Appendix 4 - Teckal [1]

1 Teckal – the requirements

1.1 The *Teckal* exemption arises from the European case of the same name. The principles have also been elaborated upon in a number of cases and in particular the recent domestic Supreme Court case of *Brent London Borough Council and others v Risk Management Partners Ltd.* The *Teckal* exemption establishes that in certain circumstances, there will not be a contract opportunity (and therefore not a legal duty to conduct a tender process) for the purposes of the Regulations if:

- the public body (or bodies) exercises the same kind of control over the service provider as it does over its own departments;
- the service provider carries out the principal or essential part of its activities with the relevant public body (or bodies); and
- there is no private sector ownership of the service provider or any intention that there should be any.

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1.2 You should note that these conditions are cumulative. An arrangement will therefore only satisfy the requirements of *Teckal* if the service provider meets all of the conditions above.

1.3 Article 12 of the adopted version of the new EU procurement directive provides that:

> *"A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside of the scope of the Directive where all of the following conditions are fulfilled:*
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> *(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;*
> *(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and*
> *(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.*
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> *A contracting authority is 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 the strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which itself is controlled in the same way by the contracting authority."*

[1] *Since Appendix 4 was written the Public Contracts Regulations 2015 have been made by Parliament and come into force on 26th February 2015. These regulations give effect in national law to the new EU procurement directive referred to in the text and accordingly the advice in this Appendix is not materially affected."*

1.4 The new directive also clarifies that even if a contracting authority does not, on its own, exercise a control over the service provider which is similar to that which it exercises over its own departments, the *Teckal* exemption may still be available if that contracting authority exercises such control over the service provider together with at least one other contracting authority and limbs (b) and (c) above are satisfied.

1.5 The utility of a *Teckal* organisation in these circumstances will depend on the parties involved with the arrangement, their powers to create such an organisation, and the constitution of the organisation being sufficiently carefully designed to bring it within the scope of the test set out above. We would be happy to advise on this further once more information is available concerning the proposed arrangement. If the Council do not intend to be involved, however, the *Teckal* exemption would not be available. The exemption would also impact on the commercial options given the restrictions on private involvement.

2 The Hamburg test

2.1 The *Hamburg* case is named after a dispute between the European Commission and Germany relating to shared services for waste disposal in Hamburg. The principles in this case have been developed through a series of European judgments, which in our view lead to the following summary of the cumulative requirements that must be met in order to satisfy the exemption:

- The contract in question must establish cooperation between contracting authorities with the aim of ensuring that a public function that they all have to perform is carried out;
- That contract must be concluded exclusively by public entities, without the participation of a private party;
- No private provider of the services should be placed in a position of advantage vis-à-vis competitors as a result of the arrangement; and
- Implementation of such cooperation must be governed solely by considerations and requirements relating to the pursuit of objectives in the public interest (i.e. it should be of a non-profit making, non-commercial nature).
- In addition, it should be noted that if a contract:
    - Generates profit for one of the parties to it; or
    - Involves one party providing services to the others (rather than a genuine pooling of resources and cooperation/collaboration), whether or not the providing party makes any profit;

  then such a contract is unlikely to meet the requirements of *Hamburg* as it has been developed in recent European cases.

As is the case for the *Teckal* exemption, the commercial drivers will influence whether this exemption could be an option.

<u>Matters to consider – common public function?</u>

2.2 The first limb of the Hamburg test relates to the arrangement "establishing cooperation with the aim of ensuring that a public function that [all of the participating contracting authorities] have to carry out is carried out".

2.3 The first issue to consider is whether all of the Responsible Authorities jointly operating a shared service can properly be classified as being for the purpose of "*enabling all of the parties to perform a public function or task that they all have in common and all have to carry out*". This will depend on whether the word "*enabling*"

and the phrase "*function…that they all have in common and all have to carry out*" is given a wide or narrow interpretation.

Direct or ancillary to performance of public function?

2.4 A parallel and linked issue is whether the *Hamburg* exemption properly covers services ancillary to the performance of the function that the contracting authorities all have to carry out, rather than only the direct performance of the required function itself. Where is the line drawn between the performance of the public function/task, and the performance of services ancillary to, or complementary to, or even that better enable that function to be performed?

2.5 Compare for example, a contract for the coordination of waste disposal (a direct and primary public function that the authorities in *Hamburg* were required to carry out – and which fell within the scope of the exemption), with a contract for the cleaning of an office or IT services (which are not a direct public function of the parties, but which it could be argued are ancillary to and would enable one of the parties to fulfil its primary public functions) Cleaning services have, for example been held not to fall within the scope of the exemption in *Piepenbrock,* one of the most recent cases on this subject. This is a point that has not been dealt with by the European Court expressly and therefore the position is currently unclear. The level of shred functions would also need to be considered.

2.6 Given that the European Court has not, to date, provided any express guidance on the above points and the consequent lack of certainty, our view is that there is a degree of risk of challenge to any such shared service arrangement that does not directly result in a common public function being delivered.

2.7 Recent European case law has confirmed that the *Hamburg* exemption will not apply where one party (or several parties) to an arrangement acts as a service provider to another party (or parties). In such circumstances there will not be a genuine pooling of resources or the required degree of cooperation to fulfil the requirements of the exemption. This will be the case whether or not the service provider makes a profit for providing the services. The parties to the arrangement will therefore need to demonstrate that they are working together genuinely to deliver the relevant common functions, rather than simply outsourcing those functions or requirements to one (or several) of the parties to perform behalf of the others.

Summary of the Hamburg position under the new procurement directive

- The new directive sets out a public to public cooperation exemption that is wider than that set out in the current case law;
- In interpreting the articles of the directive, it is appropriate to take into account the stated objectives contained in the recitals to the directive;
- Taking the recitals and the articles of the new directive together, it is possible both to envisage that the public to public cooperation exemption extends to services that potentiate the delivery of a public service and, significantly here, that the services of the cooperating public bodies need not be identical so long as they are complimentary in achieving a common objective;
- The new directive of course is not yet in force in the UK (but it is anticipated that it will be before the end of the year), but it has some persuasive force as an indication of what a true interpretation of the EU law is (or should be);

Explanation of Hamburg position under the new procurement directive

2.8 Article 12(4) of the new procurement directive as adopted provides that:

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

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

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

(c) the participating contracting authorities perform on the open market not less than 20% of the activities concerned by the cooperation."

2.9 It is also of note that recital 33 to the new directive states that:

"Contracting authorities should be able to choose to provide jointly their public services by way of cooperation without being obliged to use any particular legal form. Such cooperation might cover all types of activities related to the performance of services and responsibilities assigned to or assumed by the participating authorities, such as mandatory or voluntary tasks of local or regional authorities or services conferred upon specific bodies by public law. The services provided by the various participating authorities need not necessarily be identical; they might also be complementary."

2.10 The above text suggests a wider interpretation of the *Hamburg* test, and that activities related to the performance of services and responsibilities assigned to or assumed by participating authorities might be covered by the exemption when the new directive is implemented into domestic law via new regulations. It is also worth noting the potential widening effect of the final sentence (confirming that the services need not necessarily be identical in order to fall within the scope of the exemption).

2.11 Unfortunately, the text that is most supportive of a wider interpretation of the *Hamburg* exemption is contained in a recital (which would be used to assist with interpretation) rather than the operative text of the directive itself, but this does not mean that the recital is completely without impact, especially in the context of European Law rules of interpretation (European Law should be interpreted purposively).