PROCUREMENT LAWYERS' ASSOCIATION

SHARED SERVICES WORKING GROUP

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About this paper

The Procurement Lawyers' Association (PLA) is an organisation which exists to bring together all procurement lawyers, whether in private practice or in-house, public or private sector and including solicitors, barristers and academics based in the UK and elsewhere.

The PLA aims to represent, promote and strengthen procurement law expertise in a number of ways, including through in-depth discussion of procurement law issues.

Shared service models have been successfully used by public authorities for many years and their use is anticipated to increase following the United Kingdom's coalition government's Comprehensive Spending Review and the need for public bodies to achieve efficiency savings. Procuring a service provider can sometimes be a lengthy, uncertain and expensive process so understandably, contracting authorities are keen to take advantage of what is now commonly known as the "**Teckal**" or "**in-house**" exemption.

Whether public authorities can contract with one another and the extent to which they can involve the private sector without the need to conduct a formal EU procurement process has been considered on a number of occasions by the ECJ and domestic courts and the resulting decisions are complex and sometimes contradictory. The aim of this working group paper is to distil and draw conclusions from this case law, consider the legal position in the context of some likely factual scenarios and thus, we hope, to provide further clarity on the circumstances in which authorities might lawfully rely on this exemption.

This paper is focused on procurement law considerations and hence does not seek to address the considerable variety of legal structures that can be set up to deliver shared services or the legal parameters in which they operate such as company law, vires and tax. Public authorities intending to set up shared service structures and rely on the **Teckal** exemption are advised to seek specialist legal advice.

The PLA hopes that this paper clarifies some areas of uncertainty in relation to the **Teckal** exemption and assists in the development of best practice across public procurement and the promotion of fair and effective competition for public contracts.

It remains to be seen what effect the Localism Bill published on 13 December 2010, will have on procurement generally, and in particular, with regard to vires, as a result of the proposed power of general competence in section one of the Bill. For the purposes of this paper however, we remain focused on procurement law issues.

Disclaimer

This working group discussion paper has been prepared by a working group of the PLA.

This paper does not represent the views of any of:

(i) the PLA;

(ii) any individual member of the PLA; and

(iii) any firm or other organisation with which any individual member of the PLA is connected.

Readers of this paper should note the following:

- The paper is only a summary of the relevant law as at the date of publication. In no circumstances can this paper be relied upon as advice and specialist legal advice should be sought if you are looking to rely upon the **Teckal** exemption;

- The case studies in this paper are fictional and any similarity to any person or organisation is merely coincidental;

- European law applies a purposive approach so any deliberate device to avoid procurement will be vulnerable to challenge; and

- Compatibility between administrative arrangements and the Treaty and analysis of domestic legislation (e.g. vires and company law) are outside the scope of this paper.

Exploration of case law

1 **The background to Teckal**

1.1 The provision of services on a shared basis (shared services) by public authorities can have many advantages and is a common feature in public administration in most developed jurisdictions. However, it can present interesting problems in terms of EU public procurement law.

1.2 The question arises whether a public body procuring services from a third party organisation can only do so having gone through a formal OJEU tender process even if the third party organisation is another public body or is an entity the public body participates in itself and has helped establish.

1.3 It is against that background that the exemption in **Teckal**[1] was developed judicially. This is to the effect that the EU public procurement formalities do not apply in relation to a contract awarded by a contracting authority to another (contracting) legal entity where the substance of the arrangements would be substantially similar to in-house arrangements between that contracting authority and elements within the authority itself (sometimes described as affording control similar to that over "its own departments"). The strands to the rule enunciated in the decision of the European Court of Justice (as it then was) (ECJ) are that:

1.3.1 the contracting authority must exercise over the proposed contractor a control which is similar to that which is exercises over its own departments; and

1.3.2 simultaneously, the proposed contractor to which a contract would be awarded must carry out the essential part of its activities with the contracting authority or authorities.

1.4 A person seeking to rely on the **Teckal** exemption bears the burden of proof that the exemption applies and that the conditions for that exemption have been satisfied. Consistent with the ordinary contra proferentem rule, that burden lies upon the person seeking to assert entitlement to the benefit of the exemption.

1.5 In most instances, persons awarded contracts with the benefit of the **Teckal** exemption have themselves been separate legal entities (typically companies, corporations or similarly incorporated bodies). It is long established that the presence of any element of private equity within the beneficiary contractor will be sufficient to oust the benefit of the **Teckal** exemption.

1.6 It is clear that the exemption can be used to establish a vehicle with more than one public sector owner. In **Carbotermo**[2] (at paras 69-70) the Court confirmed that the exemption envisages the possibility that the exemption could apply not only in cases where a single authority controls such a legal person, but also where several authorities do so. Where several authorities control an undertaking, the condition relating to the essential part of its

[1] Case C-107/98 Teckal Srl v Comune di Viano (Reggio Emilia [1999 ECR I – 8121])
2 SpA and Consorzio Alisei v Commune di Busto Arsizio and AGESP SpA [2006] ECR I-4137

activities may be met if that undertaking carries out the essential part of its activities, not necessarily with one of those authorities, but with all of those authorities together.

2 Subsequent Developments

2.1 The **Teckal** exemption has now been established for over 10 years and is firmly rooted in EU public procurement jurisprudence. The exemption has been confined to the public sector because of the element requiring that there be no private sector equity involvement in the contractor. The rules for the public sector are now contained in Directive 2004/18/EC and in the Public Contracts Regulations 2006 (SI 2006 No. 5) in England and Wales and Northern Ireland (the Regulations). As it happens, there are different exemptions in the utilities directive itself (not judicially developed) which are not dissimilar.

2.2 The ongoing relevance of the **Teckal** exemption is illustrated in two judicial decisions on 9 June 2009 but with apparently different outcomes in each.

2.3 In the Court of Appeal of England and Wales the case of **Risk Management Partners Ltd v Brent London Borough Council**[3] **(Brent)** was decided in relation to a mutual insurance undertaking established by a number of London Boroughs. Here a challenge against a public procurement award in favour of that mutual entity by Risk Management Partners Ltd was successful on the grounds of public procurement law and separately on the basis of vires.

2.4 On the other hand, in **Commission v Germany**[4] (**Hamburg Waste**) proceedings brought by the European Commission against the German state as being responsible for actions by the City of Hamburg and four other local authorities for the supply of waste to the City of Hamburg, were rejected by the ECJ.

3 Risk Management Partners Ltd v Brent LBC

3.1 In **Brent** the Court of Appeal rejected a contention on behalf of the claimant challenger that the **Teckal** exemption did not percolate through into English law and was not contained in the Regulations. While Moore-Bick LJ giving the first judgment found this a "difficult question" he concluded that the UK had not excluded "what was already an established and important principle of law affecting the scope of the Directive" either in the Regulations or elsewhere. Pill LJ reached a similar conclusion and also adverted to the fact that the EU public procurement regime was intended to apply (by implication, evenly) throughout the EU. Accordingly, where there was no clear intention to the contrary, the Regulations fell to be "construed in accordance with the jurisprudence of the ECJ".

3.2 The **Brent** case also deals with general powers and vires, although as the Procurement Lawyers Association, we do not, in this paper, propose to focus on this area.

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3 [2009] EWCA CIV 490
4 Case C-480/06, Commissioner of the European Communities v Germany, 9 June 2009

3.3 The Court of Appeal in **Brent** had not available to it the benefit of the ECJ decision in **Hamburg Waste**. However, the decision by the ECJ in **Coditel**[5], had been decided on 13 November 2008 and was available. In **Coditel** the issue was whether **Teckal** applied to the grant by the Council of Uccle (a suburb of Brussels) of a concession for the management of its cable television network, Brutélé, which was effectively an intercommunal cooperative enterprise operating across a number of Brussels regional boroughs. In finding that the **Teckal** exemption was not breached, the ECJ adverted to the fact that Brutélé was made up as a membership composed entirely of municipalities, was not open to private members and that its decision making organs were made up exclusively of representatives of those member municipalities. There was no degree of independence or arm's length dealing apart from the member municipalities. They had no objective other than the interest of those municipalities. Accordingly, the first **Teckal** condition could be satisfied where control was exercised jointly by a number of municipalities and once that was fulfilled the precise procedure for adopting decisions was irrelevant. The Court was satisfied that there could still be joint control for the purpose even if decisions were taken by a majority of those voting.

3.4 In **Brent**, Moore-Bick LJ rejected the contention that different considerations applied to a concession such as that in **Coditel** from a conventional award of contract. The Court of Appeal was clear that the same principles applied to conventional procurements and to the grant of concessions. It could still be joint control to the necessary degree even if any one member municipality would not of itself command control of the entity to which the contract would be awarded.

3.5 However, Moore-Bick LJ was favourably disposed towards the contention of the challenger in **Brent** but the question of control had to be determined at the time of entering into the contract. However, on the facts in **Brent**, Moore-Bick LJ rejected the suggestion that **Brent** borough itself would have no effective control until it obtained a policy of insurance from the mutual company and would thus become a participating member of the mutual company; he found this inconsistent with **Coditel** where the relationship between the borough and Brutélé only came into existence as a result of the contract entered into between them.

3.6 It is suggested that that would not be inconsistent with other cases where, in any case, any relationship between an awarding or contracting authority might only be crystallised more fully and formally when, for example, a special purpose vehicle (SPV) or company was incorporated and corporate arrangements were completed.

3.7 However, Moore-Bick and Pill LJJ went on to say that the first (or control) element of the **Teckal** test was not in fact satisfied on the facts of **Brent** primarily because the features of the insurance relationship require that the contract between an insurer and an insured was not one in which the control test could apply by the insured over the insurer. The particular type of contract held by the borough in **Brent** over the mutual company (LAML) was insufficient to satisfy the control condition. In particular, key decisions such as those pertaining to reserves, capital contributions, membership and terms of cover were entrusted to a board which operated at a certain remove from the member London

[5] Case C-324/07 Coditel Brabant SA v Commune d'Uccle, Région de Bruxelles-Capitale, Société Intercommunale pour la Diffusion de la Television (Brutélé), Third Party, 13 November 2008 [2009] 1 CMLR 29

boroughs. Moreover, the directors, although appointed by the borough owed fiduciary duties to the mutual company itself. The board was invested with considerable discretionary decision making power over the running of the mutual company including as to its dealings with any individual member boroughs. Furthermore, certain powers had been delegated to a management company which, while "not in itself fatal" to a view that the mutual company might be equated to a department of any of the Councils, in fact added to the overall thrust of the arrangements as being inconsistent with the necessary control test contained within **Teckal**.

3.8 The Court of Appeal having concluded that the first **Teckal** condition was not satisfied, it was not necessary for it to determine if the second condition had been met.

3.9 **Brent** was heard in the Supreme Court on 8, 9 and 13 December 2010. Judgement (or a reference to the ECJ) is awaited, at the time of writing this paper there is no indication of when this judgment will be delivered.

4 Commission v Germany (Hamburg Waste)

4.1 **Hamburg Waste** involved arrangements between the City of Hamburg and a number of contiguous local authorities whereby waste would be supplied to Hamburg which in turn would (and did) go to the market through public procurement to secure contractor to build and operate a waste treatment plant. The arrangements between the local authorities as to the supply of waste were on a non-profit making basis. On receipt of a complaint, the European Commission instituted proceedings impugning the legal validity of the arrangements between the local authorities but not as to the procurement of a contractor to construct and operate the waste treatment plant.

4.2 In the proceedings, it was suggested by the Commission that before one authority made arrangements with the other authority it ought to have gone to the open market as per the formalities of EU public procurement law in order to see if others might supply waste on perhaps more favourable terms. However, the ECJ took the view that where cooperation between public authorities was governed solely by considerations relating exclusively to the pursuit of objectives in the public interest and where the principle of equal treatment was respected and thus no private enterprise was placed at a competitive disadvantage towards its own competitors there was nothing in EU law which required that the proposed cooperation arrangements between such public authorities had to be subjected to the formalities of EU public procurement law unless there was the possibility that the arrangements were being devised as a device to circumvent the EU public procurement rules. Accordingly, the Commission's action was dismissed.

4.3 It is noteworthy that the Advocate General had opined earlier that the **Teckal** exemption was not available because the neighbouring local authorities did not exercise any control over Hamburg's own waste services. However, the ECJ, invoking the principle of public authority cooperation already set forth in **Coditel**, decided that the arrangements were not subject to the EU public procurement rules because they were "governed solely by considerations and requirements relating to the pursuit of objectives in the public interest".

4.4 Moreover, it appears from **Hamburg Waste** that EU law does not require that public authorities use any specific form of legal entity to give effect to their cooperation in realising public service objectives in order to obtain the benefit of the **Teckal** exemption.

5 Sea

5.1 In the case of **Sea**[6], the ECJ was concerned with the award of a contract for services of collection, transport and disposal of municipal waste. It was held by the ECJ that member municipal authorities exercised control over a company established for purposes of the contract. Control fell to be regarded as similar to that over their own departments if the activities of the special purpose or contractor company were to be limited to the territory of the member authorities, and was in essence to carry out for the benefit of the member authorities relevant functions. In addition the authorities exercised conclusive influence both in relation to overall or strategic objectives of the contractor company and key decisions made through its organs as determined by its corporate arrangements including under its governing corporate documents. On that basis, it would be held that member authorities exercised over the special purpose contractor company a control similar to which each member authority exercised over its own departments.

5.2 However, the ECJ also considered that even a tiny minority holding by a private enterprise in the share capital of the SPV or contracting company would operate to deprive the benefit of the **Teckal** exemption.

5.3 In **Sea** the ECJ further held that the time of contract award was the relevant time to determine whether there was any relevant private equity holding. It did, however, allow that special circumstances might require events occurring after the date of the contract award to be taken into consideration including where there was the possibility of a later private equity stake. The Court further recalled that it would be impermissible to use any of these arrangements as a device to circumvent the ordinary EU public procurement rules. Accordingly, the ordinary rule was that where, at the time of contract award, the share capital of the contractor company was wholly public (in reality held entirely by the member municipal authorities) and there was no sign of any making available of the contractor company's capital to private investment then the mere fact that private persons might at some stage in the future hold some element of the capital in the company would not of itself be sufficient to oust a qualification for the benefit of the **Teckal** rule.

5.4 The ECJ proceeded to hold that the relevant control over a contractor company could still be similar to that over member authorities' own departments whether the control was exercised jointly or individually. It would be a question of fact in each case.

6 The Commission

6.1 On 8 October 2009, in the light of the ECJ Judgments in **Coditel, Hamburg Waste** and **Sea**, the Commission announced that it had decided to close an infringement case, IP/09/1462 against Germany, concerning the award of IT supply and service contracts by local and regional public authorities in Hamburg and North-Rhine-Westphalia to public IT service providers. As the Commission put it, the ECJ has developed its concept of "in-

[6] Sea Srl v Comune di Ponte Nossa Case C-573/07, 10 September 2009

house" contract awards and confirmed that public-public co-operation via jointly controlled public entities with limited market orientation carrying out the essential part of their activities with their public owners does not require the application of public procurement procedures; the Commission has specified that public-public co-operation does not require the creation of jointly controlled entities, but can be based on a not-for-profit co-operation aimed at jointly ensuring the execution of the public tasks of the co-operation partners which is solely governed by considerations and requirements relating to the pursuit of objectives in the public interest. On the same day, and on the same basis, the Commission announced that it had decided to close another infringement case against Germany, IP/09/1465, concerning the award of public waste treatment service contracts by administrative districts and public special purpose associations to other public entities in Rhineland-Palatinate.

6.2 Nonetheless the Commission continues to be interested in whether the in-house exemption is being abused. On 20 November 2009 the Commission sent a formal notice to Westminster City Council in relation to the expansion of the local authority membership of Partnerships in Parking. The investigation has recently been concluded. On 20 October 2010 the Commission opened an infringement case against Sweden, IP/10/1442, alleging that the "in-house" conditions were not met in relation to waste management contracts because the companies the municipalities owned were active in the private market where they make a significant share of their turn-over.

Addressing Some Misconceptions

The background in section one above is a discussion of the decisions to date. There are a number of misconceptions which are frequently encountered by practitioners, the most common ones are addressed below (although, this is not an exhaustive list).

1 UK government policy does not overrule European law and can not be used to justify circumvention of EU procurement rules.

2 Structuring organisations or transactions deliberately to circumvent the provisions of the Directive is likely to be in breach of EU Treaty obligations. The courts apply a purposive approach and look at transactions holistically to see whether there has been any breach. **Hamburg Waste** and **Commission v Italy**[7] (**Italian Lottery**) are examples of this.

3 Challenges brought on the basis of alleged breaches of EU procurement rules are now becoming more frequent in the United Kingdom. See for example the cases of **Indigo Services (UK) Limited v The Colchester Institute Corporation**[8] and **Henry Bros (Magherafelt) Ltd v Department of Education for Northern Ireland**[9]**.**

4 The introduction of the Remedies Directive means compliance is even more important as the sanctions for breach are potentially more onerous (for example, a contract may be rendered ineffective and financial penalties imposed on contracting authorities).

5 A contracting authority's contract with another contracting authority is not automatically exempt and the exemptions must be applied on a case by case basis.

6 Contracts between contracting authorities and the not-for-profit sector are not automatically exempt from the Regulations. The judgment of the Court of Appeal in **R (Chandler) v Secretary of State for Children, Schools and Families**[10] **(Chandler)** may not be good authority to justify awarding contracts to not-for-profit bodies on a cost reimbursable basis without conducting a more detailed assessment based on the case law we have cited in this paper (see below for a brief discussion of Chandler).

7 Any set of circumstances justifying an exemption must be monitored on an ongoing basis. Restructuring or changes in funding or new business activities can mean that an organisation will lose the benefit of an exemption.

8 An entity which falls within the **Teckal** exemption will constitute a "body governed by public law", under regulation 3(1)(w), which if it wishes to let contracts, means that it has to comply with the Regulations when awarding contracts for the procurement of works, supplies or services.

[7] Case C272/91
[8] [2005] IESC 38, [2005] 2 I.R. 115
[9] [2008] NIQB 153; [2009] B.L.R. 174
[10] [2010] P.T.S.R. 749 [2010] 1 C.M.L.R. 19 [2010] A.C.D. 7

Practical Case Studies

Case Study 1

Establishing a Shared Service Entity

Five years ago a number of local authorities collaborated on a project to develop a management information system to support their provision of education services. One local authority took the lead organisational responsibility for developing the software and establishing the shared service on behalf of itself and twelve other local authorities.

The arrangements were established pursuant to a Joint Agency Agreement between the participating local authorities, each making an annual financial contribution to the Lead Council for the provision of the services.

The project has been a great success, and has been developed and expanded by a project team.

The management information system is now widely recognised and another 18 local authorities are interested in participating in the current arrangements.

Concerned at the growing scale of the operation, the Lead Council proposes to formalise the arrangements and seek additional funding to establish an organisation that will be fully resourced to deliver the services.

An options paper is presented to the current 12 participating local authorities. The preferred option in this instance, is to establish the shared service arrangement as a Limited Liability Partnership (LLP) or as a limited company depending on vires, tax treatment and other factors (the Entity). It is proposed that the participating local authorities, 30 in total, choose to become either a member of the Entity or a customer of the Entity under a separate services agreement (or otherwise to withdraw from the service altogether).

The entity's constitutional documents set out the objects of the Entity, details of membership, management board, ownership of assets and members' duties. The intention is that the Entity is managed by a Board of Management. The Board would be composed of 10 members: eight representatives of the managing councils, the senior manager of the Entity and the finance officer. The managing councils represent a regional grouping of local authorities and are to be selected on the basis of a rota. The Board would vote by simple majority. However, a number of decisions would have to be approved by the unanimous consent of all members.

Important areas for consideration:

1 **How should the objects of the Entity be defined so as to ensure that the Entity can benefit from the Teckal exemption?**

1.1 The Entity must be established as a truly public sector entity which is not market oriented. Accordingly the members agreement should contain objects which clearly limit its activity

to the public sector, and the servicing of its members and should not contain an external commercial purpose. It may be worth considering a specific limitation in the constitution that the membership of the Entity is limited to public sector bodies only.

1.2 The objects should be set out clearly in the constitutional documents, setting out the nature and purpose of the Entity and the services that will be provided to its members. The remit of the services should try to mirror the members' relevant public service remits in terms of territory covered and scope or functions (**Sea** at para. 76).

1.3 It is important that the EU public procurement rules and the **Teckal** exemption are considered at the outset, ideally before any outline business case is prepared. The European Courts have emphasised the need to understand the nature and purpose of any shared service entity, to put it in its proper legal and economic context. For example, understanding the relevant legislative context and the powers under which any such entity is to be established (**Sea** at para. 63). It is important therefore that these issues are properly scoped out and then clearly articulated, ideally in the business case and supporting background papers.

1.4 A key issue is whether the shared service Entity can be said to be "market orientated" in the sense of being able to pursue commercial relations with undertakings in the private sector or otherwise deal with third parties on arm's length commercial terms (**Sea** at para. 73).

1.5 This issue was also discussed in Chandler. In this case, for the purposes of the definition of "service provider" in Directive 2004/18 art.1, referring to any person or public entity or bodies offering on the market the execution of work and/or a work, products or services, the words "on the market" required the participants in the market to be intending to make a profit from contracting to provide services offered by them. In other words, where the contracting authority is paying nothing more to the service provider than the cost of running the service, that arrangement falls outside of the Regulations. Chandler is a decision of the UK courts (not the ECJ) and, in addition, might be considered to be peculiar to its facts. It is probably unsafe to rely on this decision exclusively.

1.6 Although a number of different classes of membership of the entity may be permissible, the existence of commercial or unrelated external partners will prevent the exemption from applying. Accordingly, only those public bodies who are procuring services from the entity should be members of it. In this regard should the arrangements be open to new public sector partners they should only be brought in to the Entity when they take services from it and arguably should be removed when they cease to take services.

1.7 All the members must be local authorities or other public sector bodies. Any private sector participation will remove the benefit of the **Teckal** exemption (**Sea** at para. 47 to 53). However, the **Sea** decision, whilst not explicitly allowing private sector involvement, did indicate that it may not be fatal to claiming the benefit of the exemption if the private sector could be involved in the long term, provided that there was no immediate or short term evidence of this being planned for. Accordingly, the use of an LLP vehicle (or alternatively a company limited by shares) is permissible notwithstanding it is, by its nature, a body which could in the future include private sector members. However, the desire to include the private sector cannot be part of any business planning at the time of establishment. It

would, as suggested above, also be sensible to specifically limit membership of the Entity to public bodies in its constitution.

2 **Is the level of control exercised by the members sufficient to ensure that the LLP Entity can benefit from the Teckal exemption? What decisions should require the unanimous approval of all members?**

2.1 The members must have the "power of decisive influence over both the strategic objectives and the significant decisions of that company" (**Sea** at para. 65). It should not be assumed that because the Entity would be entirely owned by public authorities that this demonstrates sufficient control for the purposes of the **Teckal** exemption. In **Parking Brixen**[11] (para 37) the EC court was clear that the fact that the contracting authority holds, alone or together with other public authorities, all of the share capital in the company (in that instance) was not decisive, in demonstrating that they exercised a control similar to that which it exercised over its own departments.

2.2 From a commercial stand point the LLP or company will need to function as an entity and be able to (as internal departments would be able to) make decisions about its everyday activity without having to refer back to its controlling members for every small decision. Furthermore, its is likely that any membership agreement will provide for a hierarchy of decision making where some of the decisions reserved to members will not need their unanimous approval and others will require unanimity. The ECJ in **Coditel**, confirmed (at para 54) that the exemption does not require that all decisions are unanimously approved by the members.

2.3 When drafting the constitution it will be important to give thorough consideration as to what decisions are likely to be regarded as "strategic" or otherwise "significant". The members will need to demonstrate genuine control over the management of the Entity. The decision making structure in the constitutional documents will have to reserve to the members decisions such as, for example:

2.3.1 the approval of the annual budget and business plan, any changes to them or any activity which is materially outside of those documents;

2.3.2 the right to make appointments to the management board and the right to remove those so appointed;

2.3.3 the right of the controlling authority/authorities to give instructions to the Entity and intervene in the day to day management of the Entity in certain circumstances;

2.3.4 capital expenditure and investments over a certain amount;

2.3.5 entering into contracts that are outside the normal course of business;

2.3.6 any material changes to the core Service Level Agreements or charging arrangements;

[11] Case C-458/03

2.3.7 amendments to the members agreement or other constitutional documents;

2.3.8 accepting new members and subject to suitable controls the removal of members; and

2.3.9 contracting with third party organisations.

3 **To what extent would the provision of services to local authorities that are not members threaten the continued reliance on the Teckal exemption**

3.1 There is no definitive indication from the ECJ as to what an “essential part” of an Entity's activities actually is for the purposes of satisfying the second **Teckal** condition. However, by the use of the terminology “essential” rather than for example “exclusively” the courts have accepted that some activity may be conducted with parties outside the owning members without losing the right to use the exemption.

3.2 In **Carbotermo**, it was held that any activities with contracting authorities not having a sufficient level of control over the company for the purposes of the first **Teckal** condition should only be of "marginal significance" (at para. 63).

3.3 In **Sea** it was held that the fact that the company supplies some of its services to the private sector does not in itself mean that the second **Teckal** condition is not met on the proviso that its private sector activities are merely incidental to its core activity. The Entity can be given powers to supply services to private economic operators provided that the power is “merely incidental to its core activity”, The fact that such a power exists is not sufficient in itself to render the Entity “market orientated” (**Sea** at para. 79).

3.4 Drawing an analogy to the provisions in the Utilities Directive 2004/17, any more than 20% would almost certainly take the arrangement outside of the **Teckal** exemption. The position below 20% is unclear though and there is no safe harbour. The European Court's use of "marginal significance" and "merely incidental" suggest the threshold may well be below 20%. Consideration would have to be given to whether the non-member activities indicated that the Entity was in fact, or had become, market orientated in a way that took it outside of the **Teckal** exemption.

3.5 Therefore there is clearly a risk that the provision of services to local authorities that are not themselves members of the Entity may threaten the continued reliance on the **Teckal** exemption. Based on the case law of the ECJ this seems to be regardless of the fact that the third party provision of services is to other non-member public sector bodies rather than to non-member private sector companies.

3.6 To help try and ensure the benefit of the **Teckal** exemption is maintained all local authorities to be provided services from the Entity should be members of the Entity and the objects and purpose of the Entity should be clearly drafted expressly identifying any local authorities that may wish (at a future date) to become members. The Entity risks losing the benefit of the **Teckal** exemption if it allows non-member local authorities or other public sector bodies to "piggy back" on the Entity once it has been set up.

3.7 It may be an obvious statement but for completeness it is worth confirming that it is not necessary for all members to take an equal amount of services from the Entity or indeed for any member to take services on a pro rata basis to their ownership. In **Tragsa**[12] the Company was 99% owned by the Spanish state (through a holding company and a guarantee fund), and 1 % owned by the four autonomous communities. However, it carried out more than 55% of its activities with the autonomous communities and nearly 35% with the state. The Court held that the second limb may be met if that undertaking carries out the essential part of its activities, not necessarily with any one of those authorities, but with all of those authorities together as a whole.

4 When establishing the Entity, what steps might the members take to reduce the risk of challenges from third parties? In particular the potential risk of the new arrangements being declared 'ineffective' and the members fined?

4.1 This is a complex and developing area and the local authorities should seek specialist legal advice on the formation of the Entity (and not just on the procurement aspects) before entering into any shared service arrangement. Ultimately the members of the Entity and any other non-member local authorities proposing to contract with it must be confident that they are not acting in breach of the EU procurement rules or otherwise acting unlawfully when entering into these arrangements.

4.2 Provided specialist legal advice has been taken and there is no attempt being made to circumvent the EU procurement rules one way of de-risking the Entity further would be to consider issuing a Voluntary Ex-Ante Transparency Notice (VEAT).

4.3 The VEAT notice was introduced with the new Remedies Directive (Directive 2007/66). It provides contracting authorities with a means by which they can be afforded a degree of legal certainty when lawfully awarding contracts without conducting an OJEU exercise. However, importantly, the protection afforded by publishing a VEAT has a number of limitations. It only affords protection from direct legal challenge claiming the new remedy of "ineffectiveness" once the contract(s) has been entered into (effectively a claim that the contract be set aside and considered to be prospectively, but not retrospectively ineffective). The publishing of a VEAT notice provides no legal protection against any challenge made to the shared service arrangements before they have been entered into (whether by the member local authorities or to any new member subsequently joining the Entity or to any non-member negotiating a contract separately with the Entity). Equally, the publishing of a VEAT notice does not prevent the European Commission investigating the shared service arrangements under general EU Treaty obligations (see section 6 above).

4.4 The VEAT can be issued by the Entity (or perhaps the lead authority on behalf of the other prospective members, prior to the forming of the Entity) on behalf of the members and any non-member local authorities that may wish to become members at a future date.

4.5 At least 10 days must be allowed to elapse between the publication of the VEAT notice and the signing of any contractual documentation. It may be advisable to consider issuing

[12] (C-295/05)

further VEAT notices should other local authorities later become members of the Entity or otherwise contract with it for the provision of services.

4.6 It is however important to re-emphasise that whilst the VEAT notice provides some degree of protection against legal challenge it must only be used where the local authorities relying on it are confident that no OJEU exercise is required and that the proposed arrangements do not breach the EU procurement rules.

Case Study 2

Local Authority Collaboration

Mid-valley Council (**Valley Council**) is the largest of four Local Authorities in the Valley Region (the **Region**), delivering winter transport and frontline services to almost 2 million people across more than 5,000 square miles (the **Services**). The other Councils of the Region, East-valley (the **East Council**), West-valley (the **West Council**) and South-valley (the **South Council**) each serve more rural areas which have a lower population density and wider geographical coverage than the Valley Council.

At present, each Council operates and manages its own winter vehicle fleet, including large gritting machines, ploughs and multi-purpose vehicles. The volume, type and classification of vehicles and other equipment owned by each of the Councils varies in size – but Valley Council has a larger fleet and greater levels of fit-for-purpose plant and equipment. Each Council also carries out fleet maintenance in-house and separately procures supplies of road gritting materials (estimated values being below current EU financial thresholds for supplies). Each Council has operational storage facilities and workshops in their respective areas.

During recent harsh winters and especially during 2009/2010, Valley Council experienced major problems including prolonged road and school closures caused by a severe depletion of grit supplies. Other Councils in the Region experienced problems due to a lack of fit-for-purpose vehicles (particularly snowploughs). Delays and limitations in repair and maintenance prevented operation at full capacity during adverse weather conditions.

The Valley Council is concerned about a shortage of road de-icing solutions. In particular, it is deeply concerned that performance levels would drop again if it is faced with equally harsh conditions in future winters. Combined with a sizeable increase in the financial cost to the Valley Council of delivering the Services over recent years, Valley Council carries out a winter service assessment. The assessment identifies commonalities between the Councils in the Region and opportunities for the Councils significantly to reduce costs, greatly to enhance reliability and also to improve public service delivery. The assessment proposes a shared delivery model to be extended across the Region. Valley Council approaches East Council, West Council and South Council.

Together they commission an efficient government report. The principal report findings and recommendations are as follows:

1. Each Council will continue to be responsible ultimately for the operation and management of its own vehicle fleet, its staff, equipment, and property costs, but the resources available throughout the Region, including manpower, fleet, equipment, operational storage facilities and administrative support will be shared in order to allow statutory functions to be performed collaboratively.

2. Operational storage facilities - The Valley Council's main operational facility and workshop is to the north of the Region and will remain in use. To reduce costs, other central storage facilities and workshops in the Region will close and be replaced by a new operational facility positioned strategically to service East Council, West Council and South Council and close to the south of the Valley Council area. It is proposed those three authorities would

jointly procure the supply of grit, erasing duplication of effort and allowing a significant increase in volumes purchased. The surplus will be made available to Valley Council, payable on the basis of usage.

3. Vehicle Fleet and Equipment - Given the fact that the Valley Council's repair workshop has capacity to service a greater number of vehicles, it is proposed that most of the vehicle fleet owned by East Council, West Council and South Council will be serviced, maintained and repaired at the Valley Council's workshop. Some existing staff will be seconded to Valley Council's workshop to meet the increased workload. The new facility to be built to service East Council, West Council and South Council will be used to service, repair and maintain a small number of specialist vehicles owned by each Council and will house an emergency maintenance team, including some staff from Valley Council.

   The running costs for each workshop including staff costs, rent, maintenance, utilities, and the purchase of equipment and parts are to be shared by each Council in proportion to their respective usage. Similarly, surplus Valley Council vehicles are to be made available to the other three Councils as and when required, payment by monthly invoice charged to the recipient on use. Alternatively the report suggests that, rather than paying a monthly invoice, where possible, Valley Council could off-set, fully or partially, the costs incurred for its share of surplus gritting material.

4. Workforce - Each Council will continue to be responsible for its own workforce in carrying out these activities for their respective areas. However, the Councils are to establish a common arrangement for delivering and assessing workforce training, and administrative support; expected to achieve an estimated cost saving of £285,000 across the board.

1 **Points 1 and 2 - Fleet / Operational Storage Facilities**

1.1 Contractual arrangements whereby each Council retains ownership and responsibility for vehicles and equipment could provide for collaborative activity as proposed, on terms that do not constitute a public contract. Those arrangements may include secondment arrangements (for example) in respect of relevant staff, including in respect of administrative activities.

1.2 The Councils may decide to close operational facilities, taking into account in such decisions proposed shared use of Valley Council's main storage facility by other Councils under a lease or licence. These documents could be primarily agreements for property use, but the proposed arrangements should be assessed to ensure that any reliance on the exclusion for acquisition of land in Regulation 6(2)(e) of The Regulations is properly justifiable.

1.3 The closure and disposal of these surplus facilities should not engage public procurement obligations provided that the disposing Council is not receiving a direct economic benefit as considered by the ECJ in the **Helmut Müller**[13] case.

[13] C-451/08

1.4 The commissioning of a replacement facility, if it comprises works valued above the threshold, should be procured as a public works contract in accordance with the Regulations, either solely or, potentially, as part of a wider public procurement opportunity. Similarly, the acquisition of grit and other supplies, assumed to be valued above the threshold, should be procured as public supply contracts in accordance with the Regulations, by the Councils acting jointly to maximise economies of scale. The treatment of surpluses generated over time should be accounted for by each Council and, subject to public finance requirements, may be used to provide a surplus to be available for extreme weather events if this is considered appropriate.

2 Points 3 and 4 - Vehicle Fleet and Equipment and Workforce

2.1 The running costs of shared facilities including overheads and administrative costs may be met by each Council according to use and accounted for in accordance with public accounting requirements. These arrangements need not comprise the provision of services by one Council to another (or collectively), but care must be taken to ensure that the arrangement does not actually comprise service provision to which, in principle, the Regulations might apply.

2.2 Similarly the pooling of and joint working by employees of the Councils at these joint facilities should not engage public procurement obligations provided that full cost reimbursement occurs and is properly accounted for. Such accounting arrangements may be simplified if some costs are 'netted off' against others but this needs to be transparently accounted for.

2.3 There is potential for common training and administrative arrangements to be collaborative and not to constitute public services contracts, but since these requirements also might be met through joint procurement of training services (to which, in principle, the Regulations might apply), this should be considered carefully.

Case Study 3

Grant of exclusive rights and delegation/sharing of statutory functions

In the light of ongoing financial constraints on government spending the Government Department for Savings and Efficiency (DSE) has conducted a review of local authority spending and joint working arrangements.

New Regional Professional Services Organisation

In the past the DSE has encouraged local authorities to co-operate more widely on the procurement and delivery of services but it has been disappointed with both the time it has taken for local authorities to set up effective joint working arrangements and the outcomes in terms of savings. The DSE therefore decides to mandate specific joint services arrangements. Its initial focus is on professional services, which it believes can be delivered more efficiently and with significant savings through central delivery organisations.

The Minister for Savings and Efficiency announces her intention to issue Ministerial Directions setting up new regional level organisations to deliver professional services to local authorities. This is within the Minister's legitimate powers and is permissible under relevant local authority legislation and powers. The first professional services organisation to be set up will serve 8 neighbouring local authorities in two contiguous regions - the Hill Region and the Valley Region. It will be known as the Hills and Valleys Professional Services Organisation (HVPSO). The first tranche of professional services which HVPSO will deliver are architectural and design services.

The draft Ministerial Direction establishes HVPSO as a ministerial agency and grants HVPSO an exclusive right to deliver architectural and design services to the 8 local authorities in the Hill Region and the Valley Region for a period of 3 years. The DSE will top slice the central government funding to the 8 local authorities by an amount (less 20%) which represents the current administrative and accommodation costs to each of the local authorities of providing the architectural and design services. The DSE will provide those top-sliced monies direct to HVPSO. Local authority staff currently providing the architectural and design services will transfer to HVPSO. HVPSO will deliver services to the local authorities under the terms of standard form service level agreements and local authorities will pay HVPSO professional fees which have been set at a central government level on a project by project basis.

New co-operation arrangements between local authorities and local health organisations

The DSE is also of the view that significant improvements in service delivery and savings can be made by increased levels of joint working between local authorities and local health organisations. The DSE understands that local solutions may vary.

The new Health and Social Services Act 2010 therefore includes a provision in section 100 which permits local authorities and local health organisations to work together to deliver any health or social services related service. Section 100 permits both local authorities and local health organisations to delegate or transfer functions to each other, pool funds and resources, charge for services at cost and integrate service delivery. This is permissible under relevant local authority and local health organisation legislation and within their powers.

Using Section 100, Mid-Valley Council and East Valley Council agree to work jointly with the Mid and East Valley Health Organisation (MEVHO), which is the local public sector health provider, to deliver home based health and social care in the Mid and East Valley area.

Under the proposed arrangements the services will be delivered by a home care team based within MEVHO. MEVHO will provide day-to-day management as well as dealing with the administration of funding and expenditure issues. Mid-Valley Council is providing office accommodation for the home care team. Members of the home care team come from all three organisations under secondment arrangements. The three organisations have signed a pooled fund arrangement to fund the operation of the service at cost.

1 **Important areas for consideration**

1.1 In the following analysis the options explored are likely to be available only in very limited circumstances and/or where central or devolved government is actively involved.

1.2 This case study concludes with an information note on the argument that the arrangements fall outside, or are an exemption to, the Treaty provisions and so the EU procurement rules do not apply.

2 **New Regional Professional Services Organisation**

2.1 **On what grounds will the local authorities to be able to pay for and use HVPSO services without first running an EU compliant competition?**

Under the proposed arrangements the local authorities will contract in writing with HVPSO, which is a separate legal entity, for the provision of architectural and design services. The local authorities will pay HVPSO for the services received. Architectural and design services are "Part A" services[14], to which the procurement rules apply in full. Where the value of the services purchased by a local authority exceeds the relevant EU financial threshold then a direct award will be in breach of the EU procurement rules unless an exemption to the EU procurement rules is available or the EU procurement rules do not apply.

2.2 This note looks firstly at a potential statutory exemption and secondly considers whether it can be argued that no public contract exists to which the EU rules can apply.

3 **Is a statutory exemption available?**

3.1 The **Teckal** exemption will not be available as HVPSO is not a company or organisation owned by the local authorities to whom it delivers services (see Case Study 1). It is also unlikely that this arrangement falls within the type of co-operation arrangements discussed in Case Study 2. However there are statutory exemptions to the requirement to comply with the EU procurement rules which are set out in Regulation 6. The most relevant

[14] Services listed in Part A of Schedule 3 to the Regulations

exemption in this context is Regulation 6(2)(l), which is often referred to as the "exclusive rights" exemption[15]:

> Regulation 6(2)(l)
>
> (2) These Regulations do not apply to the seeking of offers in relation to a proposed public contract….
>
> (l) Under which services are to be provided by a contracting authority……because that contracting authority …..has an exclusive right -
>
> (i) to provide the services, or
>
> (ii) which is necessary for the provision of the services;
>
> in accordance with any published law, regulation or administrative provision, which is compatible with the EC Treaty;

3.2 When considering the availability of this exclusion it is worth bearing in mind that a published law, regulation or administrative provision is required and this is likely to require the involvement of central or devolved government. If support from that source is not forthcoming then there is probably little practical prospect of this exemption being available.

3.3 In the context of this case study, the arrangements are driven by central government and so it is helpful to look at the five key questions which arise when considering the availability of this exemption:

4 Does the arrangement relate to the provision of services?

This exemption applies only to the provision of services and not to supplies (goods) or works. In the circumstances outlined in the case study HVPSO is granted an exclusive right to deliver architectural and design services and so the arrangement does relate to the provision of services.

5 Is the service provider a contracting authority?

5.1 We are told that HVPSO has been set up as a "ministerial agency" and so it is not entirely clear whether or not HVPSO is a contracting authority for the purposes of the EU procurement rules.

5.2 It is therefore necessary to check whether HVPSO falls within the contracting authorities named and listed in the Regulations or whether it falls within the general sweep up definition in Regulation 3(1)(w).

5.3 For the purposes of moving on through this case study we will assume that HVPSO does fall within the classification of a contracting authority.

[15] Not to be confused with Regulation 14(1)(a) permitting the use of the negotiated procedure without prior publication of a contract notice when for technical or artistic reasons or for reasons connected with the protection of exclusive rights the contract may only be awarded to a particular economic operator

6 **Has the service provider has been granted an exclusive right?**

It is not clear from the Regulations precisely what the nature of the exclusive right must be in order to fall within the exclusion. Unresolved issues include, for example, whether the exclusive right could relate only to a particular contract. The facts in this case indicate that an exclusive right has been granted as HVPSO has been set up as the sole provider of the services and the contracting authorities are obliged to use HVPSO.

7 **Is there a published law, regulation or administrative provision granting the exclusive right?**

7.1 It is clear that the grant of the exclusive right must be published. The terminology used is a direct citation from the Directive. Primary and secondary legislation (in the UK, Acts and Statutory Instruments) will fall within the definition but what about a Ministerial Direction? The reference to administrative provision should probably be read in the context of administrative law based legal systems. The following is an illustrative example:

7.1.1 Each nuclear licensed site is operated by a "Site License Company", which is in form a private company limited by shares, making and distributing profits, but also a contracting authority within Regulation 3(1)(w). The SLCs operate the sites under contracts with the Nuclear Decommissioning Authority. Each company holds an exclusive licence from the Regulator, the Nuclear Installations Inspectorate, to manage that site. It would be illegal for any other body to operate that site. Hence the NDA, if it were to award a new operating contract, could award it only to the particular SLC with the appropriate licence.

8 **Is the arrangement compatible with the Treaty?**

Even where the first 4 questions are answered in the affirmative the Regulations specifically provide that the exemption will not be available if the arrangement is incompatible with the Treaty. This means that the arrangements should not result in breaches of the fundamental principles, the most relevant of which for public procurement are the prohibition against discrimination on the grounds of nationality, freedom of establishment and freedom to provide services. The arrangements must not constitute a barrier to trade by, for example, restricting fair competition or breaching transparency requirements. For an illustration of this point, see the note below on the Spanish Postal Services Case.

9 **Can it be argued that no public contract exists and so there is no contract to which the EU procurement rules apply?**

9.1 This is an argument which has been considered by the ECJ, with mixed results. For example, in the **Tragsa**[16] case the ECJ considered a situation where the Spanish State and autonomous communities entrusted certain forestry, rural development and environment related works to **Tragsa** which was a public company. It appeared that **Tragsa** was obliged by law to undertake work assigned to it and could not negotiate a price, which was set under a fixed tariff. The ECJ considered the **Teckal** exemption and

[16] C-295/05 Asemfo v Tragsa

found that the two conditions were met. However it also observed that if **Tragsa** had no choice whether or not to accept work or as to the tariff paid for its services then the court's requirement for a contract is not met.

9.2 Just a few months later, in the **Spanish Postal Services** case[17] the ECJ looked at this issue again. The Spanish state had entered into an arrangement with Correos which was a company wholly owned by the Spanish state for the provision of postal services to the Spanish government. Some of these postal services were covered by a law which reserved the services to be delivered only by Correos. Other of the services could be delivered by other bodies in addition to Correos. The ECJ held that the **Teckal** exemption was not available as Correos provided extensive services on the market so its essential activity was not carried out for its controlling authorities. It also rejected an argument that no public contract existed, pointing to the commercial nature of the arrangements. The ECJ also rejected an argument that the exclusive rights exemption was available on the grounds that even if the other conditions were met, the arrangements were not compatible with the Treaty as they infringed the directive on liberalisation of the postal services.

9.3 A contracting authority seeking to rely upon this argument needs to proceed with caution and to understand that these and other cases in which this argument is raised are illustrative of the court’s thinking rather than creating reliable precedent.

10 New Statutory Co-operation arrangements between local authorities and local health organisations

10.1 The **Teckal** exemption will not be available here as this does not relate to the creation of a separate organisation owned by the contracting authorities. It is likely to prove difficult to demonstrate that an exclusive right has been granted, as explored above.

10.2 It would be worth considering whether the co-operation model discussed in Case Study 2 applies. In addition it may be possible to use an argument that no public contract exists as it is made in the context of the discharge of statutory powers. Unfortunately there is little authoritative case law on this issue and much of the discussion involves analysis of competition law principles. There is particular uncertainty around issues such as whether this argument is available where legislative provisions are permissive (enabling) rather than mandatory and whether the legislation itself is in breach of Treaty provisions. The following cases are provided by way of illustration of the difficulties with this issue.

10.3 The Case C-475/99 **Ambulanz Glöckner v Landkreis Sudwestpfalz** [2001] ECRI-8089 involved consideration by the ECJ of a German law which effectively required that ambulance services in respect of both emergency transport and ordinary patient transport were to be reserved for medical aid organisations whereas, in fact, independent contractors would have been in a position to provide the latter type of patient transport service and were thus subject to a law which had the effect of limiting markets and prejudicing of consumers by reserving to the medical aid organisations ancillary transport activity which might have been carried on by independent contractors. The ECJ held that such a law may, in certain circumstances, be in breach of some provisions of the Treaty.

[17] C-220/06 Associacion Profesional de Empresas de reparto y Manipulado de Correspondencia v Administracion General del Estado

10.4 The **Ambulanz Glöckner** case was considered by the Irish High Court **in Mr Binman Ltd v Limerick City Council** [2005] IEHC 192 in which judgment was delivered by Ms Justice Dunne on 15 June 2005.

10.5 In this case, a challenge by way of judicial review was brought by the applicant against the decision of Limerick City Council, the respondent, to conduct a tender procedure for a contract to provide household waste disposal services to low income households. Previously a system had existed whereby householders, both low income and others, would each select their own provider for the service from amongst those with a permit to operate in the functional area of the local authority. Most households would bear the cost themselves but a scheme existed whereby the Council would bear the cost for low income households. The respondent Council decided to tender a contract for a single enterprise to provide the service to these low income households and only those receiving the service would have their costs paid by the Council.

10.6 Mr. Binman, which was the incumbent service provider for all households, both low income and others, brought proceedings by way of judicial review seeking to restrain the Council claiming that its initiative involved a tort of inducing breach of contract (contending that the contractor already had contracts with low income householders and these would inevitably be broken) and violation of the Competition Act 2002.

10.7 The Court held that the conduct of the competition would not constitute an inducement to breach a contract.

10.8 The Court then proceeded to deal with the argument on the Competition Law point (bottom of page 5 and page 6). Dunne J distinguished the decision of the European Court of Justice in **Ambulanz Glöckner** and stated that:

> *"The situation in the present case is somewhat different. That case [the German case] involved a statutory provision which in effect gave a veto to those already in the market in respect of those who could come into the market. What is proposed by the respondent here [Limerick City Council] involves an open tender process to all who wish to tender for the delivery of a limited service, namely, the collection of waste from low income households on behalf of the respondent. While there is an element of exclusivity in that one contractor only will thereafter provide the service, as long as the service is provided on behalf of the respondent in accordance with the provisions of Section 33 and Section 75 of the Waste Management Act 1996, as amended, it seems to me that this is a permissible activity by the respondent which is not in breach of Sections 4 and/or 5 of the Competition Act 2002 [which mirror Articles 101 and 102 of the TFEU]."*

10.9 The statutory provisions in the Waste Management Act quoted were enabling and not mandatory and provided legal authority for the Council to outsource the collection of waste and where charges were waived by it in respect of categories of persons to pay a charge in respect of that to the person who would provide the service.

10.10 In Case C-532/03 **Commission of the European Communities v Ireland** [2007] ECR I-11353, the European Commission instituted proceedings against Ireland alleging that a health authority, then known as Eastern Regional Health Authority and beforehand Eastern Health Board, had permitted Dublin City Council (DCC) to provide emergency ambulance services without prior advertising and that accordingly Ireland had failed to fulfil its obligations under Articles 43 and 49 of the EC Treaty. The European Court of Justice noted that national legislation empowered both the health authority and DCC to carry out emergency ambulance services and that a fire authority was authorised to carry out or assist in any operations of an emergency nature and might accordingly make such provision for the rescue or safeguarding of persons and protection of property as it considered necessary for the purpose. DCC was the responsible fire authority.

10.11 The Court noted, citing previous authority, that it was incumbent upon the Commission to place before the Court the information needed to enable the Court to establish that a public contract had been awarded. However, on the facts on this case, neither the Commission's arguments nor the documents produced demonstrated an award of a public contract as it was conceivable that DCC provided emergency ambulance services in the exercise of its own powers derived directly from its own enabling statutes. Moreover, the mere fact that as between two public bodies, funding arrangements existed in respect of such services did not imply that the provision of the services concerned constituted an award of a public contract which would need to be assessed in the light of the fundamental rules of the EU Treaty. The action was accordingly dismissed.

1 Information note – Arrangements not subject to the Treaty provisions

1.1 In a number of cases it has been argued that contracts or other arrangements are not subject to the EU procurement rules because they are not subject to Treaty provisions. These types of argument are well illustrated by the German Ambulance case[18] outlined below.

1.2 It should be noted that arguing that the Treaty does not apply is likely to prove an uphill struggle and so this approach is provided by way of illustration rather than a recommendation.

2 Are these contracts outside the scope of the European Union law on public contracts?

2.1 The **German Ambulance** case related to contracts for public ambulance services, many of which had been awarded by the German authorities direct to the German Red Cross without a competitive tender.

2.2 The ECJ considered two arguments put forward by the Federal Republic of Germany which, had they been accepted, would mean that the contracts in question were outside of the scope of the EU on public contracts.

3 The provision of public ambulance services is connected with the exercise of official authority and is covered by an exemption under the Treaty.

3.1 [19]The ECJ considered and rejected the argument that public ambulance services are covered by the exemption under art. 45 EC (now art. 51 TFEU), in conjunction with art. 55 EC (now art. 62 TFEU), which takes them outside the scope of EU law on public contracts.

3.2 According to art. 45 EC (now art. 51 TFEU), in conjunction with A55 (now art. 62 TFEU), the provisions in the EC Treaty relating to the freedom of establishment and the freedom to provide services do not extend to activities which in Member States are connected with the exercise of official authority. The Federal Republic of Germany argued that the categorisation of the activity under national law determines its association with the exercise of official authority.

3.3 In the Federal Republic of Germany the public ambulance organisation service is governed by public law rules. In addition, and above all, the activity entrusted to the providers of those services is connected with the exercise of official authority as evidenced by the emergency vehicle drivers' right of way and associated features, namely the use of blue flashing lights and sirens. The Federal Republic of Germany added that the activities associated with public ambulance services generally presupposed the existence of special powers and the activities were based on close coordination between various links in the emergency chain which only an official authority is in a position to undertake on a permanent basis.

[18] Case C-160/08 *European Commission v Germany.*

[19] This is an edited extract from a full case summary published in the Public Procurement Law Review 2010 Number 5 pp NA 180-185

3.4 The ECJ rejected these arguments. It confirmed, in line with previous cases, that the derogations from these fundamental EC Treaty rules on freedom of establishment and freedom to provide services must be interpreted in a manner which limits their scope to what is strictly necessary in order to safeguard the interests they allow Member States to protect and must be restricted to activities which, in themselves, are directly and specifically connected with the exercise of official authority. The ECJ was not satisfied that these and other requirements were met and observed that a contribution to the protection of public health which any individual may be called upon to make in particular by assisting a person whose life or health are in danger is not sufficient for there to be a connection with the exercise of public authority.

4 **Ambulance services fall within the definition of "services of general economic interest" within the meaning of article 86(2) EC (now art. 106 TFEU) and so fall within a permitted derogation from the rules relating to public contracts.**

4.1 The ECJ considered and rejected the merits of an alternative argument that public ambulance services are services of general economic interest thus permitting contracting authorities to derogate not only from the competition rules but also from the fundamental freedoms and from the rules relating to public contracts.

4.2 Article 86(2) (now art. 106 TFEU) exempts from the Treaty public undertakings providing services of a general economic interest, to the extent necessary for the performance of their task and provided that there is no excessive effect on trade. The Federal Republic of Germany contended that derogation from the fundamental freedoms and rules was necessary in this case to enable cross-subsidisation between densely-populated geographic areas, where the provision of ambulance services is profitable, and areas of low population density, which are far less profitable. The Federal Republic of Germany also contended that the link that exists between the emergency and civil protection service and the state's obligations to protect national health organisations providing assistance in the event of major emergencies militates in favour of a derogation from the rules of EU law relating to public contracts.

4.3 The ECJ referred to the finding in the **Ambulanz Glöckner**[20] case in which the ECJ had categorised emergency ambulance services as services of a general economic interest within the meaning of art. 86(2) EC (now article 106 TFEU). However, it is incumbent on the Member State which invokes article 86(2) (now article 106 TFEU) to show that all of the conditions for application of the provision are fulfilled.

4.4 In the present case the ECJ was not satisfied that the arguments put by the Federal Republic of Germany satisfied the conditions for application of article 86(2) EC (now art. 106 TFEU), as alternative arrangements could be made to guarantee the required services: the publication of a contract award notice was not going to prevent the accomplishment of the service and thus the Court rejected this argument.

[20] Case C-475/99 ***Ambulanz Glöcknerv Landkreis Sudwestpfalz*** [2001] E.C.R. I-8089; [2002] 4 C.M.L.R. 21