps between the contracting authority and the economic operator or conferral to the economic operator of an exclusive right to collect third-party payments. In *Köln Messe*,<sup>54</sup> leasing and sub-leasing arrangements between the City of Cologne and Grundstücksgesellschaft Köln Messe for the construction and use for 30 years of four exhibition halls, ancillary buildings and relevant infrastructure were regarded as pecuniary interest considerations.

The pecuniary interest consideration requirement is also indissolubly linked with the ability of the contracting authority to specify the object of the public contract. Requirements specified by contracting authorities include measures which define the type of works, or action on the part of contracting authorities which has decisive influence over the design of a project or the execution of works. The means of execution are irrelevant, in the sense that prime contracting or sub-contracting could be utilized for the fulfilment of the contract's object with no effect on contractual obligations or liability issues arising from the public contract. Interestingly, the Court did not consider urban planning conditions as specifications by a contracting authority capable of attributing an immediate economic benefit, even if public interest is served by such conditions.

Notably, planning gain contracts or contractual arrangements emanating from planning decisions of contracting authorities are covered by the public

products and which also covers, as an incidental matter, placement and installation operations must be considered as a public supply contract. Art. 1(2)(d) of the Public Sector Directive specifies as public service contracts, contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II of the Directive. A public contract having as its object both products and services within the meaning of Annex II must be considered as a "public service contract" if the value of the services in question exceeds that of the products covered by the contract.

54. See Case C-536/07, *Commission v. Germany*, ECR I-10355.

procurement directives, irrespective of the identity of the entity responsible for their execution. The Court in *Ordine degli Architetti* ruled<sup>55</sup> that the conditions attached to planning permission to develop and deliver certain infrastructure requirements specified by a contracting authority as a result of its granting planning to a landowner are capable of generating contractual obligations which are conducive to public contracts. However, the relationship between the contracting authority and the landowner is not a public contract, since the contracting authority does not have any choice over who is responsible for the execution of the planning gain requirements, as the only person responsible could be the landowner. That relation is regarded as a mandate emanating from the contracting authority and obliges the landowner to treat planning gain requirements as public contracts.

*Commission v. France*<sup>56</sup> touched upon agency or representation relations with the object of delegating project contracting between contracting authorities and entities distinct from them or their internal departments. Such relations are deemed public service contracts, provided a written agreement is concluded between the contracting authority and the agent or representative for pecuniary interest in return for agency or representation services, provided the agent or representative is responsible for signature, project authorization or payments to third parties on behalf of the contracting authority and does not have sufficient autonomy in executive decisions to be considered as a beneficiary of the contract's objects.

Public contracts denote a demonstrable element of economic benefit or risk directly attributable to the contracting authority. Features of direct economic benefit include ownership of asset by a contracting authority, a legal right over its use and future economic advantages enjoyed by the contracting authority or risks assumed by the contracting authority in relation to the materialization of a project. In *Auroux*,<sup>57</sup> a dispute arose relating to a leisure centre in the French town of Roanne, the design and execution of which was entrusted to a semi-public urban development company without the prior issue of a call for tenders. The project had some specific features in as much as only certain parts of the proposed leisure centre were intended for the town itself, while other parts were to be disposed of by the urban development company directly to third parties, although the town was to contribute towards their financing, take over those parts not disposed of at the end of the project, and bear the full risk of any losses incurred. The Court held that an agreement by which a contracting authority entrusts another contracting authority with the execution

55. *Ordine degli Architetti and Others*, cited *supra* note 10.

56. See Case C-264/03, *Commission v. France*, [2005] ECR I-8831.

57. See Case C-220/05, *Jean Auroux and Others v. Commune de Roanne*, [2007] ECR I-385.

of a work constitutes a public works contract, regardless of whether or not it is anticipated that the first contracting authority will become the owner of all or part of that work. Ownership of an asset is crucial only in determining work concession contracts, for it is deemed necessary as the means to grant an exclusive exploitation right to the concessionaire.

The Court thus maintained in *Auroux* that, even if national laws oblige the conclusion of a contract with certain undertakings which are themselves contracting authorities and are bound to use the provisions of the public procurement directives to the award of any following sub-contractual arrangements directly related to the former contract, contracting authorities must regard the initial contract as a public contract and apply the procurement directives to its award in order to preserve legal certainty and eliminate the potential avoidance of the application of public procurement rules by division of sub-contracts into lots below the relevant thresholds. It follows that the contractual relation between two, ipso facto, contracting authorities is to be regarded as a prime public contract, which can demonstrate a clear element of economic benefit or of risk attributable to the contracting authority, irrespective of the obligation imposed upon the second contracting authority to apply the public procurement rules for the award of the relevant sub-contracts.

Although it has obvious similarities with *Commission v. Germany*,<sup>58</sup> in the sense of public sector entities cooperating for the delivery of public projects, *Auroux* differs fundamentally in that the German case introduced a genuine public-public partnership relation, where the contractual interface was not based upon pecuniary interest considerations nor was any payment materialized in return for the delivery of the contract's objects.

*Auroux* concerned a legislative gap in procurement for public works contracts, in the sense that an analogous provision to Article 18 of the Public Sector Directive, which covers public service contracts awarded by a contracting authority to another contracting authority or an association of contracting authorities on the basis of an exclusive right based on law, regulation or administrative provision compatible with the Treaty, does not exist within the framework of the provisions relevant to public works contracts. The case showed that this can only be filled by the presence of the dependency test, i.e. the *Teckal* criteria.

*Auroux* left open the issue of double tendering, as the Court did not address the issue of consecutive procurement of prime public contracts and subsequent sub-contracts.<sup>59</sup> The Court, however, ruled that in order to

58. *Commission v. Germany*, cited *supra* note 51.

59. In its Interpretative Communication on Public-Private Partnerships COM(2007)6661, the Commission is against double tendering requirements in the case of Institutional Public

determine the value of a public contract, account must be taken of the total value of the works contract from the point of view of a potential tenderer, including not only the total amounts to be paid by the contracting authority but also all the revenue received from third parties. In cases of mixed public contracts, a quantitative evaluation reflecting contract values is applicable to the services / supplies divide, whereas a qualitative evaluation reflecting the object of contract is conducive to the works / services divide. The object of contract, which also reflects on the requirements and specification of contracting authorities, represents that decisive classification factor for the works/services divide.

The Court in *Helmut Müller*<sup>60</sup> held that sales of assets or land by contracting authorities to economic operators or other contracting authorities are not deemed public contracts, as a public contract is based on a “purchasing” capacity of contracting authorities and on the imperative of a contracting authority in being able to determine standards and specifications suitable to meet the conditions of immediate economic benefit. Thus, the sale of assets or land is not a public contract, unless a directly related public contract to that asset or land is imminent by the contracting authority or another contracting authority, in which case the land or asset sale and the consecutive public works should be viewed in their entirety as a public contract.

In *Helmut Müller* the Court reiterated that the concept of public works contracts does not require that the works which are the subject of the contract be materially or physically carried out for the contracting authority, provided that they are carried out for that authority’s immediate economic benefit. The Court restricted the conditions which reflect the direct economic benefit to a contracting authority by inserting an element of functionality in the notion of public contracts, and rendered the ownership of assets irrelevant to the determination of direct economic benefit on the part of contracting authorities. In fact, the necessary conditions to satisfy an immediate economic benefit to contracting authorities reflect only on the legal right of a contracting authority over the use of an asset or on the future economic advantages enjoyed or risks assumed by the contracting authority in relation to the relevant asset.

*Helmut Müller* revealed that the immediate economic benefit from a concession contract to a contracting authority presupposes a significant assumption of operational or functional risks by the concessionaire and a different makeup of the pecuniary interest consideration, in that the

Private Partnerships, encouraging contracting authorities to consider *en bock* the selection of a private partner and the sub-sequent award of works or services as a single contractual interface.

60. See Case C-451/08, *Helmut Müller v. Bundesanstalt für Immobilienaufgaben*, [2010] ECR I-2673.

concessionaire has the economic freedom to charge end-users or third parties for a certain duration. The ability of an economic operator to obtain urban planning permission does not reflect operational risk and the unlimited duration of concessions could not be regarded as lawful.

### 2.2.2. *Contracts below the thresholds of the directives*

The Court's settled case law<sup>61</sup> has made clear that contracts below the stipulated thresholds of the directives are excluded from their applicability. *Vestergaard*<sup>62</sup> showed that although such contracts are excluded from the scope of public procurement directives, contracting authorities are nevertheless bound to comply with the fundamental principles of the Treaty.<sup>63</sup> *Medipac-Kazantzidis*<sup>64</sup> confirmed that contracts below the stipulated thresholds need to comply with the duty of transparency<sup>65</sup> as well as the principle of non-discrimination on grounds of nationality.<sup>66</sup> In *Correos*<sup>67</sup> the Court ruled that even in the absence of any discrimination on grounds of nationality, the principle of equal treatment is applicable to the award of public contracts below the stipulated thresholds.<sup>68</sup> The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables contracting authorities to verify that those principles are complied with. The duty of transparency imposed on contracting authorities consists in ensuring a sufficient degree of advertising to enable the relevant public contract to be opened up to competition and the impartiality of procurement procedures to be reviewed.<sup>69</sup>

However, the application of the fundamental principles of the Treaty to contracts below the stipulated thresholds is based on the assumption that the

61. See Joined Cases C-147 & 148/06, *SECAP SpA and Santorso Soc. coop. arl*, [2008] ECR I-3565; see Case C-412/04, *Commission v. Italy*, [2008] ECR I-619, para 65.

62. See Case C-59/00 *Vestergaard* [2001] ECR I-9505.

63. *Telaustria*, cited *supra* note 10, para 60.

64. See Case C-6/0,5 *Medipac-Kazantzidis AE v. Venizelio-Panania (PE.S.Y. KRITIS)*, [2007] ECR I-4557.

65. *Telaustria*, cited *supra* note 10, paras. 60 and 61; *Vestergaard*, cited *supra* note 62, paras. 20 and 21; *Coname*, cited *supra* note 47, paras. 16 and 17; *Parking Brixen*, cited *supra* note 32, paras. 46–48.

66. *Telaustria*, cited *supra* note 10, para 60; *Vestergaard*, cited *supra* note 62, paras. 20 and 21; *Commission v France*, cited *supra* note 56, para 32; *Medipac-Kazantzidis*, cited *supra* note 64, para 33.

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

68. *Parking Brixen*, cited *supra* note 32, para 48, and *ANAV*, cited *supra* note 41, para 20.

69. *Parking Brixen*, *ibid.*, para 49, *ANAV*, *ibid.*, para 21.

contracts in question are of certain cross-border interest.<sup>70</sup> The parameters which could determine if a contract is likely to be of certain cross-border interest and therefore attract economic operators from other Member States comprise the contract's estimated value in conjunction with its technical complexity or the location of its execution. It is in principle for the contracting authority concerned to assess whether there may be cross-border interest in a contract whose estimated value is below the threshold laid down by the procurement directives. However, such assessment should be subject to judicial review.

It is permissible, nevertheless, for national legislation to lay down objective criteria, at national or local level, stipulating certain cross-border interest for public contracts which fall below the thresholds of the public procurement directives. Such criteria could include, *inter alia*, the quantum of the monetary value of a contract, or its strategic importance to economic operators, in conjunction with the place where the work is to be carried out. The projected profitability to an economic operator from a sub-dimensional contract may also be part of such criteria to determine certain cross-border interest for public contracts. Where the financial returns in the relevant contracts are very modest,<sup>71</sup> the likelihood of a cross-border interest is considerably weakened. However, in certain cases, the geography and the particular location of the performance of a public contract could trigger cross-border interest, even for low-value contracts.

The Court held that exclusion of sub-dimensional public contracts of certain cross-border interest from the application of the fundamental rules and general principles of the Treaty could undermine the general principle of non-discrimination, could give rise to collusive conduct and anti-competitive agreements between national or local undertakings, and finally could impede the exercise of freedom of establishment and freedom to provide services.<sup>72</sup>

### 2.2.3. *Annex II B Services Contracts*

For Annex II B Services Contracts, which are also referred to as non-priority public service contracts, the EU legislature assumed that contracts for such services are not, in the light of their specific nature, of cross-border interest such as to justify their award being subject to the conclusion of a tendering procedure in accordance with the public procurement directives. For that

70. See Case C-507/03, *Commission v. Ireland (An Post)*, [2007] ECR I-9777, para 29, and *Commission v. Italy*, cited *supra* note 61, paras. 66 and 67.

71. *Coname*, cited *supra* note 47, para 20.

72. See Case C-79/01, *Payroll and Others*, [2002] ECR I-8923, para 26; Case C-442/02, *CaixaBank France*, [2004] ECR I-8961, paras. 12 and 13; and Case C-452/04, *Fidium Finanz*, [2006] ECR I-9521, para 46.

reason, the Public Sector Directive merely imposes a requirement of publicity after the award of such service contracts.

*An Post*<sup>73</sup> touched on contracts concerning services which fall under Annex II B of the Public Sector Directive. The contracting authorities are bound only by the obligation to define the technical specifications by reference to national standards implementing European standards which must be given in the general contract documents and to send a notice of the results of the award to the EU Publications Office. The other procedural rules in the Public Sector Directive, including those relating to the award procedures and award criteria are, by contrast, not applicable to those contracts.

However, the limited advertisement requirements contained in the Public Sector Directive for contracts relating to services within the ambit of Annex II B cannot justify the absence of any transparency, especially when the relevant contract is of certain cross-border interest. The Court held<sup>74</sup> that if a contract of certain cross-border interest is awarded to an undertaking located in the same Member State as the contracting authority without any call for competition, this action would amount to a difference in treatment to the detriment of undertakings which are located in other Member States and might be interested in that contract. Such a difference in treatment, by excluding all undertakings located in other Member States, amounts to indirect discrimination on grounds of nationality<sup>75</sup> and contravenes the purpose of the public procurement directives to eliminate barriers to intra-Union trade in accordance with the fundamental principles of Union law, and in particular the right of establishment and the freedom to provide services.<sup>76</sup>

#### 2.2.4. *Service concessions as public contracts*

*Telaustria*<sup>77</sup> recognized that concession services are contracts which are excluded from the scope of public procurement directives by the fact that the consideration provided by the contracting authorities to the concessionaire consists in the latter obtaining the right to exploit for payment its own service. Notwithstanding such exclusion, contracting authorities concluding concession services are bound to comply with the fundamental rules of the

73. *Commission v. Ireland (An Post)*, cited *supra* note 70.

74. *Telaustria*, cited *supra* note 10, paras. 60 and 61, and *Coname*, cited *supra* note 47, para 17.

75. *Coname*, cited *supra* note 47, para 19.

76. *University of Cambridge*, cited *supra* note 9, para 16; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, para 32; and Case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs- GmbH (HI) and Stadt Wien*, [2002] ECR I-5553, para 43.

77. *Telaustria*, cited *supra* note 10.

Treaty, in general and, in particular, the principle of non-discrimination on the ground of nationality and the duty of transparency. The latter is intended as verification of compliance with the relevant Treaty principles and consists in ensuring a degree of competitiveness in the award of such contracts, in conjunction with a review process of the award procedure.

*Coname*<sup>78</sup> held that the direct award by a municipality of a service concession does not comply with the transparency principle if, without necessarily implying an obligation to hold an invitation to tender, undertakings located in other Member States were precluded from having access to appropriate information with a view to expressing their interest in obtaining that service concession. The Court held that infringement of the duty of transparency triggers the potential infringement of the principles of free movement of services and the right of establishment.

In *Parking Brixen*,<sup>79</sup> the Court reiterated that public authorities concluding services concessions must comply with the principle of non-discrimination on grounds of nationality and the principle of equal treatment, which conceptually correspond to the principles of the right of establishment and the freedom to provide services.<sup>80</sup> The Court has suggested that the right of establishment and the freedom to provide services are specific expressions of the principle of equal treatment.<sup>81</sup> The prohibition on discrimination on grounds of nationality is also a specific expression of the general principle of equal treatment.<sup>82</sup> The Court stated that the principle of equal treatment in public procurement is intended to afford equality of opportunity to all tenderers, regardless of their nationality.<sup>83</sup> As a result, the principle of equal treatment is applicable to public service concessions even in the absence of discrimination on grounds of nationality. The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with and that a sufficient degree of competition for the award of the service concession is maintained. Finally, the transparency obligation ensures the imperative of reviewing the impartiality of procurement procedures.<sup>84</sup>

Recourse to Article 106(1) TFEU (ex 86(1) EC) does not alter the requirement for contracting authorities to comply with the principle of transparency for service concessions, as the granting of special or exclusive

78. *Coname*, cited *supra* note 47.

79. *Parking Brixen*, cited *supra* note 32.

80. *Telaustria*, cited *supra* note 10, para 60; *Coname*, cited *supra* note 47, para 16.

81. See Case 3/88, *Commission v. Italy*, [1989] ECR 4035, para 8.

82. See Case 810/79, *Überschär*, [1980] ECR 2747, para 16.

83. See Case C-87/94, *Commission v. Belgium*, [1996] ECR I-2043, paras. 33 and 54.

84. *Telaustria*, cited *supra* note 10, paras. 61 and 62.

rights by Member States must not contravene the Treaty rules on equal treatment and the competition provisions.<sup>85</sup>

The essence of the definition of public service concessions under the public procurement directives is that a service concession is a contract which meets the definition of a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment. That corresponds to the Court's criterion of remuneration which comes not from the public authority concerned, but from sums paid by third parties. However, in addition, the Court has stressed that an essential feature of a public service concession is that the concession holder assumes the risk of operating the services in question.<sup>86</sup>

The Court has given some further guidance on what kind and degree of transfer of risk is required for a contract to be categorized as a service concession. In *Eurawasser*,<sup>87</sup> it ruled that in relation to a contract for the supply of services, the fact that the supplier does not receive consideration directly from the contracting authority, but is entitled to collect payment under private law from third parties, is sufficient for that contract to be viewed as a service concession, where the service provider assumes all, or at least a significant share of the operating risk faced by the contracting authority, even if that risk appears limited.

The Court thus took the view that what matters is not that the operating risk should be significant in itself but that whatever risk is already assumed by the contracting authority should be transferred, either fully or to a significant extent, to the successful service provider. In *Eurawasser*, the Court expressly considered the fact that the limitation of the risk relevant to the contract derived from public regulations (common in the utilities sector) which were, on the one hand, beyond the control of the contracting authority and, on the other hand, such as to reduce the likelihood of any adverse effect on transparency or competition.

### 2.3. *Developments in the Court's jurisprudence related to changes of circumstances in public contracts*

A change in the terms and conditions of a contract which was previously awarded in accordance with the public procurement directives may necessitate

85. Bovis, *op. cit. supra* note 3.

86. See Case C-382/05, *Commission v. Italy* [2007] ECR I-6657, para 34, and Case C-437/07, *Commission v Italy* [2008] I-153\*, para 29; see also Commission Interpretative Communication on Concessions under Community Law, O.J. 2000, C 121/2.

87. See Case C-206/08, *WAZV.Gotha v. Eurawasser Aufbereitungs*, [2009] ECR I-8377.

initiating fresh award procedures. In *Pressetext*,<sup>88</sup> various changes were introduced by the contracting authority, in particular instituting an internal re-organization by transferring the contract to a subsidiary of the economic operator that was carrying out the contract and waiving the right to terminate contract for three years. Additionally, a rebate increase from 15 percent to 25 percent was set up to counterbalance the price conversion to Euro from the domestic currency and a clause was introduced to update price indices. The Court held that these changes were not sufficient to constitute a new award under the procurement directives.

The key test appears to assert that amendments during the duration of an awarded public contract necessitate new award procedures when they are materially different in character from the original contract and therefore demonstrate the intention of the parties to re-negotiate the essential contractual terms. In practice, it is not easy to distinguish between material and non-material amendments in a public contract. An amendment may be regarded as material when it would have extended significantly the duration of the initial contract; when it would have allowed for admission of different bidders or selection of a different bid in the original tender; when it extends the scope of the contract considerably to encompass services not initially covered; or when it changes the economic balance of the contract in favour of the contractor. However, if the change in terms and conditions was foreseen in the initial contract, such change is normally regarded as a variation of the execution of the contract, thus not meriting fresh award procedures.

In *Commission v. Germany (Ambulances)*<sup>89</sup> an extension of ambulance services contract to a new area increasing its value by 15 percent was regarded as a material change. In *Wall*,<sup>90</sup> the change of sub-contractor, even with the consent of the contracting authority and even if the possibility of such change was provided for in contract, amounts to a material change, requiring a re-tender, if the use of that sub-contractor was a decisive factor in the award decision. In *Commission v. Spain*,<sup>91</sup> contract changes effected in the period between the contract notification notice in the O.J.E.U. and the award of the contract are material when the final contract included additional works which were not mentioned in the O.J.E.U. notice or tender specifications and when they increase the value of the contract. The possibility of additional works not constituting material changes in the terms and conditions of a contract is only permitted if such additional works were envisaged in the O.J.E.U. notice published by the contracting authority.

88. See Case C-454/06, *Pressetext Nachrichtenagentur*, [2008] ECR I-4401.

89. See Case C-160/08, *Commission v. Germany*, [2010] ECR I-3713.

90. See Case C-91/08, *Wall AG v. Stadt Frankfurt am Main*, [2010] ECR I-2815.

91. See Case C-423/07, *Commission v. Spain*, [2010] ECR I-3429.

A post-award change in the financial make-up of a contract, which results in it being de-classified as a concession is also to be regarded as material change. So, if the contracting authority alters the method of remuneration of the economic operator by substitution of the right to exploit the concession with direct payment, a significant reduction in operational risk is effected, which favours the concessionaire and takes away the two necessary criteria for concessions, namely the assumption of operational risk by the concessionaire and the total or partly payment by means of third-party or end user contributions based on the concessionaire's exclusive right of exploitation.

### 2.3.1. *Developments in the Court's case law on selection and award procedures*

In *Lianakis*<sup>92</sup> the Court held that tenderers must be aware of "all the elements" to be taken into account by the authority for identifying the most advantageous offer, including their relative importance. The contracting authority cannot apply weightings or sub-criteria that it has not previously brought to tenderers' attention. The weightings and sub-criteria related to the evaluation procedure leading to the award of a contract cannot be established or changed after the submission of tenders. In *Lianakis*, the specific issue was the fusion of selection and award criteria, an issue already clarified by the Court. The Court has maintained<sup>93</sup> that the examination of a contractor's suitability based on its technical capacity and qualifications and its financial and economic standing may take place simultaneously with the award procedures of a contract.<sup>94</sup> However, the two procedures (the suitability evaluation and bid evaluation) are totally distinct processes, which should not be confused.<sup>95</sup>

In *Lianakis*, the contracting authority specified the bidder's experience on projects in last 3 years, as well as the bidder's manpower and equipment and the bidder's ability to complete the project by deadline as award criteria. The Court reiterated that award criteria cannot be "essentially linked to the tenderer's ability to perform the contract in question", pointing that the criteria used by the contracting authorities were in fact selection criteria in order to establish suitability of interested tenderers, and they must relate to financial standing and technical capability of interested tenderers. The Court concluded that the public procurement directives prohibit selection criteria from being used as award criteria and reminded contracting authorities that the

92. See Case C-532/06, *Emm G. Lianakis AE v. Alexandroupolis*, [2008] ECR I-251.

93. *Beentjes*, cited *supra* note 9.

94. See Case C-28/86, *Bellini*, [1987] ECR 3347.

95. See Case C-71/92, *Commission v. Spain*, [1993] ECR I-5923. Also, *Beentjes*, cited *supra* note 9, paras. 15 and 16, where the simultaneous application of selection of tenders and award procedures is not precluded, on condition that the two are governed by different rules.

selection and award processes are two independent and separate process in a public procurement and that a fusion of selection and award criteria infringes public procurement rules.

In *Commission v. Greece*,<sup>96</sup> a railway utility advertised a contract for engineering services whereby non-Greek engineers were excluded since they submitted qualifications different from those required for the relevant contract. The Court ruled that the utility had confused selection and award criteria and applied the *Lianakis* ruling verbatim. In *Commission v. France*<sup>97</sup> the Court reiterated the exhaustive character of award procedures and ruled against the French Public Procurement Code allowing for a special award procedure for “definition contracts”, where the holder of an initial definition contract was given preference for subsequent contracts. The Court mentioned that the public procurement directives allow exhaustively the award procedures permitted (open, restricted, competitive dialogue and negotiated) and that the definition contract procedure was not a form of competitive dialogue since it covered several different contracts.

### 2.3.2. *Proportionality and exclusion grounds for tenderers*

Contracting authorities may apply measures which result in exclusion of private sector undertakings from participating in tendering procedures on grounds of equal treatment and transparency, only if these measures are proportionate. In *Michaniki*<sup>98</sup> the Court ruled that Greek law prohibiting all media companies from bidding for public contracts was unlawful, as it contravenes the principle of freedom to provide services. Also, in *Assitur*<sup>99</sup> it ruled that Italian law prohibiting affiliates from the same group from submitting separate bids in a tendering procedure contravenes the public procurement directives; finally, in *Serrantoni*<sup>100</sup> it held that a ban on a consortium participating in the same tender as members of that consortium was against the spirit and letter of the procurement directives and the underlying EU law principle of freedom to provide services.

96. See Case C-199/07, *Commission v. Greece*, [2009] ECR I-10669.

97. See Case C-299/08 *Commission v. France*, [2009] ECR I-11587.

98. See Case C-213/07, *Michaniki AE v. Ethniko Simvoulío Radiotileorasis and Ipourgos Epikratias and others*, [2008] ECR I-9999.

99. See Case C-538/07, *Assitur Srl v. Camera di Commercio, Industria, Artigianato e Agricoltura di Milano*, [2009] ECR I-4219

100. See Case C-376/08, *Serrantoni Srl and Consorzio stabile edili Srl v. Comune di Milano*, [2009] ECR I-12169.

### **3. The traction of the remedies directives in public procurement**

#### *3.1. Enforcement of public procurement directives*

The old Remedies Directives<sup>101</sup> brought a decentralized dimension into the application of public procurement rules. The Remedies Directives suffered from serious shortcomings, in the sense that they did not provide for effective review procedures between the stages of contract award and contract conclusion respectively. That gave rise to direct awards and the so-called race to sign the relevant contract to assume immunity from any redress based on the *pacta servanta sunt* principle. In addition, at both pre-contractual and post-contractual stages there were no effective deterrents for breach of either procedural or substantive public procurement laws. Finally, the much publicized attestation and conciliation procedures, which were branded as innovative compliance solutions were not used by Member States and contracting authorities.

The new amending Remedies Directive<sup>102</sup> is predominately based on the previous instruments but it introduced new themes such as a clear divide between pre-contractual and post-contractual stages, a balance between effective review of public contracts and need of efficient public procurement, a strict standstill requirement for contract conclusion, including direct awards by contracting authorities, extensive communication and monitoring requirements and a substantial refocus of the corrective mechanism. The amending Remedies Directive repealed the attestation and conciliation procedures which was laid down by its predecessors and extended its coverage to countries of the EEA.

The Court has used three principles to address issues relevant to the traction of the Remedies Directives and the judicial review of public contracts; on the one hand, the principle of procedural autonomy and, on the other hand, the principle of effectiveness and the principle of procedural equality.

#### *3.2. The principle of procedural autonomy*

The principle of procedural autonomy affords discretion to Member States to organize public procurement review procedures in alignment with national review procedures.

101. See the public sector Remedies Directive 89/665 O.J. 1989, L 395/33, and the utilities Remedies Directive 92/13, O.J. 1992, L 76/14.

102. See Directive 2007/66/EC, O.J. 2007, L335/31.

### 3.2.1. *Time limits to enact review proceedings*

Member States have wide discretion to establish the procedural framework for review procedures and the logistics for their operation. The existence of national legislation which provides that any application for review of decisions of contracting authorities must be commenced within a specific time-limit and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period is compatible with public procurement acquis,<sup>103</sup> provided that, in pursuit of fundamental principle of legal certainty, such specific time limits are reasonable.<sup>104</sup>

### 3.2.2. *Ex proprio motu investigation of the unlawfulness of decisions*

National courts responsible for hearing review procedures in actions brought by aggrieved tenderers, with the ultimate aim of obtaining damages, may declare of their own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer.<sup>105</sup> However, a tenderer harmed by a decision to award a public contract, whose lawfulness he is contesting, cannot be denied the right to claim damages for the harm caused by that decision on the grounds that the award procedure was in any event defective owing to the unlawfulness, raised *ex proprio motu*, of another decision of the contracting authority. Therefore, national courts cannot dismiss an application for damages on the ground that the award procedure was in any event unlawful and that the harm which the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

### 3.2.3. *Admissibility requirements of interim measures*

Interim measures represent an autonomous legal remedy which must remain unconditional to any other judicial review process. Their objective is to correct the alleged infringement or prevent further damage to the interests concerned, suspend or ensure the suspension of the procedure for the award of a public contract, and finally suspend or ensure the suspension of the implementation of any decision taken by the contracting authority. Interim measures are granted with reference to a balance test which takes into consideration the likely consequences of such measures for all parties liable to be harmed and the public interest.

103. *Universale-Bau*, cited *supra* note 9.

104. See Case C-261/95, *Palmisani*, [1997] ECR I-4025, para 28, and Case C-78/98, *Preston and Others*, [2000] ECR I-3201, para 33.

105. *GAT & ÖSAG*, cited *supra* note 10.

The Court examined<sup>106</sup> the conditionality of an application for interim measures upon a prior action to set aside or annul an act or a decision of a contracting authority and ruled against such a requirement on the grounds that it restricts interim judicial protection by making the suspension of an administrative act procedurally conditional on bringing an action for the annulment of the contested act.<sup>107</sup>

The Court maintained that not only actions against definitive acts but also procedural acts, should be allowed to be suspended by the application of interim measures, if they determine, directly or indirectly, the substance of the case, or bring an end to the award procedures for a public contract, or cause irreparable harm to legitimate rights of interested parties. The Remedies Directive does not provide for any derogation regarding the possibility of appeal against procedural acts, or administrative measures which do not bring administrative proceedings to an end.<sup>108</sup>

#### 3.2.4. *The failure to participate in the contract award procedure*

Member States are not obliged to make review procedures available to any person wishing to obtain a public contract, but instead, require that the person concerned has been or risks being harmed by the alleged infringement.<sup>109</sup> In that sense, participation in a contract award procedure may validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract.

#### 3.3. *The principle of effectiveness*

The principle of effectiveness of review procedures under the Remedies Directive covers the ability of aggrieved tenderers to set aside decisions of contracting authorities taken unlawfully or to remove discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award

106. See C-214/00, *Commission v. Spain*, cited *supra* note 13 ; C-236/95, *Commission v. Greece* [1996] ECR I-4459.

107. *Commission v. Greece*, cited *supra* note 106.

108. See Case C-81/98, *Alcatel Austria and Others*, [1999] ECR I-7671. The exclusion of review of procedural acts is embedded in EU case law. See Case C-282/95, *Guérin automobiles v. Commission* [1997] ECR I-1503. The Court has also held that the preparatory nature of the act against which the action is brought is one of the grounds of inadmissibility of an action for annulment, and that the Court may examine this of its own motion, see Case C-346/87, *Bossi v. Commission*, [1989] ECR 303.

109. See Case C-249/01, *Hackermüller*, [2003] ECR I-6319, para 18.

procedure. Set aside procedures are deemed as a legitimate conditional remedy for the award of damages.

### 3.3.1. *Standstill period*

The standstill period is viewed as the answer to prevent the so-called race to sign a public contract and as the mechanism to allow interested parties to launch review procedures.<sup>110</sup>

### 3.3.2. *Ineffectiveness*

The threat of ineffectiveness deters the award of public contracts in breach of the relevant directives and offers a great deal of discretion in the hands of national law.<sup>111</sup> Ineffectiveness may result in retrospective cancellation of contractual obligations, or reduction of contractual obligations or appropriate penalties in the sense of fines levied on contracting authorities or shortening of concluded public contracts. Grounds for deviation from ineffectiveness reflect overriding reasons relating to a general interest and must be subject to alternative penalties.

Economic interests may, in exceptional circumstances, be overriding reasons due to the disproportionate consequences arising from the contract's ineffectiveness. Economic interests directly linked to the contract such as costs resulting from the delay in the execution of the contract, costs resulting from the launching of a new procurement procedure, costs resulting from the change of the economic operator and costs of legal obligations resulting from the ineffectiveness are not deemed overriding reasons.

### 3.3.3. *Obligation to allow sufficient time between contract award and conclusion*

Member States are required to provide for a review procedure so that an applicant may have set aside a decision of a contracting authority to award a public contract to a third party, prior to the conclusion of the contract.<sup>112</sup> That right of review for tenderers must be independent of the possibility for them to

110. See Art. 2 (a) of Directive 2007/66 which stipulates a standstill requirement for 10 calendar days from the day following day of award decision if fax or electronic means are used, or 15 calendar days from the day following day of award decision if other means of communication are used, or 10 calendar days from the day following the date of the receipt of the contract award decision.

111. See Art. 2d(1) and Art. 2f of Directive 2007/66 which lays down that Member States may provide that application for review regarding ineffectiveness of contracts must be made before 30 calendar days after publication of contract award notice, provided that decisions of contracting authority to award contract without prior publication of contract notice was justified or in any case before expiry of period of at least six months after conclusion of contract.

112. See Case C-212/02, *Commission v. Austria*, judgment of 24 June 2004 (not published).

bring an action for damages once the contract has been concluded.<sup>113</sup> A national legal system that makes it impossible to contest the award decision, because the award decision and the conclusion of the contract occur at the same time, deprives interested parties of any possible review in order to have an unlawful award decision set aside or to prevent the contract from being concluded. Complete legal protection requires that a reasonable period must elapse between the decision which awards a public contract and the conclusion of the contract itself, as well as a duty on the part of contracting authorities to inform all interested parties of an awarding decision.

#### 3.3.4. *Meaning and content of decisions for review*

The Court verified that any remedies available to interested parties against decisions of contracting authorities extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders,<sup>114</sup> such as decisions on whether a particular contract falls within the personal and material scope of the public procurement directives, as well as decisions to withdraw invitations to tender and abort public procurement procedures.<sup>115</sup> The Remedies Directives preclude national legislation which limits review of the legality of the withdrawal of an invitation to tender to mere examination of whether it was arbitrary. However, the Court has defined the scope of the obligation to notify reasons for abandoning the award of a contract,<sup>116</sup> which must be limited to exceptional cases or must necessarily be based on serious grounds.<sup>117</sup> Although a contracting authority is required to notify candidates and tenderers of the grounds for its decision if it withdraws the invitation to tender, there is no implied obligation on that authority to carry the award procedure to its conclusion.

The broad meaning of the concept of a decision taken by a contracting authority is confirmed by the Court's case law. The Court has held that there is no restriction with regard to the nature and content of the decisions taken by contracting authorities.<sup>118</sup> Nor could such a restriction be inferred from the wording of the Remedies Directives. Moreover, a restrictive interpretation of the concept of a decision amenable to review would be incompatible with the requirement that Member States provide for interim relief procedures in relation to any decision taken by the contracting authorities.<sup>119</sup> On the other

113. *Alcatel Austria*, cited *supra* note 108, para 43.

114. *Stadt Halle*, cited *supra* note 9.

115. *Hospital Ingenieure*, cited *supra* note 76, para 55.

116. See O.J. 1993, L 199/54.

117. See Case C-27/98, *Fracasso and Leitschutz v. Salzburger Landesregierung*, [1999] ECR I-5697, paras. 23 and 25.

118. *Alcatel Austria*, cited *supra* note 108, paras. 32–35.

119. *Hospital Ingenieure*, cited *supra* note 76, para 49.

hand, decisions or acts of contracting authorities which constitute a mere preliminary study of the market or which are purely preparatory and form part of the internal reflections of the contracting authority with a view to a public award procedure are not amenable to review.<sup>120</sup> The Court has held that the contracting authority's decision prior to the conclusion of the contract as to the tenderer to whom the contract will be awarded must in all cases be open to review, regardless of the possibility of obtaining an award of damages once the contract has been concluded.<sup>121</sup>

### 3.3.5. *Locus standi and interest to review acts*

*Fritsch Chiari*<sup>122</sup> precludes the conditionality of locus standi upon prior participation of aggrieved tenderers in conciliation procedures as incompatible with the effectiveness principle, thus recognizing the autonomous and unconditional character of judicial review procedures in public procurement. Even though Member States are free to determine the detailed rules according to which they must make the review procedures provided for in the Remedies Directive available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement,<sup>123</sup> they cannot interpret the term interest in obtaining a public contract strictly.<sup>124</sup> Thus, a person who has participated in a contract award procedure, but subsequently failed to initiate pre-judicial proceedings, such as conciliation or mediation proceedings, to review an act or decision of a contracting authority must not be regarded as having lost his interest in obtaining the contract and therefore being precluded from lodging an action to contest the legality of the contract awarding decision or any decision of the contracting authority.<sup>125</sup>

Persons to whom review procedures must be available must include, at least, any person having or having had an interest in obtaining a public contract<sup>126</sup> who has been or risks being harmed by an alleged infringement.<sup>127</sup> The formal capacity of tenderer or candidate is not thus required.<sup>128</sup> The Court

120. See the Opinion of A.G. Stix-Hackl in *Stadt Halle*, cited *supra* note 9, paras. 23–29.

121. *Alcatel Austria*, cited *supra* note 108, para 43.

122. See Case C-410/01, *Fritsch, Chiari & Partner, Ziviltechniker GmbH and Others and Autobahnen- und Schnellstraßen-Finanzierungs-AG. (Asfinag)*, [2003] ECR I-11547.

123. See Case C-327/00, *Santex SpA v. Unità Socio Sanitaria Locale n. 42 di Pavia*, [2003] ECR I-1877, para 47.

124. *Fritsch Chiari*, cited *supra* note 122, paras. 31 and 34.

125. See Case C-230/02, *Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG and Republik Österreich*, [2004] ECR I-1829.

126. *Stadt Halle*, cited *supra* note 9.

127. *Commission v. Austria*, cited *supra* note 112.

128. *Grossmann*, cited *supra* note 125.

maintained that an assessment of an aggrieved tenderer's interest in reviewing a decision or an act of a contracting authority should be examined in light of the fact that he did not participate in the contract award procedure and did not appeal against the invitation to tender before the award of the contract.

*Grossmann*<sup>129</sup> confirmed the existence of interest in obtaining a contract where no bid has been submitted. The Court held that it must be possible for an undertaking to seek review of discriminatory specifications before submitting a bid and without waiting for the contract award procedure to be terminated, but a refusal to acknowledge interest in obtaining a contract of a person who has not participated in the contract award procedure or has not sought review against the invitation to tender does not impair the effectiveness of the Remedies Directives.

*Espace Trianon*<sup>130</sup> recognized the existence of both collective and individual interest in obtaining a contract in cases of consortia participation in public procurement procedures and the Court held that not only all the members of a consortium without legal personality which has participated in a procedure for the award of a public contract and has not been awarded that contract, acting together, may bring an action against the decision awarding the contract, but locus standi is recognized even where only one member of the consortium seeks review. Interestingly, if the application of one of the consortium members is held inadmissible, locus standi of the other members of the consortium is not affected.

*Elisoccorso/Elilombarda*<sup>131</sup> repeated the *Espace Trianon* ruling by confirming the existence of individual interest and reaffirming the eligibility of an aggrieved individual member of a consortium without legal personality to contest a decision or an act of a contracting authority in relation to the award of a public contract.

### 3.4. *The principle of procedural equality*

The principle of procedural equality (or equivalence) obliges Member States to treat public procurement review procedures equally to domestic review procedures.

129. *Grossmann*, cited *supra* note 125.

130. See Case C-129/04, *Espace Trianon SA and Société wallonne de location-financement SA (Sofibail) v. Office communautaire et régional de la formation professionnelle et de l'emploi (FOREM)*, [2005] ECR I-7805.

131. See Case C-492/06, *Consorzio Elisoccorso San Raffaele v. Elilombarda Srl and Azienda Ospedaliera Ospedale Niguarda Ca' Granda di Milano*, [2007] ECR I-8189.

### 3.4.1. *Time limits to decide review of acts or decisions*

The period for assessing the legality of act or decisions of contracting authorities<sup>132</sup> remains within the discretion of Member States, subject to the requirement that the relevant national rules are not less favourable than those governing similar domestic actions.<sup>133</sup>

In *Universale Bau*,<sup>134</sup> Austrian procurement rules stipulated limitation periods within which certain allegedly unlawful decisions had to be challenged. The Court declared that the Remedies Directives do not provide for any specific limitation periods and that, in the absence of EU rules, Member States are free to set procedural rules if they comply with fundamental principles of EC Treaty. The Court considered a two-week limitation period in principle consistent with principles of effectiveness and equivalence and reflecting an element of appropriateness in the light of their overall objective.<sup>135</sup>

*Sanetex*<sup>136</sup> concerned Italian law providing that an invitation to tender or clauses thereof must be challenged within the limitation period of sixty days; when that period had expired, a challenge was no longer possible. An aggrieved bidder did not challenge a specific (potentially discriminatory) clause because the contracting authority led him to believe that the disputed clause would be interpreted in a non-discriminatory manner. After the elapse of the time limitation period, the contracting authority excluded the bidder from the tender procedure on basis of the potentially discriminatory clause. The Court considered the 60 days limitation period as being reasonable, but held that the changed conduct of the contracting authority had rendered the exercise of the rights conferred on tenderer excessively difficult (effectiveness). The latter requirement requires national courts to interpret domestic law in a way which might not apply or might extend limitation-periods which render redress excessively difficult.

In *Lämmerzahl*,<sup>137</sup> the Court dealt with an application for review being deemed inadmissible where no complaint was raised about infringements that are identifiable in the contract notice by, at the latest, the end of the period for submission of bids. The Court held that a contract notice lacking any information as to the estimated contract value followed by evasive conduct of

132. *Hospital Ingenieure*, cited *supra* note 76.

133. See Case C-390/98, *Banks v Coal Authority and Secretary of State for Trade and Industry* [2001] ECR I-6117, para 121; Case C-453/99, *Courage v. Crehan* [2001] ECR I-6297, para 29.

134. *Universale-Bau*, cited *supra* note 9.

135. See Case C-231/96, *EDIS*, [1998] ECR I-4951.

136. *Santex*, cited *supra* note 123.

137. See Case C-241/06, *Lämmerzahl GmbH v. Freie Hansestadt Bremen*, [2007] ECR I-8415.

the contracting authority must, in view of a limitation period, be seen as rendering excessively difficult the exercise by the tenderer concerned of rights conferred on him by EC law

In *Uniplex*<sup>138</sup> the Court confirmed that any periods laid down for bringing proceedings start to run only from the date on which claimant knew or ought to have known of alleged infringement; a contracting authority must notify unsuccessful candidates of the relevant reasons or at least a summary of its decision in relation to the award of a public contract. The Court had to rule on the compatibility of UK law which provides that “proceedings must be brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers there is a good reason for extending the period within which proceedings may be brought”. The Court held that the UK provisions give rise to legal uncertainty as the limitation period, the duration of which is at the discretion of the competent court, is not predictable in its effects and national courts are bound to interpret national law that transposes a directive in the light of the wording and purpose of the directive, i.e. in a way that the period begins to run from the date on which the claimant knew or ought to have known of the infringement. If national law does not arrive at such an interpretation the national court is bound to extend the period for bringing proceedings in relation to the award of public contracts.

The Court upheld the *Uniplex* ruling in *Commission v. Ireland*,<sup>139</sup> where national law provided that application for review of a decision to award a contract shall be made “at the earliest opportunity and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending such period”. The Court maintained that the national limitation periods are to be interpreted by national courts as to apply not only to the final decision to award the contract but also to preparatory acts or interim decisions and that national rules need to be unequivocally clear and beyond doubt as to the time from which the limitation period starts to run.

The principle of effectiveness underpinned *Commission v. Germany*,<sup>140</sup> where the Court confirmed that the Commission, as guardian of Treaty, has absolute discretion to initiate compliance proceedings for failure to implement EU law against a Member State even if limitation periods under national law have expired.

138. See Case C-406/08, *Uniplex (UK) Ltd v. NHS Business Services Ltd.*, [2010] ECR I-817.

139. See Case C-456/08, *Commission v. Ireland*, [2010] ECR I-859

140. See Case C-17/09, *Commission v. Germany*, [2010] ECR I-4\*.

### 3.4.2. *Admissibility requirements of interim measures*

National provisions concerning the possibility of launching interim measures against acts or decisions of contracting authorities must not be specific to the award of public contracts, but apply equally to all procedures.<sup>141</sup> National legislation which restricts judicial protection in public procurement disputes through the conditional application of interim measures, such that interested parties must bring an action for the annulment of the contested act of a contracting authority first, is in contradiction with the principle of procedural equality.

### 3.4.3. *Damages*

Award of damages in public procurement is limited to persons economically harmed by an infringement on the part of the contracting authority. After conclusion of contract, damages represent the only remedy available. The Remedies Directive contains no further requirements as to the burden of proof or method of calculation. The national legislature, although free to decide, must comply with the principle of equivalence and the principle of effectiveness. The degree of effective award of damages in breach of public procurement law varies enormously within the legal orders of the Member States. The effectiveness is different where courts can grant punitive damages or award damages according to the principle of likelihood of harm, compared with legal systems requiring proof that the contract would have been awarded to a particular tenderer. Difficulties also arise in cases where no bid was submitted or in cases of direct awards, where the award criteria did not require that a notice was published or no tender procedure was carried out.

In *Commission v. Germany*,<sup>142</sup> the Court recognized that the principle *pacta servanda sunt* and the prospect of damages litigation for termination of illegally awarded contracts cannot act as defence of contracting authorities for not rescinding illegally awarded contracts. German municipalities concluded services contracts for a term of at least 30 years without publishing notices. Germany argued that the breach had happened and was subsequently exhausted by conclusion of the contracts, and that after conclusion of the relevant contracts there was no longer actual breach. The Court held that the effects of unlawful contract awards go beyond the conclusion of contract because of its long duration and that a breach of obligations under the public procurement directives and EU law is an active breach as long as the unlawfully concluded contract is valid.

141. *Commission v Greece*, cited *supra* note 106.

142. See Joined Cases C-20/00 and C-28/01, *Commission v. Germany*, [2003] ECR I-3609.

In *Wall / Frankfurt*,<sup>143</sup> the Court held that the principles of equal treatment and non-discrimination and the consequent obligation of transparency do not require the national authorities to terminate a contract or grant a restraining order in every case of an alleged breach of that obligation in connection with the award of service concessions. But it is for the national law to regulate the legal procedures for safeguarding the rights which individuals derive from the transparency obligation in such way that those procedures are no less favourable than similar domestic procedures, according to the principle of equivalence, and they do not make the exercise of those rights practically impossible or excessively difficult, according to the principle of effectiveness.

In Portugal, domestic law made the award of damages to persons harmed by a breach of EU procurement law conditional on proof of fault or fraud on the part of the contracting authorities, a fact which substantially reduced the likelihood of aggrieved tenders in obtaining damages. The Court pronounced that such conditionality contravenes the principle of effectiveness of Remedies Directives.<sup>144</sup>

In *Aktor ATE / ESR*,<sup>145</sup> the Court expanded *de lege ferenda* the coverage of the Remedies Directives to bodies which are not contracting authorities but their decisions are capable of having a certain effect on the outcome of a procurement procedure. The Court found that the national law did not comply with principles of equivalence and effectiveness, as it rendered impossible to seek annulment of a decision and to obtain compensation for any damage incurred, whereas this was not the case in other areas of national law applicable to damages incurred by virtue of unlawful acts of public authorities. As a result, those bodies should be deemed as contracting authorities, by applying the functionality test, and their decisions or acts in relation to public procurement procedures must be subject to review procedures to satisfy the effectiveness principle of the Remedies Directive. The Court reiterated that in the absence of EU rules governing damages it is for each Member State to designate the courts having jurisdiction and to lay down detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law as long as they are not less favourable than those governing similar domestic actions in accordance with the principle of equivalence.

143. *Wall AG*, cited *supra* note 90.

144. Case C-275/03, *Commission v. Portugal*, Case C-70/06, *Commission v. Portugal*, [2008] ECR I-1.

145. See Joined Cases C-145 & 149/08, *Club Hotel Loutraki AE and Others v. Ethnico Symvoulia Radiotileorasis and Ypourgos Epikrateias and Aktor Anonymi Techniki Etaireia (Aktor ATE) v. Ethnico Symvoulia Radiotileorasis*, [2010] ECR I-4165.

#### 4. The porosity of the public procurement directives

##### 4.1. Exhaustive harmonization: The enemy within

Exhaustive harmonization in the public procurement directives has surfaced as their strategic shortcoming and has resulted in the porosity of their legal effect. Exhaustive harmonization *de lege lata* excludes or limits from the scope of the public procurement directives public contracts below certain thresholds or certain services contracts. However, the *lex specialis* character of public procurement directives undermines their effectiveness by preventing their applicability to certain contractual situations and as a result restricting a *de lege ferenda* extension of their provisions.<sup>146</sup>

The effects of exhaustive harmonization in the procurement directives expose their inability to regulate contractual relationships which mimic inter-administrative interfaces in the public sector or contractual relations based on dominant influence between utilities and affiliated undertakings. These contractual relations can be classified under five broad categories: i) service concessions ii) public service contracts awarded by a contracting authority or entity to another contracting authority or an association of contracting authorities on the basis of an exclusive right based on law, regulation or administrative provision compatible with the Treaty; iii) public contracts awarded by utilities to their affiliated entities, upon which they exercise dominant influence; iv) in-house contractual relations between contracting authorities and public entities or undertakings upon which the former exercise control similar to that exercised over their own departments and the controlled entities are operationally dependent on them; v) public service contracts relating to services of general economic interest or having the character of a revenue-producing monopoly in accordance with Article 106(2) TFEU (ex 86(2) EC).

The porosity of the public procurement directives in relation to contractual relations which are regarded as the by-product of exhaustive harmonization situations relate to service concessions, inter-administrate public contracts based on exclusive rights, public contracts in pursuit of services of general economic interest and in-house contracts, which result in direct awards and escape the applicability of the directives and to non-priority services contracts and contracts with values below the stipulated thresholds, which attract a limited applicability of the directives.

Nevertheless, exhaustive harmonization by *lex specialis* legal instruments such as the public procurement directives cannot impose limits on the application of primary EU law to supplement their legal thrust. The need for

146. See Bovis, *op. cit. supra* note 5.

conformity with EU law is evident even in cases beyond exhaustive harmonization and with respect to excluded contracts from the public procurement directives. The Public Sector Directive and the Utilities Directive provide for mutual exclusivity of their provisions<sup>147</sup> as well as their non-applicability in cases of public contracts awarded pursuant to international rules,<sup>148</sup> or secret contracts and contracts requiring special security measures or contracts related with the protection of Member States' essential interests.<sup>149</sup> The Public Sector Directive also does not cover public contracts whose object is to provide or exploit public telecommunications networks;<sup>150</sup> contracts for the acquisition or rental of land; contracts related to broadcasting services; contracts related to financial securities, capital raising activities and central bank services; employment contracts; and research and development contracts which do not benefit the relevant contracting authority.<sup>151</sup> The Utilities Directive does not apply to contracts awarded in a third country;<sup>152</sup> contracts awarded by contracting entities engaged in the provision or operation of fixed networks for the purchase of water and for the supply of energy or of fuels for the production of energy;<sup>153</sup> contracts subject to special arrangements for the exploitation and exploration of oil, gas, coal or other solid fuels by virtue of European law;<sup>154</sup> contracts and framework agreements awarded by central purchasing bodies;<sup>155</sup> contracts whose object activity is directly exposed to competition on markets to which access is not restricted<sup>156</sup> and contracts related to works and service concessions<sup>157</sup> which are awarded by contracting entities carrying out one or more of the activities covered by the Utilities Directive, in particular activities including gas, heat and electricity, water, transport services, postal services, exploration for oil, gas or other solid fuels, extraction of oil, gas or other solid fuels and provision of ports and airports where those concessions are awarded for carrying out those activities.

Reliance on the conditions for exclusion of contracts from the applicability of the directives is to be determined by the European Commission, by virtue of extensive publication and communication requirements imposed upon

147. See the Utilities Directive 2004/17, cited *supra* note 6.

148. See Art. 15 of the Public Sector Directive 2004/18, cited *supra* note 6, and Art. 22(a) of the Utilities Directive.

149. See Art. 14 of the Public Sector Directive and Art. 21 of the Utilities Directive.

150. See Art. 13 of the Public Sector Directive.

151. See Art. 16 of the Public Sector Directive.

152. See Art. 20(1) of the Utilities Directive.

153. See Art. 26(a) of the Utilities Directive.

154. See Art. 27 of the Utilities Directive.

155. See Art. 29(2) of the Utilities Directive.

156. See Art. 30(1) of the Utilities Directive.

157. See Art. 30(6) third indent of the Utilities Directive.

contracting authorities and Member States. Such limitations could be viewed as inhibiting factors in Member States' freedom and autonomy to organize and deliver public services and as mistrust on their part to effectively comply with the public procurement acquis.

#### 4.2. *The treatment of porosity*

The Court has recognized the lacuna in the effectiveness of the procurement directives and particularly in areas which cannot *de lege ferenda* be conducive to regulatory control. Although the application of primary EU law is not precluded in the presence of exhaustive provisions of secondary law,<sup>158</sup> the Court explicitly recognized that the *lex specialis* character of the procurement directives aims at complementing fundamental freedoms of EU law in respect of intra-community trade in public contracts.

The Court reacted to the porosity of the directives with two conceptual actions. The first signals the necessity to supplement their remit with the acquis deriving from fundamental principles of EU law, whereas the second manifests the need to increase compliance by contracting authorities by promoting the objectivity of the procurement directives and enhancing their justiciability, whilst in parallel limiting their inherent flexibility. Thus, the applicability of primary EU law intends to close the gap that exists in contracts falling outside the procurement directives, such as service concessions.<sup>159</sup> As for contracts which fall within the remit of the directives, but escape from the full thrust of the principles enshrined therein, such as sub-dimensional contracts and non-priority services contracts, primary EU law, in particular the fundamental freedoms also apply.<sup>160</sup>

158. See Case C-37/92, *Vanacker and Lesage*, [1993] ECR I-4947, para 9; Case C-324/99, *DaimlerChrysler*, [2001] ECR I-9897, para 32; and Case C-322/01, *Deutscher Apothekerverband*, [2003] ECR I-14887, para 64.

159. *Coname*, cited *supra* note 47, para 16, and *Commission v. France*, cited *supra* note 56, para 32.

160. See Case C-45/87, *Commission v. Ireland*, [1988] ECR I-4929, para 27, where the Court held that the inclusion in the contract specification of a clause stipulating exclusively the use of national specifications infringe Art. 30 EC; Case C-243/89, *Commission v. Denmark (Storebælt)*, [1993] ECR I-3353, where the Court found that contract clauses concerning preference to national specifications and nominated sub-contractors infringe Arts. 30, 48 and 59 EC; Case C-158/03, *Commission v. Spain*, and Case C234/03, *Contse and Others*, [2005] ECR I-9315, where the content of tendering specifications, and in particular sub-criteria for the award of contracts ran contrary to Art. 49 EC; *Hospitale Ingenieure*, cited *supra* note 76, para 42, where the Court ruled that contracting authorities' decisions are subject to fundamental rules of EU law, and in particular to the principles on the right of establishment and the freedom to provide services; Case C-244/02, *Kauppatalo Hansel Oy*, [2003] ECR I-12139, paras. 31 and 33, where the Court confirmed the principle under which primary law is to be taken into account in a supplemental capacity for evaluating the effectiveness of the public procurement directives;

The Court dealt with the porosity of the public procurement directives using the principle of transparency. The principle of transparency embraces the fundamental EU law principles which are applicable to public procurement, such as the free movement of goods, the right of establishment and the freedom to provide services, as well as the principle of non-discrimination and its surrogate principle of equal treatment. The Court's case law shows the close link between transparency and the principle of equal treatment. Transparency intends to ensure the effectiveness of equal treatment in public procurement by guaranteeing the conditions for genuine competition. As the principle of equal treatment is a general principle of EU law, Member States are required to comply with the duty of transparency, which constitutes a concrete and specific expression of that principle. The Court has seen the duty of transparency as representing a concrete and specific expression of the principle of equal treatment, one of the fundamental principles of EU law,<sup>161</sup> which the Member States must observe when they act within the scope of EU law. The principle of equal treatment assumes that similar situations should not be treated differently unless differentiation is objectively justified.<sup>162</sup>

The Court had the opportunity to define the scope of the principle of equal treatment in the context of public procurement in *Commission v. Denmark* and *Commission v. Belgium*.<sup>163</sup> The Court held that compliance with the principle of equal treatment requires an absence of discrimination on grounds of nationality and a duty of transparency which enables contracting authorities to ensure that that principle is complied with. The Court then defined the scope of the duty of transparency in *Telaustria*<sup>164</sup> and *Parking Brixen*.<sup>165</sup> Accordingly, the duty of transparency is intended to preclude any risk of favouritism or arbitrariness on the part of contracting authorities by ensuring

*Makedoniko Metro and Mihaniki*, cited *supra* note 10, para 69, where the Court held that even if the directives on public procurement do not contain specifically applicable provisions, the general principles of EU law govern procedures for the award of public contracts; Case C275/98, *Unitron Scandinavia and 3-S*, [1999] ECR I-8291, para 30 et seq, where the Court held that EU law principles such as the principles of transparency and the prohibition of discrimination on grounds of nationality must embrace the remit of the public procurement directives.

161. See Joined Cases C-117/76 & C-16/77, *Ruckdeschel and Others*, [1977] ECR 1753, para 7.

162. See Joined Cases 201 & 202/85, *Klensch and Others*, [1986] ECR I-3477, para 9, and Case C-442/00, *Rodríguez Caballero*, [2002] ECR I-11915, para 32.

163. See *Commission v. Denmark*, cited *supra* note 160, paras. 37–39, and *Commission v. Belgium*, cited *supra* note 83, in particular paras. 51–56. See also Case C-496/99, *Commission v. CAS Succhi di Frutta*, [2004] ECR I-3801, para 108.

164. *Telaustria*, cited *supra* note 10.

165. *Parking Brixen*, cited *supra* note 32.

a sufficient degree of advertising, which would result in opening up the market to competition and by guaranteeing effective review mechanisms of the impartiality of the procurement procedures.

The duty of transparency also implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents in order to enable all reasonably informed tenderers to see their significance and to allow unequivocally their interpretation. The duty of transparency must also enable contracting authorities to ascertain whether the tenders submitted satisfy the criteria applied to the relevant contract.<sup>166</sup>

## 5. Conclusions

The vision and aspirations of European Institutions towards a Single Market Act<sup>167</sup> have identified public procurement reforms as essential components of competitiveness and growth<sup>168</sup> and as indispensable instruments of delivering public services.<sup>169</sup> The Court of Justice has hinted where these reforms are needed. The substantive public procurement rules and mainly the Public Sector Directive suffer from legal porosity as a result of exhaustive harmonization. Exhaustive harmonization represents a *de lege lata* approach to public procurement regulation on the part of the EU legislature. This approach has developed certain deficiencies. The effectiveness of the procurement rules is thus compromised and the Court has applied, through a rule of reason approach, a hybrid transplant of EU principles on the public procurement directives in order to control their porosity. However, this

166. See Commission Interpretative Communication on the Community Law Applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, O.J. 2006, C 179/02. The Commission drew up best practice in practically applying the case law on contract awards which are not or not fully subject to the provisions of the directives but capable of attracting considerable interest from undertakings located in different Member States by recommending means of adequate and commonly used publication of notices in the Member States, such as the internet, the contracting authority's website, or specific portal websites, national official journals and other means of publication including a voluntary submission to the OJEU/Tenders Electronic Daily for larger value contracts.

167. See Commission Communication, *Towards a Single Market Act*, cited *supra* note 1.

168. See Commission Communication, *Europe 2020, A strategy for smart, sustainable and inclusive growth*, COM (2010)2020 final.

169. See Commission, Guide to the application of the European Union rules on State aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, SEC(2010)1545 final. See Commission, *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement*, SEC(2010)1258, final.

treatment is temporary and not conducive to legal certainty and legitimate expectation.

Public contracts awarded by utilities to their affiliated entities, over which they exercise dominant influence, do not pose any significant concern and will remain unaffected by any reforms. The author maintains that reforms of the public procurement regime will be limited and focus mainly on the way service concessions and contracts awarded by a contracting authority to another contracting authority on the basis of an exclusive right based on law, regulation or administrative provision compatible with the Treaty are regulated in the public procurement acquis, in the light of its interface with the Services Directive.<sup>170</sup> On the other hand, public-public partnerships and in-house contractual relations between contracting authorities or undertakings over which the former exercise control similar to that exercised over their own departments and the controlled entities operationally dependent on them link conceptually very well with public service contracts relating to services of general economic interest or contracts having the character of a revenue-producing monopoly, and as such reflect on the positive dimension of inherent flexibility in the public procurement directives.

Public contracts which fall below the stipulated value thresholds (sub-dimensional contracts) represent the most difficult category for reform. On the one hand, they encapsulate a significant amount of Member States' public expenditure which *de lege lata* escapes the control of the public procurement acquis. On the other hand, the Court is keen to subject these contracts to some form of competition and has supplemented the public procurement directives with EU law principles which ensure a parallel process of procurement with dimensional public contracts. This development has created uncertainty in the market and resulted in a dysfunctional application of procurement rules to those contracts. The administrative and procedural burdens on the part of contracting authorities often exceed any potential efficiency benefits resulting from competitively tendering sub-dimensional contracts. In addition, adequate safeguards against intentional division of dimensional contracts into lots in order to avoid the applicability of the public procurement directives exist in the current acquis.

The Green Paper uses rhetoric which implies the need for simplification of public procurement in the European Union. The author's view is that simplification will result from procedural efficiencies and streamlining the application of the substantive rules. However, the challenge of the forthcoming reforms will be to demarcate the exhaustive harmonization of

170. See Directive 2006/123/EC of the European Parliament and of the Council of 12 Dec. 2006 on services in the internal market (O.J. 2006, L 376/36).

the public procurement directives in the light of market access of undertakings from third countries and sheltered markets for small and medium enterprises. Public procurement will be an essential part of the Single Market Act and its regulation will play a pivotal role for the Europe 2020 Growth Strategy. Its success will be constantly evaluated by Member States and the public markets.

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