REVIEW ARTICLES

THE IN HOUSE PROVIDING IN EUROPEAN LAW: WHEN NOTHING GETS LOST IN TRANSLATION

Christian Iaione *

Professors Mario Comba and Steen Treumer have co-edited a book entitled *The In-House Providing in European Law*. The book comprises various contributions, two of which address the in house providing issue in a broader perspective and from an EU law perspective. "The In-House Providing: The Law as It Stands in the EU" by Roberto Caranta, and "In-House providing - European regulations vs. national systems" by Fabrizio Cassella fall within this category. Other contributions look into the interpretation and implementation at national level in six member states: "In-House Providing in Germany" by Martin Burgi; "In-House Providing in Italy: the circulation of a model" by Mario Comba; "In-House Providing in Spanish Public Procurement" by Julio González Garcia; "In-House Providing in Polish Public Procurement Law" by Marcin Spyra; "In-House Providing in Denmark" by Steen Treumer; "From the indivisible Crown to Teckal: the In-House provision of works and services in the UK" by Martin Trybus.

In particular, Roberto Caranta's contribution shows how in the last decade the E.C.J. has developed substantial body of jurisprudence on "in-house providing". Under the "in-house" umbrella, public authorities award public contracts to entities that have a distinct legal personality but are partially or wholly owned by the contracting authority itself [1]. The E.C.J.'s findings, together

* Assistant Professor of Public Law, University N. Cusano, Roma, Italy.

[1] Advocate General Kokott explains in *Parking Brixen*: "… *In-house operations* stricto sensu *are transactions in which a body governed by public law awards a contract to one of its departments which does not have its own legal personality.* Largo sensu, *however, in-house operations may also include certain situations in which contracting authorities conclude contracts with companies controlled by them which do have their own legal personality. Whereas in-house operations* stricto sensu are *by definition irrelevant for the purposes of procurement law, since they involve transactions wholly internal to the administration, in-house operations* largo sensu *(sometimes called 'quasi-in-house operations') frequently raise the difficult question whether or not there is a requirement to put them out to tender …*". Case C-458/03,

with the analysis provided by the Advocates General, represent dissatisfaction with local public entrepreneurship [2].

The first opportunity for the E.C.J. to consider in-house operations came in *Gemeente Arnhem v. BFI Holdings BV* [3]. At issue was whether the award of a public service contract to a public limited liability company jointly incorporated by two Dutch municipalities was subject to E.C. public procurement rules. Advocate General La Pergola contended that the company's formation was a measure of administrative reorganization and the award of public responsibilities to the company was to be construed as an "inter-department delegation," thereby escaping the scope of the (old) Public Service Contracts Directive [4]. However, the E.C.J. did not address this issue [5]. In *R.I.SAN Srl v. Comune di Ischia* concerning a public service contract awarded to an Italian company, the capital of which was held as to 51% of the contracting authority itself and as to 49% of a central government undertaking [6]. Advocate General Siegert Alber maintained that

---

Parking Brixen GmBH v. Gemeinde Brixen, 2005 ECR 1-8585. There are three in-house or quasi-in-house scenarios: an award to a company wholly owned by a contracting authority or entity equated with that authority; an award to a joint public company, the shares of which are held by a number of contracting authorities; and, a award to a semi-public company, in which genuinely private parties hold a majority or minority stake.

[2] See C. Iaione, *Local public entrepreneurship and judicial intervention in a Euro-American and global perspective*, 7 Wash. U. Global Stud. L. Rev. 215 (2008).

[3] Case C-360/96, *Gemeente Arnhem v. BFI Holding BV*, 1998 E.C.R. I-6821 [hereinafter *Gemeente Arnhem*]. See also R. Williams, *The "Arnhem" Case: Definition of "Body Governed by Public Law*," 8 Pub. Procurement L. Rev. 5 (1999); E. Papangeli, *The Application of the EU'S Works, Supplies and Services Directives to Commercial Entities,* 9 Pub. Procurement L. Rev. 201 (2000).

[4] Case C-360/96, *Gemeente Arnhem v. BFI Holding BV*, 1998 E.C.R. I-6821 [hereinafter *Gemeente Arnhem*]. See also R. Williams, *The "Arnhem" Case: Definition of "Body Governed by Public Law*," 8 Pub. Procurement L. Rev. 5 (1999); E. Papangeli, *The Application of the EU'S Works, Supplies and Services Directives to Commercial Entities,* 9 Pub. Procurement L. Rev. 201 (2000).

[5] *Gemeente Arnhem*, *supra* note …, at I-6851–52. The E.C.J. canvassed instead the corporate structure of the company to establish whether it constituted a "body governed by public law" (i.e., having legal personality, subject to public control and established for meeting needs in the general interest, not having an industrial or commercial character), falling therefore within the scope of the "in-house" explicit exemption set forth in Article Six of the old Public Service Contracts Directive. *Id.*

[6] Case C-108/98, RI.SAN. Srl v. Comune di Ischia, 1999 E.C.R. I-5219, I-1542.

whether one contracting authority exercises a "decisive influence" over another entity is determinative of whether an "in-house" relationship exists [7].

In its landmark *Teckal* decision [8], the E.C.J. forged a hermeneutic method that has subsequently been adopted to evaluate in-house operations in all cases. *Teckal* concerned the direct award to an interlocal consortium (forty-five municipalities) of a contract to operate the heating systems of several municipal buildings, including the contracting authority [9] The key issue in the case was whether granting a public service to an entity of which the contracting authority is a member is subject to the detailed E.C. rules on public procurement. The E.C.J. carved out the basic elements of an in-house operation and extended it to relations between a contracting authority and entities having a distinct legal personality, provided that certain conditions are met. Most notably, an in-house relation exists if "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*" [10]. Thus, substantive subordination to the contracting authority of a publicly-controlled legal entity in regards to decision-making and operating functions does not trigger the applicability of E.C. rules on public procurement.

As to the scope of the in-house derogation, *Teckal* generalized the principle explicitly foreseen only in Article 6 of the Public Service Contracts Directive and extended the application of the in-house rule to public contracts outside public services [11].

---

[7] *Id*. at I-5234. On the basis of functional considerations, he concluded that even without knowing all the organizational details of the entity in question, it formed a part of the Italian State by the mere fact that the state owned 100% of its shares. *Id*. at I-5234–35.

[8] *Id*. at I-5234. On the basis of functional considerations, he concluded that even without knowing all the organizational details of the entity in question, it formed a part of the Italian State by the mere fact that the state owned 100% of its shares. *Id*. at I-5234–35.

[9] *Teckal*, at I-8147–249.

[10] *Id*. at I-8154.

[11] The contract at issue concerned both the provision of services and the supply of goods. However, as the value of the latter was greater than the value of

Since *Teckal*, the E.C.J. has broadened the scope of "in-house" services to include public supply and infrastructure works contracts [12], as well as concession agreements [13] granted by a public authority [14], whereby the local government, acting as a

---

former, the E.C.J. ruled on the basis of the old Public Supplies Contracts Directive. *Id*. at I-8152–53.

[12] Case C-26/03, Stadt Halle v. Arbeitsgemeinschaft Thermische Restabfall-und Energieverwertungsanlage TREA Leuna, 2005 E.C.R. I-1; Case C-29/04, Comm'n v. Rep. of Austria, 2005 E.C.R. I-9705; Case C-340/04, Carbotermo SpA v. Comune di Busto Arsizio, 2006 E.C.R. I-4137 [hereinafter *Carbotermo*].

[13] See Council Directive 04/18, art. 1 § 4, 2004 O. J. (L 134) 114. A "'service concession' is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment." *Id*. at 127. A similar definition is drawn for public works concessions. *Id*.

[14] Case C-231/03, Consorzio Aziende Metano v. Comune di Cingia de' Botti, 2005 E.C.R. I-7287; Case C-458/03, Parking Brixen GmbH v. Gemeinde Brixen, 2005 E.C.R. I-8612 [hereinafter *Parking Brixen*]; Case C-410/04, *Associazione Nazionale* Autotrasporto Viaggiatori (ANAV) v. Comune di Bari, 2006 E.C.R. I-3303 [hereinafter *ANAV*]. "Notwithstanding the fact that, as Community law stands at present, [public services or works concession contracts] are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the [E.C.] Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular." Case C-324/98, Telaustria Verlags GmbH v. Telekom Austria AG, 2000 E.C.R. I-10745, I-10746 [hereinafter *Telaustria*]. The E.C. Treaty prohibits discrimination on grounds of nationality. E.C. Treaty, *supra* note …, art. 12. Regarding provisions on public service concessions, Article 43 states, "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited." *Id*. Also, "restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended." *Id*. art. 49. The E.C.J. interprets Articles 43 and 49 as specific expressions mandating equal treatment. *See* Case C-3/88, Comm'n v. Italy, 1989 E.C.R. 4035, 4059. It interprets the prohibition on discrimination on grounds of nationality similarly. *See* Case 810/79, Überschär v. Bundesversicherungsanstalt, 1980 E.C.R. 2747, 2764–65. In its case law relating to Community directives on public procurement, the E.C.J. affords equal opportunity to all tenderers when formulating their tenders, regardless of their nationality. *See* Case C-87/94, Comm'n v. Belgium, 1996 E.C.R. I-2043, I-2076, I-2097. As a result, the principle of equal treatment of tenderers must be applied to public service concessions, even absent nationality discrimination. In addition, the principles of equal treatment and non-discrimination imply a duty of transparency, which enables the concession-granting public authority to ensure that they are complied with. It "consists [of] ensuring, for the benefit of any potential tenderer, a degree of

contracting authority, exercises oversight over the awardee company substantially equivalent to that exercised on its own internal services, and the awardee dedicates the majority of its activities to the authority that controls it [15]. And, in *Parking Brixen* and *Commission v. Austria*, the E.C.J. made clear that the award of concessions or contracts even to wholly owned subsidiaries of contracting authorities may be subject to the public procurement regime [16]. Moreover, the E.C.J. has asked for the fulfillment of the *Teckal* test in cases where the purpose of the procurement laws is to ensure a transparent and non-discriminatory selection of private contractors could have no foundation. In *Commission v. Spain* [17], the E.C.J. upheld the application of *Teckal* to inter-administrative cooperation agreements formed between two or more public legal entities. This determines whether the contract in question falls under the scope of the Public Procurement Directives or under the "in-house" exemption. In *Commission v. France* [18] and more recently in *Auroux v. Commune de Roanne* [19], the E.C.J. utilized the *Teckal* test for urban renewal projects. *Auroux* concerned a redevelopment agreement for a brownfield area and the construction of a leisure center in Roanne, France [20]. The Municipal Council authorized the mayor to sign a contract with a semi-public company owned by the Region of Loire [21]. The Court

---

advertising sufficient to enable the service market to be opened up to competition and the impartiality of procurement procedures to be reviewed." Telaustria, cit. at 12, I-10746.

[15] In Stadt Halle, the E.C.J. held that: "… *A public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. In such a case, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority. There is therefore no need to apply the Community rules in the field of public procurement* …".

[16] Parking Brixen, cit. at 12, I-8612; Comm'n v. Austria, cit. at 12, I-9705.

[17] Case C-84/03, Comm'n v. Spain, 2005 E.C.R. I-139; Martin Dischendorfer, *Issues under the EC Procurement Directives: A Note on Case C-84/03, Commission v Spain*, 14 Pub. Proc. L. Rev. 78 (2005).

[18] Case C-264/03, Comm'n v. France, 2005 ECR I-8831.

[19] Case C-220/05, Auroux v. Commune de Roanne, 2007 E.C.R. I-389.

[20] *Id*. at 13–14.

[21] *Id*. at 2. In 2002, the French municipality of Roanne decided, as an urban development measure, to construct a leisure center in the area close to the railway station, including a multiplex cinema, commercial premises, a public car park, access roads and public spaces. See *id*. at 13. The construction of other

stated that the agreement showed that the construction of the leisure center was intended to house commercial and service activities designed to regenerate an area of Roanne, thus fulfilling an "economic function" [22]. As such, it must be regarded as an ordinary public works contract [23].

More recently, the E.C.J. has tried to place the *Teckal* criteria in context. The application of *Teckal* to specific cases revealed the two criteria are blurry and may lead to contradictory interpretations. According to Caranta, the E.C.J. has initially interpreted them very strictly because their fulfillment deactivates the E.C. public procurement legislation and principles. The burden of proof is on the person seeking such derogation [24]and a narrow interpretation could make it unlikely for the *Teckal* criteria to be met [25]. However, the most recent case-law, namely *Asemfo* [26],

---

commercial premises and a hotel were envisaged subsequently. *Id*. In order to implement this project, the municipality of Roanne awarded a semi-public development company (the Société d'équipement du department de la Loire), to acquire land, obtain funding, carry out studies, organize an engineering competition, undertake construction works, coordinate the project and keep the municipality informed. *Id*. 15. The Administrative Tribunal of Lyon asked the E.C.J. to establish whether the award of the contract to the regional company constituted an award of a public works contract subject to a call for competition in accordance with E.C. directives concerning the coordination of procedures for the award of public works contracts. *Id*. 20(1). As to whether the development agreement constituted a public works contract, the E.C.J. first reasoned that the directive concerning the coordination of procedures for the award of public works contracts defines a public works contract as any written contract, concluded for pecuniary interest between a contractor and a contracting authority (State, local authority, body governed by public law) whose purpose is, in particular, the design and/or execution of works, or a work corresponding to the requirements specified by the contracting authority. See *id*. 6. The E.C.J. noted that SEDL, a contractor within the meaning of the directive, *id*. at 44, was engaged by the municipality on the basis of an agreement concluded in writing. *Id*. at 43. It observed that, although the agreement to engage SEDL contained an element providing for the supply of services, its main purpose was the construction of a leisure center, which involved work within the meaning of the directive. *Id*. at 46–47. The E.C.J. stated that it was irrelevant that SEDL did not execute the work itself but instead delegated that work to subcontractors. *Id*. at 44.

[22] *Id*. at 41.

[23] *Id*. at 47.

[24] Stadt Halle, cit. at 12, 46; Parking Brixen, cit. at 12, 63; ANAV, cit. at 14, 26.

[25] For instance, Advocate General Cosmas opined that the "control criterion" was unlikely to be met in a case where forty-five municipalities owned the

shows that unrestrained formalism in construing these criteria could jeopardize local self-government and entrepreneurship, administrative innovation and interlocal cooperation.

Caranta's illustration of these interpretative evolution testifies of this latent conflict. According to Caranta, in *Carbotermo* the E.C.J. read the second *Teckal* criterion so "restrictively" to deprive an undertaking of its freedom of action [27]. However, the E.C.J. seems to interpret the "essential part of activities" factor to require that the entity is "devoted principally" to the contracting authority and "any other activities are only of marginal significance" [28]. As a result, national judges must carry out qualitative and quantitative analyses of the facts [29]. This assessment shall apply to any activities carried out under a contract awarded by the contracting authority, regardless of who the beneficiary is (the contracting authority or the user of the services) or who pays the contractor [30]. However, as Caranta demonstrates, the E.C.J. was more lenient on this issue in *Asemfo*.

With regards to the first *Teckal* criterion, it is difficult to prove that a contracting authority controls its legally distinct contractor the way it controls its own departments. The "similar control" criterion should be adapted to the factual context and applied flexibly. Through a restrictive interpretation of this criterion the E.C.J. has gradually narrowed the scope of in-house operations, almost rendering them unrealistic.

First, in *Stadt Halle* the E.C.J. held that the award of public responsibilities to public-private companies cannot be construed as an "in-house" operation being the similar control incompatible with the presence of a private shareholder within the partnership and it is therefore subject to the E.C. public procurement rules [31]. This solution builds on the argument that private and public shareholders pursue different and incompatible goals.

---

entity in question and the contracting authority had only 0.9% share of the entity's capital. Teckal at I-8136.

[26] Case 295/05 Asemfo [2007] ECR I-2999.

[27] Carbotermo, cit. at 12, I-4137.

[28] *Id*. at 63.

[29] *Id*. at 65.

[30] *Id*. at 65–67.

[31] See Stadt Halle, cit. at 12.

This holding affected local public-private partnerships [32] such as major, long-term projects for services relating to transportation, public health, and waste management. After *Stadt Halle*, contracting authorities are obliged to apply Public Procurement Directives to the choice of the private shareholder. However, according to Caranta, it is not clear whether the same rule applies to a private financial or long-term investor [33].

Caranta argues that *Carbotermo* and *Asemfo* ruled out usual corporate governance rules as a means to show respect of the "similar control" criterion. He believes that the procuring entity has to have a "a sort of command power" over the in house undertaking which has no choice but to comply. However, Caranta's contribution shows how, starting from 2008, the E.C.J. has taken a much softer stance in cases mainly focused on cooperation modules between public authorities.

If interpreted too restrictively the "similar control" criterion would make it impossible for most public undertakings to fulfill the *Teckal* doctrine. And contracting authorities forced to comply with procurement rules before concluding contracts with their subsidiaries, insofar as those subsidiaries are organized as private limited companies, would much rather drop out. Therefore, the choice of a public or private limited company as a form of organization would become appreciably less attractive.

Through its use of the "similar control" criterion *Teckal* intended to indicate that a local authority has different possibilities to influence its own departments and public

---

[32] Public-private partnerships are neither regulated nor defined at the European level. Before *Stadt Halle*, it was not clear whether the assignment of public tasks to such entities in the form of public contract or concession fell within the scope of the Public Procurement Directives. See *id.*

[33] See *Commission Communication on Public-Private Partnerships and Community Law on Public Procurement and Concessions* 8, COM (2005) 569 final (Nov. 15, 2005). The European Commission plans to publish an interpretative Communication to clarify the limits of the public procurement rules' application to joint undertakings between the public and the private sector. This initiative, although soft law, will guide the selection of private partners participating in public partnerships and contribute, to a better understanding of relevant E.C.J. case law. *See* Sue Arrowsmith, *Public-Private Partnerships and the European Procurement Rules: EU Policies in Conflict?* 37 Common Mkt. L. Rev. 709 (2000); L. Hausmann & J. Denecke, *Changes to German Public Procurement Legislation by the PPP Acceleration Act*, 14 Pub. Proc. L. Rev. 195 (2005).

undertakings [34]. Whether a contractor is akin to an administrative department or other market operators is not based on whether, *from a formal point of view*, the public body has the same possibilities *in law* as it does in relation to its own departments (for example, the right to give instructions in a particular case). Rather, the issue is whether, *in practice*, the contracting authority attains its public-interest objectives fully at all times.

Such extensive interference with the organizational sovereignty of the Member States and, in particular, with the right to self-government of many municipalities is not necessary for the market-opening purposes of public procurement law. Such an extensive interference in municipalities' self-governance and organizational discretion may appear, even from the EU competition law standpoint, extremely disproportionate [35]. In *Parking Brixen*, Advocate General Kokott noted, after all, the purpose of procurement law is to ensure that contractors are selected in a transparent and non-discriminatory manner in all cases where a public body has decided to use third parties to perform certain tasks. However, the spirit and purpose of procurement law is not also to bring about, "*through the back door*," the privatisation of those public tasks which the public body would like to continue to perform by using its own resources. This would require specific liberalisation measures on the part of the legislature [36].

The lesson learned by reading this book is that the E.C.J. case law on in-house operations deserves at least careful re-reading, due to these local self-governance implications. *Teckal* intended to preserve local governments' sphere of self-governance regarding organization and service provision. Subsequently, the E.C.J. expanded "in-house" to apply to all other types of public contracts [37]. The expansion of this category triggered the E.C.J.'s

---

[34] Teckal, cit. at 9, I-8121.

[35] See Charter of Local Self-Government. Article 6(1) provides that local authorities must "be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management.".

[36] Parking Brixen, cit. at 12, I-8585.

[37] The Community procurement regime does not provide an "in-house" provision similar to the one foreseen for in the E.C. Directive concerning the coordination of public service contracts awarding procedure.

interpretive self-restraint. Sometimes this attitude led the E.C.J. to deeply weaken local governments' entrepreneurial discretion, as well as interlocal cooperation. More recent case-law shows more respect and deference towards local authorities right to use their own resources to perform the public interests tasks conferred on them. Some uncertainty still lie ahead and this book helps identifying those issues that need further clarification at the national and EU level.

This book is nevertheless very valuable as it is the first to elaborate on the in house providing issue at the EU level and to explore how and to what extent the national laws of various Member States have tried to accommodate European rules and principles relating to the in-house providing doctrine.