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Actual Questions of Public Procurements in the European Union and in the Member States

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Public-Public Partnerships

Rethinking public service delivery

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Introduction

- **Freedom of choice:**
  - EU law does not restrict the freedom of a contracting authority to use it's own resources to perform public interest tasks

- **When a contracting authority turns to other public sector bodies in order to obtain services, works or goods:**
  - The contracts between the two public bodies fall in principle into the scope of application of the EU public procurement directives
  - However, some cases, under certain conditions, may be exempted

- **Basic rule:**
  - Procurement activities that can and should benefit from competition, should be conducted in line with EU public procurement law on op
  - Other methods of public task performance through public-public cooperative schemes may be exempted

Basic rule

- **EU public procurement directives apply**
  - To any contract awarded by a contracting authority that is not excluded from EU pubic procurement directive's scope of application, regardless of the legal nature of the economic operator (private or public)

- **This rule applies in contracts awarded both by the contracting authorities in the public sector and the contracting entities in the utilities sector**
  - Art. 1(8) of the public sector procurement directive 2004/18 stipulates that *"The terms "contractor", "supplier" and "service provider" mean any natural or legal person or **public entity** or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services".*
  - Accordingly, art. 1(7) of the utilities sector procurement directive 2004/17 stipulates that *"The terms "contractor", "supplier" or "service provider" mean either a natural or a legal person, or a **contracting entity** within the meaning of Article 2(2)(a) or (b), or a group of such persons and/or entities which offers on the market, respectively, the execution of works and/or a work, products or services".*

Public entities ➔ Economic operators

CJEU has clarified that

- *"...The fact that the service provider is a public entity distinct from the beneficiary of the services does not preclude the application of the Directive..."* [CJEU, C-480/06 Commission / Italy]

- For the application of the EU public procurement rules, *"... it is sufficient, in principle, if the contract was concluded between a local authority and a person legally distinct from it...."* [CJEU, C-107/98 Teckal]

- It constitutes an incorrect transposition of EU public procurement directives to exempt from the scope of application of the relevant transposing national legislation *"...relations between public authorities, their public bodies and, in a general manner, non-commercial bodies governed by public law, whatever the nature of those relations...."* [CJEU, C-84/03 Commission / Spain]

Performance of public interest tasks outside the scope of application of the EU public procurement rules

- **When a contracting authority considers the means of performing a public task conferred to it...**
  - it reserves the right to opt for utilizing its own administrative, managerial, technical and other resources that suffice to fulfil the task at hand [CJEU, C-26/03 *Stadt Halle*]

  ➔ outsourcing to external economic operators **not** mandatory

- **When the contracting authority decides to use its own resources**
  - in a way that does not lead to the conclusion of a public contract ...
  - it is not obliged to apply the provisions of the EU public procurement directives

  Example: The city of Budapest maintains the urban road infrastructure through its internal technical department

- **When many contracting authorities decide to share their own combined resources in order to mutually perform public tasks**
  - in a way that does not involve remuneration of any kind ...
  - They are not obliged to apply the provisions of the EU public procurement directives

  Example: 3 municipalities in the same Region use their means of passenger transportation in order to provide jointly inter-city passenger transportation services

Contractual relationships between public bodies

- **Contracting authorities are entitled to cooperate on the basis of contracts**
  - Concluded for pecuniary interest (i.e. involving reciprocal rights and obligations)

> Article 1.2(a) dir. 2004/18 stipulates that ***"Public contracts"*** *are contracts* ***for pecuniary interest*** *concluded* ***in writing between*** *one or more* ***economic operators*** *and one or more* ***contracting authorities*** *and having as their object the execution of* ***works****, the* ***supply*** *of products or the provision of* ***services*** *within the meaning of this Directive*

- **In principle those arrangements are treated as <u>public</u> contracts**
  - Thus they are in principle subject to procurement in line with the EU rules

- **When contracting authorities co-operate with a view to jointly ensuring the execution of public interest tasks**
  - This may lead to the conclusion of contracts without triggering the obligation to apply the EU public procurement directives

Types of **Public-Public cooperation** outside of the EU public procurement rules

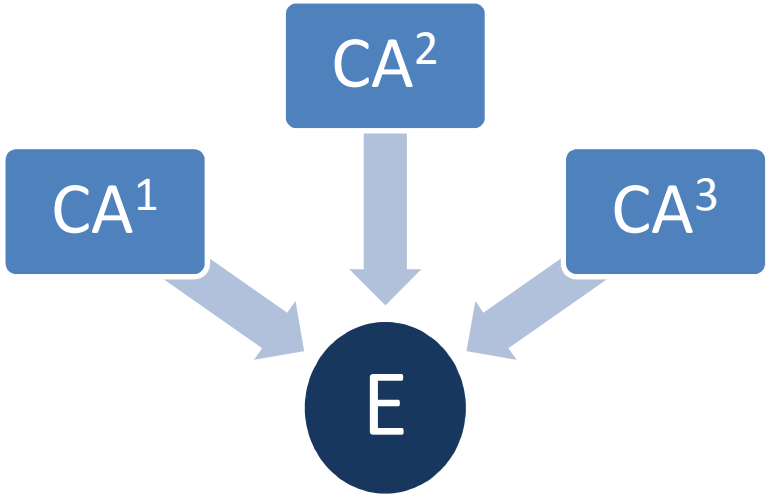
2 types of cooperative arrangements between public bodies may be eligible for exclusion from the EU public procurement rules:

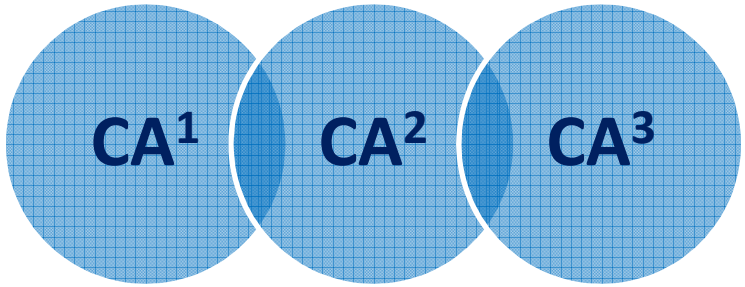
Vertical / Institutionalized cooperation:

One or more contracting authorities form a jointly controlled third entity connected to them via a ***"quasi in-house" relationship***, that is entrusted with the performance of the task

Horizontal / non-institutionalized cooperation:

The co-operation is implemented directly by the contracting authorities by joint activities and ***mutual sharing of resources and capabilities***, without the involvement of third structures





CA: Contracting authority

E: Entity controlled by contracting authority/authorities

Both the **vertical** and **horizontal** model of co-operation allow contracting authorities to organize the performance of public tasks **outside the scope of application of EU public procurement law**

Vertical (institutionalized) cooperation ← **Conditions**

- **The vertical / institutionalized co-operation** is based on the **"in-house"** exemption-doctrine, that has been formulated through the **CJEU case law*** and allows **derogation from the application of the EU public procurement rules** when an contract is awarded by a contracting authority to another, legally distinct body, provided that **3 conditions** are cumulatively met:

1. The contracting authority authorities exercises over the separate entity a *control "similar to that which it exercises over its own departments"*
   ➔ **structural control**

2. The separate (depended) entity carries out *"the essential part of its activities with the controlling authority or authorities"*
   ➔ **economic dependency**

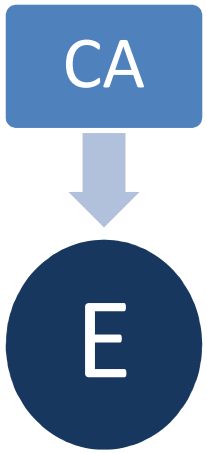
3. There is *no private capital* in the depended entity
   ➔ **pure (100%) public ownership**

* vide S.10

Vertical (institutionalized) cooperation ➔ **Forms**

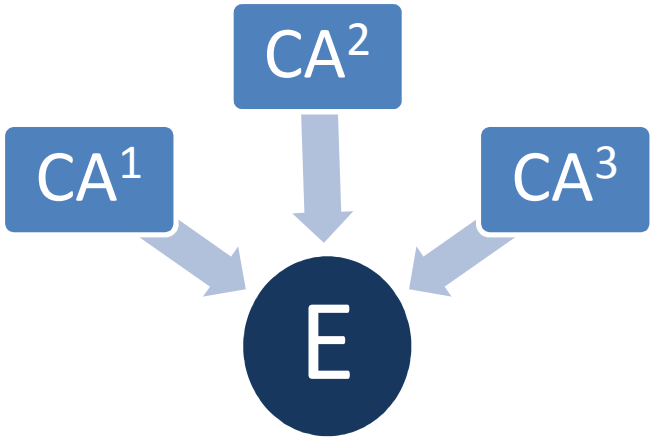
The vertical / institutionalized co-operation may take 2 forms:

Single contracting authority **controls** its own in-house entity



CA is the contracting authority and **E** is the legal entity which is depended on CA

Multiple contracting authorities **jointly control** an in-house entity



CA1, CA2 & CA3 are the contracting authorities and **E** is the legal entity which is depended on all of them both in organizational and economic terms

The **"in-house" exemption** in the **ECJ** case law

1. C-107/98 *Teckal*, 18 November 1999
2. C-26/03 *Stadt Halle*, 11 January 2005
3. C-231/03 *Coname*, 21 July 2005
4. C-458/03 *Parking Brixen*, 13 October 2005
5. C-29/04 *Commission v Austria,* 10 November 2005
6. C-295/05 *ASEMFO v* TRAGSA, 19 April 2007
7. C-410/04 *ANAV*, 6 April 2006
8. C-340/04 *Carbotermo*, 11 May 2006
9. C-371/05 *Commission v Italy*, 17 July 2008
10. Case C-220/06 *Correos*, 18 December 2007
11. C-480/06 *Commission v Germany "Stadtreinigung Hamburg"*, 9 June 2009
12. C-324/07 *Coditel Brabant*, 13 November 2008
13. C-573/07 *Sea*, 10 September 2009

C-107/98 *Teckal*

Facts:

- AGAC was a consortium set up by 45 Italian municipalities to manage energy and environmental services such as heating and gas for civil and industrial purposes
- One of the municipalities awarded a contract for the management of heating services for certain municipal buildings to AGAC without conducting an EU public procurement awarding procedure
- *Teckal* challenged the award
- The case was referred by national courts to ECJ

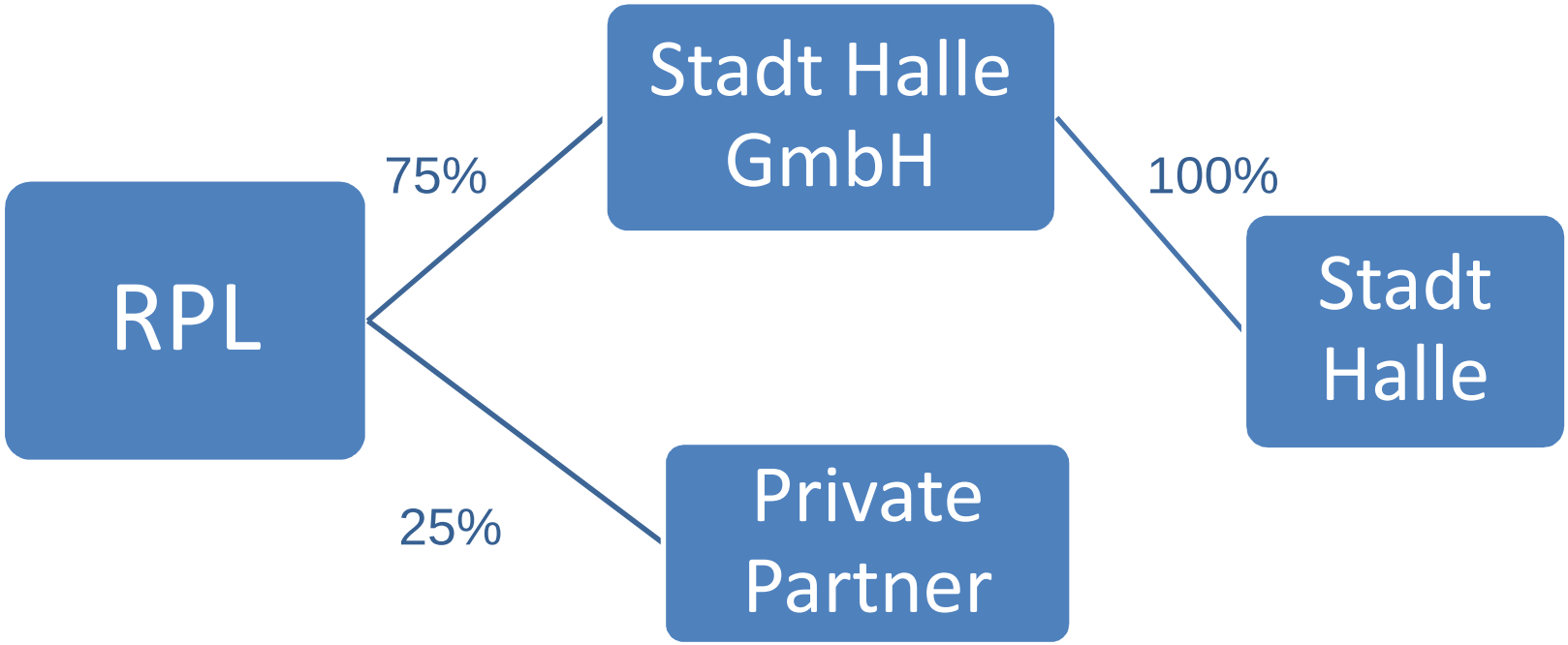
Judgment:

The "Teckal" test (structural control + economic dependency) was adopted

C-26/03 - *Stadt Halle*

Facts:

The city (Stadt) of Halle awarded a contract to a semi-public company without a tender procedure



Judgment:

The “in-house” exemption cannot be used where there is any private ownership

C-458/03 - *Parking Brixen* [1]

Facts:

- Municipality of *Brixen* awarded a contract to *Stadtwerke Brixen* - its wholly owned subsidiary - a 9 year contract to manage car parks without a tender process
- The case was referred by national courts to CJEU

Judgment:

- Public service concession
- Subject to the principles of equal treatment, non-discrimination and transparency
- In house is a derogation from the general principles and the basic rule of EU law (competitive procurement) and thus must be interpreted strictly
- CJEU examined first Teckal-criterion only

C-458/03 - *Parking Brixen* [2]

Analysis:

- All legal provisions and circumstances
- influence over strategic objectives and significant decisions
- legal form: company limited by shares
- Broadening
  - objects (e.g. information technology, telecommunications)
  - expansion of the geographical area
- Mandatory opening to private capital
- Wide independence vis-à-vis Brixen
  - Considerable powers of the Board
  - Control limited to rights assigned to the majority

C-29/04 - *Commission / Austria*

Facts:

- The municipality of *Mödling* decided to establish a legally independent body to carry out its statutory duties relating to waste disposal.
- The municipality set up *AbfallgmbH* in which the municipality held 100% of the shares.
- *AbfallgmbH* exclusively responsible for waste management in the municipality

Judgment:

- Austria in breach as a few weeks after contract award, the contracting authority sold 49% of the subsidiary's capital to a private undertaking.
- The transaction was held as an "artificial construction"

C-340/04 - *Carbotermo*

Facts:

- Contract originally advertised – Decision to avail of "in-house" exemption
- Mixed Contract including supplies
- The contracting authority awards *AGESP* (a 100% subsidiary of a 99,98% owned subsidiary - AGESP Holding SpA) - remaining 0,02% held by other local authorities.
- Several public owners

Judgment:

- The "Control" criterion cannot be met merely by share ownership: **"It *must be a case of a power of decisive influence over both strategic objectives and significant decisions of that company*"**
- Majority shareholder control not enough
- Intervention of a holding company may weaken control
- "Activities" criterion only met if other activities are of ***"marginal significance"***

Horizontal (non-institutionalized) co-operation ➔ **CJEU** (the **"Hamburg"** case)

CJEU [C-480/06, *Commission / Germany*] recognised also the possibility of public-public cooperative schemes for the performance of public tasks through **horizontal / non-institutionalized** arrangements

Facts:

- Direct award of a 20-year contract by 4 district councils to Hamburg's waste management unit *"Stadtreinigung Hamburg"* for the disposal of their waste in new incineration plant
- The Commission argued that agreement = a priority services contract (Annex IIA dir. 2004/18), subject to full regulation
- Germany argued that merely administrative cooperation arrangement, involving only reimbursement of service provider's operating costs

Judgment:

- Not in dispute that the control exercised by 4 authorities did not meet the *Teckal* control condition
- However:
  - contract established co-operation between public authorities and facilitated performance of public interest task
  - contract did not prejudice award of any contracts in respect of construction/operation of incineration plant
  - nothing to indicate that the contracting authorities had contrived to circumvent procurement regulation

CJEU *Hamburg* case ➔ Conclusions

Conclusions:

- Contract a **vehicle for inter-municipal co-operation in performance of a public interest task**, reached by reference to specific aspects of the contract:
  1. absence of commercial considerations
  2. arrangement governed solely by considerations and requirements relating to pursuit of public interest objectives
  3. arrangement respected equality of treatment principle (in that no private undertaking was favoured at expense of competitors nor did it prejudice the award of any contracts)

Horizontal (non-institutionalized) cooperation ➔ **Conditions**

Horizontal public-public cooperative schemes are allowed provided that:

1. The arrangement involves only contracting authorities, and there is **no participation of private capital ➔ Bodies governed by public law** (art. 1(9) dir. 2004/18) in which **private capital** is involved are not entitled to enter into horizontal P2P cooperative schemes

2. The character of the arrangement is that of real cooperation aimed an the **joint performance of a common task** as opposed to a conventional public contract
   - ➔ The cooperating authorities address a **common aim**, i.e. to **jointly** ensure the performance of a public task which has been conferred to them by legal or administrative acts **(≠ unilateral assignment of a task to another contracting authority against remuneration)**
   - ➔ **mutual participation and sharing** of resources and obligations, which lead to **mutual synergy effects**
   - ➔ The cooperation must not involve **financial transfers** between the public actors beyond those indented to cover the **costs** of each partner

> **Example:** *3 municipalities* co-operate for *joint waste management* by sharing their capabilities
> ➔ **M1:** *Collecting* **+ M2:** *Recycling* **+ M3:** *Disposing*

3. The cooperation is governed solely by considerations related to the **public interest** ➔ the cooperation agreement should **not include activities offered to the open market**

> **Example:** If *Stadtreinigung Hamburg* had built a waste incineration facility with capacity outrunning the needs of the cooperating public *authorities* with a view to exploit the surplus capacity in the open market, their cooperation would involve commercial activity

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Vertical & Horizontal **Public-Public Partnerships → Summary**

Both **Vertical & horizontal public-public cooperation (partnerships)** models share some **common characteristics**:

1. Use of **own resources in cooperation with other public sector bodies**, regardless of the legal nature of the cooperation (vertical / horizontal)

2. Only contracting authorities participate; **no private capital** involved

3. No market orientation, i.e. cooperation should not have commercial purposes
   - → In the **vertical** (in-house) model, the **essential part of the activity** of the depended entity should be directed to the **controlling authority**
   - → In the **horizontal** model only ancillary market activities are allowed

4. Type of connection between the P2P cooperation partners (**contractual vs. administrative relationship**)
   - → In the **vertical** (in-house) model the presence of an in-house relationship between 2 public bodies leads to a **derogation** from the EU procurement rules **of the procurement of a contract** that would normally be covered by them
   - → The establishment of the **horizontal** model requires that **(a)** the cooperation involves **mutual rights and obligations that go beyond the "performance of a task against of remuneration" as opposed to a normal public contract and (b)** the aim of the cooperation is not of a commercial nature

If the above conditions are met → Derogation from the EU public procurement law

Utilizing **external** resources
➔ Alternative types of public-public relationships [1]

- Various EU member states adopt **other types of public-public cooperation** for the purposes of fulfilling their **administrative functions** and ensuring **public service delivery,** in line with their administrative organization and tradition

- These arrangements involve primarily the **transfer of a public interest task to a third entity**, i.e. the **use of external resources** for the performance of this task.

- The main types of **alternative P2P partnerships** are:

1. **Transfer of competence:**

   The contracting authority, instead of purchasing works/services/supplies required for the performance of a public task, transfers permanently all relevant competences to another entity (though it may retain some power, such as the right to information)

2. **Non contractual attribution of tasks:**

   The contracting authority purchases works/services/supplies from another entity on a basis of a pre-set transactional framework that regulates strictly the fundamental aspects of the performance of the relevant assignment (technical requirements, tariffs etc), thus denying any room for negotiation between the 2 parties ➔ **No contract within the meaning of the EU public procurement law = No obligation to apply the EU PP directives** [ECJ, C-295/05, Asemfo / TRAGSA]

Utilizing **external resources** ➔ **Other types of public-public** relationships [2]

3. Award on the basis of an exclusive right:

Article 18 of dir. 2004/18 allows a contracting authority to directly award **public service contracts to another contracting authority** (or to an association of contracting authorities) on the basis of an **exclusive right** which has been conferred to the latter pursuant to **a national legislative, regulatory or administrative act which is compatible with the TFEU**.

4. Joint procurement activities:

Contracting authorities can co-operate for the purposes of **collaborative procurement** by

- ➔ forming **associations of contracting authorities** (art. 1(9) dir. 2004/18) for the purposes of organizing one or more **common call(s) for tenders** or
- ➔ Establishing a **central purchasing body** in order to buy **from** or **through** it in accordance with art. 11 of dir. 2004/18

Concluding remarks [1]

1. CJEU holds firm on the **basic rule: Cooperation between public sector bodies is subject to the application of the EU public procurement rules**, when that cooperation is characterized as a **contract** within the meaning of the EU public procurement law

2. An exception may be possible when a **"quasi in-house relationship"** between the cooperating entities is determined, in accordance with the criteria set by the CJEU case law **(Vertical / Institutionalized Cooperation)**

3. In addition to the in-house exemption, public sector bodies may opt for other types of public-public partnerships **(Horizontal / Non-institutionalized Cooperation)**, provided that these arrangements **(i)** involve **sharing** of resources for the **joint** performance of **common public interest** activities and **(ii)** they **lack market relevance**

4. Furthermore, when a contract between two public bodies is concluded and executed on the basis of **pre-set mandatory administrative or statutory provisions** that delimit the power of the parties to negotiate on the fundamental aspects of the transaction, this contract may not be defined as a contract within the meaning of the EU public procurement law and thus fall outside its scope of application

5. Exemptions may also be triggered **(i)** when the cooperation involves **permanent allocation of powers or responsibilities** to another public body or **(ii)** when the award is based on **exclusive right(s)** in line with the EU public procurement rules or **(iii)** when multiple contracting authorities conduct collaborative **procurement**

Concluding remarks [2]

- **CJEU** continues to **develop and expand its in-house doctrine**, adding new variables and providing for clarifications on complex arrangements of public-public cooperation, **gradually confirming derogations from the EU public procurement rules**
- In any case, **given the diversity and the complexity of the public-public cooperation** models, **derogation from the application of the EU public procurement rules** should always:
  - Follow an **ad hoc (case-by-case) assessment** of each cooperation arrangement, in order to determine its legal form and functional characteristics
  - Rely on **strict (narrow) interpretation** of the EU public procurement rules, since these derogations constitute deviations form the basic rule (open and transparent procurement process)
  - Test their judgment and decisions against the **current CJEU case law** in order to ensure compliance with the EU *acquis* on public procurement
- Further **analysis and practical guidance** on the setting-up of public-public partnerships provided by the European Commission in the **COMMISSION STAFF WORKING PAPER concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation')** available at: http://ec.europa.eu/internal_market/publicprocurement/partnerships/cooperation/index_en.htm

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