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A State aid perspective on certain elements of Article 12 of the new Public Sector Directive on in-house provision

Grith Skovgaard Ølykke* and Cecilie Fanøe Andersen†

1. Introduction

It has always been entirely up to contracting authorities to decide whether to make or buy; if they choose to make (in-house), no contract is awarded in the sense of the public procurement Directives,¹ whereas if they choose to buy (ex-house), the rules on public procurement must be followed. The *Teckal* judgment of the Court of Justice of the European Union (CJEU) was the beginning of the era of the case law based in-house rule delimiting the scope of when an in-house award occurs.² In *Teckal*, the CJEU found that even when the provider is a separate legal entity the “contract” award is in-house, and not subject to the EU public procurement rules, if two conditions are fulfilled: firstly, the contracting authority must exercise control over the provider at a level similar to the control it exercises over its own departments (“similar control criterion”); and, secondly, the provider must supply the essential part of its activities to the controlling contracting authority (“essential part of activities criterion”).³ This case law based on the in-house rule has been referred to as the “quasi-in-house rule”,⁴ as it covers arrangements where the provider is a separate legal entity, and, hence, its scope is wider than what might intuitively be expected from the word “in-house”. Where appropriate, the denomination “quasi-in-house” will be used in this article; however, the term “in-house” will in most cases be used as covering all types of in-house arrangements. The era of the case law based on the in-house rule, which has now been codified in Article 12 of the new Public Sector Directive, lasted close to 15 years and was a real exercise in

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¹ See Article 1(2) (a) of the current Public Sector Directive: Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134/114 and Article 2(1) (5) of the new Public Sector Directive: Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ 2014 L 94/65.

² *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* (C-107/98) [1999] E.C.R. I-8121.

³ *Teckal* (C-107/98) [1999] E.C.R. I-8121 at [49]–[50].

⁴ Cf. the terminology used by A.G. Stix-Hackl in her opinion on 23 September 2004 concerning *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* (C-26/03) [2005] E.C.R. I-1; R.C. Perin and D. Casalini, “Control over in-house providing organisations”, P.P.L.R. 2009(5), 227-240 at p. 231; and, J. Wiggen, “Public procurement rules and cooperation between public sector entities: the limits of the in-house doctrine under EU procurement law”, P.P.L.R. 2011(5), 157-172, at p. 161. Other terms have been used, such as the “extended in-house rule”, see S. Treumer, “In-House Providing in Denmark” in M. Comba and S. Treumer (eds) *The In-house Providing in European Law* (Copenhagen: DJØF Publishing, 2010), 165-185, at 168.

balancing, on the one hand, flexibility for public authorities to organise their service provision and, on the other hand, the risk of granting a competitive advantage to the in-house provider; hence, it has given rise to much academic debate.⁵ Two of the central clarifications to *Teckal* are that the control criterion cannot be fulfilled if private capital is involved, because private investors pursue other objectives than do contracting authorities,⁶ and that both the similar control criterion and the essential part of activities criterion can be fulfilled jointly by several contracting authorities.⁷

The codification of the in-house case law in the new Public Sector Directive, which in some ways deviates from the case law based on the in-house rule by being more permissive,⁸ could be viewed in different ways. On the one hand, contracting authorities gain much more flexibility in organising provision of their public tasks, which has clearly been a political objective in the codification. On the other hand, the (from a political/contracting authority perspective) strict approach taken by the CJEU had the unarticulated advantage of safeguarding against breach of State aid rules and distortion of competition. This function could be compromised by the permissive codification. In this article, a State aid perspective on the new in-house rule in the new Public Sector Directive will be taken. This is a highly relevant topic, because while the contracting authority's choice to self-supply via in-house entities cannot be challenged under public procurement law⁹ – especially with the permissive codification of case law – the *conditions* under which such entities operate may be challenged under other rules, in particular the State aid rules.¹⁰

Below, in section 2, the actual purpose of the in-house rule will be determined. In section 3, the relation between public procurement rules and State aid rules will be set out briefly, to provide

⁵ See, e.g. K. Weltzien, “Avoiding the procurement rules by awarding contracts to an in-house entity – scope of the procurement directives in the classical sector”, P.P.L.R. 2005(5), 237-255; F. Avarkioti, “The application of EU public procurement rules to “in-house” arrangements”, P.P.L.R. 2007(1), 22-35; T. Kaarresalo, “Procuring in-house: the impact of the EC procurement regime”, P.P.L.R. 2008(6), 242-254; Perin and Casalini (fn. 4); M. Comba and S. Treumer (fn. 4); Wiggen, (fn. 4).

⁶ *Stadt Halle* (C-26/03) [2005] E.C.R. I-1 [50], as confirmed by e.g. *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* (C-231/03) [2005] E.C.R. I-7287; [2006] 1 C.M.L.R. 2 at [26]; *Commission of the European Communities v Republic of Austria (Mödling)* (C-29/04) [2005] E.C.R. I-9705; [2006] 1 C.M.L.R. 40 at [47]; *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari and AMTAB Servizio SpA* (C-410/04) [2006] E.C.R. I-3303; [2006] 2 C.M.L.R. 63 at [31]; *Jean Auroux and Others v Commune de Roanne* (C-220/05) [2007] E.C.R. I-385 at [64]; *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale* (C-324/07) [2008] E.C.R. I-8457; [2009] 1 C.M.L.R. 29 at [30]; *Commission of the European Communities v Federal Republic of Germany* (C-480/06) [2009] E.C.R. I-4747; [2010] 1 C.M.L.R. 32 implicitly at [36]; *Sea Srl v Comune di Ponte Nossa* (C-573/07) E.C.R. I-8127; [2010] 1 C.M.L.R. 10 at [46]; *Acoset SpA v Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others* (C-196/08) E.C.R. I-9913; [2010] 1 C.M.L.R. 35 at [53]; and, *Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH* (C-91/08) E.C.R. I-2815 at [51].

⁷ See e.g. *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* (C-295/05) [2007] E.C.R. I-2999 [2007]; 2 C.M.L.R. 45 at [62] and *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale* (C-324/07) [2008] E.C.R. I-8457; [2009] 1 C.M.L.R. 29 at [50]. *Coditel* has recently been qualified by *Econord SpA v Comune di Cagno and Comune di Varese and Comune di Solbiate and Comune di Varese* (C-182-183/11) [2013] 2 C.M.L.R. 7, where the CJEU reminded Member States of the requirement of actual control by influence over both the strategic objectives and the significant decisions, cf. [27] and [31].

⁸ See also J. Wiggen, “Directive 2014/24/EU: the new provision on co-operation in the public sector”, P.P.L.R. 2014 (3), 83-93 at p. 85

⁹ As emphasised in Recital 5 and Article 1(4) of the new Public Sector Directive.

¹⁰ Competition rules may also be relevant.

context for the remainder of the analysis. In section 4, a State aid perspective is taken on certain aspects of the codification of the in-house case law, the way in which competition could be distorted is explained, and proposals as to how contracting authorities may reduce the risk of granting State aid are made. In section 5, it is concluded that the permissive codification of the in-house case law could lead to distortion of competition between private undertakings and the risk of granting State aid to the in-house entity making this entity capable of conducting cross-subsidization, which could distort competition in the markets where in-house providers compete with other undertakings. However, it is proposed that the risk could be minimised by measures which Member States or each contracting authority must or could enact.

2. The purpose of the in-house rule

Article 345 TFEU, which states that “The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership”, is the legal basis for the right to make (in-house and quasi-in-house situations) rather than to buy. The provision ensures that Member States and hence their contracting authorities can autonomously decide on the organisation of their markets. The link to Article 345 TFEU is not clear from the judgment in *Teckal*, where the CJEU did not elaborate on the basis for extending the in-house concept to other legal entities. However, A.G. Cosmas argued that the decisive point in distinguishing between internal delegation¹¹ and contractual relationship between two separate legal persons is the presence of “*two autonomous wills representing separate legal interests in a manner consistent with the customary form of relationship that characterises the contractual relationship*”,¹² and he emphasised the public procurement Directives’ objective of free and undistorted competition.¹³ Essentially, these considerations together reveal that the purpose of the quasi-in-house exemption is to allow contracting authorities to autonomously organise the provision of public tasks in the manner they find most efficient, without the burden of the public procurement regime; that is, according to political and economic preferences.¹⁴ However, it is required that the involved entities actually form part of the public sector and, hence, that the (legal) interests of the contracting authority and any separate legal entity are coinciding; moreover, competition on markets where private undertakings operate must not be distorted.

The autonomy to organise the public sector has subsequently been articulated by the CJEU in a line of case law.¹⁵ In *Commission v Germany*,¹⁶ the CJEU allowed the cooperation between four

¹¹ For critique of this criterion as a relevant factor, see J. Wiggen, (fn. 4) at p. 164.

¹² Opinion of A.G. Cosmas on 1 July 1999 concerning *Teckal Srl mod Comune di Viano og Azienda Gas-Acqua Consorziata (AGAC) di Reggio Emilia* (C-107/98) [1999] E.C.R. I-8121 at [64] and [67]. See also *Stadt Halle* (C-26/03) [2005] E.C.R. I-1 at [50] and prior to *Teckal* opinion of A.G. La Pergola on 19 February 1998 concerning *Gemeente Arnhem and Gemeente Rheden v BFI Holding BV* (C-360/96) [1998] E.C.R. I-6821 at [37] – [38].

¹³ Opinion of A.G. Cosmas on 1 July 1999 concerning *Teckal* (C-107/98) [1999] E.C.R. I-8121 at [65].

¹⁴ See also J. Wiggen, “Anskaffelsesreglene og samarbeid I offentlig sector: om avgrensningen av anskaffelsesdirektivets kontraktsbegrep utenfor læren om egenregi” in T. Madell, T. Bekkedal and U. Neergaard (eds.), *Den Nordiska välfärdem och marknaden* (Uppsala: Iustus Förlag, 2011), 281-306, at pp. 290 and 297.

¹⁵ *Commission of the European Communities v Federal Republic of Germany* (C-480/06) [2009] E.C.R. I-4747; [2010] 1 C.M.L.R. 32; *Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di*

Landkreise and the municipality of Hamburg concerning the delivery of waste by the Landkreise to an incinerator build by the municipality of Hamburg, and operated by a semi-private undertaking (the contract with the operator of the incinerator was explicitly not an aspect in the breach of Treaties procedure)¹⁷. The CJEU found that, even in the absence of control, public authorities are free to organise the fulfilment of public service tasks and it firmly emphasised that EU law does not require public authorities to use any particular legal form when they (jointly) carry out the public service tasks.¹⁸ The CJEU added that it was essential that the cooperation was governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and that no private undertaking was placed in a position of advantage vis-à-vis competitors,¹⁹ hereby implicitly referring to the private participation in the operation of the incinerator. In *Università del Salento*, direct award of a contract concerning consultancy services for a study and an evaluation of the seismic vulnerability of hospital structures in the province of Lecce, had been made by the Local Health Authority of Lecce in Italy to the local University. Italy argued that the contract concerned public interest tasks. The CJEU clarified that public-public cooperation where the *Teckal* criteria are not fulfilled could only be exempted from the public procurement rules, where the cooperation has the aim of ensuring that a public task, which all the involved public entities have to perform, is carried out.²⁰ The CJEU added that such contracts must be concluded exclusively by public entities, without the participation of a private party; it must be ensured that no private provider of services is placed in a position of advantage vis-à-vis competitors (the contract allowed use of external collaborators, which the CJEU pointed out might be private undertakings)²¹; and, implementation of that cooperation must be governed solely by considerations and requirements relating to the pursuit of objectives in the public interest.²² Hence, these recent cases, which by

Lecce and Others (C-159/11); [2013] 2 C.M.L.R. 17; and, *Piepenbrock Dienstleistungen GmbH & Co. KG v Kreis Düren* (C-386/11); [2014] 1 C.M.L.R. 1.

¹⁶ This judgment has been widely discussed, see e.g. T. Kotsonis, “Co-operative arrangements between public authorities in the pursuit of a public interest task: Commission of the European Communities v Federal Republic of Germany (C-480/06)” PPLR 2009 (6) NA212-216; K. Pedersen and E. Olsson, “Commission v Germany - A new approach to In-House Providing?” 2010 (1) PPLR 33-45; M.T. Karayigit, “A new type of exemption from the EU rules on public procurement established: “in thy neighbour’s house” provision of public interest tasks”, PPLR 2010 (6), 183-197; S. Treumer, “In-House Providing in Denmark” in M. Comba and S. Treumer (eds.) *The In-house Providing in European Law*, 165-185, at pp. 173-176; Wiggen (fn. 4); G.S. Ølykke, “The Definition of a Contract under Article 106 TFEU” in E. Szyszczak, J. Davies, M. Andenæs, T. Bekkedal, (eds.) *Legal Developments in Services of General Interest* (TMC Asser Press, 2011), 103-120, at pp. 117-119.

¹⁷ Cf. *Commission v Germany* (C-480/06) [2009] E.C.R. I-4747 at [31] read in conjunction with [36].

¹⁸ *Commission v Germany* (C-480/06) [2009] E.C.R. I-4747 at [45] – [47]. This was contrary to the position of the Commission who had argued that the cooperation could only be accepted if a jointly owned legal entity had been formed.

¹⁹ *Commission v Germany* (C-480/06) [2009] E.C.R. I-4747 at [47].

²⁰ *Università del Salento* (C-159/11) [2012] at [34]. *Università del Salento* was followed up by *Piepenbrock Dienstleistungen GmbH & Co. KG v Kreis Düren* (C-386/11). See also Ølykke (fn. 16) at pp. 117-118 for a discussion of *Commission of the European Communities v Federal Republic of Germany* (C-275/08) [2009] E.C.R. I-168, where the service was not a public task, and which may be seen as a forerunner for the other judgments mentioned in this footnote.

²¹ *Università del Salento* (C-159/11) [2012] E.C.R. I- at [38].

²² *Università del Salento* (C-159/11) [2012] E.C.R. I- at [35].

some academics have been perceived as a “new” exemption for public-public cooperation,²³ appears to be justified on the basis of the original purpose of the quasi-in-house rule.²⁴ At least, the same considerations of allowing for efficient organisation of public interest tasks²⁵ without distorting competition between private undertakings or in markets where private undertakings operate, underlie these judgments. The purpose underlying the in-house rule has been carried on in the new Public Sector Directive, cf. Recitals 31-34.

Case law on the quasi-in-house rule and the public service task exemption developed in *Commission v Germany* shows that the CJEU will accept efficient organisation of the public sector as a legitimate ground for many types of agreements and arrangements between public entities,²⁶ as long as there is no underlying intent of circumvention of the public procurement rules.²⁷ However, the CJEU has not elaborated on the other underlying concern, namely on when or how competition may be distorted between private undertakings as an effect of in-house arrangements.²⁸ Neither has the CJEU, or the new Public Sector Directive, elaborated on the potential distortion of competition in markets where the in-house entity competes with private undertakings. The potential distortion of competition is only mentioned, not exemplified. Further explanation from the CJEU would have helped clarify why the safeguards put in place in the case law are indeed necessary. In this context, it should be noted that Recital 4 of the current Public Sector Directive, which stresses the obligation to ensure that the participation of a body governed by public law as tenderer must not distort competition in relation to private tenderers, has been removed in the new Public Sector Directive, so that any focus on the possible distortions caused by public participation in the market is entirely absent.²⁹

3. State aid and public procurement

State aid is defined in Article 107(1) TFEU, as construed by the CJEU in its case law, as: a transfer of State resources, by the State, providing an economic advantage to one or more undertakings

²³ E.g. Karayigit (fn. 16), at p. 192; M. Steinicke, “In house-kontrakter eller administrative aftaler” in T. Madell, T. Bekkedal and U. Neergaard (eds.), *Den Nordiska välfärdem och marknaden* (Uppsala: Iustus Förlag, 2011), 259-280, at pp. 276-280.

²⁴ Along these lines, see Karayigit (fn. 16), at p. 189 and Wiggen (fn. 4) at p. 159.

²⁵ For an emphasis on this purpose, see also Wiggen (fn. 4), at pp. 167 and 171 and Ølykke (fn. 16) at p. 119.

²⁶ See also *Technische Universität Hamburg-Harburg and Hochschul-Informationssystem GmbH v Datenlotsen Informationssysteme GmbH* (C-15/13) at [25].

²⁷ *Commission v Germany* (C-480/06) [2009] E.C.R. I-4747 at [48]. See also *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* (C-220/06) [2007] E.C.R. I-12175 at [42] read in conjunction with [53]-[54] and [59], which concerned the impact of liberalisation of the postal sector on the duty to conduct a public procurement procedure, and *Club Hotel Loutraki AE and Others v Ethnico Symvoulio Radiotileorasis and Ypourgos Epikrateias and Aktor Anonymi Techniki Etaireia (Aktor ATE) v Ethnico Symvoulio Radiotileorasis* (C-145 and 149/08) [2010] E.C.R. I-4165; [2010] 10 C.M.L.R. 33 at [59] and [61].

²⁸ Distortion of competition is also emphasised by Wiggen (fn. 14), at p. 299 who, however, does not specify *how* competition could be distorted.

²⁹ However, the CJEU has acknowledged potential distortion of competition by public tenderers, cf. *Conorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa) v Regione Marche* (C-305/08) [2009] E.C.R. I-12121, in particular [32] – [33]. *CoNISMa* was a kind of follow up on the preliminary questions answered by the CJEU in *ARGE Gewässerschutz v Bundesministerium für Land- und Forstwirtschaft* (C-94/99) [2000] E.C.R. I-11037; [2002] 3 C.M.L.R. 39.

which distorts competition and affects trade between Member States. “State” is very widely construed, and includes at least all public authorities;³⁰ hence, contracting authorities will usually be the “State” in the sense of Article 107(1) TFEU. “A transfer of State resources” does not necessarily entail a subsidy; the concept of aid is wider because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect.³¹ In the context of in-house provision, it should be noted that the concept of “undertaking” for the purpose of State aid and competition law is defined as the exercise of economic activities, i.e. supply of goods and services on the market, and each separate activity must be assessed; hence, at least the market activities of an in-house entity constitutes an undertaking in the sense of State aid and competition law.³²

Under the more or less just completed modernisation of the State aid regime, public procurement has been a focal point as a tool to prevent or minimise granting of State aid.³³ However, it appears that the discussion of State aid implications of the increased flexibility, not least in the in-house context, has been completely absent in the negotiations of the new public procurement Directives. As a general rule, when there has been a public procurement procedure with genuine competition (i.e. more than one qualified tenderer participates, the contracting authority does not have a preferred tenderer, and there has been no collusion between tenderers), no economic advantage will be granted in the award of the contract, competition will not be distorted,³⁴ and, hence, no State aid will be involved. The competition for the contract, where every (or a number of) qualified tenderer(s) have been able to participate and potentially win the contract, normally eliminates the

³⁰ See K. Bacon, *European Community Law of State Aid*, Oxford University Press, 2009, 26; C. Quigley, *European State Aid Law and Policy*, 2nd ed. Hart Publishing, 2009, 13; L. Hancher, T. Ottervanger and J.P. Slot, *EU State Aids*, 4th ed. Sweet & Maxwell, 2012, 60-61.

³¹ *Banco de Crédito Industrial SA, now Banco Exterior de España SA v Ayuntamiento de Valencia* (C-387/92) [1994] E.C.R. I-877; [1994] 3 C.M.L.R. 473 at [13].

³² Along similar lines, see opinion of A.G. Geelhoed on 28 September 2006 concerning *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* (C-295/05) [2007] E.C.R. I-2999 at [67]-[68]. See also the draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, para. 14, where it is stated that even in in-house situations an economic activity can exist e.g. where other economic operators are willing and able to provide the service. The draft Commission Notice is available at: http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf (accessed in June 2014).

³³ See Communication from the Commission (fn. 32), paras. 91-99, on the criteria a public procurement procedure must meet in order to exclude the risk of granting State aid.

³⁴ See e.g. *P & O European Ferries (Vizcaya), SA and Diputación Foral de Vizcaya v Commission of the European Communities* (T-116&118/01) [2003] E.C.R. II-2957 at [118]; [2003] 3 C.M.L.R. 14; N264/2002 United Kingdom: *London Underground Public Private Partnership*; N46/2007 United Kingdom: *Welsh Public Sector Network Scheme*; or, N110/2008 Germany: *JadeWeserPort - Financement d'infrastructures portuaires*. See also paras. 92-99 in the draft Commission Notice (fn. 32), where it seems that a transaction is in line with market conditions if certain criteria are met. Moreover, see A. Bartosch, “The relationship between public procurement and State aid surveillance - the toughest standard applies?” CMLR, 2002, 39, 3, 551-576. at p. 562 and P. Nicolaidis and I.E. Rusu, “Competitive Selection of Undertakings and State Aid: Why and When Does it Not Eliminate Advantage?”, *European Procurement & Public Private Partnership Law Review* 2012(1), 5-29, at pp. 7-8.

risk of an economic advantage being granted, because market price is paid.³⁵ It is submitted that this is the case even if it is not the tenderer offering the lowest price who is being awarded the contract, as long as there has been competition on criteria other than price.³⁶ However, in some circumstances, the Commission has nevertheless found that, despite the conduct of a public procurement procedure, it could not rule out the presence of State aid to the successful tenderer.³⁷ Considering in-house situations, absence of sufficient competition to eliminate the risk of State aid is an irrelevant consideration since no competition has occurred at all; therefore in-house situations by their nature expose contracting authorities to the risk of granting State aid. If State aid is granted without being notified to the Commission,³⁸ it is illegal, and even if it may still be compatible with the internal market, the beneficiary (the in-house provider) may have to pay illegality interests if competitors file a case at a national court.³⁹ If the State aid is incompatible with the Internal Market, it must be fully recovered.⁴⁰

Distortion of competition in the sense of Article 107(1) is a relatively wide concept. It is closely related to the concept of an economic advantage, as it encompasses any distortion emanating from the economic advantage an undertaking could get over its competitors; hence, the benchmark is normal market conditions and a level playing field.⁴¹ The major problem with in-house situations is of course that due to the absence of any competition, it is not possible to rule out that the in-house entity which also operates in the market has certain advantages which (may be used to) distort competition. In the in-house context, competition may be distorted in at least two ways. Firstly, the in-house entity could gain advantages which affects its ability to perform in the competitive market, such as a continuous stable demand, enabling it to climb the learning curve fast(er than competitors), and to fully use capacity, thereby minimising costs. In-house entities may also have an image-advantage in other markets, arising from their connection to the public sector. Other cost advantages, such as absence of financial risks, as the public owner/buyer will always ensure timely payment, and the reduced risk/transaction costs compared to other undertakings when contracting

³⁵ See also Nicolaidis and I.E. Rusu, (fn. 33) at p. 5. P.A. Baistrocchi, “Can the Award of a Public Contract be deemed to Constitute State Aid?” *European Competition Law Review* 2003 24(19), 510-517, at pp. 516-517, finds that a properly conducted public procurement procedure prevents selectivity, as no specific economic operator can be targeted.

³⁶ For a more reserved position, see Nicolaidis and Rusu (fn. 34), p. 20.

³⁷ E.g. N213/2003 United Kingdom: *ATLAS - Broadband infrastructure scheme for business park*, where a complaint to the Commission resulted in a restructuring of the public procurement procedure to avoid State aid; N57/2005 United Kingdom: *Regional Innovative Broadband Support*; and, SA.32019 Denmark: *Danish Radio Channel FM4*, COM(2011) 1376 final, where the Commission at [54] could not rule out State aid even though a tender procedure was conducted, due to the specific circumstances of the case; however, possible State aid was exempted according to Article 106(2) TFEU.

³⁸ As required by Article 108(3) TFEU.

³⁹ *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)* (C-199/06) [2008] E.C.R. I-469; [2008] 2 C.M.L.R. 20. Concerning the national courts' obligation to adopt preliminary measures, see *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)* (C-1/09) [2010] E.C.R. I-2099; [2010] 3 C.M.L.R. 12; and *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH* (C-284/12); [2014] 2 C.M.L.R. 20.

⁴⁰ Cf. Article 14 of Regulation No 659/1999/EC of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ [1999] L 83/1.

⁴¹ It is much wider than distortion of competition under Articles 101 and 102 TFEU.

with the public sector, as no cost of tendering is irrecoverable due to absence of competition, might also be considered to distort competition. The mentioned advantages of contracting with the public sector would normally be factored into the price in a public procurement procedure. Secondly, and probably most pertinent, competition could be distorted by the in-house entity's pricing behaviour, such as cross-subsidization.⁴² Cross-subsidization occurs if the in-house provider in its price-setting allocates all of its fixed and common costs to the price of in-house provision, and only covers its variable costs in the price on the competitive market.⁴³ All of these kinds of distortion of competition are relevant under the State aid rules.

4. A State aid perspective on the new in-house rule

A risk of granting State aid and distorting competition is triggered by a number of elements in the permissive codification of the in-house case law in Article 12 of the new Public Sector Directive. Firstly, according to Article 12(2), control as such is no longer a condition, as the controlled entity may also purchase from the controlling entity, or from other entities controlled by the controlling entity, without observing the rules on public procurement.⁴⁴ Secondly, according to Article 12(1) (b), (3) (b) and (4) (c), the transaction is considered to be in-house as long as 80 % of the controlled entity's activities are provided for the contracting authority (controlling entity). Thirdly, according to Article 12(1) (c) and (3) (c), "non-controlling" and "non-blocking" forms of private capital participation being required by national law, which must be in conformity with the Treaties, does not rule out an in-house situation.

These issues will be examined below in sections 4.1 and 4.2. Subsequently, in section 4.3, it will be discussed how the risk of granting State aid, which arises due to the absence of competition for the directly awarded contracts to the in-house entity, may be reduced.

4.1 The inverted control criterion and the relaxed essential part of activities criterion

The point of departure is a duty to conduct a public procurement procedure, as soon as procurement is made ex-house. In *Teckal* and subsequent in-house case law, the CJEU relaxed this point of departure and allowed direct award of contracts to legal entities separate from the contracting authority, but made such awards contingent *inter alia* on the exercise of a level of control similar to that which the contracting authority exercise over its own internal departments. In *Coditel Brabant*⁴⁵ this was further relaxed to allow for joint control between several contracting

⁴² There are substantial differences between how cross-subsidization is addressed under competition rules and under State aid rules; See J-L. Sierra and L. Hancher, "Cross-subsidization and EC law", CMLR, 1998, 35, 4, 901-945, at p. 909.

⁴³ Whereas issues of cross-subsidization has previously primarily been a concern in utility sectors, where it could jeopardise the successful introduction of competition as part of the liberalisation, cf. Hancher and Sierra (fn. 42), at pp. 901-902, the in-house situation could be viewed as a move in the opposite direction, since the in-housing is arguably the opposite of liberalisation, and the in-house provider is allowed to enter competitive markets.

⁴⁴ This is already allowed under the current Utilities Directive; see Article 23(2) (a) read in conjunction with Article 23(1).

⁴⁵ *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale* (C-324/07) [2008] E.C.R. I-8457 at [50], even though such joint control had previously been rejected by the CJEU in *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* (C-231/03) [2005] E.C.R. I-7287 at [24].

authorities.⁴⁶ However, Article 12(2) of the new Public Sector Directive removes the control criterion by stipulating that controlled entities may award contracts to the controlling contracting authority and to sister entities as well. This may make good sense, as the control exercised by the controlling entity could reasonably extend to the purchasing activities and as the activities could be conceived as being performed by related entities (à la concern);⁴⁷ if a separate legal entity is in-house to a controlling entity (in the sense that it is chosen to make, rather than buy), arguably the converse should also apply.

The policy choice of inverting the control criterion should be viewed in conjunction with the fixing of the essential part of activities criterion, which supports the control criterion, as freedom to act in the market would diminish the control and in-house character of the entity.⁴⁸ All though not expressly stated by the CJEU, presumably, the idea of allowing the in-house entity to operate on the market, as long as it supplies the essential part of its activities to the controlling entity, is to avoid spare capacity lingering unused; some types of tasks demanded by the public sector are seasonal in character or excess capacity exists due to security of supply obligations, and the manpower/equipment might be utilised in the private market, when the public demand is not at its peak. The CJEU has previously refused to state a specific percentage limiting the scope of market activities for in-house entities;⁴⁹ however, in the codification of the in-house case law the essential part of activities criterion has been fixed so it allows 20 % market participation.⁵⁰ It could however have been argued that the relaxation of the control criterion in reality means that in-house entities would have less of a problem utilising spare capacity, and therefore should not have been allowed to operate on the market at all.

The problem from a State aid perspective is that the codification of the in-house rule has abandoned the safeguards put in place by the CJEU to avoid distortion of competition in the market: now we may see in-house entities with a reserved market which is not restricted to the controlling entity's demand but also includes the demand of related entities - in other words, a reliable income - operating with 20 % of its capacity on competitive (local) markets. Even though it has probably not been intended at the political level, this state of law is highly problematic for local SMEs which could experience a shrinking size of the local market, due to the wider scope of in-house activities and the possibility of in-house providers carrying out 20% of their activity on the market.

⁴⁶ Recent cases include *Sea Srl v Comune di Ponte Nossa* (C-573/07) E.C.R. I-8127 and *Econord SpA v Comune di Cagno and Comune di Varese and Comune di Solbiate and Comune di Varese* (C-182-183/11).

⁴⁷ In the recent *Technische Universität Hamburg-Harburg and Hochschul-Informationssystem GmbH v Datenlotsen Informationssysteme GmbH* (C-15/13), the CJEU did not find that it was necessary to take a position on the current state of law on this point under the current Public Sector Directive; see [32]-[33].

⁴⁸ Along these lines, see *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA* (C-340/04) [2006] E.C.R. I-4137 at [61]; [2006] 3 C.M.L.R. 7.

⁴⁹ *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA* (C-340/04) [2006] E.C.R. I-4137 at [56], and *Asociación Nacional de Empresas Forestales (Asemfo)* (C-295/05) [2007] E.C.R. I-2999 at [63], where 90% of activities was confirmed to be an essential part. See also *Centro Hospitalar de Setúbal EPE, Serviço de Utilização Comum dos Hospitais (SUCH) v Eurest (Portugal) – Sociedade Europeia de Restaurantes Lda*, (C-574/12) at [20] read in conjunction with [45].

⁵⁰ Which is the same as the “affiliated undertaking” provision of the current Utilities Directive; see Article 23(3). The same level is fixed in the new Utilities Directive; see Article 28(1) (b), on in-house, and Article 29(4) on affiliated undertakings.

A relevant related question is how the 20% of activities is calculated. The way in which the essential part of activities should be measured has not yet been subject of a major case, but a few examples of assessment by the CJEU exist.⁵¹ In *Carbotermo*, which concerned the direct award of contracts to an entity owned 100 % by a holding company, which was owned by a number of public authorities, the CJEU held that activities carried out for third parties must only be of marginal significance and that both quantitative and qualitative criteria must be taken into account in the assessment of whether that is the case.⁵² Moreover, the CJEU rejected the view that the territory of the controlling entity could be a relevant factor, and emphasised that *all* activities carried out for the controlling entity or on its behalf should be taken into account.⁵³ *Asemfo* concerned the claimed in-house entity Tragsa, which carried out forestry works for the Spanish State and some municipalities as well as for private customers.⁵⁴ Competitors to Tragsa, represented by the National Association of Forestry Undertakings, complained about the direct award of contracts to Tragsa. Even though the CJEU found that probably no public contract was present, as Tragsa was an instrument of the public administration, the in-house criteria were nevertheless examined. Regarding the essential part of activities, the CJEU merely stated percentages of activities without revealing the basis for the calculation.⁵⁵ However, in his opinion, A.G. Geelhoed calculated percentages on the basis of Tragsa's turnover.⁵⁶ Hence, it appears that turnover is the basis which the CJEU has actually used for assessment of the essential part of activities criterion. This approach has been codified in Article 12(5), which explicitly mentions average turnover as the basis for calculation of the essential part of activities criterion, but also allows for "an appropriate alternative activity-based measure such as costs incurred". It is submitted that measurement uncritically based on turnover could be subject of manipulation by increasing the price of in-house provision and reducing the price of market activities, i.e. it might encourage cross-subsidization.

4.2 Private capital participation

In all case law involving participation of private capital in entities which Member States argued to be in-house, the CJEU has reiterated that allowing participation of such private capital participation would be contrary to the objective of free and undistorted competition and the principle of equal treatment of tenderers because direct awards to a semi-public entity that includes such private

⁵¹ In Denmark, the Complaints Board for Public Procurement used the turnover as measurement unit, and, contrary to the claim made by the defendant (a utility company) who had argued that the 80 % threshold should be calculated by category of product and type of contract, found that the percentage of turnover should be calculated on the basis of broad categories (works, goods and services, respectively); see, *Intego A/S mod NRGi Net A/S*, verdict of 20 August 2012, J.nr.: 2012-0026792 (accessed in June 2014, at: www.klfu.dk).

⁵² *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA* (C-340/04) [2006] E.C.R. I-4137 at [63] – [64].

⁵³ *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA* (C-340/04) [2006] E.C.R. I-4137 at [65]-[67].

⁵⁴ *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* (C-295/05) [2007] E.C.R. I-2999.

⁵⁵ *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* (C-295/05) [2007] E.C.R. I-2999 at [63].

⁵⁶ Opinion of A.G. Geelhoed on 28 September 2006 concerning *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* (C-295/05) [2007] E.C.R. I-2999 at [62].

participation would give the private undertaking involved an advantage over its competitors.⁵⁷ It was clarified in *Acoset* that where a tender has been conducted to select the private capital participant,⁵⁸ competition is not distorted when the semi-public entity subsequently is awarded contracts directly by the public contracting authority who is a party to the semi-public undertaking, if certain conditions are fulfilled. Firstly, the tender must also be based on the private undertaking's technical capacity to fulfil the subsequent contracts;⁵⁹ and, secondly, the corporate purpose of the resulting semi-public entity must remain fixed during the duration of the contracts awarded⁶⁰ – otherwise a new tender must be conducted, under reference to the *Presstext* case law, according to which a renewed competition is required when the contract is subject to material amendments.⁶¹ In *Acoset*, the competition was not distorted despite private participation and subsequent direct award of contracts, since the initial tender had provided all interested tenderers with an opportunity to tender for the capital participation, factoring in all the advantages of cooperating with the public sector, including the benefit of future direct contract awards in their bids.

The substance of the advantage accruing for private capital owners in semi-public entities has not been elaborated by the CJEU. The advantage occurs where a private undertaking is privileged by participation in a semi-public entity without having to compete with other undertakings on the terms for such (capital) participation. Under such conditions participation in semi-public entities, if they were awarded contracts directly, could distort competition vis-à-vis the private undertakings because the private participant might get beneficial terms in the cooperation: i.e. would be capable of making supernormal profits on the capital investment (which might be State aid, if the conditions in Article 107(1) TFEU are fulfilled); could obtain an improved reputation in a possible private market where it also operates; might get access to new facilities or technologies, which it would not (yet) have invested in by itself; or, it might have a stable public demand which enables it to climb the learning curve which could spill over to benefit activities in other markets.

In Article 12(1) of the new Public Sector Directive, it is stated that award of contracts fall outside the scope of the Directive,⁶² if the *Teckal* criteria are fulfilled. However, a third criterion has been added to the control criterion and the essential part of activities criterion:⁶³

⁵⁷ E.g. *Stadt Halle* (C-26/03) [2005] E.C.R. I-1 [51] and *Commission of the European Communities v Republic of Austria (Mödling)* (C- 29/04) [2005] E.C.R. I-9705 at [48].

⁵⁸ *Acoset SpA v Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others* (C-196/08) E.C.R. I-9913. For a situation where no tender for private capital participation had been conducted, and subsequent contracts therefore had to be tendered, see *Mehiläinen Oy and Terveystalo Healthcare Oy v Oulun kaupunki* (C-215/09) [2010] E.C.R. I-13749.

⁵⁹ *Acoset SpA v Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others* (C-196/08) E.C.R. I-9913 at [59].

⁶⁰ *Acoset SpA v Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others* (C-196/08) E.C.R. I-9913 at [62].

⁶¹ *Presstext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung* (C-454/06) [2008] E.C.R. I-4401. The *Presstext* case law has been codified in Article 72 of the new Public Sector Directive, Article 89 of the new Utilities Directive, and Article 43 of the Concessions Directive. See also Treumer, S. "Contract changes and the duty to retender under the new EU public procurement Directive", P.P.L.R. 2014(3), 148-155.

⁶² This is contrary to the current position, where fulfilment of the *Teckal* criteria implies that no contract exists in the sense of Article 1(2) (a) in the current Public Sector Directive.

“there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by applicable national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person”

From the wording it is clear that the case-law based general rule that prohibits private capital participation in in-house entities is upheld. An exemption is made for non-controlling and non-blocking capital participation which is required by national legislation, and it is also a requirement that the private capital holder does not exert a decisive influence on the in-house entity. In the related Recital 32, it is explained that the exemption on non-controlling and non-blocking capital is made in view of the particular characteristics of public bodies with compulsory membership where private capital membership is prescribed in national law, and on the condition that the non-controlling and non-blocking capital does not confer decisive influence over the semi-public entity to the private capital holder. In Recital 32, it is also clarified that possible private capital participation in the controlling entity does not preclude direct awards to the controlled legal entity because in such a case the competition between private economic operators is not affected. This could be questioned, as the Recital does not cover the possibility of controlled entities awarding contracts directly to controlling entities: it might be foreseen that controlling entities having private capital participation could decide that controlled entities should award contracts upstream to the controlling entity, thereby making available for private capital holders in controlling entities the advantages mentioned above.

It appears, firstly, that the provision is specifically tailored to certain Member States’ national legislation.⁶⁴

Secondly, it seems that no consideration has been given to *why* private undertakings would participate in the capital of semi-public entities: for private undertakings, the only incentive to invest in such entities is profit maximisation i.e. that they somehow benefit more from capital participation in the semi-public entity, than they would from similar strictly private investments. The most obvious benefit would be that the investment is secure, compared to similar investments in the private market, due to the security of demand and the absence of a bankruptcy risk of the public party (which is also the main customer).⁶⁵ This benefit is an advantage which can only be diminished by subjecting private capital participation to competition, i.e. a public procurement procedure, as *Acoset* prescribes.

⁶³ Article 12(1) (c) of the new Public Sector Directive. A similar wording is found in Article 12(2) and (3) (c).

⁶⁴ For example in Denmark, Act 548/2006 on municipalities’ performance of tasks for other public authorities and participation by municipalities and regions in companies (*Kommuners udførelse af opgaver for andre offentlige myndigheder og kommuners og regioners deltagelse i selskaber*) as amended *inter alia* by Act 620/2011, a 25% private capital participation is required in companies set up by municipalities and regions, cf. § 4; the semi-public companies may currently provide 25% of their output to other customers than the public owners, cf. § 5; however, they cannot perform tasks for other contracting authorities unless a tender has been conducted by that contracting authority, cf. § 2(2).

⁶⁵ On public undertakings and the risk of bankruptcy, see Ølykke, G.S., “Public Undertakings and Imputability – the Case of DSBFirst”, *European State Aid Law Quarterly*, 2/2013, 341-361, at p. 356-357.

4.3 Direct award of contracts – prevention of State aid

There are various ways to prevent granting of State aid to, and distortion of competition by, in-house entities. However, no explicit provision has been made to avoid State aid in Article 12 of the new Public Sector Directive, and none of the existing and possibly applicable measures have been mentioned. The most obvious way to prevent State aid is, of course, to hold a public procurement procedure, which would eliminate the economic and competitive advantages available in public contracts and cooperation with the public sector. As mentioned above, this tool is the best way to eliminate any advantages for private capital participation in semi-public in-house entities. However, in in-house situations with no private capital participation, it is exactly the absence of a competition for the contract which may create opportunities for the in-house entity's distortion of competition in competitive markets. This section will discuss measures which contracting authorities may enact to reduce the risk of granting State aid and distortion of competition in situations where no public procurement procedure has been conducted. Firstly, in section 4.3.1, benchmarking rules are considered as a tool to replace competition in in-house situations. Secondly, in section 4.3.2, rules on cost-allocation and separation of accounts, which are tools to prevent cross-subsidization, will be examined.

4.3.1 Benchmarking

Under State aid law, contracting authorities which use in-house provision will be obliged to benchmark the price they pay, in order to prevent granting of State aid to the in-house entity. In this context, the analysis is split between Services of General Economic Interest (SGEI), in section 4.3.1.1, and tasks which are not SGEI, but “just” economic activities, in section 4.3.1.2.⁶⁶ The purpose is to illustrate the different approach taken in State aid law to these two categories; however, in both cases an efficiency or benchmarking criterion is imposed requiring the public authority, in the absence of competition, to ensure that it does not support inefficient (high cost) production and/or does not pay too high a price (overcompensates).

4.3.1.1 Benchmarking when the task is a Service of General Economic Interest

In some situations, the task provided in-house will be an SGEI, for example public transport and broadband, water or electricity distribution.⁶⁷ The *Altmark* case concerned the direct award of a contract for the provision of bus transport services and connected public service obligations (PSOs),⁶⁸ which may also be seen as quality requirements set out for the provision of the particular service. Even though it is not clearly set out in the judgment, which does not mention SGEI,⁶⁹ the

⁶⁶ Non-Economic Services of General Interest are not covered by the Treaties; cf. Protocol no. 26 on Services of General interest, Article 2.

⁶⁷ On the concept of an SGEI as well as an overview of the many judgments, see G.S Ølykke and P. Møllgaard, “What is a Service Of General Economic Interest?”, *European Journal of Law and Economics*, forthcoming in 2014, DOI: 10.1007/s10657-013-9426-8 (available at: <http://www.springerlink.com/openurl.asp?genre=article&id=doi:10.1007/s10657-013-9426-8>).

⁶⁸ *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* (C-280/00), [2003] E.C.R. I-7747; [2003] 3 C.M.L.R. 12. See further e.g. E. Szyszczak, “Altmark assessed” in E. Szyszczak (ed.), *Research Handbook on European State Aid Law* (Edward Elgar Publishing LTD, 2011), at p. 293.

⁶⁹ Possibly because the judgment actually concerned Regulation No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, OJ [1969] L 156 which applied specifically to PSO's in the transport sector.

relationship between SGEI and PSO follows from the wording of Article 106(2) TFEU: “Undertakings entrusted with the operation of services of general economic interest...shall be subject to the rules contained in the Treaties, ..., in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.” The “particular tasks assigned to them” are PSOs.⁷⁰ This relationship has been confirmed by the Commission’s *Altmark* packages, which refer to Article 106 (2) TFEU.⁷¹ The central question in *Altmark* was whether the price paid as remuneration for the provision of PSOs contained State aid. The CJEU found that this was not the case, given that what has been denominated the “*Altmark* conditions” are fulfilled:⁷² firstly, the PSO must be imposed and clearly defined; secondly, the parameters for calculating the compensation must be established in advance in a transparent and objective manner; thirdly, no overcompensation can take place, but a reasonable profit is allowed;⁷³ and, fourthly, *if a public procurement procedure has not been conducted*, the compensation should be calculated not on the basis of the actual cost incurred, but by benchmarking with a typical undertaking, well run and equipped with the necessary means to provide the PSO – this is also known as the “efficiency requirement”. Situations where a public procurement procedure has not been conducted could be in-house situations. Hence, in in-house situations where the activity concerned is an SGEI, the *Altmark* conditions should be followed to ensure that State aid is not granted. The flexibility in the *Altmark* conditions, compared to the application of Articles 107 and 108 TFEU, is that it brings the compensation outside the scope of these provisions, implying that the Commission need not be notified in advance.⁷⁴

4.3.1.2 The task is not a Service of General Economic Interest

In many circumstances, the task provided in-house will not be an SGEI, as for example with cleaning maintenance and catering services. In these situations, the general benchmark used in State aid law to measure the market participation by States, the Market Economy Investor Principle (MEIP), applies.⁷⁵ The MEIP requires that the transaction carried out by the State resembles a transaction which a hypothetical private investor of the same size and with the same economic strength would have conducted on the same terms; if that is the case, market terms prevail, therefore

⁷⁰Or Universal Service Obligations; see also Ølykke and Møllgaard (fn. 67). For another approach, see the General Court in *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v Commission of the European Communities* (T-289/03) [2008] E.C.R. II-81 at [162], where it states that PSO and SGEI is the same.

⁷¹The first *Altmark* package was adopted in 2005, and the second in 2011; the latter is available at: http://ec.europa.eu/competition/state_aid/legislation/sgei.html (last visited in August 2014).

⁷²*Altmark* (C-280/00), [2003] E.C.R. I-7747 at [89] – [93].

⁷³The Commission has developed a specific set of swap-rates to increase legal certainty on the reasonable profit-criterion; see http://ec.europa.eu/competition/state_aid/legislation/swap_rates_en.html.

⁷⁴The judgment has been supplemented by a specific SGEI *de minimis* regulation, Commission Regulation No 360/2012/EU of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJ 2012 L 114/8, and by Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ 2012 L 7/3, which both on certain conditions exempts PSO compensation that does *not* fulfil the *Altmark* criteria from the duty to notify the Commission according to Article 108(3) TFEU.

⁷⁵See also N. Tosics and N. Gaál, “Public procurement and State aid control – the issue of economic advantage”, *Competition Policy Newsletter* 2007(3), 15-18, at p. 16 and Nicolaidis and Rusu (fn. 34) at pp. 10-11.

no advantage would be granted in the sense of Article 107(1) TFEU, and hence no State aid is present. The MEIP can also be used where the State acts as a seller or a buyer.⁷⁶ The latter situation is present in in-house situations, and here the MEIP would subject contracting authorities to compare their purchases with a hypothetical market actor with regard to the necessity of the purchase⁷⁷, as well as with regard to price⁷⁸. The MEIP could therefore be used to assess the terms and the price of the transaction between the in-house entity and the controlling entity. An example of how the Commission assesses the possible presence of State aid in in-house transactions, where the service provided is not (claimed to be) an SGEI, is the *Clusterfonds Seed* Decision.⁷⁹ In this Decision, the task of managing a risk capital scheme (the fund) had been awarded by a public bank (which was integrated in the State administration, and thus undoubtedly a contracting authority) to its fully owned subsidiary. One aspect of the case was to decide whether this in-house “contract” award contained an element of State aid. The Commission applied the MEIP and accepted Germany’s documentation (an expert’s report) as evidence of that the remuneration for the management activities was at market level. The Commission also emphasised that the fund was prohibited from diversifying its activities into other areas than the stated purpose of the risk capital scheme, and that separation of accounts between management of the fund and the other activities of the in-house entity was envisaged by the German authorities. The condition limiting diversification into other activities has also been central in other in-house case law, and it could be seen as a safeguard against distortion of competition in related competitive markets.⁸⁰ The condition on separation of accounts is a safeguard against cross-subsidization, as will be discussed below.

4.3.2 Separation of accounts and cost-allocation

Separation of accounts can be used to prevent cross-subsidization.⁸¹ By requiring the in-house entity to carry out separation of accounts, the contracting authority both ensures transparency in the cost of providing in-house and competitive activities, respectively, and that resources are not shifted from one production to the other. The rules requiring contracting authorities to enact separation of accounts are outlined in section 4.3.2.1. However, in order to conduct a meaningful separation of accounts, it must be decided how costs should be divided between different outputs; for this purpose

⁷⁶ Along these lines, see Bartosch (fn. 34), at p. 556. See also the BAI-judgments, *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities* (T-14/96) [1999] E.C.R. II-139; [1999] 3 C.M.L.R. 245; *P & O European Ferries (Vizcaya), SA and Diputación Foral de Vizcaya v Commission of the European Communities* (T-116&118/01) [2003] E.C.R. II-2957; [2003] 3 C.M.L.R. 14; as upheld by *P & O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v Commission of the European Communities* (C-442&471/03P) [2006] E.C.R. I-4845. The BAI-judgments are relevant in the present context, as no public procurement procedure was conducted.

⁷⁷ *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities* (T-14/96) [1999] E.C.R. II-139 at [79].

⁷⁸ *P & O European Ferries (Vizcaya), SA and Diputación Foral de Vizcaya v Commission of the European Communities* (T-116&118/01) [2003] E.C.R. II-2957 at [123].

⁷⁹ N406/2009 Germany: *Risk Capital Scheme ‘Clusterfonds Seed GmbH & Co. KG’*.

⁸⁰ See e.g. *Acoset SpA v Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others* (C-196/08) E.C.R. I-9913 at [62] and for an example where the scope of activities were not limited and in-house status was not awarded to the relevant entity, see *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* (C-458/03) [2005] E.C.R. I-8585 at [67] read in conjunction with [72]; [2006] 1 C.M.L.R. 3.

⁸¹ Cf. M. Fehling, “Problems of cross-subsidisation” in M. Krajewski, U. Neergaard, J. van de Gronden, *The Changing Legal Framework for Services of General Interest in Europe - Between Competition and Solidarity*, T.M.C. Asser Press, 2009, 129-147, at p. 135.

different cost-allocation methods may be used. The applicable cost-allocation methods in the context of in-house provision are discussed in section 4.3.2.2.

4.3.2.1 Applicability of the Transparency Directive's rules on separation of accounts to in-house situations

The purpose of the Transparency Directive is to facilitate the enforcement of State aid rules; therefore, transparency must be ensured for the benefit of the Commission.⁸² The Transparency Directive works with two groups of undertakings: firstly, public undertakings; and, secondly, all undertakings (public or private) which are granted a special or an exclusive rights or which have been entrusted with the provision of SGEI, and that, firstly, receives some form of compensation from the State *and*, secondly, also carry out other activities.⁸³

Regarding the first category, Member State are required to ensure that all financial relations between public authorities and such undertakings are transparent, which entails transparency about the public funds made available and the use to which they are put.⁸⁴ Hence, in situations where the in-house entity constitutes an undertaking in the sense of EU competition law, there must be transparency with regard to the financial relations between the public authorities and their in-house entities; the transparency obligation extends to virtually all financial transfers.⁸⁵ There are various exemptions to this obligation, of relevance for the in-house situations is in particular supply of services which is not liable to affect trade between Member States to an appreciable extent, and where the transferred funds amounts to less than EUR 40 million over two years.⁸⁶ In a public procurement context, an appreciable effect on trade will very likely be present where a cross-border interest may be envisaged; the test for appreciable effect on trade in competition law is, as the cross-border interest test, a jurisdictional test and has traditionally been interpreted broadly.⁸⁷

Regarding the second category, Member States must ensure the keeping of separate accounts reflecting the revenues and costs associated with the different activities carried out; in this context, the method used to allocate revenues and costs to different activities must clearly emerge.⁸⁸ In the context of in-house entities, the requirement to keep separate accounts follows directly from the Transparency Directive in situations where the provision concerns SGEIs, or the in-house entity has been granted a special or an exclusive right.⁸⁹ The non-appreciable effect on trade exemption also

⁸² Article 6 of the Transparency Directive.

⁸³ Article 2(b) and (d) of the Transparency Directive.

⁸⁴ Article 1(1) and Article 3 of the Transparency Directive.

⁸⁵ See the list in Article 3 of the Transparency Directive.

⁸⁶ Article 5(1) (a) and (d) of the Transparency Directive.

⁸⁷ Cf. A. Jones and B. Sufrin, *EU Competition Law*, 4th ed. Oxford University Press, pp. 182, see also pp. 177-183 and 269-273. However in 2004, the Commission issued guidelines on the topic, see Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 2004 C 101/81, fixing market share/turnover thresholds.

⁸⁸ Article 1(2) and Article 4 of the Transparency Directive.

⁸⁹ According to Article 2(g): "special rights" means rights that are granted by a Member State to a limited number of undertakings, through any legislative, regulatory or administrative instrument, which, within a given geographical area: (i) limits to two or more the number of such undertakings, authorised to provide a service or undertake an activity, otherwise than according to objective, proportional and non-discriminatory criteria; or (ii) designates, otherwise than according to such criteria, several competing undertakings, as being authorised to provide a service or undertake an

applies, and transparency is not required where the annual turnover for the undertaking for a period of two years amounts to less than EUR 40 million; moreover, exemption from the obligation to keep separate accounts is granted where the SGEI has been entrusted following an open, transparent and non-discriminatory procedure.⁹⁰ The latter, however, is not relevant on the in-house context.

Even though the Transparency Directive's requirement to keep separate accounts applies to in-house entities in a number of situations, there are important gaps due to the lack of requirement to keep separate accounts for all public undertakings and due to the exemptions. Hence, in situations where no special or exclusive rights are granted, and where the service provided in-house is not an SGEI, separation of accounts to ensure that competition in competitive markets is not distorted, is up to the Member States and/or their contracting authorities. Moreover, it should be noted that no specific cost-allocation method is prescribed in the Transparency Directive.⁹¹

4.3.2.2 *Cost-allocation methods*

The specific choice of cost-allocation methods for prevention of undesirable cross-subsidization is widely discussed.⁹² In the context of in-house entities operating on competitive markets and with a focus of preventing State aid, the choice of cost-allocation method is crucial, as it frames the in-house entity's price-setting in competitive markets.⁹³ Even though the *Altmark* conditions and the MEIP ensure that the contracting authority does not over-compensate the in-house provider, further qualification of the magnitude of the compensation is needed. The reason is that the common costs of in-house activities and competitive activities in principle could be fully covered by the compensation for the in-house activities under both tools, unless further specifications on allocation of costs are made. It would constitute overcompensation, if the compensation for in-house activities covers all common costs, as the market activities of the in-house provider should contribute to covering the costs which are common for the provision of both in-house and market activities. Common costs could include the cost of administration, cost maintenance of equipment and cost of the equipment itself, in particular if overcapacity is required to ensure security of supply in relation to the in-house tasks.

It could be argued that the MEIP requires contracting authorities to take the part of costs that should be allocated to competitive activities into account, as a hypothetical private procurer would not accept having to cover all common costs in the price of the in-house activities. This requirement is facilitated by the easy access to economic information from the in-house entity, which is controlled by the contracting authority. Hence, what remains is the cost-allocation between provision of PSOs

activity; or (iii) confers on any undertaking or undertakings, otherwise than according to such criteria, any legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same service or to operate the same activity in the same geographical area under substantially equivalent conditions."

⁹⁰ Article 5(2) of the Transparency Directive.

⁹¹ See also Fehling (fn. 81), at p. 135.

⁹² It is outside the scope of this analysis to discuss all possible cost-allocation methods. For further information, see e.g. G.R. Faulhaber, "Cross-Subsidization: Pricing in Public Enterprises", *American Economic Review*, 1975, 65(5), 966-977; G.B. Abbamonte, "Cross-subsidisation and Community Competition Rules: Efficient Pricing versus Equity", *European Law Review*, 1998, 23(5), 414-433; L. Hancher and J.L.B. Sierra, "Cross-Subsidization and EC Law", *Common Market Law Review*, 1998, 35(4), 901-945; Fehling (fn. 81).

⁹³ For the opposite finding, i.e. that the *Altmark* conditions solve cross-subsidization issues, see Fehling (fn. 81), at p. 131.

(SGEI) and competitive activities. The Commission has addressed this issue in its *Altmark* Decision,⁹⁴ concerning the application of the *Altmark* conditions under certain circumstances and for specific services, and the *Altmark* Framework,⁹⁵ which concerns the compatibility of compensation for PSOs/SGEI in all other circumstances. These measures specifically address the situation where a provider of PSO/SGEI also operates on competitive markets, and stipulate that the costs linked to any activities outside the scope of the SGEI must include all the direct costs (that is, fixed and variable costs) and an appropriate contribution to the common costs.⁹⁶ In other words, in order to ensure the absence of overcompensation and State aid in relation to the in-house activities – and, hence, the risk of cross-subsidization of competitive activities⁹⁷ – the price in competitive markets must cover both directly attributable costs and an appropriate share of common costs.⁹⁸

5. Conclusions and proposals for prevention of State aid in in-house relations

Where the public procurement rules do not apply, because the award is in-house, instead State aid rules are applicable. The codification of the case law based in-house rule has without doubt been a challenge for the Commission, and the result mirrors the Member States' desire for flexibility. However, the strict boundaries erected by the CJEU in its case-by-case approach to in-house provision had the purpose of preventing granting of State aid and thereby distortion of competition both between private undertakings and by in-house entities on competitive markets. This purpose has either not been realised by the negotiators, or has been ignored. Now, when the Member States have achieved the holy grail of wide flexibility in *inter alia* construction of in-house arrangements, they must take upon them the responsibility of preventing serious distortion of competition in (local) markets. However, it is also entirely in the Member States' own interest to take this responsibility seriously as in the future private undertakings competing with in-house entities in the market will have the State aid rules as an alternative or a supplement to the public procurement rules if they want to contest in-house arrangements; contrary to the somewhat blunt public procurement remedies, State aid rules require repayment of the advantage granted or, if the State aid is declared compatible, the beneficiary may have to pay illegality interests for any non-notified aid. This article has discussed three tools which either do apply and should be remembered, or are readily available to use for contracting authorities, that can significantly reduce the risk of granting State aid when contracting authorities choose to make rather than to buy from the market. . Firstly, *if* private capital is necessary, a tender should be conducted, á la *Acoset*, which – if proper competition takes place – will eliminate any advantage to the private party. Secondly, the terms of

⁹⁴ Commission Decision 2012/21/EU of 20.12.2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ 2012 L 7/3.

⁹⁵ Communication from the Commission - European Union framework for State aid in the form of public service compensation, OJ 2012 C 8/15.

⁹⁶ See the *Altmark* Decision (fn. 68), Article 5(9) and the *Altmark* Framework (fn. 95), para. 44 read in conjunction with para. 31.

⁹⁷ Along the same lines, see L. Hancher, "Public Sector Aid" in L. Hancher, T. Ottervanger and J.P. Slot, *EU State Aids*, 4th ed. Sweet & Maxwell, 2012, 245-301, at p. 286.

⁹⁸ See Fehling (fn. 81) on the remaining considerable discretion left to, in the present context in-house entities, in the choice of cost-allocation methods.

the agreements with in-house entities *must* be benchmarked with market terms – this applies in different guises irrespectively of whether the relevant task is an SGEI or “just” a normal economic activity. Thirdly, *if* in-house entities also operate on competitive markets, they should be required to keep separate accounts and conduct appropriate cost-allocation for in-house and market activities in order to increase transparency and prevent cross-subsidization which distorts competition in the competitive market.