ORGANISATION V MARKET IN PURCHASING ARRANGEMENTS AMONG PUBLIC ENTITIES: THE EUROPEAN PERSPECTIVE

Roberto Cavallo Perin and Dario Casalini

Roberto Cavallo Perin, Ph.D., is Full Professor of Administrative Law, Department of Juridical Science, University of Turin (Italy). His teaching and research interests center on public services, public procurement and concessions, civil service, healthcare services provision, public authorities' and civil servants' liability, judicial review.
Dario Casalini, Ph.D., is Assistant Professor of Public Law, Department of Law for Economics, University of Turin (Italy). His teaching and research interests include) public services, public procurement, public property, civil service, healthcare organisations, public authorities' liability.

ABSTRACT
The establishment of a European market was accomplished also through issuing public contracts rules. The effectiveness of such legislation depends upon a precise definition of its subjective coverage but a broad definition of public sector may prove to be self-defeating, should the intra-public sector arrangements fall outside the scope of procurement law. According to EU law a relationship between public entities is subject to public contract rules and competition principles, unless it proves to be a merely organisational one (*in-house providing* or a form of pure cooperation among public authorities), which is active entirely within the public organisation domain without addressing the market at all. A clear-cut distinction between intra-organisational and contractual relationships is essential above all in those countries with a strong tradition of public providers. The scope of EU procurement law will be defined in this paper through an analysis of its interplay with the national legislations that regulate the choice between organisational and market solutions.

1. Implementing EC rules on public procurement: the widening of the definition of contracting authorities.

The European Union was founded in order to establish, protect and maintain a common market among the Member States that are actually 27 with 27 different national legal systems, legal traditions and legal taxonomies. Public contracting was addressed in the early 70s as one of the key-sectors to promote an effective integration of the then protected and separated national markets. A legal framework was issued soon after to wind up the national boundaries protecting

markets whose average value has been around 16% of European Union GDP[1].

The EU public procurement regime now in force is the outcome of progressive development over a period of several decades aimed at opening up the public sector market to competition as the ideal means of promoting economic efficiency (Arrowsmith, 2005). The development of the European legal framework on public procurement underlines a gradual widening of its subjective coverage in order to prevent any attempts of sidestepping the duties thus imposed on the public sector. The well-known trend of outsourcing public tasks set up since the 80s easily offered public authorities organizational tools to avoid the application of EU directives on public contracts. This was possible by establishing distinct legal entities not yet included in the list or definition of contracting authorities laid down by the EC relevant legislation.

From the first Directive 71/305, through the Directives of the 90s (Directives n. 92/50, 93/36, 93/37, 93/38), up to Directives n. 2004/18 and 2004/17 currently in force, the category of public authorities compelled to apply EU regulation on public contracts was constantly widened.

In Directive n. 71/305 of July 26th, 1971, which dealt exclusively with public work contracts, only the legal persons governed by public law exhaustively listed in Annex I were included among the contracting authorities along with State, regional and local authorities and the associations among them (that we may call the traditional contracting authorities). Notwithstanding the periodical updating of the list, it quickly turned out to be impossible to follow the constant changes of public organizations without delays that proved to be as many sidesteps of the relevant European law on public procurement. Similar risks of circumventing public procurement law due to the poor coverage of the latter or to the ambiguity of its scope arose again recently as regards the coverage of the WTO's Agreement on Government Procurement (Wang, 2007; Olivera, 1997; Arrowsmith, 2003).

The awareness of the inadequacy of the definition of the subjective coverage of EU law on public procurement became undoubted thanks to the European Court of Justice case-law. In *Beentjes*, the ECJ, in order to prevent the avoidance of EU law on public procurement simply by outsourcing some public tasks, was forced to state that "a body, whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it is its task to award, must be regarded as falling within the

notion of the State for the purpose of the abovementioned provision, even though it is not part of the State administration in formal terms"[2].

Therefore the EC Directives of the 90s took the decisive step by defining in abstract terms the new organisational tools and models used by the traditional authorities to carry out their own public tasks that have to be regarded as contracting authority themselves, thus still referring to a list which was no more exhaustive but updated solely by way of examples. According to these EU Directives on public procurement "a 'body governed by public law' means any body: (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, (b) having legal personality and (c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law"[3]. The definition of "body governed by public law", confirmed by the new EU Directives of 2004, is useful to cover any entity established by the State, the regional or local authorities to carry out their own tasks or duties (sometimes called delegation of power), regardless of its the legal form. Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria are set out in Annex III of the new EU Directives on public procurement and Member States shall periodically notify the Commission of any changes to their lists of bodies and categories of bodies.

Nevertheless the assessment of the first criterion (the non industrial or non commercial character of the needs pursued) soon turned out to be tricky. The ECJ strove for a stable and clear interpretation of this requirement throughout the last decades, underlining that Member States may not automatically exclude commercial companies under public control from the scope of those directives[4]; that the bylaws or the statute of the entity are not relevant whenever the latter implemented actual changes in its sphere of activity or was entrusted not only with meeting such needs[5]; that the absence of competition is not a conclusive condition[6], while the needs in the general interest are ones which the State itself chooses to provide or over which it wishes to retain a decisive influence[7]. The ECJ finally pinpointed the criterion of the economic risk: an entity established for meeting needs in the general interest has neither an industrial nor a commercial character whenever it does not bear the economic risk of its activities itself, for instance, relying on a mechanism for offsetting any financial losses[8]. The criterion of the economic risk expressed the core rationale of EU law on public

procurement as explicitly stressed by ECJ: "If the body operates in normal market conditions, aims to make a profit, and bears the losses associated with the exercise of its activity, it is unlikely that the needs it aims to meet are not of an industrial or commercial nature. In such a case, the application of the Community directives relating to the coordination of procedures for the award of public contracts would not be necessary, moreover, because a body acting for profit and itself bearing the risks associated with its activity will not normally become involved in an award procedure on conditions which are not economically justified"[9]. Such a perspective could prove useful for those legal systems with a large state sector where most state enterprises enjoy monopoly or exclusive rights in their respective markets and therefore have poor incentives to procure for best value for money and to avoid discriminatory behaviours in other public undertakings' favour (Wang 2007: 907; see also evidences in Anderson and Kovacic 2009).

The functional and broad interpretation of the term "contracting authority" envisaged by ECJ case-law in order to pursue the dual objective of opening up competition and transparency is due, moreover, to the need of dealing with many different national legal systems whose conception of public authority has therefore to be uniformed or harmonized accordingly. It appears consequently useless or even misleading to search for perfect correspondence between definitions set out by EU Directives and national ones. In practise, every attempt to force these correspondences led to litigations before ECJ. A broad subjective coverage is therefore essential to prevent national operators and courts from any ambiguous interpretative efforts that may hamper EU legislation aims.

As for the utilities sector alone, the category of contracting authorities includes both "public undertakings" - whose definition is broader than that of the "body governed by public law" insofar as it lacks the requirement of the non industrial and commercial character[10] - and other entities which are not contracting authorities or public undertakings but have as one of their activities any of the activities referred to in the Directive n. 2004/17, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State[11].

2. Form body governed by public law to in-house exception.

A chance to escape the issues that the assessment of the non-industrial or non-commercial character of the body governed by public law entails was suddenly offered to the ECJ. In *Teckal* the issue of the legal qualification of a relationship between contracting

authority whose subject-matter was a mix of supply and services provision was at stake. An Italian Municipality had directly awarded the provision of the management of the heating service for the municipal buildings along with the supply of fuel to a consortium set up by several local authorities, including the awarder itself, to manage energy and environmental services[12]. It was therefore stated that whenever the party entering into a relationship with the contracting authority is not actually a third party vis-à-vis that authority or, in other words, a separate person from the latter, there is no contract at all and thus the relationship falls outside the scope of EU Directives on public procurement.

Two requirements have to be met in order to rule out the condition of being a third party for the contractor, hence determining its status of in-house provider of the contracting authority. The public authority asking for works, supply or services must i) exercise control over the in-house provider which is similar to that which it exercises over its own departments and, at the same time; ii) the in-house provider must carry out the essential part of its activities with the controlling public authority or authorities. Whenever both requirements are met the services are awarded on account of the control exercised by a public authority over a provider who is only "formally" and not "substantially" a third party, whose mission is to provide supply, works or services for its controller or on behalf of it, regardless of the fact that the provider is subject to public or private law and established pursuant to contract, statute, regulation or administrative provision.

While the in-house relationship between the contracting authority and its instrumental entity (so called in-house provider) falls outside the scope of EU public procurement law, the in-house provider, as part of the controlling authority, is a contracting authority itself. Although not explicitly listed among the categories of contracting authorities (State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law) by any European legal provision, the in-house provider is compelled to apply EU procurement Directives, regardless of whether as a new kind of contracting authority or as a department of the controlling authority itself.

The in-house doctrine therefore proved to be useful in two ways. Firstly, it allows Member States to maintain their own public providing organisations if necessary as an alternative to market purchasing in compliance with the real aim of EU procurement Directives which is not a massive liberalisation of the public sector. Secondly, it avoids the difficulties entailed by the assessment of the non-industrial and non-commercial character but it nonetheless

widens the subjective coverage of EU procurement law and opens up to competition the market of the factors of production insofar as the in-house providing organisations are legally qualified as contracting authorities.

3. Searching for a reasonable balance: public organisation provision v market.

The extension of the subjective coverage of EU Directives on public procurement gave rise to the issue of the legal qualification of the relationship between contracting authorities concerning the provision of works, supply or services so as to ascertain whether these relations fall outside or within the scope of the EU Directives. The issue was tackled in *ARGE Gewasserschutz*[13] where several research and testing institutes from the public sector submitted tenders in an open procedure issued by an Austrian Ministry concerning the taking and analysis of samples of water from various lakes and rivers alongside private undertakings. The ECJ stated that public bodies can take part in a procedure for the award of a public service contract without breaching EC Treaty principles. Therefore, the mere fact that the contracting authority allows public bodies - receiving subsidies of any kind which enable them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers - to take part in such a procedure does not amount to a breach of the principle of equal treatment.

EU principles protecting competition and ensuring the effectiveness of economic freedoms within the European market forbids derogatory rules for undertakings subject to public dominance whose possible special national legal regime cannot affect the implementation of EU competition rules[14]. ECJ settled case-law states the possibility for a public entity to participate in an awarding procedure issued by a contracting authority, thus the prohibition of direct awards of contracts to public entities without a previous call for tenders. At least in principle, the relationships among public entities fall within the scope of the EU public procurement rules unless they do not have legal contractual nature[15].

Following this view, the new EU Directives on public procurement of 2004 define the economic relationships covered in broad terms as “contracts for pecuniary interest stipulated between one or more economic operators and one or more contracting authorities and having as their subject the execution of works, the supply of products or the provision of services”. Moreover, an economic operator is “any natural or legal person or public entity or group of such persons and/or bodies which offers on the market … the execution of works and/or a work, products or services”[16].

Even a relationship between two public entities concerning the provision of works, products or services may therefore fall within the scope of EU Directives on public procurement and engage EC competition law principles. The notions of "contracting authority" and "economic operator" – as the necessary parties of a public contract – are not mutually exclusive as long as the same entity can play different roles in different contractual relationships[17]. A public entity providing on the market work, supply or services is thus entitled to participate in an awarding procedure as a tenderer alongside private sector economic operators. Whenever this participation harms competition in relation to private tenderers due to the fact that the public tenderer is the recipient of State aid illegally granted, the contracting authority may reject its tender as abnormally low[18].

A different perspective excluding inter-public entities arrangements from public procurement rules may hinder the enforcement of EU competition principles pursued throughout the last decades by means of broadening EU procurement law's subjective coverage. Those legislative and judicial efforts would prove to be useless or self-defeating if the relationship between a contracting authority and its subsidiaries were not covered by the regulation itself (the same issue at GPA level is discussed by Wang 2007).

On the other hand, EU public procurement rules cannot be used far beyond their scope, as a tool to enforce a compulsory privatisation of public interest tasks. The power of organising the provision of those public tasks is vested in the sovereign domain of each Member state and in the autonomy of their regional and local authorities according to the principle of self-government set in the European Charter on Local Self-Government of 1985[19]. Besides the specific exceptions to European market rules safeguarding competition and economic freedoms provided in the European Treaties[20] as well as in the public procurement directives[21], the enforceability of European open market and competition law principles is limited by Member States' power to shape and regulate the organization of their own public administrations.

The increasing organisational complexity of the public sector, and the spread of various forms of delegation of public tasks from State, regional or local authorities to new entities specially established in order to carry out such tasks, raised the problem of defining precisely the boundaries of the public organisation that falls outside the scope of EU competition and public procurement rules.

Each Member State public administration is composed of several local or territorial authorities (regions, provinces, municipalities)

each of which gave life to controlled organisations which sometimes take the legal form of corporation or company. The public administration therefore takes the form of a "group", like a commercial holding company, within which the mutual relationships among the inherent public entities have an organisational rather than a contractual legal nature, thus not being subject to market rules. From a legal perspective, the internal relationships of a group, regardless of its public or private nature, are not market relationships with third economic operators as long as they take place entirely within the organisation.

ECJ case-law provides for what is increasingly recognised as a twofold general definition of public providing within public organisations in opposition to the market and its relevant rules. Beside the earlier in-house exception, many scholars point out a brand new and recent exception, namely a form of cooperation among public authorities that does not entail a vertical organisational integration between parent authority and its subsidiaries (Pedersen, Olsson 2010; Treumer 2010: 175). Both of them will be discussed in detail in the next paragraphs.

3.1 The in-house providing exception

Teckal marked the external boundaries of the EU internal market and at the same time it provided a definition of what might be a public organization, inherently not subject to EC competition rules. The following ECJ case-law has confirmed and refined the so called *in-house providing* exception as a relationship within the public organisation domain that is still not expressly disciplined by EU legislation at all.

The in-house provision exception basically lays on the above-mentioned two requirements of the "similar control" and the "destination of the essential part of its activities" that have a broad application but have to be interpreted narrowly as far as the public authority enjoys the discretion to arrange for its own existing or purpose-made department(s) to provide works, supply or services or to establish a distinct legal entity provided with legal personality (*quasi in house providing*) in respect of all the activities it is entitled to carry out but in compliance with ECJ settled requirements .

The "similar control" requirement deals with the governance structure of the in-house provider entity. It is met whenever the latter "has no discretion whatsoever and that, in the end, the public authority is the only one to make decisions concerning that company" [22] . The similar control is therefore a much stricter requirement than the "public dominant influence" required for bodies

governed by public law which are subject to a much lower interference of the controller authority[23].

The parent public authority is therefore able to take the most relevant decisions on the management and manufacturing process of the in-house provider, thus excluding a bilateral bargaining upon the terms and conditions of the supply of works, products or services. The manufacturing and supplying conditions which the in-house entity has to provide in compliance with are set unilaterally by the controlling contracting authority as the solely way to carry out the providing tasks assigned to the in-house unit (Cavallo Perin and Casalini, 2009)[24].

In this light, even the direct shareholding of the controlling authority in the in-house provider's capital may be neither relevant or necessary nor sufficient. The powers of influence exerted by the parent contracting authority could follow either ordinary management powers due to a majority shareholding in compliance with company law or special powers expressly provided by the in-house provider statute or bylaws, insofar as they allow the controlling authority to exercise a "similar control". Nonetheless, some scholars envisage more difficulties in founding such a "similar control" solely on the ordinary corporate governance tools (Spyra, 2010). Although these conclusions seem undoubted when the intervention of an intermediary holding company weakens any control possibly exercised by the contracting authority, nonetheless it depends on the circumstances of the case and so it is not theoretically inconsistent with the "similar control" requirement [25]. On the contrary, a shareholders agreement or the applicable national company law may render the majority shareholder powers of control ineffective, binding or limiting the power to appoint the managerial board or narrowing the managing director's discretion, thus wiping out public authority influence on the in-house provider's strategic objectives and significant decisions[26].

As a matter of management rather than ownership (Cavallo Perin and Casalini 2009), an actual exercise of similar control may be affected by the structure of the shareholding of the in-house provider entity which, however, must be considered, once again, neither necessary nor sufficient[27]. If the controlling authority owns the whole capital of its in-house unit the "similar control" requirement is met, in the absence of circumstances to the contrary, above all where the in-house provider carries out all its activity solely for the controlling authority. The absence of other shareholders yields the presumption of a lack of interference of "external" interests in the pursuit of the public interests that led to establish the in-house organisation.

A plurality of shareholdings in the in-house provider's capital does not prevent the "similar control" of some of the shareholding authorities: however, only some of the shareholding authorities might exercise a "similar control", while others may not participate in the in-house relationship, thus being unable to dispose direct awards to the in-house organisation in compliance with EU law[28]. The more the capital shareholdings is fragmented, the more an in-depth analysis on whether the minority shareholders are entitled to influence the provider's decision-making is due.

Any shareholding of the in-house provider capital by entities which are third parties as regards the parent public authorities introduces economic interests which may affect and interfere with the exercise of "similar control" by the parent public authorities, thus harming the pursuit of the above-mentioned public interests (Kaarresalo 2008). The actual presence of a third-party private shareholder was often considered inconsistent with the "similar control" requirement[29] and this is the case whenever the private minority shareholder acquires considerable rights of veto over important decisions or the power to appoint one of two managing directors having identical rights; whenever the by-laws decree a wide breadth of business objectives, the possibility of expansion of the geographical scope of a company's activities to the whole of a national and foreign territory and the opening of the company to other capital; whenever, notwithstanding the holding of majority in a company's general assembly or the power to appoint more than an half of the managerial or administrative board members, the managing director is appointed by the private minority shareholders[30].

The relevance of a private shareholding in the in-house provider's capital in itself is not clearly stated insofar as the actual managing powers of the private shareholder were always assessed anyway and therefore every time proved to be inconsistent with the similar control of the parent authority[31]. It follows that if a in house entity's capital is wholly owned by the contracting authority, alone or together with other public authorities, opening of the in house provider's capital to private investors may not be taken into consideration unless there exists, at that time, a real prospect in the short term of such an opening suitable to hinder the similar control of the parent authorities. In any case, the purchase of shares in the capital of the in house entity along with management tasks to private shareholders, still during the period for which those services were entrusted, would require the contract to be put out for competitive tender.

Many scholars failed in clearly distinguishing the irrelevance of the ownership structure of the in house unit from the solely decisive issue of its effective governance by the parent authorities. The

distinction was clear in *Asemfo* (Treumer 2010): the "similar control" requirement was met in a case where 99% of the share capital of the in house provider (Tragsa) was held by the Spanish State itself, while the four actually awarding Autonomous Communities, each with one share, held 1% of such capital in all. The minority shareholders were meant to exert a "similar control" over Tragsa, since the latter "is not free to fix the tariff for its actions and that its relationships with them are not contractual" but it is merely "an instrument and technical service of the Administration": as a result "Tragsa's relations with those public bodies, inasmuch as the company is an instrument and a technical service of those bodies, are not contractual, but in every respect internal, dependent and subordinate"[32].

The "similar control" may be exercised over the in-house provider by a plurality of controlling authorities either individually or jointly[33]. A joint exercise of the "similar control" allows forms of pure cooperation or association among local authorities developed mainly within the European tradition of public service providing, in so far as they are designed in such a way as to enable each of the latter to actually manage in-house provider activities carried out on behalf of it (Dischendorfer, 2007).

The second requirement to be met in order to consider a work, supply or service provision arrangement totally within the public organisation is that the in-house provider must carry out the essential part of its activities for its parent and controlling public authority or authorities. Only a very small portion of the in-house entity's activities can be pursued outside the in-house relationship in order to reap the benefit of economies of scale and scope (Cavallo Perin and Casalini 2006; Avarkioti 2007: 33). It follows that any other activity towards third entities may only be of accessory, ancillary, secondary or marginal significance. The destination of the essential part of the in house provider's activities expresses a very close functional and economic dependence of the latter on the controlling authorities so that the repeal of the entrusting of works, supply and services should follow the winding up of the in-house provider.

Notwithstanding some uncertainty in assessing the criteria eligible to meet this requirement, there are some settled achievements.

Only the activities effectively performed by the in house provider as opposed to the potential activities which the latter could undertake – according to the law, its own by-laws or the act of delegation issued by the controlling authorities – may be taken into account. In case of several controlling authorities the activities to be taken into account are those effectively carried out for all these authorities taken together. It is irrelevant who is the beneficiary (the contracting

authority or the users), who pays for (the contracting authority or the customers) and where the services are provided[34].

Moreover, the essential part of the in house provider's activity has to be assessed both from a qualitative and quantitative point of view (Weltzien 2005; Avarkioti 2007). Considering the qualitative perspective, it is necessary to examine what kind of tasks the company is entitled to carry out, mainly whenever the in-house provider both operates in a competitive market and carries out entrusted tasks - at the same time - based on a concession or delegation which transfers a granted and protected demand to it

From a quantitative perspective the income or turnover of the entity turns out to be decisive: considering all the activities performed, those awarded by the controlling authorities must be predominant. To that extent, it appears impossible to define a percentage threshold in advance as a general rule to apply automatically, whereas a case by case approach seems more suitable.

In many national legal systems, in-house entities used to act as economic operators outside the territory of their parent authorities, that is to say outside their own in-house relationship. In house providers may compete for the public contracts on equal terms with other contractors and if they did so successfully, they may enter contractual relations with third contracting authorities as far as these activities, not provided in-house, remain of marginal importance compared to the activities provided in house. The contractual relationships among public entities not involved in the in-house relations themselves constantly boosted and leaded both EU law[35] and some national legislation to limit the in-house providers' commercial activities outside the territories of their respective controlling authorities, often far beyond EU definition of the "essential part" requirement (Burgi 2010; Casalini 2009). The breach of these limitations may bring about the loss of the status of in-house providers as far as the activities carried out with third public authorities that do not take part in the in-house relationship become of major importance.

3.2 Association and collaboration agreement among public authorities and State aids prohibition.

As an alternative to self-provision of works, supply or services within its own organisation, a public administration may decide to enter a cooperative arrangement with other contracting authorities in order to carry out their public tasks or their functions and activities jointly. The power of establishing forms of cooperation among territorial public authorities is an expression of the freedom of self-

government enjoyed by the latter in almost every European national legal system and therefore recognised in the European Charter on Local Self-Government of 1985. As for the public procurement sector, these forms of cooperation can be traced back to the core definition of contracting authority since the very first European directive on public procurement already included among the traditional contracting authorities (State, regional or local authorities) the "associations formed by one or several of such authorities"[36].

ECJ recently seized the opportunity to specify the requirements and the conditions that have to be met as to consider these forms of collaboration amid public authorities completely run within the public organisation without addressing the market and its rules, thus falling outside the scope of EU law. In the case brought to the ECJ's attention, four *Landkreise* concluded a contract with the city of Hamburg relating to the disposal of their waste in the new incineration facility that is intended to produce both electricity and heat. Its construction was still to be completed by the city of Hamburg. The four *Landkreise* agreed to pay the price directly to the facility's operator which entered another, distinct contract with the city of Hamburg. The contract at issue was concluded directly between the four *Landkreise* and the city of Hamburg without following the tendering procedure provided for in EU directives on public procurement. The infringement procedure issued by EU Commission concerned solely the contract among the city of Hamburg and the four *Landkreise* for the treatment of waste in return for a price to be paid to a third party not involved in this agreement and along with the obligation of the four *Landkreise* to make the landfill capacity which they did not use themselves available to the City of Hamburg[37].

The European judge first ruled out the fulfilment of the two in-house exception requirements as long as there was not any direct relationship among the four *Landkreise* and the incineration facility's operator which was neither subject to the similar control of the *Landkreise* nor was carrying out its activities essentially with the latter.

Nevertheless, there was not a breach of EU public procurement law since the contract was agreed among local authorities without the involvement of any third economic operators as to establish a form of cooperation between the contracting parties who, if necessary, will assist each other in the performance of their legal obligation to dispose of waste and will therefore perform that service jointly in the region concerned. The main features which allows for considering a contract as a form of cooperation among local authorities entirely run within their public organisations, thus falling outside the scope of EU

procurement law as well as of EU competition principles seem to be essentially two.

Firstly, the contract must be agreed upon solely by public authorities without the participation of external economic operators which otherwise would benefit from an unfair advantages that can be even considered an economic aid illegally granted by a public administration in breaching art. 107 of the Treaty on the Functioning of European Union (TFEU)[38]. In this light, the prohibition of State aids amounts to a principle which is fundamental to ensure a fair competition and to avoid discriminatory behaviours within the EU internal market. More specifically, it prevents any contracting authority from giving economic distortive advantages by means of awarding a contract or assigning an essential facility without a proper competition throughout a call for tenders. If the public demand for works, supply or services addresses the market and its economic operators the principle of prohibition of State aids, generally speaking, requires a competitive awarding of the demand itself among the operators potentially interested in fulfilling it (see also Neergaard 2007: 404; Caranta 2010: 51). If no third (public or private) economic operators are involved, the demand will be fulfilled within the public organisation by means of a self or in-house provision, hence leaving out EU competition and procurement rules. Moreover, whenever no third economic operators are involved in this kind of agreement, the latter does not provide for or prejudice the award of any contracts that may be necessary in respect of the actual provision of works, supply or services required to pursue the public tasks that lead to the cooperation agreement[39].

Secondly, the agreement must be entered with the only aim to pursue the public interest tasks assigned to the public authorities involved. Since EU law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks, they can chose among a cooperation model, an in-house provision as well as a market solution. The inter-public sector cooperation may be either purely contractual or institutionalised (by establishing a new associative entity).

It is however clear that the process of inter-municipal cooperation so defined may sometimes not work out the further issue of the actual provision of the works, supply or services needed. The latter may be directly and mutually provided by the contracting authorities which entered the agreement as well as by other entities. In this case, the cooperation agreement may be therefore followed either by an in-house arrangement consistent with its relevant requirements (as it is in *Coditel Brabant*[40]) or by a call for tenders to select the third economic operator to entrust with the provision of such services. To that extent, some scholars distinguished between

vertical and horizontal cooperation: there is vertical cooperation when one or more local authorities "own or run an undertaking with legal personality", while horizontal cooperation means that two or more local authorities "enter into a contract in order to delegate or mandate the legal responsibility for a public task to the partner" local authority (Burgi 2010).

4. Forestalling competition before the market at the national level: the comparison among internal and external bids.

Both the forms of cooperation or association among public contracting authorities and the in-house provision doctrine, as defined by ECJ case-law and applied by EU Commission in its *Green Paper* and *Communications* on public-private partnership (PPP)[41], can be understood as a corollary of a public administration's power of self-organisation and freedom of choice over whether to outsource or arrange for collaborative agreements among public sector entities or in-house provision of its needs (see also Prosser 2005: 11; Arrowsmith 1997). As the transaction cost economics pointed out long since, market solutions may be well-suited for some public purposes but not for others (Williamson 1999).

Consequently, the decision-making amid the possible alternatives of cooperation models, in-house provisions or market solutions fall outside the scope of EU law, thus being a matter of sole national sovereignty (Cavallo Perin and Casalini 2006; Burgi 2010). The public authorities' decision to self-provide individually or jointly works, supply or services has nonetheless a direct influence on the internal market as long as it implies its reduction by means of taking some economic opportunities away from the economic operators acting on the affected market sector.

Furthermore, we can pinpoint that the external boundaries of the European internal market are defined by the sole will of the Member states and their public authorities, in the absence of explicit liberalisation policies pursued in particular sectors only, historically dominated by legal public monopolies such as utilities sector (e.g. energy, telecommunication, while universal postal services and railroad transport are forthcoming) (Arrowsmith, 2005; Footer, 1994; Mardas, 1994; Pontarollo, 1994).

The internal market principles, and the following special regulation on public procurement, may protect and trigger competition only once a public contracting authority has decided to address the market but these principles turn out to be powerless in promoting market solutions under EU law.

Given the situation, many Member States exerts their national sovereignty in order to properly regulate public administration's choice between cooperative or in house provision within its organisation and third parties' provisions within the market. A due comparison between the two main alternatives as well as among every possible variant of the solutions available seems to be fundamental in order to pursue both economic efficiency and effectiveness and the best fulfilment of public tasks.

The United Kingdom's contracting authorities have long developed a tradition of comparison between in house options and market options since compulsory market testing policies were issued as to test whether services currently carried out by in-house units could be provided more efficiently and cost effectively by third parties. The Compulsory Competitive Tendering (CCT) forced English local authorities to open up services provided by their own units to competition among economic operators, pursuant the aim of achieving value for money and efficiency. The services, expressly listed in the Local Government Acts of the 1980s and 1990s, were allowed to remain in house provided only if the in-house unit won the tender for the contract to provide those services in an open competition against market operators (Trybus 2010; Casalini 2003). Even after the replacing of CCT by the Best Value in 1999, the comparison among external and internal bids remained an important opportunity for the departments of the contracting authorities which issued the call for tenders. The UK Public Contracts Regulations expressly provides that it is always possible to submit a "bid by one part of a contracting authority to provide services, to carry out work or works or to make goods available to another part of the contracting authority when the former is invited by the latter to compete with the offers sought from other persons". Once the tendering procedure starts, the contracting authority is compelled to negotiate with internal and external bidders in the same way, without any discrimination so long as the procedure continues "but the authority can still choose to terminate the procedure to keep the work in-house for strategic reasons if it chooses to do so" (Arrowsmith 1997: 203).

At the same time, similar experiences took root in other European national legal system like Denmark. Here the tender submitted by internal units of the contracting authority itself issuing a call for tenders is called a "control bid". A "control bid" is therefore considered a "methodology allowing contracting authorities to decide on an objective basis when it is relevant to contract out" rather than a 'bid' in the sense of EU public procurement law (Treumer 2010: 179). Whenever the control bid is the lowest or the most economically advantageous the contracting authority can thus waive the awarding procedure and choose to provide in-house the relevant works, supply

or services. Since the annulment of the call for tenders after the submission of both external and internal bids offloads all the participation costs and expenses sustained on the third bidders that took part in the procedure, the "control bid" practice could deter external bids as well as it could waive a real and genuine competition. To this extent the contracting authority should announce in the contract documents that an internal offer (or "control bid") is expected. Nevertheless it is pointed out that contracting authorities enjoy an "extremely wide discretion" in deciding whether or not a tender procedure shall terminate without an award: according to the most recent case-law, they can assess non economic aspects of the tenders as well as the social externalities generated by a potential contracting out solution, even if not provided for in the contract notice defining the awarding criteria (Treumer 2010: 183).

In Italy, a compulsory comparison between in-house providing and contracting out was recently provided solely with regard to local public service provision. The ordinary way of running local public services is either a contractual (awarding a contract to economic operator selected by means of a call for tender) or an institutionalized (establishing a mixed capital corporation by means of a call for tender to select the private partner entrusted with the management of the corporation) public-private partnership (PPP). The in-house option is available only "in exceptional situations when peculiar economic, social, environmental or geomorphological characteristics of the territorial context do not allow for an efficient and useful market solution"[42]. The contracting authority must prove that these special circumstances are met by means of publicizing its choice and stating grounds for it through a market analysis followed by a detailed report that has to be submitted to the Italian Antitrust Authority. The latter may express a prior advice within 60 days after the request, but after such deadline the contracting authority has the right to proceed anyway in order to arrange an in-house provision of its public tasks. On the other hand, Italian legislation on public procurement implementing European Directives does not allow the submission of internal bid by one or more departments of the contracting authority itself. This, however, does not prevent the contracting authority form terminating a tendering procedure without an award, whereas an in-house solution appeared more efficient: the contracting authority may nonetheless incur in damages for pre-contractual liability insofar as the option of waiving the auction had not been provided for in the contract notice (Racca 2002; Casalini 2008).

To sum up, it is worth noting that many European national legislations, sooner or later, went far beyond EU law scope in order to impose a transparent and fair assessment of the alternative options

of contracting out or providing in-house within their own organisational resources. A compulsory comparative evaluation of organisational v market solutions may be useful as to prevent any distortion of the in-house option that EU internal market rules are unfit to cope with. To that aim, a commonly widespread method of internal or "control" bid seems more adequate as far as it is generally available in every tendering procedure if properly noticed. It fosters competition on a decision-making stage which, in some European Member states at least, traditionally escapes market testing and even judicial review. A case by case approach such as the Italian one concerning public service seems less effective, since it implies external authority's interference and it is only based on predictions and expectations rather than on the effective assessment of actual bids.

5. Conclusions

The aim of EU public procurement legislation to open up the public sector to competition, thus allowing public authorities to enter the economic benefits and advantages entailed by a competitive market, largely depends upon the flexibility of its subjective coverage so as to prevent the risks of sidestepping by national authorities. On the other hand, a broad definition of public sector may prove to be self-defeating should the relationships between public entities within the public sector fall outside the scope of EU directives on public procurement.

EU law provided for a fine-tuned balance between the safeguard of the Member States national sovereignty in designing the organisational patterns and tasks of the public sector and the protection of the European internal market and its competitive structure whenever a public demand applies to it. According to EU law principles (art. 107 and 345 TFEU above all), as further specified in EU public procurement legislation, any arrangements between public entities is considered a market relationship subject to all the relevant competition and public contracts rules, unless the provision is carried out individually or jointly solely within the public authorities' organisations through their own departments. A self provision may take the form either of in-house providing (where the in house provider entity is vertically integrated in its parent authority organisation) or of horizontal cooperation among several territorial authorities without the involvement of any third party.

Every European contracting authority enjoys the freedom of choosing whether to self-provide work, supply or service or to address the market. As far as the exercise of this freedom may curtail the internal market, increasingly national legislations regulate this

choice either admitting internal bid in a tendering procedure or imposing a control over the choice.

The European experience seems useful as to underline the issues that the widening of the subjective coverage of public contracts law entails without, at the same time, denying the power of self-organisation enjoyed by every public administration (Collins, 2008). To that end, it is essential to provide for a non ambiguous definition of those relations amid public entities which, departing from the general rule, have an organisational nature and are active entirely within the public organisation domain without addressing the market at all.

NOTES

[1] EU Commission (2009). *Your Europe - Business*. [On-line]. Available at http://ec.europa.eu/ [Retrieved July 2009]

[2] Case C-31/87, *Gebroeders Beentjes BV* [1988] E.C.R. I-4635, § 11-12: "the term "the State" must be interpreted in functional terms. The aim of the directive, which is to ensure the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts, would be jeopardized if the provisions of the directive were to be held to be inapplicable solely because a public works contract is awarded by a body which, although it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration".

[3] Art. 1, § 9, Directive n. 2004/18.

[4] ECJ, Case C-214/00 *Commission v Spain*, [2003] E.C.R. I-4667, § 53.

[5] ECJ, Case C-470/99 *Universale-Bau AG*, [2002] E.C.R. I-11617, § 58; Case C-44/96 *Mannesmann Anlagenbau* [1998] E.C.R. I-73, § 26.

[6] ECJ, Case C-360/96 *BFI Holding BV*, [1998] E.C.R. I-6821, § 47 "since it is hard to imagine any activities that could not in any circumstances be carried on by private undertakings, the requirement that there should be no private undertakings capable of meeting the needs for which the body in question was set up would be liable to render meaningless the term body governed by public law".

[7] ECJ, Case C-360/96 *BFI Holding BV*, [1998] E.C.R. I-6821, § 44, 51.

[8] ECJ, Case C-223/99 *Agorà s.r.l.*, [2001] E.C.R. I-3605, § 40; ECJ, Case C-283/00 *Commission v Spain.*, [2003] E.C.R. I-11697, § 91 "regardless of the question whether or not there is any official mechanism for offsetting any losses made by SIEPSA, it seems unlikely that it itself should have to bear the financial risks bound up with its activity. In fact, having regard to the fact that the performance of that company's duties is a fundamental constituent of the Spanish State's prison policy, it seems likely that that State, being the sole shareholder, would take all necessary measures to prevent the compulsory liquidation of SIEPSA".

[9] ECJ Case C-18/01 *Korhonen et al.* [2003] E.C.R. I-5321, § 51; Case C-373/00 *Adolf Truley* [2003] E.C.R. I-1931, § 42; Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, § 52; Case C-380/98 *University of Cambridge* [2000] ECR I-8035, § 17.

[10] According to Art. 2, § 1(b), EC Directive n. 2004/17 a "public undertaking" is “any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the contracting authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking: - hold the majority of the undertaking's subscribed capital, or - control the majority of the votes attaching to shares issued by the undertaking, or - can appoint more than half of the undertaking's administrative, management or supervisory body”.
[11] Art. 2, § 2(b), EC Directive n. 2004/17.
[12] Case C-107/98 *Teckal v Comune di Viano* [1999] E.C.R. I-8121, § 51.
[13] Case C-94/99 *ARGE Gewasserschutz v Bundesministerium für Land-und Forstwirtschaft* [2000] E.C.R. I-11037, commented by M. Ohler (2001) 1 P.P.L.R., NA54.
[14] According to art. 345 of the Treaty on the Functioning of European Union (ex art. 295 TEC) “This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership”; moreover Art. 106(1) TFEU states that “In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty”.
[15] Case C-220/05 *Aroux and Comune de Roanne v SEDL* [2007] E.C.R. I-385; Case C-26/03 *Stadt Halle and RPL Lochau GmbH v TREA Leuna* [2005] E.C.R. I-00001; Case C-231/03 *CONAME v Comune di Cingia de’ Botti* [2005] E.C.R. I-7287; see also Joint Cases C-83/01 P, C-93/01 P, C-94/01 P *Chronopost SA, La Poste and French Republic v Ufex et al.* [2003] E.C.R. I-6993, EU Commission’s Communication of November 20, 2007 on *Services of general interest, including social services of general interest: a new European commitment*, COM(2007) 725 final, and EU Commission’s Green Paper of April 30, 2004 on *public-private partnerships and Community law on public contracts and concessions*, COM(2004) 327 final, para. 63.
[16] Art. 1(2) and 1(8), EC Directive n. 2004/18.
[17] Whereas (4), Directive 2004/18.
[18] Art. 55, § 1, lett. e, EC Directive 2004/18.
[19] Case C-26/03 *Stadt Halle* at [48]; Case C-324/07 *Coditel Brabant SA* [2008] E.C.R. I-8457 at [48-49] and Conclusions of AG in Case C-324/07, *Coditel Brabant* at [83]; Conclusions of AG Kokott in Case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [2005] E.C.R. I-8580 at [42, 71, 80] states that “such extensive interference in the organisational sovereignty of Member States and, in particular, in the self-government of many municipalities is – even from the point of view of the market-opening function of procurement law – entirely unnecessary”; see also Case C-186/01 *Dory v. Bundesrepublik Deutschland* [2003] E.C.R. I-2479. The European Charter on Local Self-Government, 15 October 1985 (in force since 1 September 1988), Article 6(1) provides that “without prejudice to more general statutory provisions, local authorities must be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management”

[20] Articles 51 TFEU ("Activities which are connected, even occasionally, with the exercise of official authority") and 106(2) TFEU ("Services of general economic interest" insofar as the application of the rules on competition does not obstruct their performance, in law or in fact") identify functions and services that can depart from EU rules on competition.

[21] Directive 2004/18, Art. 18 states that "this Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty" while Directive 2004/17, Art. 23 et seq. exclude from the application of the utility directive the contracts awarded by a contracting entity, or a joint venture formed exclusively by such entities to carry out utility services, to an affiliated undertaking if two requirements are met: i) the undertaking is considered affiliated only if controlled by the contracting authorities; and ii) at least 80 % of the average turnover of the preceding three years of the undertaking depends upon those contract directly awarded by virtue of the exception itself.

[22] Opinion of AG Bot in Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración del Estado* [2007] E.C.R. I-12175, § 75.

[23] Case C-231/03 *CONAME*; Case C-458/03 *Parking Brixen GmbH*; Case C-26/03 *Stadt Halle*; Case C-107/98 *Teckal*; Case C-337/06 *Bayerischer Rundfunk v GEWA* [2007] E.C.R. I-11173; Case C-29/04 *E.C. Commission v Austria* [2005] E.C.R. I-9705; Case C-237/99*E.C. Commission v French Republic* [2001] E.C.R. I-939; Case C-373/00 *Adolf Truley GmbH v Bestattung Wien GmbH* [2003] E.C.R. I-1931.

[24] Case C-295/05 *Asemfo* [2007] E.C.R. I-2999 at [59]; Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración del Estado* [2007] E.C.R. I-12175; Case C-573/07 *Sea s.r.l. v Comune di Ponte Nossa* [2009] at [81-87]; C-324/07*Coditel Brabant* [2008] at [46-47, 50].

[25] Case C-340/04 *Carbotermo, Consorzio Alisei v Comune di Busto Arsizio* [2006] E.C.R. I-4137 at [39]; Opinion of Advocate General Sixt-Hackl in Case C-26/03 *Stadt Halle and RPL Lochau GmbH v TREA Leuna* [2005] E.C.R. I-0000 at [6-10, 59].

[26] Case C-26/03 *Stadt Halle* at [19]; Case C-324/07 *Coditel Brabant SA* [2008] E.C.R. I-8457 at [34] and Case C-458/03 *Parking Brixen GmbH* at [65]; Case C-340/04 *Carbotermo* at [38].

[27] See also art. 5(2) Regulation 2007/1370/EC on public passenger transport services by rail and by road.

[28] Case C-107/98 *Teckal*; Case C-231/03 *CONAME;* Case C-324/07 *Coditel Brabant SA* [2008] E.C.R. I-8457 at [31]; Case C-340/04 *Carbotermo,* at [37] and Case C-295/05 *Asociación Nacional de Empresas Forestales (Asemfo)* at [57].

[29] Case C-26/03 *Stadt Halle* [2005] E.C.R. I-1 at [19]; Case C-337/05 *Commission v Italy* [2008] E.C.R. I-2173, § 39

[30] Case C-29/04 *E.C. Commission v Austria* [2005] E.C.R. I-9700 at [36, 39, 46]; Case C-458/03 *Parking Brixen GmbH* at [65-67]; Case C-94/99 *ARGE*

Gewasserschutz v Bundesministerium für Land-und Forstwirtschaft [2000] E.C.R. I-11037, commented by M. Ohler (2001) 1 P.P.L.R., NA54; Case C-29/04 *E.C. Commission v Austria* [2005] E.C.R. I-9705; Case C-458/03 *Parking Brixen GmbH* at [64].

[31] This were the cases in Case C-26/03 *Stadt Halle and RPL Lochau GmbH v TREA Leuna* [2005] E.C.R. I-00001, Case C-337/05 *Commission v Italy* [2008] E.C.R. I-2173, Case C-29/04 *E.C. Commission v Austria* [2005] E.C.R. I-9705

[32] Case C-295/05, *Asemfo* [2007], E.C.R. I-2999 at [59, 65].

[33] Case C-371/05 *E.C. Commission v Italy* [2008] E.C.R. I-110 at [25]; Case C-324/07 *Coditel Brabant SA* [2008] E.C.R. I-8457 at [41]; Case C-573/07 *Sea s.r.l. v Comune di Ponte Nossa* [2009].

[34] Case C-340/04, *Carbotermo* at [69]-[72]; Case C-295/05 *Asociación Nacional de Empresas Forestales (Asemfo)* at [59, 65]; Case C-324/07 *Coditel Brabant SA* [2008] E.C.R. I-8457 at [18, 27]; Case C-371/05 *E.C. Commission v Italy*.

[35] Art. 5(2) of Regulation 2007/1370/EC on public passenger transport services by rail and by road.

[36] Art. 1 referring to Annex I of EC Directive n. 71/305/CEE on public work procurement.

[37] Case C-480/06 *Commission v Germany* [2009]

[38] Stating that "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".

[39] According to Case C-480/06 *Commission v Germany* [2009], § 47 "such cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors".

[40] Case C-324/07 *Coditel Brabant SA* [2008] E.C.R. I-8457 at [41]

[41] EC Commission *Green Paper on public-private partnerships and Community law on public contracts and concessions*, April 30th, 2004, COM(2004) 327 def., § 63; EC Commission *Interpretative Communication on the application of Community Law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP)*, February 5th, 2008, C(2007) 6661; EU Commission *Communication on Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnership*, November 19th, 2009, COM(2009) 615 final.

[42] Art. 23-bis of Law Decree of June 25th, 2008, n.112

REFERENCES

Anderson, R.D., Kovacic, W.E. (2009) "Competition policy and international trade liberalisation: essential complements to ensure good performance in public procurement markets" *Public Procurement Law Review* 18 (2): 67-101

Arrowsmith, S. (1997) ''Some problems in delimiting the scope of the Public Procurement Directives: privatisations, purchasing consortia and in-house tenders'' *Public Procurement Law Review* 6 (5): 198-204

Arrowsmith, S. (2003) *Government Procurement in the WTO*, The Hague, New York, London: Kluwer Law International

Arrowsmith, S. (2005) *The Law of Public and Utilities Procurement*, 2nd edn., London: Sweet and Maxwell

Avarkioti, F. (2007) "The application of EU public procurement rules to 'in house' arrangements", *Public Procurement Law Review* 16 (1): 22-35

Burgi, M. (2010) "In-House providing in Germany", in Comba, M., Treumer, S. (eds.), *The In-House Providing in European Law* (pp. 71-93). Copenhagen: DJØF Publishing

Caranta, R. (2010) "The In-House providing: The Law as It Stands in the EU", in M. Comba, S. Treumer (eds.), *The In-House Providing in European Law* (pp. 13-52). Copenhagen: DJØF Publishing

Casalini, D. (2009) "Oltre la tutela della concorrenza: le forme giuridiche nazionali di esercizio dell'impresa pubblica" *Giornale di diritto amministrativo* (9): 969-977

Casalini, D. (2008) "La scelta tra mercato e auto-produzione di beni e servizi" *Foro amministrativo – C.d.S.* (4): 1158-1180

Cavallo Perin, R., Casalini, D. (2006) "L'in house providing: un'impresa dimezzata" *Diritto Amministrativo* (1): 51-97

Cavallo Perin, R., Casalini, D. (2009) "Control over In-house Providing Organisations" *Public Procurement Law Review* 18 (5): 227-240

Collins, D. (2008) “Canada’s sub-central coverage under the WTO Agreement on Government Procurement” *Public Procurement Law Review* 17 (1): 21-35

Dischendorfer, M. (2007) “The compatibility of contracts awarded directly to ‘joint executive services’ with the Community rules on public procurement and fair competition” *Public Procurement Law Review* 16 (5): NA123-130

Footer, M. (1994) “External aspects of the Community's public procurement policy in the utilities sectors” *Public Procurement Law Review* 3 (6): 187-194

Kaarresalo, T. (2008) “Procuring in-house: the impact of the EC procurement regime” *Public Procurement Law Review* 17 (6): 242-254

Mardas, D. (1994) “The profile of the industries supplying the utilities sectors in the southern regions of the E.C.**”** *Public Procurement Law Review* 3 (2): 87-97

Neergaard, U. (2007) “Public service concessions and related concepts - the increased pressure from Community law on Member States' use of concessions” *Public Procurement Law Review* 16 (6): 387-409

Olivera, P. (1997) “Defining the Scope of Covered Entities under the WTO Agreement on Government Procurement'” *Public Procurement Law Review* 6(1): 1–26

Pedersen, K., Olsson, E. (2010) “Commission v Germany - a new approach to in-house providing?” *Public Procurement Law Review* 19 (1): 33-45

Pontarollo, E. (1994) “Procurement in the utility sector in Italy” *Public Procurement Law Review* 3 (1): 1-15

Prosser, T. (2005) *The Limits of Competition Law: Markets and Public Services* Oxford: Oxford University Press

Racca, G.M. (2002) “Sindacato sulla decisione di non procedure all’aggiudicazione di un appalto Pubblico (recesso dalle trattative) e responsabilità precontrattuale” *Foro amministrativo – C.d.S.* (9): 1966-1980.

Spyra, M. (2010) “In-House providing in polish Public procurement Law”, in M. Comba, S. Treumer (eds.), *The In-House Providing in European Law* (pp. 139-164). Copenhagen: DJØF Publishing

Treumer, S. (2010) “In-House providing in Denmark”, in Comba, M., Treumer, S. (eds.), *The In-House Providing in European Law* (pp. 165-185). Copenhagen: DJØF Publishing

Trybus, M. (2010) “From the indivisible Crown to Teckal: the In-House provision of works and services in the united Kingdom”, in Comba, M., Treumer, S. (eds.), *The In-House Providing in European Law* (pp. 187-211). Copenhagen: DJØF Publishing

Wang, P. (2007) “Coverage of the WTO's agreement on government procurement: challenges of integrating China and other countries with a large state sector into the global trading system” *Journal of International Economic Law*, 10 (4): 887-920

Weltzien, K. (2005) “Avoiding the procurement rules by awarding contracts to an in-house entity - scope of the procurement directives in the classical sector”, *Public Procurement Law Review* 14 (5): 237-255

Williamson, O.E. (1999) “Public and Private Bureaucracies: A Transaction Cost Economics Perspective” *The Journal of Law, Economics and Organization*, 15 (1): 306-342