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BUSINESSEUROPE'S PRELIMINARY OBSERVATIONS ON IN-HOUSE PROCUREMENT¹

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1. INTRODUCTION

- 1.1 The main principles of the EU Procurement Rules (see the Glossary) are to open the market and to enable Public Authorities to obtain best value for money.
- 1.2 Most Public Authorities provide an in-house capability to perform some of the services which they need in order to maintain their organisation.
- 1.3. BUSINESSEUROPE believes that Public Authorities have the right to decide for themselves what they do themselves and what they procure from third parties.
- 1.4. When Public Authorities decide to acquire a work, supply or service, the procurement process must comply with the EU Procurement Rules.
- 1.5. However, in-house Contracts - including performances arranged without a contract - can be seen as a way to avoid the use of the EU Procurement Rules
- 1.6. The scope of the definition of “in-house” is crucial. In-house Contracts all too easily lead to restriction or obstruction of competition and frustration of the smooth operation of the Internal Market. When Public Authorities use in-house Contracts instead of awarding a contract though use of the EU Procurement Rules the testing of value for money through a competitive process does not take place; this occurs when the in-house status is used abusively.

¹ **The views expressed in this document are provided with a view to supporting the current ongoing work on this issue. BUSINESSEUROPE reserves the right to amend these views as and when it deems fit. The views expressed here represent a starting point for the discussion; not a definite and final expression of position.**



- 1.7. This paper addresses in particular two main areas which are linked to the in-house concept where problems exist:
- Institutional Public Private Partnerships (IPPPs);
 - Inter-communal cooperation.
- 1.8. BUSINESSEUROPE is of the opinion that clarification is needed in order to identify to what extent Community law applies to the delegation of tasks to public bodies, and which forms of co-operation remains outside the scope of internal market provision.
- 1.9. BUSINESSEUROPE is also of the opinion that legal certainty does not require amendment of the Directives. Clarification on the issue could possibly form a part of an Interpretative Communication on IPPPs.

2. DEFINITION OF IN-HOUSE CONTRACTS IN THE PUBLIC SECTOR – THE TECKAL AND STADT HALLE CRITERIA

- 2.1 The ECJ *Teckal* decision (18 November 1999) established two criteria allowing a decision to be taken as to whether a legally separate entity affiliated to a Public Authority can be regarded as in-house by its parent authority. In principle, the public procurement directives rules apply to the award of a contract by a public authority to a separate entity, unless the following two criteria are met:
- The Public Authority exercises over the entity concerned a **control** which is similar to that which it exercises over its own departments, and
 - that entity carries out the essential part of its **activities** with the controlling Public Authority or Authorities.
- 2.2. The ECJ *Stadt Halle* decision (C-26/03) established that an entity with any non-public shareholders or partners cannot qualify as in-house.
- 2.3 BUSINESSEUROPE acknowledges the *Teckal* and *Stadt Halle* judgements together with the subsequent ECJ decisions (see section 5: Annex) which further clarify the conditions under which a public Contract does not need to be subject to the EU Procurement Rules, even if it is awarded to a legally distinct entity which is controlled by the Contracting Authority.
- 2.4 BUSINESSEUROPE supports the ECJ's opinion that some additional conditions are necessary if the potential distortion of the public purchasing market which would flow from abuse of in-house contracting is to be avoided.



3. INSTITUTIONAL PUBLIC PRIVATE PARTNERSHIPS (IPPPs)

3.1 IPPPs are a special case of contractual PPPs based on a Contract between a Public Authority and a mixed capital entity (MCE) created between and owned by that Public Authority and a private partner. According to this Contract, the Public Authority outsources to the MCE a mission or activity contributing to the delivery of a public service.

3.1.1 The Contract may be explicit or implicit. It is either a contract for services to be awarded according to procedures described in the EU Procurement Rules, or a concession to be awarded in compliance with the principles of the Treaty, as described in the Interpretative Communication on Concessions (4 May 2000).

3.1.2 An IPPP is therefore the result of the creation of a mixed public/private entity and of the attribution to this entity of an economic activity by the Public Authority.

3.1.3 It is the circumstances of the award of the contract by the Public Authority to the MCE which raise issues of compliance with EU procurement regulation because, being partly privately owned, an MCE cannot benefit from the in-house exemption when it comes to public procurement rules.

3.2 On the basis of the jurisprudence referred to in section 3.2 (*Teckaland Stadt Halle*), there are in practice three sets of circumstances in which the award of an activity by a Public Authority to an MCE should be deemed to be compliant with EU procurement procedures and the principles of the Treaty. In this context, "EU procedures" embrace the EU Procurement Rules and the Commission communication on concessions.

3.2.1 The Public Authority has created a wholly-owned company. This company has been awarded the contract to deliver an economic activity following a competitive process that meets the EU procedures. The opening up of the company's capital to private investors/partners at a later stage does not raise a problem, provided that the terms of the mission remain unaffected. Upon termination of the contract, the MCE will have to compete with third party operators to try and win a new contract.

3.2.2 The MCE is created following competitive process compliant with EU procedures to select a private partner to deliver an economic activity.

3.2.3 One condition of the process is that the contract recipient will have to deliver the activity through an MCE; the characteristics of the MCE and the terms for its creation and on-going operation will have been specified in the tender documents.

3.2.3.1 An "in-house" company has been created by the Public Authority and awarded directly a contract for operation of an



economic activity. The Public Authority decides at a later stage to partner with a qualified operator to run the service.

3.2.3.2 It organizes a competitive process, compliant with EU procedures, for the right to deliver the service. Competing operators will have to qualify professionally for delivery of the service and to quote a price for the purchase of a stake in the erstwhile “in-house” company. The new MCE has therefore won through a competitive process the right to deliver the activity.

3.3. There are examples in Europe of IPPPs fitting each of the three sets of circumstances above. A communication on IPPPs should confirm whether or not these three scenarios are compliant with EU rules.

3.3.1 In the above cases, the concession or services contract between the Public Authority and the MCE is awarded for a set term.

3.3.2 Upon termination, the contract will have to be re-awarded through a competitive process compliant with EU procedures.

3.4. In our opinion, for situations not covered under section 3.2 above, the MCE is managing the contract in breach of EU procurement rules.

3.4.1 There are many such situations in Europe. They usually relate to in-house entities whose share capital has been opened without competition to the private sector whilst the parent authority retains shareholding control. There are also examples of such entities being awarded further public service activities without competition.

3.4.2 The effect of a communication by the Commission on this subject should be two-fold:

- it should prevent the development of new situations where the EU Procurement Rules are breached. IPPPs created after publication of the communication should comply with the process described in section 3.2.
- it should point to a process whereby non compliant cases can be brought back into compliance.

4. INTER-COMMUNAL COOPERATION

4.1. Public authorities are free to organise their public services duties. They can either decide to deliver the public service in-house or to contract out the service.



- 4.1.1 In some situations public authorities can decide to make a complete transfer of their competences for a given service of general economic interest to another public authority to be performed by the transferee in full independence and under its own responsibility (*Arnhem (C-360/96 10 November 1998)*). Such administrative reorganisation including a reallocation of competences does not involve a procurement process.
- 4.1.2 BUSINESSEUROPE believes that to a certain degree Public Authorities may also be free to cooperate on an inter-authority basis to procure together in the market either by use of a purchasing agency or by pooling their requirements so that a “group” request for tender can be issued, unless such cooperation leads to cartels.
- 4.1.3 Problems arise however in connection with the Internal Market when inter-authority cooperation leads to the award of Contracts to other public authorities without any competition (public-to-public Contracts)
- 4.2 If several authorities group together for purposes of delivering jointly a public service without a prior delegation of their public service competence for that service to another authority (*delegierung* in Germany), they cannot consider that the in-house entity to one of these authorities is also in-house to all of them, and they cannot thus task this in-house entity with the delivery of the service to all.
- 4.3. A possible approach to those issues could be that, if a Public Authority delivers a service because the competence so to do is vested in it, it can decide either to deliver the service itself, or through an entity which is in-house to itself, or by contracting it out to third parties in compliance with EU Procedures. Although its in-house entity is only in-house to the Public Authority itself, it can properly deliver services relating to competences which have been transferred to it by other Public Authorities even though the entity is not in-house to the “donor” Public Authorities. The reason for this is that the donors have given up all responsibility for the transferred services which now vests in the recipient.
- 4.3.1 If the Public Authorities retain the responsibility and the competence to render a service, but intend to delegate the actual delivery of it to an entity which is in-house to one of them, then the process should be open to competition as it is not strictly in-house to all of them.
- 4.3.2 In this instance BUSINESSEUROPE would draw attention to the *Commission vs. Spain, case (C-84/03 13 June 2002)* where contractual agreements for inter-communal cooperation are not excluded from the scope of the public procurement directives.



5 ANNEX

The European Court of Justice's (ECJ) *Teckal* decision (C-107/98) established two criteria allowing a decision to be taken if a legally separate entity affiliated to a Public Authority can be regarded as in-house by its parent authority.

- Teckal 1: The Public Authority exercises over the entity concerned a **control** which is similar to that which it exercises over its own departments, and
- Teckal 2: that entity carries out the essential part of its **activities** with the controlling Public Authority or Authorities

The *Teckal 1* decision has been clarified further by additional ECJ decisions:

- The *Stadt Halle* decision (C-26/03) stipulates that if the entity has a private minority shareholder it cannot qualify as in-house of the authority that is the major shareholder.
- The *Coname* decision (C-231/03) applies the *Teckal* criteria in the framework of the award of a concession for gas distribution and concludes that the recipient of the award was not properly controlled by the authority doing the award.
- The *Brixen* decision (C-458/03) decrees that an entity which obtained a public contract without competition because it was "in-house" at the time of the award, does not comply with EU regulation if it opens its capital to private shareholders without opening a competition for the award of the contract.
- The *Mödling* decision (C-29/04) reaffirms the previous ruling in a situation where a private company bought 49% of the shares of the in-house company within two weeks of the award of a waste management contract.
- The *Commune di Bari* decision (C-410/04) reiterated that, in a situation where the initial award was to a in-house entity, the sale of shares to a private company created a situation in breach of EU procurement rules similar to that which may arise if a concession has been awarded to the private sector without a proper competitive process.
- Finally, the *Carbotermo* decision (C-340/04) found that ownership of all the capital by the awarding authority is not sufficient to accept that the entity is in-house. The awarding authority must be capable of taking decisions within and on behalf of the entity. It also strengthens the second *Teckal* criterion in that it should not be interpreted as a quantification of the activity being carried by the in-house company for



others than the awarding authority (the idea that other activities should be less than 20% of the total is rejected as a sufficient proof).

- The quality of that activity also matters. In particular, if the entity competes on the open market for the award of contracts from third parties, then it would lose its ability to qualify as an in-house entity if that competitive activity is more than marginal. The implication would seem to be that if the entity can compete on the open market, then there is no reason to protect it on its core business.

6 GLOSSARY

Directive(s)	Directive 2004/17 (Classical), and/or 2004/18 (Utilities)
EU Procurement Rules	The Directives, the Treaty, and the Commission's Interpretative Communication on Concessions (4 May 2000), as the context may admit.
Public Authority	A public authority as defined in the Classical Directive.
Contracting Authority	A Public Authority engaged in the award of a Contract.
Utility	A public utility as defined in the Utilities Directive.
Contract	A contract, agreement or other arrangement for the provision of works, supplies or service to a Public Authority. The use of the term is not in this paper restricted to formal contracts.
PPP	Public-private partnership.
MCE	A mixed-capital entity having participation from a Public Authority and a private entity or, in either case, more than one.
IPPP	Institutional PPP whereby the entity involved is an MCE.
Treaty	The Treaty of Rome.
ECJ	European Court of Justice.