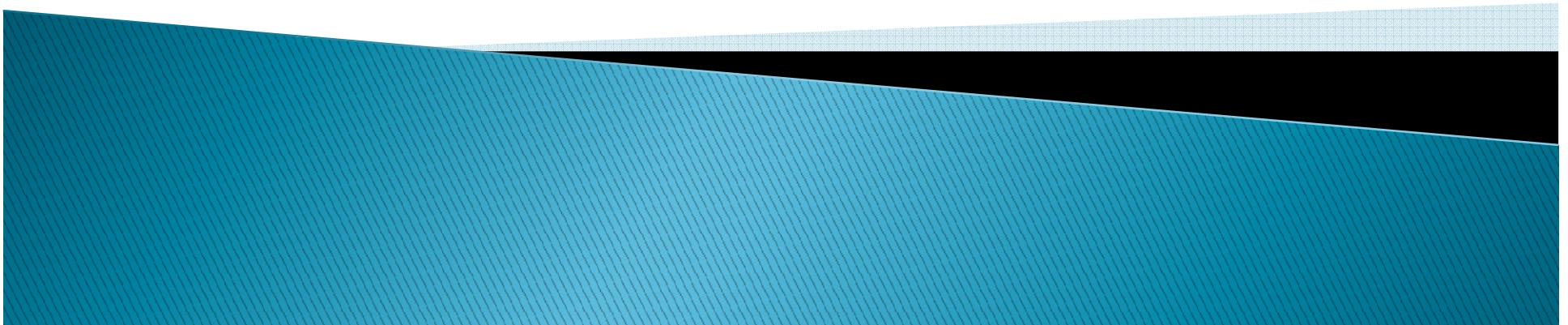
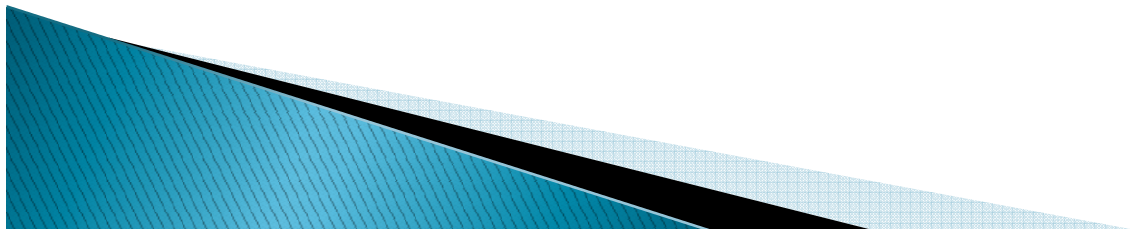


# EU Public Procurement The Revision of The Directives

Professor Christopher H. Bovis

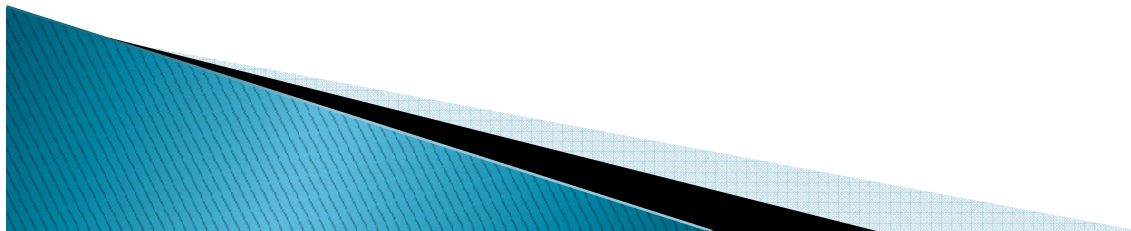


- ▶ Directive 2004/18, OJ L 134, 30.4.2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
- ▶ Directive 2004/17, OJ L 134, 30.4.2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.
- ▶ Directive 2007/66/ 11.12. 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts



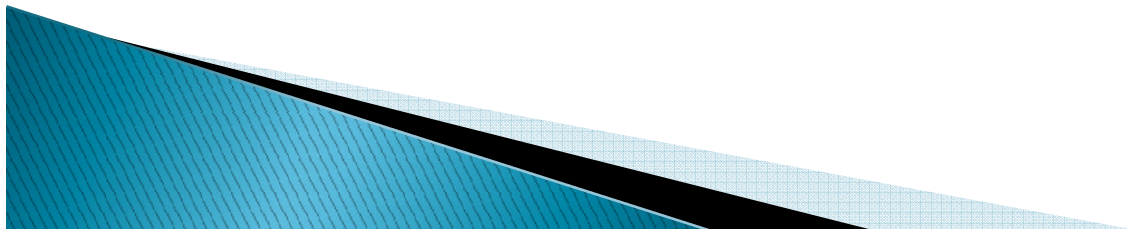
# Principles of Public Procurement Regulation

- ▶ Transparency
- ▶ Accountability
- ▶ Objectivity
- ▶ Non-discrimination



# What does public procurement stand for?

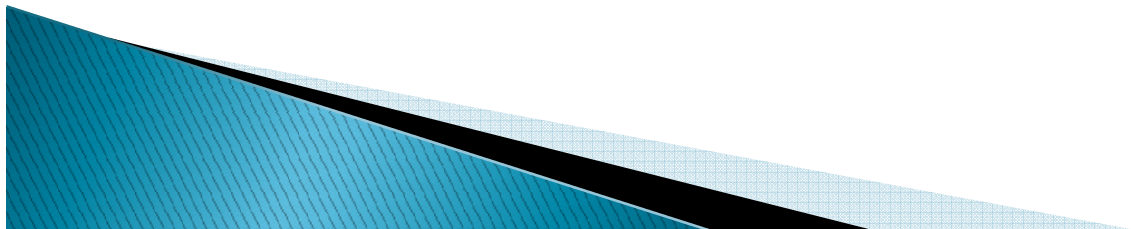
- ▶ Procedural safeguard of competition
- ▶ Conceptual instrument
  - Public policy
  - Public services



# What has changed?

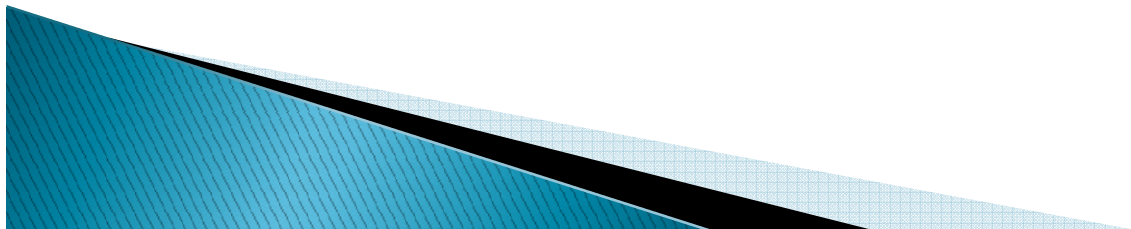
## Codification of administrative laws

- ▶ Public sector rules
- ▶ Utilities rules
- ▶ Remedies



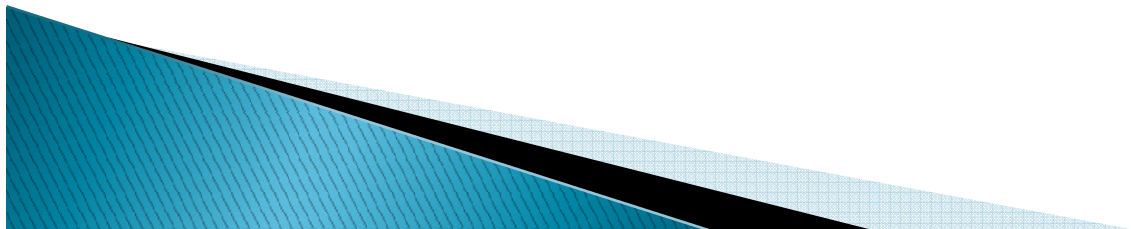
# What has influence the change?

- ▶ ECJ: *rule of reason approach*
- ▶ Magnitude of public procurement
  - EURO 1 trillion
  - 20% of GDP



# The ECJ Influence

- ▶ Centralised interpretation of public procurement rules
  - Reference procedures under Article 234 EC



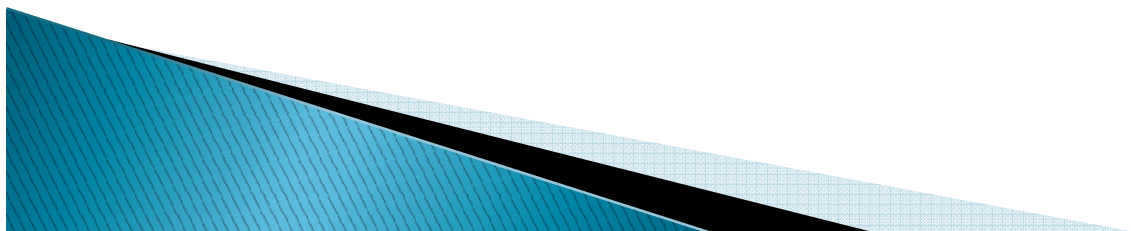
# The doctrine of objectivity

*1. equivalence test* to eliminate non-tariff barriers

- ▶ technical standards
- ▶ product specification
- ▶ standardization

*2. restrictive interpretation*

- ▶ selection procedures
- ▶ quantitative and qualitative suitability criteria
- ▶ award procedures, in particular negotiated procedures





# The doctrine of flexibility

- ▶ *functionality*

- ▶ *dependency*

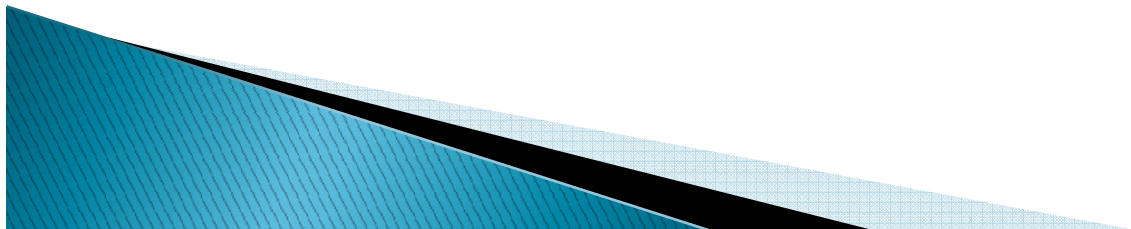
in order to define the notion of contracting authorities

- ▶ *dualism*

- ▶ *commercialism*

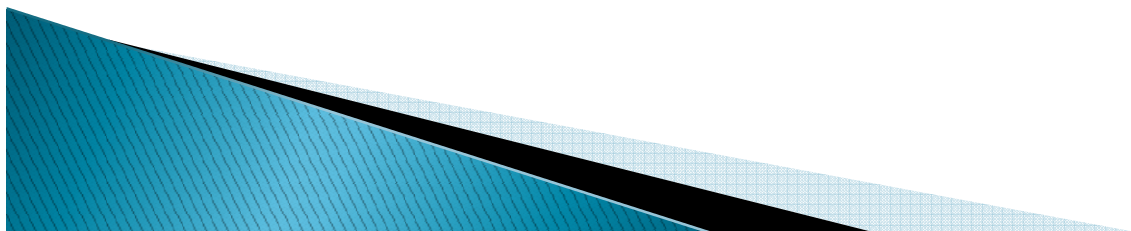
- ▶ *competitiveness*

in order to determine the applicability of public procurement rules



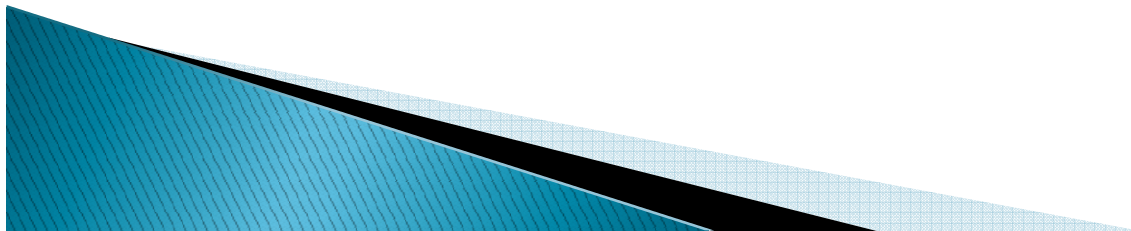
# The doctrine of complementarity

- ▶ *compatibility* of socio-economic and environmental policies
- ▶ *contract compliance*



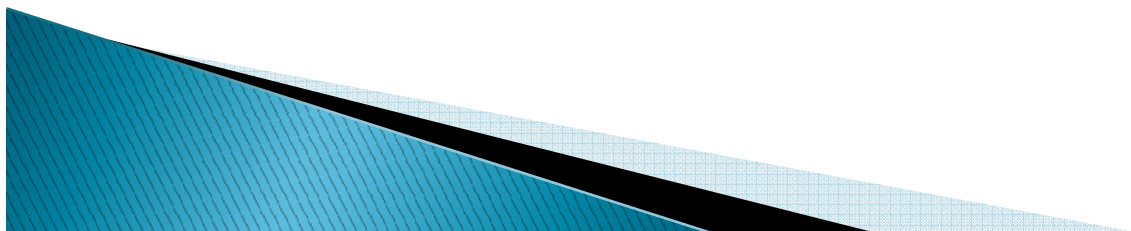
# The doctrine of procedural autonomy

- ▶ wide discretion afforded to Member States to create the appropriate *fora* to receive complaints against decisions of contracting authorities and utilities, as well as actions for damages.



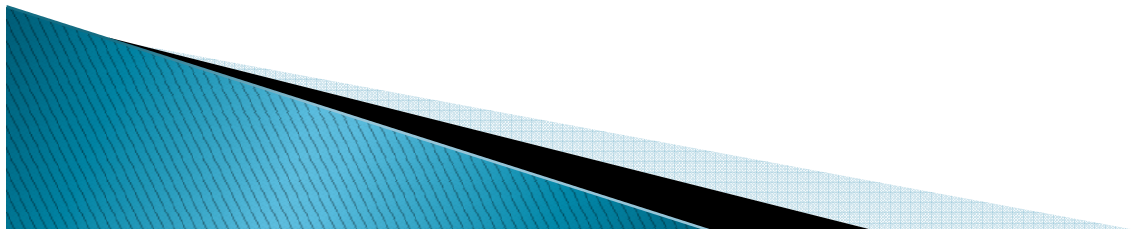
# The doctrine of procedural equality

- ▶ Review procedures for public procurement disputes, as well as procedures for actions for damages must not differ, in a discriminatory context, from other review procedures and procedures for actions for damages under national law.



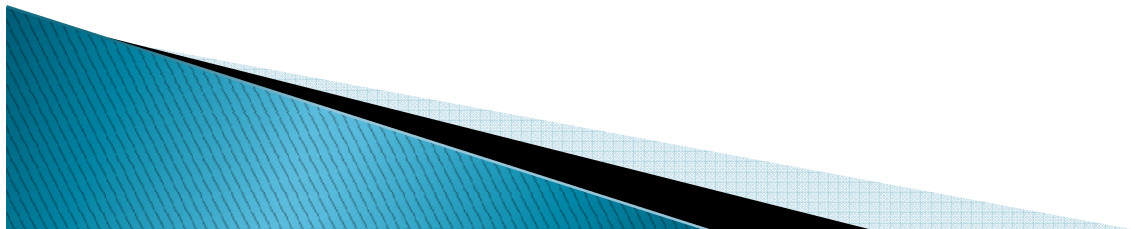
# The doctrine of effectiveness

- ▶ Swift dispute resolution at national level
- ▶ Enforceability of decisions of national courts or tribunals



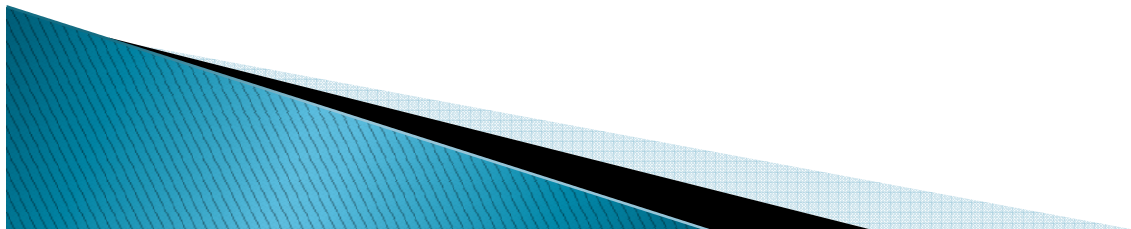
# Public sector procurement

- ▶ Eligibility of bodies governed by public law to tender
- ▶ Joint and Centralized procurement
- ▶ Official list of contractors
- ▶ The competitive dialogue
- ▶ Framework procurement
- ▶ Electronic Procurement



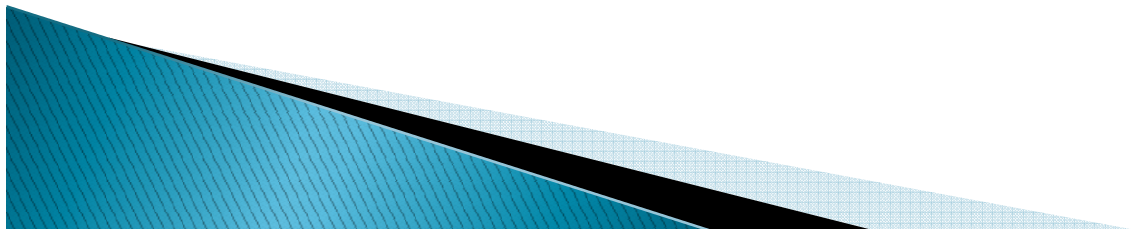
# Utilities procurement

- ▶ Remit and extent of coverage
- ▶ Special or Exclusive rights
- ▶ Affiliated undertakings
- ▶ Competitive markets



# Remedies Directive

- ▶ Clear divide between pre-contractual and post-contractual stages
- ▶ Balance between effective review of public contracts and need of efficient public procurement
- ▶ Standstill of contract conclusion, including direct awards
- ▶ Communication requirements
- ▶ Refocus of Corrective Mechanism
- ▶ Repeal of Attestation and Conciliation
- ▶ Monitoring requirements
- ▶ EEA coverage





# The implementation of the Directives. Opportunities and Pitfalls

## Simplification

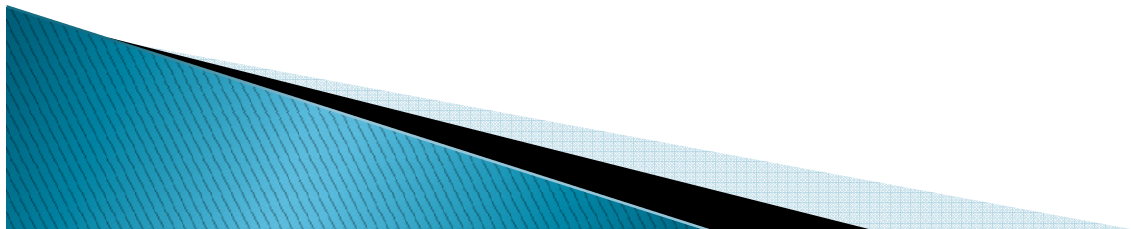
- ▶ Dichotomy of public and utilities procurement
- ▶ Legal certainty and legitimate expectation
- ▶ Legal efficiency
- ▶ Compliance discipline

## Modernization

- ▶ Electronic procurement
- ▶ Framework procurement

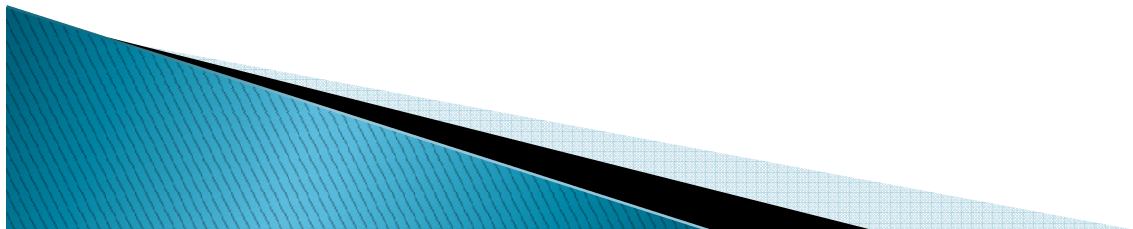
## Flexibility

- ▶ Disengagement of utilities from procurement rules



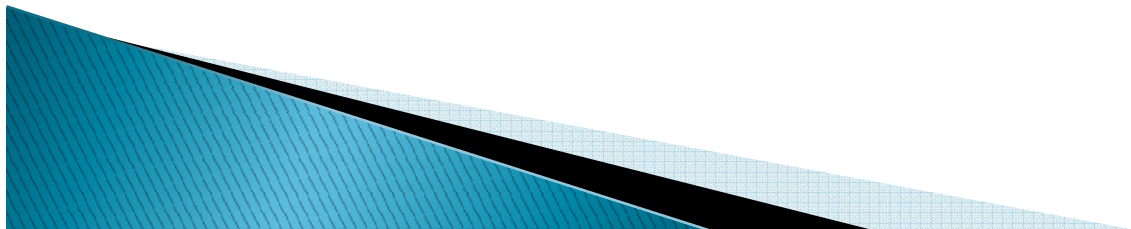
# Increase Cross-border Competition

- ▶ Transparency
- ▶ Tradability of public contracts



# Themes for Review

- ▶ In- House arrangements
- ▶ Sub-dimensional procurement
- ▶ Non-priority Service Contracts
- ▶ Service Concessions
- ▶ Competitive Dialogue



# In-house arrangements

The conditions for inapplicability of public procurement rules  
C-107/98, *Teckal*

- CA exercises over an entity a control which is similar to that which it exercises over its own departments (control condition)
- that entity carries out the essential part of its activities with the controlling local authority or authorities (activity condition)

The in-house exemption also applies to concessions and Annex B-services

C-458/03, *Parking Brixen*

C-340/04, *Carbotermo*



# The in-house case-law

C-349/97, Com v. Spain

C-107/98, *Teckal*

C-94/99, ARGE

C-26/03, Stadt Halle

C-84/03, Com v. Spain

C-231/03, Coname

C-458/03, Parking Brixen

C-29/04, Mödling

C-410/04, ANAV

C-340/04, Carbotermo

C-295/05, Asemfo

C-220/06, Asociación

C-371/05, Mantua

C-324/07, Coditel

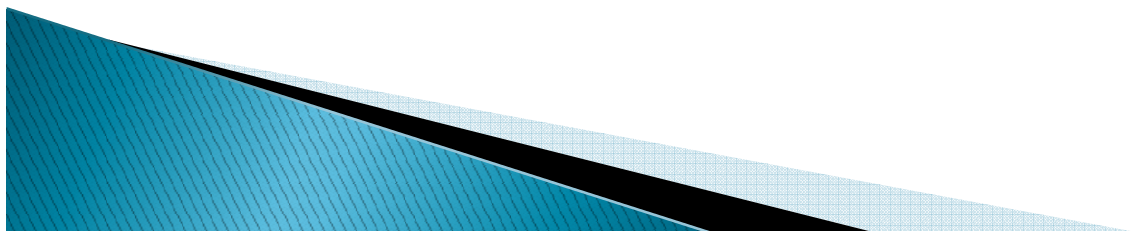
C-337/05, Com v. Italy

C-480/06, Com v. Germany

C-573/07, Sea

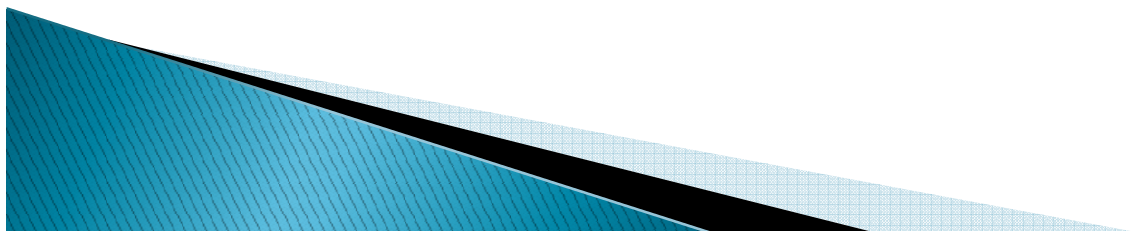
C-196/08, Acoset

C-17/09, Com v. Germany



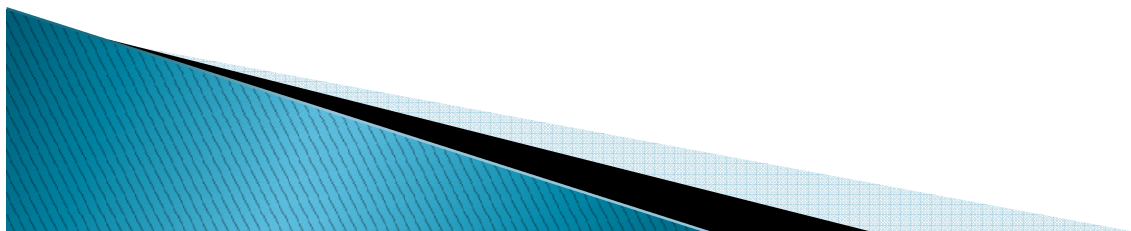
# In-house arrangements in procurement

- ▶ Dependency and similarity of control
  - C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 48.
  - C295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado*, [2007] ECR I-2999, paragraph 65.
  
- ▶ Public-public cooperation → no similarity of control BUT remit of such relation to deliver a public task or service specified under Community law; no intention to circumvent public procurement rules; not pecuniary contractual relation
  - C-480/06, *Commission v Germany*, [2009] ECR I-04747
  
- ▶ Inter-municipal co-operative societies whose members are contracting authorities and a jointly controlled entity
  - C-324/07, *Coditel Brabant SA v Commune d'Uccle, Région de Bruxelles-Capitale*, [2009] 1 CMLR 29.



# Control and in-house arrangements

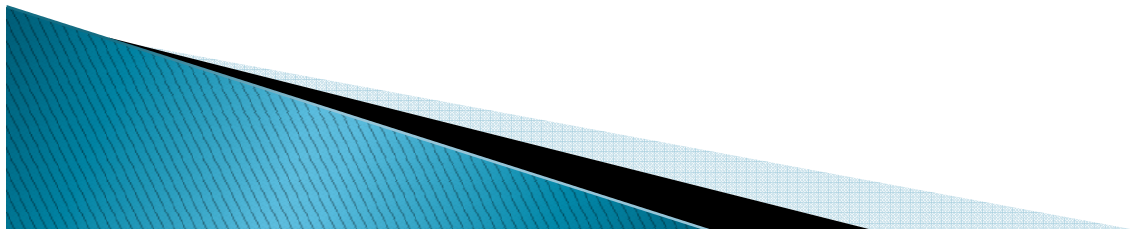
- ▶ More than ‘dominant influence’
  - as a company law notion
  - as a notion to define certain bodies as contracting authorities
  - as a notion found in Utilities Directive (Articles 1(3) 13).
- ▶ Control → *‘a potential power of decisive influence over both strategic objectives and significant decisions’*.
  - C-458/03 *Parking Brixen* [2005] ECR I-8612 paragraph 65
- ▶ Comprehensive approach not solely based on company law features but embracing legislative operational frameworks of *de facto* influencing corporate behaviour



# Similarity of control and contracting authorities

Control must be:

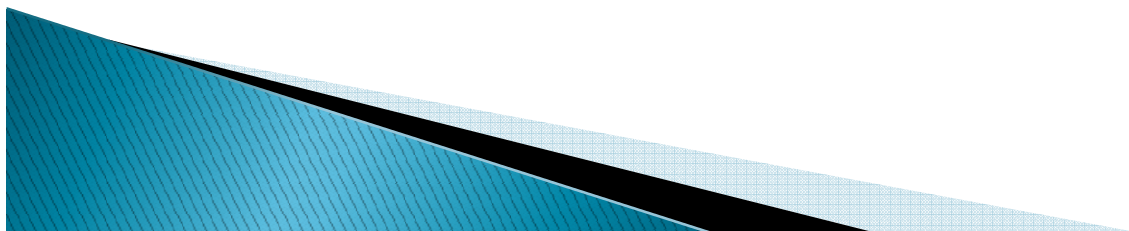
- ▶ functional but not formal
- ▶ similar but not identical
- ▶ collective or individual
- ▶ irrelevant if based on a public or private law relationship
  
- ▶ Joint-stock public companies presume similarity of control
  - C-340/04 *Carbotermo and Consorzio Alisei*, paragraph 37, and case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 57.
    - Subject to
  - Board of Management remit of authority
  - Proxy / intermediary exercise of control
    - C-340/04, *Carbotermo SpA, Consorzio Alisei v Comune di Busto Arsizio, AGESP SpA*, [2006] ECR I 4137.





# Similarity of control (*cont*)

- ▶ Private capital negates similarity of control
  - C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1.
  
- ▶ Possibility of imminent participation of private capital negates similarity of control
  - C-231/03 *Coname* [2005] ECR I-7287 paragraphs 5 and 28.
  
- ▶ Visibility of imminent participation of private capital negates similarity of control
  - C-458/03 *Parking Brixen* [2005] ECR I-8612, paragraphs 67 and 72.
  - C-410/04, *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari, AMTAB Servizio SpA*, 2006] ECR, I-3303
  
- ▶ Semi-public entities or undertakings do not assume similarity of control (contracting authorities *ipso facto*)
  - C-29/04 *Commission v Austria (Modling)* [2005] ECR I-563, paragraph 48



# Similarity of control (*cont*)

- ▶ *Parking Brixen* and *ANAV* → defence mechanism to prevent abuse of *Teckal* exception

## *Problem*

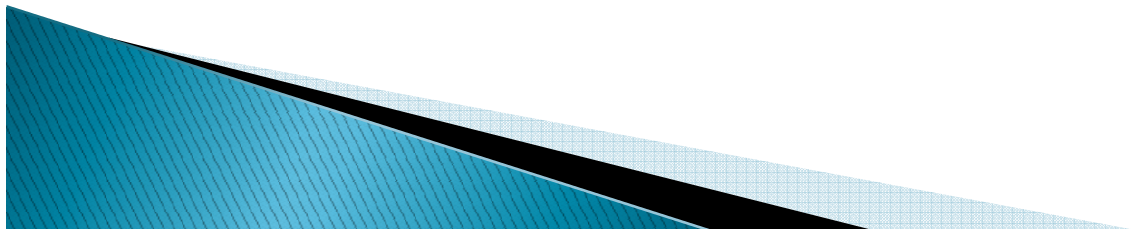
- ▶ Imminent or prospective privatisation resultant of law, regulation or policy choice

## *Solution*

- ▶ The existence of a private capital must be determined at the time of award
  - C-573/07 *Sea Srl. v. Comune di Ponte Nossa* ECR [2009] I-08127.

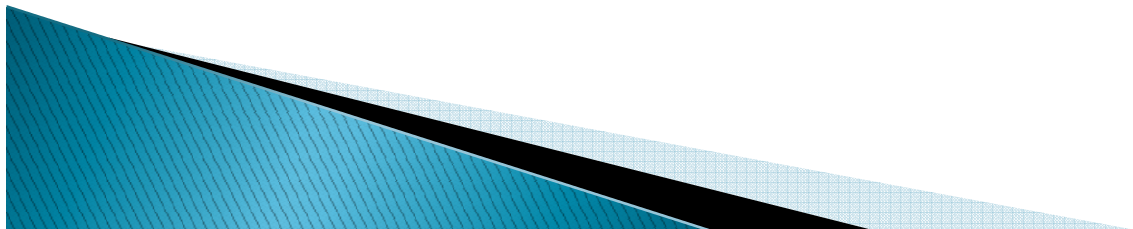
## *Caveat*

- ▶ Duration of contract → private capital constitutes alteration of fundamental conditions



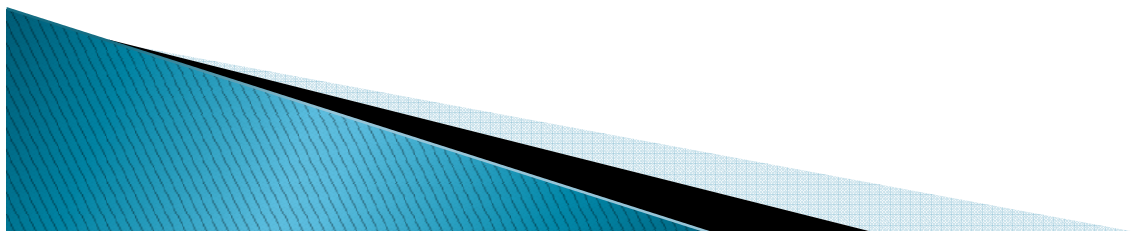
# Operational dependency and contracting authorities

- ▶ *Dependency* = essential part of activities
  - *Teckal*
- ▶ Essential part of activities = territorial limitation
  - *Sea*
  - *Parking Brixen*
- ▶ Essential part of activities = quantitative limitation
  - *Utilities affiliation 80% rule rejected*
  - *Carbotermo*



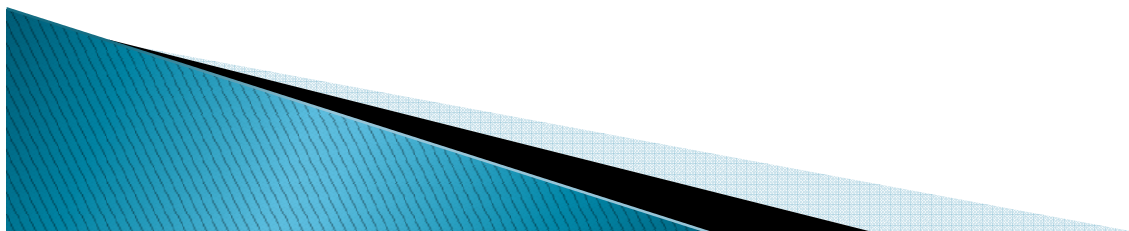
## Contracting authorities

- ▶ Functionality interprets the term contracting authority in broad and functional terms.
  - *C-44/96 Mannesmann Anlagenbau Austria and Others, [1998] ECR I-73, paragraphs 20 and 21;*
  - *C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraphs 51 to 53;*
  - *C-214/00 Commission v Spain [2003] ECR I-4667, paragraphs 52 and 53;*
  - *C-283/00 Commission v Spain [2003] ECR I-11697, paragraph 69.*



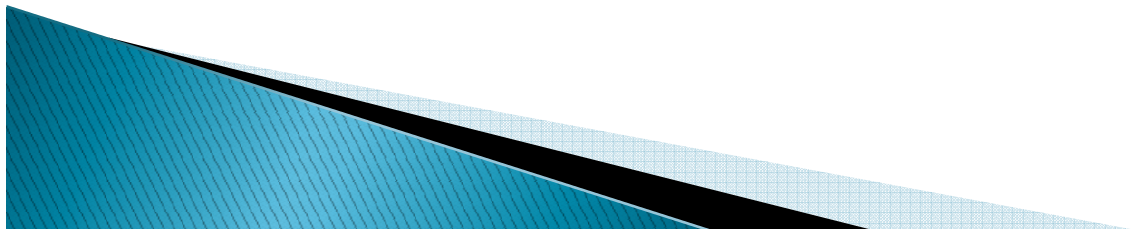
# Functionality and contracting authorities

- ▶ **private law entities**
  - 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.
- ▶ **private entities for industrial and commercial development**
  - 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.
- ▶ **entities meeting needs of general interest retrospectively**
  - C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 51 to 53;
- ▶ **semi-public undertakings**
  - C-26/03 *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] ECR I-1.
- ▶ **state controlled commercial company**
  - 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.
- ▶ **statutory sickness fund**
  - C-300/07, *Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik, v AOK Rheinland/Hamburg*, judgment of 11 June 2009



# Effectiveness and bodies governed by public law

- ▶ an effective concept of Community law which must receive an autonomous and uniform interpretation
  - C-44/96 *Mannesmann Anlagenbau Austria and Others*, [1998] ECR I-73, paragraphs 20 and 21;
  - C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 51 to 53;
  - C-214/00 *Commission v Spain* [2003] ECR I-4667, paragraphs 52 and 53;
  - C-283/00 *Commission v Spain* [2003] ECR I-11697, paragraph 69.
- ▶ *dualism* → ability of contracting authorities to pursue market oriented activities without losing their classification as contracting authorities
  - C-44/96 *Mannesmann Anlagenbau Austria*, [1998] ECR I-73, paragraphs 17 to 35.
- ▶ *commercialism* → profitability and commercially motivated decision-making render the public procurement directives inapplicable.
  - 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 I-73
  - C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 51.



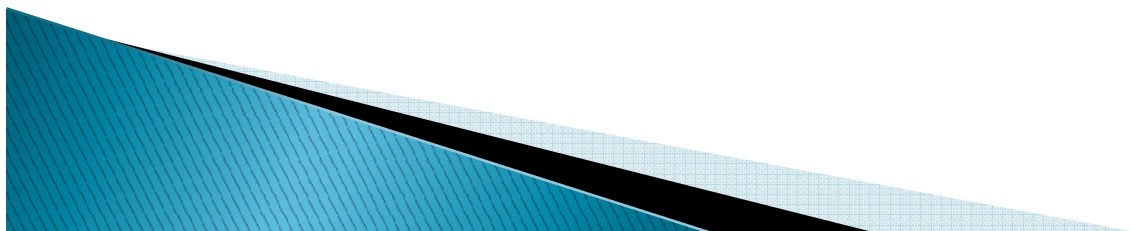
# Flexibility and contracting authorities

- ▶ doctrine of flexibility → parameters for inapplicability of the public procurement Directives
  
- ▶ *dependency*
  - similarity of control
  - operational dependency
    - C-237/99, Commission v. France
    - C-380/98, The Queen and H.M. Treasury, ex parte University of Cambridge
    - C-107/98, Teckal Srl v Comune di Viano
  
- ▶ *competitiveness*
  - elements of competition diluting the notion of body governed by public law
    - C-223/99 *Agora Srl v Ente Autonomo Fiera Internazionale di Milano*
    - C-260/99 *Excelsior Snc di Pedrotti runa & C v. Ente Autonomo Fiera Internazionale di Milano*
    - C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 51.



# The doctrine of effectiveness and public contracts

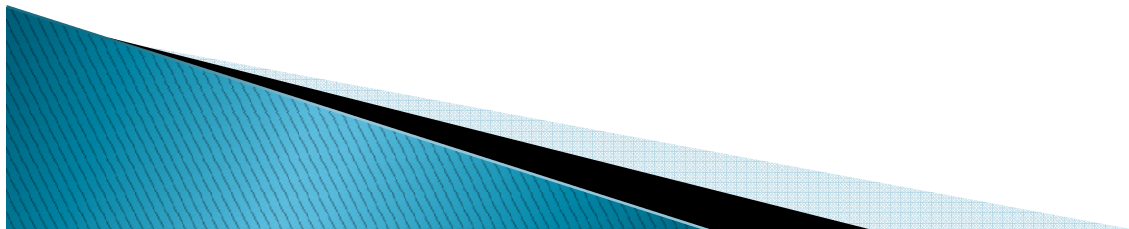
- ▶ a pecuniary interest consideration given by a contracting authority
- ▶ in return of a work, product or service which is of direct economic benefit to the contracting authority
  - C-536/07 *Commission v Germany*, (Köln Messe) judgment of 29 October 2009.
- ▶ Concept of public contracts
  - Not materially or physically carried out for the contracting authority
  - Necessary for *immediate* economic benefit of contracting authority
    - C-451/08 *Helmut Müller v Bundesanstalt für Immobilienaufgaben*, [2010] 3 C.M.L.R. 18.





# The doctrine of functionality and public contracts

- ▶ pecuniary interest
  - Direct or deferred payment
  - Commitment to lease-back
  - Asset swaps
  - Conferral of an exclusive right to collect third-party payments
  - Leasing and sub-leasing arrangements
  - The ability to specify the object of the public contract
  - Measures which define the type of works
  - Decisive influence over the design of a project or the executions of works
    - C-536/07 *Commission v Germany*, (Köln Messe) judgment of 29 October 2009.
  
- ▶ Urban planning conditions not capable of attributing an immediate economic benefit
  - C-536/07 *Commission v Germany*, (Köln Messe) judgment of 29 October 2009.
  
- ▶ Planning gain contracts are public contracts
  - C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409.
  
- ▶ Agency or representation relations are public contracts
  - C-264/03, *Commission v. France* [2005] E.C.R. I-8831.
  
- ▶ Public contracts denote demonstrable elements of
  - economic benefit or
  - risk
  - directly attributable to the contracting authority
    - C-220/05, *Jean Auroux and Others v Commune de Roanne*, ECR [2007], p. I-385.



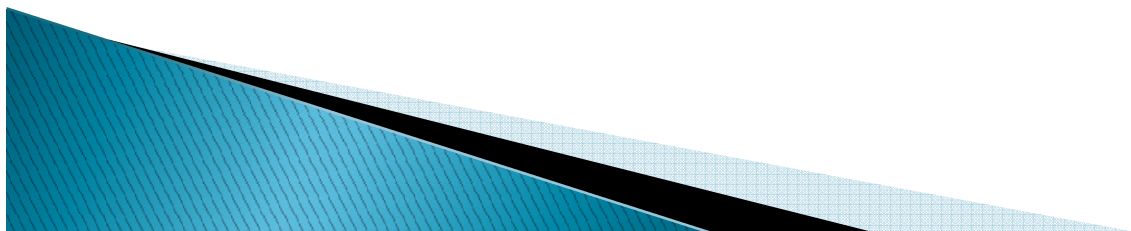
# The doctrine of flexibility and public contracts

Asset or land sales are not public contracts

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

Caveat

imminent and directly related public contract  
to that asset or land

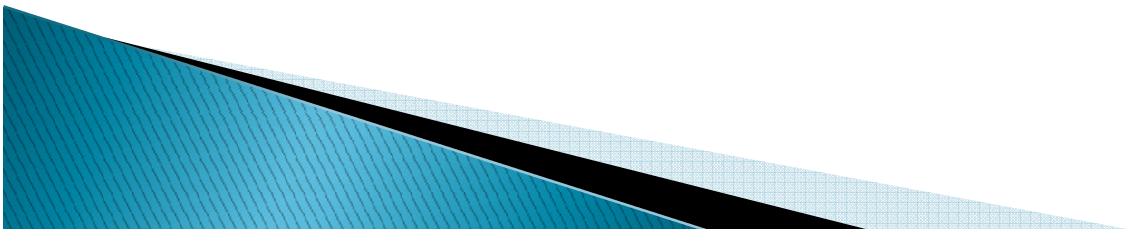


# Sub-dimensional contracts

- ▶ Below threshold contracts are excluded from the scope of the public procurement Directives but liable to compliance with the fundamental rules of the Treaty.
  - Transparency
  - Non-discrimination
    - C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 and 61.
    - C-59/00 *Vestergaard* [2001] ECR I-9505.
    - C-6/05 *Medipac-Kazantzidis AE v Venizelio-Pananio (PE.S.Y. KRITIS)*, [2007] ECR I-4557.
    - C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16 and 17.
    - C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraphs 46 to 48.
    - C-264/03 *Commission v France* [2005] ECR I-8831, paragraph 32.
    - C-147/06 and C-507/03 *Commission v Ireland* [2007] ECR I-0000, paragraph 29.
    - C-412/04 *Commission v Italy* [2008] ECR I-0000, paragraph 65.
    - C-148/06, *SECAP SpA and Santorso Soc. coop. arl*

## CAVEAT

- ▶ Certain cross-border interest
  - C-507/03 *Commission v Ireland* [2007] ECR I-0000, paragraph 29,
  - C-412/04 *Commission v Italy* [2008] ECR I-0000, paragraph 65.
  - C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado*, [2007] ECR I-12175.

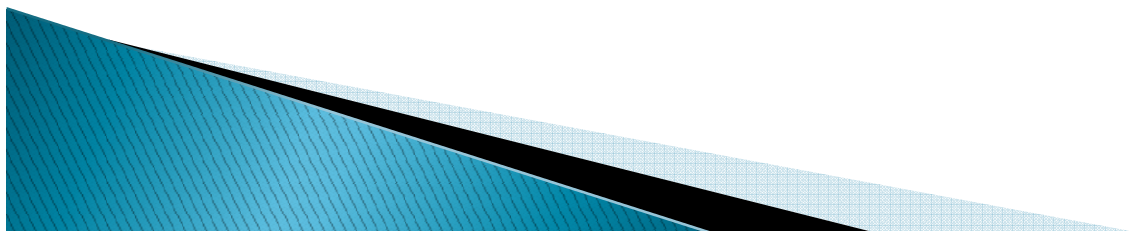


# Services in Annex I B of the Public Sector Directive

- ▶ Requirements
  - Define the technical specifications by reference to national standards implementing European standards
  - Reference of technical specifications in the general or contractual documents
  - Notice of the results of the award procedure to the Publications Office
    - C-507/03, *Commission v Ireland*, (An Post) [2007] ECR I-9777.
    - C-231/03 *Coname* [2005] ECR I-7287, paragraph 17.

## Caveat

- ▶ If certain cross border interest
- ▶ Then fundamental EU principles such as transparency and non-discrimination apply



# Service concessions as public contracts

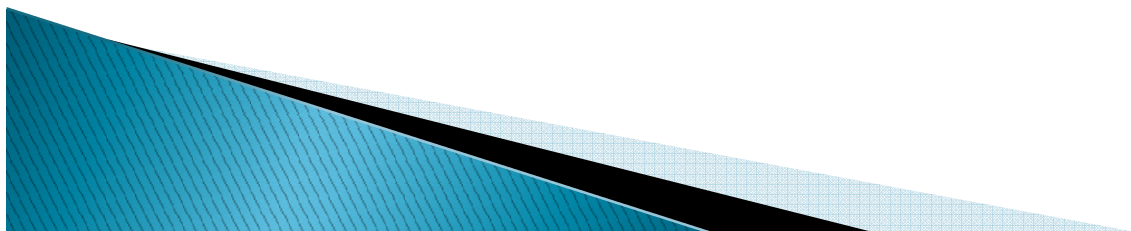
- ▶ Consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment
- ▶ Concession holder assumes the risk of operating the services in question
  - C-231/03, *Consorzio Aziende Metano (Coname). v. Comune di Cingia de' Botti* [2005] ECR I-7287.
  - C-382/05 *Commission v Italy* [2007] ECR I-6657, paragraph 34.
  - C-437/07 *Commission v Italy* [2008] ECR I-0000, paragraph 29.
  - C-206/08 *WAZV Gotha v. Eurawasser Aufbereitungs* [2009] ECR I-8377.
- ▶ Concession services are excluded from the scope of public procurement Directives
  - C-324/98 *Telaustria and Telefonadress*, [2000] ECR I-10745.

## *Caveat*

- ▶ The fundamental principles of the Treaty, in general and, in particular, the principle of non-discrimination on the ground of nationality and the principle of transparency apply

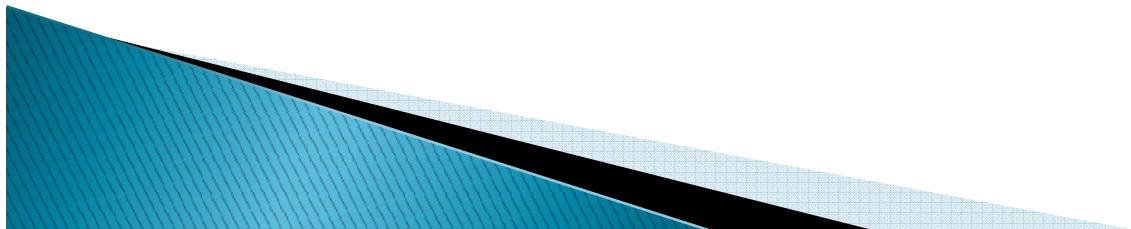
## *Requirements*

- ▶ a degree of competitiveness in the award of such contracts
- ▶ a review process of the award procedure



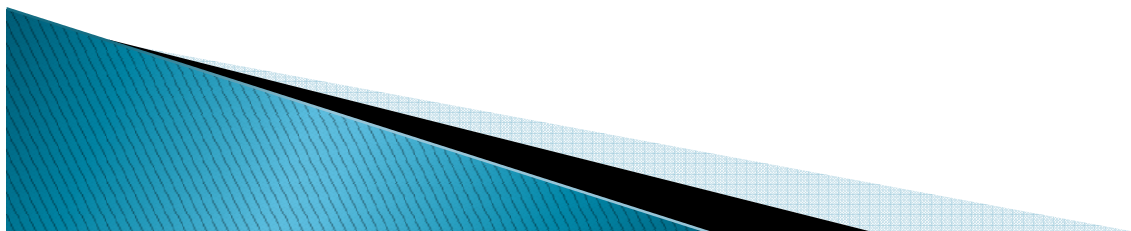
# Market response to Competitive Dialogue

- ▶ Competitive Dialogue envisages facilitating the award of complex projects
- ▶ PPPs
- ▶ TENs



# Pertinent questions

- ▶ The exceptional nature of the competitive dialogue
- ▶ Its hierarchy with other award procedures
- ▶ The discretion of contracting authorities to initiate the competitive dialogue
- ▶ The internal structure and conduct of the competitive dialogue
- ▶ Predictably high costs in participating
- ▶ The degree of competition achieved (there is great potential for post tender negotiations)
- ▶ The overall value for money results (in many instances the competitive dialogue is less flexible than the negotiated procedures)



# The Porosity of the Public Procurement Directives

*Exhaustive harmonisation: the enemy within*

*The treatment of porosity:  
the principle of transparency*

## Review of EU Public Procurement Directives

- Simplification
- Modernisation
- Link with 2020 EU Growth Strategy

