



developments in procurement law



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1 developments in procurement law

- 1.1 This is a brief guide to some very important developments affecting procurement law which affects public bodies including local authorities across all the EU Member States arising from recent European Court of Justice ('ECJ') judgments. For a 4ps summary of the main cases to date (June 2008) – see the Annex to this document.
- 1.2 Where guidance from relevant bodies exists on these issues (such as from OGC or the European Commission) we have inserted web site links to the relevant documents and/or web site concerned.

2 key messages for local authorities

- 2.1 Take note of the developments outlined in this paper – decisions of the ECJ are binding across all EU Member States and legal action could be brought against an authority for failing to comply.
- 2.2 Review Council Standing Orders and procurement practices across departments to ensure they are fully compliant with EU procurement rules and with fundamental EC Treaty requirements for competition – this is particularly important for contract opportunities which hitherto may have been regarded as outside of EU advertising requirements such as the procurement of sports and recreation services, health and social services, legal services and lower value (below EU threshold) contracts.
- 2.3 Explore cost effective and practical measures to demonstrate compliance with EU advertising requirements such as web site or buyer profile advertising and utilisation of the DTI's www.supply2.gov.uk web site to reach small and medium sized contractors who may be interested in expressing interest in bidding for such contracts.
- 2.4 Consider the potential impact of the procurement rules and advertising requirements where public to public service delivery is contemplated or where collaborative ventures are planned by or with other local authorities and/or public bodies and/or where, for service delivery purposes, the setting up an external entity (such as a company) is proposed.
- 2.5 Take legal advice from suitably qualified practitioners (internal lawyers or external law firms and procurement specialists) before awarding service contracts or before awarding income generating opportunities such as service concessions without advertisement.
- 2.6 Seek assistance and guidance from 4ps and other relevant local authority central bodies (such as the LGA's European and International Unit) and from relevant central government bodies such as the Office of Government Commerce or the Department of Communities and Local Government.

3 outline

- 3.1 The case law emanating from the ECJ in recent years confirms the following principles:
 - 3.1.1 Local authorities need to consider advertising and inviting tenders for relatively low value contracts (i.e. contracts below EU financial thresholds)
 - 3.1.2 Local authorities need to consider advertising and inviting tenders for contracts which fall outside mainstream EU procurement rules (known as Annex 2(b) services, which include hotel and restaurant services, recreational, cultural and sporting services, legal services, health and social services)
 - 3.1.3 Such competitions do not necessarily need to be advertised in OJEU and need not follow the detail of the EU procurement rules but any such competition must be in accordance with fundamental EU treaty principles such as non-discrimination and equal treatment

- 3.1.4 Where an opportunity exists to exploit (i.e. to generate income from) a service for a period of time, such opportunities must be advertised and opened up to competition prior to award (see the Annex below and the case of *Parking Brixen*). Such arrangements are known as public services concessions. Whilst currently services concessions are not subject to the full EU procurement regime, the European Commission are considering legislation in this area. Leisure centres and car parks might be examples of such public services concessions
- 3.1.5 Supplies of services by and between public bodies are subject to the public procurement rules and/or EU Treaty competition requirements and there are no exceptions or exclusions from the rules simply by virtue of such transactions being by or between public bodies
- 3.1.6 Subject to *Teckal* (as developed in later cases – see the Annex below) the establishment of a company or similar separate entity by a public body will need to comply with procurement rules or competition requirements if the entity is to be awarded service contracts or if the establishment of such entity involves private sector investment (whatever the nature of that investment)
- 3.1.7 To be regarded as outside procurement and competition obligations, the establishment of a company (or other separate entity) by one or more public bodies must come within the exceptions to the general rule in *Teckal*, i.e. only where a public body exercises ‘control’ similar to that which it exercises over its own departments and at the same time the entity carries out the essential part of its activities with the controlling public body or bodies will the public procurement rules etc not apply. The ‘control’ test is more difficult to satisfy if there are several public bodies involved in the venture (see the Annex and the case of *Coname* below).

4 below threshold and exempt contracts

- 4.1 The European procurement rules have for some years required contracting authorities to advertise significant contracting opportunities in the Official Journal of the European Union (OJEU), to comply with specified selection and evaluation criteria, to follow statutory timescales and to meet other requirements set out in the detailed regulations where contracts are above the relevant financial thresholds or where services are classified as falling within Annex 2(a) of the relevant Directive (for these purposes the relevant Directive is 2004/18/EC).
- 4.2 Services falling within Annex 2(b) of the relevant directive do not have to be advertised in the OJEU or follow the processes set out in the procurement rules. Contracts of all types below the specified financial thresholds are similarly excluded from the OJEU requirement and full procurement rules. Whilst public bodies could, if they so chose, have volunteered to advertise such opportunities via OJEU, traditionally, local authorities have followed their own processes set out in standing orders to obtain value for money when procuring such low value contracts or when procuring Annex 2(b) services. These requirements could involve some form of competitive process but may not necessarily have required an advert to be placed and probably would not have followed the various processes set out in the procurement rules for selecting contractors.
- 4.3 ECJ case law now confirms that the Treaty principle of non-discrimination on the grounds of nationality implies an obligation of transparency on contracting authorities. The ECJ has indicated a need to ensure that there is “a sufficient degree of advertising to enable the market to be opened up to competition and the impartiality of the procurement process to be reviewed”. It has also found that there will be a difference of treatment between organisations in different Member States to their detriment if an authority fails to advertise a contract “of certain cross-border interest”.

- 4.4 In view of the fact that these requirements are vague and uncertain, a non-legally binding 'Interpretative Communication' was issued by the European Commission (EC) in June 2006 which provides an indication as to how the Commission will interpret these judgments. That Interpretative Communication on transparency in sub-threshold contracts etc can be accessed at:
http://ec.europa.eu/internal_market/publicprocurement/key-docs_en.htm
- 4.5 The OGC have also issued a procurement policy information note on the subject in July 2006:
<http://www.ogc.gov.uk/documents/ProcurementPolicyThresholdProcurement.pdf>

5 what are the practical implications of the ECJ rulings and Commission's guidance?

- 5.1 The Commission states that it is the responsibility of each procuring public body to consider in each case whether an advertisement is necessary. However, they also indicate that not every contract will be of interest to the wider market, such as where the contract is of low value and is unlikely to be of interest to bidders from other EU Member States. Unfortunately, there is no indication of what precisely 'low value' means in this context.
- 5.2 The Commission advises that it is also a matter for the procuring public body to decide how to advertise. In making that decision, it needs to look at the relevance of the contract to the internal market and, in particular, to the value and nature of the contract. In general terms, the more interest there is likely to be from potential bidders from outside the domestic market, the more accessible the advert needs to be to such bidders. Whilst an OJEU Notice is not required for these types of contract, it may be in some circumstances the only way in which the procuring authority can be certain that it has used appropriate means to communicate the opportunity to bidders.
- 5.3 Where the contract value is low or where there is unlikely to be interest from bidders from a wider field, it is possible to advertise such opportunities by means of:
- 5.3.1 Web sites, such as the procuring authorities' own web site or as part of the Authority's Buyer Profile on the Internet
- 5.3.2 Portal websites specifically created for visibility of such opportunities. The DTI have established www.supply2.gov.uk specifically for this purpose and to increase transparency and enable small and medium sized businesses to respond to such 'lower value' opportunities
- 5.3.3 National official journals or trade press with national or regional coverage or other specialist publications. A good example here would be for recruitment of lawyers (an Annex 2(b) excluded service), placing an advert in the Law Society's Gazette
- 5.3.4 Local publications – the Commission includes this as an option for where there are very small contracts or where there is only a local market. However, great care would need to be exercised to avoid allegations of discriminatory practices or favouritism.
- 5.4 The procuring authority must give sufficient information in the adverts to allow contractors to make a decision on whether to express interest in the contract but thereafter the processes are not subject to any specific regime. The process adopted, however, must be in accordance with basic EU Treaty principles:
- 5.4.1 Non-discriminatory description of the subject-matter of the contract (using words 'or equivalent' when describing particular characteristics of a product or service)
- 5.4.2 Equal access for contractors from all Member States – no direct or indirect discrimination
- 5.4.3 Mutual recognition of diplomas, certificates or other evidence of formal qualifications
- 5.4.4 Appropriate time limits to express interest and submit offers

- 5.4.5 Transparent and objective approach – set out rules of process in advance and apply them similarly to every respondent
- 5.4.6 Limit number of applicants in a transparent and non-discriminatory manner
- 5.4.7 Provide a means of reviewing the impartiality of processes adopted
- 5.4.8 Contractors must be able to challenge decisions which are made or the conduct of the process.
- 5.5 The European Commission has, in recent years, commenced a number of proceedings against member states for failure to advertise sub threshold and Annex 2(b) contracts and there are signs that there is more of a willingness on the part of contractors to take action in the local Courts for breaches of procurement law.

6 public to public collaboration and service supplies

- 6.1 The potential for impact of the ECJ case law on the current drive for public sector efficiency in the UK through public sector collaboration initiatives is significant. Unfortunately, there is little, if any guidance from the Commission or from other central government sources on how to interpret the new case law and its impact in practice on proposed public/public partnerships.
- 6.2 The ECJ's ruling in *Commission-v-Spain* (see the Annex below) established that co-operation agreements between local authorities cannot, as a rule, be excluded from procurement law by National legislation. The law of contract applies where two legally distinct entities conclude a contract for pecuniary interest. Local authorities can be both procurers of services and suppliers of services.
- 6.3 The case of *Teckal* has further decided that generally, the award of a contract to an entity legally distinct from the public body awarding the contract will need to be advertised prior to award. Only where a public body exercises 'control' similar to that which it exercises over its own departments and at the same time the entity carries out the essential part of its activities with the controlling public body or bodies will the public procurement rules etc not apply. This 'exception' has been very narrowly interpreted by the ECJ in successive cases since *Teckal* (see Annex below). This means that the setting up of a company (or other third party entity) by a local authority (or group of authorities) is highly likely to require compliance with the procurement rules (or advertising if the contract is below the threshold or excluded – see above) before that company can be established.
- 6.4 The case of *Stadt Halle* further decided that trading with another public entity is not an exception *per se* to competition requirements either under the procurement rules (if a service contract) or under the EU Treaty (if a services concession).
- 6.5 Therefore, whilst collaboration between local authorities or within the public sector may appear to be a sensible, practical cost effective way of delivering front line services, harnessing benefits of economies of scale, saving money and making the back office more efficient, public bodies will have to consider very carefully whether they need to comply with procurement law before simply entering into such arrangements with other like minded authorities.
- 6.6 Joining up to deliver services more efficiently and effectively is something which the UK Government has been actively encouraging the public sector to explore, following the Gershon efficiency review. However, collaborative initiatives by and between public bodies which potentially involve the supply of services from one economic operator (or service supplier) to another contracting authority involves consideration of the application of the EU public procurement rules/EU competition requirements.

- 6.7 EU law is interpreted according to the purpose for which the laws were enacted and there must be no attempt to avoid the application of the rules or to distort trade or discriminate in favour of particular suppliers (e.g. public body suppliers in this context).
- 6.8 There have been some helpful developments which may assist the shared services agenda following the introduction of the new consolidated directive and the accompanying UK *Public Contracts Regulations 2006*. Included within this new statutory code for procurement are a number of options for procuring services which now need to be considered and addressed to see whether any of them can help local authorities to join up or collaborate more effectively when purchasing services. These new processes are described below.

7 the establishment of Central Purchasing Bodies ('CPBs')

- 7.1 Whilst CPBs have been established for some time (such as the Yorkshire Purchasing Organisation) new provisions both in the new Directive and the regulations expressly refer to the ability to establish such agencies on behalf of two or more public bodies. The CPBs themselves must be contracting authorities in their own right and must follow the public procurement rules when purchasing on behalf of principal clients but this approach does enable public bodies to come together through the medium of an agent in order to then procure services for all more efficiently and effectively.
- 7.2 Such an agent may be a public body (such as one authority acting on behalf of a number of others in the area) or may be a corporate entity established and wholly controlled by public bodies established for that purpose. However, legal advice would need to be taken on whether a procurement exercise or competition would be necessary to establish the agency itself, if that agency were to make money from or take a fee for acting in that capacity since this may be interpreted as a services concession and require competition prior to establishment.

8 the ability to set up framework arrangements and call off contracts

- 8.1 Again, whilst such arrangements have been established in the past (see OGC buying solutions for example), the recent procurement legislation expressly acknowledges the ability to set up such processes and provides a set of rules within which such framework contracts will work. Although frameworks have been used largely for the supply of goods there is no reason in principle why they should not include the supply of services. They may also be set up through a central purchasing body as mentioned above. This may be a way of scoping demand for certain services in an area from certain public bodies, agreeing how that demand is to be translated into a public tender (e.g. through a central agency acting on behalf of all the participating bodies who have agreed to purchase through such arrangements) and then inviting the market to respond through an OJEU notice to be suppliers. Such suppliers may include purchasing authorities acting as suppliers (e.g. direct service organisations within local authorities).
- 8.2 Dynamic purchasing systems, electronic procurement and e-auctions, buyer profiles and web site advertising of opportunities and contracts
- 8.3 As outlined above there is a need to advertise contract opportunities and these more modern approaches assist with transparency and may help protect authorities from non-compliance allegations.

9 pooling resources between public bodies

- 9.1 Section 75 of the *National Health Service Act 2006* permits pooling of resources by local authorities and health agencies such as PCTs following regulations made under section 31 of the *Health Act 1999*. Unfortunately, whilst powers were included in the *Local Government Act 1999* (section 16) to extend pooling arrangements more widely across all local government services these provisions have not been brought into force. Where two or more public bodies (subject to identification of powers) decide to share resources through a pooling arrangement in order to improve efficiency or provide a more appropriate service to end users, there is at least the potential for distinguishing such arrangements from a contract for services between public bodies. However, there are no decided cases on this as yet and the authorities involved would need to consider this carefully and take appropriate legal advice.

10 local authority – purchaser or supplier?

- 10.1 A crucial issue to determine when considering any proposal to share services or to join up with other bodies to supply services via a contract is to determine who is acting as a procurer of services and who is acting as a supplier of services. Indeed, it will need close analysis to determine whether what is being proposed actually involves a procurement decision at all. Merely exploring or scoping options for service delivery is unlikely to involve a procurement of services. Consequently, it may be possible, as a preliminary step before going to the market, for public bodies to agree amongst themselves how they are going to go forward to procure and supply services in the future. Far from seeking to avoid competition, the authorities would be re-organising the 'client' or 'purchasing' side (perhaps through the use of a CPB and/or framework arrangement) to try and sort out a more attractive contracting package for the ultimate supplier(s) who would then be procured through an EU compliant OJEU process.
- 10.2 Local authority suppliers (such as direct service organisations) could bid in competition with any private sector suppliers to win the right to supply services via these arrangements to the procuring bodies (obviously care would need to be taken to ensure there was no bias built into the process in favour of any public sector contracting parties and that conflicts of interest were managed appropriately).

11 previous approaches and enabling legislation

- 11.1 Care must be taken with any proposed arrangements to check there are legal powers enabling the approach or vehicle proposed. Legal advice must also be taken as to whether legislation used frequently in the past remains a sound basis upon which to establish a new procurement arrangement or whether recent case law or subsequent legislation impacts on such 'traditional' arrangements.
- 11.2 Merely because a statute contains enabling powers to undertake some function (such as in the case of the long standing '*Local Authorities (Goods and Services) Act 1970*' or the more recent trading powers in the *Local Government Act 2003*) it does not mean that the EU procurement rules or the EC Treaty fundamental principles can be disregarded or ignored. There may still be an obligation to put out to tender such proposed arrangements if they amount to a supply of services to one public body from another economic operator.

12 consequences of breach of the EU procurement rules or fundamental Treaty principles

- 12.1 It is crucial for local authorities to take account of these recent developments in EU procurement law. There are a number of potential ways in which local authorities (or indeed any public body failing to comply with procurement obligations) can be challenged. Those who may challenge decisions and processes include the following:
 - 12.1.1 Contractors from across the EU Member States who have either been unsuccessful in bidding for a contract opportunity or who have been prevented from competing because the opportunity has not been advertised and/or a proper EU compliant process has not been followed
 - 12.1.2 Other interested parties (such as citizens within the authority's area who may have concerns about the award of contracts other than through transparent processes) may complain (anonymously or otherwise) to the European Commission inviting investigation
 - 12.1.3 The European Commission may of its own volition choose to undertake an investigation and bring challenges or infraction proceedings against the UK government in the European Court. Many of the cases in the annex below have been commenced in this fashion.

13 methods of challenge and remedies

- 13.1 In addition to civil remedies available in the UK courts available to contractors and others with sufficient legal standing (such as trade associations) there are special remedies provided for in the regulations which are available to contractors and potential contractors who have suffered as a result of a breach of the rules. The remedies available depend upon the stage at which the procurement process (if any) has reached and all remedies are at the court's discretion. Potential remedies include:
 - 13.1.1 Interim relief e.g. to suspend an award process
 - 13.1.2 Injunctions restraining a contracting authority from proceeding with an unlawful contract award process or to require compliance
 - 13.1.3 Awards of damages e.g. for deliberate breach of the rules.
- 13.2 In the future, given increased accessibility to the courts and new legal requirements forcing greater transparency of procurement processes (such as the *Alcatel* standstill requirements prior to contract award, as set out in the regulations), there may be a greater risk of legal action against local authorities for breaches of procurement rules, than in previous years.
- 13.3 In December 2007, the European Council and Parliament agreed a new Remedies Directive. The OGC are tasked with implementing it, which should be done by 20 December 2009 following consultation on draft amendments to the UK Regulations. Once implemented, the directive will increase the availability of remedies for breaches of the procurement rules. It will strengthen national review procedures for illegal direct awards and introduce a mechanism for authorities to voluntarily publish a notice of their intention to make a direct award, such notice triggering an *Alcatel* standstill period. For serious breaches (for example direct awards where contracts were not advertised but should have been), remedies could include a declaration that the signed contract is ineffective. Other remedies include a shortening of the contract period and/or fines.

14 4ps actions

- 14.1 4ps are working with local authorities and relevant central and local government bodies to understand how these developments are likely to affect and impact upon contracting arrangements and proposals currently being explored by many authorities across the UK.
- 14.2 4ps are working in partnership with many local authorities to explore ways of establishing partnerships with both public and private sector partners which are fully compliant with EU procurement law and fundamental treaty obligations.
- 14.3 4ps are working in partnership with other pan- European representative agencies (such as CEMR which represents local and regional government in Europe) to lobby for legislative change and for clear guidance to be issued by the European Commission on their interpretation of the ECJ case law and in particular its effect on public to public sector partnerships and collaborative working.

15 conclusions

- 15.1 It is very important to take account and act upon the new developments which have taken place in the public procurement environment. Assumptions which may have been made in the past about the necessity to submit particular opportunities to advertisement need to be challenged and tested with legal advisers. It is no longer sufficient (if it ever was) to rely solely on the identification of legal powers to authorise a particular activity such as trading between public bodies. Legal advice must be taken as to whether such proposals need first to be advertised in the market instead of simply being awarded to other local authorities or public bodies. Any opportunity to generate income from a service such as the use of land for a car park or income from the use of sports facilities and the like may also need to be submitted to public tender in future.
- 15.2 4ps will be monitoring developments on this subject and will post more information on its web site in due course.

Summary of recent ECJ and domestic case law and recent Commission infringement proceedings affecting public/public partnerships and arrangements involving the establishment of companies to undertake concessions or service contracts

ECJ cases

C-107/98: Teckal Srl v Comune di Viano (18/11/99)

Generally, the award of a contract to an entity legally distinct from the public body awarding the contract will need to be advertised prior to award.

Only where (1) a public body exercises 'control' similar to that which it exercises over its own departments (the 'control' condition) and at the same time (2) the entity carries out the essential part of its activities with the controlling public body or bodies will the public procurement rules etc not apply.

C-324/98: Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG (07/12/00)

The case involved public service concessions. The ECJ made it clear that although such contracts are outside of the scope of the procurement Directives, the contracting authorities concluding them must nevertheless comply with the fundamental rules of the EC Treaty in general and the principle of non-discrimination on grounds of nationality in particular. There could be implied an obligation of transparency in order to allow a contracting authority to satisfy itself that it had complied with the principle of non-discrimination. That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

C-59/00: Bent Moustén Vestergård v Spottrup Bogiselskab (03/12/01)

In this case, which involved the award of a contract below the relevant value threshold, the ECJ relied on *Telaustria* for the proposition that although certain contracts are excluded from the Directives, they must be concluded in compliance with the fundamental rules of the Treaty.

C-26/03: Stadt Halle (11/01/05)

Trading with another public entity is not an exception per se to competition requirements either under the procurement rules (if a service contract) or under the EU Treaty (if a concession).

Majority ownership by a public body or minority participation by a private sector investor will not satisfy the *Teckal* 'control' condition. More than that – the existence of private sector investment, however minimal, introduces a 'commercial emphasis', meaning the entity cannot be considered to be 'in-house' (to satisfy the *Teckal* exception).

C-84/03: Commission v Spain (13/01/05)

The ECJ's concern to resist the creation of new exceptions to the application of the procurement rules was reinforced in this case. The ECJ decided two things: firstly that any arrangement between legally distinct contracting authorities may be subject to the Directives and the *Teckal* exemption will only apply where the prescriptive conditions of that judgment are met; and secondly, the test for whether or not an entity is a contracting authority is the test set out in the three cumulative conditions of Directives 93/36 and 93/37 (one of which considers the commercial character of the entity), and an entity's private law status does not preclude it from classification as a contracting authority. This means that an entity which includes an element of commercial trading in its activities, but which was not established for this purpose, may be subject to the public procurement regime.

C-231/03: Consorzio Aziende Metano (Coname) v Comune di Cingia de Botti (21/07/05)

The case involved a public service concession award without a tender to a company that was predominantly (but not wholly) owned by public bodies. The awarding public body held a very small shareholding in the company (0.97 per cent). As the company was open, at least in part, to private capital, the ECJ said the award could not qualify for the *Teckal* "in house" exception. The ECJ went on to say that such an award would be in breach of the Treaty obligations if there had been a failure to comply with the underlying transparency requirements. These do not necessarily require the public body to issue an invitation to tender. However, organisations in other Member States should at least have access to appropriate information regarding the concession, to be in a position to express an interest in obtaining it.

C-458/03: Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG (13/10/05)

This case involved an award of a public service concession (a car park operation) to a wholly-owned subsidiary company without going out to public tender.

The ECJ held that even where there is no private sector involvement and a wholly owned public entity is established to carry out an activity, the public authority may be required to advertise the opportunity if it is in the nature of a 'concession' (i.e. there is the potential to generate third party income) and the in house contract exception set out in *Teckal* does not apply.

The ECJ elaborated on the first 'control' condition of the *Teckal* exception and said this would be satisfied if there is a power of decisive influence over the strategic objectives and significant decisions of the company. On the facts, the company failed to come within this exception because:

- its administrative board had considerable powers, which it could exercise outside the management control of the public authority shareholder;
 - its objects were extended into significant new areas;
 - its capital had to be opened up to other investors; and
 - the geographical area of its activities has been expanded to all of Italy and beyond.
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C- 264/03: Commission v France (Unpublished) (20/10/05)

The case concerned a French law which reserved, in the context of urban revival, the task of delegated project contracting to a list of French legal entities. In considering the application of Treaty principles, the ECJ noted that the Services Directive did not apply to contracts below the threshold but went on to say that the mere fact that the Community legislature considered that the strict special procedures laid down in the Directives do not apply to contracts of small value does not mean that they are excluded from Community law. Contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty.

C-29/04: Modling (10/11/05)

The Council awarded a waste collection and disposal contract directly to a company that at that time was established and owned in full by the Council. Shortly after the contract award the Council sold 49 per cent of its shares in the company to a private sector partner. The ECJ ruled the chronology of events was not determinative i.e. the fact the company was wholly-owned at the point of contract award did not automatically exempt the award from public procurement rules. The fact that the private sector investment took place soon after contract award was sufficient to determine that the public procurement regime applied. A Commission press release indicates that following the Commission's threat of enforcement proceedings against Austria, the contract was terminated on 31 December 2007 to make way for a new contract award procedure.

C-410/04: ANAV v Comune de Bari (06/04/06)

The ECJ underlined its strict interpretation of the *Teckal* exception following a referral from the Italian Courts requesting a ruling on whether obligations enshrined in Italian legislation were compatible with the principles of transparency and equal treatment in the Treaty of Rome. National legislation set no limits on the freedom of public bodies to choose between various methods of awarding service contracts for transport services such as between carrying out a public tendering exercise in accordance with the procurement rules and the award of a service contract to a wholly owned company without such competition. The Bari transport system was a 'services concession' and the award must comply with Treaty principles (non-discrimination and equal treatment).

Whilst the ECJ held that the National legislation in question was not incompatible with the Treaty it warned that the *Teckal* exception to the rules would be strictly interpreted by the Court. In this case, there was some evidence that the share capital of the wholly owned company might, at some future stage, be opened up to private sector investors during the concession period. The ECJ, following its reasoning in *Stadt Halle* and *Coname*, stated that in so far as the company was (or was intended to be) open, even in part, to private capital this would preclude it from being regarded as a structure for the in-house management of a public service on behalf of a controlling public authority.

The Commission's Interpretative Communication on Institutionalised PPPs of 5 February 2008 considers the issue of private sector participation in the capital of a public authority's company. It distinguishes intent from theoretical possibility. The theoretical possibility would not, in the Commission's opinion, undermine the in house relationship between the public authority and its company.

C-340/04: Carbotermo SpA v Commune di Busto Arsizio (11/05/06)

Here the ECJ again held that fundamental Treaty principles precluded the direct award of a public supply contract to a company whose capital is held by another company whose majority shareholder is the contracting authority and where the managerial powers of the board of directors of that company may be exercised independently of the contracting authority. Moreover, in order to determine whether an undertaking carries out the essential part of its activities with the controlling authority (for the purposes of applying the second condition of the *Teckal* exception) account must be taken of all the activities which that undertaking carries out, regardless of who pays for those activities (whether it be the contracting authority itself or users of the service) and regardless of the territory where the activities are carried out.

C-507/03: Commission v Ireland (13/11/07)

This case concerned the Irish Minister of Social Welfare's decision to award a high value contract for the provision of social benefit payment services to An Post (the national Post Office). The Commission brought this case because the contract was not opened up to competition. The ECJ confirmed that while public contracts like this for Annex 1B services are not subject to the full procurement regime, they are still caught by the fundamental rules of Community law. These include the Treaty principles on the right of establishment and freedom to provide services. The Court confirmed that there is a difference of treatment between organisations to their detriment if:

- the contract is of "certain cross-border interest"; and
- the authority prevents organisations in other Member States from expressing their interest because the authority fails to provide adequate information before contract award.

Such practices are forbidden under the Treaty as a form of indirect discrimination on the basis of nationality. However, in this case, the ECJ said the Commission had not brought enough evidence of cross border interest to support its case.

C- 532/03: Commission v Ireland (18/12/07)

The Commission referred Ireland to the ECJ for not advertising an arrangement between two public bodies. This arrangement involved Dublin City Council providing emergency ambulance services to Eastern Regional Health Authority. As an Annex 1B service, it is not governed by the detailed provisions of the procurement rules. The Commission considered that this arrangement should have been opened up to competition in line with the Treaty obligations. The ECJ noted that national legislation empowered both authorities to carry out emergency ambulance services. There were funding arrangements between both bodies, through which Dublin City Council applied its own funds and was paid a contribution by Eastern Regional Health Authority for part of its costs. The ECJ decided it was conceivable that Dublin City Council provided such services in the exercise of its own powers derived directly by statute. That there were funding arrangements did not detract from the court's view that this had not been shown to be an award of a public services contract. Accordingly, the case was dismissed.

C-195/04: Commission v Finland (26/04/07)

This case concerns a procurement of kitchen equipment where the value is below the threshold. The Commission argued that even though certain contracts concerning public procurement are outside the full scope of the procurement regime, contracting authorities must nevertheless comply with the fundamental provisions of the Treaty. Procurement must be made public to a reasonable extent and that obligation of publicity must be complied with, even in the case of contracts whose estimated values are below the threshold of application of the EC procurement Directives.

Here, the Finnish authority awarded the contract after directly seeking tenders from a selection of companies, rather than advertising to ensure competition and to avoid discrimination on the grounds of nationality. A procedural irregularity meant that the ECJ could not consider the merits of the case. However, it does highlight the Commission's willingness to pursue authorities for insufficient advertising for below threshold contracts.

cases pending before the european court of justice

The European Commission continues to investigate the procurement activities of Member States. These investigations could culminate in a referral to the European Court of Justice. This emerging pipeline of cases, as featured in European Commission press releases available on the RAPID database online, shows the level of scrutiny to which local authorities may be subject when awarding contracts, whether below the value threshold, for Part B services or to subsidiaries. It also gives a good indication of the European Commission's areas of interest when policing the procurement rules.

pending: infringement proceedings against Germany (15/07/05)

The Commission has referred Germany to the ECJ concerning the failure of several museums to advertise below threshold contracts. These contracts are for the transport of works of art. The Commission considers that such "small" contracts do need public advertising as they can be quite important for many enterprises in the Internal Market, including SMEs. The Commission is relying on ECJ case law that confirms the need for a sufficient degree of advertising for such contracts to ensure a fair chance for all potential bidders. We await proceedings before the court.

pending: infringement proceedings against Germany (15/07/05)

The Commission sent a reasoned opinion to Germany in connection with contracts for sewage disposal services. These contracts were concluded between (1) a body established by the City of Hamburg for the operation of its sewage system and (2) several municipalities situated around Hamburg. Germany considers these contracts are cooperation between municipalities outside the scope of the procurement regime.

However, the Commission maintains (based on the procurement Directives and case law) that public contracts concluded between different public entities are caught by the procurement regime. The Commission considers that such contracts must be awarded following a transparent procedure, to ensure fair competition between potential bidders. We await the outcome of these proceedings, which could include a reference to the ECJ.

pending: infringement proceedings against Austria (29/06/06)

The Commission sent a reasoned opinion to Austria concerning the direct award by two cities, Hartberg and Kapfenberg, of long term waste disposal contracts. These contracts were awarded to mixed undertakings, in which the respective cities have a 51 per cent stake. The Commission thinks the “in house” exception does not apply, based on the *Stadt Halle* case. We await the outcome of this procedure, which could include a reference to the ECJ.

pending: infringement proceedings against Germany (29/06/06)

The Commission announced it would bring a case against Germany before the ECJ. Its reason for doing so is that several administrative districts in Lower Saxony have awarded a contract for waste disposal services to another public entity without competition. Germany considers this is a public-public co-operation outside the procurement regime. The Commission disagrees, referring to ECJ case law (especially case C-84/03 (*Commission v Spain*)), which provides there is no general exception for public-public co-operation from the procurement regime. Proceedings before the court are pending.

pending: infringement proceedings against Italy (27/06/07)

The Commission is investigating Italy for the direct award of a contract for waste management services in the Municipality of Contigliano to a public-owned limited liability company. The town of Contigliano owns 0.5 per cent of the capital in the company. Italy maintains this is an “in house” award outside the scope of the procurement regime. The Commission disagrees for the following reasons:

- the powers entrusted to the Municipality of Contigliano as a minority owner are insufficient to confer to the latter a control which is similar to that which it exercises over its own departments; and
- the undertaking is active in the market and it carries out a significant part of its activities with parties other than its controlling entities.

We await the outcome of this investigation, which could include a reference to the ECJ.

pending: infringement proceedings against Italy (03/04/08)

The Commission has started infringement proceedings against Italy in the context of structures of cooperation between public bodies. A consortium of public bodies responsible for the coordinated management of water and wastewater services in their area, has awarded a contract for such services to a company they collectively own without an invitation to tender.

The Commission does not consider that this arrangement qualifies for the in-house exception because:

- the powers entrusted to each public body as a minority owner of the company are not enough to confer on them a control which is similar to that which they exercise over their own departments
- the shareholders of the company cannot jointly control it through the public consortium, since the company carries out a number of activities other than the management of the water service, which do not fall within the competence of the public consortium.
- the board of the company has considerable management autonomy.

We await the outcome of this investigation, which could culminate in a reference to the ECJ.

pending: infringement proceedings against Germany (03/04/08)

The Commission is investigating Germany for the direct award (i.e. without inviting tenders) of a series of contracts for waste disposal services between two municipalities and an administrative district. These public authorities have cooperated in waste disposal matters since 1986. Under the current cooperation structure, each authority is responsible for the disposal of a certain type of waste. A private waste operator has complained to the Commission that the co-operation structure does not comply with the "in-house" exception and therefore such contracts should have been competitively tendered.

pending: infringement proceedings against Italy (06/05/2008)

The European Commission is investigating the town of Rocca Priora's direct award of waste management and pharmacies management services to a public-owned company limited by shares. The town of Rocca Priora owns 0.038 per cent of the capital of the company.

Italy considers that the award is excluded from the application of EU public procurement rules, since the company is an "in-house" structure of the awarding entity, as set out in ECJ case-law.

The Commission has said it considers that the first condition required by the ECJ case-law for the application of the "in-house" exception is not met, because:

- the 0.038 per cent holding in the share capital of the company is so small that it prevents the town of Rocca Priora from exercising a control which is similar to that which it exercises over its own departments; and
 - the company is open, at least in part, to private capital, which precludes it from being regarded as a structure for the "in-house" management of public services on behalf of the municipalities which form part of it.
-

closure of infringement proceedings

The European Commission has also given publicity to those cases where infringement proceedings against public bodies have been closed by it before reaching the European Court of Justice. While we do not know for certain the full reason for closure, Commission press releases available online on the RAPID database are helpful in indicating the types of arrangement under scrutiny.

closed: infringement proceedings against Germany (15/07/05)

The Commission has closed its case against Germany in which a municipality became a member of a regional water association organising water supply and sewage services. Through that membership, the municipality transferred its waste water disposal services to the association. At the same time, the municipality and the association entered into a contract for those services. The Commission referred this to the ECJ because there has been no competitive tendering procedure for the contract. The contract was later terminated. The municipality continued to be a member of the association, which continued to perform the services. The termination of the contract clarified that responsibility for performing the services had transferred to the association when the municipality joined it. The Commission said it closed the case because it considered that the association was entrusted with the services through an act of internal reorganisation of public powers and not through a public contract.

closed: infringement proceedings against Germany (21/03/07)

The Commission has closed a case against Germany concerning the direct award by four municipalities in North Rhine-Westphalia of waste disposal services to the special purpose association established by them. In the Commission's view, the complete transfer of a public task from one public entity to another, to be performed by the transferee in full independence and under its own responsibility, does not imply the provision of services for remuneration within the meaning of Article 49 EC Treaty. Such a transfer of public

tasks constitutes an act of internal organisation of the public administration of the Member State in question. As such, it is not subject to the application of eu law and its basic freedoms.

closed: infringement proceedings against Italy (27/06/07)

The Commission has closed a case against Italy on water management services in Basilicata. The case concerns the direct award of services related to integrated water management in the ATO (best territorial division) of Basilicata to a public company limited by shares wholly owned by the relevant local authorities. These authorities jointly exercise their competencies through a common entity, the company.

Italy has now changed the constitutional documents of the company as follows:

- its objects are limited to water management services in Basilicata
- private shareholders are not permitted
- the powers of control of the controlling authorities have been bolstered

The Commission considers that the local authorities jointly exercise over the company a control which is similar to that which they exercise over their own departments. Therefore, the Commission considers this is a structure for the “in-house” management of water services on behalf of the authorities which form part of it.

closed: infringement proceedings against Italy (27/06/07)

The Commission has closed a case against Italy in respect of a public-public cooperation for waste management services within the ATO TP 2 (territorial units within the Province of Trapani). In this case, the Municipalities within the territory of the ATO TP2 in Sicily and the Province of Trapani established a company to which they transferred all urban waste management competences. The company subsequently decided to execute waste management services within the ATO TP2 by its own means, without running a public tender exercise. The Commission considers that this transfer of urban waste management competences amounts to an internal reorganisation of the administration which does not fall within the scope of the procurement regime.

High Court, England and Wales

case no.: HQ07X01934

**Risk Management Partners Limited v Brent LBC (and others),
16 May 2008**

This recent domestic case considers the growing body of ECJ case law on the award of exempt in-house contracts and introduces some clarity on the application of the procurement rules. It is one of two related cases: the earlier case of 22 April 2008 (case no.: CO/4667/2007) related to judicial review proceedings on the issues of vires and authority and will be the subject of a separate note by 4ps.

There are a number of learning points from this procurement case. Local authorities should be cautious if they are seeking to rely on the in house contracts exemption, particularly if they are awarding contracts to companies established by two or more authorities. The degree of independence given to these publicly owned companies will need to be carefully assessed, as will the role of private companies in managing their affairs.

facts of the case

The case concerned the abandoning of a tender process and later direct award of contracts of insurance to the London Authorities Mutual Ltd (“LAML”). LAML is a mutual insurance company of which Brent is a member, with membership restricted to London Boroughs. Risk Management Partners Limited (“RMP”) was a candidate in the abandoned tender process and brought a claim before the High Court for breach of the

procurement rules and damages. Brent claimed that at the time it awarded the insurance contracts to LAML, its relationship with LAML satisfied the *Teckal* in house contracts exemption, as developed by the ECJ. The High Court considered whether, on the facts, the requirements of the *Teckal* exemption (see summary above) were met.

the first Teckal condition – control

The High Court first examined whether the condition of control required under *Teckal* was satisfied where a company such as LAML is owned by a number of local authorities. Under *Teckal*, that first condition is met where “the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments”. The High Court here noted that LAML was made up of a number of London Borough Members and confirmed that “it is sufficient if the public authorities together exercise the requisite influence over the company...in the case of a company owned by a number of authorities, it will normally be impossible for any one of them to have a decisive influence on the strategic objectives of the Company. On this basis, it is unnecessary for Brent, in the present case, to show that it alone has the power of decisive influence over both the strategic objectives and significant decisions of LAML in relation to the insurance policies it has taken”.

On the requirement for control between the public authorities and the “in house” entity, the High Court was also strongly influenced by the fact that the Members and Board of LAML had decided that a private company would manage LAML’s affairs. The High Court found that “the Members of LAML may give directions to the Board, which may in turn give directions to the Managers. However, one would not expect the Members in general meeting to use this power regularly; and one would not expect the Board to intervene in the general administration of the business. The general picture given by the documents...is of a business the administration of which is relatively independent. Just as in *Stadt Halle* the fact that there was private participation in the ownership of the contractor was inconsistent with the *Teckal* exemption, and in *Carbotermo* the fact that the public authority’s interest was held through a holding company was an indication that the *Teckal* exemption did not apply, so in my judgment, the employment of a private company to manage the LAML points against it. Moreover, and perhaps more importantly, there are contractual provisions that point to a degree of decision that is inconsistent with the first condition”. Accordingly, the High Court was not satisfied that the first *Teckal* condition on control applied and it later decided that RMP was entitled to damages for breach of the procurement rules.

about 4ps

4ps is local government's partnership and project delivery specialist. As part of the LGA, 4ps works in partnership with all local authorities to secure funding and accelerate the development, procurement and implementation of PFI schemes, public private partnerships, complex projects and programmes. 4ps' multidisciplinary team provides hands-on support, gateway reviews, skills development and best-practice know-how.

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The Local Government Association is the national voice for more than 450 local authorities in England and Wales. The LGA group comprises the LGA and five partner organisations which work together to support, promote and improve local government.

