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An examination of the intended codification of the exceptions of quasi in-house procurement and inter-municipal cooperation

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Glossary

The Classic Directive	Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114.
The Utilities Directive	Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L 134/1.
The procurement Directives	Directive 2004/18/EC and Directive 2004/17/EC.
The draft Directive on public procurement	European Commission, 'Proposal for a Directive of the European Parliament and of the Council on public procurement' COM(2011) 896 final.
The Working Paper	European Commission, 'Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation')' SEC(2011) 1169 final.
The Court	Short form for the Court of Justice of the European Union. Also referenced as the Court of Justice.
Public contract	Contract for the realisation of works, the purchasing of supplies or the provision of services, concluded between a contracting authority and one or more economic operators in the form of a written agreement for remuneration.
Contracting authority	The State, regional or local authorities, bodies governed by public law and associations of one or several of these, falling under the scope of application of the procurement Directives.
Economic operator	Any natural or legal person or public entity or group of such and/or bodies which offers on the market the execution of works, products or services with whom a contracting authority may conclude a public

	contract.
Controlling (contracting) authority	The contracting authority awarding a contract to an entity over which it exercises a control similar to that which it exercises over its own departments and who is the principal beneficiary of that entity's activities.
Controlled entity	The entity to which the controlling authority awards a contract, which is subject to control similar to that exercised by the controlling authority over its own departments and carries out the essential part of its activities with that authority.
Cooperating (contracting) authorities	Contracting authorities cooperating in the joint execution of their public interest tasks.

Chapter 1

1.1 Introduction

Few people will have failed to notice the economic and financial crisis plaguing the world; its effects are felt in all walks of life, not only among citizens but also their governments. Those governments, especially on the regional and local level, are forced by an ever diminishing budget to search for ways to cut costs, while still ensuring that the public tasks for which they have been made responsible are properly carried out. However, any measure they may devise to cut expenditures will have to comply with applicable legislation, including the national and European public procurement rules. Precisely those European procurement rules have proven to constitute an enormous administrative burden on public authorities and private undertakings alike, considering that a European procurement procedure generally costs around €28.000,00 and takes on average 108 days to complete.[1] Any way in which the application of those costly procedures can be lawfully avoided is therefore quite interesting for public authorities.

Besides the exceptions already contained in the procurement Directives themselves, the Court of Justice of the European Union[2] has developed two more: the exceptions of quasi in-house procurement and inter-municipal cooperation. It is with these exceptions that this thesis is concerned, not only with their development but also their intended codification in the proposals for the new procurement Directives. It will examine to what extend that codification remains faithful to the case law of the Court, while clarifying and simplifying them where needed. To that end, the second chapter will identify the criteria for the application of the exceptions, while the third chapter will compare and contrast the intended codification with these criteria. The final chapter will illustrate the comparison between the case law and the codification through the re-examination of the first case on the quasi in-house exception. But before going into such detail, this first chapter will introduce the basics of public procurement, the exceptions and the modernisation of the procurement Directives.

1.2 The basics of public procurement

Public procurement is the art of public spending, or more precisely the art of public purchasing. When public authorities purchase from the market to ensure the execution of their public interest tasks, or indeed for any other reason, special rules apply to the decision with whom to conclude a contract.[3] These special rules are necessary because public authorities are not subject to the same commercial and competitive pressures on their purchasing activities as their private sector counterparts, but do play an important role within the economy: in 2009

[1] According to the European Commission, 'Commission Staff Working Paper. Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation (Part 1)' SEC(2011) 853 final, 117 and 126 ('Commission Evaluation Report'). This is the combined costs borne by the public authorities and the economic entities submitting tenders.

[2] From now on: the Court (of Justice).

[3] To provide certain goods, amenities or services in the public interest which are not provided by private undertakings, due to a lack of profitability, is one of the fundamental tasks of government. This can be done in one of two ways: either a private undertaking is asked or ordered by a public authority to provide the service in return for remuneration, in the case of services of general economic interest, or the authority can take the execution of that task upon itself.

alone, they spend over €2 trillion on goods, services and works, about 19 percent of the European Union Gross Domestic Product. [4] Therefore, special procedures for public procurement had to be put into place, to encourage proper spending of public money and to limit corruption and favouritism among suppliers.[5]

1.2.1 The procurement Directives

Within the European Union, public procurement is governed by fundamental Treaty provisions as well as a number of secondary instruments.[6] Specifically, there are two main procurement Directives: the Utilities Directive regulates contracts concluded by entities operating in the water, energy, transport and telecommunications sectors, whereas the Classic Directive concerns itself with the so-called 'classic' public contracts for pecuniary interest.[7] These directives contain provisions coordinating the procurement procedures of Member States for contracts which must be procured at the European level. This obligation does not apply to all contracts within the European Union, however; there must be a certain measure of cross-border interest inherent in the contract, which makes it of interest to economic operators across the European Union. For these contracts, the procurement Directives contain a number of procedural obligations, including the obligation to publish a contract notice in the Official Journal of the European Union.[8] Another obligation imposed on public authorities is to treat economic operators fairly and non-discriminatorily as well as to act in a transparent way, as ensured by the procedures contained in the Directives.[9]

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[4] SEC(2011) 853 final (n.1) i.

[5] SEC(2011) 853 final (n.1) iv. The threat of corruption is far from illusionary, as a study carried out by the Organisation for Economic Co-operation and Development, *Integrity in public procurement. Good practice from A to Z* (OECD Publishing 2007) 9, showed that public procurement offers multiple opportunities to subjugate public money by facilitating contact between the public and private sectors. If supervision is lacking, these moments of contact offer plenty of opportunities for bribes and conflicts of interest to arise on the side of the procuring authority.

[6] In particular, the procurement practices of the Member States must respect the free movement provisions contained in Part Three, Titles II and IV of the Treaty on the Functioning of the European Union [2010] OJ C 83/47, and the principles derived from those provisions, especially the principles of transparency, equal treatment, non-discrimination, proportionality and mutual recognition.

[7] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L 134/1 and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114 respectively. Together, the Classic and Utilities Directives will be referred to as 'the procurement Directives'.

Other secondary legislation currently applicable to public procurement are a number of sectorial ones as well as two Directives on remedies: Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L 395/33 as amended by Directives 92/50/EEC and 2007/665/EC for the Classic Directive, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L 76/14 as amended by Directives 2006/97/EC and 2007/66/EC in the case of utilities procurement. These other Directives will not be dealt with in the following text, and are not included in the term 'the procurement Directives'.

[8] Article 35 of the Classic Directive and Article 41 of the Utilities Directive.

[9] Article 2 of the Classic Directive and Article 10 of the Utilities Directive.

1.2.2 Contracting authorities

When referring to the authorities falling within their scope of application, the two procurement Directives use 'contracting authorities' in the case of the Classic Directive and 'contracting entities' for utilities procurement. Both definitions refer not only to the regional and local authorities previously mentioned, but also the State, bodies governed by public law and associations of these bodies.[10] In the case of utilities, the Directive also covers so-called 'public undertakings' owned by contracting authorities and entities which have been made responsible for providing utilities by special of exclusive right.[11] These authorities are under an obligation to apply their own national procurement procedures, adjusted according to the procedures contained in the Directives.[12]

1.2.3 Public contracts

The procurement Directives apply whenever a contracting authority wants to conclude a public contract for the realisation of works, the purchasing of supplies or the provision of services.[13] When a contract is concerned with more than one activity, for example with both the supply of goods and the provision of services, the contract will be categorised according to the activity which has the highest value. However, not all public contracts concerned with works, supplies or services fall under the scope of the procurement Directives: they must represent a value equal to, if not surpassing, the thresholds established therein.[14] If the contract does not breach these thresholds, it can be presumed that there is not sufficient cross-border interest to justify the use of a European procurement procedure.

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[10] Article 2 para 1 (a) of the Classic Directive and Article 2 para 1 (a) of the Utilities Directive. Among the contracting authorities, the so-called 'bodies governed by public law' are a special category. The term refers to entities established with legal personality specifically to meet needs in the general interest (not having an industrial or commercial character) and which, due to finance or control by other public authorities, are closely dependent on the State. This rather broad definition, derived from Article 1 para 9 of the Classic Directive and case C-44/96 *Mannesmann Anlagenbau Austria AG and Others and Strohal Rotationsdruk GesmbH* [1998] ECR I-73, para 20, is meant to bring under the scope of the procurement Directives those public bodies which are not a part of the traditional 'State' model.

[11] Article 2 para 1 (6) and para 2 of the Utilities Directive.

[12] For the sake of simplicity, the rest of this thesis will refer to both 'contracting authorities' and 'contracting entities' together as 'contracting authorities'.

[13] Which one depends on the object of the contract, according to Article 1 para 2 under (b), (c) and (d) for both the Classic Directive and the Utilities Directive. Within this definition 'public service contracts' tend to function as the catch-all category: a contract is a service contract when it is not a contract for works or supplies. 'Public works contracts' have as their object the execution, or both the design and execution, of building of engineering works, whereas 'public supply contracts' are concerned with the acquisition (be it through purchasing, rental, etc.) of products.

[14] Currently those thresholds are:

- For works contracts: €5.000.000,00.
- Supplies en services contracts:
  - €400.000,00 in the case of Utilities procurement.
  - €200.000,00 for some supplies and services not awarded by a contracting authority contained in Annex IV or not concerning a product contained in Annex V of the Classic Directive or certain telecommunications services.
  - €130.000,00 for all other supplies and services awarded under the Classic Directive not falling under the previous threshold.

Article 7 of the Classic Directive and Article 16 of Utilities Directive.

The award of a contract is subject to the procurement Directives if it is a written agreement for remuneration, concluded between a contracting authority and one or more economic operators; in the Classic Directive this is referred to as a 'public contract'.[15] If any of these elements is missing, or a contract is not concerned with works, supplies or services, there is no public contract and its award does not need to follow the procedures contained in the procurement Directives.

A contract in which the consideration for a work or service consists of the right to exploit that work or service, sometimes in combination with payment, is a 'concession'.[16] Concessions are at present regulated only to a limited extend in European procurement legislation, for instance the Utilities Directive excludes both service and work concessions from its scope of application.[17] The Classic Directive also excludes service concession from its scope, although it does contain rules on certain kinds of public work concessions.[18] Although contracting authorities mostly do not have to apply the procurement Directives when awarding concessions, they must still comply with the fundamental rules of the Treaty and the principles derived therefrom, especially the principal of non-discrimination on the grounds of nationality and the principle of transparency.[19]

1.2.4 Applicable procedures

To achieve the best possible outcome when purchasing, the Directives contain a number of procedures for contracting authorities to use in the search for a contractor.[20] These are the open and the restricted procedures, the competitive dialogue and the negotiated procedure with or without prior publication of a contract notice. In the open procedure, all economic operators can submit tenders to win the contract, whereas in the restricted procedure after expressing their interest the contracting authority may choose a number of them to submit their tender.[21] Contracting authorities are offered a free choice between these two procedures, although the open procedure is better suited for smaller or uncomplicated contracts whereas the restricted procedure generally allows for more complexity. Only in very specific cases

[15] Article 1 para 2 (a) of the Classic Directive. The Utilities Directive simply refers to 'supply, works and services contracts, according to Article 1 para 2 (a) of that Directive. Once again for simplicity's sake, the rest of this thesis will refer to both types of contracts as 'public contracts', to distinguish these from all other contracts not falling under the scope of application of the procurement Directives.

[16] Article 1 para 3 and 4 of the Classic Directive and Article 1 para 3 (a) and (b) of the utilities Directive.

[17] Article 18 of the Utilities Directive.

[18] The exclusion of service concessions can be found in Article 17, whereas the rules on public work concessions are contained in Title III, Article 56 and further of the Classic Directive. On the basis of these articles, the Directive applies to public work concessions which have a value equal to or greater than €5.000.000,00 and which are not otherwise excluded through Article 57.

[19] Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* [2000] ECR I-10745, para 60 and case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [2005] ECR I-08585, paras 46 and 48. On the basis of these principles, the authority awarding the concession must principally ensure equal opportunity of acquiring the contract to economic operators across the European Union. This comes down to an obligation to ensure sufficient publicity on the fact that the authority is seeking to award a concession.

[20] See Chapter V of both Directives.

[21] Article 1 para 11 (a) and (b) and Article 28 of the Classic Directive and Article 1 para 9 (a) and (b) and Article 40 of the Utilities Directive.

may a contracting authority make use of either the competitive dialogue or the negotiated procedure.[22]

1.2.5 Selection and award

The Directives maintain a strict separation between the *selection* of suitable participants and the *awarding* of the contract to one of them. The selection process, which takes place after submission of tenders in the case of the open procedure or before in the case of the others, consists of two stages. Under the Classic Directive, the contracting authority must first examine if the economic operators should not be excluded on the basis of their personal situation or their suitability to pursue the professional activity.[23] The candidates who are not excluded are then examined with regards to their financial standing, their professional and technical knowledge and ability.[24] An important difference with the subsequent award of the contract is the obligation for contracting authorities to only use the selection criteria contained in the Directive when deciding on the suitability of the candidates.[25] Under the Utilities Directive, contracting authorities have more freedom to decide on the selection criteria: so long as they are based on objective rules and criteria and are available to the interested operators, the contracting authorities are free to decide on their contents.[26]

There are two ways to decide to whom the contract should be awarded: either by basing it on the lowest price only or by deciding on the basis of what is called the 'most economically advantageous tender'.[27] In the case of the lowest price only, no other criteria such as life-cycle costs may play a part in the evaluation of the bids submitted; this criterion is therefore best suited to simpler contracts.[28] When it comes to the most economically advantageous tender meanwhile, a number of non-price related criteria linked to the subject-matter of the contract in question may be included in the evaluation of the tenders submitted.[29] It is up to the contracting authority to specify in the invitation to tender which criteria it will include, and what the relative weight of each will be.

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[22] In the case of particular complex contracts, the competitive dialogue allows contracting authorities to conduct a dialogue with potential candidates on the basis of which those candidates submit tenders (Article 1, para 11 (c) the Classic Directive). The negotiated procedure allows contracting authorities to consult the economic operators of their choice and negotiate the terms of contract with one or more of them, either with or without publication of a contract notice (Article 1, para 11 (d)). Due to the lack of transparency and competition inherent to these procedures, they may be employed only in very limited cases. With regards to utilities procurement, the regime is a little less strict in the sense that contracting entities are free to choose between the open, restricted and negotiated procedure, so long as a call for competition has been made (Article 40 para 2 of the Utilities Directive).

[23] Articles 45 and 46 of the Classic Directive. In the case of exclusion due to the personal situation of the candidate, Article 45 contains grounds for both mandatory (para 1) and optional (para 2) exclusion.

[24] Article 44 of the Classic Directive.

[25] As stated in case 31/87 *Gebroeders Beentjes B.V. v State of the Netherlands* [1988] ECR 04635, para 15.

[26] Article 54 of the Utilities Directive. Paragraph 4 of that Article references the exclusion criteria listed in Article 45 of the Classic Directive, thus allowing for the use of criteria based on the personal situation of the tenderer.

[27] Article 53 of the Classic Directive and Article 55 of the Utilities Directive.

[28] Article 53 para 1 (b) of the Classic Directive and 55 para 1 (b) of the Utilities Directive.

[29] Article 53 para 1 (a) of the Classic Directive and Article 55 para 1 (a) of the Utilities Directive. Examples of such criteria are: quality, environmental characteristics, cost-effectiveness, the projected delivery date, etc.

1.3 Objective of procurement Directives

The Court has repeatedly held that the primary objective underlying the procurement rules is to safeguard the free movement of goods and services as well to open up public procurement in the Member States to undistorted competition.[30] It is intended to protect economic operators, wishing to obtain a contract in another Member State, against the non-tariff barriers to trade which arise from discriminatory procurement practices of contracting authorities. Thus, the obligation to advertise the contract at the European Union level, to ensure widespread knowledge of its existence, and the transparency principle, making it harder to disguise discriminatory practices, are among the most important aspects of the public procurement rules.

From the principle objective of the procurement rules, an *obligation to procure* every contract which falls within their scope of application can be derived. Any exception to that obligation to procure can only exist if it does not infringe the principle objective.[31] In other words, certain activities of contracting authorities may be exempted from the scope of application of the procurement rules because they do not infringe the free movement provisions or distort competition, thereby eliminating the 'raison d'être' of the procurement rules.[32]

1.4 Exceptions to the obligation to procure

There are a number of exceptions to the obligation to procure, some of which are codified in the procurement Directives whereas others have been developed by the Court of Justice. In the following text, these exceptions are introduced. The unwritten exceptions will be examined further in the next chapter, whereas the codified exceptions will remain woefully under examined.

1.4.1 Codified exceptions

The procurement Directives both contain a list of specific and narrowly defined contracts which are excluded from their scope of application, such as contracts concerned with broadcasting, employment contracts or service concessions.[33] Partial exclusions also exist, for example in the case of defence procurement: public contracts in the field of defence are subject to the procedures contained in the Directives, unless that obligation is contrary to the essential interest of a Member State's security.[34]

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[30] See for example case C-26/03 *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] ECR I-00001, para 44 and case C-337/06 *Bayerischer Rundfunk and Others v GEWA – Gesellschaft für Gebäudereinigung und Wartung mbH* [2007] ECR I-11173, paras 38 and 39.

[31] Case C-480/06 *Commission of the European Communities v Federal Republic of Germany* [2009] ECR I-04747, para 47.

[32] Case C-340/04 *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA* [2006] ECR I-04137, para 62.

[33] Article 16 (b) and (e) and Article 17 of the Classic Directive. The complete list of contracts excluded from this Directive can be found under Section 3 of Chapter II, Article 12 and further. For the Utilities Directive, a similar list can be found in Chapter II, Section 2, Subsection 2, 3 and 4, or Article 19 and further.

[34] Article 10 of the Classic Directive, referring to Article 346 of the Treaty on the Functioning of the European Union (n. 5). See similarly Article 21 of the Utilties Directive, which allows disapplication of that Directive in the case of contracts which are secret or require special security measures.

Both Directives also contain an exception which allows the direct award of a contract for the provision of services by one contracting authority to another, on the basis of an *exclusive right* enjoyed pursuant to a legal basis compatible with the Treaty.[35] Similarly, the Utilities Directive contains a provision on the award of contracts to an affiliated undertaking. Such an award is not subject to the procurement regime if the undertaking derives at least 80 percent of its average turnover through activities for the entities with which it is affiliated.[36] The exception requires that the contracting authority either consolidates its account with the affiliated undertaking, or otherwise exercises a dominant influence over it. The Classic Directive does not contain a similar provision to this second exception.

1.4.2 Unwritten exceptions

The procurement Directives require the existence of a public contract concluded between a contracting authority and an independent economic operator to apply. When no public contract is concluded, no obligation to procure exists. This may seem straightforward, but there are situations in which the existence of such a contract is not as clear as may appear at first. Starting from the acknowledgment of the so-called 'genuine in-house situations', the exceptions of quasi in-house procurement and inter-municipal cooperation have been developed by the Court exactly to clarify such situations.

1.4.2.1 Genuine in-house operations

In this respect it is important to recall that although public procurement law is pervasive, it is not a tyrant: it does not force a contracting authority to make use of a distinct entity if it is capable of executing the public task concerned 'in-house', through the use of its own resources.[37] In such a case, no contract is concluded between two independent entities, because the contracting authority controls its departments. Thus, there is no obligation to procure the execution of the task because it is a 'genuine in-house operation', which does not infringe the principle objective of public procurement law. A municipality which entrusts its own cleaning department with the upkeep of the municipal road network would, for example, be under no obligation to procure that service provision.

1.4.2.2 Quasi in-house procurement

Under certain circumstances, the same reasoning can be applied when a contracting authority does conclude a contract with a formally distinct entity, because that entity is not genuinely

[35] Article 18 of the Classic Directive and Article 25 of the Utilities Directive. The exception was used for the first time in Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [1992] OJ L 209/1 ('the old Services Directive'), Article 6. This exception was, and still is, solely applicable to public services.

[36] Article 23 of the Utilities Directive, respectively Article 13 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1993] OJ L 199/84 ('the old Utilities Directive'). The scope of this exception has been expanded in the current Directive to not only encompass services, which was the case under the old Directive, but also supplies and work contracts.

[37] M.T. Karayigit, 'A new type of exemption from the rules on public procurement established: "in thy neighbour's house" provision of public interest tasks', (2010) 6 PPLR 183, 192.

independent from the contracting authority. In its seminal *Teckal* judgment, the Court laid down the criteria applicable to this 'exception of quasi in-house procurement': the contracting authority must exercises over the entity concerned a control similar to that which it exercises over its own departments and the entity must carry out the essential part of its activities with the contracting authority.[38] When these two criteria are fulfilled, there is no obligation to put the contract concerned out to competitive tender; instead, it may be awarded directly to the entity as if it were an in-house operation. The exception can apply to all types of public contracts as well as to works and services concessions.[39] Thus the exception would allow the municipality mentioned above to make a cleaning service, which it controls as if it was its own department, responsible for the upkeep of the municipal roads.[40]

1.4.2.3 Inter-municipal cooperation

Building on the foundations it had established in the *Teckal* line of case law, the Court delivered another controversial judgment in the summer of 2009 in *Stadtreinigung Hamburg*.[41] In this case, the Court created the 'exception of inter-municipal cooperation', on the basis of which cooperation agreements between contracting authorities are excluded from the obligation to procure, as long as no private parties participate in the conclusion of the contract or benefit by it. Furthermore, such cooperation is only allowed in the pursuit of a common public interest task shared by all the contracting authorities involved, and must be governed solely by objectives in the common interest.

1.4.2.4 Continued uncertainty

Throughout the years, the Court has ruled on the exception of quasi in-house procurement numerous times, either restricting or expanding its scope. However, some uncertainty still surrounds the exception: in its annual implementation review of 2012, the Commission found that 'incorrect application of the in-house rules' still ranked highly among infringements of the procurement rules.[42] The exception of inter-municipal cooperation, meanwhile, has so far only been the subject of two cases, both of which concerned a service contract.[43]

One of the difficulties which continue to plague procurement practitioners about the exceptions is whether and to what extend they apply to cooperation between independent contracting authorities for the execution of their public interest tasks, not only under the

[38] Case C-107/98 *Teckal Srl v Commune di Viano and AGAC di Reggio Emilia* [1999] ECR Page I-08121, para 51.

[39] European Commission, 'Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation')' SEC(2011) 1169 final, 7. See also joined cases C-182/11 and C-183/11 *Econord SpA v Comune di Cagno, Comune di Varese, Commune di Solbiate and Comune di Varese* [2012] OJ C 26/7, para 25.

[40] In the context of the exception of quasi in-house procurement the contracting authority will be referred to as the 'controlling (contracting) authority', whereas the entity over which it exercises its control will be called the 'controlled entity'.

[41] *Stadtreinigung Hamburg* (n. 31).

[42] European Commission, 'Staff Working Document. Annual Public Procurement Implementation Review' SWD(2012) 342 final, 29.

[43] *Stadtreinigung Hamburg* (n. 31) and case C-159/11 *Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] OJ C 46/4.

exception of inter-municipal cooperation but also the quasi in-house exception. The Commission has responded to this need for clarification by publishing a Working Paper containing guidance on the cooperation by public authorities in the execution of their public tasks, as well as including the exceptions in the modernisation of the procurement Directives.[44]

1.5 Modernisation of the procurement Directives

The need to simplify and streamline the existing procurement regime was noted by the European Parliament in a resolution from May of 2010.[45] In this resolution, the Parliament remarked that there was a continued need for simplification and clarification of the procurement rules. That included the exceptions of quasi in-house procurement and inter-municipal cooperation, or 'public-public partnerships' as the Parliament called them.[46] The Parliament then called upon the Commission and the Member States to make information on the legal implications of this case law widely available.[47]

The modernisation of the procurement Directives is taking place within the framework of the Europe 2020 Strategy for smart, sustainable and inclusive growth, which is meant to help the European Union recover from the financial crisis.[48] Public procurement plays a key role within this Strategy, since it is one of the most important of the market-based instruments to help it achieve its objectives.[49] However, the difficulties associated with the procurement rules meant that it could not be used to its full potential; therefore, the Commission announced its intention to simplify and update the procurement rules, to make contract awards more flexible and allow the use of public contracts in support of common societal goals.[50] To that end, it announced its intention to submit proposals for new procurement Directives, to enter into force before the end of 2012.

To ensure wide-spread support for the modernisation, a consultation of all interested stake-holders was initiated in January 2011 with the publication of the 'Green Paper on the modernisation of public procurement policy'.[51] The Green Paper identified many of the problems with the current public procurement regime, including the uncertainties surrounding the unwritten exceptions.[52] It posed the question if the exceptions should be codified and, if so, what form that codification should take: either that of a general concept with common criteria applicable to all situations, or specific rules for each of the excluded situations. In

[44] SEC(2011) 1169 final (n. 39).
[45] European Parliament, 'Resolution on new developments in public procurement' 2009/2175(INI).
[46] Thereby focusing on the possibilities offered to contracting authorities to cooperate without infringing the procurement rules.
[47] 2009/2175(INI) (n. 45) paras 9 to 12.
[48] As agreed upon by the Member States at the June 2010 Council meeting, according to the European Commission, 'Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Europe 2020 Flagship Initiative. Innovation Union*' COM (2010) 546 final, 6.
[49] European Commission, 'Green Paper on the modernisation or EU public Procurement policy. Towards a more efficient European Procurement Market' COM (2011) 15 final, 3.
[50] ibid.
[51] ibid.
[52] ibid, 23.

addition to this public consultation, the Commission also conducted an evaluation of the impact and effectiveness of the public procurement rules.[53] This evaluation set out to answer the question to what extend the procurement Directives had met their objectives and to identify, together with the responses to the Green Paper, where there was room for improvement and what shape those improvements should take.[54]

The Commission received an overwhelming response to its Green Paper: in total, 623 stakeholders submitted answer, ranging from central, local and regional authorities and civil society organisations to undertakings and individual citizens.[55] According to the Commission, there was general agreement on the need to simplify and codify the exceptions, as well as on the form which that codification should take. A clear majority of the stakeholders favoured the development of a single overarching framework with common criteria for the different forms of the exception.[56] Taking these responses to heart, the Commission has included a provision codifying the exceptions in the proposed procurement Directives.

[53] SEC(2011) 853 final (n. 1).

[54] ibid, ii. On the basis of the impact assessment a package of preferred options was identified on which the subsequent proposals for new procurement Directives were based.

[55] European Commission, 'Green Paper on the modernisation of public procurement policy. Towards a more efficient European Procurement Market. Synthesis of replies', 2 ('Synthesis of replies'), to be found on <http://ec.europa.eu/internal_market/consultations/2011/public_procurement_en.html> accessed 08 April 2013.

[56] Synthesis of replies, p. 12.

Chapter 2

2.1 Introduction

The previous chapter introduced the problem of contracting authorities wishing to lawfully avoid the application of the procurement rules, while still ensuring the proper execution of their public interest tasks. The Court has attempted to offer a solution to this conundrum, through the creation of the exceptions of quasi in-house procurement and inter-municipal cooperation. This chapter will examine some of the cases dealing with the exceptions to establish the criteria for their application, without attempting to be a *complete* overview. As the older of the two, the exception of quasi in-house procurement will be dealt with first, before the exception of inter-municipal cooperation. In that respect, it is important to note that the older cases were decided under the old procurement Directives.[57] However, there have been no significant changes between the old Directives and the ones currently in force and the Court has continued to apply these older cases in the newer ones without hesitation.

2.2 Quasi in-house procurement

Although the need to decide on quasi in-house relations had already been acknowledged in the opinions of its Advocate Generals[58], the Court did not rule on them until its judgment in the landmark *Teckal* case.[59] That case concerned the direct award of a contract for the operation and maintenance of heating installations and the supply of fuel by the Municipality of Viano to a consortium it had set up with other municipalities. Its previous contracting partner, Teckal Srl, sought the annulment of the contract on the basis of its infringement of the obligation to procure. Seeking guidance on the possibility of applying the exception of a direct award on the basis of an exclusive right from the old Services Directive[60], the competent Italian court send a number of preliminary questions to the Court.

Due to the value of the different parts of the contract, the Court of Justice decided that it was a supplies contract rather than a contract for the provision of services; the exception for services therefore could not be utilised. The determination whether the old Supplies Directive applied to the facts of the case was left to the national court, including whether or not the municipality and the consortium had concluded a contract. This required, according to the Court, an agreement between two separate persons:

[57] Mainly Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [1992] OJ L 209/1 ('the old Services Directive') and Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [1993] OJ L 199/1 ('the old Supplies Directive').

[58] See for example the Opinion of Advocate General La Pergola in Case C-360/96 *Gemeente Arnhem and Gemeente Rheden v BFI Holding B.V.* [1998] ECR Page I-6821 or Advocate General Alber in Case C-108/98 *RI.SAN v Commune di Ischia and Others* [1999] ECR I-5219.

[59] Case C-107/98 *Teckal Srl v Commune di Viano and AGAC di Reggio Emilia* [1999] ECR Page I-08121.

[60] Article 6 of the old Services Directive (n. 57) allows for the direct award of a contract between contracting authorities on the basis of an exclusive right, as long as that right is based on a legislative provision compatible with the Treaty. See similarly section 1.4.1 of the previous chapter.

> "In that regard, in accordance with Article 1(a) of Directive 93/36, it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities."[61]

Accordingly, the Directives apply whenever a contract is concluded between a contracting authority and an independent entity, unless that entity cannot be considered as truly independent on the basis of the two *Teckal* criteria:

- The *control criterion* – the contracting authority exercises over the entity a control similar to that which it exercises over its own departments.
- The *activities criterion* – the controlled entity performs the essential part of its activities for the benefit of the controlling authority.

When these two criteria are satisfied, a contract may be awarded without invitation to tender to a controlled entity formally distinct from the contracting authority; consequently, the exception of quasi in-house procurement was born.[62]

The two criteria may seem to be precise and workable, but appearances can be deceptive. It has become clear over time that the Court remained notoriously vague in its *Teckal* judgment, leaving a number of essential questions unanswered and definitions unexplained. At its most basic, the Court did not explain when a contracting authority exercises over the controlled entity 'similar control' as that which it has over its own departments, or how the essential part of its activities should be determined. This lack of guidance led not only to confusion among procurement practitioners but also to vastly different interpretations between Member States as to the scope of the exception.[63]

2.3 The control criterion

The control criterion is by far the more controversial of the two *Teckal* criteria, which is evidenced by the fact that most of the cases examined in this chapter focus solely on it. After all, the Court declared that the control exercised should be similar, but not that it should be the same as the control exercised over the departments of the contracting authority. That definition left open many questions of interpretation, chief among them whether the Court

[61] *Teckal* (n. 59), para 50. Emphasis added.

[62] The judges of the Court gave no further guidance on the probability of the Municipality of Viano successfully relying on the exception; this was for the national court to decide. That national court did come to the conclusion that the consortium was an in-house company of Viano, as will be seen in the final chapter of this thesis.

[63] K. Weltzien, 'Avoiding the procurement rules by awarding contracts to an in-house entity – scope of the procurement directives in the classical sector' (2005) 5 PPLR 237, 238, who demonstrates the need for guidance through the differing interpretation between Norway and Denmark. In Norway, it was argued that the State should be regarded as one legal person, thereby allowing the direct award of contracts between the different ministries without needing to start a procurement procedure, whereas Denmark argued that such direct awards should be limited to a ministry and its underlying departments.

intended to create a new definition of 'control' unique to public procurement law. Although the demands for further clarification started coming in almost immediately after publication of the *Teckal* judgment, it took the Court six years to provide further clarification.[64] When that guidance finally came, the Court proceeded to set some very strict limits with regards to the applicability of the quasi in-house exception.

2.3.1 Private participation

The strict interpretation of the scope of application is most evident in the *Stadt Halle* case, which resulted in the exclusion of semi-public undertakings from the exception.[65] The City of Halle had directly awarded two contracts for waste treatment to a semi-public undertaking, in which it indirectly held 75.1 percent of the shares; the remaining 24.9 percent of the shares were held by a private limited liability company. The adoption of resolutions by the general meeting of that undertaking required either a simple majority or a majority of 75 percent. The City of Halle therefore concluded that, as the majority shareholder, it could exercise over the undertaking a control similar to that which it has over its own departments.

The Court disagreed. It considered that even a *minority participation* of a private undertaking in the capital of a company precludes the possibility of a contracting authority exercising a similar control over that company.[66] The Court based this prohibition of private participation in the controlled entity on two different grounds. First, the relationship between a contracting authority and its departments is governed solely by considerations and requirements proper to the pursuit of objectives in the public interest, whereas a private undertaking follows private considerations and pursues private objectives.[67] Secondly, a private undertaking with a capital presence in a controlled entity to which a contract is awarded directly, receives an advantage when compared to its competitors. This is contrary to the principle objective of undistorted competition as well as to the principle of equal treatment pursued by public procurement law.[68] The Court therefore concluded that the award of a contract to semi-private undertakings can never benefit from the *Teckal* exception.[69]

The Court's exclusion of semi-public undertakings *prima facie* from the scope of application of the exception of quasi in-house procurement resulted in a decline in popularity of semi-public undertakings used to provide for the public interest. Up to that point they had been quite frequently used as they allowed contracting authorities to benefit from the financial

[64] An example of that demand for clarification can be found in case C-94/99 *ARGE Gewässerschutz v Bundesministerium für Land- und Forstwirtschaft* [2000] ECR I-11037, concerning the participation of subsidised semi-public undertakings in a procurement process. A semi-public undertaking is an undertaking in which the ownership is shared between public authorities and private entities. Unfortunately, due to its answers to the other questions the Court did not answer whether the exception of quasi in-house procurement could be applied to such undertakings.

[65] Case C-26/03 *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] ECR I-00001.

[66] ibid, para 49. In this regard, the Court emphasised the fact that the undertaking in *Teckal* was wholly owned by public authorities.

[67] ibid, para 50.

[68] ibid, para 51.

[69] ibid, para 52.

resources and managerial expertise of private undertakings. After the Court's judgment in *Stadt Halle*, such partnerships could no longer be guaranteed the direct award of a contract in advance, which quite naturally makes private undertakings less enthusiastic about investing without the guarantee of a return.[70] The more flexible approach advocated by Advocate General Stix-Hackl in her Opinion on this case allowed more room for such partnerships, as she held that the involvement of a private undertaking in an entity alone does not automatically preclude application of the exception.[71] Instead, the specific powers of the controlling contracting authority should be examined to establish whether the influence it has over the controlled entity satisfies the first *Teckal* criterion.[72] Under this approach, private participation would be possible, but only if it were wholly silent and the private partner did not participate in the management of the undertaking at all.[73]

2.3.2 Decisive influence

Although the Court in *Stadt Halle* did clarify when the exception does *not* apply, interested parties had to wait until the judgment in the *Parking Brixen* case to learn more about when it does.[74] The case dealt with a service concession for the management of two car parks, which the Municipality of Brixen had directly awarded to Stadtwerke Brixen AG. That entity, originally a special undertaking set up for the management of public services but later converted to a company limited by shares, was wholly owned by the municipality. Although a service concession is not included in the definition of a 'public contract' which must be procured in accordance with the Directives, the Treaty principles do impose on the award of a concession minimal requirements of transparency and non-discrimination. The Court therefore deemed it proper to apply the exception also to service concessions, to prevent unwarranted differences in treatment between public contracts and public concessions.[75]

According to the Court, when assessing if the contracting authority exercises over the controlled entity a control which is similar to that which it exercises over its own departments,

[70] P. Kalbe, 'Public-private partnerships under the constraints of EC procurement rules' (2005) 6 PPLR NA176, NA176.

[71] *Stadt Halle* (n. 65) Opinion of Advocate General Stix-Hackl, paras 68 and 71. Her approach is in line with the precious interpretations of Advocate Generals, especially that of Advocate General Léger in *ARGE* (n. 64), para 60, who held that the exception could apply even when the 'economic ownership' of the contracting authority was limited to 50.5% of the share capital of the controlled entity. Unfortunately, the fact that the Court did not answer the question on the quasi in-house exception allowed the continued existence of such misconceptions.

[72] ibid, para 76. According to her, the control which the controlling authority exercises should go beyond the 'dominant control' used in company law, and should encompass individual management decisions as well as more important ones, see paras 72 and 78.

[73] The strictness of the Court's decision in *Stadt Halle* has been tempered somewhat by the decision in case C-196/08 *Acoset SpA v Conferenza Sindaci and Presidenza Prov. Reg. ATO Idrico Ragusa and others* [2009] ECR I-01645. In that case, a number of contracting authorities had decided to entrust the integrated management of their water services to a semi-public body. The private partner in this body was chosen through a proper procurement procedure, with selection criteria pertaining not only to its financial standing, but also to its technical capacity and the characteristics of the tender with regards to the services to be provided. Under such circumstances, requiring the use of a double competitive tendering procedure to both find the private partner and to conclude the contract would create an artificial roadblock for the creation of such partnerships. Therefore, the direct award of the contract to the controlled entity established for the sole reason of exercising the tasks is allowed, even though that entity is a semi-public undertaking.

[74] Case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [2005] ECR I-08585.

[75] ibid, paras 61 and 62. If the Court had decided differently the rather curious situation would have arisen in which unregulated concessions would sometimes be subject to a *stricter* regime than the regulated public contracts.

account must be taken of all the legislative provisions and relevant circumstances of the case. Those must confer on the contracting authority 'a power of *decisive influence* over both strategic objectives and significant decisions' of the controlled entity.[76] Ever since *Parking Brixen*, the Court has used this criterion as the determining factor for the existence of similar control as required by the exception.

The Municipality of Brixen held 100 percent of the shares of Stadtwerke Brixen AG. However, that was not enough for the Court to conclude that the municipality held a decisive influence over the controlled entity. In that respect, the Court looked at the fact that Stadtwerke Brixen AG had become market-oriented, which rendered the control exercised by the municipality *tenuous*.[77] When a controlled entity becomes market-oriented, it starts to exercise its activities for commercial benefit rather than the fulfilment of public interest tasks. Whether the controlled entity is market-oriented can be ascertained from a number of factors, although the geographical and material scope of the entity's activities as well as its opportunities to establish relations with private undertakings are the most important.[78] Furthermore, the Administrative Board of Stadtwerke Brixen AG enjoyed extensive powers of routine administration while the powers of the municipality were limited to those granted to all majority shareholders. In these circumstances, the Court decided that the market-orientation and the degree of independence enjoyed by the entity precluded the control criterion from being fulfilled.[79]

The Court's decision in the *Parking Brixen* case has been reaffirmed in its subsequent case law, the *Carbotermo* case from 2006 being an important example.[80] In this case, the share capital of a controlled entity was held by multiple authorities together, through the intervention of a holding company. One of these authorities relied on the quasi in-house exception when its direct award of a contract to the controlled entity was challenged. According to the Court, the fact that the controlling authority under examination held, either alone or together with other authorities, all of the share capital in the controlled entity served as a rebuttable *indication* of the existence of similar control.[81]

However, here too the broad powers enjoyed by the Board of Directors of the controlled entity rendered such control tenuous, as the statutes of the controlled entity did not grant any special rights to the controlling authority to limit that independence. Furthermore, the control of the controlling authority was again limited to that enjoyed by a majority shareholder, which did not translate to the much more complete control exercised by a contracting authority over its own departments.[82] Finally, the fact that the control was exercised indirectly through a holding company could, depending on the circumstances, weaken it even further.[83] The Court

[76] ibid, para 65. Emphasis added.
[77] ibid, para 67.
[78] As determined in the latter case C-573/07 *Sea Srl v Comune di Ponte Nossa* [2009] ECR I-08127 ('*Sea*'), para 73.
[79] *Parking Brixen* (n. 74) paras 68, 69 and 70.
[80] Case C-340/04 *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA* [2006] ECR I-04137.
[81] ibid, para 37.
[82] ibid, para 38.
[83] ibid, para 39.

concluded that the controlling authority did not, subject to verification by the national court, exercise similar control over the controlled entity.

2.3.3 Joint control

Some of the cases discussed in the previous sections concerned entities controlled by more than one contracting authority. Joint ownership of an entity with whom contracting authorities can conclude contracts allows those authorities to pool their resources to ensure the execution of their public interest tasks. It is quite common for contracting authorities to cooperate in this manner: *Teckal*, for example, concerned 45 municipalities who had jointly set up a consortium so that they could entrust it with the management of certain services.[84] Interestingly enough, the Court never examined whether those controlling authorities could together exercise over the controlled entity a control similar to that which they have over their own departments; instead, each time the Court focussed on whether one of them alone had such control.[85] The Court finally broke its silence on the possibility of 'joint control' when it ruled in the *Coditel Brabant* case.[86] *Coditel Brabant* concerned the direct award by a municipality of the operation of its cable television network to a wholly public inter-municipal cooperative society of which it was a member. All members of that society were, directly or indirectly, municipalities; its governing bodies were composed of their representatives.[87]

While examining whether the members of the cooperative society could exercise 'similar control' over it, the Court focused on the fact that the entity was wholly owned by public authorities, which indicates the existence of similar control.[88] On top of that, the composition of its governing bodies, consisting solely of representatives of the members, showed that the members controlled those bodies; consequently, the Court held that the controlling authorities could exercise a decisive influence over the entity.[89] Nor was that influence rendered tenuous by the other circumstances of the case: even though the governing council of the controlled entity enjoyed the widest powers, the entity was not market-oriented because it could not pursue any interest other than the municipal interest of its members.[90]

After having established that the contracting authorities could exercise decisive influence over the controlled entity, the Court went on to state that such control must be similar and effective, but it does not need to be identical.[91] Requiring identical control would, after all, render the exception impossible to apply in most cases where a contract is awarded directly to

[84] *Teckal* (n. 59), para 12.
[85] See for example case Case C-231/03 *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [2005] ECR I-07287, para 24, on the direct award of a concession for management of gas distribution to a company in which the contracting authority relying on the exception held a 0.97 percent share. In that case, the Court was quite definitive on the fact that the holding of that authority was so small that similar control was precluded.
[86] Case C-324/07 *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale* [2008] ECR I-08457.
[87] ibid, para 33.
[88] As established in *Carbotermo* (n. 80), para 37.
[89] *Coditel Brabant* (n. 86), para 34.
[90] ibid, paras 35, 36 and 38.
[91] ibid, para 46.

a jointly owned entity. Furthermore, public authorities are free to use their own resources to perform their public tasks, and may do so in cooperation with other authorities.[92] Thus, even when the contracting authorities concerned would not be able to individually exercise similar control over such an entity, they have the possibility of exercising the control *jointly*.[93]

To establish the possibility of joint control in *Coditel Brabant*, the Court not only relied on *Carbotermo* but also on another earlier case concerning a jointly owned entity. In *Asemfo*, a state company called Tragsa had been established by law to function as an instrument and technical service of public authorities.[94] As a wholly public undertaking, its share capital was held by the Spanish State and four Autonomous Communities; the State held 99 percent, whereas the four Communities each had 0.25 percent. It was argued by Tragsa's competitors that in such circumstances, the control criterion could only be fulfilled in regards to contracts fulfilled at the demand of the State whereas it was acting as a third party with regards to the four Communities.[95]

On the basis of its establishing law, Tragsa had no choice in carrying out the orders of public authorities nor was it free to fix the tariff for its services.[96] According to the Court, not only did this indicate that those authorities did not conclude a contract with Tragsa, as required for application of the procurement Directives, but it also meant that Tragsa could not be considered as a third party with regards to the authorities which hold a part of its capital.[97] Thus, regardless of the level of their shareholding, based on the circumstances of the case both the Spanish State as well as the four Autonomous Communities satisfied the control criterion.

In *Econord*, which is one of its most recent cases dealing with the exception, the Court held that although individual power of control is not necessary for joint control to exist, the very notion of joint control would be rendered meaningless if a contracting authority could not exercise any influence at all over the controlled entity.[98] If a contracting authority were allowed to directly award a contract without an invitation to tender to a jointly controlled entity even though its affiliation to that entity is purely formal and it does not partake in the 'similar control', that would open the way to circumvention of the procurement rules.[99]

In this respect, it is important to emphasise that the Court in *Coditel Brabant* took particular note of some of the circumstances of the case which proved beyond a shadow of a doubt that joint control existed, such as the composition of the governing bodies of the controlled entity.

[92] ibid, para 49.
[93] ibid, para 50.
[94] Case C-295/05 *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* [2007] ECR I-02999.
[95] ibid, para 59.
[96] ibid, para 60.
[97] ibid, paras 54 and 61.
[98] Joined Cases C-182/11 and C-183/11 *Econord SpA v Comune di Cagno, Comune di Varese, Commune di Solbiate and Comune di Varese* [2012] , paras 30 and 31.
[99] ibid, para 31.

It did not, however, state that joint control can only exist under those circumstances. A finding of similar control must each time be based on an examination of the relevant legislation and circumstances of the case.

2.3.4 Evaluation of control

The evaluation of the existence of 'similar control' will normally be based on the circumstances as they stand at the time of the direct award of the contract. However, under special circumstances certain events, which take place after the award of the contract, must be included in a subsequent evaluation, for example when that direct award is contested before a court. This is the case if those events are a part of an *artificial construction* intended to circumvent the application of the procurement rules. The Court came to this conclusion in the *Mödling* case, wherein a wholly owned subsidiary of the town of Mödling was made exclusively responsible for the municipality's waste collection.[100] Only a few days later, 49 percent of the shares in the controlled entity were transferred to a private undertaking, after which the entity become operational. The Court of Justice held that when dealing with such a blatant attempt to circumvent public procurement law, all the stages leading up to the undertaking becoming operational as well as their underlying purpose should be taken into account when evaluating the direct award.[101]

Although the exclusion of such a blazingly obvious attempt to misuse the exception is hardly surprising, the Court did not clearly demarcate when a possible future event becomes an artificial construction to circumvent the procurement rules. For example, with an undertaking whose capital is provided by shares there is always a *possibility* of those shares being sold to a private undertaking.[102] If such a possibility meant that a controlling authority could never satisfy the control criterion with regards to such an undertaking, the exception of quasi in-house procurement would be negated in a large number of cases.

The *Sea* case allowed the Court to clarify its findings in *Mödling*.[103] The case focused on an undertaking limited by shares owned by a number of Italian municipalities for the purpose of urban waste collection. To this controlled entity, the Comune di Ponte Nossa directly awarded a contract for the collection of urban waste in its territory. Sea Srl challenged the award of the contract, arguing inter alia that the control exercised by the Comune did not fulfil the requirements of the first *Teckal* criterion. Not only did a possibility exist for private entities to acquire some of the shares in the controlled entity, although at the time of the award no such private shareholder existed, but the minority shareholding of the Comune also created doubts whether the control criterion was fulfilled.

The Court of Justice dispelled the idea that the mere *possibility* of a private holding of shares in a controlled entity could exclude the finding that, at the time of the award of the contract,

[100] Case C-29/04 *Commission of the European Communities v Republic of Austria* [2005] ECR I-09705.
[101] ibid, paras 40 and 41.
[102] Provided that the establishing legislation, the entity's statutes or any other rules do not prohibit such a sale.
[103] *Sea* (n. 78).

that entity was controlled by contracting authorities. This can be different only if there is a real prospect, at the time of the direct award of the contract, of the controlled entity's capital being opened up in the short term to private capital.[104] However, that does not mean that a subsequent opening up of the capital which could *not* be foreseen at the time of the contract award gets away scot-free. If, during its lifetime, the contract is opened up to private shareholders, than that would constitute alteration of a fundamental condition of the contract resulting in an obligation to put the contract out for competitive tender.[105]

2.3.5 Comparison with competition law

The Court is not always mindful of carefully distinguishing between the different areas of Union law. In its clarification of the control criterion, it has used terms corresponding to those used in competition law to define the notion of a 'concentration' under the Merger Regulation.[106] According to that Regulation, a concentration may result from the acquisition of direct or indirect control by one or more undertakings over another undertaking.[107] Such control requires that the controlling undertaking acquires the possibility of exercising *decisive influence over the strategic decisions* of the controlled undertaking, either through the acquisition of shares or on a contractual basis.[108]

Despite these similarities in phrasing, the definition of control under procurement law is markedly more stringent than that of control in competition law.[109] This is due to the fact that in competition law, the establishment of a concentration through the acquisition of control is the main rule and any exceptions to that must be interpreted strictly.[110] In public procurement law, on the other hand, the existence of control is part of the exception to the main rule, which itself must be interpreted strictly. In this respect, the Merger Regulation merely requires the *possibility* to exercise decisive influence for control to exist; the actual exercise of that influence is not required.[111] Furthermore, in the absence of special requirements sole control over another undertaking can be acquired through the acquisition of a percentage of shares conveying a relative majority of the votes.[112] Such a mere possibility of control attributed to a majority shareholder would never be able to comply with the standard established under procurement law, as shown by the case *Parking Brixen.*[113] When the control enjoyed by the

[104] ibid, paras 49 and 50.
[105] ibid, para 53.
[106] Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1.
[107] Article 3 para 1 (b) of the Merger Regulation.
[108] Article 3 para 2 (b) of the Merger Regulation and P. Christensen et al, 'Mergers', in J. Faull and A. Nikpay (eds), *The EC Law of Competition* (2nd edn, OUP 2007), para 5.35.
[109] Similarly *Parking Brixen* (n. 74) Opinion of Advocate General Kokott, para 52.
[110] Aricle 3 para 5 of the Merger Regulation and P. Christensen et al (n. 108) para 5.35 n. 28.
[111] Para 16 of the European Commission 'Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings' [2008] C 95/01.
[112] P. Christensen et al (n. 108) paras 5.42 and 5.43. Thus, depending on circumstances, sole control can be acquired when an undertaking holds 20 or 30 percent of the shares in another undertaking, if it is unlikely that the other shareholders will be able to effectively counter its decisions.
[113] As discussed in section 2.3.2 above.

controlling authority is does not go beyond that of a 'normal' majority shareholder, while the controlled entity is independent, the control criterion is not satisfied.[114]

2.4 The activities criterion

The second *Teckal* criterion has not received nearly as much attention as the control criterion, but unfortunately this is not due to it being much easier to interpret than its counterpart. Instead, the lack of jurisprudence is due to the practice of the Court not to consider the second criterion if the first is not fulfilled; as can be seen above, this is often the case. There are however two cases which do give some further guidance on how the requirement that the controlled entity carries out the essential part of its activities for the controlling authority should be interpreted: the cases *Carbotermo* and *Asemfo.*[115]

Of these two cases, *Carbotermo* is both the older one and the most important. Under circumstances hearkening back to the original *Teckal* judgment, the award of a contract for the supply of fuel and for the maintenance of heating installations in the buildings of the Municipality of Busto Arsizio resulted in a preliminary reference to the Court of Justice. After recalling the fact that the *Teckal* criteria are aimed at preventing distortions of competition, the Court stated that the activities criterion requires the controlled entity to devote its activities *principally* to its controlling authority, with any other activities remaining marginal.[116] This determination must be based on both a qualitative as well as a quantitative assessment of the facts of the case.[117] In the case of multiple authorities together holding the share capital of the controlled entity, account may be taken of the activities carried out with all these authorities.[118] Furthermore, the analogous application of the 80 percent turn-over based threshold from the Utilities Directive was rejected by the Court, because the need to interpret exceptions strictly made such an analogous application inappropriate.[119]

In *Asemfo*, meanwhile, the Court considered that the controlled entity carried approximately 90 percent of its activities for the benefit of its controlling authorities. Accordingly, the Court held that the controlled entity carried out the essential part of its activities with its controlling authorities.[120] Interestingly, these two cases together have been interpreted by some as the Court rejecting the possibility of the activities criterion being fulfilled at 80 percent, while it will always be satisfied at 90 percent.[121] Although this last conclusion is not difficult to defend, 90 percent can certainly be considered as the 'principal' part of something, the rejection as such of 80 percent does not follow from the *Carbotermo* case. It is very well

[114] *Parking Brixen* (n. 74), para 69 and 70.
[115] Both have already been discussed in the examination of the control criterion, *Carbotermo* (n. 80) with regards to the decisive influence and *Asemfo* (n. 94) on the possibility of joint contol.
[116] *Carbotermo* (n. 80), para 63.
[117] ibid, para 64.
[118] ibid, para 70.
[119] ibid, para 55. See for the exception for affiliated undertakings section 1.4.1 of the previous chapter.
[120] *Asemfo* (n. 94), para 63.
[121] See for example J. Wiggen, 'Public procurement law and public-public co-operation: reduced flexibility but greater legal certainty ahead? The Commission's Staff Working Paper on the application of EU public procurement law to relations between contracting authorities and the 2011 proposal for a new Directive', (2012) 5 PPLR NA225, NA228.

possible, depending on a qualitative and quantitative evaluation of the circumstances of the case, that the criterion can be satisfied with 80 percent of the activities of the controlled entity being performed for the controlling contracting authorities.

2.5 Inter-municipal cooperation

The possibility of jointly exercising control over a third entity allows cooperation between contracting authorities, if their cooperation can be structured through the use of such an entity. However, cooperation in the public sector is often based on contracts, or similar mechanisms, entered into by independent authorities who do not control each other.[122] Such inter-municipal cooperation agreements cannot *prima facie* be excluded from the scope of the procurement rules, as the Court has held that agreements concluded between independent authorities fall, in principle, under the duty to procure.[123] Besides repeating this principle, the Court did not rule on inter-municipal cooperation until its judgment establishing the exception of inter-municipal cooperation.

2.5.1 Establishing the exception

Stadtreinigung Hamburg concerned an agreement concluded by four German administrative districts with the cleansing department of the City of Hamburg for the disposal of their waste in a newly constructed incineration facility, without a prior call for tenders.[124] For the use of these services the four districts undertook to pay an annual fee to the cleansing department, to be passed on to the operator of the facility, as well as make available to the City of Hamburg their excess landfill capacity.[125] On the grounds that the contract should have been procured in accordance with the public procurement Directives the Commission started infringement proceedings against the German State.

After dismissing the possibility of applying the quasi in-house exception, due to the lack of control exercised by the four districts over either the cleansing department or the operator of the facility, the Court found that the contract at issue established 'inter-municipal cooperation' between the authorities aimed at carrying out a shared public interest tasks.[126] European Union law does not lay down any requirements on the legal form that contracting authorities should use when jointly carrying out such tasks, therefore this may involve but does not require the creation of a separate entity.[127] Accordingly, the Court held that as long as the cooperation does not undermine the principal objective of the EU procurement rules and is governed solely by considerations and requirements related to the pursuit of objectives in the public interest, without advantaging any private undertaking, contracting authorities are free

[122] J. Wiggen, 'Public Procurement rules and cooperation between public sector entities: the limits of the in-house doctrine under EU procurement law' (2011) 5 PPLR 157, 157.
[123] Case C-84/03 *Commission of the European Communities v Kingdom of Spain* [2005] ECR I-00139, paras 39 and 40, wherein the Court relies on para 50 of *Teckal* (n. 59).
[124] Case C-480/06 *Commission of the European Communities v Federal Republic of Germany* [2009] ECR I-04747.
[125] ibid, para 41.
[126] ibid, paras 36 and 37.
[127] ibid, paras 46 and 47.

to cooperate to discharge of their public service obligations.[128] After remarking that there was no reason to believe that the authorities concerned were trying to circumvent the procurement rules, the Court therefore dismissed the Commission's action.[129]

With the above considerations, the Court has created an exception to the obligation to procure for cooperation between contracting authorities, even if that cooperation is not based in a jointly controlled entity like in *Coditel Brabant*. Unfortunately but true to form the Court once again introduced an exception in a notoriously unclear judgment. It embedded the exception firmly in the circumstances of the case, thereby making it very difficult to establish what, if any, the generally applicable criteria for it are.[130]

2.5.2 Clarification

Thankfully, the Court was given the opportunity to expand on its new exception a few years later, in *Azienda Sanitaria*.[131] In that case, the Court examined the decision of a Health Authority to engage a public university to execute a study on the seismic vulnerability of hospitals in the Italian Province of Lecce. This decision was contested before the national courts by an association of architects, whose members claimed to be just as capable of executing the study if they had been given the change to obtain the contract. In defence, the Health Authority relied on the exception as created in *Stadtreinigung Hamburg*.[132]

According to the Court, a contract establishing cooperation between public authorities is one of two types of contract which fall outside the scope of application of the procurement Directives.[133] For that to happen, however, the following cumulative criteria must be fulfilled[134]:

- The cooperation between the contracting authorities is intended to ensure the execution of a shared public interest task;
- The contract is concluded solely between public authorities, without the participation of a private party;
- No private provider of services is given an advantage in comparison to its competitors;
- The cooperation is governed solely by objectives in the public interest.

[128] ibid, paras 46 and 47.
[129] ibid, paras 48 and 49.
[130] For example: the Commission has at different times identified either three or five criteria on the basis of this judgment, as evidenced by the European Commission, 'Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation')' SEC(2011) 1169 final and Article 11 of the 'Proposal for a Directive of the European Parliament and of the Council on public procurement', COM(2011) 896 final respectively.
[131] Case C-159/11 *Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] OJ C 46/4.
[132] ibid, para 18.
[133] The other being, naturally, contracts concluded with a quasi in-house entity.
[134] *Azienda Sanitaria* (n. 131), paras 34 and 35.

While the contract at issue in the main proceedings did satisfy some of these criteria, the lack of a public task *shared* between the Health Authority and the university as well as the possibility of private undertakings being advantaged resulted in the cooperation being unable to benefit from the exception.[135]

The Courts judgment in the *Azienda Sanitaria* case can only be welcomed, as it has significantly clarified the second exception, although there is still room for further refinement. For example, it would be beneficial if the Court gave further guidance on when it considers 'cooperation' to exist. Advocate General Trstenjak, in her excellent opinion in *Azienda Sanitaria*, concluded that cooperation requires a common strategy and a relationship of exchange and coordination of the respective interests of the partners involved, going beyond the mere exchange of remuneration for services.[136] However, the fact that the cooperation in *Azienda Sanitaria* consisted of exactly such an exchange of services for remuneration did not enter into the evaluation of the Court. Until further guidance is given, therefore, it may be best to assume such cooperation is not excluded from the exception, if it satisfies the four criteria established in *Azienda Sanitaria*.

2.6 Conclusion

On the basis of the preceding examination, the criteria for both exceptions can be summarised as follows.

The exception of quasi in-house procurement requires the fulfilment of two cumulative criteria:

- The control criterion: the controlling authority must exercise over the formally distinct entity a control which is similar to the control which it has over its own departments.
    - Similar control requires the existence of decisive influence over strategic objectives and significant decisions of the controlled entity. Such control can be exercised either by one authority alone or jointly by multiple authorities together.
    - The existence of similar control must be evaluated at the time of the award of the contract, although in special cases circumstances taking place after the award, but which could be predicted with sufficient certainty at the time of the award, must be taken into account as well.
    - Private participation in the capital of the controlled entity precludes similar control from existing. If a private undertaking acquires a part of the capital in a controlled entity during the lifetime of the contract, this will constitute an alteration of a fundamental aspect of the contract which requires it to be put out to competitive tender.
    - Full public ownership is an indication of the existence of similar control, which can be counteracted by the particular circumstances of the case. The operational independence and market-orientation of the controlled entity are

[135] ibid, paras 37 and 38.

[136] ibid, Opinion of Advocate General Trstenjak, paragraphs 75 and 76.

the main reasons why the control exercised by the contracting authorities may be rendered tenuous.

- The activities criterion: the controlled entity must carry out the essential part of its activities for the benefit of its controlling authority. To this end, the controlled entity must be principally active for its controlling authority; any other activities may only be marginal.

For the exception of inter-municipal cooperation to apply, the Court appears to have settled on four cumulative criteria:

- The contract in question must establish cooperation between contracting authorities to ensure that a shared public task is executed.
- The contract is concluded between those contracting authorities alone, without the participation of a private party.
- No private provider of services is advantaged vis-à-vis its competitors.
- The cooperation is governed only by objectives in the public interest.

The need to define the exact scope of the unwritten exceptions has remained consistent throughout the fifteen years of their existence. Highly relevant for contracting authorities wishing to ensure the execution of their public tasks, the Court has sought to safeguard the underlying principle objective of the public procurement rules while still allowing room for the efficient provision of such tasks.

The approach chosen by the Court to the exceptions is quite functional. In *Teckal*, it established two general criteria for the application of the exception of quasi in-house procurement, which could be applied to many different situations. An example is the finding of a decisive influence over the strategic objectives and significant decisions of the controlled entity: this must be based on an examination of the relevant legislation and factual circumstances of each case, and may be established in a number of different ways including, but not limited to, the composition of the governing bodies of the controlled entity. The same can also be said for the exception of inter-municipal cooperation: as long as the principle objective of public procurement is safeguarded, the specific form which the cooperation takes does not matter. This approach might at times be somewhat complicated, especially due to the unavoidable nature of its case-by-case development, but the continuing refinement of the unwritten exceptions have resulted in a set of exceptions which can be relied upon in practice. Now the time has come for the unwritten exceptions to be turned into written ones; whether the Commission has respected the case law of the Court in its intended codification will be examined in the next chapter.

Chapter 3

3.1 Introduction

In the final paragraphs of the first chapter the modernisation of the public procurement Directives was introduced. After having concluded its consultation, which confirmed the existence of broad approval for the codification of the unwritten exceptions, the Commission presented a package of three draft public procurement Directives; each of these contains a provision codifying the Commission's interpretation of the exceptions. This chapter will examine that interpretation, both by reference to the case law as well as other documents produced during the modernisation process. On the basis of this examination, the question to what extend the codification remains faithful to the case law will be answered. Faithfulness to the case law must however be balanced against the need for simplification and clarification of the exceptions, which are the result of the case-by-case development of the exceptions.

3.2 Relevant documents

On multiple occasions, the Commission has expressed its wish for the acceptance of the proposals before the end of 2012.[137] As will have become clear, this rather ambitious date has not been met.[138] To create as complete a picture of the intended codification as possible, the following examination will include the amendments proposed by the other legislative institutions, as well as a few other documents which are introduced below.

3.2.1 Draft Directives

Naturally, the draft Directives themselves are the most important when examining the intended codification. The three proposals were presented in December 2011 and consist of the following: a Directive on public procurement, to replace the Classic Directive, a renewed Directive on Utilities and an entirely new one on concessions.[139] They are meant to increase the efficiency of public spending through the simplification and flexibilisation of the procurement rules, as well as to enable better use of public procurement in support of other common societal goals.[140] The three provisions codifying the exceptions, one in each proposal, are almost identical to each other. Due to this similarity, this chapter will focus on

[137] For example in European Commission, 'Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Towards a Single Market Act – For a highly competitive social market economy' COM (2010) 608, 6.

[138] In fact, at the time of writing the indicative sitting date for the first reading in the European Parliament was set for 10 September 2013.

[139] Respectively European Commission, 'Proposal for a Directive of the European Parliament and of the Council on public procurement' COM(2011) 896 final ('the draft Directives on public procurement'), European Commission, 'Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors' COM(2011) 895 final ('the draft Utilities Directive') and European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts' COM(2011) 897 final ('the draft Directive on concessions').

[140] Explanatory Memorandum of the draft Directive on public procurement, COM(2011) 896 final (n. 139) 2.

Article 11 of the draft Directive on public procurement, with the understanding that the observations made can be applied *mutatis mutandis* to the other provisions.[141]

3.2.2 Working Paper

In October 2011, only two months before the publication of its proposals, the Commission published a Working Paper containing guidance on cooperation by public authorities.[142] In this Working Paper, the Commission set out to consolidate the case law on the exceptions, thereby creating the basis for their incorporation in the draft Directives. Although the Working Paper was explicitly not intended to law down new rules or requirements, the Commission does not refrain from drawing conclusions which do not follow directly from the cases on which they are based.[143] The Working Paper is a long and necessarily very detailed document, which nevertheless is a helpful overview drawing together all of the then existing cases on the exceptions.

3.2.3 Legislative documents

After the Commission presented its package of proposals in December 2011, in accordance with the applicable co-decision procedure they were submitted to the Council of the European Union and the European Parliament for consideration. In response, a Presidency compromise text and a Committee report were published, containing the amendments which these institutions wish to see made to the Commission's text. The amendments may be included in the examination of Article 11, either as a counterbalance to the choices made by the Commission, or on their own merits to discuss the desirability of their acceptance.

3.2.3.1 Presidency compromise text

Within the Council, public procurement falls under the competence of the Competitiveness Council, who is supported by the Working Party on Public Procurement.[144] Furthermore, the Permanent Representatives Committee had to negotiate on a number of issues on which agreement could not be reached, including on the intended codification of the unwritten exceptions.[145] On the basis of these negotiations, the Presidency of the Council could draw up its final Presidency compromise text, to form the basis for further negotiations with the European Parliament.[146]

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[141] Those provisions are Article 21 for the draft Utilities Directive, COM(2011) 895 final (n. 139) and Article 15 of the draft Directive on concessions, COM(2011) 897 final (n. 139).

[142] European Commission, 'Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation')' SEC(2011) 1169 final ('the Working Paper').

[143] ibid, 3.

[144] Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on public procurement – General approach' 2011/0438 (COD) document number 16726/12, para 5. According to this document, the Working Party had to meet nineteen times just to discuss all of the issues with the draft Directive on public procurement alone, but even this was not enough to reach agreement on all the issues.

[145] ibid, para 7.

[146] Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on public procurement - Presidency compromise text' 2011/0438 (COD) document number 16725/1/12. The General approaches

3.2.3.2 Committee report

The Committee on the Internal Market and Consumer Protection of the European Parliament, also known as the IMCO Committee, has also done extensive preparatory work which has cumulated in an extensive report proposing over 250 amendments to the proposal.[147] The final report was preceded by a draft containing all of the amendments proposed by the members of the Committee, numbering into the thousands.[148] The codification of the exceptions is one of the provisions extensively reworked in the IMCO Committee's report. On some of the amendments, the Presidency compromise text and the Report are in agreement; for others, further negotiation will be needed to come to a compromise.

3.2.3.3 Commission's non-paper

To ease discussions, the Presidency of the Council divided the proposal into ten clusters, with each of the clusters containing all the provisions of the draft Directive dealing with a particular subject-matter. The provision codifying the exceptions was included in the tenth cluster, on the scope of the draft Directive. The Directorate General on Internal Market of the Commission, responsible for public procurement, prepared a number of so-called 'non-papers' containing detailed article-by-article explanations of each of these clusters. The non-paper on 'Cluster 10' therefore contains valuable insight into the choices made by the Commission with regards to the incorporation of the unwritten exceptions.[149]

3.3 Intended codification

The importance of the exceptions is acknowledged in recital 14 of the draft Directive on public procurement.[150] Emphasising both the freedom of contracting authorities to cooperate in the execution of their public tasks as well as the need to avoid distortions of competition, the Commission set out to clarify when contracts concluded between contracting authorities do not fall under the scope of application of the procurement rules. This clarification can be found in Article 11 of the draft Directive, which bears the title 'Relations between public authorities'.

Certain criteria or requirements show up multiple times in Article 11, without any substantial changes in their definitions. To prevent unnecessary repetition, those criteria and any proposed amendments will only be examined the first time they are mentioned.

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adopted for the draft Directives on utilities procurement and concessions echo to a large extend the compromises reached with regards to the draft Directive for public procurement.

[147] Committee on the Internal Market and Consumer Protection, 'Report on the proposal for a directive of the European Parliament and of the Council on public procurement' 2011/0438 (COD) document number A7-0007/2013.

[148] Committee on the Internal Market and Consumer Protection, 'Draft report on the proposal for a directive of the European Parliament and of the Council on public procurement' 2011/0438 (COD) document number C7-0006/2012.

[149] That non-paper can be found in: Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on public procurement - Cluster 10: Scope' 2011/0438 (COD) document number 9315/12 ('the Commission's non-paper').

[150] As well as in recital 19 of the proposed Utilities Directive, COM(2011) 895 final (n. 139) and recital 17 of the draft Directive on concessions, COM(2011) 897 final (n. 139).

3.3.1 Single control

The first paragraph of Article 11 codifies the exception of quasi in-house procurement in the case of one contracting authority directly awarding a contract to an entity which it controls.

Box 1

1. A contract awarded by a contracting authority to another legal person shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments.
(b) at least 90 % of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;
(c) there is no private participation in the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person.

As is apparent from this paragraph, the Commission has chosen a different approach from the case law, and its own Working Paper, by incorporating three criteria instead of the classic two from *Teckal*.[151] The prohibition of private participation in the controlled entity is laid down as a separate criterion, rather than included as a part of 'similar control'. The codification of the control criterion, incidentally, is in perfect compliance with the case law; the explanation of it in the second subparagraph is a copy of the decision in the *Parking Brixen* case, as it requires for the similar control the existence of a decisive influence over strategic objectives and significant decisions.[152]

The usefulness of turning the prohibition of private capital participation into a separate criterion can be questioned: the Court has been very consistent with its strict interpretation of the control criterion, and the draft Directive is not intended to deviate from this interpretation.[153] However, it seems that the prohibition is not widely accepted, and the separately prohibition of private participation may have been intended as a direct response to such naysayers. The fact that the prohibition is not widely favoured can for instance be seen in the amendment which the IMCO Committee, who wish to see added to the end of the third criterion that

[151] Case C-107/98 *Teckal Srl v Commune di Viano and AGAC di Reggio Emilia* [1999] ECR Page I-08121, para 51. For the Commission's finding in its Working Paper, see SEC(2011) 1169 final (n. 142) 6.
[152] Case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [2005] ECR I-08585, para 65.
[153] Explanatory Memorandum of the draft Directive on public procurement, COM(2011) 896 final (n. 139) 8.

> 'non-controlling or legally enforced forms of private participation, in conformity with the Treaties, and which do not exert any influence on the decisions of the controlling contracting authority'

should be allowed.[154] If adopted, participation by private undertakings in the controlled entity would no longer be prohibited, so long as it takes the form of a silent shareholding. The IMCO Committee thus seems to favour the approach established by the Advocate General in *Stadt Halle*, rather than that of the Court.[155] The Council's proposed amendment to the prohibition is much less controversial and more in line with case law, as it only intends to clarify that 'private *capital* participation' is prohibited.[156] From the point of view of both faithfulness to the case law as well as the need for clarification and simplification, the original prohibition of the Commission with the amendment of the Council should be included in the final version of the provision. Any legislation of Member States which make the participation by private undertakings mandatory, which formed the inspiration for the amendment proposed by the IMCO Committee, will have to conform to this prohibition rather than the other way around.

The codification of the activities criterion also deviates from the case law. After all, on those few occasions when it ruled on the activities criterion, the Court insisted on a qualitative as well as a quantitative assessment of all the facts of the case.[157] In its draft Directive, however, the Commission has chosen to quantify the criterion, thereby removing the need for a qualitative assessment of the facts. The Commission has also expanded the scope of the criterion, albeit only very limitedly, by allowing the activities performed for other controlled entities to be counted as if performed for the controlling authority. The setting of the benchmark at 90 percent is almost certainly inspired by the *Asemfo* case, in which the controlled entity did indeed carry out at least 90 percent of its activities for its controlling authorities.[158] Although it deviates from the case law, setting a standard percentage for the fulfilment of the activities criterion does significantly clarify that criterion. Neither the Council nor the Committee seem to disagree with the decision to quantify the criterion, although both wish to see it lowered to 'more than' or 'at least' 80 percent.[159] Regardless of the percentage which will be included in the final version of the provision, the Court's

[154] Committee Report 2011/0438 (COD) document number A7-0007/2013 (n. 147) amendment 73.

[155] Case C-26/03 *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] ECR I-00001, Opinion of Advocate General Stix-Hackl, para 76 as discussed in section 2.3.1 of the previous chapter.

[156] Presidency compromise text 2011/0438 (COD) document number 16725/1/12 (n. 146) 80. Emphasis added.

[157] Case C-340/04 *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA* [2006] ECR I-04137, para 64.

[158] Case C-295/05 *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* [2007] ECR I-02999, para 63.

[159] The first is the wording of the Council, the second the amendment of the IMCO Committee, see the Presidency compromise text 2011/0438 (COD) document number 16725/1/12 (n. 146) 4 and Committee Report 2011/0438 (COD) document number A7-0007/2013 (n. 147) amendment 72, respectively.

decision that the controlled entity must be *principally* active for the controlling authority is respected.[160]

3.3.2 Familial relations

The second paragraph of Article 11 codifies certain 'familial relations'[161] which the Commission had identified in its Working Paper as not yet addressed by the Court of Justice, but which can arise in practice.[162]

> *Box 2*
>
> 2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract.

The first situation refers to a so-called 'bottom-up contract award', in which a controlled entity directly awards a contract to its controlling authority; more simply put, a 'daughter' awards a contract to its 'mother'. The second situation which may occur is the direct award of a contract between 'in-house sisters', entities controlled by the same contracting authority. The *Teckal* criteria cannot be satisfied in either situation, although the underlying in-house logic is present: a contract is concluded between two entities that are not truly independent from each other.[163] Due to this similarity, the Commission felt it was logical to include the two situations under the exception of quasi in-house procurement. As long as there is no private participation in the entity being awarded the contract, the Commission felt that to differentiate between the exception and these familial relations would be overly formulistic.[164] The Presidency compromise text does not envision any substantive changes to the paragraph; the Committee Report only expands its scope to include joint control as well.[165]

The Court has always insisted that any exception to the obligation to procure must be interpreted *strictly*; it has done so explicitly and multiple times for the exception of quasi in-house procurement.[166] What the Commission has done in this paragraph does not conform to this requirement of a strict interpretation, because it has included under the scope of an

[160] Either percentage will respect that decision, because the rejection in *Carbotermo* of the 80 percent was based on the strict interpretation of exceptions rather than an absolute rejection of that percentage, see section 2.5.

[161] Name based on M. Burgi and F. Koch, 'In-House Procurement and Horizontal Cooperation between Public Authorities. An Evaluation of Article 11 of the Commission's Proposal for a Public Procurement Directive from a German Perspective', (2012) 7 EPPPL 86, 88.

[162] SEC(2011) 1169 final (n. 142), 11.

[163] ibid, 12.

[164] The Commission's non-paper 2011/0438 (COD) document number 9315/12 (n. 149) 31.

[165] Committee Report 2011/0438 (COD) document number A7-0007/2013 (n. 147) amendment 75. Unfortunately, the way in which the amendments are included in the text of the second paragraph makes for confusing reading: not only does the amendment allow for the bottom-up award of a contract to multiple controlling authorities, i.e. the expansion to joint control, but it also adopts the provision for use by multiple controlled entities.

[166] See for example *Stadt Halle* (n. 155) para 46 and *Parking Brixen* (n. 152) para 63.

exception two situations which cannot fulfil that exception's criteria. Furthermore, as identified in the first chapter, any exception of the obligation to procure can only exist if it does not undermine the principle objective of public procurement, especially the opening up of public procurement to undistorted competition.[167] Thus, it will have to be ensured that the familial relations of paragraph two do not infringe this objective, for their inclusion in Article 11 to be accepted.

The explicit prohibition of private participation in the entity being awarded the contract limits the distortion of competition which could result from the direct award of a contract in one of the above situations. However, that is not the only way in which competition may be distorted. If the entity being awarded the contract, in this situation either the 'mother' or the 'sister', is active on the market, then the direct award of that contract will advantaged it to the detriment of the private undertakings active on the same market. It is therefore unfortunate that the reference in paragraph two to the first paragraph is rather unclear, as it does not explain how the criteria contained therein apply to the familial relations. Although it is obvious that the control criterion cannot be satisfied in either situation, and private participation is already excluded in that paragraph itself, it is quite important to know whether the activities criterion should be applied *mutatis mutandis.* If not, there would be no restriction on the activities on the related market of the entity awarding the contract or that of the entity to which it is awarded; if it does apply, only the activities of the entity being awarded the contract will be curtailed.[168] Either way, the entities concerned would be advantaged in comparison to their competitors, which infringes the underlying objective of public procurement.[169] Thus, the exclusion of these familial relations still requires significant clarification before the entry into force of the Directives.[170]

3.3.3 Joint control

The third paragraph of Article 11 lays down the requirements to be met for the application of the quasi in-house exception in the case of joint control. The basic criteria for a finding of joint control are nearly identical to those in the first paragraph; the establishment of 'similar control' is however much more complicated.

[167] See section 1.3.

[168] J. Wiggen, 'Public procurement law and public-public co-operation: reduced flexibility but greater legal certainty ahead? The Commission's Staff Working Paper on the application of EU public procurement law to relations between contracting authorities and the 2011 proposal for a new Directive', (2012) 5 PPLR NA225, NA229.

[169] One would be advantaged because it does not have to follow a procurement procedure; the other by being directly awarded a contract without competition.

[170] Although, to be fair, the extent to which these situations may actually arise in practice is questionable; after all, until now they have not appeared in any case before the Court. Considering the large volume of cases on the exceptions and any related circumstances, the lack of cases before the Court may indicate that the situations are not all that common.

Box 3

3. A contracting authority, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a public contract without applying this Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:

(a) the contracting authorities exercise jointly over the legal person a control which is similar to that which they exercise over their own departments;
(b) at least 90 % of the activities of that legal person are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;
(c) there is no private participation in the controlled legal person.

For the purposes of point (a), contracting authorities shall be deemed to jointly control a legal person where the following cumulative conditions are fulfilled:

(a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities;
(b) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person;
(c) the controlled legal person does not pursue any interests which are distinct from that of the public authorities affiliated to it;
(d) the controlled legal person does not draw any gains other than the reimbursement of actual costs from the public contracts with the contracting authorities.

According to the Commission, the extensive list in the second subparagraph has been included to prevent joint control from becoming a 'pure legal fiction', and public procurement law from being circumvented.[171] The first two sub-criteria are meant to ensure that the contracting authority relying on the exception actually has a measure of influence over the decision-making of the controlled entity, while the last two are meant to limit the distortion of competition which may arise from the use of the exception. Interestingly, in its Working Paper the Commission did not conclude that any of these sub-criteria were mandatory elements for the finding of joint control.[172]

Of the four sub-criteria made mandatory by the Commission only the second one, requiring the ability to jointly exercise decisive influence over the controlled entity, has been consistently used by the Court in its case law. The first and third sub-criteria, on the composition of the controlled entity's decision-making bodies and the interests it pursues, were both circumstances which helped the finding of similar control in *Coditel Brabant*; they

[171] The Commission's non-paper 2011/0438 (COD) document number 9315/12 (n. 149) 32.
[172] SEC(2011) 1169 final (n. 142) 9. Instead, it contented itself with the finding that joint control does, in fact, exist.

were not, however, established as being generally applicable criteria.[173] The fourth sub-criterion, meanwhile, is similar to a fact from the *Asemfo* case, which was so insignificant that the Court did not remark upon it in its decision.[174] The Commission's wish to prevent the use of joint control as a means to circumvent the procurement rules is admirable, and does confirm to the Court's later judgment in the *Econord* case.[175] However, the choices made to ensure a measure of influence for each of the controlling authorities go far beyond what is necessary, severely restricting the freedom of contracting authorities to structure their cooperation whichever way they see fit.[176]

Ensuring participation by each authority in the control exercised over the controlled entity can be achieved by other means than the mandatory participation in the entity's decision-making bodies, for example through the use of shareholder agreements.[177] Allowing one representative to represent multiple authorities, as envisioned by the Council and the Parliament's Committee, does little to alleviate the restrictive nature of the first sub-criterion.[178] The third sub-criterion, which prohibits the controlled entity pursuing other interests than those of its controlling authorities, will also require further explanation.[179] The Commission has included this criterion to limit the market-orientation of the controlled entity, thus it seems likely that it is meant to ensure that the controlled entity does not pursue commercial interest even when it is lawfully active on the market.[180] However, when, how and by whom those interests should be determined is not clear, and neither is the reason why differing interests are a problem in the case of joint control, but not when establishing single control.[181] The final sub-criterion of paragraph three is the least objectionable of the three, as it merely intends to limit the benefit enjoyed by the controlled entity when it is active on the market.

[173] Case C-324/07 *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale* [2008] ECR I-08457.

[174] *Asemfo* (n. 158) para 10 (6). In this case, the fact that the State owned company was not free to fix its own tariff (and had no choice in carrying out the orders from contracting authorities) did figure prominently in the Courts reasoning, both with regards to the lack of a public contract being concluded as well as the existence of similar control. The fact that the tariffs 'shall be calculated so as to reflect the actual costs' of the activities concerned did not have any place in the Court's reasoning, however.

[175] Joined cases C-182/11 and C-183/11 *Econord SpA v Comune di Cagno, Comune di Varese, Commune di Solbiate and Comune di Varese* [2012] OJ C 26/7, in which the Court held that the position of a contracting authority with regards to a jointly controlled entity must convey some influence over the decision making of that authority; if not, a purely formal affiliation is not enough to bring the relationship under the scope of application of the exception.

[176] As acknowledged in case C-480/06 *Commission of the European Communities v Federal Republic of Germany* [2009] ECR I-04747 ('Stadtreinigung Hamburg'), para 47.

[177] Acknowledged by the Court in *Econord* (n. 175) para 32.

[178] Presidency compromise text 2011/0438 (COD) document number 16725/1/12 (n. 146) 82 and Committee Report 2011/0438 (COD) document number A7-0007/2013 (n. 147) amendment 80.

[179] A point of view shared by M. Burgi and F. Koch (n. 161) 88, who call it 'one of the most dazzling and ambiguous legal terms known in the legal systems of all European States'.

[180] Based on the findings of the Court in *Coditel Brabant* (n. 173), para 38, where the Court established the controlled entity's raison d'être as being the pursuit of the 'municipal interest', without being any clearer s to what that interest is.

[181] Or, if the requirement that the controlled entity does not pursue any interests distinct from the interests of the controlling authorities is an element of both joint and single control, as argued by J. Wiggen (n. 168) NA230, then why is it included as a separate sub-criterion under joint control?

Whether the inclusion of joint control in the intended codification of the exceptions constitutes a simplification can be considered in one of two ways. On the one hand, laying down a long list of requirements instead of sticking to the decisive influence established by the Court does seem to make the application of the exception a little more complicated. On the other hand, a closer examination of those requirements makes it clear that, instead of the variety of entities which could benefit from the case law of the Court, after entry into force of the codification in its current form only those controlled entities which closely resemble the inter-municipal cooperative society from the *Coditel Brabant* case will continue to benefit from the exception. It can be argued that this makes the application of the exception much easier, rather than harder. However, such a severe restriction does not, as stated, respect the doctrine as developed by the Court; that would require that all but the second sub-criterion is deleted.

3.3.4 Inter-municipal cooperation

As emphasised by the Commission in its Working Paper, up until the end of 2012 only one case dealt with the exception of inter-municipal cooperation.[182] In the absence of any further guidance from the Court, paragraph 4 of Article 11 was intended to create legal certainty for contracting authorities wishing to rely on the exception by deriving workable criteria from that case.[183] In its Working Paper, the Commission found 'at least' three conditions; in the draft Directive, it settled on five.

Box 4

4. An agreement concluded between two or more contracting authorities shall not be deemed to be a public contract within the meaning of Article 2(6) of this Directive where the following cumulative conditions are fulfilled:

(a) the agreement establishes a genuine cooperation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;
(b) the agreement is governed only by considerations relating to the public interest;
(c) the participating contracting authorities do not perform on the open market more than 10 % in terms of turnover of the activities which are relevant in the context of the agreement;
(d) the agreement does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;
(e) there is no private participation in any of the contracting authorities involved.

[182] SEC(2011) 1169 final (n. 142) 12. That case was *Stadtreinigung Hamburg* (n. 176).
[183] The Commission's non-paper 2011/0438 (COD) document number 9315/12 (n. 149) 33.

The first criterion establishes the need for the cooperation to be 'genuine', requiring that all contracting authorities contribute to the joint performance of a shared task.[184] Such genuine cooperation must be contrasted with a normal public contract, in which a service is provided in exchange for remuneration. Such a service provision should not, according to the Commission, be considered as cooperation exempt from the scope of application of the procurement rules.[185] Thus, the contribution of a contracting authority to the cooperation may not be solely financial, even though that may be all a contracting authority is in a position to contribute.[186] Instead of being able to pool their resources and allowing one municipality to take the lead in the provision of the task, contracting authorities which cannot materially contribute to the cooperation will have to separately perform the public services, which is much more expensive and less efficient.[187] These concerns are reflected in the amendment contained in the IMCO Committee report, which modifies the first requirement to allow the pooling of resources to enable each of the authorities to carry out their own tasks.[188] According to that amendment, it would not matter if for example some of these authorities only contribute financial resources, while others act as service providors. So long as each of them contribute something to the cooperation, it would fall within the amendment proposed by the Committee.

Nearly a year after the publication of the Commission's proposals, the Court of Justice was given the change to reaffirm its findings on the exception of inter-municipal cooperation. Although the Commission could not have known about the judgment in the *Azienda Sanitaria* case at the time it created Article 11, it is still a part of the current framework for the application of the exception and can therefore not be ignored when evaluating that Article.[189] In *Azienda Sanitaria*, the Court gave four clearly distinguishable criteria for the application of the exception; the existence of mutual rights and obligations was not one of them. In fact, that case concerned the provision of a service in return for remuneration, but the lack of 'genuine cooperation' did not enter into the Court's considerations.[190] This shows that the Court never intended for 'genuine cooperation' to be a part of the evaluation of the exception of inter-municipal cooperation. If the Commission none the less wishes to retain the criterion, an amendment in line with that proposed by the IMCO Committee should be incorporated.

[184] Incorporated in the provision through the phrase 'involving mutual rights and obligations', see the Commission's non-paper, p. 34.

[185] In this, the Commission reflects the approach taken by Advocate General Trstenjak in her Opinion in the case C-159/11 *Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] OJ C 46/4, although considering the timing it may have been the Advocate General who drew inspiration from the choices made by the Commission.

[186] M. Burgi and F. Koch (n. 161), 90.

[187] According to the Council of European Municipalities and Regions, 'Public-public cooperation must be made coherent in service concessions and public procurement directives' <http://www.ccre.org/en/actualites/view/2333> accessed on 10 April 2013.

[188] Committee Report 2011/0438 (COD) document number A7-0007/2013 (n. 147) amendment 83.

[189] *Azienda Sanitaria* (n. 185).

[190] It did find that the possibility of the contracting authority being able to rely on the exception was doubtful, due to the fact that there was no shared service task and the contract could potentially favour private operators, see paras 37 and 38 of that case.

The second criterion of paragraph four concerns the need for the cooperation to be governed solely by the public interest, which is a lot less controversial. It can be derived directly from the two cases on inter-municipal cooperation, and merely excludes from the scope of the exception cooperation which serves a commercial objective.[191] The third and fourth criteria are more likely to divide opinions. They are intended to restrict the market-orientation of the cooperation, through the analogous application of the activities criterion from the quasi in-house exception and the prohibition of financial transfers.[192] This way, the effects of the cooperation on competition on the market are minimised. The analogous application of criteria developed under one exception to all situations falling under another can be quite problematic: the strict interpretation of exceptions makes such analogous application inappropriate, and the Court will not have contemplated the situations falling under one exception while developing the criteria for the other.

Neither the third nor the fourth criterion of paragraph four has been confirmed by the Court in *Azienda Sanitaria* as one of the cumulative criteria applicable to the exception of inter-municipal cooperation. The prohibition of financial transfers is however in line with the Commission's demonstrated penchant for promoting circumstances of a case to generally applicable criteria, as it was a fact in *Stadtreinigung Hamburg*.[193] For the analogous application of the activities criterion, the Commission has trouble finding a consistent basis. According to its Working Paper, the cooperation could become governed by objectives not in the public interest if the cooperating authorities were allowed to deploy too many activities on the open market.[194] The non-paper, however, bases the limitation on the need to prevent distortions of competition, by prohibiting the gains resulting from the cooperation being used to offer activities in competition with private undertakings.[195] Whichever basis its wants to use at any given time, it will be hard for the Commission to deny that that basis cannot be found in the case law of the Court. Not that this makes its inclusion in paragraph four automatically undesirable, as the inclusion of a predictable rule to limit the distortion of competition ensures that the principle objective of the procurement Directives is safeguarded.

The final requirement of paragraph four will not have raised many eyebrows. The prohibition of private participation in any of the contracting authorities involved is based on the need to respect the principal of equal treatment, which requires that no private undertaking is placed in an advantageous position to the detriment of its competitors.[196] Although the benefit which the private undertaking participating in one of the contracting authorities would receive from the cooperation is much less evident than the benefit given to an undertaking participating in a controlled entity under the other exception, to ensure the objectives in the public interest it is best to exclude any private capital.

[191] *Stadtreinigung Hamburg* (n. 176) para 47 as well as *Azienda Sanitaria* (n. 185) para 35.
[192] The Commission's non-paper 2011/0438 (COD) document number 9315/12 (n. 149) 34 and 35.
[193] *Stadtreinigung Hamburg* (n. 176) para 43.
[194] SEC(2011) 1169 final (n. 142) 13.
[195] The Commission's non-paper 2011/0438 (COD) document number 9315/12 (n. 149) 34.
[196] *Stadtreinigung Hamburg* (n. 176) para 47.

3.3.5 Final paragraph

The final paragraph of Article 11 continues with the theme of private participation, as it lays down the moment that the existence of private participation must be evaluated as well as the consequences of such participation in an ongoing contract.

Box 5

5. The absence of private participation referred to in paragraphs 1 to 4 shall be verified at the time of the award of the contract or of the conclusion of the agreement.

The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures.

Taking inspiration from the *Sea* case, the Commission has included that the consequence for the infringement of the prohibitions of private participation is that the contract must be put out to competitive tender.[197] Whether there is any private participation at all must be evaluated at the same time as the evaluation of the existence of similar control. Curiously, the IMCO Committee has proposed to remove the second sub-paragraph, without inserting any replacement.[198] How that Committee envisions the consequences of a subsequent participation of private capital remains somewhat unclear. Its amendment to the prohibition of private participation only made provision for private participation which is non-controlling or legally enforced; Article 11 will therefore still need a way to deal with a private participation which does have control.[199] Therefore, keeping the final paragraph of Article 11 without change is both in compliance with the case law as well as the need for clarification.

3.4 Conclusion

This chapter set out to examine whether the intended codification of the exceptions of quasi in-house procurement and inter-municipal cooperation has remained faithful to the case law of the Court. After scrutinising Article 11, it has become apparent that the provision is, at times, a little *too* faithful: the Commission tends to include specific circumstances of individual cases as generally applicable criteria, resulting in an overly formulistic "check the box" approach wherein situations can only be excepted from the scope of the procurement Directives if they comply with a long list of criteria which are very specific. This can be contrasted with the more functional approach of the Court, who formulated general criteria which can be applied to many different situations.[200]

The formulistic approach is especially apparent in the case of cooperation between contracting authorities, either through the use of a controlled entity or on a contractual basis. It is understandable in the case of the exception of inter-municipal cooperation; after all, at the

[197] Case C-573/07 *Sea Srl v Comune di Ponte Nossa* [2009] ECR I-08127, para 53.
[198] Committee Report 2011/0438 (COD) document number A7-0007/2013 (n. 147) amendment 86
[199] As discussed in section 3.3.1.
[200] The strict exclusion of semi-public undertakings notwithstanding.

time of writing its proposals, the Commission had only the *Stadtreinigung Hamburg* case to use for inspiration. However, developments do not grind to a halt during the legislative process, and the Commission has been overtaken by the case law. *Azienda Sanitaria* clearly shows the criteria which the Court finds important with regards to the exception of inter-municipal cooperation, and if the Commission wishes to ensure wide-spread acceptance of its intended codification it should amend its criteria to reflect those found by the Court.

Meanwhile, the manner in which the Commission wishes to make the finding of joint control depended on compliance with the facts of the *Coditel Brabant* case is much harder to justify, as at the time the proposals were written there was not nearly as much uncertainty about the definition of joint control as there was on the exception of inter-municipal cooperation. The fact that the control criterion requires the existence of a decisive influence had been present in the case law since *Parking Brixen*, after all. The decision to include three extra requirements for the establishment of joint control will therefore result in a severe limitation of the scope of application of the exception. That reduction is not counterbalanced by the slight expansion of the scope of application of the exception, which is most apparent in the inclusion of the 'familial relations' of the second paragraph.

Chapter 4

4.1 Introduction

The procedure before the competent court, which resulted in the preliminary procedure documented in the *Teckal* case, ended with the Italian Council of State deciding that the relationship between the controlling authority and the controlled entity was quasi in-house.[201] Since that decision, however, the exception of quasi in-house procurement has undergone significant fine-tuning, having been both restricted and expanded by the Court. This poses the interesting question whether or not the Italian court, or indeed any national court, could come to the same decision if presented with the same facts today. When that question is answered not only on the basis of the doctrine developed by the Court but also the intended codification of the exception, it will form a good illustration of the differences between the two. The majority of this chapter will therefore be devoted to this examination. Besides fine-tuning the quasi in-house exception, the Court has also developed the exception of inter-municipal cooperation. Although the facts of the *Teckal* case could never support the application of that second exception, the final paragraphs of this chapter will give an indication of how those facts could be restructured to allow for such an application.

4.2 *Teckal* revisited

The proposed re-evaluation will require a far more in-depth look into the facts of the *Teckal* case than has thus far been possible.[202] As stated in the second chapter, the case concerned a contract for the operation and maintenance of heating installations as well as the supply of fuel for those installations. The Italian Municipality of Viano directly awarded that contract to AGAC, a consortium it had set up together with 44 other municipalities. Viano's previous contracting partner, Teckal Srl, challenged the award on the basis that the Community rules on public procurement law had been infringed.

The legislative provisions on the basis of which AGAC had been created could be found in the 'Law on the organisation of local authorities', which laid down the various ways in which municipalities could ensure the provision of local public services.[203] One of these ways was through the establishment of a special undertaking, which is a body with legal personality, commercial autonomy and its own statutes. The municipality establishing that undertaking was responsible for setting its objective and ensure effective supervision, to assure that the undertaking would be effective, efficient and profitable.

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[201] Sentenza del Consiglio di Stato, Sezione Quinta, n. 2605 del 9 maggio 2001, according to the European Commission, 'Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation')' SEC(2011) 1169 final, p. 6, footnote 12.

[202] The facts were discussed in case C-107/98 *Teckal Srl v Commune di Viano and AGAC di Reggio Emilia* [1999] ECR Page I-08121, para 8 to 16, and the Opinion of Advocate General Cosmas, paras 11 to 21. The following text will be based on these discussions.

[203] Law No 142 of 8 June 1990 (Ordinary Supplement to the GURI No 135 of 12 June 1990).

Municipalities seeking to jointly ensure the management of one or more services could agree to set up a special undertaking in the form of a consortium. AGAC was such a consortium, set up for the management of a number of environmental services including the operation and maintenance of heating installations for civil and industrial purposes. AGAC could also extent its activities to other related services, or offer them on the open market. Neither the law nor the statutes contained any limitation on these ancillary activities, which meant that they could be offered to public bodies which were not members of the consortium as well as to private entities. For the management of these related services, AGAC could either choose to participate in already existing private undertakings or public bodies or create its own.

The bodies of the consortium consisted of a general meeting, a council and its chairman as well as a director-general. The general meeting, composed of the representatives of the participating municipalities, had the power to elect the members of the other bodies as well as approve the documents of constitution dictated by the consortium's statute. Furthermore, the general meeting had to approve the most important managerial acts of AGAC, including the preparation of accounts and budgets. The statutes of AGAC specified each of the municipalities' percentage participation in the general meeting, as well as in its profits and losses; the participation of the Municipality of Viano was set at 0.9 percent.

By virtue of its composition, the general meeting was the only one of the consortium's bodies who could be called to account for its actions by the member municipalities. The other managerial bodies were expressly excluded from having to answer to the participating authorities for their managerial acts. Furthermore, the natural persons who were the members of those managerial bodies could not be representatives of the member municipalities.

According to its statutes, AGAC had to achieve a balanced budget and operational profitability. For its funding the consortium was depended on its members, although it did pay an annual interest in return for the funds and assets it received. Any profits which AGAC earned during a financial year had to be allocated in accordance with the decision of the general meeting. They could in particular decide between allocating it among the members, let it be retained by AGAC as reserves or allow investment into AGAC's other activities.

4.3 Doctrine of the Court

The legislative and statutory provisions paint a picture of AGAC as an entity which, although not free from managerial oversight by the municipalities, still enjoys a great deal of independence, especially with regards to the activities which it can offer on the market. When it comes to the possibility of applying the exception of quasi in-house procurement, it is exactly such independence of the controlled entity which is often the main stumbling block for application of the quasi in-house exception. Thus, the following examination will determine whether the consortium would be able to benefit from the doctrine of the Court as it stands today.

4.3.1 The control criterion

Whether the member municipalities of AGAC can exercise over that entity a control which is similar to the control which they have over their own departments depends on an examination of the relevant legislation and the circumstances of the case. According to these, the municipalities must be able to exercise a *decisive influence* over the strategic objectives and significant decisions of the controlled entity.[204]

4.3.1.1 Single control

It scares needs illustrating that a municipality occupying a position similar to that occupied by the Municipality of Viano cannot fulfil the control criterion alone, without the help of the other members. As one of 45 municipalities, the percentage participation conferred on Viano was only 0.9 percent; this percentage is simply too low for the municipality to be able to exercise 'single control'.[205] This can be different only when it can be deduced from the applicable provisions or the circumstances of the case that the controlled entity cannot refuse to carry out the demands of the authorities concerned.[206] In such circumstances, the controlled entity can be regarded as an instrument of the controlling authorities, instead of an independent entity. However, the legislative and statutory provisions discussed above show no sign of such compulsion with regards to AGAC. Indeed, the independence of the consortium to operate on the market and the fact that its managerial bodies are not subject to the municipalities' supervision seems to indicate the lack of it much more strongly. Thus, under these circumstances it seems unlikely that a national court may regard the existence of single control as proven.

4.3.1.2 Joint control

However, the Court has established that it is not necessary for control to be exercised by each of the cooperating authorities individually; that control may also be exercised jointly, so long as it remains effective.[207] It will therefore have to be checked whether the contracting authorities who owned the consortium were able to jointly exercise the same control over it as that which they have over their own departments. The fact that the consortium is wholly public is a helpful indication of the existence of such control, although this indication can be disproven by other circumstances of the case.[208]

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[204] Case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [2005] ECR I-08585, para 65.

[205] See similarly the case C-231/03 *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [2005] ECR I-07287, para 24, where this was the case for a municipality having a holding of 0.97 percent.

[206] Case C-295/05 *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* [2007] ECR I-02999, para 13.

[207] Case C-324/07 *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale* [2008] ECR I-08457, para 46.

[208] Case C-340/04 *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA* [2006] ECR I-04137, para 37. The fact that AGAC was wholly owned by public authorities can be found in Case C-26/03 *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] ECR I-00001, para 49.

4.3.1.2.1 Decisive influence

The member municipalities of AGAC are represented in its general meeting. The powers of supervision of that general meeting consist not only of the power to appoint the members of the other managerial bodies as well as to approve the document of constitutions described by the law, but also of the statutory power to block the most important managerial acts of the consortium by withholding approval. The establishing municipalities are also responsible for setting the consortium's objectives and policy and to monitor its management results. These circumstances, together with the indication following from the wholly public nature of the consortium, indicate that the municipalities jointly exercise a decisive influence over the strategic objectives and significant decisions of AGAC.

4.3.1.2.2 Market-orientation and independence

On the other hand, it is apparent from case law that if the controlled entity is market-oriented and enjoys an independence from its controlling authorities which is too great, the control exercised by those authorities is rendered tenuous.[209] Whether a controlled entity is market-oriented must be determined on the basis of the opportunities it has to establish relations with private undertakings, as well as the geographical and material extent of its activities.[210]

With regards to its market-orientation, the fact that AGAC can provide its services or supplies to others than its member municipalities indicates that it is capable of entering into contracts with them. Therefore, AGAC had the opportunity to establish relations not only with other public authorities but also with private undertakings. Neither the law nor its statutes contains any limits on these activities, which makes it likely that they may be offered to others throughout Italy and beyond. The fact that AGAC is capable of offering activities outside of the geographical territory of its members is an indication that it is market-oriented. Finally, the consortium may extend its activities to those ancillary or related to the activities for which it has been made explicitly responsible, which means that the material extent of its activities also go beyond the activities it offers to its members. Thus, all three of the criteria for the existence of market-orientation are potentially fulfilled. But the mere *possibility* of being market-oriented is not enough to render the joint control tenuous; the controlled entity must be actually active in such a manner. Whether or not this was the case for AGAC cannot be deduced from the facts of the *Teckal* case; none the less, there are strong indications that the joint control of the municipalities is rendered tenuous by the consortium's market-orientation.

Besides the possibilities offered to the consortium to be active on the market, the other important factor is its independence. In this respect, it is important to note that, except for the general meeting, AGAC's managerial bodies are not directly answerable to the municipalities for their actions, nor are the persons sitting in them representatives of the member municipalities. This lack of accountability together with the consortium's commercial autonomy, as indicated by the possibilities it has to extend its activities, makes it likely that it enjoys a considerable amount of independence. The power of the general meeting to approve

[209] *Parking Brixen* (n. 204) paras 67 and 68.

[210] Case C-573/07 *Sea Srl v Comune di Ponte Nossa* [2009] ECR I-08127, para 73.

the ‘most important managerial acts’ may thwart the establishment of such independence, but only if the decisions related to the consortium’s market-orientated activities can be counted among those important acts subject to approval.[211]

4.3.1.2.3 Representatives

The fact that the managerial bodies of AGAC are not all composed of representatives of the member municipalities is not, in itself, a problem for the establishment of joint control. Although such representation in the governing bodies of the controlled entity may show that similar control exists, this is certainly not the only way in which it can be proven.[212] For example, in the *Asemfo* case the state-owned company was considered to be jointly owned by the Spanish State and the Autonomous Regions on the basis of the applicable legislation, without the composition of its managerial bodies entering into the evaluation.[213]

4.3.2 The activities criterion

The division between the activities which the consortium provides for the benefit of its members and those which it offers on the open market also form the basis of the evaluation of the second criterion, which demands that the controlled entity carries out the essential part of its activities for the benefit of the controlling authorities. This requires that AGAC is *principally* active for the benefit of its member municipalities, with any other activities being only of marginal significance.[214] A more precise definition does not exist, although it is commonly accepted that 90 percent or more will certainly constitute the ‘essential part of the activities’. However, on the basis of the facts provided in the original *Teckal* judgment, it cannot be decided whether this criterion is satisfied.

4.3.3 Verdict

Although the municipality wishing to rely on the exception of quasi in-house procurement in similar circumstances as those applicable in the *Teckal* case would have some work to do, proving that the two criteria are satisfied is not impossible. The legislative and statutory provisions create the strong indication that the municipalities jointly have a decisive influence over the consortium’s most important decisions, which would fulfil the control criterion. That joint control could be rendered nugatory by the latitude conveyed on AGAC to act independently and to be active on the market, which would have to be established through an examination of the facts of the case. AGAC’s independence appears to be, at least on paper,

[211] The setting up of an entirely new undertaking for the management of these activities, for example, or buying shares in another company are evidently important enough to require the approval of the general meeting before implementation. Less evident might be more general day-to-day decisions, such as the one to conclude a contract for the provision of services with non-members or the decision to purchase the necessary equipment to provide such services. The extent to which the consortium’s managerial bodies can decide independently in those situations will have an effect on the determination of its independence.

[212] *Coditel Brabant* (n. 207) paras 33 and 34.

[213] *Asemfo* (n. 206).

[214] *Carbotermo* (n. 208) para 63.

significant. Whether the second *Teckal* criterion would be satisfied will also depend on an examination of the factual circumstances of the case.

4.4 After codification

It follows from the above examination that, although not necessarily easy, the doctrine developed by the Court does not make it completely impossible to apply the exception to the facts of the *Teckal* case. As indicated by the previous chapter, however, the criteria for the establishment of similar control will change significantly after entry into force of the proposed codification.[215] This examination will follow the approach established by the Commission, starting with the possibility of single control before moving on to the criteria needed to establish joint control.

4.4.1 Single control

According to the first paragraph of Article 11, the direct award of a contract falls outside the scope of the draft Directive if the three cumulative criteria given there are satisfied. Those criteria are the control criterion, the activities criterion and the prohibition of private participation respectively.[216] As explained above, a municipality in the position of Viano can never exercise a control similar to that which it has over its own departments alone, without the cooperation of the other member municipalities. Thus, the first paragraph of Article 11 cannot be applied to the facts such as those under examination, and does not need to be examined further.[217]

4.4.2 Joint control

If the contracting authority is not in a position to exercise single control over another legal person in the sense of the first paragraph of Article 11, the third paragraph lays down the criteria under which a direct award of a contract is still possible if the entity to which the contract is awarded is controlled by more than one authority.[218] This, too, requires the existence of 'similar control', as well as the fulfilment of the activities criterion and the prohibition of private participation. For the existence of similar control, four sub-criteria are given.

4.4.2.1 Representatives

The very first of those four sub-criteria may already pose a problem, as it requires that the decision-making bodies of the controlled legal entity are composed of representatives of the participating authorities. In the case of AGAC, only the general meeting is composed of representatives of the municipalities involved. The other managerial bodies are very decidedly

[215] At least in its current form, as laid down in European Commission, 'Proposal for a Directive of the European Parliament and of the Council on public procurement', COM(2011) 896 final.
[216] See 'Box 1' of the previous chapter.
[217] And neither does the second paragraph, found in 'Box 2', which applies the first paragraph to the situation of a bottom-up contract award and the direct award of a contract between in-house sisters.
[218] See 'Box 3' of the previous chapter.

not made up of persons who exercise an official function within the members.[219] This will be a problem if those managerial bodies can be considered as *decision-making bodies*. In that respect, their commercial independence of the consortium makes it likely that they have the power to take all manner of decisions with regards to the consortium's market-orientated activities. The oversight, and therefore the decision-making powers, of the general meeting are meanwhile limited to the most important managerial acts. Thus, there seems to be a grey area left for the managerial bodies of the consortium to take decisions with regards to its market-orientated activities which are not important enough to fall under the power of approval of the general meeting. If so, the managerial bodies can be considered as decision-making bodies which are not composed of representatives of the member municipalities. Thus, the first sub-criteria is most likely not satisfied, which would normally result in the non-applicability of the exception. If, however, the powers of the managerial bodies do not involve actual decision-making powers, their composition does not threaten the application of the exception.

4.4.2.2 Decisive influence

Of course, that does not mean that the independence of the managerial bodies of AGAC cannot constitute a further inconvenience in the rest of the examination. The second sub-criterion on the finding of joint control requires the existence of decisive influence over the strategic objectives and significant decisions of the controlled entity. There is no indication that the Commission intended to deviate from the case law when it incorporated this requirement; consequently, the same difficulties as identified with regards to the establishment of joint control under the case law apply here as well. The independence of the consortium with regards to its day-to-day management and the possibilities it has to become commercially active may render the control exercised by the member municipalities tenuous.

4.4.2.3 Distinct interests

The commercial autonomy which has been noted a few times before can further complicate the possibility of using the exception as codified in the draft Directive. The third sub-criterion for a finding of joint control demands that the controlled entity does not pursue any interests distinct from the interests of its controlling authorities. According to case law, that is the case when the controlled entity is established for and has as its only objective the pursuit of the municipal interest.[220] Thus, the controlled entity may not pursue commercial interests, even when active on the market. There is however nothing in the provisions of the law or its statutes to indicate that AGAC could not pursue such commercial interest when offering its services to others than its members. Indeed, the fact that the consortium is by law intended to be profitable constitutes a decidedly commercial consideration. It therefore seems to be the case that AGAC can indeed pursue interest distinct from those of its controlling authorities, resulting in another requirement not met.

[219] *Teckal* (n. 202), para 14 which repeats the provision from the statutes of AGAC.
[220] *Coditel Brabant* (n. 207), para 38.

4.4.2.4 Benefits

The fourth and final sub-criterion for the existence of joint control states that the controlled entity may not benefit from the activities it exercises for the benefit of the controlling authorities. Instead, it may only be reimbursed for the costs of the activities. According to AGAC's statutes, its member municipalities will provide it with the funds required for the provision of the services, for which it will pay them an annual interest. With regards to the profits which the consortium can earn, it is not clear from the text of the *Teckal* judgment whether those can only come from the other activities of AGAC or also from the provision of the services to the member municipalities. If AGAC could profit from the service provision to its members, it will draw a gain from that service provision which is contrary to this sub-criterion. On the other hand, if the consortium's profit can come solely from its other activities, then this last requirement may in fact be met.

4.4.3 Activities and private participation

In contrast to the requirements for the existence of joint control, the other two criteria contained in paragraph three of Article 11 are not nearly as difficult to satisfy. The activities criterion requires that the controlled entity carries out at least 90 percent of its activities for the benefit of its controlling authorities; this requires an examination of the facts of the case and can therefore not be answered based on the information found in the original *Teckal* judgment. The prohibition of private participation in the consortium will not constitute an obstacle; as noted, AGAC was wholly owned by its 45 founding municipalities.

4.4.4 Comparison

All in all, if it was mildly difficult for the Municipality of Viano to prove its quasi in-house relationship with AGAC according to the Court's doctrine, it would be near impossible to prove under the draft Directive. When comparing the requirements for the application of the exception under the case law and according to the intended codification, the increase in difficulty under the draft Directive stands out like a sore thumb. With both of them, the bulk of the problem lies with proving the existence of similar control, but this has always been the most difficult of the *Teckal* criteria to prove. However, the fact that the Commission has chosen to model the sub-criteria for the establishment of that control almost entirely on the factual circumstances of the *Coditel Brabant* case, whereas under the case law many more situations could be exempted, has resulted in an enormous restriction of the scope of application of the exception. In either case, the possibilities of applying the exception of quasi in-house procurement to the facts of the *Teckal* case will be significantly more difficult today than it was before.

4.5 Inter-municipal cooperation

The exception of inter-municipal cooperation is meant to be used in situations where cooperation is based on a contractual arrangement, rather than in a jointly controlled entity. Therefore, to be able to use the exception to excuse the cooperation between the municipalities in the *Teckal* case, that cooperation will have to be restructured somewhat. The

following paragraphs will sketch a picture of cooperation which would fulfil all the requirements imposed by the Court of Justice and the Commission respectively.[221]

4.5.1 Under the case law

Municipalities can benefit from the exception of inter-municipal cooperation if they conclude an agreement among themselves to cooperate in the execution of a public interest objective, such as the management and operation of heating installations for civil and industrial purposes. The supply of fuel cannot be included in the contract, because the exception has only been acknowledged for the provision of services. Unfortunately for the municipalities, the supply of fuel for the heating installations will therefore have to be procured separately. In that respect, it is very important that the contract concluded between the authorities does not contain any provisions on the award of that contract to a private provider. If the contract were to prejudice the award of the supplies contract to a private undertaking, that would remove it from the sphere of the exception.

The agreement may be concluded between the municipalities alone or between them and a service provider belonging to a third municipality. Thus, although in this hypothetical situation AGAC cannot exist as a consortium controlled by all of the municipalities combined, it can be reinvented as the service provider owned or controlled by one such municipality. Thus, the cooperation between the municipalities does not require that they have the understanding required to manage and operate heating services themselves; the services of an expert body can be invoked. However, that expert may not be a private undertaking, as the exception explicitly excludes private entities from participating in the conclusion of the contract. Furthermore, the 'new and improved' AGAC may not pursue any commercial interests when it offers its services, nor may the municipalities pursue such interest: the cooperation must be governed solely by requirements in the public interest.

4.5.2 According to the proposal

As can be seen, the restructuring of the cooperation between the municipalities from the *Teckal* case to comply with the case law on inter-municipal cooperation is relatively easy. That will no longer be the case if the proposal for a new Directive on public procurement enters into force, as the Commission has chosen to include some different requirements from those established by the Court.[222] To be able to fulfil the requirements of the draft Directive, the municipalities will have to establish 'genuine cooperation', which requires the existence of mutual rights and obligations for all the municipalities. This idea of genuine cooperation can be contrasted with the kind of cooperation explained above, in which one of the municipalities offers its services, or those of one of its service providers, for which the other municipalities pay a compensatory fee. Such cooperation falls squarely within the definition

[221] To be found in case C-480/06 *Commission of the European Communities v Federal Republic of Germany (Stadtreinigung Hamburg)* [2009] ECR I-04747, paras 44 and 47, and Case C-159/11 *Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] OJ C 46/4, paras 34 and 35 and Article 11 para 4 of the draft Directive on public procurement, COM(2011) 896 final (n. 215)

[222] See 'Box 4' of the previous chapter.

of ‘service provision’ according to the Commission, which excludes it from benefitting from the exception of inter-municipal cooperation. Therefore, the member municipalities would no longer be able to contract the provision of the heating services out to AGAC who could provide its services in return for compensation. Instead, the service provision will have to be divided up between all the municipalities involved, no easy feat when there are 45 of them.

After having established such genuine cooperation, the municipalities will have to ensure that the cooperation is governed solely by objectives in the public interest. The management and operation of heating installations for civil and industrial purposes can be considered as such an objective. The services that they cooperating authorities will want to offer on the open market may not go beyond a very marginal 10 percent. As previously indicated, the original facts at least offered significant possibilities for offering services, both those offered to the members as well as related and ancillary services, on the market. This will have to be severely limited if the cooperating authorities wish to prevent themselves from crossing the Commission. Finally, the ever present prohibition of private participation will not become an issue if the municipalities make sure not to include a private undertaking or allow it to benefit from the cooperation. Nor may any public authorities participate in the cooperation if they are partially in private hands, as such semi-public entities are also excluded under the draft Directive. In casu, all of the public authorities participating in the cooperation are municipalities which cannot be partially owned by private undertakings.

4.5.3 Conclusion

Not only have the possibilities for relying on the quasi in-house exception been severely restricted in the draft Directive, but the same can be said for the exception of inter-municipal cooperation. It is especially the requirement of ‘genuine cooperation’ which will make the application of the exception very difficult, essentially denying contracting authorities the possibility of pooling their resources to be able to provide for the provision of public services together. It does not matter under the case law whether one cooperating authority provides the services concerned to all the others in return for remuneration, but the Commission’s choices will make such a sharing of resources impossible without needing to apply the procurement Directives. Thus, the Commission wishes to limit the exception to one particular form of cooperation, rather than allowing the cooperating authorities the freedom to organise their cooperation as they see best for their needs and capabilities.

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