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The Institutionalised and Non-Institutionalised Exemptions from EU Public Procurement Law: Towards a More Coherent Approach?

Willem A. Janssen*

1. Introduction

The new public procurement directives were published in the EU Official Journal on 28 March 2014 after a long legislative process.¹ These directives bring forth various changes – some minor, others of great importance – to the legal framework for public procurement in the European Union (EU) (Section 2). This contribution considers one of the most controversial inclusions, namely the introduction of Article 12 in the Directive on public procurement.² This article codifies the legal exemptions from the public procurement regime in the case of institutionalised and non-institutionalised cooperation between contracting authorities (together referred to as ‘in-house exemptions’). In the last fifteen years, these legal exemptions have been brought to light by interpretations of the Court of Justice of the European Union (Court) and they ensure that a public contract granted between two contracting authorities is not subjected to a possible duty to contract out if the relevant criteria are met (Section 2.1).³ These cases before the Court concern the bottom-up enforcement of public procurement law by means of national judicial review, which resulted in preliminary questions at the EU level. In most of these cases, the appellant aimed to enforce the proper application of public procurement law. These parties were often previously contracted to perform a (public) service, after which a public authority decided to favour the in-house performance of a service. If the Court found that contracting authorities could not rely on these in-house exemptions, it would mean that these authorities were obliged to contract out these public contracts. Initially, the Court was hesitant to accept the in-house performance of public services in the field of public procurement law. However, a more lenient approach is currently visible, making it more onerous for third parties to contest these forms of public service delivery.⁴ In light of the Court’s case law, it will be

* W.A. Janssen LL.M. is a PhD Researcher at Utrecht University’s Centre for Shared Regulation and Enforcement in Europe (RENFORCE) and the Public Procurement Research Centre (PPRC) (<www.pprc.eu>). The author wishes to thank Elisabetta Manunza, John Vervaele, Marloes van Rijsbergen and Sander van Hees for their valuable comments on earlier drafts of this article. For comments: w.a.janssen@uu.nl.

1 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, pp. 65-242 (Directive on public procurement). Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, pp. 243-374. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, pp. 1-64.

2 Art. 12 Directive on public procurement.

3 Case C-107/98, *Teckal*, [1999] ECR I-8121 and Case 480/06, *Commission v Germany*, [2009] ECR 4747.

4 This has also occurred on a national level in the Netherlands. In this respect, the Dutch cases in the field of the waste sector have become the strongest precedent. These Dutch cases will not be assessed further, but show a similar pattern as on the EU level. Court of Appeal (*Gerechtshof*) Arnhem-Leeuwarden, 9 September 2013, ECLI:NL:GHARL:2013:6675, Court of Appeal ’s-Hertogenbosch, 11 February 2014, ECLI:NL:GHSHE:2014:28 and Supreme Court (*Hoge Raad*), 18 November 2011, ECLI:NL:HR:2011:BU4900.

argued that the codification of Article 12 Directive on public procurement has substantially broadened the applicability of these initially judge-made exemptions, leaving a greater latitude for contracting authorities to decide upon whether or not these authorities wish to make use of transparent and objective competitive procedures when purchasing works, services and goods (Sections 2.3-2.4). Additionally, the remaining legal uncertainty created by this codification only emphasises the enforcement issues that third parties are faced with when initiating proceedings (Section 2.5.1). Therefore, it is argued that the Member States have an important role to play in clarifying these exemptions from EU public procurement law, making it a shared regulatory responsibility to ensure consistent uniform application within the EU (Section 2.5.2).

In light of this legal uncertainty, this contribution considers that these developments relating to the in-house exemptions should be considered in a broader, more coherent, context. It considers the need to include the phase prior to public procurement in the regulatory framework for public procurement (Section 3), whilst assessing these exemptions from public procurement law. This pre-procurement phase, also referred to as the make-or-buy decision, encompasses the democratic decision-making phase, in which a public authority decides to favour either the internal or external performance of a public service. At this point in time, public authorities can choose between different modes of service performance. This discretion allows them to either internalize public service delivery by carrying it out themselves, possibly in cooperation with other public authorities, or to externalize the delivery of a public service by approaching a third party. It should be noted that the legal framework of EU competition law and state aid law are also imperative in creating the legal boundaries of this discretionary power. However, a thorough discussion of these fields of law go beyond the scope of this contribution.⁵

In the Netherlands, recent developments have revived the discussion surrounding the extent of this discretionary power to decide upon public service delivery. Consequently, it has been suggested to introduce a coherent legal framework for public procurement, which governs this pre-procurement decision-making phase (Section 3.1).⁶ Within this framework, public authorities should identify internal and external service delivery modalities as equal alternatives with their own advantages and disadvantages. For this purpose, these different modalities should be compared by using transparent and objective criteria. Additionally, third parties currently faced with enforcement issues would be able to review or even challenge the decisions of public authorities in the pre-procurement phase. In order to contribute to the research endeavours in this field, two regulatory measures are discussed: the Dutch Public Procurement Act 2012 (Section 3.4), which contains a first step towards regulating and enforcing the pre-procurement phase, and the US competitive sourcing initiatives (Section 3.5), which extensively regulates and allows for the enforcement of the pre-procurement phase on a federal level in the United States of America.

2. New EU public procurement directives

The impact of regulatory changes on the EU public procurement market is substantial, making the review of the public procurement directives the focal point of discussions in practice and academia over the last couple of years. In 2010, public procurement law found itself being placed in the spotlight by the former EU Commissioner Monti when he set out his vision for the future of the single market.⁷ This focus was justified by the size of the EU public procurement market, which amounts to approximately 20 percent of the EU GDP each year. For this reason, the public procurement directives were to be modernized with

5 For example, the definition of an ‘undertaking’ in these fields of law is but one of the many converging issues. V. Hatzopoulos, ‘The Economic Constitution of the EU Treaty and the Limits between Economic and Non-economic Activities’, 2012 *European Business Law Review*, no. 6, pp. 973-1007 or the pivotal distinction between services of general economic interest and services of non-economic interest. M. Krajewski et al. (eds.), *The changing legal framework for services of general interest in Europe: Between competition and solidarity*, 2009. It is also for this reason that the term ‘public authority’, instead of ‘contracting authority’, is used if reference is made to the broader context of this contribution.

6 E.R. Manunza, ‘Naar een consistente en doelmatige regeling van de markt voor overheidsopdrachten’, in J.M. Hebly et al. (eds.), *Beschouwingen naar aanleiding van het wetsvoorstel Aanbestedingswet*, Preadvies voor de Vereniging van Bouwrecht, 2010, pp. 111-119. E.R. Manunza & W.J. Berends, ‘Social Services of General Interest and the Public Procurement Rules’, in U. Neergaard et al. (eds.), *The Role of SSGIS in EU Law: New Challenges and Tensions*, 2012, pp. 347-384.

7 M. Monti, ‘A New Strategy for the Single Market; at the Service of Europe’s Economy and Society’, Report to the President of the European Commission José Manuel Barroso, 2010, p. 12 (Monti Report).

two goals in mind, which have now also found their way into the final versions of these directives in 2014. Firstly, the directives have extended the possibilities for contracting authorities to put public procurement to better use. Specific tools, such as the use of life-cycling costs,⁸ or the expansion of the exclusion grounds,⁹ allow contracting authorities to achieve societal goals, such as the protection of the environment or the stimulation of innovation, in addition to fulfilling their basic needs.¹⁰ Secondly, these directives aim to improve the efficiency of public spending by simplifying the existing rules and aim to provide further flexibility when applying these rules. In light of this, the EU legislator has deemed it important to make public procurement more accessible for SMEs and to clarify the rules which are applicable to in-house procurement.¹¹ The outcome of the latter's reform is the focus of this contribution. The following sections discuss the changes made to the scope of the in-house exemptions in light of the new directives.

2.1. In-house exemptions from public procurement law

In order to be able to discuss the in-house exemptions from public procurement law, it is important to consider that for the public procurement rules to come into force, contracting authorities¹² must engage in contractual relations with economic operators on the market.¹³ European public procurement rules are, apart from other conditions, only applicable if a contract is concluded between two separate persons: a contracting authority and an entity which is legally separate from this authority.¹⁴ The rules are also applicable to agreements between two contracting authorities, or between a contracting authority and a privatized authority, which was previously part of the contracting authority.

Article 12 Directive on public procurement concerns the codification of extensive jurisprudence of the Court dealing with these in-house exemptions. It is important to note that the codification is not all-inclusive, thereby omitting valuable insights previously confirmed by the Court in its case law. For this reason, the didactic and practical importance of these rulings remain in force, because understanding the emergence and interpretation of the in-house exemptions allow for a better application in practice. Hence, whilst interpreting these exemptions from European public procurement law, the analysis must begin by realising that these exemptions constitute the Member States' right to public organization and, thus, limit the emergence of the European open market.¹⁵ In this respect, the role of European public procurement law is to contribute to the European single market by ensuring free movement and effective competition through the introduction of procedures for the awarding of public contracts. In doing so, it wishes to eliminate nationality-based discrimination, which should allow bidders across the EU to have access to all European tender procedures. It involves an obligation for all contracting authorities to apply the relevant European rules where the conditions for such application are satisfied. These exemptions allow contracting authorities to put aside these goals in pursuit of performing a service internally by a contracting authority or in conjunction with others. The Commission Staff Working Paper on public-public cooperation clearly described this and stated:

'(...) The aim of these [EU Public Procurement] rules is to ensure that the relevant public purchasing contracts are open to competition for suppliers across the internal market. At the same time, EU law does not restrict the freedom of a contracting authority to perform the public interest tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own structure.'¹⁶

8 Art. 68 Directive on public procurement.

9 Art. 57 Directive on public procurement.

10 Preamble 2 Directive on public procurement. W.A. Janssen, 'Maatschappelijk Verantwoord Aanbesteden: van een procedurele naar een instrumentele benadering van het aanbestedingsrecht', 2012 *Tijdschrift Aanbestedingsrecht*, pp. 7-17.

11 Preambles 31-32 Directive on public procurement.

12 Art. 2(1)(1) Directive on public procurement.

13 R. Cavallo Perin & D. Casalini, 'Control over in-house providing organisations', 2009 *PPLR*, no. 5, p. 227.

14 Art. 2(1)(5) Directive on public procurement.

15 Cavallo Perin & Casalini, *supra* note 13, p. 231. The fact that the EU Directives on public procurement exclude certain categories of contracts due to the absence of an interstate effect does not mean that Member States lack the discretionary power still to apply the public procurement procedures for these types of contracts.

16 Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation'), Brussels, 4.10.2011, SEC(2011) 1169 final, p. 3

This statement is the result of distinct national characteristics of public service delivery in the various Member States. Public services are performed in various ways across the EU, making the extent of the government performance of services also distinct. This often depends on the different traditions and cultures in relation to state intervention. The needs of users also differ due to geographical, social and cultural situations.¹⁷ Hatzopoulos exemplifies these differences by stating that ‘health as a commodity, largely accepted as such in the US, would be shocking to most, if not all, Europeans (at least a few years ago), while waiting lists for patients, largely in use in the UK, would appear intolerable to most Scandinavians.’¹⁸

Despite these national differences, the case law of the Court has confirmed that contracts between contracting authorities do not automatically fall outside the scope of European public procurement law. For this purpose, the Court has introduced two types of exemptions. The first type of exemption is referred to as institutionalised cooperation and is characterised by the performer of a service being a legally separate entity, which is dependent on the relevant public authority or contracting authorities.¹⁹ This dependency requires (1) the public authority to exercise (joint) control over this entity similar to its own departments, and (2) the latter entity must perform the predominant part of its activities for the controlling authority or controlling authorities. The second type of exemption concerns non-institutionalised cooperation between contracting authorities based on a public interest task, which rests on all of these authorities.²⁰ It allows them to use each other’s own resources to perform this public task if (1) this cooperation is governed solely by considerations and requirements concerning the pursuit of objectives in the public interest, and (2) the principle of equal treatment must be adhered to by placing no private undertaking in a position of advantage over its competitors. Despite the extensive development of these exemptions, the Court was, up until 2007, hesitant to accept the in-house performance of public services in the field of public procurement law.²¹ A clear turning point is visible in *Tragsa* in which the Court considered the *Teckal* criteria to have been fulfilled, after which a more lenient approach is visible in subsequent cases.²²

2.2. Codified Article 12: flexibility or legal certainty?

The codification of the Court’s jurisprudence should be considered as a milestone in the history of EU public procurement law, because the European legislator clearly confirmed the discretionary power of contracting authorities to decide upon the delivery and organisation of public services.²³ Earlier attempts to codify the in-house exemption created in *Teckal* failed prematurely with the emergence of Directive 2004/18/EC. The Commission Proposal at the time stated:

- ‘This Directive shall not apply to public contracts awarded by a contracting authority to a legally distinct entity owned exclusively by that contracting authority, if:
- the entity concerned does not have autonomous decision-making powers in relation to the contracting authority on account of the latter exercising over that entity a control which is similar to that which it exercises over its own departments;
 - the entity carries out all its activities with the contracting authority which owns it.’²⁴

Weltzien concludes that this attempt failed because the Member States were not able to construct a common wording for the *Teckal* exemption. This can be explained by the organizational differences between these separate legal entities throughout the European Union.²⁵ Alternatively, the European legislature may

17 Manunza & Berends, *supra* note 6, p. 358.

18 Hatzopoulos, *supra* note 5, p. 979.

19 Case 107/9, *Teckal*, [1999] ECR I-8121.

20 Case 480/06, *Commission v Germany*, [2009] ECR 4747.

21 R. Bleeker & E.R. Manunza, ‘De invloed van het Europees Recht op het Nederlandse Aanbestedingsrecht’, in A. Hartkamp et al. (eds.), *De invloed van het Europese recht op het Nederlandse Privaatrecht*, 2014, pp. 741-810. In cases C-26/03, *Stadt Halle*, [2005] ECR I-00001; C-231/03, *Coname*, [2005] ECR I-07287; C-458/03, *Parking Brixen*, [2005] ECR I-08585; C-340/04, *Carbotermo*, [2006] ECR I-04137.

22 C-295/05, *Asemfo v Tragsa*, [2007] ECR I-02999; C-573/2009, *Sea Srl*, [2009] ECR I-08127; C-324/07, *Coditel*, [2008] ECR I-08457.

23 Bleeker & Manunza, *supra* note 21, pp. 741-810.

24 COM(2002) 236 final, OJ C 203 E, 27.8.2002, p. 228.

25 K. Weltzien, ‘Avoiding the Procurement Rules by Awarding Contracts to an In-House Entity – Scope of the Procurement Directives in the Classical Sector’, 2005 *PPLR*, p. 252 and S. Arrowsmith & R. Anderson, *The WTO Regime on Public Procurement: Challenge and Reform*, 2011, p. 179.

have been hesitant to codify the jurisprudence of the Court at a stage when many questions and issues had not been decided upon before the Court. The following sections describe the two exemptions as created by the Court. Their relevant codification in Article 12 Directive on public procurement is noted alongside their discussion.²⁶

2.3. Institutionalised cooperation (Article 12(1))

The first type of in-house exemption concerns the institutionalised cooperation exemption (also referred to as the quasi in-house exemption).²⁷ The Court excluded the relation between a public authority and a legally separate entity (hence the reference to ‘institutionalised’) from the scope of public procurement law, if this separate entity was similar to one of the contracting authorities’ own departments.²⁸ The Commission describes the status of this entity as ‘formal independence’, as opposed to ‘substantial independence.’²⁹ Pijnacker Hordijk claims that its existence can be explained by a desired flexibility for contracting authorities to act and perform in the public domain.³⁰ In 1999, the Court introduced this first exemption in its *Teckal* ruling.³¹ Despite the presence of a legal separation between the local public authority and an entity called ‘Teckal’, the Court ruled that these two entities could still be exempted from the EU public procurement rules by fulfilling two conditions:

‘(...) The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.’³²

These two criteria have been included in Article 12(1)(a) and (b) Directive on public procurement. In his opinion, Advocate General Cosmas feared the expansion of exemptions from the directives on public procurement and warned the Court in *Teckal* by stating:

‘To accept that it is possible for contracting authorities to have recourse, for the supply of goods, to separate entities over which they maintain either absolute or relative control, in breach of the relevant Community legislation, would open the floodgates for forms of evasion contrary to the objective of ensuring free and undistorted competition which the Community legislature seeks to achieve through the coordination of procedures for the award of public supply contracts.’³³

26 Also see, J. Wiggen, ‘Directive 2014/24/EU: the new provision on co-operation in the public sector’, 2014 *PPLR*, pp. 83-93.

27 Art. 12(1) Directive on public procurement:

‘A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) 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 national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.’

28 The Commission refers to this as ‘vertical cooperation’. Commission Staff Working Paper, supra note 16, p. 6.

29 *Ibid.*, p. 7

30 E.H. Pijnacker Hordijk et al., *Aanbestedingsrecht: Handboek van het Europese en het Nederlandse Aanbestedingsrecht*, 2009, p. 114.

31 *Teckal*, supra note 19; *Stadt Halle*, supra note 21; *Coditel*, supra note 22; *Sea Srl*, supra note 22; *Carbotermo*, supra note 21; C-196/08, *Acosef SpA*, [2009] ECR I-09913.

32 *Teckal*, supra note 19, Para. 50. The impact of the decision has been extensive. As Advocate General Stix-Hackl stated in the subsequent case of *Carbotermo*: ‘This case [*Carbotermo*], like those before it, shows that the Teckal criteria comprise a number of imprecise concepts which have raised a raft of legal questions and caused numerous problems of differentiation. (...) Through its judgement in *Teckal* in November 1999, the Court opened the way for exceptions to the directive. How wide that opening is, however, is still unclear.’ Opinion of Advocate General Stix-Hackl in C-340/04, *Carbotermo*, [2006] ECR I-04137, Para. 17.

33 Opinion of Advocate General Cosmas in Case 107/9, *Teckal*, [1999] ECR I-8121, Para. 65.

Advocate General Cosmas was soon proven right, because the scope of *Teckal* was extended further than cases relating to public contracts under the directives on public procurement.³⁴ In *Parking Brixen*, the Court reconfirmed the *Coname* ruling by stating that the exemption can also be used to exempt obligations stemming from the internal market freedoms when contracting authorities distribute concessions. In this case, a concession to exploit two car parks was granted by the municipality of Brixen directly to Stadtwerke Brixen AG, without a prior call for competition.³⁵ Brown concludes that the reasoning underlying this exemption from European public procurement law does not entail any true external procurement and must thus apply equally under the Treaty.³⁶

2.3.1. Control and joint control criterion

For a relation between a public authority and another entity to be considered ‘internal’, a public authority must exercise control over the other entity, as it would over its own departments. This control criterion is now vested in Article 12(1)(a) and (3)(a) Directive on public procurement. Cavallo Perin & Casalini describe it as the entity not having any ‘entrepreneurial autonomy’.³⁷ In order to identify whether the contracting authority exercises control similar to that which it exercises over its own departments, account has to be taken of all the legislative provisions and relevant circumstances. Whether this exercised influence is based on private or public law powers is irrelevant.³⁸ Advocate General Stix-Hackle in *Stadt Halle* stated in her opinion that ‘it is required to have a comprehensive power of control, it is not sufficient only to have control of a strategy, but also the competence to exercise and decide simple decisions’.³⁹ In *Parking Brixen*, the control criterion was further exemplified in detail. The Court deemed the former special undertaking Stadtwerke Brixen AG not to be sufficiently controlled by the Municipality of Brixen. The Court came to this conclusion by considering various elements which assessed whether Stadtwerke Brixen was market-orientated. Amongst other things, it was relevant that Stadtwerke Brixen had been turned into a company limited by shares, and that its objectives had been broadened, which meant that the company had started to work in the areas of the carriage of persons and goods, information technology and telecommunications. In addition, the obligatory opening of the company to other capital and the expansion of the geographical area of the company’s activities to the whole of Italy and abroad played a role.⁴⁰ Additionally, the Administrative Board held considerable powers apart from the approval of a limited amount of decisions, leaving the municipality no real management control. The Court concluded that control was to be seen as having a conclusive influence on both the strategic objectives of the company and on its significant decisions, which has been explicitly codified in Article 12(1) Directive on public procurement.

In *Coditel*, the control criterion was extended to joint control.⁴¹ Advocate General Trstenjak added to this in her opinion that if control was to be individual, it would render it impossible to cooperate with

34 Cooperation between European Institutions does not fall within the scope of *Teckal*. Z. Petersen, ‘Case Comment: Inter-institutionalised cooperation between Community institutions: an exception to the public procurement rules: Centro Studi Antonio Manieri Srl v Council (T-125/06)’, 2009 *PPLR*, pp. 226-230.

35 *Parking Brixen*, supra note 21, Para. 62.

36 A. Brown, ‘Case Comment: The application of the EC Treaty to a services concession awarded by a public authority to a wholly-owned subsidiary: Case C-458/03 *Parking Brixen*’, 2006 *PPLR*, pp. 40-47.

37 Cavallo Perin & Casalini, supra note 13, p. 239.

38 *Ibid*, p. 232.

39 Opinion of Advocate General Stix-Hackl in C-26/03, *Stadt Halle*, [2005] ECR I-00001, Para. 78.

40 AG Kokott was less limited by such considerations by not deeming such elements decisive for control over an entity as such. She stated that it is important to consider the activities actually carried out by the company. Opinion of Advocate General Kokott in C-458/03, *Parking Brixen*, [2005] ECR I-08585, Para. 87.

41 *Coditel*, supra note 22, Para. 46. This is contrary to the opinion of AG Cosmas in *Teckal* delivered on 1 July 1999, who deemed it unlikely that the municipality of Viano, with a 0.9% share of the joint consortium AGAC, in which also 45 other separate municipalities took part, would be able to exercise over that consortium the kind of control which it would have over an internal body. See also: T. Kotsonis, ‘Case Comment: Application of the “Teckal” Exemption to a services concession contract: Coditel Brabant SA V Commune d’Uccle, Région de Bruxelles-Capitale (C-324/07)’, 2009 *PPLR*, pp. 73-78. See Art. 12(3) Directive on public procurement:

‘A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled.

(a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;

(b) more than 80 % of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling

other contracting authorities.⁴² The joint control criterion is codified in Article 12(3)(a) Directive on public procurement. It is accepted that joint control cannot be entirely identical to control that a public authority exercises over its own departments, but control must at least be effective.⁴³ For that matter, it is not relevant how decisions are adopted in collective bodies. Decisions can thus be made by a majority rule.⁴⁴ The joint control criterion was further considered in *Econord Spa* and was possibly tightened.⁴⁵ As opposed to earlier jurisprudence, the position of an individual contracting authority holding shares in a separate entity again appears to be relevant. The control criterion is not satisfied if in a jointly owned entity the control rests with one of the shareholders and the other shareholders are only formally participating. The shares in the relevant case were divided in such a way that one shareholder held 173,467 shares, while the other 318 were divided between 36 municipal councils. However, this lack of control can be lifted if these minority shareholders still have an effective role in the management of the company.⁴⁶

The case law of the Court has also provided some guidance on the ‘influence’ aspect which a controlling entity must have in relation to the actual decision making. A strong indication of joint control is the fact that the decision-making bodies of the controlled entity are entirely made up out of representatives of the controlling authorities.⁴⁷ Article 12(3)(i) Directive on public procurement states that the decision-making bodies of the controlled legal person should be composed of representatives of all participating contracting authorities. However, individual representatives may represent several or all of the participating contracting authorities. The legal form of the entity is still not decisive. Surprisingly, the Court did add in *Coditel* that a joint stock company would be more inclined to pursue objectives independently of its shareholders (as opposed to an inter-municipal cooperation based on public law).⁴⁸ Based on this statement, it could be assumed that the legal status of the entity does appear to have some, but definitely not more, influence on the final verdict on control. The influence on the decision-making processes within the controlled entity was further assessed in *Carbotermo*, which related to two aspects that provided valuable guidance. Firstly, the characteristics of national company law can mean that the existence of a majority shareholding is not sufficient to exercise influence over the controlled entity. Secondly, influence exercised through a holding company may weaken the possibility of control.⁴⁹ Additionally, the Directive states that the controlled legal person is not allowed to pursue any interests which are contrary to those of the controlling contracting authorities.⁵⁰

2.3.1.1. Private capital

Whilst the Court condemned any form of private capital in the institutionalised exemption, Article 12 Directive on public procurement allows for indirect private capital, and direct private capital if it concerns non-controlling and non-blocking forms of private capital participation, which is required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.⁵¹ Cavallo Perin & Casalini have previously argued in favour of the inclusion of

contracting authorities or by other legal persons controlled by the same contracting authorities; and

- (c) 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 national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:

- (i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;
- (ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and
- (iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.’

42 Opinion of Advocate General Trstenjak in C-324/07, *Coditel*, [2008] ECR I-08457, Para. 36.

43 *Coditel*, supra note 22, Para. 46.

44 *Coditel*, supra note 22, Para. 51.

45 Joined Cases 183/11 and C-182/11, *Econord SpA*, [2012] (not published).

46 S. Smith, ‘In-house awards to jointly controlled companies – satisfying the control test: *Econord SpA* cases C-182/11 and C-183/11’, 2013 *PLR*, p. 34.

47 Commission Staff Working Paper, supra note 16, p. 9.

48 *Coditel*, supra note 22, Para. 37. Commission Staff Working Paper, supra note 16, p. 10.

49 *Carbotermo*, supra note 21, Paras. 38-39.

50 Art. 12(3)(iii) Directive on public procurement.

51 Art. 12(3)(c) Directive on public procurement.

such a provision. These authors claimed that a full ban on private capital would hinder public access to in-house share capital, and in this line of thought the registration of such a company on the stock exchange. Arrowsmith also argued that, in the pre-*Teckal* era, problems existed in relation to the privatization of former state companies. The application of the directives would hinder privatization, because it would be impossible to find prospective buyers for these companies without being allowed to attach the existing contract or goodwill from a government business.⁵²

The previous course of the Court was crystal clear. Even a minority holding of a private undertaking in the capital of an entity eliminated the possibility to exercise over that entity control similar to that which it exercises over its own departments.⁵³ In *Stadt Halle*, the City of Halle indirectly held a 75.1% share in RPL Recyclingpark Lochau GmbH, which was granted the management of the residual urban waste in Halle. The remainder of the shares were held by a private limited liability company, making Lochau GmbH a ‘semi-public company’.⁵⁴ The reference for a preliminary ruling considered the compatibility of such a holding in relation to the control criterion. The Court rejected the possibility of control in relation to a minority of privately held shares.⁵⁵ It came to this conclusion by distinguishing the importance of objectives in the private and public interest:

‘that the relationship between a public authority which is a contracting authority and its own departments is governed by considerations and requirements proper to the pursuit of objectives in the public interest. Any private capital investment in an undertaking, on the other hand, follows considerations proper to private interests and pursues objectives of a different kind.’ Second, the award of a public contract to a semi-public company without calling for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, in particular in that such a procedure would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors.⁵⁶

In *Coditel* the Court clarified that the existence of such a holding must be determined at the time of the possible award of a public contract.⁵⁷ If a private minority shareholding in a majority public company would acquire rights of veto over important decisions, this would also make ‘similar control’ impossible. Events occurring after the award of the contract must also be considered, especially if they are used to circumvent EU legislation by transferring the shares previously entirely owned by a public authority to a private company.⁵⁸ These events can only be taken into consideration if, at that time, a real prospect of such an opening to private capital exists. This raises questions as to whether it is allowed to grant entities ‘birth help’ during the initial stages of establishing the company after which it would be intended to be privatized.⁵⁹ The Court did allow the potential existence of private capital in the case of *Sea Srl*, in which the question also arose whether the possibility that private entities might come to hold shares in a controlled entity would be of influence. In this case, Se.T.Co’s statutes contained the option to issue preferential shares in order to encourage the widest ownership of shares at a local level, which could lead to private ownership.⁶⁰ According to the Court, this mere possibility does not affect the question whether

52 S. Arrowsmith, ‘Some problems in delimiting the scope of the Public Procurement Directives; privatisations, purchasing consortia and in-house tenders’, 1997 *PPLR*, p. 198.

53 *Sea Srl*, supra note 22, Para. 46; *Stadt Halle*, supra note 21, Para. 49; *Coditel*, supra note 22, Para. 30. Also see more recently, C-574/12, *Centro*, (not yet published).

54 Opinion of Advocate General Stix-Hackl in C-26/03, *Stadt Halle*, [2005] ECR I-00001, Para. 58.

55 AG Stix-Hackl was inclined to accept private capital by stating that ‘there is therefore, in principle, no problem created by private businesses being involved’. She came to this conclusion by assessing the actual situation and whether a private company would have a dominant influence. Opinion of Advocate General Stix-Hackl in *Stadt Halle* on 23 September 2004, Paras. 64-71.

56 *Stadt Halle*, supra note 21, Paras. 50-51.

57 *Coditel*, supra note 22, Para. 30.

58 *Sea Srl*, supra note 22, Para. 48.

59 Weltzien, supra note 25, p. 255.

60 *Sea Srl*, supra note 22, Paras. 42-43.

sufficient control is exercised.⁶¹ This seems to be contrary to the ruling in *Parking Brixen*, which appeared to be less lenient.⁶²

Private participation is thus no longer fatal if control is attempted to be proven before the Court. However, it still remains true that control is easily proven if private capital is absent. In *Carbotermo*, it was stated that if a contracting authority holds, alone or together with other contracting authorities, all of the share capital in a separate entity, that fact tends to indicate a control similar to that which it exercises over its own departments.⁶³ In this case, the Court was not convinced that the control criterion had been met. The Board of Directors had generous managerial powers, which it could exercise independently. The statutes granted the controlling municipality of Busto Arsizio no special control or voting powers to restrict this freedom.⁶⁴ Additionally, the capital was held entirely by another joint stock company whose majority shareholder was, in turn, the contracting authority. According to the Court, the intervention of such an intermediary may weaken any possibility of control exercised by the contracting authority over a joint stock company merely because it holds shares in that company.⁶⁵ However, this requirement does not seem to be absolute as it was also considered to be irrelevant in *Stadt Halle*.⁶⁶

2.3.2. Essential part of the activities criterion

The second Teckal criterion is the percentage of activities that a controlled entity is allowed to perform on the market if it still wishes to fall under institutionalised cooperation. In other words, the controlled entity's activities must be performed, for an essential part, for the controlling contracting authority. It aims to ensure that EU public procurement law remains applicable if the controlled entity is in competition with other undertakings on the market.⁶⁷ The undertaking in question can only be considered to be carrying out the essential part of its activities if the undertaking's activities are devoted principally to that authority and any other activities are only of marginal significance.⁶⁸ Pijnack Hordijk questions whether the Court intentionally wanted to limit the application of the *Teckal* exemption, because the notion of 'marginal significance' did not return in the dictum.⁶⁹

'Essential' is defined in this respect as taking into account all the qualitative and quantitative facts of the case.⁷⁰ For this purpose, the undertaking's turnover is based on the turnover that it achieves due to the awarded contracts, including the turnover achieved with users in the implementation of the award decisions. The activities which must be taken into account are those activities relating to the awarded contract. In *Carbotermo*, the Court stated that such a calculation is irrespective of the attributes which these services are performed for or paid by, or the territory on which they are performed.⁷¹ It was further clarified that when several contracting authorities control an entity, the condition relating to the essential part of its activities can be met if that undertaking carries out the essential part of its activities, not necessarily with one of those authorities, but with all of those authorities together.⁷² In *Asemfo*, 55% of Asemfo's activities were performed for the Autonomous Communities, which held 1% of its shares, and nearly 35% for the State, which held the other 99%. The Court concluded that this total of 90% which was performed for the controlling authorities fulfilled the essential part of its activities doctrine. In Article 12(1)(b) Directive on public procurement, the European legislature has concluded this debate by setting this percentage at 80%. The initial proposal by the Commission contained a more restricted view towards this percentage, being 90%. After the trilogue, the percentage was lowered to 80%, allowing

61 *Sea Srl*, supra note 22, Para. 53. See also, D. McGowan, 'Case Comment; Does the future possibility of private capital being held in a public company prevent the application of Teckal? *Sea Srl v Comune di Ponte Nossa (C-573/07)*', 2010 *PPLR*, pp. 13-16.

62 In this case, the fact that national legislation provides for the compulsory opening of the supposedly controlled entity in due course was still to be taken into account.

63 *Carbotermo*, supra note 21, Para. 37; *Coditel*, supra note 22, Para. 31; *Asemfo v Tragsa*, supra note 22, Para. 57.

64 *Carbotermo*, supra note 21, Para. 38.

65 *Carbotermo*, supra note 21, Para. 39.

66 Opinion of Advocate General Stix-Hackl in C-26/03, *Stadt Halle*, [2005] ECR I-00001, Paras. 6-10.

67 Commission Staff Working Paper, supra note 16, p. 11.

68 *Carbotermo*, supra note 21, Paras. 64-65.

69 Pijnacker Hordijk et al., supra note 30, pp. 115-116.

70 Weltzien, supra note 25, p. 249.

71 *Carbotermo*, supra note 21, Paras. 66-67.

72 *Carbotermo*, supra note 21, Para. 70; *Teckal*, supra note 19, Para. 50.

contracting authorities to deliver a greater amount of services in competition with other third parties without falling outside of the institutionalised exemption.

2.3.3. *Contracts granted to sister and mother entities*

Under Article 12(1) Directive on public procurement, a ‘bottom-up contract award’, meaning that the controlled entity awards a contract to the controlling parent, qualifies as an exempted award of a public contract.⁷³ The Commission had earlier stated that it believed that the reciprocal relationship could also fall under this exemption.⁷⁴ Additionally, a contract awarded between two in-house entities controlled by the same parental entity is now also included in this doctrine (a horizontal award). Formally, it can be argued that these entities do not have their own will, and because both of them are controlled by the same entity, contracts between them are also exempted. The Court recently emphasized the importance of the control criterion in these cases.⁷⁵ In *Technische Universität Hamburg-Harburg*, the Court confirmed that *both* controlled entities should fulfil the control criterion, which concerns not just one part of the activities (in this particular case the procurement department). Consequently, greater legal certainty is created by this explicit inclusion, thereby further extending the scope of public contract categories.

2.3.4. *Services outside of the public interest*

Article 12 Directive on public procurement also confirms that cooperation between contracting authorities based on the institutionalised exemption does not necessarily have to involve services derived from the public interest. Supportive services such as IT, catering and security services can be included in this exemption, because no demands are made that these services must be of general interest.⁷⁶

It can be concluded that the codification of the institutionalised exemption has provided explicit legal certainty concerning the activities criterion. However, it also extended the scope of this exemption by allowing private capital under certain circumstances by including public contracts granted to sister and mother entities under its scope and by confirming its applicability to services outside of the public interest.

2.4. *Non-institutionalised cooperation (Article 12(4))*

Many scholars extensively discussed the case law following *Teckal* and its limitations to state activities. The case of *Commission/Germany* further sparked this debate, because many discussed whether a new exemption had been created in addition to the in-house saga.⁷⁷ Additionally, it was even questioned whether or not the Court had decided to take a completely different course in relation to in-house exemptions. This course would appear to be more lenient towards contracts concluded between public entities.⁷⁸ The codification of this exemption alongside institutionalised cooperation in Article 12(4) Directive on public procurement reconfirms its separate existence.⁷⁹ The use of a public authority’s own

73 See Art. 12(2) Directive on public procurement:

‘Paragraph 1 also applies where a controlled legal person which is a contracting authority awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.’

74 Commission Staff Working Paper, supra note 16, p. 9.

75 Case 15/13, *Technische Universität Hamburg-Harburg*, (not yet published). D. McGowan, ‘Can horizontal in-house transactions fall within Teckal? A note on case C-15/13, Technische Universität Hamburg-Harburg, Hochschul-Informationssystem GmbH v Datenlotsen Informationssysteme GmbH’, 2014 *PPLR*, pp. 120-122.

76 Bleeker & Manunza, supra note 21, pp. 741-810.

77 *Commission v Germany*, supra note 20; C-159/11, *ASL di Lecce*, (not yet published). The Commission also refers to this type of cooperation as ‘horizontal’. Commission Staff Working Paper, supra note 16, p. 12.

78 K. Pedersen & E. Olsson, ‘Commission v Germany – a new approach to in-house providing’, 2010 *PPLR*, p. 40.

79 See Art. 12(4) Directive on public procurement:

‘A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

(c) the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation.’

However, the case law of the Court had already confirmed this in subsequent rulings. C-386/11, *Piepenbrock*, (not yet published) and

resources for the provision of a public task may thus also be done in cooperation with other contracting authorities. Basically as long as the cooperating entities are not remunerated by each other and an exchange of reciprocal rights or obligations occurs, no public contract under EU public procurement law exists. An example of such a cooperation is ‘a general understanding between two municipalities that their respective music ensembles would perform at each other’s city celebrations,’ or, multiple municipalities dividing elements of the waste management chain, such as collection, recycling and incineration could also fall under this category.⁸⁰ This exemption from public procurement law appears to be the most problematic in its application, because its criteria, such as the denomination between public and non-public interest, give rise to difficulties in practice.

In *Commission v Germany*, the four administrative districts of Harburg, Rotenburg, Sotau-Fallingbostal and State (‘the Landkreise’) concluded a contract for 20 years with Stadtreinigung Hamburg, which concerned the disposal of waste in a new, still to be constructed, incineration facility called Rugenberger Damm. The City of Hamburg committed itself to reserving 120,000 tonnes of waste per year for this incineration facility. In return, the Landkreise agreed to pay for the waste disposal services of Stadtreinigung Hamburg. The fees were partly fixed and partly based on the amount of waste collected. Additionally, they also committed themselves to making landfill capacity available for Stadtreinigung Hamburg and to dispose of the waste slag which remained after incineration and which was derived from the quantities of their own waste, in their own landfill. Acting on a call from a German citizen, the Commission informed the German authorities that they were in breach of Directive 92/50/EC by directly awarding the contract. In short, Germany claimed that it was concluded within the ambit of the state and did not affect the market or the relevant Directive. In the procedure before the Court, the application of *Teckal* was undisputed, because the cooperation clearly failed to fulfil the control criterion. The Landkreise had no control over either Stadtreinigung Hamburg or the incineration facility operator, and vice versa.⁸¹ Following the inapplicability of *Teckal*, the Court continued to analyse the factual circumstances of the contract concluded between the four Landkreise and Stadtreinigung Hamburg. The contract between Stadtreinigung Hamburg and the incineration facility was not assessed, however. The basis of the assessed contract was founded on the obligation to perform a public task, namely waste disposal. This task required Member States to conclude appropriate measures to ensure the collection, sorting and treatment of waste at the nearest possible installation.⁸² The Court further considered that the obligation that rested on the City of Hamburg to reserve capacity was not to be seen as a guarantee, because the disposal of the City of Hamburg’s waste took priority and other facilities of the City of Hamburg had to have capacity where the waste of the Landkreise was to be processed.⁸³ The Court also took notice of the fact that there were no other financial transfers between the City of Hamburg, other than the fees paid by the Landkreise.⁸⁴

The Court concluded by dismissing the action of the Commission and created a new test for inter-municipal cooperation within the public domain. It decided by stating that the contract had been concluded, without private participation, solely between contracting authorities. The contract intended to create the basis for the operation and construction of a waste incineration facility, which contributed to the performance of a public task.⁸⁵ The Court referred to *Coditel* and emphasized the importance of the discretionary power relating to the public task performance of contracting authorities.⁸⁶ In its dictum, the Court then went on to provide a three-legged test, which if fulfilled would not undermine the free movement of services and the opening up of undistorted competition.⁸⁷ The trilogy has extensively

ASL di Lecce, supra note 77.

80 Commission Staff Working Paper, supra note 16, pp. 6 and 13.

81 Due to this, Advocate General Mazák and the Commission came to the conclusion that the contract had been granted directly which was contrary to European public procurement law. Opinion of AG Mazák in Case 480/06, *Commission v Germany*, [2009] ECR 4747.

82 See Directive 75/442/EC, which was amended by Directive 91/156/EC.

83 *Commission v Germany*, supra note 20, Para. 39.

84 *Ibid.*, Para. 43.

85 *Ibid.*, Paras. 37 and 45-47.

86 This may seem odd because in *Coditel Brabant* the Court considered the control criterion, which was not fulfilled in this case. *Commission v Germany*, supra note 20, Para. 46. Also see K. Pedersen & E. Olsson, ‘Commission v Germany – a new approach to in-house providing’, 2010 PPLR, p. 40.

87 *Commission v Germany*, supra note 20, Para. 47.

altered its wording.⁸⁸ Firstly, the contract needs to be concluded exclusively by public entities without the participation of private parties. However, Article 12 Directive on public procurement also allows private capital in non-institutionalised cooperations. It provides the same conditions as provided in the case of institutionalised cooperation. In this regard, the preamble to the Directive on public procurement states:

‘it should also be clarified that contracting authorities such as bodies governed by public law, that may have private capital participation, should be in a position to avail themselves of the exemption for horizontal cooperation.’⁸⁹

The caselaw, which was considered in Section 2.3.1.1., provides further insight into the discussion about private capital. Secondly, no private provider can be placed in a position of competitive advantage. The provision of services must not compete with private parties to avoid interference with the principle of free and undistorted competition.⁹⁰ This criterion also did not find its way into the final wording of Article 12(4) Directive on public procurement, but still appears to be relevant in light of the other criteria. Thirdly, only considerations and requirements relating to the pursuit of public interest which rests on them all underlie the cooperation. This has been confirmed in Article 12(4)(a) and (b). In *Commission v Germany*, this meant that the contract must not be concluded for pecuniary interest. Hence, cooperation cannot exist in the form of a unilateral assignment of tasks, meaning that ‘true’ cooperation must occur. Article 12(4)(c) allowing 20% of commercial activities apparently does not hinder the fulfilment of this criterion. Karayigit claims that the broad scope of this exemption adheres to the principle of subsidiarity and Article 14 Treaty on the Functioning of the European Union (TFEU) that grants Member States the responsibility to organize and perform their services of general interest.⁹¹ Lastly, *Piepenbrock* clarified in relation to the public interest requirement that the existence of a public interest is not a given fact if there is an interest to purchase services jointly, which in this case concerned cleaning services.⁹²

In relation to the non-institutionalised exemption, it can be concluded that legal certainty has been provided for some aspects of non-institutionalised cooperation, which was one of the goals of the modernization process. The activities criterion that was originally created in the field of institutionalised cooperation also applies to this exemption and some forms of private capital are allowed, which was certainly not allowed under the Court’s scrutiny. These clarifications expand the scope of non-institutionalised cooperation and, thus, contribute to stronger flexibility concerning its application. Combined with remaining aspects of legal uncertainty, the consequences of this greater flexibility that were also visible in the institutionalised exemption are discussed in the following section.

2.5. Extended applicability of the in-house exemptions

The discussion of Article 12 Directive on public procurement in the previous sections has shown that it concerns a codification of the jurisprudence of the Court, but a more lenient approach is present. The scope of the in-house exemptions has been broadened, which raises many questions. Is the granted legal certainty sufficient for application in practice? For instance, will contracts awarded between cousin entities or to uncle or aunt entities also be included within its scope in the future? Is the control criterion sufficiently clarified to ensure proper application? Does the type of legal instrument, being a contract or legal act, which created the legal relationship between a contracting authority and a controlled entity play a role when discussing the control criterion?⁹³ And what constitutes a ‘consideration in the public

88 Informal tripartite meetings attended by representatives of the European Parliament, the Council and the Commission in the legislative procedure.

89 Preamble 32 Directive on public procurement.

90 *Stadt Halle*, supra note 21, Para. 50.

91 M. Karayigit, ‘A new type of exemption from the EU rules on public procurement established: “in thy neighbour’s house” provision of public interest tasks’, 2010 *PPLR*, p. 190.

92 *Piepenbrock*, supra note 79.

93 In *Asemfo*, the strict legal framework in which Asemfo functioned appeared to be decisive, whilst in *Commission v Germany* the contractual relationship between the Landkreise and the city of Hamburg ensured that control was not possible. AG Mazák in C-295/05, *Asemfo v Tragsa*, [2007] ECR I-02999, Para. 44. See R. Caranta, ‘The In-House Providing: The Law as It Stands in the EU’, in M. Comba & S Treumer (eds.), *The In-house providing in European Law*, 2010, pp. 48-51.

interest'? Despite the advantages of flexibility for contracting authorities, legal uncertainty will therefore continue to exist due to this codification in the new directives.

2.5.1. Legal uncertainty and enforcement issues

The case law previously described has exemplified legal issues in which third parties aim to enforce public procurement law by initiating proceedings in the courts. The aim of these proceedings is to break open contracts granted between contracting authorities by showing the misinterpreted application of the law. Consequently, this could have obligated contracting authorities to subject these public contracts to a public procurement procedure. Their attempts have frequently been in vain, especially since the Court adopted a more lenient approach towards in-house performance from 2007 onwards, as discussed before. The codification of Article 12 Directive on public procurement continues to follow this approach.

It is to be expected that the codification of this extensive case law will make enforcing the application of the law by third parties more burdensome for three reasons. Firstly, the codification is only partial, meaning that the status of non-codified interpretations by the Court have become uncertain. For instance, it was concluded in *Stadt Halle* that the criterion of control was fulfilled if a contracting authority owns all the shares in the controlled entity, and additionally there are no limitations in the articles of association.⁹⁴ Or *Coditel's* clarification that control should be effective and that an inter-municipal cooperation would be more inclined to pursue objectives independently of its shareholders. Does the explicit exclusion of such clarifications mean that no guidance can be derived from them? This conclusion seems improbable, but the partiality of this codification does contribute to legal uncertainty on this matter because it is also possible to argue that the codified criteria are exhaustive. Secondly, the absence of legal clarity in relation to the interpretation of in-house exemptions on an EU level can lead to diverse interpretations across the Member States. For instance, 'considerations in the public interest' in relation to non-institutionalised cooperation are traditionally interpreted distinctly across the EU. This has the potential not only to hamper the creation of a single market for public contracts, but can also lead to cross-border enforceability problems. This can mean, for instance, that a German contractor may struggle to engage in judicial review in relation to a contract awarded in-house in Spain, if interpretations vary from Member State to Member State. Thirdly, a bottom-up enforcement through judicial review plays a pivotal role in the enforcement of public procurement law on a national level, because supervisory bodies specifically established to ensure the proper application of this field of law often do not exist on a national level. The Commission's proposal to oblige Member States to establish such authorities did not make it into the final version of the adopted directives.⁹⁵ If anything, an enhanced discretionary power for national contracting authorities should, at least, be balanced by attributing sufficient protection to legal subjects in the Member States, making legal certainty even more essential.

2.5.2. Providing more legal certainty: a shared responsibility for the EU and its Member States

Contrary to the common beliefs of many Member States, there is a national discretionary power to provide further clarification of many aspects of this harmonization measure. Article 12 Directive on public procurement appears to be minimum harmonization and, thus, still leaves open many opportunities for the Member States to adopt their own legislation or policy in relation to these important – and widely used – exemptions from public procurement law. The EU and the Member States thus have shared regulatory powers in relation to public procurement law. The Dutch legislator confirmed the existence of these powers when it adopted the Public Procurement Act 2012, which on many issues provides more explicit legal norms than the current Directives 2004/17/EC and 2004/18/EC contain.⁹⁶ This approach was contrary to the previous implementation policy of the Netherlands in this field.⁹⁷ In any event, the

⁹⁴ *Stadt Halle*, supra note 21.

⁹⁵ Art. 84 Proposal for a Directive of the European Parliament and the Council on public procurement, COM(2011) 896 final.

⁹⁶ The inclusion of the *Gids Proportionaliteit* [Proportionality Guide] into the legal framework for public procurement is one example of this endeavour. *Staatscourant* 2013, no. 3075.

⁹⁷ The *Besluit aanbestedingsregels voor overheidsopdrachten* [Decree on public procurement rules for public contracts] and the *Besluit aanbestedingen speciale sectoren* [Decree on special sector tenders] were generally speaking nothing more than a translated copy of the implementation of the directives.

Member States and the EU share a responsibility to create transparent and objective procedures for the awarding of public contracts and to create sufficient means for enforcement through judicial review. The following sections delve further into this latter point.

3. Regulation and enforcement of the pre-procurement phase: mapping its challenges

The changes which have been made to the exemptions from the public procurement legal framework should be placed in a broader, more fundamental, context.⁹⁸ A wider applicability of these exemptions creates more policy space for national public authorities whilst deciding upon public service delivery. In the European Union, public authorities have been granted the freedom to decide upon the organization of public services. It allows each Member State to decide *which* interests it deems necessary to safeguard and *how* these services should subsequently be organized, financed, and by *whom* the service should be performed.⁹⁹ Article 106(2) TFEU strongly embodies this freedom, and the Protocol on Services of General Interest further complements this statement by recognizing that

‘(...) the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users; the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations; (...)’¹⁰⁰

More specifically, public procurement law has up until now adhered to the freedom of public authorities to decide upon the organization of public services. In this regard, the European Commission (the Commission) states that:

‘it is entirely up to the public authorities to decide whether to provide a service themselves or to entrust it to a third party (externalisation). The public procurement rules only apply if the public authority decides to externalise the service provision by entrusting it to a third party against remuneration.’¹⁰¹

Despite this distant role of the European Union, the Commission has pursued an extensive soft law policy to clarify the various forms of services of general interest (SGIs).¹⁰² The provided clarification via soft law enhances the enforcement issues described above in Section 2.5.1, because the status of these instruments is not legally binding, but they do have some legal relevance if one looks at their usage by judges in the courts.¹⁰³ Nonetheless, the Commission considers SGIs to be ‘services that public authorities of the Member States classify as being of general interest and are therefore subject to specific public service obligations.’ These services can be divided into two groups: non-economic and economic activities. Services of general economic interest (SGEI) are seen as economic activities which deliver outcomes that benefit the overall public good that would not, or not sufficiently, be supplied by the market without public intervention. Such economic activities are subject to specific European legislation

98 The following paragraphs concern a revised and improved version of Janssen, *supra* note 10, pp. 7-26.

99 Wetenschappelijke Raad voor het Regeringsbeleid, ‘Het borgen van publiek belang’, *Rapporten aan de regering*, no. 56, 2000.

100 Consolidated version of the Treaty on the European Union, Protocol (No. 26) on services of general interest, OJ C 115, 9.5.2008, pp. 308-308.

101 Commission Staff Working Document, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, Brussels, 29.4.2013, SWD(2013) 53 final/2, p. 87.

102 See, amongst others, Communication from the Commission, Services of General Interest in Europe, OJ C 281, 26.9.1996, pp. 3-21; Communication from the Commission, Services of General Interest in Europe, OJ C 17, 19.1.2001, pp. 4-23; Report to the Laeken European Council – Services of General Interest, COM(2001) 598 final, 17 October 2001; Green Paper on Services of General Interest, COM(2003) 270 final, 21 May 2003; Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Council of the Regions, White Paper on Services of General Interest, COM(2004) 374 final, 12 May 2004; Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, COM(2007) 725 final; A Quality Framework for Services of General Interest in Europe, Brussels, 20.12.2011, COM(2011) 900 final.

103 J. van den Brink & J. van Dam, ‘Nederlandse bestuursrechters en unierechtelijke ‘beleidsregels’’, 2014 *JB Plus*, p. 26.

and are therefore covered by the internal market rules (i.e. the Lisbon Treaty, state aid, competition and public procurement rules). Non-economic services of general interest (NESGI) fall outside the scope of these rules.¹⁰⁴ Consequently, the academic debate has focused on identifying *what* SGIs are and *what set of rules* should apply to them.¹⁰⁵ Despite the competence of the Commission to initiate regulations on this topic, no consensus has been reached on a EU level, making a common EU approach absent.¹⁰⁶

3.1. More internal performance of public services

At the national level of the Netherlands, recent developments have reinitiated questions surrounding the extent of the freedom to decide upon the provision of public services. In general, this is predominantly instigated by a trend in which more and more services are performed by public authorities themselves, or in cooperation with other public authorities. This trend can be explained by a number of reasons.¹⁰⁷ Firstly, the internal performance of services, and especially public-public cooperation, has gained importance in recent times.¹⁰⁸ In the Netherlands, an increase in institutionalised cooperation between (local) public authorities has occurred, which consists of 698 cooperations based on public law, and 1022 cooperations based on private law.¹⁰⁹ Such cooperation within the public domain can first of all be explained by a leading vision document of the former Dutch government, which pursues a 'compact' government.¹¹⁰ Secondly, this desire for more cooperation can be put into context by the need to spend public funds efficiently. More cooperation amongst public authorities for efficiency gains becomes even more relevant in times of financial crisis. Additionally, the Treaty of Lisbon has increased the role of regional and local self-governance, which also compels this development.¹¹¹ Thirdly, the use of exemptions from public procurement law in general is influenced by the current views on the relationship between the market and the government.¹¹² The advantages of introducing competition into markets are not as commonly accepted, and thus applied throughout Europe, as they were in the 1990s when liberalization was strongly pursued.¹¹³ This is caused, to some extent, by the fact that the limitations of the market, and the services it can provide, have become more visible.¹¹⁴ Finally, the extended scope of in-house exemptions in the new directives on public procurement will only emphasize the need to scrutinize the use of in-house exemptions from public procurement law.

3.2. Regulating the pre-procurement phase

In response to the developments previously described, Manunza has suggested introducing a coherent legal framework that governs the decision of a public authority to perform a service itself (or in cooperation with others) or to externalize the performance to a third party via a transparent and competitive procedure.¹¹⁵ As such, it would regulate the phase prior to a public procurement procedure,

104 In recent years, a distinct category of social services of general interest (SSGI) has been introduced. These services can also be either economic or non-economic and include 'social security schemes covering the main risks of life, such as those linked to health, ageing and disability, and a range of other essential social services provided directly to the person, such as occupational training, rehabilitation and language training for immigrants'. Communication from the Commission – Implementing the Community Lisbon Programme – Social services of general interest in the European Union, COM/2006/0177 final.

105 See note 102, supra; Manunza & Berends, supra note 6, p. 378; P.J. Slot et al., 'Diensten van algemeen (economisch) belang naderbeschouwd', 2007 *Markt & Mededinging*, no. 4, pp. 102-105; M. Krajewski, 'Providing legal clarity and securing policy space for public services through a legal framework for services of general economic interest: squaring the circle', 2008 *EPLR*, pp. 377-397.

106 Krajewski, supra note 105, pp. 377-397. The Commission has the competence to initiate a regulation or directive according to Arts. 14 TFEU and 114 TFEU.

107 These reasons have been discussed in more detail in Manunza, supra note 6; Janssen, supra note 10.

108 See for instance: Commission Staff Working Paper, supra note 16 and Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP), Brussels 2008/C 91/02.

109 Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, *Visiedocument 'Bestuur en bestuurlijke inrichting: tegenstellingen met elkaar verbinden'*, 2011, p. 5.

110 *Ibid.*, p. 5; E.R. Manunza, 'Incoherente ontwikkelingen in de relatie Markt en Overheid. 'Uitvoering door de overheid' v. 'uitvoering door de markt (insourcing v. outsourcing / inbesteden v. uitbesteden)', 2013 *Tijdschrift Aanbestedingsrecht*, pp. 200-207.

111 Manunza, supra note 6, p. 76.

112 For instance, the liberalization of the water, postal and the energy markets still continues.

113 The combination of market fatigue with 'integration fatigue' is considered to be detrimental to the functioning of the internal market. Monti Report, supra note 7, p. 24.

114 Monti Report, supra note 7, p. 24.

115 Manunza, supra note 6, p. 115. Manunza & Berends, supra note 6, p. 376; A. Sánchez Graells, *Public Procurement and the EU Competition Rules*, 2011, p. 232.

also referred to as the *pre-procurement phase* or the *make-or-buy decision*. This fundamental decision-making phase is currently left in the hands of politicians and public policy makers. The introduction of such a ‘test’ has the advantage of resulting in an improved provision of public services, because it answers the question of *who is most suitable to perform a service*; the market or the state? Important aspects to be researched are the core elements of such a framework, in which objectivity and subsequent transparency will play an imperative role. The absence of an objective and transparent balance of the advantages and disadvantages of different public service delivery modalities can lead to public contracts being awarded directly, or services being performed in-house, without them leading to the best value for society. It is thus the question whether the ‘highly competitive social market economy’ as it stands today in the EU could benefit from regulating the relationship between the market and the government more extensively.¹¹⁶ Recently, the Confederation of Netherlands Industry and Employers (VNO-NCW) and the largest representative organisation for SMEs in the Netherlands, the Royal Association MKB-Nederland (MKB NL), explicitly supported these research endeavours and urged the Dutch Minister to further investigate these matters.¹¹⁷ In this line of thought, the legal possibility to make use of an exemption from the public procurement regime must, at least, be preceded by a thorough analysis in which objective and transparent factors decide whether internal or external public service delivery is deemed best for society. The legal, economic and societal factors which allow for a true comparison of performance alternatives require further research.¹¹⁸ The same is true for the level on which this regulation is to be introduced. Both the EU level and that of the Member States are to be considered. In relation to the EU level, the EU Treaty appears to have granted the Commission an explicit legal basis to introduce a common approach in Article 14 TFEU or 114 TFEU, which has gained further importance since the introduction of Protocol 26 on Services of General Economic Interest. Krajewski argued for such an EU-wide regulatory framework. His approach is based on introducing universal service obligations. Regulating more extensively would be difficult due to the distinct characteristics of public service delivery in the Member States.¹¹⁹ Regulation on a national level could potentially be more suitable to fit each Member State’s needs, but would, in return, have the potential to create incoherence across the EU.

3.3. Enforcing the pre-procurement phase

In Section 2.5.1, the difficulties resulting from the codification of the jurisprudence of the Court relating to in-house exemptions were discussed. It was argued that parties have in the past attempted, but failed, to challenge in-house service performance by contracting authorities. Currently, a mix of enforcement methods under public procurement law is present in the European Union. For instance, the Netherlands and Germany apply private law, granting competence to the civil courts, whilst Italy and France view public procurement law as public law, giving the administrative judges jurisdiction.¹²⁰ In the Netherlands, judicial review in the field of public procurement law does not stretch as far as the described pre-procurement phase. At present, only once the decision to externalise public service delivery is taken do the public procurement rules and subsequent legal protection come into force accordingly. More specifically, Article 8:3 General Administrative Law Act (*Algemene wet bestuursrecht*) prevents an objection to or an appeal against decisions by public authorities leading to the conclusion of a public contract, making this phase a public law matter.

It is therefore of importance to *ex ante* consider the enforceability of a framework regulating the pre-procurement phase, if it were to emerge. Such enforcement would allow third parties to truly gain access to a judicial review of the question of who is best suited to perform a certain service, instead of challenging

116 Monti Report, supra note 7, p. 68.

117 These Dutch representative bodies argued against the plans of the Rutte II administration to have cleaning and security services performed in-house, instead of continuing to contract them out to market parties. VNO-NCW & MKB NL, ‘Inbesteden, brief aan de VC voor Wonen en Rijksdienst van de Tweede Kamer’, 23 June 2014.

118 It is of interest to consider the Impact Assessment as used by the Commission, the Dutch *Maatschappelijke kosten-batenanalyse* [Cost-benefit analysis] and the *Markteffecttoets* [Market-effect test] in this respect. See Sociaal Economisch Raad, ‘Overheid én markt: Het resultaat telt! Voorbereiding bepalend voor succes’, 2010 *Advies*, no. 1 - March.

119 Krajewski, supra note 105.

120 R. Caranta, ‘General Report’, in U. Neergaard et al. (eds.), *Public Procurement Law: Limitations, Opportunities and Paradoxes*, 2014, pp. 81-85.

broadly interpreted legal criteria under the in-house exemptions discussed before. In the Netherlands, the discussion on enforcement should, at least, entail the question whether the administrative courts or the civil courts would be best suited to decide upon a review of decisions taken in the pre-procurement phase. On the one hand, De Haan discussed the need to open pre-procurement decisions to objection and appeal under administrative law, which was confirmed by Schlössels & Zijlstra.¹²¹ On the other hand, including the pre-procurement phase in the jurisdiction of the civil courts seems to have its merits, because it allows judges to rely on the extensive experience which they have gained by being allowed to scrutinise public procurement practices over the years. Additionally, it can create stronger coherence, because the civil courts would remain competent concerning disputes arising from public procurement procedures themselves. However, difficulties can arise in both instances in relation to the extent of the court's review, making it important to consider what type of decisions are to fall under the scope of judicial review by taking into account the separation of powers. Additionally, the question must be answered whether judges are sufficiently equipped to scrutinize these procurement policy decisions and whether review processes would not further impede efficient administrative decision-making. Hence, a balance is to be pursued between providing sufficient judicial protection and, at the same time, ensuring efficient administration. In any case, a situation in which both civil and administrative courts have competence over legal issues arising from different phases of public procurement, being the pre-procurement phase and the procurement phase, appears not to be desirable due to the legal uncertainty and the judicial incoherence which it causes.

From both a regulatory and an enforcement perspective many questions require further research. The following aims to contribute to this endeavour by contextualizing the regulatory and enforcement elements discussed before through a brief discussion of two regulatory alternatives, which encompass both elements in a legal framework.

3.4. The Dutch Public Procurement Act: leading the way?

The first step towards an approach in which the pre-procurement phase is regulated and enforced comes from within Dutch public procurement law. The Dutch legislator has taken this step when it adopted the Dutch Public Procurement Act 2012 (PPA 2012). Article 1.4 PPA 2012 aims to improve the 'societal value' of tenders.¹²² In the Explanatory Note on this article, it is described as the proper allocation and possible saving of public funds in an economic sense.¹²³ It obliges contracting authorities to base the choice for the type of procedure, which the contracting authority wishes to use, on *objective criteria*. Similarly, this obligation exists in relation to the choice for the selection criteria of tenderers or candidates in this procedure. An explanation in relation to both of these choices must be available at the request of market parties, making a judicial review of this decision possible through transparency. However, the exact meaning of the term 'societal value' is currently not defined, but does not necessarily appear to include the achievement of societal goals, such as social inclusion and sustainability. The Explanatory Note clarifies that it is only intended to create more efficient public spending.¹²⁴

If a market party would decide to contest the internal performance of a service before a Dutch court in the future, the assessment of the court may be different than before. Hence, due to this duty to provide reasoned decisions, not only legal considerations, but also economic consideration can potentially play a role in the court's assessment. The first ruling on Article 1.4 PPA 2012 by a Dutch District Court stated that this article was to be interpreted as requiring the achievement of the best value for the money spent, but did not delve further into the potential scope of this article.¹²⁵ Nonetheless, a broader interpretation that considers the decision-making of public authorities in the pre-procurement phase more extensively has the potential to greatly improve the decision-making process of public authorities. Whether or not

121 P. de Haan, 'Besluiten tot privaatrechtelijke rechtshandelingen. Een brug tussen publiek en privaatrecht', 2004 *Nederlands Tijdschrift voor Bestuursrecht*, no. 4, pp. 109 et seq.; R.J.N. Schlössels & S.E. Zijlstra, *Bestuursrecht in de sociale rechtsstaat*, 2010, pp. 1252-1254.

122 The notion of 'societal value' was introduced by an Amendment by the MP Koppejan. *Kamerstukken II 2010/11*, 32 440, no. 46. See Janssen, supra note 10.

123 *Kamerstukken II 2010/11*, 32 440, no. 46.

124 *Ibid.*

125 District Court (*Rechtbank*) Noord-Nederland, 25 October 2013, ECLI:NL:RBNNE:2013:7100.

the higher courts will agree with the District Court's interpretation, and whether judges are willing to undertake more extensive scrutiny, still remains to be seen in future cases.

3.5. US competitive sourcing: an example of regulation and enforcement

The second example of regulating and enforcing the pre-procurement phase is found in the United States of America.¹²⁶ In this federal system, a different approach is taken by which the decision to externalize or internalize a service on a federal level is extensively regulated by two competitive sourcing initiatives, notably the US Federal Inventories Reform Act (Fair Act) of 1998 and OMB Circular A-76.¹²⁷ This competitive sourcing system aims to competitively find the best 'source' of service performance.¹²⁸ The Fair Act introduces the obligation for federal agencies to publish an annual inventory of their activities.¹²⁹ These inventories divide services into 'inherently governmental functions' or 'commercial services'.¹³⁰ Inherently governmental functions are those functions that are so intimately related to the public interest that they mandate performance by government employees.¹³¹ The inherently governmental functions fall into two categories. The first being the act of governing, i.e. the discretionary exercise of government authority, and the second being monetary transactions and entitlements.¹³² In general, agencies have considerable discretion in determining whether particular functions are inherently governmental. Factors that should at least play a role in this analysis are listed as well. These factors contribute to the decision of governmental agencies to identify a function as 'inherently governmental'. They include, amongst other things, if an activity is already performed on the market, the degree to which official discretion would be limited and if a statutory restriction that defines an activity as inherently governmental is in place. As a rule of thumb, government employees perform these latter functions and commercial services are performed by either governmental employees or private sector sources (such as contractors).

If a service is considered to be of a commercial nature and is currently performed by governmental personnel, OMB Circular A-76 provides public-private competitions in which a streamlined or standard competitive procedure can be followed.¹³³ In the streamlined competitive procedure, the governmental agency calculates, compares and certifies costs based on the scope and requirements of the activity, in order to determine whether government agency performance or private sector performance is the most efficient and suitable.¹³⁴ In the standard competition process, tenderers compete against one another based on objective and transparent criteria, such as a demonstrated understanding of the government's requirements, costs, technical approach, management capabilities or personnel qualifications.¹³⁵ Interestingly, the governmental agency itself also submits a bid, which allows for a comparison of performance 'sources'.¹³⁶

Challenge and review processes are available for the inventories and the public-private competitions. Interested parties are, for instance, allowed to challenge the inclusion or omission of a service on the inventory.¹³⁷ This creates a situation in which third parties can review the decision of a public authority to provide a service internally. As described above, this is contrary to the case law relating to the in-house exemptions from public procurement law. Both initiatives have been subject to vehement debate over the years and should, therefore, be assessed carefully in order to identify their strengths and weaknesses

126 Manunza, supra note 6, pp. 116-118.

127 US Fair Act, Public Law 105-270 of 105th Congress and OMB Circular A-76, accessible on <http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction> (last visited 17 October 2014).

128 M. Blum, 'The Federal Framework for Competing Commercial Work between the Public and Private Sectors', in J. Freeman & M. Minow, *Government by contract: Outsourcing and American Democracy*, 2009, pp. 63-90.

129 US FAIR Act Section 2: Annual lists of government activities not inherently governmental in nature (a).

130 For extensive guidance, see OMB OFFP, Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions*, Fed. Reg. Vol. 76, No. 176.

131 US FAIR Act Section 5: Definitions (2) (A).

132 US FAIR Act Section 5: Definitions (2) (B).

133 US FAIR Act Section 2: Annual lists of government activities not inherently governmental in nature (d).

134 OMB Circular No. A-76 Attachment B. Public-private competition, C. Streamlined competition procedures.

135 OMB Circular No. A-76 Attachment B. Public-private competition, D. Standard Competition procedures.

136 OMB Circular No. A-76 Attachment B. Public-private competition, A. Preliminary planning 8.a.

137 US FAIR Act, Section 3: Challenges to the list. 'Interested parties' are, according to Section 3 of the Act, allowed to submit a challenge to an omission of a particular activity, or an inclusion of a particular activity on the published list. The scope of this article is broad as it allows private parties and unions to object to the classification of the list.

when identifying best practices for the EU and its Member States.¹³⁸ Nonetheless, the regulatory and judicial enforcement of the phase prior to public procurement are thus present in this example, making it a valuable field of future research endeavours.

4. Concluding remarks

The contribution has discussed the codification of a long line of jurisprudence in relation to the in-house exemptions from public procurement law, institutionalised and non-institutionalised cooperation. The Court in its case law, and subsequently the EU legislator in Article 12 Directive on public procurement, have attempted to strike a balance between, on the one hand, allowing Member States to pursue their national interests through the organisation of public services, and, on the other, further strengthening the emergence of the internal market for public contracts. Due to this codification, substantial changes relating to private capital, the amount of commercial activities allowed, the application of these exemptions to services outside the public interest, and the inclusion of contracts awarded to ‘sister’ and ‘mother’ entities have resulted in a wider applicability of in-house exemptions than was previously allowed by the Court. Additionally, it has been argued that the legal uncertainty created has the potential to further hamper the enforceability of these exemptions from public procurement law. The Member States have a shared regulatory responsibility with the EU to create more clarity on this subject.

These developments have been placed in a broader, more fundamental, context by discussing the need to consider regulating and enforcing the pre-procurement phase, before a public authority decides to rely on an in-house exemption. The use of these exemptions from public procurement law should be included in this decision-making phase relating to public service delivery. A modern social market economy could potentially benefit from the introduction of transparency and objectivity into this phase. Objectively comparing state and market performance via criteria which have been transparently established beforehand should be at the core of such a framework. Future research should focus on identifying these criteria, on analysing the level of desired regulation (EU or MS), and on whether the civil or administrative courts are best suited to provide for the enforcement of public procurement law through judicial review. The experiences and best practices gained from the Dutch PPA 2012 and the US competitive sourcing initiatives can be used for this purpose, as they both contain regulatory and enforcement perspectives on how to create such a coherent framework in the future. ¶

138 S. Schooner, ‘Competitive Sourcing Policy: More Sail than Rudder?’, 2004 *Pub.Cont.L.J.*, pp. 263-279. Government Accountability Office, *Competitive Contracting: The Understandability of FAIR Act Inventories was Limited*, 2000, accessible at <www.gao.gov> (last visited 17 October 2014) or the current Moratorium on public-private competitions in the Consolidated Appropriations Act 2014, p. 8.