

APPENDIX 2

The "Teckal" Principle

It is a well-established principle of EU procurement law that the open advertising and tendering rules for public contracts do not apply where a public body obtains services from "in-house" sources.

Basic law is that any public body in the EU wishing to obtain services from the private sector has to comply with public procurement rules, which require open and non-discriminatory advertising, tendering, and contract award. As a generally-accepted rule, a public body does not have to comply with public procurement rules where it is only utilising its own internal resources to satisfy its requirements.

Furthermore if a public body wishes to obtain services from another public body this is provided for under what is known as the "Teckal" ruling, where, for the first time the European Court of Justice held that a public body could bypass the EU procurement rules and directly enter into a contract with a service provider so long as:

- the public body controls the service provider in question as if it was that public body's own department; and
- the service provider in question carries out the essential part of its activities with the contracting authority which controls that entity.

The Teckal exemption allows contracting authorities a greater scope of cooperation amongst themselves without having to rely on a much narrower, existing exemption which applies only where services were provided by a contracting authority based on certain exclusive rights held by that contracting authority.

The question of ownership is not alone decisive in determining whether the requisite level of control is exercised over the proposed service provider by a contracting authority:

- any private sector part-ownership (no matter how minor the stake is) of the proposed service provider is likely to defeat the application of the Teckal exemption;
- the Teckal exemption could still apply even where multiple contracting authorities share the control over the proposed service provider; and
- the controlling contracting authority must possess "a power of decisive influence over both strategic objectives and significant decisions" over the proposed service provider for the Teckal exemption to apply (i.e., the more independently the entity in question is able to act, the less likely it is for the Teckal exemption to apply).

Section 95 of the Local Government Act 2003

Section 95 of the Local Government Act 2003 provides specifically for Local Authorities to take part in trading activities with other public and private sector bodies, and to do “for a commercial purpose anything which they are authorised to do for the purposes of carrying on any of their ordinary functions”.

The act makes further provision that the commercial trading can only be undertaken via a company regulated by both the Companies Acts and Part V of the Local Government and Housing Act 1989.

This provision is to ensure that:

- to make it a level playing field, as most competitors will usually be companies;
- for tax reasons, as local authorities would otherwise have a tax advantage over the competition;
- to ensure compliance with EU Competition Rules - if there is a requirement for a company it is easier to keep it all separate and transparent; and:
- to comply with state aid rules.