The Reform of EU Directives on Public Procurement

Vertical Cooperation (In-House) and Horizontal Cooperation:

Enhancing legal certainty or policy setting?
1. Evaluation criteria for reform proposals

- Compatibility with primary law (TEU and TFEU)?

- Good legislation:
  - Achievement of self-proclaimed objectives?
  - Justification for basic decisions and exceptions?
  - Coherence?

2. The European Commission goals and considerations

- Proposal: 
  (14) There is considerable legal uncertainty as to how far cooperation between public authorities should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted ... It is therefore necessary to clarify in what cases contracts concluded between contracting authorities are not subject to
the application of public procurement rules. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice. However, the application of public procurement rules should not interfere with the freedom of public authorities to decide how to organise the way they carry out their public service tasks. ...

A thorough documentation of the developments is provided by the Commission Staff Working Paper of 4 Oct. 2011 concerning the application of EU public procurement law to relations between contracting authorities (SEC [2011] 1169 final).

Further conclusions for the interpretation that the Commission apparently prefers can be drawn from the Commission's so-called „non-paper“ relating to „Cluster 10“, 2011/0438 (CEODE), document of the Council of 27 Apr. 2012, p. 29 et seq.
3. Vertical Cooperation (In-House)

- From *Teckal, Stadt Halle, Parking Brixen, Carbotermo, Coditel, Sea, to Oulun caupunki (C 215/09 [2010]).*
- The main battle seems to be over, the EU-Legislator could recognize the jurisprudential platform built over years by establishing the *criteria of control and essentiality* into a single paragraph. Additionally it is absolutely right (and has always been) to strictly deny the In-House exception when a private entity is involved.

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**Article 11 Relations between public authorities**

“1. A contract awarded by a contracting authority to another legal person shall fall outside the scope of this Directive where the following cumulative 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) at least 90% of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;
(c) there is no private participation in 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.
2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract.

3. A contracting authority, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a public contract without applying this Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:
(a) the contracting authorities exercise jointly over the legal person a control which is similar to that which they exercise over their own departments;
(b) at least 90% of the activities of that legal person are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;
(c) there is no private participation in the controlled legal person.
For the purposes of point (a), contracting authorities shall be deemed to jointly control a legal person where the following cumulative conditions are fulfilled:

(a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities;
(b) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person;
(c) the controlled legal person does not pursue any interests which are distinct from that of the public authorities affiliated to it;
(d) the controlled legal person does not draw any gains other than the reimbursement of actual costs from the public contracts with the contracting authorities."

Intense debate in IMCO (Comitee on Internal Market and Consumer Protection) and (to be expected) during the first plenary sitting date in October.

Evaluation
- The goal of improving legal certainty will presumably not be achieved. Instead, the introduction of the two additional criteria (Nr. 3 c and d) creates new questions of interpretation
Contrary to its own allegations, the commission does not fully acknowledge the case law. The ECJ has stressed repeatedly and with increasing occurrences the contracting authority’s “freedom to use its own resources (cooperate) with other public authorities, without being obliged to call on outside entities not forming part of its own departments”.

Dissimulating a new basic decision taken by the commission itself, which considerably reduces the freedom of “make or buy”. Instrumentalisation of procurement law to allegedly further fairer competition in markets in which both private and public entities are active.
4. **Horizontal cooperation**

- Scenario for local authorities and for cooperations among the provinces, Länder or regions regarding (for example) the administration of human resources, real estate or development of IT-infrastructur.

- High potential for the saving of public money and thereby the reduction of public dept in the Eurozone.
ECJ, C-480/06, Decision of 9 June 2009 (Stadtreinigung Hamburg): Literally ground-breaking judgment, opening unwritten exemption beyond In-House (essential statements can be found in recitals 37 – 38 and 44 – 48):

− Cooperation for the fulfillment of public tasks as another aspect of freedom of “making” instead of “buying”;
− no participation of private entities; and

− Irrelevance of the legal form of organization, meaning that it should be irrelevant whether two municipalities found a private limited liability company and are therefore allowed to award a contract by reference to the in-house constellation or whether they cooperate horizontally – this is also valid for justification.
Proposal:

4. An agreement concluded between two or more contracting authorities shall not be deemed to be a public contract within the meaning of Article 2(6) of this Directive where the following cumulative conditions are fulfilled:

(a) the agreement establishes a genuine cooperation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;

(b) the agreement is governed only by considerations relating to the public interest;

(c) the participating contracting authorities do not perform on the open market more than 10% in terms of turnover of the activities which are relevant in the context of the agreement;
(d) the agreement does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies; there is no private participation in any of the contracting authorities involved.”

Evaluation:

- Legal certainty is as unlikely to be fulfilled for horizontal cooperations as is the case for in-house, considered that both new criteria of Art. 11(4)b) and d) will raise significant problems of interpretation. Additional difficulties are created through the use of the terms “genuine” and “public service task” (see lit. (a) for both).
Factual circumstances in previous case law will be transformed into obligatory conditions for the new exception to apply (see J. Wiggen, PPLR 2012, NA 233).

− The basic decision of the ECJ in that regard (and, what is more, European primary law) are questioned and in parts even thwarted to the benefit of the Commission’s normative aspirations.
− It should be stressed that horizontal cooperation not only constitutes the most legitimate exemption in this field.
Principle of the organizational and procedural autonomy + Art. 4 (2) S. 1 TEU:

"The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government".

Presumably, the consequence of this sudden firework of conditions in Article 11(4) is not likely to be an augmentation of procurement on the market. Rather, authorities will probably continue to perform all their public tasks themselves.