

Public Procurement in the EU: Jurisprudence and Conceptual Directions

Christopher H. Bovis*

Introduction

The significance of liberalised and integrated public procurement as an essential component of the Single Market is well documented¹. 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 market². 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 savings³.

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 nationality⁴. The need for competitiveness and transparency in public procurement markets is considered as safeguard to the attainment of fundamental principles of the Treaties⁵.

* Professor Christopher H. Bovis JD, LL.M., MPhil, FRSA, H.K. Bevan Chair in Law, Law School, University of Hull

¹ See European 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 European Commission, *White Paper for the Completion of the Internal Market*, COM (85) 310 fin, 1985; also Green Paper on Public Procurement in the European Union: *Exploring the way forward*, European Commission 1996; also European Commission, Communication on Public Procurement in the European Union, COM (98) 143.

³ See Commission of the European Communities, *The Cost of Non-Europe, Basic Findings, Vol.5, Part.A; The Cost of Non-Europe in Public Sector Procurement*, Official Publications of the European Communities, 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 CMLRev, 2009, 805-846; also Bovis, *Recent case law relating to public procurement: A beacon for the integration of public markets*, 39 CMLRev, 2002, pp. 1025-1056.

⁵ See Bovis, *The State, Competition and Public Services*, Chapter 11 in *The European Union Legal Order after Lisbon*, Birkinshaw and Varney (Eds), Kluwer, 2010. Also, cases C-223/99 *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* and C-260/99 *Excelsior Snc di Pedrotti Runa & C v. Ente Autonomo Fiera Internazionale di Milano*, [2001] ECR 3605; C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, [1998] ECR 6821; C-44/96, *Mannesmann Anlagenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH*, [1998] ECR 73.

The current public procurement legal regime⁶ 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 privatised 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 compliance⁷ by covering governing supplies, works and services procurement in a single legal instrument⁸.

The evolution of public procurement law has been shaped by the instrumental role of the European Court of Justice. The Court's jurisprudence has influenced the interpretation of public procurement legal concepts such as contracting authorities⁹, the remit of selection and qualification criteria¹⁰, and the parameters for contracting authorities to use environmental and social considerations¹¹ as award criteria.

This review is structured into three parts. In the first part, the author provides for a critical evaluation of concepts developed and evolved through the case-law of the European Court of Justice, especially after the enactment of the current public procurement Directives in 2006.

In the second part, the author assesses the principles which underpin the public procurement remedies regime and determine the judicial review of public contracts at

⁶ See Directive 2004/18, OJ L 134, 30.4.2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17, OJ L 134, 30.4.2004 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 CMLRev 2006, p.p. 461-495.

⁸ See Directive 2004/18, *op.cit.*

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 Truley* [2003] ECR-193; case C-84/03, *Commission v Spain*, ; case C-44/96 *Mannesmann Anlagenbau Austria*, [1998] ECR I-73; case C-31/87 *Beentjes* [1988] ECR 4635; case C-360/96 *BFI Holding* [1998] ECR I-6821; case C-223/99, *Agora Srl v Ente Autonomo Fiera Internazionale di Milano*, and case C-260/99 *Excelsior Snc di Pedrotti runa & C v. Ente Autonomo Fiera Internazionale di Milano*, [2001] ECR 3605; case C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, [1998] ECR 6821; case C-343/95 *Diego Cali et Figli* [1997] ECR I-1547; case C-380/98 *University of Cambridge* [2000] ECR I-8035; case C-237/99 *Commission v France* [2001] ECR I-939; 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* [1999] ECR I-8121; case C-18/01 *Korhonen and Others* [2003] ECR I-5321; case C-237/99 *Commission v France* (OPAC), [2001] ECR I-939.

¹⁰ See case C-315/01, (*GAT*) and *Österreichische Autobahnen und Schnellstraßen AG (ÖSAG)*, ECR [2003] I-6351; case C-21/03 and C-34/03, *Fabricom SA v État Belge*, ; case C-285/99 and case C-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, paragraph 29; case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 92; case C-314/01 *Siemens and ARGE Telekom & Partner* [2004] ECR I-2549, paragraph 44; case C-57/01 *Makedoniko Metro and Mikhaniki* [2003] ECR I-1091.

¹¹ See case C-31/87, *Gebroeders Beentjes B.V. v. State of Netherlands* [1988] ECR 4635; case C-225/98, *Commission v. French Republic (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.

national level, particularly after the coming into force of the Remedies Directive in 2009.

In the third part, the author exposes the *exhaustive harmonisation* prescribed in the current public procurement Directives as the cause of their porosity and the resultant ineffectiveness of the public procurement *acquis*.

The review has the following aims. Its main aim is to draw upon emerging conceptual themes from the Court's jurisprudence which determine the traction of the procurement rules and prompted the European Commission to launch a Green Paper¹² 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 of the review is to demonstrate that *exhaustive harmonisation* 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 its 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 Community law.

Finally, the review intends to provide insights to possible legal reforms of the substantive public procurement Directives in the light of the EU 2020 Growth Strategy.

1. The Traction of Public Procurement Directives

Two concepts are fundamental to the traction of public procurement law: the concept of contracting authorities (contracting entities in Utilities procurement) and the concept of public contracts.

1.1. Developments in the Court's jurisprudence related to the concept of contracting authorities

1.1.1. 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 terms¹³ in order to bring under the remit of

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

¹³ See case C-44/96 *Mannesmann Anlagenbau Austria and Others*, [1998] ECR I-73, paragraphs 20 and 21; case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 51 to 53; case C-214/00 *Commission v Spain* [2003] ECR I-4667, paragraphs 52 and 53; and case C-283/00 *Commission v Spain* [2003] ECR I-11697, paragraph 69.

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 law¹⁴. The Utilities Directive recognises 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 them¹⁵. The Utilities Directive includes also as contracting entities undertakings which, although they are not contracting 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.¹⁶

The test of *dualism*¹⁷, 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 non-industrial or commercial character. Consequently, *Commission v. Spain*¹⁸ has recognised 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 constitute a criterion for precluding it from being considered as a contracting authority, and in particular as being incompatible with 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 contracting authority is also compatible with the concept of public undertakings, in accordance with the Utilities Directive.

*Adolf Truley and Korhonen*¹⁹ 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

¹⁴ See Article 1(9) of the Public Sector Directive and Article 2(1)(a) of the Utilities Directive. A body governed by public law indicates any organization which satisfies the following conditions in a cumulative manner. 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 fulfill the three cumulative criteria for a body governed by public law are set out in Annex III of the Directive.

¹⁵ See Article 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.

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

¹⁷ See case C-44/96 *Mannesmann Anlagenbau Austria*, [1998] ECR I-73, paragraphs 17 to 35.

¹⁸ See case C-214/00 *Commission v Spain* [2003] ECR I-4667, paragraphs 54, 55 and 60; and case C-283/00 *Commission v Spain* [2003] ECR I-11697, paragraph 75.

¹⁹ See case C-373/00 *Adolf Truley* [2003] ECR-193, paragraph 66, and C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraphs 48 and 59.

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*²⁰ 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*²¹ regarded semi-public undertakings as contracting authorities, where in particular a company governed by private law and is 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 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 viability²².

*Oymanns*²³ 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 rested on the principle 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, which do not have industrial nor commercial character. In similar vein, *Bayerischer Rundfunk*²⁴ 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”.

1.1.2. Contracting authorities and the non- applicability of the public procurement Directives

The test of *commercialism*²⁵ 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*²⁶ when the Court recognised that contracting authorities are free to set up legally independent entities if they wish to

²⁰ See case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 51 to 53;

²¹ See case C-26/03 *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] ECR I-1.

²² See case C-283/00, *Commission v Spain*, [2003] ECR I-11697. See cases C-373/00 *Adolf Truley* [2003] ECR-193, paragraph 42, and C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraphs 51 and 52.

²³ See case C-300/07, *Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik, v AOK Rheinland/Hamburg*, judgment of 11 June 2009.

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

²⁵ See cases C-360/96 *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, [1998] ECR 6821; C-44/96, *Mannesmann Anlagenbau Austria AG et al. v Strohal Rotationsdurck GesmbH*, op.cit.

²⁶ See case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 51.

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 to be 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 which are not economically justified. In parallel, the test of *competitiveness*²⁷ indicates that any element of competition from private undertakings in the activities of an undertaking, dilutes the assumption that for that undertaking to be considered as a body governed by public law, it must be established for the specific purpose of meeting needs in the general public interest not having an industrial or commercial character. Therefore, proof of the competitiveness test also renders the public procurement rules inapplicable.

Finally, the test of *dependency*²⁸ applied by the Court in *Teckal*²⁹, 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.

1.1.3. The in-house procurement arrangements

1.1.3.1. Similarity of control and contracting authorities

*Teckal*³⁰, inserted flexibility in 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 which should solely be based neither on company law features nor on 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

²⁷ See case C-223/99 *Agora Srl v Ente Autonomo Fiera Internazionale di Milano*, and C-260/99 *Excelsior Snc di Pedrotti runa & C v. Ente Autonomo Fiera Internazionale di Milano*, judgment of 10 May 2001; case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 51.

²⁸ See case C-237/99, *Commission v. France*, case C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge*, case C-107/98, *Teckal Srl v Comune di Viano*, [1999] ECR I-8121.

²⁹ See case C-107/98 *Teckal*, *op.cit.*

³⁰ See case C-107/98 *Teckal*, *op.cit.*

contracting authorities. In particular, control is extended beyond the ‘dominant influence’ notion found in Utilities Directive³¹. For the purposes of in-house relations, the object of such control should not be 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*³², 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, the ability to possess 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 is not emanating from legislative provisions alone.

In *Cabotermo*³³, 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 of 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 provided the all contracting authorities exhibit control over the relevant entity which is similar to that over their own departments³⁴. In such situations, as in the case of inter-municipal co-operative 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 met³⁵.

³¹ See Article 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 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 paragraph 65.

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

³⁴ See case C-340/04 *Carbotermo and Consorzio Alisei*, paragraph 37, and case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 57.

³⁵ See case C-324/07, *Coditel Brabant SA v Commune d’Uccle, Région de Bruxelles-Capitale*, [2009] 1 CMLR 29.

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 individually³⁶.

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*³⁷ 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 kind³⁸. 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 a control similar to that which it exercises over its own departments³⁹.

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*⁴⁰ 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 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.

Parking Brixen prevents similarity of control in situations where there is visibility of imminent participation of private capital in a wholly owned public undertaking or entity. Interestingly, although *ANAV*⁴¹ extends the *Teckal* criteria to companies limited by shares, it appears to link prospective privatisations 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

³⁶ See case C-458/03 *Parking Brixen*, op.cit, paragraph 62.

³⁷ See case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1.

³⁸ See case C-26/03 *Stadt Halle and RPL Lochau*, op.cit, paragraph 50.

³⁹ See case C-26/03 *Stadt Halle and RPL Lochau*, op.cit, paragraph 49.

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

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

competition, which would interfere with the objectives pursued by the procurement Directives and the principles of Community law⁴².

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 privatisation 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 upon the concept of institutional public-private partnerships, where contracting authorities entrust the delivery of public services. Additionally, prospective privatisations 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*⁴³ appears to correct the potential problems deriving from *AVAV*. 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 award⁴⁴. 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 capital⁴⁵.

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 possible⁴⁶ because the transfer is viewed as an artificial device to circumvent public procurement rules.

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 exists, 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 in which 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 that company is not present. That conclusion is not contradictory to *Coname*⁴⁷ which

⁴² See case C-29/04 *Commission v Austria* [2005] ECR I-563, paragraph 48

⁴³ See case C-573/07 *Sea Srl. v. Comune di Ponte Nossola* ECR [2009] I-08127.

⁴⁴ See case C-26/03 *Stadt Halle and RPL Lochau*, op.cit, paragraphs 15 and 52.

⁴⁵ See case C-458/03 *Parking Brixen* [2005] ECR I-8612, paragraphs 67 and 72.

⁴⁶ See case C-29/04 *Commission v Austria* [2005] ECR I-9705, paragraphs 38 to 41.

⁴⁷ See case C-231/03 *Coname* [2005] ECR I-7287 paragraphs 5 and 28.

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 that award.

Sea made the situation clear when 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.

1.1.3.2. Operational dependency and contracting authorities

The *Teckal* second criterion specifies that an essential part of the controlled entity’s activities 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 that which they exercise 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 the essential part of the controlled entities activities cannot be carried out for the benefit of the controlling public authority, if the geographical area of whose activities has been extended to the entire country and abroad.

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% criterion, such 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*⁴⁸ revealed interesting insights on operational dependency. The Court declared that the 80% rule of affiliated operational dependency cannot be imported into the public sector procurement for the reasons of that provision is being 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 Community 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, organisational planning, market

⁴⁸ See case C-340/04 *Carbotermo Spa v Comune di Busto Arsizio* [2006] ECRI 4137.

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.

1.1.3.3 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 departments⁴⁹. That possibility for public authorities to use their own resources to perform the public interest tasks conferred on them may be exercised in co-operation with other public authorities⁵⁰.

*Commission v Germany*⁵¹ provided a superb demonstration of flexibility in the hands of contracting authorities in relation to their freedom to organise and deliver public services. Co-operation between independent contracting authorities in the form of establishing an entity upon which no similar control is exercised to that over their own departments, resulting in the entrustment of a contract 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 co-operation exists in relation to a public task or service specified under Community 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 is materialised. The Court used an analogy with *Coditel Brabant*⁵² where contractual relations between inter-municipal co-operative societies whose members are contracting authorities and a jointly controlled entity can be deemed in-house.

⁴⁹ See case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 48.

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

⁵¹ See case C-480/06, *Commission v Germany*, [2009] ECR I-04747.

⁵² See case C-324/07, *Coditel Brabant SA v Commune d'Uccle, Région de Bruxelles-Capitale*, [2009] 1 CMLR 29.

1.2 The Concept of Public Contracts

The existence of a public contract is a precondition to the application of the public procurement Directives⁵³. Public procurement law has configured the meaning of a public contract. The determining factor of its nature is not what and how is described as public contract in national laws, nor is the legal regime (public or private) that governs its terms and conditions, nor are 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.

1.2.1 Developments in the Court's jurisprudence related to the concept of public contracts

A functional application of the pecuniary interest consideration requirement by the Court brought a variety of payment mechanisms 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*⁵⁴ 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 of 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 executions of works. The means of execution are irrelevant, in the sense that prime contracting or sub-contracting could

⁵³ See Article 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. Article 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 fulfill an economic or technical function. Article 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 products and which also covers, as an incidental matter, placement and installation operations must be considered as a public supply contract. Article 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*, judgment of 29 October 2009.

be utilised 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.

Interestingly, planning gain contracts or contractual arrangements emanating from planning decisions of contracting authorities are covered by the public procurements Directives, irrespective of the identity of the entity responsible for their execution. The Court in *Ordine degli Architetti* has ruled⁵⁵ 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 was to be 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*⁵⁶ 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 of agency or representation services, provided the agent or representative is responsible for signature, project authorisation 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 of 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 materialisation of a project. In *Auroux*⁵⁷, 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, once constructed, 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 of a work constitutes a public works contract, regardless of whether or not it is anticipated that the first contracting authority is or will become the owner of all or part of that work. Ownership of an asset is crucial only in determining work

⁵⁵ See case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409.

⁵⁶ See case C-264/03, *Commission v. France* [2005] E.C.R. I-8831.

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

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 is capable in demonstrating 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.

Auroux, although reflecting obvious similarities with *Commission v Germany*⁵⁸ in the sense of public sector entities co-operating for the delivery of public projects, differs fundamentally in that the latter case introduced a genuine public-public partnership relation, where the contractual interface was not based upon pecuniary interest considerations nor any payment was materialised in return of the delivery of the contract's objects.

Auroux revealed that the 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, 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-contracts⁵⁹. The Court, however, ruled that in order to 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.

⁵⁸ See case C-480/06, *Commission v Germany*, op.cit ft. 52

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

The Court in *Helmut Müller*⁶⁰ held that the sale 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.

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

1.2.2 Contracts below the thresholds of the Directives

The Court’s settled case law⁶¹ has made clear that contracts below the stipulated thresholds of the Directives are excluded from their applicability. *Vestergaard*⁶² ruled 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 Treaty⁶³. *Medipac-Kazantzidis*⁶⁴, confirmed that contracts below the stipulated thresholds need to comply with the duty of transparency⁶⁵ as well as the principle of non-discrimination on grounds of

⁶⁰ See case C-451/08 *Helmut Müller v Bundesanstalt für Immobilienaufgaben*, [2010] 3 C.M.L.R. 18.

⁶¹ See joined cases C-147/06 and C-148/06, *SECAP SpA and Santorso Soc. coop. arl*, [2008] E.C.R. I-3565; See case C-412/04 *Commission v Italy* [2008] ECR I-0000, paragraph 65.

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

⁶³ See case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60.

⁶⁴ See case C-6/05 *Medipac-Kazantzidis AE v Venizelio-Panania (P.E.S.Y. KRITIS)*, [2007] ECR I-4557.

⁶⁵ See case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 and 61; case 59/00 *Vestergaard*, paragraphs 20 and 21; Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16 and 17, and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraphs 46 to 48.

nationality⁶⁶. *Correos*⁶⁷ 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 thresholds⁶⁸.

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 which is 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 reviewed⁶⁹.

However, the application of the fundamental principles of the Treaty to contracts below the stipulated thresholds is based on the assumption that the contracts in question are of certain cross-border interest⁷⁰.

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 of 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 modest⁷¹, 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

⁶⁶ See *Telaustria and Telefonadress*, paragraph 60; Case C-50/00 *Vestergaard*, paragraphs 20 and 21; Case C-264/03 *Commission v France* [2005] ECR I-8831, paragraph 32; and Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, paragraph 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 See case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 48, and case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 20.

⁶⁹ See case C-458/03 *Parking Brixen* [2005] ECR I-8612, paragraph 49, and case C-410/04 *ANAV*, paragraph 21.

⁷⁰ See case C-507/03 *Commission v Ireland* [2007] ECR I-0000, paragraph 29, and *Commission v Italy*, paragraphs 66 and 67.

⁷¹ See case C-231/03 *Coname* [2005] ECR I-7287, paragraph 20.

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 services⁷².

1.2.3 Annex II B Services Contracts

For Annex II B Services Contracts, which are also referred to as non-priority public service contracts, the Community 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 reason, the public sector Directive merely imposes a requirement of publicity after the award of such service contracts.

*An Post*⁷³ 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 Publications Office of the EU. The other procedural rules provided for by 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 held⁷⁴ 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 nationality⁷⁵ and contravenes the purpose of the public procurement Directives to eliminate barriers to intra-Community trade in accordance to the fundamental principles of Community law, and in particular the right of establishment and the freedom to provide services⁷⁶.

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

⁷³ See case C-507/03, *Commission v Ireland*, (An Post) [2007] ECR I-9777.

⁷⁴ See case C-324/98 *Telaustria and Telefonadress*, [2000] ECR I-10745, paragraphs 60 and 61, and case C-231/03 *Coname* [2005] ECR I-7287, paragraph 17.

⁷⁵ See case C-231/03 *Coname* [2005] ECR I-7287, paragraph 19.

⁷⁶ See case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 32; and case C-92/00 *HI* [2002] ECR I-5553, paragraph 43.

1.2.4 Service concessions as public contracts

*Telaustria*⁷⁷ recognised 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 Treaty, in general and, in particular, the principle of non-discrimination on the ground of nationality and the duty of transparency. The latter is indented 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*⁷⁸ 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*⁷⁹, the Court reiterated that public authorities concluding services concessions are responsible to 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 services⁸⁰. The Court has suggested that the right of establishment and the freedom to provide services are specific expressions of the principle of equal treatment⁸¹. The prohibition on discrimination on grounds of nationality is also a specific expression of the general principle of equal treatment⁸². 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 nationality⁸³. 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 procedures⁸⁴.

⁷⁷ See case C-324/98 *Telaustria and Telefonadress*, [2000] ECR I-10745.

⁷⁸ See case C-231/03, *Consorzio Aziende Metano (Coname) v. Comune di Cingia de' Botti* [2005] ECR I-7287.

⁷⁹ See case C-458/03 *Parking Brixen* [2005] ECR I-8612.

⁸⁰ See case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60, and case C-231/03 *Coname* [2005] ECR I-7287, paragraph 16.

⁸¹ See case C-3/88 *Commission v Italy* [1989] ECR 4035, paragraph 8.

⁸² See case 810/79 *Überschär* [1980] ECR 2747, paragraph 16.

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

⁸⁴ See case case C-324/98 *Telaustria and Telefonadress*, op.cit, paragraphs 61 and 62.

Recourse to Article 86(1) EC [Article 106(1) TFEU] does not alter the requirement of contracting authorities to comply with the principle of transparency for service concessions, as the granting of special or exclusive rights by Member States must not contravene the Treaty rules on equal treatment and the competition provisions⁸⁵.

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 question⁸⁶.

The Court has given some further guidance on what kind and degree of transfer of risk is required for a contract to be categorised as a service concession. In *Eurawasser*⁸⁷, 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.

1.3 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 initiating fresh award procedures. In *Presstext*⁸⁸, various changes were introduced by the contracting authority, in particular instituting an internal re-organisation by transferring the contract to a subsidiary of the economic operator that was carrying out the contract

⁸⁵ See Bovis, *The State, Competition and Public Services*, Chapter 11 in *The European Union Legal Order after Lisbon*, Birkinshaw and Varney (Eds), Kluwer, 2010.

⁸⁶ See case C-382/05 *Commission v Italy* [2007] ECR I-6657, paragraph 34, and case C-437/07 *Commission v Italy* [2008] ECR I-0000, paragraph 29; see also European Commission Interpretative Communication on Concessions under Community Law, OJ 2000 C 121, p. 2.

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

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

and waiving the right to terminate contract for three years. Additionally, a rebate increase from 15% to 25% 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*⁸⁹ (Ambulances case) an extension of ambulance services contract to a new area increasing its value by 15% was regarded as a material change. In *Wall*⁹⁰, 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*⁹¹, contract changes effected in the period between the contract notification notice in the OJEU and the award of the contract are material when the final contract included additional works which were not mentioned in OJEU 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 have been envisaged in the OJEU notice published by the contracting authority.

A post-award change in the financial make-up of a contract, which results 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.

⁸⁹ See case C-160/08, *Commission v Germany*, judgment of 29 April, 2010.

⁹⁰ See case C-91/08 *Wall AG v Stadt Frankfurt am Main*, judgment of 13 April 2010.

⁹¹ See case C-423/07, *Commission v Spain*, judgment of 22 April, 2010.

1.3.3 Developments in the Court's jurisprudence related to selection and award procedures

In *Lianakis*⁹² 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 in question was the fusion of selection and award criteria, an issue already clarified by the Court. The Court has maintained⁹³ 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 contract⁹⁴. However, the two procedures (the suitability evaluation and bid evaluation) are totally distinct processes, which shall not be confused⁹⁵.

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

In *Commission v Greece*⁹⁶, 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*⁹⁷ 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

⁹² See case C-532/06 *Emm G. Lianakis AE v Alexandroupolis* [2008] E.C.R. I-251.

⁹³ See case C-31/87, *Gebroeders Beentjes B.V. v. State of Netherlands* [1988] ECR 4635.

⁹⁴ See case C-28/86, *Bellini op.cit.*

⁹⁵ See case C-71/92, *Commission v. Spain*, [1993] E.C.R. I-5923. Also, *Beentjes*, op.cit at paragraphs 15 and 16, where the simultaneous application of selection of tenderes and award procedures is not precluded, on condition that the two are governed by different rules.

⁹⁶ See case C-199/07, *Commission v Greece*, judgment of November 12, 2009.

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

the *definition contract procedure* was not a form of competitive dialogue since it covered several different contracts.

1.3.4 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*⁹⁸ the Court ruled that Greek law prohibiting all media companies from bidding for public contracts was unlawful, as it contravenes with the principle of freedom to provide services. Also, *Assitur*⁹⁹ ruled that Italian law prohibiting affiliates from same group from submitting separate bids in a tendering procedure contravenes the public procurement Directives and finally *Serrantoni*¹⁰⁰ maintained 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 Community law principle on freedom to provide services.

2. The Traction of the Remedies Directives in Public Procurement

2.1 Enforcement of Public Procurement Directives

The Remedies Directives¹⁰¹ 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 publicised attestation and conciliation procedures, which were branded as innovative compliance solutions were not used by Member States and contracting authorities.

The new amending Remedies Directive¹⁰² 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

⁹⁸ See case C-213/07 *Michaniki AE v Ethniko Simvoulío Radiotileorasis v Ipourgós Epikratias and others*, judgment of December 16, 2008.

⁹⁹ See case C-538/07, *Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano*, judgment of 19 May 2009.

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

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

¹⁰² See Directive 2007/66/EC of 11 December 2007, OJ L335/31.

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.

2.2 *The principle of procedural autonomy*

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

2.2.1 *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*¹⁰³, provided that, in pursuit of fundamental principle of legal certainty, such specific time limits are reasonable¹⁰⁴.

2.2.2 *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 on their own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer¹⁰⁵. However, a tenderer harmed by a decision to award a public contract, the lawfulness of which 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.

¹⁰³ See case C-470/99, *Universale-Bau AG, Bietergemeinschaft*, ECR [2002] I-11617;

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

¹⁰⁵ See case C-315/01, *Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) and Österreichische Autobahnen und Schnellstraßen AG (ÖSAG)*, [2003] ECR I-6351;

2.2.3 Admissibility requirements of interim measures

Interim measures represent an autonomous legal remedy which is to remain unconditional to any other judicial review process. Their objective is to correct the alleged infringement or preventing 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.

The Court examined¹⁰⁶ 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 act¹⁰⁷.

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 do not provide for any derogation regarding the possibility of appealing against procedural acts, or administrative measures which do not bring administrative proceedings to an end¹⁰⁸.

2.2.4 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 infringement¹⁰⁹. 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.

2.3 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

¹⁰⁶ See cases C-214/00, *Commission of the European Communities, v Kingdom of Spain*, ECR [2003] I-4667; C-236/95, *Commission v Greece* [1996] ECR I-4459.

¹⁰⁷ See case C-236/95 *Commission v Greece* [1996] ECR I-4459.

¹⁰⁸ See case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671. The conception of precluding the review of procedural acts is embedded in Community case-law. See case C-282/95 P *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 that is a ground which the Court may examine of its own motion, see case 346/87 *Bossi v Commission* [1989] ECR 303.

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

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

2.3.1 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 procedures¹¹⁰.

2.3.2 Ineffectiveness

The threat of ineffectiveness is deterrent factor in the award of public contracts in breach of the relevant Directives and offers a great deal of discretion in the hands of national law¹¹¹. 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.

Overriding reasons are economic interests, in exceptional circumstances, which manifest the conclusion of the contract due to the disproportionate consequences arising from its 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.

2.3.3 Obligation to allow sufficient time between contract award and contract conclusion

Member States are required to provide for a review procedure so that an applicant may set aside a decision of a contracting authority to award a public contract to a third party, prior to the conclusion of the contract¹¹². That right of review for tenderers must be independent of the possibility for them to bring an action for damages once the contract has been concluded¹¹³. A national legal system that makes impossible to contest the award decision because of the award decision and the conclusion of the contract occurring at the same time deprives interested parties of any possible review

¹¹⁰ See Article 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 Article 2 (d) 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.

¹¹³ See case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraph 43.

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.

2.3.4 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 tenders¹¹⁴, 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 procedures¹¹⁵. The remedies Directives preclude national legislation from limiting 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 contract¹¹⁶, which must be limited to exceptional cases or must necessarily be based on serious grounds¹¹⁷. Although a contracting authority is required to notify candidates and tenderers of the grounds for its decision if it decides to withdraw the invitation to tender for a public contract, 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 authorities¹¹⁸. Nor may such a restriction could 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 of Member State providing for interim relief procedures in relation to any decision taken by the contracting authorities¹¹⁹. On the other 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 amendable to review¹²⁰. 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 concluded¹²¹.

¹¹⁴ See case C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall und Energieverwertungsanlage TREA Leuna*, op.cit.

¹¹⁵ See case C-92/00 *Hospital Ingenieure* [2002] ECR I-5553, paragraph 55.

¹¹⁶ See OJ 1993 L 199, p. 54.

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

¹¹⁸ See case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraphs 32-35.

¹¹⁹ See case C-92/00 *Hospital Ingenieure* [2002] ECR I-5553, paragraph 49.

¹²⁰ See the Opinion of Advocate-General Stix-Hackl in case C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall und Energieverwertungsanlage TREA Leuna*, points 23-29, delivered on 23 September 2004.

¹²¹ See case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraph 43.

2.3.5 *Locus standi* and interest to review acts

*Fritsch Chiari*¹²² 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 infringement¹²³, they cannot interpret the term interest in obtaining a public contract strictly¹²⁴. 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 authority¹²⁵.

Persons to whom review procedures must be available must include, at least, any person having or having had an interest in obtaining a public contract¹²⁶ who has been or risks being harmed by an alleged infringement¹²⁷. The formal capacity of tenderer or candidate is not thus required¹²⁸. The Court maintained that an assessment of an aggrieved tenderer's interest in reviewing a decision or an act of a contracting authority should be examined on the face that he did not participate in the contract award procedure, as well as he did not appeal against the invitation to tender before the award of the contract.

*Grossmann*¹²⁹ 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.

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

¹²³ See case C-327/00 *Santex* [2003] ECR I-1877, paragraph 47.

¹²⁴ See case C-410/01, *Fritsch, Chiari & Partner and Others*, ECR [2003] I-11547, paragraphs 31 and 34.

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

¹²⁶ See case C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall und Energieverwertungsanlage TREA Leuna*, judgment of 11 January 2005,

¹²⁷ See case C-212/02 *Commission v Austria*, unpublished.

¹²⁸ See case C-230/02, *Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG and Republik Österreich*, [2004] ECR I-1829.

¹²⁹ See case C-230/02, *Grossmann Air Service*, op.cit.

*Espace Trianon*¹³⁰ 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 recognised 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*¹³¹, 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.

2.4 The principle of procedural equality

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

2.4.1 Time limits to decide review of acts or decisions

The duration to assess the legality of act or decisions of contracting authorities¹³² 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 actions¹³³.

In *Universale Bau*¹³⁴, 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 absence of Community rules, Member States are free to provide procedural rules if they are coherent with fundamental principles of EC Treaty. The Court considered that a two-week limitation period in principle consistent with principles of effectiveness and equivalence and reflect an element of appropriateness in the light of their overall objective¹³⁵.

In *Sanetex*¹³⁶, Italian law provided that an invitation to tender or clauses thereof must be challenged within the limitation period of sixty days; when that period has expired,

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-07805.

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-08189.

¹³² See case C-92/00, *Hospital Ingenieure Krankenhausstechnik Planungs- GmbH (HI) and Stadt Wien*, [2002] ECR I-5553.

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

¹³⁴ See case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617.

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

¹³⁶ See case C-327/00 *Santex SpA v Unità Socio Sanitaria Locale n. 42 di Pavia* [2003] ECR I-1877.

a challenge is no longer possible. An aggrieved bidder did not contend specific (potentially discriminatory) clause because contracting authority led him to believe that disputed clause would be interpreted in a non-discriminatory manner. After the elapse of the time limitation period, the contracting authority excluded bidder from tender procedure on basis of potentially discriminatory clause. The Court considered that the 60 days limitation period as being reasonable but held that the changing conduct of contracting authority has rendered the exercise of the rights conferred on tenderer excessively difficult. The latter requirement gives ground to national courts to interpret domestic law in such a way which might not apply or extend limitation-periods which render redress excessively difficult.

In *Lämmerzahl*¹³⁷, the Court dealt with an application for review being deemed inadmissible where no complaint is 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 the contracting authority must, in view of limitation period, be seen as rendering excessively difficult the exercise by the tenderer concerned of rights conferred on him by EC law

In *Uniplex*¹³⁸ 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 and requires contracting authority to notify unsuccessful candidates of the relevant reasons at least a summary of its decision in relation to the award of a public contract. The Court had the opportunity 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 that 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 period begins to run from the date on which the claimant knew or ought to have known 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*¹³⁹, 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.

¹³⁷ See case C-241/06 *Lämmerzahl GmbH v Freie Hansestadt Bremen*, [2008] 1 CMLR 462.

¹³⁸ See case C-406/08 *Uniplex (UK) Ltd v NHS Business Services Ltd* [2010] ECR I-0000.

¹³⁹ See case C-456/08 *Commission v Ireland* [2010] ECR I-0000.

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

2.4.2 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 procedures¹⁴¹. National legislation which restricts judicial protection in public procurement disputes through the conditional application of interim measures, 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.

2.4.3 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. Remedies Directive contains no further requirements, as to the burden of proof method of calculation. National legislator free to decide, must however 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 principle of likelihood of harm from legal systems requiring proof is evident 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 required that in cases where no notice was published or no tender procedure was carried out.

*Commission v Germany*¹⁴², recognized that the principle *pacta servanda sunt* and the prospect of damages litigation for termination of illegally awarded contracts cannot act as defense 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 breach happened and exhausted by conclusion of the contracts, and that after conclusion of the relevant contracts there is no actual breach. The Court held that the effects of unlawful contract awards go beyond the conclusion of contract because of its long duration and breach obligations under the public procurement Directives and Community law is active as long as the unlawfully concluded contract is valid.

In *Wall / Frankfurt*¹⁴³, 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

¹⁴⁰ See case C-17/09, *Commission v Germany*, judgment of 21 January 2010.

¹⁴¹ See case C-236/95 *Commission v Greece* [1996] ECR I-4459.

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

¹⁴³ See case C-91/08 *Wall AG v City of Frankfurt*, judgment of 13 April 2010.

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, provided these 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 *Commission v Portugal*¹⁴⁴, 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 tenderers in obtaining damages. The Court pronounced that such conditionality contravenes the principle of effectiveness of Remedies Directives.

In *Aktor ATE / ESR*¹⁴⁵, 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 by virtue 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 Community 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 Community law as long as they are not less favorable than those governing similar domestic actions in accordance with the principle of procedural equality.

3. The Porosity of the Public Procurement Directives

3.1 Exhaustive harmonisation: the enemy within

Exhaustive harmonisation in the public procurement Directives has surfaced as their strategic shortcoming and has resulted in the porosity of their legal effect. Exhaustive harmonisation *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

¹⁴⁴ See case C-275/03, *Commission v Portugal*, and case C-70/06, *Commission v Portugal* [2004] ECR I-0000.

¹⁴⁵ See case C-145/08 *Club Hotel Loutraki AE and Others v Ethnico Symvoulío Radiotileorasis and Ypourgos Epikrateias* and case C-149/08 *Aktor Anonymi Techniki Etaireia (Aktor ATE) v Ethnico Symvoulío Radiotileorasis*, [2010] ECR I-0000.

undermines their effectiveness by preventing their applicability to certain contractual situations and as a result restricting a *de lege ferenda* extension of their provisions¹⁴⁶.

The effects of exhaustive harmonisation 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 86(2) EC [now 106(2) TFEU].

The porosity of the public procurement Directives in relation to contractual relations which are regarded as the by-product of exhaustive harmonisation 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 harmonisation by *lex specialis* legal instruments such as the public procurement Directives cannot impose limits on the application of primary Community law to supplement their legal thrust. The need for conformity with Community law is evident even in cases beyond exhaustive harmonisation 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 provisions¹⁴⁷ as well as their non applicability in cases of public contracts awarded pursuant to international rules¹⁴⁸, or secret contracts and contracts requiring special security measures or contracts related with the protection of Member States' essential interests¹⁴⁹. The public sector Directive also does not cover public contracts of which their object is to provide or exploit public telecommunications networks¹⁵⁰; contracts for the acquisition or rental of land; contracts related to broadcasting services; contracts related with financial securities, capital raising activities and central bank services; employment contracts; and research and development contracts which do not benefit the relevant contracting authority¹⁵¹. The Utilities Directive does not apply to

¹⁴⁶ See Bovis, *The State, Competition and Public Services*, Chapter 11 in *The European Union Legal Order after Lisbon*, Kluwer, 2010, op.cit.

¹⁴⁷ See the Utilities Directive 2004/17, OJ 2004, L 134/1.

¹⁴⁸ See Article 15 of the Public Sector Directive and Article 22(a) of the Utilities Directive.

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

¹⁵⁰ See Article 13 of the Public Sector Directive.

¹⁵¹ See Article 16 of the Public Sector Directive.

contracts awarded in a third country¹⁵²; 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 energy¹⁵³; contracts subject to special arrangements for the exploitation and exploration of oil, gas, coal or other solid fuels by virtue of European law¹⁵⁴; contracts and framework agreements awarded by central purchasing bodies¹⁵⁵, contracts of which their object activity is directly exposed to competition on markets to which access is not restricted¹⁵⁶ and contracts related to works and service concessions¹⁵⁷ which are awarded by contracting entities carrying out one or more of the activities covered by the Utilities Directive and 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 contracting authorities and Member States. Such limitations could be viewed as inhibiting factors in Member States' freedom and autonomy to organise and deliver public services and as mistrust on their part to effectively comply with the public procurement *acquis*.

3.2 *The treatment of porosity*

The Court has recognised 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 Community law is not precluded in the presence of exhaustive provisions of secondary law¹⁵⁸, the Court explicitly recognised that the *lex specialis* character of the procurement Directives aims at complementing fundamental freedoms of Community law in respect to 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 *acquis* deriving from fundamental principles of Community law, whereas the second conceptual action manifests the need to increase compliance by contracting authorities by promoting the objectivity of the procurement Directives and enhancing their judiciability, whilst in parallel limiting their inherent flexibility. Thus, the applicability of primary Community law intends to close the gap that exists in contracts falling outside the procurement Directives, such as service concessions¹⁵⁹. As for contracts which fall

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

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

¹⁵⁴ See Article 27 of the Utilities Directive.

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

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

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

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

¹⁵⁹ See case C-231/03 *Coname* [2005] ECR I-7287, paragraph 16, and case C-264/03 *Commission v France* [2005] ECR I-8831, paragraph 32.

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 Community law, in particular the fundamental freedoms also apply¹⁶⁰.

The Court treated the porosity of the public procurement Directives with the principle of transparency. The principle of transparency embraces the fundamental Community 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 Community 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 viewed that the duty of transparency represents a concrete and specific expression of the principle of equal treatment, one of the fundamental principles of Community law¹⁶¹, which the Member States must observe when they act within the scope of Community law. The principle of equal treatment assumes that similar situations should not be treated differently unless differentiation is objectively justified¹⁶².

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*¹⁶³. 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

¹⁶⁰ See case 45/87 *Commission v Ireland* [1988] ECR I-4929, paragraph 27, where the Court held that the inclusion in the contract specification of a clause stipulating exclusively the use of national specifications infringe Article 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 Articles 30, 48 and 59 EC; Case C-158/03 *Commission v Spain*, and Case C-234/03 *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 Article 49 EC; Case C-92/00 *HI* [2002] ECR I-5553, paragraph 42, where the Court ruled that contracting authorities' decisions are subject to fundamental rules of Community 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, paragraphs 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; Case C-57/01 *Makedoniko Metro and Mihaniki* [2003] ECR I-1091, paragraph 69, where the Court held that even if the Community directives on public procurement *do not contain specifically applicable provisions*, the general principles of Community law ... govern procedures for the award of public contracts; Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 30 et seq, where the Court held that Community 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 and C-16/77 *Ruckdeschel and Others* [1977] ECR 1753, paragraph 7.

¹⁶² See joined cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraph 9, and case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraph 32.

¹⁶³ See case C-243/89 *Commission v Denmark* [1993] ECR I-3353, paragraphs 37 to 39, and case C-87/94 *Commission v Belgium* [1996] ECR I-2043, in particular paragraphs 51 to 56. See also case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 108.

*Telaustria*¹⁶⁴ and *Parking Brixen*¹⁶⁵. Accordingly, the duty of transparency is intended to preclude any risk of favouritism or arbitrariness on the part of contracting authorities by ensuring 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 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 contract¹⁶⁶.

Conclusions

The vision and aspirations of European Institutions towards a Single Market Act¹⁶⁷ have identified public procurement reforms as essential components of competitiveness and growth¹⁶⁸ and as indispensable instruments of delivering public services¹⁶⁹. The European 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 harmonisation. Exhaustive harmonisation represents a *de lege lata* approach to public procurement regulation on the part of the Community legislature. Such 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 Community principles on the public procurement Directives in order to control their porosity. However, this treatment is temporary and not conducive to legal certainty and legitimate expectation.

Public contracts awarded by utilities to their affiliated entities, upon which they exercise dominant influence do not pose any significant concern and will remain

¹⁶⁴ See case C-324/98 *Telaustria and Telefonadress*, [2000] ECR I-10745.

¹⁶⁵ See case C-458/03 *Parking Brixen* [2005] ECR I-8612.

¹⁶⁶ See European Commission Interpretative Communication on the Community Law Applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ, 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 European 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.

¹⁶⁸ See European Commission, Communication, Europe 2020, A strategy for smart, sustainable and inclusive growth, 3.3.2010, COM (2010) 2020 final.

¹⁶⁹ See European 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, 7.12.2010, SEC(2010) 1545 final. See European Commission, *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement*, SEC(2010) 1258, final.

unaffected from any reforms. The author maintains that reforms of the public procurement regime will be limited and focus mainly upon 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 Directive¹⁷⁰. On the other hand, public-public partnerships and in-house contractual relations between contracting authorities 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 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 clutches 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 Community law principles which ensure a parallel process of procurement with dimensional public contracts. This development has created uncertainty in the market place and resulted in a dysfunctional application of procurement rules to those contracts. The administrative and procedural burdens on the part of contracting authorities often surpass any potential efficiency benefits resulting from competitively tendering sub-dimensional contracts. In addition, adequately sufficient 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 harmonisation of 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.

¹⁷⁰ See Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).