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Control over In-house Providing Organisations

Roberto Cavallo Perin* and Dario Casalini†

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1. Introduction

EC public procurement legislation regulates a decision by a public authority to address the market in order to procure works, supply or services establishing contractual relations with economic operators. By contrast, this regulatory regime does not apply to an alternative decision of the public authority to self-produce. To this extent, the exception of in-house providing, first set out by the European Court of Justice (ECJ) in the *Teckal* case,¹ expresses the external boundaries of the EC internal market and at the same time provides a definition of what might be public organisation, inherently not subject to EC competition rules.

The in-house providing exception is based on two requirements: the public authority must (1) exercise control over the in-house provider which is similar to that which it exercises over its own departments and, at the same time (2) the in-house provider must carry out the essential part of its activities with the controlling public authority or authorities. These requirements have been the subject of a broad analysis in a number of papers published in the *Public Procurement Law Review* by Kurt Weltzien in 2005, by Fotini Avarkioti in 2007 and by Toni Kaarresalo in 2008.²

This article focuses solely on the interpretation of the similar control requirement in the ECJ case law and the opinions of the Advocates General, drawing out the factual aspects of these decisions which the aforementioned analyses fail to examine. The central argument of this article is that the factual background of the ECJ decisions provides the basis of an interpretation of the similar control requirement different from those proposed in the above-mentioned analyses, and one that affords a more consistent account of this line of cases.

This article begins with a brief analysis of a recent decision of the ECJ, which sheds light on the elements needed to recognise an in-house relation in the case of a plurality of controlling public authorities, each of them holding a minimal share of the in-house provider's capital. In section 3 the authors will provide a general legal framework for the in-house providing exception, hypothesising that the ECJ definition of in-house providing set out the distinction between EC internal market and

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¹ *Teckal v Comune di Viano* (C-107/98) [1999] E.C.R. I-8121.

² K. Weltzien, "Avoiding the procurement rules by awarding contracts to an in-house entity—scope of the procurement directives in the classical sector" (2005) 14 P.P.L.R. 237; F. Avarkioti, "The application of EU public procurement rules to 'in house' arrangements" (2007) 16 P.P.L.R. 22; T. Kaarresalo, "Procuring in-house: the impact of the EC procurement regime" (2008) 17 P.P.L.R. 242.

its competition rules on one hand and public organisation as a matter of Member States' sovereignty and public authorities' autonomy on the other hand. In section 4 the authors suggest that a strict interpretation of the similar control requirement leads to the denial of the entrepreneurial autonomy of the in-house provider which, because of its organisational relationship with the parent public authority, may not enjoy the economic freedoms typical of any other economic operators in the market. Sections 5 and 6 highlight the differences between the situation of an in-house provider wholly owned or controlled by a single public authority or a plurality of public authorities and the situation where a third party not involved in the relevant organisational in-house relationship may influence the decisions of the in-house provider. A different interpretation of ECJ case law from those proposed in the above-mentioned analyses is suggested, which underlines the fact that the mere holding of shares in the in-house provider capital does not necessarily prevent an in-house providing relation, particularly if those shares were awarded by means of a call for tender. Finally, sections 7 and 8 point out that the different forms of association and co-operation among contracting authorities provided for by national legislative regimes cannot suffice in themselves to establish an in-house relationship. The "similar control" requirement can be met only if appropriate legal tools are set out when the in-house providing relationship is established in order to submit the in-house provider decision-making to the parent authority's will.

2. A recent decision of the European Court of Justice

In *Coditel Brabant*,³ the ECJ considered the application of EC principles of equal treatment, non-discrimination and the obligation of transparency to the in-house provision of public services. The case arose out of a decision of the Belgian Municipality of Uccle to become a member of an inter-municipal cooperative society (Brutélé), automatically entrusting the latter with the management of its cable television network without a call for tenders.

The decision was challenged by the previous provider of Uccle's cable television network (Coditel from 1969 to 1999), who questioned the existence of an in-house relationship between Uccle and Brutélé. Coditel argued that by automatically granting Brutélé the concession to run the network without comparing the advantages of that arrangement with the advantages of granting the concession to another operator, the Municipality of Uccle had infringed EC principles of equal treatment and non-discrimination and the obligation of transparency enshrined in Community law (arts 12, 43 and 49 EC).⁴

The Belgian Conseil d'État decided to stay the proceedings and refer three questions to the Court of Justice for a preliminary ruling. The first question concerned the applicability of EC competition law principles to a contracting authority's decision as to whether to grant a public service concession to an "in-house" provider as opposed to a market economic operator. The other two questions pertained to the interpretation of the so-called "similar control" requirement that must be met in order to ascertain whether an in-house providing relationship exists.

³ *Coditel Brabant SA v Commune d'Uccle* (C-324/07) not yet reported in E.C.R., November 13, 2008.

⁴ According to the Commission Interpretative Communication of February 5, 2008 on the application of Community Law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP), C(2007) 6661, para.2.1, these principles—transparency, mutual recognition and proportionality included—"are to be applied in cases where a public authority entrusts the supply of economic activities to a third party".

In particular the last two questions aimed to decide whether by virtue the composition of the statutory bodies, the management boards especially, and their relevant powers, the contracting authority may exercise a “control similar to that exercised over its own departments” over the in-house entity and whether such a control must be exercised individually by each member, or is it sufficient that it be exercised jointly by the majority of the members.

3. In-house providing and market: the limits of EC competition law principles

Among the questions referred to the ECJ it is apt to consider first the issue as to whether a contracting authority falling within the scope of EC public procurement regulation is compelled to launch a call for tenders as a means of choosing between in-house providing and procuring the necessary services from the open market.

As the case law of the ECJ⁵ makes clear, any relationship between a contracting authority and their shared entities concerning the provision of public services can engage EC public procurement regulation and EC competition law principles. Even when these relationships fall outside the scope of public procurement regulation, it is necessary to verify whether duties on the contracting authorities may rise from the application of EC open market principles which are enforceable not only where a contracting authority addresses the market to buy the service *una tantum* or to establish an institutionalised public-private partnership (IPPP), but also where a contracting authority decides to provide the services through its own organisation.

Under EC law, concessions raise the same competition issues as public-private partnerships since in both cases the contracting authority hands over to a third party its demand for services from citizens.⁶ The transfer of the public service demand to third parties itself triggers an obligation to commence an awarding procedure, since the concession must be awarded to the best contractor on the market by means of a call for tenders.

The exceptions to public procurement awarding procedure distinguish between those expressly identified in the EC Treaty⁷ and those set out in public procurement directives.⁸ The in-house providing exception covers both services which fall within the scope of public procurement directives, according to consolidated ECJ case law, and services provided by establishing an IPPP (particularly the partner choice procedure), as stated by the EC Commission in the Green Paper on public-private

⁵ *Aroux and Comune de Roanne v SEDL* (C-220/05) [2007] E.C.R. I-385; *Stadt Halle and RPL Lochau GmbH v TREA Leuna* (C-26/03) [2005] E.C.R. I-0000; *CONAME v Comune di Cingia de' Botti* (C-231/03) [2005] E.C.R. I-7287; see also *Chronopost SA, La Poste and French Republic v Ufex* (Joined Cases C-83/01 P, C-93/01 P, C-94/01 P) [2003] E.C.R. I-6993; the Commission's Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of November 20, 2007 on services of general interest, including social services of general interest: a new European commitment, COM(2007) 725 final, and the Commission's Green Paper of April 30, 2004 on public-private partnerships and Community law on public contracts and concessions, COM(2004) 327 final, para.63.

⁶ For the Italian legal system see R. Cavallo Perin, *La struttura della concessione di servizio pubblico locale* (Torino: Giappichelli, 1998).

⁷ e.g. arts 86(2), 296 and 297 EC concerning service of general economic interest, national security and serious internal disturbances respectively.

⁸ Directive 2004/18 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L34/114 arts 17–18, and Directive 2004/17 co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L123/1 arts 23 et seq.

partnerships and Community law on public contracts and concessions⁹ and in the following Interpretative Communication on the application of Community Law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP).¹⁰

Public procurement, concessions and in-house provision (even when established as an IPPP) are not equivalent: under EC law the distinction between public procurement and concession is based on economic risk allocation (art.1(3)–(4) Directive 2004/18), whereas when distinguishing between public procurement and concession, on the one hand, and in-house provision on the other, what is relevant is that both contractor¹¹ and concessionaire¹² are “formally” and “substantially” to use the words of the ECJ third parties with respect to the awarding public authority, while the in-house organisation carries out the essential part of its activities with (or on behalf of) its parent contracting authority which in turn exercises a control over the in-house provider similar to that which the authority exercises over its own departments.

It follows from the above that two situations must be distinguished. First, the scenario where services are awarded to a third party that is independent from the awarding authority, such as those awarded by a procurement, an agreement, a public contract, a concession and the like, irrespective of whether their legal basis is contractual or administrative, and of whether it falls subject to public or private law. Secondly, the situation in which services are awarded on account of the control exercised by a public authority over a provider who is only “formally” and not “substantially” a third party, whose mission is to provide services for its controller or on behalf of it (e.g. public utilities addressed to citizens), regardless of the fact that the provider is subject to public or private law and established pursuant to contract, statute, regulation or administrative provision.

The enforceability of EC open market and competition law principles are limited by Member States power to shape and regulate the organisation of public administrations.¹³

This limit is not an exception to the economic freedoms established under the EC Treaty but rather falls outside the EC Treaty definition of a market. Public procurement regulation and EC law

⁹ COM(2004) 327 final, April 30, 2004, para.63; *EC Commission v Italy* (C-337/05) [2008] E.C.R. I-2173 at [36]; *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa)* (C-295/05) [2007] E.C.R. I-2999 at [55] noted by M. Dörschendorfer, “The compatibility of contracts awarded directly to ‘joint executive services’ with the Community rules on public procurement and fair competition” (2007) 16 P.P.L.R. NA123.

¹⁰ C(2007) 6661 which does not fulfil “the lack of legal definition of IPPPs in EC law”, according to C.D. Tvarno, “A critique of the Commission’s interpretative communication on Institutionalised Public-Private Partnerships” (2009) 18 P.P.L.R. NA11.

¹¹ CONAME [2005] E.C.R. I-7287 at [9]–[10], [22]; Commission Green Paper of April 30, 2004 on public-private partnerships and Community law on public contracts and concessions, COM(2004) 327 final, which refers to a “Community law on public contracts and concessions”.

¹² For the Italian legal system see R. Cavallo Perin, *Comuni e province nella gestione dei servizi pubblici* (Napoli: Jovene, 1993), p.108 and R. Cavallo Perin, “Comment to Art. 113” in R. Cavallo Perin and A. Romano, *Commentario al Testo unico delle leggi sull’ordinamento degli enti locali* (Padova: Cedam, 2006), pp.651 et seq. Economic risks allocations that cannot be hindered by the exercise of a “similar control” over the concessionaire: *Coditel Brabant*, judgment of November 13, 2008 not yet reported in E.C.R. at [24]. Concerning the procedural obligations—imposed by EC primary legislation—to select a public utilities concessionaire: U. Neergaard, “Public service concessions and related concepts - the increased pressure from Community law on Member States’ use of concessions” (2007) 16 P.P.L.R. 387 et seq.

¹³ *Stadt Halle* [2005] E.C.R. I-0000 at [48] and Opinion of Advocate General Kokott in *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* (C-458/03) [2005] E.C.R. I-8585 at [42], [71], [80] according to whom “such extensive interference in the organisational sovereignty of Member States and, in particular, in the self-government of many municipalities is—even from the point of view of the market-opening function of procurement law—entirely unnecessary”; see also *Dory v Bundesrepublik Deutschland* (C-186/01) [2003] E.C.R. I-2479 and for the Italian legal system: April 3, 2007 (Cons. Stato) [2007] 4 Foro amm.—C.d.S. 1225 and September 18, 2003 (Cons. Stato) [2003] 9 Foro amm.—C.d.S. 2569.

on public contracts and concessions are applicable whenever a public authority addresses the market, but the public authority decision-making to self-provide the satisfaction of its needs cannot be forced to liberalise those activities that are provided in-house by public authorities.¹⁴

The in-house providing doctrine, as defined by ECJ case law and applied by EC Commission in its Green Paper on PPP, can be understood as a corollary of a public administration's freedom of choice over whether to contract out or to arrange for in-house provision of its needs, underlining that this decision-making falls outside the scope of EC law as stated in EC Treaty and in the public contracts directives¹⁵. Therefore in-house provision is distinguished from the specific exceptions provided in the public contracts directives¹⁶ and can be seen as a definition of public organisation as a limit to European open market and its relevant competition rules.

What is more, the "in-house providing doctrine" is broad in its scope of application. The public authority enjoys the discretion to arrange for its own department(s) to provide services (in-house providing) or to establish a distinct provider entity (quasi in-house providing)¹⁷ in respect of all the activities it is entitled to carry out. This is the case regardless of whether or not it acts on the basis of specific EC Treaty provisions like arts 45 and 86 which identify functions¹⁸ and services¹⁹ that can be excepted from EC rules on competition enforceability, insofar as the public authority did not intend to address its offer to the market.

The in-house providing relationship is an expression of public administrations' self-organisational power where the relationship between public authority and in-house provider has an organisational character and is not established by way of a call for tenders. In other words, parent authority and in-house entity are not mutually independent or third parties since both requirements of the "similar control" and of the "essential part of its activities' destination" are met²⁰. The substantial identification between controlling public authority and in-house provider makes the latter part of the controller organization and makes the relationship outside the scope of EC open market rules.²¹

¹⁴ *Coditel Brabant*, judgment of November 13, 2008 not yet reported in E.C.R. at [48]–[49]; Opinion of Advocate General Kokott in *Parking Brixen* [2005] E.C.R. I-8585 at [68]–[70].

¹⁵ *Coditel Brabant*, judgment of November 13, 2008 not yet reported in E.C.R. at [26]: "the application of the rules set out in Articles 12, 43 and 49 EC, as well as of the general principles of which they are the specific expression, is precluded" whenever in-house providing requirements are met; *Parking Brixen* [2005] E.C.R. I-8585 at [62]. Kaarresalo, "Procuring in-house" (2008) 17 P.P.L.R. 242, 242; S. Arrowsmith, "Some problems in delimiting the scope of the Public Procurement Directives: privatisations, purchasing consortia and in-house tenders" (1997) 6 P.P.L.R. 199, 203; T. Prosser, *The Limits of Competition Law: Markets and Public Services* (Oxford University Press, 2005), p.11.

¹⁶ Directive 2004/18 art.18 and Directive 2004/17 arts 23 et seq.

¹⁷ Opinion of Advocate General Sixt-Hackl in *Carbotermo, Consorzio Alisei v Comune di Busto Arsizio* (C-340/04) [2006] E.C.R. I-4137 at [15], [18]; T. Kaarresalo, "Procuring in-house" (2008) 17 P.P.L.R. 242, 242. The European Charter on Local Self-Government, October 15, 1985 (in force since September 1, 1988) art.6(1) provides that "without prejudice to more general statutory provisions, local authorities must be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management".

¹⁸ "Activities which are connected, even occasionally, with the exercise of official authority": art.45 EC.

¹⁹ "Services of general economic interest" insofar as the application of the rules on competition does not obstruct their performance, in law or in fact": art.86(2) EC.

²⁰ The awarded entity can be seen as a third party (with respect to the contracting authority) if it is "formally distinct from it and independent of it in regard to decision-making": *Teckal* [1999] E.C.R. I-8121 at [51]; Weltzien, "Avoiding the procurement rules by awarding contracts to an in-house entity" (2005) 14 P.P.L.R. 237, 238; according to Kaarresalo, "Procuring in-house" (2008) 17 P.P.L.R. 242, 244 and 253 "the Teckal judgment solely stated the obvious precondition for the existence of a contract: a contract should only be deemed to exist where the parties thereto are legally distinct and sufficiently independent".

²¹ With the exception of the services that the in-house provider asks for to meet its needs, services that have to be awarded throughout a call for tenders, thus being the in-house entity a contracting authority under EC public contracts regulation:

In-house organisation falls outside the scope of EC competition rules on provider selection (i.e. the provider is not a third party, hence there is no market demand) and these rules cannot obstruct the provider mission and performance while competing with other economic operators and suppliers. On the other hand, an in-house provider must carry out the essential part of its activities for its parent and controller public authority, thus limiting its economic freedom and autonomy as an enterprise and market competitor, in the sense that only a very small portion of its activities can be pursued outside the in-house relationship in order to reap the benefit of economies of scale and scope.²²

4. The “similar control” requirement and entrepreneurial freedom denial

The “similar control” requirement, as set out in the Opinion of Advocate General Y. Bot in *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia*, provides that the in-house provider,

“... has no discretion whatsoever and that, in the end, the public authority is the only one to take decisions concerning that company. Moreover, use of the expression ‘in house’ indeed reveals the intention to make a distinction between activities which the authority carries out directly—by means of internal structures ‘belonging to the house’—and those that it will entrust to a third-party operator.”²³

From this, we can draw the distinction between in-house organisations and bodies governed by public law—as defined in public contracts EC Directives—whose “public dominant influence” requirement stipulates a lower interference of the controller over the controlled.²⁴

The “similar control” requirement identifies the powers of influence required by the parent contracting authority in order to fully pursue “its public-interest objectives”, powers of influence that have become a factor to consider when identifying an in-house organisation.²⁵ This is the case regardless of whether this influence is exercised by means of private or public law powers or whether by means of a single power or by the joint effects of different powers.

Therefore the “similar control” requirement represents the parent public authority’s ability to set the most relevant decisions on the management and manufacturing process of the in-house provider, thus excluding a bilateral negotiation on terms and conditions of the supply of services.

D. Casalini, *L’organismo di diritto pubblico e l’organizzazione in house* (Napoli: Jovene 2003), pp.283 et seq.; Opinion of Advocate General Cosmas in *Teckal* [1999] E.C.R. I-8121.

²² R. Cavallo Perin and D. Casalini, “L’in house providing: un’impresa dimezzata” (2006) 1 *Diritto Amministrativo* 51. According to Avarkioti, “The application of EU public procurement rules to ‘in house’ arrangements” (2007) 16 P.P.L.R. 22, 33 “there is no fear that such undertaking may compete (in favourable terms) with other undertakings in tender procedures for public contracts”.

²³ Opinion of Advocate General Bot *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración del Estado* (C-220/06) [2007] E.C.R. I-12175 at [75].

²⁴ *CONAME* [2005] E.C.R. I-7287; *Parking Brixen* [2005] E.C.R. I-8585; *Stadt Halle* [2005] E.C.R. I-0000; *Teckal* [1999] E.C.R. I-8121; *Bayerischer Rundfunk v GEWA* (C-337/06) [2007] E.C.R. I-11173, commented on by A. Brown, “Whether German public broadcasters are financed for the most part by the State so as to fall within the EU procurement Directives: *Bayerischer Rundfunk* (C-337/06)” (2008) 17 P.P.L.R. NA124; *EC Commission v Austria* (C-29/04) [2005] E.C.R. I-9705; *EC Commission v French Republic* (C-237/99) [2001] E.C.R. I-939; *Adolf Truley GmbH v Bestattung Wien GmbH* (C-373/00) [2003] E.C.R. I-1931, concerning the management control powers suitable to meet the public dominant influence requirement of the definition of the body governed by public law; Casalini, *L’organismo di diritto pubblico e l’organizzazione in house*, 2003, pp.135 et seq. and 257 et seq.

²⁵ Opinion of Advocate General Kokott in *Parking Brixen* [2005] E.C.R. I-8585 at [74].

Agreements, contracts and bargains between the parent authority and in-house provider to define terms and conditions of the supply of services—if innovative rather than merely executive—could not comply with EC law since the bargaining of terms and conditions can be an indication of the fact that the provider is a third-party economic operator independent of the contracting authority, thus denying the existence of an in-house relationship.

Under EC law the same entity can be both a contracting authority and an economic operator,²⁶ thus being decisive in ascertaining whether the supposed in-house provider is a third party, autonomous and independent of the contracting authority, and therefore belonging to the market and not to contracting authority's organisation. In this scenario, the in-house relationship is completely within the organisation of the contracting authority, thus not giving rise to a public contract according to EC law.

The “similar control” exerted by the parent contracting authority implies the power to set unilaterally—in pursuing its own (public) interests—the manufacturing and supplying conditions to the extent of precluding a full management discretion on the part of the in-house provider, thus placing the relevant relationship outside the scope of EC competition rules and EC public contracts directives.²⁷

Each individual contracting authority can hold a specific type of share in the in-house provider capital, different from those held by other partners in the in-house providing relationship, thereby entrusting the authority to ask for different services from both a quantitative and qualitative point of view. Usually credit relations between a controlling authority and in-house provider are prescribed directly in the certificate of incorporation or in corporate bye-laws, but they can also be defined by issuing different kinds of shares which entitle the holding public authority to make a demand for the services concerned.

It appears that the “similar control” requirement as developed by the case law of the ECJ does not imply a direct shareholding of the controlling authority into in-house provider capital: sometimes, the intervention of an intermediary holding company “may, depending on the circumstances of the case, weaken any control possibly exercised by the contracting authority”²⁸; other times, the intermediary holding company is not relevant to the determination of whether the “similar control” requirement is met.²⁹

5. The “similar control” over in-house organisations as exercised by a single contracting authority or by a plurality of contracting authorities

When the in-house provider capital is wholly owned by the controlling authority who entrusts it to carry out its services, this 100 per cent shareholding, in the absence of circumstances to the contrary,

²⁶ Directive 18/2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114 art.4; C.H. Bovis, *EU Public Procurement Law* (Cheltenham: Elgar, 2007), pp.92–93 and 204 et seq.

²⁷ *Asemfo v Tragsa* [2007] E.C.R. I-2999 at [59]; *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración del Estado* (C-220/06) [2007] E.C.R. I-12175 where it seems to have been considered decisive the right of the awarded (then judged not to be in-house) provider to put an end to the contract with the contracting authority, any time.

²⁸ *Carbotermo* [2006] E.C.R. I-4137 at [39].

²⁹ Exemplary seems to be the case of the City of Halle: Opinion of Advocate General Sixt-Hackl in *Stadt Halle* [2005] E.C.R. I-0000 at [6]–[10], [59]. To meet the public dominant influence requirement requested for the definition of a body governed by public law the intermediary holding is instead considered not relevant by the settled ECJ case law: e.g. *EC Commission v Spain* (C-283/00) [2003] E.C.R. I-11697.

is an indication that the “similar control” requirement is met, above all where the in-house provider carries out all its activity for the sole controlling authority.³⁰

It is possible to argue that the satisfaction of the “similar control” requirement has a lower chance of being overturned by other countervailing circumstances where the share capital of the in-house provider is wholly owned by a sole public authority, insofar as it is reasonable to presume that the sole shareholder has the in-house organisation at his disposal for pursuing its own public interests.³¹ The absence of other shareholders permits the presumption of a lack of “external” interests that may prevent the controlling authority from pursuing the public interests set as the in-house relationship consideration.

In a situation where a group of contracting authorities hold shares in the in-house provider capital, a deeper examination as to whether the powers of interference in the in-house entity management entitle each contracting authority to exert a “similar control” over is required. For example, it has been held that an entirely public shareholding of in-house entity capital by many contracting authorities will not suffice to meet the “similar control” requirement.³²

Theoretically, only some of the shareholding authorities may exert a “similar control” on the in-house entity, while others may not take part in the in-house relationship, thus being unable to dispose direct award to the in-house organisation in compliance with EC law (see below section 6).

The contracting authority which only holds a minimal share of the in-house provider capital is not entitled to exercise a “similar control” over the latter. The negative solution set in *Teckal* and *Coname* is based on a lack of evidence of elements relevant for a “similar control” situation other than the holding of a minimal capital share—of 0.9 per cent and 0.97 per cent respectively—in a wholly public owned company.³³

Moreover it can be argued that an excessive fragmentation of capital shareholdings does not prevent each single shareholder from exerting a “similar control”, thus necessitating an in-depth analysis into whether the minority shareholders are entitled to management powers suitable for making the relevant manufacturing decisions about the services entrusted to the in-house provider (see below section 7).³⁴

6. The in-house organisations’ share holding by third entities not involved in the relevant in-house relationship

The holding of in-house provider capital shares by entities other than the parent public authorities introduces economic interests which may affect and hinder the exercise of “similar control” by the parent public authorities, thus harming the pursuit of the above-mentioned public interests.³⁵

³⁰ See Opinion of Advocate General Kokott in *Parking Brixen* [2005] E.C.R. I-8585 at [74]–[75].

³¹ *Tennoraggi Spa v Comune di Monza* (C-323/07), judgment of April 10, 2008 not yet reported in E.C.R.; commented on by A. Brown (2008) 17 P.P.L.R. NA218; Kaarresalo, “Procuring in-house” (2008) 17 P.P.L.R. 242, 248.

³² *Teckal* [1999] E.C.R. I-8121; *CONAME* [2005] E.C.R. I-7287.

³³ Opinion of Advocate General Cosmas in *Teckal* [1999] E.C.R. I-8121 at [16]; in *CONAME* [2005] E.C.R. I-7287 the Municipality of Cingia de’ Botti holds a minimal in-house provider’s capital share (0.97%); it is not entitled to exercise any other special control power (neither provided by the company bye-laws nor by any informal shareholders agreement) and moreover a bargaining of the services provisions’ terms and conditions took place before the awarding.

³⁴ *Coditel Brabant*, judgment of November 13, 2008 not yet reported in E.C.R. at [31]; *Carbotermo* [2006] E.C.R. I-4137 at [37] and *Asemfo v Tragsa* [2007] E.C.R. I-2999 at [57].

³⁵ Opinion of Advocate General Kokott in *Parking Brixen* [2005] E.C.R. I-8585 at [52], [72].

It can be argued that “if a private third party has a holding, even a minority holding, in an undertaking, the consideration given to the economic interests of that undertaking may prevent the public body from fully pursuing its public-interest objectives”,³⁶ making it necessary to ascertain whether the contracting authority maintains a power of interference sufficient to exert a “similar control” on the provider entity.³⁷

The “similar control” fades if the private minority shareholder in a majority public holding company (51 per cent) acquires considerable rights of veto over important decisions “such as increasing or reducing the share capital, amending its object as defined in its statutes, merging or selling shares, or splitting shares in the company” and the power to appoint one of the two managing directors having identical rights and who “jointly manage and represent the undertaking in its internal and external relations and are jointly authorised to sign”, for their operational activities do not require prior decisions of the general assembly.³⁸

Equally it seems that the “similar control” requirement will not be met by the mere holding of majority in a company general assembly or the power to appoint more than an half of the managerial or administrative board members—irrespective of whether this power is provided for by the company statute or by a corporate agreement—where the managing director is appointed by the private minority shareholders.³⁹ A shareholders’ agreement or the applicable national company law may render the majority shareholder powers of control ineffective, binding or limiting the power to appoint the managerial board or narrowing the managing director’s discretion, thus blunting public authority influence⁴⁰ on the in-house provider’s strategic objectives and significant decisions.⁴¹

The breadth of business objectives, the possibility of expansion of the geographical scope of a company’s activities to the whole of national territory and abroad and the opening of the company to other capital are all factors which will preclude the existence of the “similar control” over the company by the contracting authority.⁴²

It seems clear that the capital shareholding related to the awarding of a contract or a concession falls within the scope of EC competition rules.⁴³ Moreover, the actual presence of a third-party private shareholder must be considered when ascertaining whether the “similar control” requirement is met,

³⁶ Opinion of Advocate General Kokott in *Parking Brixen* [2005] E.C.R. I-8585 at [74].

³⁷ *ANAV v Comune di Bari* (C-410/04) [2006] E.C.R. I-3303 at [32]; *Aroux and Comune de Roanne v SEDL* (C-220/05) [2007] E.C.R. I-385 at [64] commented on by P. Henty (2007) 16 P.P.L.R. NA65; *EC Commission v Italy* (C-337/05) [2008] E.C.R. I-2173 at [40] commented on by B. Heuninckx (2008) 17 P.P.L.R. NA187.

³⁸ Such powers, entitled to the private shareholder, prevent the City of Mödling from exerting a “similar control” even if the latter has the majority of votes in the general assembly; Opinion of Advocate General L.A. Geelhoed in *Commission v Austria* [2005] E.C.R. I-9700 at [36], [39], [46].

³⁹ Unless the public authorities were entitled to exert decisive power of management instruction over the in-house entity: *ARGE Gewässerschutz v Bundesministerium für Land-und Forstwirtschaft* (C-94/99) [2000] E.C.R. I-11037, commented on by M. Ohler (2001) 10 P.P.L.R. NA54; *Commission v Austria* [2005] E.C.R. I-9705; *Parking Brixen* [2005] E.C.R. I-8585 at [64].

⁴⁰ *Stadt Halle* [2005] E.C.R. I-0000 at [19]: “the private minority shareholding exceeded the threshold of 10% above which, in accordance with the German legislation on limited companies, there is a minority with certain specific rights”. Weltzien, “Avoiding the procurement rules by awarding contracts to an in-house entity” (2005) 14 P.P.L.R. 237, 246 et seq.

⁴¹ *Coditel Brabant*, judgment of November 13, 2008 not yet reported in E.C.R. at [34] and *Parking Brixen* [2005] E.C.R. I-8585 at [65]; *Carbotermo* [2006] E.C.R. I-4137 at [38].

⁴² *Parking Brixen* [2005] E.C.R. I-8585 at [65]–[67].

⁴³ Commission Interpretative Communication on the application of Community Law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP), C(2007) 6661, paras 2.2 to 2.3; C.D. Tvarno, “A critique of the Commission’s interpretative communication on Institutionalised Public-Private Partnerships” (2009) 18 P.P.L.R. NA21.

and, if satisfied, the relationship between the awarding contracting authority and the public-private company would qualify as an in-house providing exception under EC law.⁴⁴

Even when it is considered that the mere private shareholding in a (previously entirely) public owned company must be subject to a call for tenders according to EC principles on competition, it can be acknowledged that the above-mentioned EC case law concerning the effects of a private shareholding in an in-house organisation would be senseless if the “similar control” requirement were met only where the share capital of the in-house organisation was wholly owned by public authorities.

The resulting “wholly public owned company” principle would hinder the public access to in-house company share capital or the Stock Exchange quotation for in-house companies entrusted with providing public utilities, unreasonably preventing the contracting authorities from taking advantage of commonly used financial or shareholding tools, which should not in themselves jeopardise the “similar control” over the in-house provider entity.⁴⁵

7. Forms of association and co-operation among contracting authorities

Many European legal systems have long known forms of co-operation among local authorities established for a joint exercise of common functions and services, such as consortia of local councils or of provinces.⁴⁶

The associative nature of the in-house provider refers to a traditional category of contracting authority as defined by the first public procurement directives which listed the state, local authorities and associations between the former bodies as contracting authorities.

It is clearly admitted that “a public authority has the possibility of performing 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 departments”, even “in cooperation with other public authorities” to such an extent that hindering this choice will not be consistent with “Community rules on public procurement and concession contracts”.⁴⁷

⁴⁴ *Stadt Halle* [2005] E.C.R. I-0000 at [19] the circumstance that the private minority shareholder had “certain specific rights” seemed to turn decisive. A different interpretation is proposed by Kaarresalo, “Procuring in-house” (2008) 17 P.P.L.R. 242, 251 who states that “the Court’s standing on the non-applicability of the in-house exception to semi-public companies appears very clear” and by Weltzien, “Avoiding the procurement rules by awarding contracts to an in-house entity” (2005) 14 P.P.L.R. 237, 251 according to the Commission Interpretative Communication on the application of Community Law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP), C(2007) 6661, paras 2.1 and 3; Avarkioti, “The application of EU public procurement rules to ‘in house’ arrangements” (2007) 16 P.P.L.R. 22, 29. For the Italian legal system: April 18, 2007 (Cons. Stato) opinion no.456 commented on by M. Lottini, “Mixed (semi-public) companies and the provision of ‘public services’: a recent opinion of the Italian Council of State” (2007) 2 E.P.P.L.R. 135; Cons. Stato, sect. VI, February 20, 2007, no.919, Cons. Stato, sect. V, October 9, 2007, no. 5281 and Cons. Stato, sect. VI, June 23, 2006, no.3999 all available on the official website <http://www.giustizia-amministrativa.it> [Accessed June 16, 2009].

⁴⁵ Under this point of view see Arrowsmith, “Some problems in delimiting the scope of the Public Procurement Directives” (1997) 6 P.P.L.R. 199 et seq. concerning the legal effects of in-house provider privatisations on in-house providing relations.

⁴⁶ e.g. for the Italian legal system see Legislative Decree of August 18, 2000, no.267 arts 30 et seq. and yet the now repealed D.P.R. March 3, 1934, no.383 arts 156 et seq.; for the French legal system see the *Code général des collectivités territoriales* arts L5111-1 et seq.; for the English legal system see the Local Government Act 2000, mainly arts 18 (area committees) and 20 (joint exercise of functions).

⁴⁷ *Coditel Brabant*, judgment of November 13, 2008 not yet reported in E.C.R. at [48-49]; Avarkioti, “The application of EU public procurement rules to ‘in house’ arrangements” (2007) 16 P.P.L.R. 22, 24 suggested that the “association of

The question of whether these associative forms of co-operation comply with EC law has been raised so far only with reference to local authority associations possessing legal personality, since associations without legal personality are presumed to be part of parent local authority organisations.

Apart from the public or private nature of legal personality—i.e. whether it is subject to the public or private law—the lack of substantial autonomy and independence towards the contracting authority asking for the services seems to be the only requirement to prove an in-house providing relationship.

A plurality of shareholders in the in-house entity capital does not preclude the possibility of the relationship from falling within the in-house providing exception where each shareholder exerts a “similar control” and the shareholding itself does not require a call for tenders if it entitles the new shareholder to exercise a “similar control” over the shared entity.

8. Joint control or interference by each shareholder contracting authority?

*Coditel Brabant*⁴⁸ is the first case in which the in-house organisation does not take the form of a company, thereby precluding the possibility of third-party shareholding under the applicable national law. As an associative form of joint exercise of local authorities’ functions, the inter-municipal co-operative society seems to provide an alternative solution to using the market and its relevant EC competition rules.

The in-house provider was an inter-municipal co-operative society (Brutélé) whose members are municipalities and an inter-municipal association whose members in turn are comprised exclusively of municipalities, not open to private members,⁴⁹ hence taking a co-operative form suitable to prevent its managerial board (or governing council) from pursuing objectives independently of the willingness of its public shareholders’. Its governing council, who enjoys the widest powers, consists of representatives of the municipalities (a maximum of three per municipality), who are appointed by the general assembly, which is itself composed of representatives of the municipalities appointed from among the municipal councillors, the mayor and the aldermen.

The shareholding municipalities are divided into two sections, one of which groups together the municipalities in the Brussels region, which may be divided into sub-sectors and within each sector, there is a sector board.⁵⁰ The governing council may delegate to the sector boards its powers with regard to the conditions for the application of charges, the programme of works and investment, the financing thereof, advertising campaigns concerning the sub-sector, the rebates or benefits to be granted to certain categories of person, the nature of and terms relating to other services to be provided via the network, such as the creation of a municipal intranet and a website, thus allowing the Municipality of Uccle, as an operational sub-sector, to exercise immediate and precise control

contracting authorities . . . may be considered as an alignment of the EC rules on public procurement with the Court’s case law and particularly with the Teckal judgment”.

⁴⁸ *Coditel Brabant*, judgment of November 13, 2008 not yet reported in E.C.R.

⁴⁹ The pursuit of the municipal interest—that is Brutélé’s object under its statutes—is not hindered by “any interest which is distinct from that of the public authorities affiliated to it”: *Coditel Brabant*, judgment of November 13, 2008 not yet reported in E.C.R. at [16], [37]–[38].

⁵⁰ Consisting of directors appointed by the general assembly, sitting in separate groups representing the holders of shares for each of the sectors, from among candidates proposed by the municipalities: *Coditel Brabant*, judgment of November 13, 2008 not yet reported in E.C.R. at [17].

over Brut  l  s activities in its sub-sector, similar to the control that that municipality would exercise over its own internal departments.⁵¹

Therefore the “similar control” requirement is met despite the high fragmentation of the shareholdings which might have troubled each shareholder’s influence on the sole governing council of the cooperative society. The establishment of a sector board relating to the award of each service under the awarding public shareholder’s control prevents a single shareholder from abusing its own powers of control over the in-house provider and avoids the even worse situation that arises where shareholders mutually exert their cross-veto powers, allowing the managing directors to act outside of the control of the shareholders.

The decision of the ECJ acknowledges that a “similar control” over the most important manufacturing decisions of the in house provider can be exerted “via the statutory bodies, by the public authorities belonging to such an inter-municipal cooperative society”,⁵² upholding some recent decisions of the same Court where the “similar control” requirement was found to be met where the contracting authorities enjoy detailed powers of influence over the in-house provider, sufficient to support a finding of an in-house providing relationship.⁵³

However the Court’s solution in this case cannot be interpreted as applying with such breadth, without ignoring the inherent nature of the association among local authorities. The Court clarifies that the control exercised over the in-house provider must be effective, but it is not essential that it be exercised individually. Therefore, where a number of public authorities own a sole in-house provider organisation to which they entrust the performance of one of their service tasks, the control which those public authorities exercise over that entity may be exercised jointly.⁵⁴ Once these conclusions are accepted, it follows necessarily that the form of pure inter-municipal co-operation taken by the in-house provider must be evaluated in conjunction with the effective “similar control” exercised by the awarding authority. On the basis of this analysis, it is possible to reconcile the present ECJ decision with recent precedents,⁵⁵ thereby avoiding the apparent inconsistencies between the ratio decidendi of this line of case law.⁵⁶

⁵¹ *Coditel Brabant*, judgment of November 13, 2008 not yet reported in E.C.R. at [14], [17], [20]: the Municipality of Uccle would have a director on the governing council of Brut  l   and three directors on the board of the Brussels operating sector, one appointee on the board of auditors and one as a municipal expert and Brut  l   would draw up an income statement and balance sheet for activities on Uccle’s network.

⁵² *Coditel Brabant*, judgment of November 13, 2008 not yet reported in E.C.R. at [41].

⁵³ *Commission v Italy*, judgment of July 17, 2008 not yet reported in E.C.R. at [25] commented on by A. Brown (2009) 18 P.P.L.R. NA6 where the Municipality of Mantova awarded directly, without launching a call for tenders, the management, maintenance and improvement of the information technology system to ASI SpA (whose capital share are partially owned by the Municipality): the Court acknowledges an in-house providing relation since the Municipality has the powers to define ASI’s functioning costs, to make inspections, to appoint a local functionary whose task is to co-operate, urge and control ASI activities.

⁵⁴ Dischendorfer, “The compatibility of contracts awarded directly to ‘joint executive services’ with the Community rules on public procurement and fair competition” (2007) 16 P.P.L.R. NA123, NA129 warns that following this interpretation “the test would always be fulfilled, since all shareholders of a company taken together will always exercise a power of decisive influence over the tenderer’s strategic objectives and significant decisions”.

⁵⁵ *CONAME* [2005] E.C.R. I-7287.

⁵⁶ In *Asemfo v Tragsa* [2007] E.C.R. I-2999 at [59], [65] the fact that 99% of the share capital of the in house provider (Tragsa) is held by the Spanish State itself, while the four awarding Autonomous Communities, each with one share, hold 1% of such capital, but are meant to exert a “similar control” over Tragsa, seems not to be the decisive argument insofar as, according to the Opinion of the Advocate General, neither the Spanish State nor the Autonomous Communities fulfilled contemporarily both the in house providing requirements: the Spanish State exercises over Tragsa a “similar control”, by virtue of holding 99% of the Tragsa’s shares, but Tragsa generated only 30% of its turnover with the state, while the Autonomous Communities, on the other hand, generated more than 50% of Tragsa’s income, but cannot influence

An issue as to whether the “similar control” requirement is satisfied by public authorities that hold a minority share in the in-house provider capital may arise whenever one of the member public authorities holds a majority or prevailing interest in the in-house entity suitable to entitle it to exercise by itself decisive control over the decisions of the latter.⁵⁷

9. Conclusion

The in-house providing relationship seems to be defined by the European legal system as the external boundary of the European internal market, so that defining the public organisation “domain” subject remains exclusively a domestic law matter for Member States. Whenever the two requirements of in-house providing are met there is no room to apply either the EC rules on competition or the rules of the public procurement Directives, in so far as the relationship takes place *within* the organisation of the contracting authority.

To prevent any abuse or distortive application of the in-house exception, however, the “similar control” and the “essential part of its activities’ destination” requirements must be strictly interpreted.

To this end the “similar control” requirement is met when the in-house provider is deprived of his entrepreneurial autonomy and discretion, and is subject to the decision-making of his controlling public authority. In other words, the in-house provider must behave as an internal structure belonging to the parent authority or as “an instrument and technical service of the Administration”.

This power of influence, it seems, is not necessarily excluded by the mere private holding of shares in the in-house provider as well as the dominant interpretation of ECJ case law suggests. Indeed, an in-house provider wholly owned or controlled by a single public authority permits a presumption of a lack of “external” interests that may prevent the controlling authority from pursuing the public interest set as a consideration of the in-house relationship. In a situation in which a group of contracting authorities or a private operator hold shares in the in-house provider, a deeper examination is required as to whether the powers of interference in the management of the in-house entity entitle each contracting authority to exert a “similar control”. The issue as to whether a private shareholding in an in-house provider falls within the scope of EC competition rules, mainly when the shareholding is related to the awarding of contracts or concessions, involves different considerations from those addressed here.

For the first time in *Coditel Brabant* the in-house provider takes the form not of a company but of an inter-municipal co-operative society closed to private members, although owned by a plurality of local authorities. The ECJ statement according to which “similar control” can be exercised jointly by the member local authorities over the in-house provider must be interpreted together with the acknowledgement of detailed powers of influence assigned to each single authority with regard to the award of the relevant service. A decontextualised interpretation of the possibility of joint exercise of “similar control” will turn into an abrogative interpretation of the “similar control” requirement

Tragsa’s strategic objectives and significant decisions, owing to their mere symbolic shareholding. In this case the ratio decidendi seems based on other circumstances such as the fact that the in-house provider (Tragsa) “is not free to fix the tariff for its actions and that its relationships with them are not contractual” as far as it is merely “an instrument and technical service of the Administration”.

⁵⁷ *Coditel Brabant*, judgment of November 13, 2008 not yet reported in E.C.R. at [46]–[47], [50] and the Opinion of Advocate General Trstenjak in *Coditel Brabant* of June 4, 2008 not yet reported in E.C.R. at [82]; T. Kaarresalo, “Procuring in-house” (2008) 17 P.P.L.R. 242, 249.

as far as the latter would be always met, since all shareholders taken together will always exercise a power of decisive influence over the in-house provider's decisions. Moreover the power of influence and control assigned to each member public authority must be set out in order to prevent any of the controlling authorities which holds a majority or prevailing interest in the in-house entity from exercising by itself decisive control over the decisions of the in-house provider.

This line of ECJ case law is well established in underlining that the "similar control" requirement is met whenever (and only if) the single public authority asking for works, supply or services exerts an effective and decisive influence over the in-house provider's decision-making, regardless of the presence of private shareholders. On the other hand, whenever there is a plurality of shareholders, attention is often focused on the equal or unequal holding of shares in the in-house provider capital that seems not to be the decisive element for fulfilling the "similar control" requirement. To that end it is useful to avoid the confusion between the shareholders' control over the management and the control of the managerial board over the provider's decision-making as far as only the latter is relevant for the "similar control" requirement. According to the classic distinction between "ownership" and "control",⁵⁸ the "similar control" requirement concerns only the latter since its fulfilment gives rise to an issue of allocation of management powers', rather than an issue of fragmentation of ownership.

⁵⁸ A. Berle and G. Means, *The Modern Corporation and Private Property*, 2nd edn (New York: Harcourt Brace & World Inc, 1968).