

***Commission v Germany: A New  
Approach on  
In-house Providing?***

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# *Commission v Germany: A New Approach on In-house Providing?*

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## 1. Introduction

On June 9, 2009 the European Court of Justice (the ECJ) handed down its judgment in *Commission v Germany* (C-480/06).<sup>1</sup> The case, the facts of which are described below (see section 3), concerns the scope for co-operation between local authorities without the need for a tendering procedure in accordance with the detailed rules of Directive 92/50 (which in all aspects relevant to this article are the same as in the new Directive 2004/18).<sup>2</sup> At first glance the judgment may appear to the reader to be contradictory to the ECJ's settled case law on what the Court itself refers to as in-house providing (the so called *Teckal* doctrine, described in further detail below in section 2).<sup>3</sup> Consequently the judgment has, in Sweden as well as in other Member States, given rise to discussions among those active within the field of public procurement. Some commentators have even expressed the view that the judgment in *Commission v Germany* represents a new approach on in-house providing.

However, it is submitted that there is more to the judgment than first meets the eye and that there is logic to be found in what first may appear illogical. The purpose of this article is to try to clarify why the judgment in fact does not contravene previous case law on in-house providing, but rather should be perceived as the ECJ applying the underlying principles of previous case law to a new situation.

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<sup>1</sup> *Commission v Federal Republic of Germany* (C-480/06), judgment of June 9, 2009, not yet reported in E.C.R.

<sup>2</sup> Council Directive 92/50 relating to the co-ordination of procedures for the award of public service contracts [1992] OJ L209/1–24; Directive 2004/18 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114–240.

<sup>3</sup> The *Teckal* doctrine has been analysed extensively in a number of articles in P.P.L.R. See for instance: Toni Kaarresalo, "Procuring In-house: The Impact of the EC Procurement Regime" (2008) 17 P.P.L.R. 242; Fotini Avarkioti, "The Application of EU Public Procurement Rules to 'In House' Arrangements" (2007) 16 P.P.L.R. 22; and Kurt Weltzien, "Avoiding the Procurement Rules by Awarding Contracts to an In-House Entity—Scope of the Procurement Directives in the Classic Sector" (2005) 14 P.P.L.R. 237.

## 2. In-house providing—the Teckal doctrine

### 2.1 Previous case law of the ECJ

According to the EC directives on public procurement, the previous as well as the current ones, public contracts are contracts for pecuniary interest concluded in writing between economic operators (suppliers, service providers or contractors) and contracting authorities.<sup>4</sup> Such economic operators may very well themselves be contracting authorities, i.e. as a general rule, public contracts awarded by an authority to another fall within the scope of the directives.<sup>5</sup>

According to the case law of the ECJ, 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, i.e. entities not forming part of its own organisation. In such a case, no contract for pecuniary interest is concluded with an entity legally distinct from the contracting authority, and there is therefore no need to apply the Community rules on public procurement.<sup>6</sup> To put it simply, a purchase within different branches of the same authority, even if it is formalised in a contract, is not a public contract within the meaning of the directives.

However, the ECJ has declared that contracts awarded between separate legal entities, i.e. contracts that would normally be regarded as public contracts, may sometimes be awarded without application of the rules of the directives. In its own words the ECJ has,

“... allowed an exception to the application of the directives on the award of public works contracts, the so-called ‘in-house providing’ exception, which relates to contracts made by a contracting authority with certain public organisations that are linked to itself. The limits on that exception were clarified in particular in Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50, and Case C-94/99 *ARGE Gewässerschutz* [2000] ECR I-11037, paragraph 40. It is clear from those judgments that in the absence of an express exception it is sufficient in principle, for a public works contract to exist, that the contract has been concluded between a local authority on the one hand and a person legally separate from the latter on the other hand. The only case where it is otherwise is where, at the same time, the local authority exercises over that person control similar to that which it exercises over its own departments and where the person carries out most of its activity with the authority or authorities which own it.”<sup>7</sup>

The in-house providing exception first launched in *Teckal*, and hence often referred to as the *Teckal* doctrine, has been developed further in a number of cases,<sup>8</sup> three of which are of particular interest for the topic dealt with in the present article. These are, to the extent necessary, explained below.

<sup>4</sup> Previously Directive 92/50 [1992] OJ L209/1–24 (services) art.1(a); Directive 93/36 [1993] OJ L199/1–53 (supply) art.1(a); Directive 93/37 [1993] OJ L199/54–83 (works) art.1(a); and Directive 93/38 OJ L199/84–138 (utilities) art.1.4 now; Directive 2004/18 [2004] OJ L134/114–240 (classic sector) art.1.2(a); and Directive 2004/17 [2004] OJ L134/1–113 (utilities sector) art.1.2(a).

<sup>5</sup> *Commission v Spain* (C-84/03) [2005] E.C.R. I-139; (2005) 14 P.P.L.R. NA78 at [40].

<sup>6</sup> *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* (C-26/03) [2005] E.C.R. I-0001; (2005) 14 P.P.L.R. NA72 at [48].

<sup>7</sup> *Commission v Spain* (C-349/97) [2003] E.C.R. I-3851 at [204].

<sup>8</sup> The Court has developed the *Teckal* doctrine in a number of cases. For a comprehensive guide to the ECJ’s case law on public procurement see A. Sundstrand, *The European Court of Justice’s case law on public procurement (Sw: EG-domstolens domar om offentlig upphandling)* (Stockholm: Nordsteds Juridik AB, 2006). *Teckal Srl v Comune di Viano* (C-107/98) [1999] E.C.R. I-8121, (2000) 9 P.P.L.R. CS41; *ARGE Gewässerschutz v Bundesministerium für Land- und Forstwirtschaft* (C-94/99) [2000] E.C.R. I-11037 (2001) 10 P.P.L.R. NA54; *Commission v Spain* (C-349/97) [2003] E.C.R. I-3851; *Stadt Halle* [2005]

In *Stadt Halle* the ECJ clarified that the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes the possibility of that contracting authority exercising over the company a control similar to that which it exercises over its own departments.<sup>9</sup>

In *Commission v Spain* the Court found a provision of Spanish law to constitute incorrect transposition of the public procurement directives where it excluded relations between public authorities and, in a general manner, non-commercial bodies governed by public law from the scope of the Spanish public procurement regulation.<sup>10</sup>

Furthermore, in *Coditel Brabant*, the ECJ found that the delegation by a municipality of a public service to an inter-municipal co-operative, the object of which was exclusively to provide services to the affiliated municipalities, could legally take place without a call for tenders. The Court considered that, notwithstanding the autonomous aspects of that co-operative's management by its board, the affiliated municipalities had to be regarded as though they together were exercising control over the co-operative.<sup>11</sup>

## 2.2 The Swedish approach to in-house providing—the SYSAV cases

For a long period of time it was thought that the *Teckal* doctrine, as developed by the ECJ, was applicable also in Sweden and in several cases in the Swedish county administrative courts and administrative courts of appeal the criteria first launched in *Teckal* were in fact applied. However, in all previous cases the result was that a call for tenders should have been made, and that the absence of such a call for tenders was considered to constitute a breach of the national Swedish legislation implementing the EC directives.

On March 17, 2008, however, the Swedish Supreme Administrative Court handed down its judgment in the so called SYSAV cases, which concerned a municipal company's provision of waste disposal services on behalf of one of the owners, the municipality of Simrishamn.<sup>12</sup> In the judgment the Supreme Administrative Court found that the *Teckal* doctrine could not be applied, since the Swedish legislation did not contain any such exception to the obligation to conduct a formal procurement procedure. In other words the Supreme Administrative Court found that the Swedish

E.C.R. I-0001, (2005) 14 P.P.L.R. NA72; *Commission v Spain* (C-84/03) [2005] E.C.R. I-139, (2005) 14 P.P.L.R. NA78; *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* (C-231/03) [2005] E.C.R. I-7287, (2005) 14 P.P.L.R. NA153; *Parking Brixen GmbH v Gemeinde Brixen, Stadtwerke Brixen AG* (C-458/03) [2005] E.C.R. I-8585, (2006) 15 P.P.L.R. NA40; *Commission v Austria (Mödling)* (C-29/04) [2005] E.C.R. I-9705, (2006) 15 P.P.L.R. NA52; *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari, AMTAB Servizio SpA* (C410/04) [2006] E.C.R. I-3303, (2006) 15 P.P.L.R. NA217; *Carbotermo v Comune di Busto Arsizio* (C-340/04) [2006] E.C.R. I-4137, (2006) 15 P.P.L.R. NA150; *Jean Auroux v Commune de Roanne* (C-220/05) [2007] E.C.R. I-385, (2007) 16 P.P.L.R. NA65; *Commission v Italy (Augusta Bell Helicopters)* (C-337/05) [2008] E.C.R. I-2173, (2008) 17 P.P.L.R. NA187; *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* (220/06) [2007] E.C.R. I-12175, (2008) 17 P.P.L.R. NA204; *Asemfó v Tragsa* (C-295/05) [2007] E.C.R. I-2999, (2007) 16 P.P.L.R. NA123; *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale* (C-324/07) Judgement of November 13, 2008, not yet reported in E.C.R., (2009) 18 P.P.L.R. NA73.

<sup>9</sup> *Stadt Halle* (C-26/03) [2005] E.C.R. I-0001 at [49].

<sup>10</sup> *Commission v Spain* (C-84/03) [2005] E.C.R. I-139 at [37]–[41].

<sup>11</sup> *Coditel Brabant* (C-324/07) [2008] at [41] as explained by the ECJ in *Commission v Germany* at [35].

<sup>12</sup> The Supreme Administrative Court's Yearly Reports, reference no.26 (Sw: RÅ 2008 ref 26).

legislation did not leave any room for application of the *Teckal* doctrine, at least not with regard to contracts awarded by municipalities to municipal companies.<sup>13</sup>

The judgment, besides giving rise to vivid discussions in particular among municipal representatives, also resulted in the Swedish Government appointing a rapporteur to prepare a proposal on a possible amendment to the Swedish legislation in order to make the *Teckal* criteria applicable in Sweden. The proposal was published in the Ministry publications series in July this year.

### 3. Commission v Germany—facts of the case

#### 3.1 Background to the case

The four administrative districts of Harburg, Rotenburg (Wümme), Sotau-Fallingbostel and Stade, hereinafter referred to as the *Landkreise*, concluded a contract on December 18, 1995 with the City of Hamburg relating to the disposal of waste in a new incineration facility at Rugenberger Damm without an open or restricted tendering procedure at Community level. In the contract, the City of Hamburg refuse disposal services agreed to make available to the *Landkreise* a capacity of 120,000 tonnes per year for the purpose of incineration of waste in the Rugenberger Damm plant and the *Landkreise* agreed to pay the City of Hamburg refuse disposal services an annual fee, part of which was fixed and part of which depended on the amount of waste delivered.

The Commission decided to act following a complaint from a citizen who considered that he was paying excessive charges for waste management and by letter of formal notice sent on March 30, 2004, pursuant to the first paragraph of art.226 EC, the Commission informed the German authorities that, by concluding a contract on waste disposal directly, without issuing a call for tenders or conducting a tendering procedure at European level, Germany had disregarded the combined provisions of art.8 and of Titles III to VI of Directive 92/50.

By letter of June 30, 2004 Germany replied that, from its perspective, the contract in dispute was an agreement on the shared performance of a public service which was the responsibility of the *Landkreise* and the City of Hamburg and that it was a question of co-operation at local district level. As Germany explained, the subject-matter of the contract was an activity taking place within the ambit of the state which did not affect the market and therefore did not fall within the scope of the law on public procurement.

Being dissatisfied with the explanation of Germany, the Commission sent a reasoned opinion dated December 22, 2004, in which it declared that the contract fell within the scope of Directive 92/50 and, after finding that Germany could not refute the claims set out in the reasoned opinion, the Commission brought an action against Germany.

#### 3.2 Arguments of the parties

The Commission first submitted that Directive 92/50 was applicable to the situation since the *Landkreise* were to be considered as contracting authorities and since the contract in question

<sup>13</sup> Arguably, the Supreme Administrative Court's decision is based on the Swedish tradition of legal interpretation which, by international standards, could be considered as keeping rather close to the letter of the law, therefore not allowing for exceptions which are not expressed therein.

constituted a written contract of pecuniary interest exceeding the thresholds for application of that directive and regarding the provision of a service covered category 16 in Annex IA.

Germany contended that Directive 92/50 was not applicable since the contract was merely a cumulation of a transaction internal to the administrative authorities. The City of Hamburg could therefore not be considered a service provider acting in return for payment, but as a body governed by public law responsible for waste disposal and offering administrative co-operation to neighbouring local authorities in return for reimbursement of its operating costs.

Germany, joined by the Netherlands, further contended that the content of the contract in question went beyond what could be considered as a service contract within the meaning of Directive 92/50. In this regard the contract contained an obligation for the *Landkreise* to provide the City of Hamburg landfill capacity which the *Landkreise* did not themselves use, in order to alleviate the lack of such capacity confronting the City of Hamburg. As the Member States pointed out, the contract also contained other provisions facilitating the co-operation between the contracting parties in the joint performance of their legal obligation to dispose of waste in the region concerned.

The Commission, however, did not accept the argument that the services provided could be regarded as an administrative co-operation, since the refuse disposal services did not carry out their activities under statute or other unilateral measures, but on the basis of a contract.

The Commission further invoked the above-mentioned case law of the ECJ, stating that the only accepted derogations from the application of Directive 92/50 are those which are exhaustively and expressly mentioned therein. In particular the Commission referred to *Commission v Spain* (C-84/03) at [38]–[40], where the Court confirmed that contracts for horizontal co-operation concluded by local authorities, such as that which the present case concerns, are subject to the law on public procurement.

Germany, however, disagreed with this interpretation of *Commission v Spain*, holding that the Court did not expressly state that all agreements concluded between administrative bodies fell within the scope of public procurement law but merely criticised Spain for its general exclusion of agreements concluded between public law bodies from the scope of the law.

The Commission also submitted that Germany could not rely on the in-house providing exception, i.e. the *Teckal* doctrine, since the condition relating to the existence of control was not fulfilled in the case, where none of the contracting bodies concerned exercised any power over the management of the City of Hamburg refuse disposal services.

Germany contended that the criteria of control, which had to be measured against the yardstick of the public interest, was indeed fulfilled owing to the interdependence of the contracting parties for the fulfilment of the objectives set out in the contract. Any divergence from the objectives jointly defined would cause the co-operation to cease altogether. The principle of “give and take” therefore implied, according to the German Government, that the City of Hamburg refuse disposal services and the *Landkreise* concerned had a mutual interest in maintaining that co-operation.

The Netherlands further submitted, on the basis of the Court’s ruling in *Asemfo*, that the control exercised by the public body concerned need not be identical to that which the public body exercises over its own departments, only similar.<sup>14</sup>

The Commission, however, took the view that the control criteria only applies where a specific legal framework establishes a relationship of dependency and subordination, allowing similar control to be exercised by several contracting authorities. Therefore it was not applicable in the situation at hand where such a framework was lacking.

<sup>14</sup> *Asemfo v Tragsa* (C-295/05) [2007] E.C.R. I-2999.

The Commission also submitted that Germany had not provided for any technical reasons for why the contract should be excluded from the scope of Directive 92/50.

Germany submitted that the City of Hamburg refuse disposal services probably could not have submitted a tender in an open or restricted procedure, since it did not have the capacity to recover waste that could have prompted it to participate in such a call for tenders. It was only in the light of the need of the *Landkreise* concerned to recover their waste and of the assurance that the *Landkreise* would use a future facility that the construction of the Rugenberger Damm facility was envisaged.

Finally, the Commission rejected the arguments of Germany that the application of Directive 92/50 must be excluded, pursuant to art.86(2) EC, where, as in the present case, it lead to the performance by public bodies of the task of waste disposal assigned to them being obstructed. Germany pointed out that if the contract at issue had not been concluded, none of the parties would have been able to perform its public task. The City of Hamburg, in particular, would not have been able to build a facility with extra capacity in order to then try, without any guarantee of success, on economic grounds to sell unused capacity on the market.

### 3.3 Findings of the Court

The Court began by outlining the limits of the Commission's action, stating that it concerned only the contract between the City of Hamburg refuse disposal services and the *Landkreise* and not the contract governing the relationship between the City of Hamburg refuse disposal services and the operator of the Rugenberger Damm waste treatment facility. The Court then proceeded by defining public service contracts stating that the fact that the service provider was a public entity distinct from the beneficiary of the services did not preclude the application of Directive 92/50. Recalling its case law relating to the in-house providing exception, the Court reiterated that a call for tenders is not mandatory where a public authority, which is a contracting authority, exercises over the separate entity concerned control similar to that which it exercises over its own departments, provided that that entity carries out the essential part of its activity with the public authority or with other controlling local or regional authorities. As the Court pointed out, this exception also applies where, as in *Coditel*, affiliated municipalities had to be regarded as together exercising control over the service provider at hand. However, as was undisputed in the case, the *Landkreise* did not exercise control over either the City of Hamburg refuse disposal services nor over the semi-private operator of the Rugenberger Damm waste incineration facility.

Having thereby excluded the possibility of the control criteria of the *Teckal* doctrine being fulfilled, the Court proceeded to observe that the contract established co-operation between local authorities with the aim of ensuring performance of a public task which they all had to perform, namely waste disposal. The Court also noted that this task related to the implementation of Council Directive 75/442 of July 15, 1975 on waste, which requires the Member States to draw up plans for waste management providing. Member States are in particular to draw up plans for appropriate measures to encourage rationalisation of the collection, sorting and treatment of waste, one of the most important of such measures being, pursuant to art.5(2) of Council Directive 91/156 of March 18, 1991, amending Directive 75/442, ensuring that waste be treated in the nearest possible installation.<sup>15</sup>

<sup>15</sup> Council Directive 75/442 on waste [1975] OJ L194/39 and Council Directive 91/156 amending Directive 75/442 [1991] OJ L78/32.

After having defined the scope of the subject matter of the case, i.e. by limiting it to the contract between the City of Hamburg refuse disposal services and the *Landkreise* and by clarifying that the *Teckal* doctrine could not be applied in the case owing to the lack of fulfilment of the control criteria, the Court then went on to examine some of the factual circumstances of the case.

The Court found it to be common ground that the contract between the City of Hamburg refuse disposal services and the *Landkreise* must be analysed as the culmination of a process of inter-municipal co-operation between the parties thereto and that it contained requirements to ensure that the task of waste disposal was carried out. The purpose of the contract was to enable the City of Hamburg to build and operate a waste treatment facility under the most favourable economic conditions owing to the waste contributions from the neighbouring *Landkreise*, making it possible for a capacity of 320,000 tonnes per annum to be attained. For that reason, the construction of that facility was decided upon and undertaken only after the four *Landkreise* concerned had agreed to use the facility and entered into commitments to that effect.

The subject-matter of the contract was expressly indicated in the first clauses. It was primarily the undertaking given by the City of Hamburg refuse disposal services to make available to the four *Landkreise* concerned a treatment capacity of 120,000 tonnes of waste annually with a view to thermal utilisation in the Rügenberger Damm facility. It did not, however, offer any guarantee in that regard.

The obligations of the City of Hamburg refuse disposal services towards the *Landkreise* were instead limited to offering replacement capacity, that obligation being conditional, however, in two respects. First, the disposal of the City of Hamburg's waste had to take priority and, secondly, capacity had to be available in other facilities to which the City of Hamburg refuse disposal services had access.

In return for this service the *Landkreise* were to pay an annual fee, the method of calculation and means of payment of which were specified in the contract. Moreover, the *Landkreise* were under an obligation to make available to the City of Hamburg refuse disposal services the landfill capacity which they did not use themselves, in order to alleviate the lack of landfill capacity of the City of Hamburg. They also agreed to take for disposal in their landfill the quantities of slag remaining after incineration that could not be utilised, in proportion to the quantities of waste which they had delivered.

The contracting parties were furthermore to assist one another in performance of their legal obligation to dispose of waste.

The last factual circumstance that the Court emphasised was that there were no financial transfers between the City of Hamburg refuse disposal services and the four *Landkreise* concerned, other than those corresponding to the reimbursement of the part of the charges borne by those *Landkreise* but paid by the City of Hamburg refuse disposal services to the operator.

From this list of factual circumstances the Court proceeded to conclude that the contract in question formed both the basis and the legal framework for the future construction and operation of a facility intended to perform a public service, namely thermal incineration of waste. The contract was concluded solely by public authorities, without the participation of any private party, and did not, according to the Court, provide for or prejudice the award of any contracts that might be necessary in respect of the construction and operation of the waste treatment facility.

Referring to its decision in *Coditel Brabant*, the Court reiterated that a public authority has the possibility of performing the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities not forming part of its own departments, and that it may do so in co-operation with other public authorities.

The Court then concluded its legal reasoning by addressing the Commission's contention that if the co-operation at issue had taken place by means of the creation of a body governed by public

law to which the various local authorities concerned entrusted performance of the task in the public interest of waste disposal, it would have accepted that the use of the facility by the *Landkreise* did not fall under the rules on public procurement. The Commission held that in the absence of such a body for inter-municipal co-operation, a call for tenders should have been issued for the service contract concluded between the City of Hamburg refuse disposal services and the *Landkreise*.

The Court merely stated that Community law does not require public authorities to use any particular legal form in order to jointly carry out their public service tasks. The Court then went on to state that such co-operation does not undermine the free movement of services and the opening-up of undistorted competition in the Member States. Where implementation of such co-operation 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, referred to in Directive 92/50, is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors, there is no need to put the contracts out for competition.

In light of these circumstances and since there was, according to the Court, nothing in the information in the file submitted to the Court to indicate that the local authorities at issue were contriving to circumvent the rules on public procurement, the Court dismissed the Commission's action.

## 4. Commission v Germany—possible ways of interpretation

### 4.1 Institutional and purely contractual co-operation between contracting authorities

At first glance, the ECJ's ruling in *Commission v Germany* seems to differ significantly from the Court's previous case law on the in-house providing exception. As the Court established early on in the judgment, the control criterion was not fulfilled in the case since the four *Landkreise* could not exercise control, similar to that which they exercised over their own departments, over either the City of Hamburg refuse disposal services or the semi-private operator of the Rugenberger Damm waste incineration facility. As we have known the Court to apply the *Teckal* doctrine this would normally be the end of it, since the in-house providing exception can only be applied where such control exists. However, as we have seen above, in *Commission v Germany* the Court did not stop there. Instead the Court engaged in a seven-paragraph long, and rather detailed, analysis of the factual circumstances of the case, including descriptions of the nature of the obligations under the contract and the method of payment for the services provided. The Court then reiterated its case law in *Coditel Brabant*, stating that a public authority has the possibility of performing the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities not forming part of its own departments, and that it may do so in co-operation with other public authorities. This might of course strike the reader as odd, especially since the paragraph in *Coditel Brabant* to which the Court refers deals with the fulfilment of the control criterion, a possibility that was already excluded some nine paragraphs earlier.

After having declared that Community law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks and that there is nothing to indicate that, in this case, the local authorities at issue were contriving to circumvent the rules on public procurement, the Court dismissed the Commission's action.

The judgment has led some readers to believe that the previous case law on the *Teckal* doctrine has been overturned and that the Court has now adopted a more lenient approach towards exempting contracts concluded between public entities from the scope of the directives. This has been said to be

the case especially where a contract can be considered as related to the fulfilment of the obligations laid down in the Council Directive 75/442 of July 15, 1975 on waste.

However, it is submitted that such an interpretation of *Commission v Germany* is not correct. Instead it seems far more likely that the judgment should be read in connection with, and perceived as closely related to, the judgment in *Coditel Brabant*. As explained above, the *Coditel Brabant* case concerned co-operation between municipalities, without any involvement of private parties, in an inter-municipal co-operative for the performance of services. In the *Coditel Brabant* case it was therefore possible for the Court to find that the municipalities jointly exercised control since the co-operation was organised in a separate legal entity, namely the inter-municipal co-operative.

In *Commission v Germany*, however, such control could not be established since there was no legal entity over which the *Landkreise* could exercise control. Instead there was a contract in which the *Landkreise* and the City of Hamburg refuse disposal services agreed to co-operate much in the same way as was agreed among the municipalities in *Coditel Brabant*.

Hence, whereas the situation in the *Coditel Brabant* case could, by analogy to the terminology used by the Commission to categorise PPPs, be described as an institutionalised co-operation, the situation in *Commission v Germany* instead is best categorised as a purely contractual (or non-institutionalised) co-operation.<sup>16</sup>

It is therefore submitted that, as indicated by the Commission at the hearing, the *Landkreise* and the City of Hamburg refuse disposal services, simply by setting up a separate legal entity and transferring their shared waste management obligations to this entity, would have been able to organise their co-operation so that the in-house providing exception would have been applicable. Hence the question that faced the Court was therefore not one of whether there was need to make the in-house providing exception more lenient when it comes to services such as waste management but rather whether, all other things being equal, the application of Community law in the field of public procurement should be made dependent on whether or not public entities decide to organise their co-operation by setting up a separate legal entity or by way of a contract, i.e. by way of institutionalised or purely contractual co-operation. It is submitted that the Court's ruling in *Commission v Germany* is intended to clarify that the application of the directives is not dependent on the form of co-operation between public entities, but on the actual content of that co-operation.

The fact that the Court has taken a functional rather than a formal position on this matter is of course commendable from a European, as well as a subsidiarity, perspective since it allows for different national variations with respect to how the Member States choose to organise the fulfilment of their public service obligations at national level. It also does away with some earlier interpretations of the applicability of directives to co-operation between separate public entities within the state. In Sweden for instance, the Court's ruling in *Commission v Spain* (C-84/03) has been held to mean that municipalities and county councils as a general rule have to conduct a public procurement procedure before entering into contracts of pecuniary interest with each other, regardless of the content or circumstances of the contract. Meanwhile entities forming part of the state, i.e. government authorities, have been alleviated of that obligation regardless of the effect on competition of the relevant contract and regardless of whether or not the *Teckal* doctrine is applicable. The explanation for this is that, according to some case law from the Swedish courts, all government authorities are considered as being part of the same legal entity, regardless of how independently they may act, while municipalities and county councils are considered

<sup>16</sup> Green Paper on public-private partnerships and Community law on public contracts and concessions, COM(2004/0327) final; see in particular para.20.

to be separate legal entities. In light of the Court's ruling in *Commission v Germany* it is submitted that it might be time to re-evaluate this position and perhaps move towards a more in casu based approach.

#### 4.2 Is there a new test developing?

The question arises as to how the national courts should apply the statements made by the Court in *Commission v Germany* to municipal co-operation at the national level. Is there a new test developing for purely contractual co-operation between contracting authorities and if so how should, according to the Court's judgment in *Commission v Germany*, such a test be applied?

As mentioned in the previous section, the Court dealt with a number of factual circumstances before deciding the case. Already from this fact, one can draw the conclusion that the ruling is not easily transferred or applied to other circumstances or other cases and that we are still far from having any general test, similar to the *Teckal* doctrine, for purely contractual co-operation. Hopefully we will see the Court develop such a test in future case law.

However, it is possible from the circumstances emphasised by the Court to draw some conclusions as to what the Court might consider when examining whether or not a purely contractual co-operation is exempted from the public procurement rules.

Perhaps most importantly the Court established that the case concerned only the contract entered into by the City of Hamburg refuse disposal services and the *Landkreise*. In other words, the Court did not examine, and the judgment consequently does not entail any conclusions on, the relationship between the City of Hamburg refuse disposal services and the operator of the Rugenberger Damm waste treatment facility which was a semi-private entrepreneur. The Court returned to this point at the end of its reasoning in the judgment, stating that:

“That contract was concluded solely by public authorities, without the participation of any private party, and does not provide for or prejudice the award of any contracts that may be necessary in respect of the construction and operation of the waste treatment facility.”

It is submitted that the Court essentially is trying to make two points clear to the reader by making these statements. First, perhaps being aware of some public authorities' tendency to over-interpret any exception from the scope of the public procurement rules, the Court states that a procurement procedure still has to be conducted, only at another stage of the process, namely when the City of Hamburg refuse disposal services engages a private or semi-private company for the construction and/or operation of the waste treatment facility. That is to say, the fact that the contract between the City of Hamburg refuse disposal services and the *Landkreise* falls outside the scope of the directives does not mean that all other contracts relating to the same service but awarded to other parties may be awarded without a call for tenders. If the contract between the City of Hamburg refuse disposal services and the operator of the Rugenberger Damm waste treatment facility is a public contract for services or, which seems likely, a service concession it is to be awarded in accordance with Community law. Secondly, the Court is, it is submitted, essentially saying that any involvement of a private interest in a purely contractual co-operation between public entities excludes the possibility of such a contract being exempt from public procurement rules. The Court is thereby keeping in line with its previous case law relating to the control criterion in institutionalised co-operation schemes,

where exemption is conditional on the fact that there is no private party interest in the co-operation body.<sup>17</sup>

The second set of circumstances that the Court emphasised are those relating to the non-commercial character of the contract. Statements that we perceive as belonging to this category are first, the Court's emphasis on the fact that the contract provides a means for local authorities to ensure that a public task that they all have to perform, namely waste disposal, is carried out and that this task is related to non-commercial obligations stemming from Community law.

Related to the non-commercial character of the contract are also the Court's statements regarding the exchange of obligations and mutual dependence between the City of Hamburg refuse disposal services and the *Landkreise*, as expressed at [39]–[42] of the judgment, giving the overall impression that the contract was not typically one that would be of interest for private parties but rather a contract which bears a number of characteristics which are specific to the unique relationship between two branches of government.

Also relating to the non-commercial character of the contract is the Court's emphasis on the fact that the contract does not give rise to any financial transfers between the *Landkreise* and the City of Hamburg refuse disposal services, other than those corresponding to the reimbursement of the part of the charges borne by those *Landkreise* but paid by the City of Hamburg refuse disposal services to the operator. There is, in other words, no profit to be made, only costs which may be covered, for the City of Hamburg refuse disposal services in the contractual relationship.

It is submitted that these statements are meant to emphasise that the object of the contract is to regulate relations which are normally kept out of the private sphere. The fact that the contract is virtually non-profit indicates that there would be little interest on the part of private companies to submit tenders had the contract been put out to competition in a public procurement procedure. There is for this reason no negative impact on competition resulting from the direct award of the contract at hand. In this sense the situation is similar to a co-ordinated public procurement procedure where one procuring authority executes the procurement procedure on behalf of a number of public authorities. In such a situation one would use the demand of all the authorities in order to calculate the value of the contract. However, if the procuring authority does not charge any fee for conducting the procurement procedure on behalf of the others, the agreement to entrust to one of the contracting authorities the duty of handling the procurement procedure may be awarded directly, since the agreement would not be a contract of pecuniary interest.

In this context it should be mentioned that the Court, if it had examined the scheme in its entirety, i.e. not only the contract between the City of Hamburg refuse disposal services but also the contract between the City of Hamburg refuse disposal services and the operator of the Rugenberger Damm waste treatment facility, might have found that there were in fact financial gains to be made for the City of Hamburg from entering into the contract with the *Landkreise*. Such financial gains, which could for example consist of revenue from the production and/or sale of energy from the waste treatment facility or from the City of Hamburg refuse disposal services being able to use the contract with the *Landkreise* as leverage when negotiating prices with operator of the Rugenberger Damm waste treatment facility, were, however, not examined by the Court. This is of course due to the fact that the Commission had limited the scope of its action to the contract between the City of Hamburg refuse disposal services and the *Landkreise*. It is, however, submitted that the side-benefits

<sup>17</sup> *Stadt Halle* (C-26/03) [2005] E.C.R. I-0001 at [49].

of the contract, had they been considered by the Court, might have led the Court to make a different conclusion on whether or not the contract would have been of interest to private companies, i.e. on whether or not the direct award of the contract would in fact have a negative impact on competition.

The third major line of reasoning in the judgment has in part been dealt with above but deserves special attention since we believe it holds the key to the proper understanding of the case. As the Court states at [47], the legal form of co-operation should not, contrary to what the Commission in the preceding paragraph is said to have suggested, have any influence on whether or not a co-operation agreement is exempted from application of the public procurement rules. As briefly explained above, this statement has to do with the need for the European legal system to be adaptable to a wide variety of, present and future, national circumstances and constellations. Ultimately this has to do with the internal coherence of Community law and the fact that an economic operator seeking to submit a tender in a public procurement procedure should be able to rely on the public procurement directives being applied consistently regardless of the internal structure of each Member State.

In its last comment before dismissing the Commission's action, the Court stated that there was nothing in the information in the file submitted to the Court to indicate that the local authorities were contriving to circumvent the rules on public procurement. Much as in *Commission v Austria* the Court by this statement indicated its willingness to enforce Community law where a procurement scheme prima facie seems to be in accordance with the case law of the Court on exceptions from the public procurement directives but where evidence suggests that the scheme was set up by the contracting authority for the purpose of avoiding application of the public procurement rules.<sup>18</sup> Inserting this statement at the end of the ruling is of course a way of mitigating the potential risk for abuse of purely contractual co-operation.

### 4.3 The consistency between the institutionalised and the non-institutionalised tests

It is submitted that *Commission v Germany* serves the purpose of applying the underlying purpose of the *Teckal* doctrine in general and of the *Coditel* judgment in particular to the situation of purely contractual (non-institutionalised) co-operation agreements between public authorities. If this is correct, *Commission v Germany* is in essence to purely contractual co-operation what *Teckal* is to institutionalised co-operation. Hence there should also be consistency between the *Teckal* doctrine and the test applied in *Commission v Germany*.

It is submitted that the circumstances emphasised by the Court in *Commission v Germany* serve to indicate the following:

- The scheme is set up by entities forming part of the state (in its wide EC law definition) without any involvement of private parties.
- The services provided for in the contract are to a large extent non-commercial and are therefore in themselves of little or no interest for a private party.
- The scheme is not created as a way of avoiding application of the public procurement rules.

The first part of the "test" is indeed very similar to the control criterion of the *Teckal* doctrine, which also excludes the possibility of private involvement by prohibiting private ownership of the legal person set up to perform the service in question.<sup>19</sup>

<sup>18</sup> *Commission v Austria (Mödling)* (C-29/04) [2005] E.C.R. I-9705.

<sup>19</sup> *Stadt Halle* (C-26/03) [2005] E.C.R. I-0001 at [49].

The second part serves the same purpose, only now it is aimed at public entities gaining an unfair advantage in markets that are subject to competition. The same reasoning can be found in state aid law where funds transferred from a public entity in a non-commercial sector to a public entity in a commercial sector may constitute state aid, since it has the potential of causing distortions in the market. The direct award of a contract for services which are not subject to competition cannot as such distort competition. The same underlying reasoning can be found in the second criterion of the *Teckal* doctrine, limiting the extent to which the service providing entity can provide services to entities which do not exercise control over it, i.e. that are not a part of the internal scheme.<sup>20</sup> If the entity providing the services is only, or at least only for the essential part, allowed to provide services to the owners, the transaction is considered internal and therefore of no consequence to competition. In such a situation the directives, to use the words of the Court, no longer has any *raison d'être*.<sup>21</sup> However, if the public entity also provides its services to other contracting authorities, which previously might have been purchasing the services from private parties, the fact that the public entity is directly awarded contracts by the contracting authorities might strengthen its position on the market in an unfair manner. As argued by Advocate General Léger in *ARGE*, it is the authors' belief that this criterion, in both instances, is designed to hinder public entities from gaining an unfair advantage on behalf of private competitors, with regard to public sector customers, when providing services in a competitive market.<sup>22</sup>

Lastly, it is submitted that the last part of the "test" in *Commission v Germany* is intended to create room for manoeuvre for the Court in future cases, i.e. by allowing for schemes which are formally in line with the case law of the Court to be rejected where it is obvious that they are a way of avoiding the full application of Community law. As previously mentioned this line of reasoning also can be found in the Court's case law on the *Teckal* doctrine.<sup>23</sup>

## 5. Conclusions

Through its judgment in *Commission v Germany* the Court has stayed faithful to its previous case law relating to institutionalised in-house providing by creating a way to deal with purely contractual (non-institutionalised) in-house providing schemes. Instead of trying to stretch the *Teckal* doctrine beyond its logical limits, it is submitted that the Court has begun to develop a test which is more apt to deal with purely contractual situations. This is of course commendable. Had the Court attempted to adopt the *Teckal* doctrine by for instance expanding the definition of control, as Germany suggested, this could easily have been over-interpreted and abused by contracting authorities also in institutionalised schemes. By instead developing a new line of reasoning which, as pointed out above, serves the same purpose, the *Teckal* doctrine is left intact while a proper balance is struck between the interest of intermunicipal co-operation and the need for undistorted competition.

The Court's reasoning in *Commission v Germany* will hopefully also serve to clarify, with regard to co-operation between contracting authorities, that it is the effects on competition and the four freedoms, and not the legal form, which ultimately decides whether or not a direct award is contrary to Community law.

<sup>20</sup> For development of the second *Teckal* criterion see *Carbotermo* (C-340/04) [2006] E.C.R. I-4137 at [68]–[71] and *Asemfo v Tragsa* (C-295/05) [2007] E.C.R. I-2999 at [62]–[65].

<sup>21</sup> *Carbotermo* (C-340/04) [2006] E.C.R. I-4137 at [62].

<sup>22</sup> AG Léger in *ARGE Gewässerschutz* (C-94/99) [2000] E.C.R. I-11037 at [61].

<sup>23</sup> *Commission v Austria (Mödling)* (C-29/04) [2005] E.C.R. I-9705; (2006) 15 P.P.L.R. NA52.

