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CHAPTER 1
The principles of public-public cooperation

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For more than twenty years, Community law on public procurement and concession contracts has challenged the freedom of Member States to organise the management of their own public services. Many relationships between public authorities are in fact likely to be classified as public procurement contracts or concessions contracts under Community law. This is the case for certain forms of inter-municipal cooperation, collaboration contracts between public authorities or the technical support provided by the State to local authorities.

Community law is, however, imbued with a principle of neutrality with regjard to the methods of managing services of general interest, the concrete expression of which has only appeared very recently(1). The latest directives on contracts and concessions were intended to guarantee this principle of neutrality(2).

The only principle of neutrality enshrined in the original Community law concerns the "system of ownership" of undertakings, enshrined in Article 295 (ex-Article 222) of the EC Treaty. Thus, "the Community shall in no way call into question the public or private status of undertakings entrusted with missions of general interest and shall not therefore impose any privatisation"(3). For the

(1) Commission of the European Communities, *Green Paper on Services of General Interest*, Bruxelles, 21 May 2003, COM(2003) 270 final, pts. 79 s.; Communication from the Commission, *Services of General Interest in Europe*, 20 September 2000, COM 2000(580) final and Conclusions of the Presidency – Nice European Council 7, 8 and 9 December 2000. Commission of the European Communities, *Report to the Laeken European Council: Services of General Interest*, Bruxelles, 17 October 2001, COM (2001) 598 final.

(2) In its communication to the European Parliament, the Commission presents the reform of the law on contracts and concessions as a way of ensuring the neutrality of the choice of organisation of public services: "The new rules will ensure that the application of public procurement rules will not interfere with the freedom of public authorities to decide how to organise and carry out their public service tasks.". Communication from the Commission, 20 December 2011, "A Quality Framework for Services of General Interest in Europe", COM(2011) 900 final, 1.2.

(3) Commission of the European Communities, *Communication* of 11 September 1996, *Services of general interest in Europe*, COM (96) 443 final, pt. 16. Translated by the author from the French version.

Commission, such respect "for national choices of economic and social organisation is nothing other than an expression of the principle of subsidiarity"(4).

The combined reading of Articles 86 and 295 of the EC Treaty would guarantee the free determination of management methods(5): the State is free to determine the level of public service obligations it imposes on an activity and to determine the form that the service operator will adopt.

However, this principle of neutrality under Article 295 does not in itself guarantee that the State is free to directly operate the public activities it has defined, once it creates a legally separate entity.

The neutrality principle of Article 295 has been interpreted broadly. A literal reading of Article 295 only implies that public authorities are free to intervene in the management of Services of General Economic Interest (SGEIs) through public law entities, without these entities benefiting from a privilege in the award of the contract. This is the sense in which the principle was set out by the Commission in 2000: "neutrality as regards the ownership, public or private, of companies is guaranteed by Article 295 of the EC Treaty. … the Commission is not concerned with whether the undertakings responsible for providing services of general interest should be public or private. There is therefore no need to privatise public undertakings…."(6)

According to the broad interpretation subsequently adopted by the Commission, the principle of neutrality also means that a public law entity can manage an SGEI without having to compete for the management: the entity will have benefited from an award privilege. Thus, three years after its 2000 Communication on services of general interest, the Commission gavea new interpretation of the principle of neutrality: "As far as the participation of the state in the provision of services of general interest is concerned, it is for the public authorities to decide whether they provide these services directly through their own administration or whether they entrust the service to a third party (public or private entity)"(7). For the French Council of State, the principle of neutrality now constitutes "a principle of freedom for the public entity to choose the mode of organisation, whether internalised or not, of

(4) *Ibid*, pt. 17. Translated by the author from the French version.

(5) "It follows… from a reading of Articles 86 and 295 of the Treaty that it is for the Member States alone to define the scope of their public sector and to choose the appropriate method of exercising the public service tasks which they consider essential for the conduct of their activities" (Il résulte… de la lecture des articles 86 et 295 du traité qu'il appartient aux seuls États membres de définir le périmètre de leur secteur public et de choisir le mode d'exercice approprié des missions de service public, qu'ils considèrent essentielles pour la conduite de leur action). Conseil d'État, Rapport public 2002, *Collectivités publiques et concurrence*, Paris, La Documentation française, *EDCE* n° 53, pp. 215-457, p. 341.

(6) Communication from the Commission, 20 September 2000, cited above.

(7) Commission of the European Communities, *Green Paper on Services of General Interest*, Bruxelles, 21 May 2003, COM(2003) 270 final, pt. 79.

the public service"[8]. According to some authors, the choice of management method is an act of public authority[9] which must remain outside the sphere of competition law[10].

This principle of free determination of management methods had no textual basis until the entry into force of Directives 2014/23[11] and 2014/24[12]. It was the result of a free interpretation by the Commission, which was obviously received very favourably by the national authorities. Although the Commission's interpretations were in no way binding forthe European Court of Justice, and the principle of neutrality, in its broad interpretation, was never enshrined in case law. Some authors[13] have highlighted the enigmatic developments of Advocate General La Pergola, who considers, in his conclusions on the BFI Holding judgment, that "the aspect relating to the freedom of a public authority to organise its structure in such a way that it better meets the needs of the community does not seem to us to be a question worth considering. The choice of an organisational model by a public authority cannot, in any case, allow the application of provisions intended to govern another well-defined situation, consisting of the provision of a service by an individual to a public authority in return for remuneration. (…)"[14].While the principle seems to be established, no indication is given as to the concrete modalities of its application.

Contrary to what Advocate General La Pergola suggests, the principle of neutrality is challenged by "the rules of the Treaty, and in particular those relating to competition and the internal market" referred to by the Commission in its 2000 Communication on services of general interest in Europe. These principles are, more specifically, the free movement of goods, the freedom of establishment and the freedom to provide services, as well as the principles

(8) Conseil d'État, Rapport public 2002, *Collectivités publiques et concurrence*, Paris, La Documentation française, *EDCE* n° 53, pp. 215-457, p. 341: "a principle of freedom for the public entity to choose the mode of organisation, whether internalised or not, of the public service" (un principe de liberté de la personne publique pour choisir le mode d'organisation, internalisé ou non, du service public).

(9) According to Jean-Marie Auby, the acts by which an administrative person determines the mode of organisation of a public service under its authority "are linked to an essential competence of the administrative person. They are based on what Bonnard calls "the inalienable and discretionary right of the Administration to decide on the mode of organisation of public services". J.-M. Auby, "La notion de concession et les rapports des collectivités locales et des établissements publics de l'électricité et du gaz dans la loi du 8 avril 1946", CJEG 1949, pp. 2 f., p. 8.

(10) A. Raclet, *Droit communautaire des affaires et prérogatives de puissance publique nationales*, Paris, Dalloz (Coll. "Nouvelle bibliothèque de thèses"), 2002, p. 315.

(11) Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 *on the award of concession contracts*.

(12) 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*.

(13) See among others A.-L. Durviaux et N. Thirion, "Les modes de gestion des services publics locaux, la réglementation relative au marchés publics et le droit communautaire", *J.T.* 10 January 2004, n° 6122, pp. 17-27, p. 26.

(14) Opinion La Pergola, CJCE, 10 November 1998, *BFI Holding c. Communes d'Arnhem et de Rheden*, aff. C-360/96, rec. p. I-6821 ; *BJCP*, n° 2, p. 155, concl., note Gazin.

that flow from them, such as equal treatment, non-discrimination, mutual recognition, proportionality, and transparency, which form the basis of the rules on competition(15).

The principle of neutrality disappears as soon as the service is entrusted to a third party to the administration(16). Additionally Community law, attached to an "atomistic" vision of the administration, apprehends the notion of third party with particular acuity, and introduces competition into any organised relationship between two distinct legal persons(17). This particular insensitivity to the diversity of "institutional arrangements", as economists call them, far exceeds the limits of competition set by the Commission. It is worth noting the notable difference in the wording between the Commission's Communication to the Laeken European Council of 17 October 2001 and the *Green Paper* of 21 May 2003.

In its Communication of 17 October 2001, the Commission notes that "as a general rule, Community legislation leaves Member States free to decide whether they wish to provide public services themselves, directly or indirectly (via other public entities), or whether they prefer to entrust this task to third parties". In the Green Paper (pt. 79), the Commission merely states that "it is for the public authorities to decide whether they provide these services directly through their own administration or whether they entrust the service to a third party (public or private entity)". In the latter case, there is no longer any reference to "indirect" management as opposed to delegation to "third parties". The two situations seem to be confused; there is here, if not a lack of clarity, at least an implicit desire to give the notion of third parties a maximum extension.

In the opposition between the notions of direct management (or "own administration") and management by third parties lies the misunderstanding of the principle of neutrality: a third party is any entity with a distinct legal personality. A public institution is therefore a "third party to the administration" and does not benefit from the principle of neutrality. Only unincorporated bodies are covered by the principle of neutrality in its "broad" sense. If this was not the case, the concept of an inter-organisational relationship (in house)

(15) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, pt. 2.

(16) Commission of the European Communities, *Services of general interest*. Report to the Laeken European Council. COM (2001) 598 final, 17 October 2001, pt. 33; Commission of the European Communities, *Green Paper on Services of General Interest,* Bruxelles, 21 May 2003, COM(2003) 270 final, pt. 81.

(17) "… procurement law becomes applicable, in principle, upon the conclusion of an agreement between two *separate people*, in other words upon the coming into being of a *contract*". Opinion Juliane Kokott 1st March 2005, CJCE, *Parking Brixen GmbH c/ Gemeinde Brixen et Stadtwerke Brixen AG*, C-458/03, pt. 43.

See also CJEC, 18 November 1999, *Teckal*, C-107/98, pt. 50.

would be useless. Advocate General Kokott in his opinion in *Parking Brixen* is explicit: "If the intention of the contracting authority … is to use an organisationally independent public undertaking, in particular one of its subsidiaries, the answer appears initially to be readily apparent. In accordance with the principle of the equal treatment of public and private undertakings, as defined in particular in Article 86(1) EC, public undertakings must not, subject to the exceptions contained in Article 86(2) EC, be treated any more favourably than private competitors. A contracting authority cannot therefore simply entrust the provision of services to an undertaking which it itself controls without first giving any consideration to other possible tenderers or conducting a transparent selection procedure in order to do so"[18]. This principle of equal treatment only ceases to apply in cases of inter-organic relations or when public authorities intervene "by using exclusively its own resources, that is to say by performing them in-house, without calling on legally independent – public or private – undertakings at all"[19].

But there are many different forms of contractual cooperation between public bodies[20]. The French Conseil d'Etat occasionally attempts to give substance to a theoretical analysis of the situation. In its annual report for 2002, after noting the great diversity of cooperation agreements between public entities, it attempted to give a general definition. For the Council, partnerships between public entities are agreements by which "public partners are jointly involved in the implementation of the same public policy, on a strictly equal footing, and most often without financial exchanges"[21]. The Council of State notes that in these cases there is no performance relationship, nor is there any remuneration of one authority for the services provided by the other. And the Council wonders "whether there are indeed reciprocal commitments and therefore contracts".

However, identifying these contracts between public bodies, which are merely a means of performing a public service, is not easy, and Spain has been condemned for exempting from competitive tendering all collaboration agreements (convenios de colaboración) whereby several public bodies make use of common resources without exchanging reciprocal services[22]. Another kind of

(18) Opinion of Advocate General Kokott delivered on 1March 2005; CJCE, *Parking Brixen GmbH c/ Gemeinde Brixen et Stadtwerke Brixen AG*, aff. C-458/03, pt. 41.

(19) *Ibid.*, pt. 42.

(20) "Les virtualités d'application de pareille approche sont vertigineuses et même, d'une certaine manière, sans limite". A.-L. Durviaux et N. Thirion, "Les modes de gestion des services publics locaux, la réglementation relative au marchés publics et le droit communautaire", précité, p. 21.

(21) Conseil d'État, Rapport public 2002, *Collectivités publiques et concurrence*, Paris, La Documentation française, *EDCE* n° 53, pp. 215-457, p. 326.

(22) CJEC, 13 January 2005, *Commission c/ Royaume d'Espagne*, aff. C-84/03, concl. Kokott; *Contrats Marchés publ.*, mars 2005, n° 3, comm. n° 69 Zimmer (Willy).

relationship is subject to the principles of non-discrimination, equal treatment and transparency. This is the relationship of assistance between public authorities. This form of technical assistance is a way of pooling public resources by providing aid in exchange for a fee that is usually symbolic. It is no longer a case of "egalitarian" collaboration as identified by the Council of State, but of assistance. This particular form of "inter-institutional cooperation"(23) is nowadays a fundamental mechanism for structuring local public authorities in most Member States.

The development of Community law on public procurement has taken place at the same time as a profound movement of administrative reform in Europe and the world. The expressions of this administrative reform are too numerous to mention. The three main aspects of public administration reform have been the reduction of the size of the state, the modernisation of its structures, and the reform of its behaviour. The modification of the surface area involves a fairlyrapid withdrawal from the industrial sector through a massive privatisation policy. The modernisation of structures is carried out through formal privatisation, the creation of agencies, the contractualisation of internal relations within the administration(24) and the reform of the labour relations law(25)(26). The reform of behaviour is embodied in a renewed definition of the relationship between the provider of public services and the user, who would become a consumer(27).

The privatisation of the forms of intervention by the administration has made it very difficult to distinguish between the public and the private, between what is solely a matter for the organisation of public authorities and what is a matter for the diversification of the administration and its gradual incursion into the competitive sector.

(23) See for a more complete theoretical account of this concept P. Cossalter, *Les délégations d'activités publiques dans l'Union européenne*, Thèse, Paris II, 2005, tome 1 pp. 484 s.

(24) See among many others: Y. Fortin, "La contractualisation dans le secteur public des pays industrialisés depuis 1980: hors du contrat point de salut?", in Y. Fortin, *La contractualisation dans le secteur public des pays industrialisés depuis 1980*, coll. Logiques juridiques, Paris, L'Harmattan, 1999, pp. 5-26. *Revue européenne de droit public*, numéro spécial hors série, 1994, *Privatisations et droit public*.

(25) This is notably the case in Italy, where a series of laws, initiated in 1993 with Law No. 29 of 3 February 1993, brings labour relations in the civil service under civil law. See in particular G. D'Auria et H. Rocchio, *Chronique "Italie"*, in *Annuaire européen d'administration publique*, 1998, n° XXI, p. 552.

(26) Many of these changes explain the recent developments in French administrative law. See for a broad overview: J.-B. Auby, "La bataille de San Romano. Réflexions sur les évolutions récentes du droit administratif", *AJDA* 2001, n° 114, pp. 912-926.

(27) For an analysis from the perspective of consumer law: J. Amar, *De l'usager au consommateur de service public*, Aix-en-Provence, PUAM, 2001. The transformation of the relationship with the user cannot be reduced to this purely "legal" aspect, and more generally concerns all the programmes intended to establish a relationship with the citizen-consumer based on the display of rights to the service and a guarantee of quality, in particular through the adoption of "charters" (*Citizen's Charters*).

Directives 2014/23 and 2014/24 have, for the first time, provided a systematic response to the issue of contractual relations within the public sector. It is not certain that all situations are really envisaged, and that real neutrality has been achieved.

1. – Distinguishing between Public and Private

1.1. – The failure of the public authority test

EU law was built on the fundamental distinction between economic and non-economic activities. This distinction only imperfectly covers the divergence between the public and private sectors. It does, however, provide the essential conceptual tools for placing properly sovereign functions outside the market.

The distinction between the state's regalian and market activities is obviously not foreign to the laws of the various EU Member States. The Spanish law on public contracts (LSCP), for example, distinguishes between activities that can only be directly exploited by the administration and those that can be entrusted to the private sector because they have "an economic content that makes them suitable for exploitation by private entrepreneurs"(28). In the same way, Italian academic literature has developed the distinction between public functions (*funzione pubbliche*) and public services (*servizi pubblici*) on the basis of the provisions of the Italian Criminal Code, which distinguish between people entrusted with a "legislative, administrative or judicial public function" and those in charge of a public service(29). According to the Italian Criminal Code, a public function is "the administrative function subject to the rules of public law and acts of authority and characterised by the formation and manifestation of the will of the public administration by means of powers of authority and certification". The public function always represents the exercise of public power understood as the sphere of the State's own legal capacity,

(28) Ley 9/2017, from 8 November, *de Contratos del Sector Público*, transposant la directive 2014/24/UE, art. 284 § 1: "1. La Administración podrá gestionar indirectamente, mediante contrato de concesión de servicios, los servicios de su titularidad o competencia siempre que sean susceptibles de explotación económica por particulares. En ningún caso podrán prestarse mediante concesión de servicios los que impliquen ejercicio de la autoridad inherente a los poderes públicos". Cet article remplace l'article 155 al. 2 LCAP (Real Decreto Legislativo 2/2000, de 16 de junio, por el que se aprueba el texto refundido de la Ley de Contratos de las Administraciones Públicas). La disposition trouve son origine dans l'article 25 de la loi générale sur les ouvrages publics (Ley General de Obras Públicas) du 13 avril 1877: "… *siempre que las obras pudieran ser objeto de explotación retribuida, salvo excepción expresa y formalmente justificada*".

(29) See current Articles 357 and 358 of the Penal Code, amended by the Law of 26 April 1990, No. 86, modifying the offences of public officials against the public administration (Modifiche in tema di delitti dei pubblici ufficiali contro la pubblica amministrazione), GURI No. 97 of 27 April 1990.

its sovereignty[30] and implies the use of authority[31]. Public services, on the other hand, represent material, technical activities, including those of industrial production, made available to individuals to help them accomplish their ends[32].

Spanish positive law retains this notion of "public functions". Thus, the Law on the Basis of the Local Regime (RBRL[33]), in its article 92, paragraph 2, reserves the exercise of public functions to career civil servants: "public functions, the exercise of which is reserved exclusively for personnel subject to the status of civil servant, are those which involve the exercise of authority, public acts and compulsory legal advice (*asesoramiento legal preceptivo*), the functions of internal control of economic-financial and budgetary management, accounting and treasury, and in general those functions which, pursuant to this law, are reserved for civil servants for the best guarantee of objectivity, impartiality and independence in the exercise of the function"[34].

The majority of academic doctrine considers that the exercise of authority involves: the safety of public places, the good order of traffic and people on public roads, the protection and extinction of fires, and the discipline of town planning[35]. The Supreme Court (*Tribunal Supremo*), in several decisions[36] has confirmed the impossibility of indirectly managing the tax collection service, a public function involving the exercise of authority.

The distinction between authority and service could have been used as a basis for dividing up what is outside the market in terms of public procurement law and what is subject to the principles of competitive tendering. Nevertheless this key is not effective for at least three reasons.

Firstly, state intervention in the field of authority does not exclude services. Public procurement in the field of defence is the most striking example of this. Secondly, the boundary presented as watertight between authority and service

(30) V. sur la notion de fonction publique : B-G. Mattarella, voce "L'attività", in S. Cassese (dir.), *Trattato di diritto amministrativo*, Milan, Giuffrè Editore, 2003, pp. 707-804.

(31) M.-S. Giannini, *Diritto amministrativo*, Milan, Giuffrè, 1993, 3e édition, vol 2, p. 16. V. en outre C. Irelli, *Corso di diritto amministrativo*, nuova ed., Turin, Giappichelli, 1997, p. 48 et pp. 56 s.

(32) See U. Pototschnig, *I pubblici servizi*, Padoue, CEDAM, 1964, p. 169 et note 77.

(33) Ley n° 7/1985, del 2 abril 1985, *Reguladora de las bases del régimen local*, "RBRL", *BOE*, n° 80 of 3 April 1985.

(34) Art. 92, al. 2: "Son funciones públicas, cuyo cumplimiento queda reservado exclusivamente a personal sujeto al estatuto funcionarial, las que impliquen ejercicio de autoridad, las de fe pública y asesoramiento legal preceptivo, las de control y fiscalización interna de la gestión económico-financiera y presupuestaria, las de contabilidad y tesorería y, en general, aquellas que, en desarrollo de la presente Ley, se reserven a los funcionarios para la mejor garantía de la objetividad, imparcialidad e independencia en el ejercicio de la función".

(35) A. Koninckx Frasquet, "La necessaria concreciòn del contrato de gestiòn de servicios públicos. Espacial referencia al ámbito municipal", *REALA*, n° 279, January-April 1999, pp. 177-211.

(36) TS, 29 January 1990, *RJ*, n° 561; TS 5 March1993, *RJ*, n° 1555; TS 31 October 1997, *RJ*, n° 7242.

has probably never been so impermeable. The development of public-private partnerships in all their forms now illustrates the fact that regalian activities are frequently subject to private sector intervention. Thirdly, and apart from the intervention of the private sector, the distinction between authority and service is itself debatable. While French administrative law doctrine, for instance, has long distinguished between police and public service, it is now undeniable for most authors that the police are themselves a service rendered to the population. The use of authority can therefore only be seen as a means, and not the definition of a particular end of the administration.

Therefore, the preservation of a "protected space" allowing the public administration to abstract from the rules of public order has never been seriously undertaken by the Member States.

1.2. – The failure of the non-market activity critera

Another way of distinguishing non-market administrative activity from market activities is the market character, as opposed to the regal or social character(37). As we have seen, Spanish law distinguishes between activities that must remain in the hands of the administration and those that can be entrusted to the private sector because they are susceptible to economic exploitation. This distinction does not structure the scope of application of public procurement law but merely the (very theoretical) definition of activities that cannot be delegated to the private sector.

In France, the Conseil d'Etat has attempted to draw a distinction between market and non-market activities. It attempted this theoretical elaboration in two decisions, "Fondation Jean Moulin"(38) and "Commune d'Aix-en-Provence"(39) both of which were not followed up. In an attempt to regulate the cases in which the administration would not have to submit the award of a public contract to advertising and competition, the Council of State identified three hypotheses, one of which is that the co-contractor is not "an operator in a competitive market", having regard to the nature of the activity in question and the particular conditions in which it is carried out. It is not appropriate here to analyse in depth the theoretical weakness of the reference to the "nature of the activity". The Conseil d'Etat often resorts to it to grant itself a

(37) CJEC, 17 February 1993, *Poucet et Pistre c/ AGF et Cancava*, aff. C-159/91 et C-160/91, rec. p. I-637. CJCE, 26 March 1996, *Garcia*, aff. C-238/94, rec. p. I-1673; Ph. Laigre, "Régimes de sécurité sociale et entreprise d'assurance", *Droit social* 1996, n° 7-8, pp. 705-718.

(38) CE Ass., 23 October 2003, avis n° 369.315 "Fondation Jean Moulin", EDCE n° 55, pp. 209 s. E. Fatôme et L. Richer, "La découverte, par le Conseil d'État, du contrat de 'simple organisation' du service public", ACCP n° 34, June 2004, pp. 74-76. A. Méneménis, "L'avis Fondation Jean Moulin et la commande publique : poursuite de la réflexion", ACCP September 2004, p. 65.

(39) CE, Sect., 6 April 2007, *Commune d'Aix-en-Provence*, n° 284736, rec.

margin of appreciation. However, the use of this indeterminate legal concept shows a notable inability to draw the boundaries of non-market activities. While it may be agreed that the social services at issue in the Jean Moulin case could perhaps justify the non-application of competition rules, by analogy with Community competition law, the opera services at issue in the Aix-en-Provence case cannot be used to justify a derogation from the application of Community law.

Apart from exceedingly rare cases involving government or social activities, the intervention of a third party to the administration of the performance of a service cannot in principle be exempted from the rules concerningadvertising and competition. The reference to the "nature of the activity" is not sufficient. This explains why the French Council of State tried to add a reference to the economic exchange: services provided free of charge or at a lower value than those of the market could have made it possible to derogate from the application of Community law on public procurement.

Italian law does, in contrast, make a distinction between economic and non-economic activities. Cultural and leisure activities considered "private of an economic nature" (prive di rilevanza economica), can be entrusted directly to associations and foundations set up and in which local authorities participate(40). However, it does not seem possible to entrust such activities without advertising and competition, to organisations other than associations or foundations controlled by public authorities. If Italian foundations can be entrusted with their tasks without advertising or competition, this is not only because of the nature of the activities in question, which cannot be determined a priori, as the Italian administrative courts point out(41), but because of the specific nature of the foundations themselves, which are subject to a legal regime that differs from that of commercial companies(42). It is therefore the legal form of

(40) Testo unico delle leggi sull'ordinamento degli enti locali approvato con Decreto legislativo 18 August 2000, n. 267, art. 30, art. 113-bis: "Gli enti locali possono procedere all'affidamento diretto dei servizi culturali e del tempo libero anche ad associazioni e fondazioni da loro costituite o partecipate" (Local authorities may also directly entrust cultural and leisure services to associations and foundations they have set up or in which they have an interest).

(41) See for instance: CS, Sez. V., n° 6529, 10 September 2010. Tar Puglia-Bari, Sez. I, n° 24, 5 January 2012.

(42) See Corte dei Conti, Sezione Regionale di Controllo per il Lazio, parere 151, 26 june 2013: "il ricorrere di determinati elementi, e cioè la costituzione/partecipazione, da parte di uno o più enti pubblici, di una persona giuridica privata, finalizzata alla realizzazione di un fine pubblico con l'impiego di finanziamenti pubblici e con modalità di gestione e controllo direttamente collegabili alla volontà degli enti soci, rende, di fatto, la persona giuridica privata un semplice modulo organizzativo dell'ente pubblico socio, al pari di altre formule organizzative aventi parimenti natura pubblicistica (aziende speciali e istituzioni)" (the existence of certain elements, namely the establishment/participation, by one or more public bodies, of a private legal person, the purpose of which is to achieve a public aim with the use of public funds and with management and control methods directly linked to the will of the member bodies, effectively makes the private legal person a simple organisational module of the public member

the managing bodies and not the activity in question that justifies a derogation from the principles of advertising and competitive tendering.

1.3. – Weaknesses of the organic critera

The contract-based approach of Community law is imperfect. While it takes no account ofadministrative relationships, it blindly subjects contractual relationships which are often no more than organisational arrangements for the local public sector.

1.3.1. – Organisations based on administrative hierarchy

One of the fundamental characteristics of European public procurement law is that it only regulates contractual relations, without addressing unilateral relations. This impediment is surprising. This limitation has sometimes been raised, by the European Commission itself. The inclusion of unilateral acts in the definition of concession agreements was announced in the interpretative communication of 12 April 2000[43]. This inclusion would have opened up a considerable scope of application, subjecting to a competitive procedure and, consequently, to control of certain elements of the implementation regime (such as duration or modification). All unilateral procedures by which the State regulates private activities of general interest by imposing public service constraints on them and all relations between public authorities or between public authorities and their public institutions.

The Commission's desire in 2000 contrasts greatly with the fate reserved for the question in Directive 2014/23, of which only point 48 mentions, in a very summary manner, this fundamental question[44] in order to resolutely exclude all "administrative relationships" from the scope of the directive. It is likely that this exclusion was made necessary by the desire to spare the bulk of public-public relations. Community law generally distinguishes between admi-

body, like other organisational formulas having an equally public nature (special companies and institutions).

(43) Commission des communautés européennes, *Communication interprétative sur les concessions en droit communautaire*, Bruxelles, 12 April 2000, *OJEC* 2000, serie C, n° 121. The Communication covered "… acts attributable to the State whereby a public authority entrusts to a third party – by means of a contractual act or a unilateral act with the prior consent of the third party – the total or partial management of services for which that authority would normally be responsible and for which the third party assumes the risk." (pt. 2.4).

(44) Directive 2014/23/Eu of the European Parliament and of the Council of 26 February 2014 *on the award of concession contracts*, pt. 48: "Certain cases exist where a legal entity acts, under the relevant provisions of national law, as an instrument or technical service to determined contracting authorities or contracting entities, and is obliged to carry out orders given to it by those contracting authorities or contracting entities and has no influence on the remuneration for its performance. In view of its non-contractual nature, such a purely administrative relationship should not fall within the scope of concession award procedures".

nistrative relationships such as licensing, which are not subject to advertising and competitive tendering, and concessions involving a public service obligation, which are subject to an advertising and competitive tendering procedure. This is the case for air transport(45), maritime cabotage(46) or public passenger transport services by rail and by road(47).

However, the exclusion of unilateral relations, which may seem logical, focuses attention on the legal procedure, without grasping its content. The Teckal judgment was handed down, it should be remembered, based on a reference from an Italian court questioning the possibility for a municipality to entrust missions to a public establishment by unilateral means(48). The Commune d'Aix-en-Provence decision of the French Conseil d'Etat(49), concerns the legality of a subsidy to a body managing a public service, even though no competitive procedure had been followed in awarding its tasks. Generally speaking, it is easy for a contracting authority to subsidise the activity of a company in which it has a majority stake without signing a contract. The unilateral act can be a substitute for the contract.

The exclusion of unilateral relationships thus allows the free organisation of the local public sector when there is no contract. This is how the creation of local public bodies (établissements publics) in France escape all publicity and competition.

1.3.2. – Organizations based on contractual cooperation

During the 1990s, many European Union states reorganised their local public sector around structures, under public or private law, subject to private law and maintaining contractual relationships with each other or with public authorities. These transformations have made it urgent for the concept of in-house(50).

Italy has developed public forms of management of public services that have borrowed heavily from the model of joint stock companies, allowing the participation of several communities and marked by the disappearance of limits to

(45) See in air transport the coexistence of licences and concessions: Regulation (EC) n° 1008/2008 of the European Parliament and of the Council of 24 September 2008 *on common rules for the operation of air services in the Community*, especially art. 17.

(46) Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide sevices to maritime transport within Member States (maritime cabotage), art. 4 about "public services contracts".

(47) Regulation (EC) n° 1370/2007 of the European Parliament and of the Council of 23 October 2007 *on public passenger transport services by rail and by road and repealing Council Regulations* (EEC) n° 1191/69 and 1107/70, pt. 34.

(48) CJEC, 18 November 1999, *Teckal*, aff. C-107/98, rec. p. I-8121, Opinion Georges Cosmas.

(49) CE, Sect., 06 April2007, *Commune d'Aix-en-Provence*, n° 284736, rec.

(50) See on this phenomenon: Ph. Cossalter, "La société publique locale: un outil répandu en Europe", *Revue du droit public*, 2011 n° 3, pp. 757 s.

territorial competence. The classic forms of azienda ne municipalizzata could not intervene outside the territorial competence of the municipalities that created them, as their territory "impassably circumscribed the interests for which the public entities could provide"(51). The aziende municipalizzate have been replaced by the more modern form of aziende speciali, which are no longer bound by a strict principle of territorial speciality.

In addition, the law allowed municipalities to enter into agreements with each other in order to manage "functions and services in a coordinated manner" and for the aziende to intervene on the territory of other local entities(52). It should be noted that, like the agreements in Article L. 5111-1 of the French Code général des collectivités territoriales(53), the agreements in question allowed the aziende to intervene without competition.

Apart from these two specific cases, Italian administrative case law allowed aziende speciali to take part in competitive tendering procedures for the award of a public service outside their initial area of competence on the twofold condition that the intervention was strictly complementary to their initial statutory purpose and that it did not prejudice the material and financial conditions for the execution of the service or services for which they were responsible(54). The complementarity was in particular territorial(55): in the absence of territorial continuity of the networks, for instance an azienda could not manage a public service of drinking water distribution(56).

(51) "… il ricorso all'attrezzatura e all'attività di un'azienda municipalizzata già operante in un Comune vicino non è consentita … in quanto trova un ostacolo insormontabile nel rilievo che il territorio circoscrive gli interessi ai quali possono provvedere gli enti pubblici, e quindi i loro organi, interessi che devono essere quelli propri della comunità amministrata". CS, 1re section, 18 December1968, n° 3587/68, cité in G. Caia, "L'attività imprenditoriale delle società a prevalente capitale pubblico locale al di fuori del territorio degli enti soci", note sous TAR Emilie Romagne, Parme, 2 mai 2002, n° 240, *Foro amm.*, 2002 p. 1565, précité.

(52) See originally Legge 8 June 1990, n° 142, *Ordinamento delle autonomie locali*, *GURI* du 12 June 1990, n° 135, Suppl. ord., art. 24 al. 1. V. currently Testo unico delle leggi sull'ordinamento degli enti locali approvato con Decreto legislativo 18 August 2000, n. 267, art. 30: "In order to carry out specific functions and services in a coordinated manner, municipalities and provinces may enter into agreements with each other in this respect" (Al fine di svolgere in modo coordinato funzioni e servizi determinati, i comuni e le province possono stipulare tra loro apposite convenzioni).

(53) Article L. 5111-1 of the General Code of Territorial Authorities, in its current wording, stipulates in its first paragraph that "Territorial authorities may associate themselves for the exercise of their competences by creating public cooperation bodies in the forms and conditions provided for by the legislation in force" (Les collectivités territoriales peuvent s'associer pour l'exercice de leurs compétences en créant des organismes publics de coopération dans les formes et conditions prévues par la législation en vigueur).

(54) CS, 5e section, 18 October 2001, *Azienda Speciale Servizi Pubblici di Cesano Maderno c/ la Acqua potabile Bovisio s.r.l.*, n° 5515.

(55) CS, 5e section, 11 June 1999, n° 631; CS, 5e section, 4 avril 2002, *ASM Pavia s.p.a. c/ Metano Pavese s.p.a.. e Comuni di Pavia e Marcignago*, n° 1875.

(56) *Ibid.*

Similarly, local public services in Germany have been subject to extensive formal privatisation (Organisationsprivatisierung[57] or Formelle Privatisierung)[58], which is currently being followed by a rather obvious remunicipalisation (Rekommunalisierung). The preferred form of this formal privatisation has been the Eigengesellschaft, a company with exclusive public capital held by a single shareholder, either in the form of a partnership (GmbH) or a corporation (AG). In addition, there are multi-shareholder companies (Beteiligungsgesellschaft), which are either wholly publicly owned (Gemischöffentliche Beteiligungsgesellschaft) or publicly and privately owned and may include a private majority partner (Gemischwirtschaftliche Beteiligungsgesellschaften)[59].

2. – The Need to adapt community Law to national realities

States such as France are organised on the basis of a dual system: the award of contracts to private sector companies or the management of public services by local public bodies. In the first case, contracts are subject to advertising and competition. In the second case, there are no contracts because public bodies are assigned their tasks by unilateral administrative acts.

On the contrary, the formal privatisation that has taken place in Italy, Germany and Austria, for example, has created this local public sector based on equity participation and sometimes complex contractual arrangements. Submission to the rules of advertising and competition has thus, in a short time, threatened to fragment local organisations.

The history of in-house is one of slow adaptation of Community law to national realities. By seeking to cover all contractual relations, without taking into account either activities or financial conditions, Community law has created major inequalities in treatment between Member States, inequalities which have had to be gradually corrected.

(57) On this concept in German law: J.-A. Kämmerer, *Privatisierung: Typologie – Determinanten – Rechtspraxis – Folgen*, Tübingen: Mohr Siebeck, 2001, pp. 41 s.

(58) See the presentation in Ziekow (Jan), *Öffentliches Wirtschaftsrecht: ein Studienbuch*, Beck, 2020, 5e éd., pp. 154 s.

(59) On these various forms see Ph. Cossalter, *Les délégations d'activités publiques dans l'Union européenne*, Paris, LGDJ (coll. "Bibliothèque de droit public", tome 249), 2007, n° 932-934.

2.1. – The theories involved: the confrontation of the contractual approach and the organic approach

The concept of in-house has been built by the European Court of Justice on a contractual approach that can be considered simplistic. For a contract to be subject to advertising and competitive tendering, it must constitute a genuine contract. A contract can only exist if there is an exchange of consents. If one of the two parties is subject to the control of the other, it has no autonomy of will and there is therefore no contract(60). This simplistic but "pure" view of the contractual relationship could explain why the Court has always refused to recognise an in-house relationship in the case of even a symbolic share of private capital.

National doctrines, on the other hand, are not contractual but organic. They are mainly based on the idea that a company, when it is created by a public person and even if its capital is not entirely held by this person, is an organ of the administration. In the early 2000s, Italian law recognised a privileged relationship by ruling out the qualification of a concession in any relationship with a company in which the contracting authority participates(61). The creation of the company and the holding of part of its equity marked the administration's desire to maintain a privileged relationship with this company. Equality of treatment was respected in a second stage, by putting the private capital share out to tender. Similarly, Spanish law classifies the mixed economy among the modes of indirect management of public services, alongside concessions, which means that the administration must have the free choice to resort to it without being hindered by the principle of advertising and competition(62). If French law has diverged from that of its neighbours concerning the status of the mixed

(60) CJEC, 18 November 1999, *Teckal*, C-107/98, rec. p. I-8121. S. opinion of Advocate General Cosmas, pt. 52 and 53: "[...] a contract must be drawn up and, in particular, must be concluded in writing. The contract is synallagmatic and for pecuniary interest. This means that the directive is applicable where, first, there is a concordance of wills between two different persons, the contracting authority and the supplier, and second, the commercial relationship that is created consists in the supply of a product for pecuniary remuneration. In other words, there are mutual acts of performance, the creation of rights and obligations for the parties to the contract and interdependence of their respective acts of performance. 53. Third – an element directly linked to the preceding one – the party entering into the contract with the contracting authority, namely the supplier, must have real third-party status vis-à-vis that authority, that is to say the supplier must be a separate person from the contracting authority. This element, likewise, is an essential characteristic for the conclusion of supply contracts falling within the scope of Directive 93/36". See opinion of Advocate General Juliane Kokott, 1st March 2005, CJCE, *Parking Brixen GmbH c/ Gemeinde Brixen et Stadtwerke Brixen AG*, aff. C-458/03, pt. 43.

(61) See the combined reading of articles 113 to 116 of Legislative Decree no. 267 of 18 August 2000 on the Single Text of the laws on the organisation of local entities (Testo unico delle leggi sull'ordinamento degli enti locali), known as "TUEL", GURI no. 227 of 28 September 2000, suppl. ord. no. 162.

(62) TS, 27 January 1992, quoted in González Palma (Francisco), "La explotación de las plazas de toros de titularidad municipal o provincial, gestión de un servicio público", Málaga, ISEL, *Cuadernos de Gestión Pública Local* n° 1, 2e semestre 2000: "en el ámbito del Derecho Administrativo no existe ... un contrato específico de gestión de servicios públicos, sino que es necesario hablar de una pluralidad

economy, it is because the Constitutional Council has declared the exemption rule provided for by the law to be contrary to the constitutional principle of equality. According to the Constitutional Council, the exemption for semi-public companies "could not be justified either by the specific characteristics of the status of the companies in question, or by the nature of their activities, or by any difficulties in applying the law that might run counter to the general interest objectives that the legislator intended to pursue".(63)

Once again, French law has suffered little from the application of Community law. On the other hand, there has been a violent confrontation between the contractual approach of Community law and the organic approach of German, Italian or Spanish law.

2.2. – The gradual reconciliation of views

The Court of Justice of the European Communities has never yielded to the presence of private sector stakeholders in the awarded public procurement contracts under in-house theory: the slightest parcel of private capital or the participation of private people, even non-profit ones, in an association(64), prevents the recognition of an in-house relationship(65).

For the rest, the Court has progressively abandoned and perverted its contractual approach in favour of an *ad hoc* approach, built up as and when cases were submitted to it and without any solid legal logic being discovered.

As we know, the Court initially only accepted an in-house relationship in the case of absolute control by a contracting authority over a third party(66). The major innovation was to accept joint controls exercisedby several public bodies over the same structure(67).

However, the recognition of joint control created a risk of circumvention of the rules, which was identified early on in Italian law. The practice developed in the early 2000s of contracting authorities acquiring even a symbolic share in a public company in order to avoid the advertising and competition procedures. In the face of this phenomenon, the regional administrative courts

contractual diferenciada a través de la que es posible dar cabida a todo tipo de gestión indirecta de un determinado servicio público".

(63) Conseil constitutionnel, décision n° 92-316 DC du 20 January 1993.

(64) CJEU, 19 June 2014, aff. C-574/12, Centro Hospitalar de Setúbal EPE (CHS), Serviço de Utilização Comum dos Hospitais (SUCH) c/ Eurest (Portugal) – Sociedade Europeia de Restaurantes Lda: JCP A 2014, act. 559.

(65) V. sur ces aspects notamment : de La Rosa (Stéphane), *Droit européen de la commande publique*, Larcier, 2020, 2e édition, pp. 317 s.

(66) CJEC, 18 November 1999, *Teckal*, aff. C-107/98, rec. p. I-8121.

(67) CJEC, 13 November 2008, Coditel Brabant, C-324/07.

(TAR) adopted a restrictive position[68], while the Italian Council of State was much more favourable to the organisational formula of multi-communal companies intended for "the joint exercise of services by public entities with homogeneous interests"[69].The difference in approach was crystallised in the requirement, on the part of the TARs, of "effective control" by the shareholder over the company, not only through the holding of a minimum share of the capital but also through the possibility of having effective powers of control over the company's management[70]. It is this approach that was finally adopted by the Court of Justice of the European Union which, in its Econor decision, imposed the need for each of the authorities wishing to benefit from the in-house exemption to participate in both the capital and the management bodies of the said entity[71].

In addition, the Court recognised the possibility of contractual relations between public bodies in its City of Hamburg decision[72]. This case concerned the provision by the City of Hamburg of its road services to neighbouring authorities. The Court accepted that relations between public authorities may be established on a contractual basis as long as the contractual agreement concerns only contracting authorities without the participation of private parties, and the contract concerns the management of a public service for which all parties are competent. This is what is known as horizontal cooperation, to differentiate it from the vertical cooperation characteristic of in-house contracts.

3. – How to Escape the rules of advertising and tendering: Backyard management

We have coined the term "backyard management" as opposed to the "in-house" theory. This method consists of a contracting authority "hiding" a public procurement contract behind a banal relationship with an association or company that it controls.

In fact, in our view, there is a form of equivalence in the means of control: the more important the statutory control is, the less important the contractual control needs to be. Thus, the in-house theory is in our view only a

(68) L. Muselli, "Affidamento diretto di servizi a società a prevalente capitale pubblico locale e principi comunitari di concorrenza", note sous TAR Lombardie, Brescia, 13 May 2003, n° 681, *Foro amm.* 2003, n° 7-8, July – August, pp. 2175-2187; G. Caia, "L'attività imprenditoriale delle società a prevalente capitale pubblico locale al di fuori del territorio degli enti soci", note sous TAR Emilie Romagne, Parme, 2 mai 2002, n° 240, *Foro amm.*, 2002 p. 1565.

(69) CS, 5e section, 30 avril 2002, *TEA c/ L'Aprica spa,* n° 2297, *Cons. St.* 2002.809.

(70) TAR Lombardie, Brescia, 4 avril 2001, n° 222, *Giorn. Dir. Amm.* 2001, p. 1127, note DUGATO.

(71) CJEU, 29 November 2012, Econord Spa c/ Comune di Cagno et Comune di Varese, C-182/11.

(72) CJEC, 9 June 2009, Commission v. Allemagne, C-480/06.

way of validating this approach: when statutory control is too important, contractual control becomes unnecessary. We can, by retaining the statement, change the point of view completely: when a contracting authority has statutory control over a company or association, there is no need to assign its tasks to it by contract. It is thus possible, simply by unilateral action (see the hypothesis above), to dispense with any advertising and competitive tendering procedure.

Community law is not totally circumvented, since such bodies are also qualified as bodies governed by public law and are themselves subject to advertising and competitive tendering procedures(73) provided of course that their activity is recognised as not being of an industrial or commercial nature(74).

The fictitious nature of concession contracts awarded to public companies is a classic issue in France. The concessionary status of the Société nationale des chemins de fer français (SNCF), for example, has been criticised in French academic literature(75). For Gaston Jèze, the SNCF, although constituted at the time in the form of a semi-public company, was not a concessionary of the State but a disguised public body (régie) because the operation of the national company was "carried out at the State's risk"(76). For René Rodière, the fictitious nature of the SNCF concession stems from the power to modify the specifications by which the State binds itself(77). The same analysis could be made of the motorway companies, semi-public companies of the State "concessionaires" of motorways and of local semi-public companies (SEM), because the majority of the capital is held by the concessionary authority(78). Although they are set up as private companies, SEMs remain the "creatures" of the public authority(79). Generally speaking, it is doubtful that the delegation can have

(73) About the "bodies governed by public law": 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*, art. 2.

(74) V. CJCE, 10 May 2001, Agorà s.r.l. et Excelsior s.n.c. c/ Ente Autonomo Fiera Internazionale di Milano, aff. C-223/99 et C-260/99.

(75) A. de Laubadère, *Traité élémentaire de droit administratif*, Paris, LGDJ, tome 3, volume 2 "L'administration de l'économie", second edition, 1971, p. 693.

(76) G. Jèze, "La réorganisation des chemins de fer d'intérêt général", *RDP* 1937, p. 536.

(77) R. Rodière, *Droit des transports : transports ferroviaires, routiers, aériens et par batellerie*, Paris, Sirey, tome 1, 1953, p. 74 : "qu'est-ce que ce cahier des charges par lequel l'État se lie à lui-même ou plus exactement par lequel il ne se lie pas car il dépend de lui d'en modifier les termes au gré de sa politique économique ?" (What are these specifications by which the state binds itself or, more precisely, by which it does not bind itself because it depends on it to modify the terms according to its economic policy?).

(78) See Ph. Cossalter, "SEM et mise en concurrence : perspectives comparées", *RFDA* 2002, n° 5, pp. 938-951.

(79) In the words of C. Boiteau, "La société d'économie mixte, délégataire de service public", *AJDA* 2002, n° 21, pp. 1318-1326, p. 1318.

any real substance when a power of domination makes it possible to modify the conditions of exercise of the delegated activity[80].

Take the example of the Cologne StadtWerke from in Germany in the 1990s. A contract "GEW-Werke Köln AG" was signed in 1996: fourteen articles and six pages gave the rights to operate the three services to the company wholly owned by the city. Even though a special act (the Konzessionsvertrag;) is formally required to assign the service to the company, it can be considered to have been entrusted with its public tasks from the outset, as indicated by its very name, GEW being the acronym for gas, electricity and water. The second conceptual "moment", the definition of the conditions for carrying out the activity, cannot withstand the control exercised over the company's statutory bodies. The summary nature of such a "management contract" suggests the existence of a broad supervisory power. The fact that Stadwerke is 100% controlled means that it is an in-house situation.

The next example will illustrate the alternative hypothesis, that of backyard management. The example is taken from a judgment of the French Council of State, UGC Ciné-Cité in2007[81].

At issue in this case was the activity of a semi-public company operating the only art house cinema in the town of Epinal. The cinema, owned by the town, was rented at a favourable price to the SEM, which also received balancing subsidies. The town had an overwhelming presence in the structures of the SEM: the president of the company was the mayor of the town, the board of directors were mostly composed of elected officials, and so on. However, the company's activity was not qualified as a public service because the municipality of Épinal had neither set the company's objectives, nor put in place procedures to control the objectives. In order for an activity operated by a private person to be classified as a public service in France, the public authority must exercise close control over the activity in question[82].

It can hardly be disputed that the Palace cinema in Epinal is an emanation of the commune. The latter maintains an indisputable public-public relationship with its company. However, this relationship escapes the rules of advertising and competition.

(80) M. Pébereau, *La politique économique de la France*, Paris, Armand Colin, 1988, tome 2, pp. 23-26 notes that "[…] the public authorities affirm the autonomy of management and decision-making of public enterprises. The fact remains that belonging to the public sector can have significant effects on their management […] Because they belong to the public sector and the State has absolute powers to appoint their managers, national companies are subject to an essential hazard: the public authorities can change the rules of the game and call into question, in practice, the management autonomy asserted in principle…". See also M. Bazex, "Vers de nouveaux modèles normatifs pour le secteur public ?", *AJDA* 1990, pp. 659 s.

(81) CE SSR., 5 October 2007, Soc. UGC-Ciné-Cité, req. n° 298773, *Rec. CE*.

(82) CE Sect., 22 February 2007, Association du personnel relevant des établissements pour inadaptés (A.P.R.E.I.), n° 264541.