Chapter 5
The Definition of a 'Contract' Under Article 106 TFEU

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Abstract The fact that the public procurement Directives apply to contracts for the provision of SGEIs ensures transparency in the entrustment of SGEIs. This raises the question of whether the privileged rules of Article 106 TFEU apply alongside the specific public procurement rules, which are set out in secondary EU legislation. Looking at Article 106 TFEU through public procurement spectacles *Skovgaard Ølykke* identifies the determination of 'what is a contract' as a central issue for the application of the public procurement Directives. Where SGEIs are provided through in-house arrangements there will not be a 'contract' and where an SGEI is entrusted through a legislative act, this will also not satisfy the requirements of a 'contract'. A different set of problems arise where the entrustment of a SGEI take place by a service concession. The procurement Directives, subject service concessions to a special regime and service concessions are exempted from the Directives but under tight conditions. This raises the question as to whether Article 106(2) TFEU could be applied. Although this question has been debated in the academic literature, it has not been explicitly applied in litigation before the ECJ. However, *Skovgaard Ølykke* argues that in recent cases Article 106(2) TFEU could be the basis for the rulings, creating a new approach to contracts where SGEI are provided even where the *Teckal* criteria (see ECJ, Case C-84/03 *Commission* v. *Spain* [2005] *ECR* I-139, para 39; cf. ECJ, Case C-480/06 *Commission* v. *Germany* [2009] *ECR* I-4747) are not fulfilled. If this is the outcome of the case law, it gives a renewed role for Article 106(2) TFEU at a time when many commentators are questioning its continued existence in the TFEU.

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5.1 Introduction

There is a sense of refuge when exclusive rights, Services of General Economic Interest (SGEIs) and Public Service Obligations (PSOs)/Universal Service Obligations (USOs) are mentioned; Member States have a *right* to grant, define, impose, entrust and assign.[1] It could be questioned whether this *right* is an unlimited carte blanche? Careful suggestions have been made that the new legislative power conferred on the Council and the Parliament in the second sentence of Article 14 of the Treaty of the Functioning of the European Union (TFEU)[2] could be used to provide a clear and transparent framework for the selection of undertakings entrusted with a Service of General Economic Interest (SGEIs).[3] However, the Commission has already held that the public procurement directives also apply for contracts for the provision of SGEIs in order to ensure transparency in the entrustment of SGEIs.[4]

In this contribution, it will be examined whether or not the privileges described in Article 106 TFEU (ex Article 86 TEC) are covered by the rules on public

[1] CFI, Case T-442/03 *SIC* [2008] *ECR* II-1161, para 145, where the CFI states that neither the wording of Article 86(2) EC (now Article 106(2) TFEU) nor case law requires a tendering procedure for the entrustment of a SGEI. See also Schnelle 2002, p. 202.

[2] *OJ* 2008 C 115/1.

[3] Sauter and Schepel 2009, p. 179.

[4] COM(2003) 270 final *Green paper on Services of General Interest*, para 81, COM(2004) 374 final, *White Paper on Services of General Interest*, at 15–16, and see also COM(2007) 725 final, *Services of general interest, including social services of general interest: a new European commitment*, at 4.

procurement, i.e., must the public procurement directives[5] or the public procurement specific interpretation of the rules of the Treaties (Treaty) be respected when exclusive rights are granted or the provision a Services of General Economic Interest (SGEI) is 'entrusted'?

Since the perspective in this book is on SGEIs, it is natural to take the starting point in what is now Article 106 TFEU (ex Article 86 TEC) and to put on the public procurement 'spectacles'. This contribution will look into one of the basic requirements for the public procurement directives to apply, namely the existence of a 'contract'.[6] Generally, nothing prevents public authorities from using their own resources to provide the various functions and services they are required to provide.[7] Therefore, an ample amount of case law exists concerning whether or not a specific relation between the contracting authority and a separate legal person providing, e.g., services, constitutes a 'contract'.

One line of that case law is particularly developed, namely the case law concerning so-called in-house providing, where the ECJ has taken a doctrinal approach and developed the *Teckal* criteria.[8] In order to fulfil the *Teckal* criteria, firstly, the contracting authority must exercise control over the provider which is similar to the control it exercises over its own departments; and, secondly, the provider must provide the essential part of its output to the controlling public authority. The case law of the ECJ has shown that the control, as well as the 'essential part of output', can be jointly held by several public authorities.[9] When the *Teckal* criteria are fulfilled, the relationship between the contracting authority and the provider is considered to be 'in-house provision', i.e., no 'contract' exists, thereby rendering the conduct of a public procurement procedure dispensable.[10]

A second line of that case law concerns imposition of obligations by a legislative act, and this line of case law will be analysed below. Moreover, the possible development of an exemption from the rules on public procurement concerning cooperation between public authorities for provision of public service tasks will be examined.

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[5] 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 (henceforth: the 'Public Sector Directive'), *OJ* 2004 L 134/114 and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors (henceforth: the 'Utilities Directive'), *OJ* 2004 L 134/1. Together the two directives are denominated the 'public procurement directives'.

[6] For a similar approach, see Drijber and Stergiou 2009 at 825–829; Sauter 2008 at 190, finds that the rules on public procurement generally apply to SGEIs, where third parties are chosen as providers (i.e., the provision is not in-house).

[7] ECJ, Case C-26/03 *Stadt Halle* [2005] *ECR* I-1, para 48.

[8] ECJ, Case C-107/98 *Teckal* [1999] *ECR* I-8121, paras 49–50.

[9] ECJ, Case C-340/04 *Cabotermo* [2006] *ECR* I-4137, paras 37 and 70.

[10] For the evolution of the in-house case law, see Caranta 2010, p. 13.

This contribution consists of three main parts: firstly, Article 106 TFEU (ex Article 86 TEC) is contemplated from a public procurement perspective, to identify possible 'contracts' (Sect. 5.2); secondly, Article 106(2) TFEU [ex Article 86(2) TEC] is considered as an exemption to the rules on public procurement (Sect. 5.3); and, lastly, conclusions are made (Sect. 5.4).

5.2 Article 106 TFEU (ex Article 86 TEC) and 'Contracts' in the Sense of the Public Procurement Directives

The definition of a 'contract' in the public procurement directives states[11]:

> "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities, and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

In order for award of contracts to be within the scope of the public procurement directives, the contract must fulfil these criteria and the contract must have a value above the thresholds stipulated in the directives. However, the latter is less important, as the case law of the Court of Justice of the European Communities (ECJ) has shown that even contracts with a value below the thresholds,[12] and sometimes even contracts explicitly exempted from the public procurement directives,[13] cannot just be awarded directly to a preferred provider; the rules of the Treaties must be respected. In a public procurement context, the Treaties require, inter alia, transparency (some sort of publication) and non-discrimination on grounds of nationality.[14] Only where there is no cross-border interest in the award of the contract can 'contracts' outside the scope of the public procurement directives be directly awarded to a preferred contractor (subject to possible requirements under national public procurement regimes).[15] Henceforth, reference is made to the rules on public procurement to imply both sets of rules. There are of course exemptions to the public procurement directives, but it is outside the scope of this contribution to consider these exemptions.[16]

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[11] Article 1(2)(a) of the Public Sector Directive and the parallel provision is Article 1(2)(a) of the Utilities Directive, which, however, does not define 'public contracts', but rather 'supply, works, and service contracts'.

[12] For example, ECJ, Case C-59/00 *Vestergaard* [2001] *ECR* I-9505.

[13] For example, ECJ, Case C-324/98 *Telaustria* [2000] *ECR* I-10745.

[14] See Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, *OJ* 2006 C 179/2. Cf., Brown 2007, p. 1.

[15] Cf., Drijber and Stergiou 2009, pp. 811–815.

[16] Cf., Trepte 2007, pp. 239–256.

5.2.1 ‘Contracts’ in Article 106(1) TFEU [ex Article 86(1) EC]

Article 106(1) TFEU [ex Article 86(1) EC] speaks, inter alia, of undertakings which have been granted special or exclusive rights.[17] Case law on Article 106(1) TFEU [ex Article 86(1) EC] has revealed that the ‘measures’ mentioned in that provision could be the special or exclusive rights themselves; i.e., also the granting of a new special or exclusive right, to a provider which has not previously held a special or an exclusive right constitutes a ‘measure’.[18] Henceforth, only exclusive rights will be dealt with, as most case law deals with exclusive rights, but in principle the same applies for special rights. The Treaties do not contain any rules regarding the granting of exclusive rights. Nevertheless, it could be argued that Article 106(1) TFEU’s [ex Article 86(1) TEC] requirement that all measures made in relation to undertakings which have been granted exclusive rights, must be compatible with the Treaties, include that the exclusive right must be granted in accordance with the rules on public procurement.[19] Article 3 of the Public Sector Directive mentions the granting of exclusive rights, but makes no reference as to how such rights should be granted.

The reason why the granting of exclusive rights is not explicitly regulated in the public procurement directives could be explained by the circumstance that exclusive rights are typically granted for the following two purposes: firstly, for compensation for a PSO (or USO) requiring uniform tariffs for the entire territory of the Member State (the exclusive right permits cross-subsidisation)[20]; or, secondly, as the basis of a concession (see further on service concessions Sect. 5.2.2.2 infra).[21] In both situations the exclusive right could be categorised as a type of pecuniary interest for the services to be carried out. This is probably where the

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[17] Due to Article 345 TFEU (ex Article 295 TEC), public undertakings will not be considered specifically. However, it should be mentioned that contracts directly awarded (without a public procurement procedure) to public undertakings will often be argued to be in-house provision (see further Sect. 5.1 supra).

[18] Cf., Buendia Sierra 1999, pp. 135 and 138–139.

[19] See Joined Opinion of Advocate General Bot on 17 December 2009 concerning Cases C-203/08 (*Betfair*) and C-258/08 (*Ladbrokes*), para 154. From a different but obvious perspective, see Buendia Sierra 1999, p. 144, who argues that Article 86(1) TEC [now Article 106(1) TFEU] could be applied in conjunction with secondary legislation, e.g., the public procurement directives.

[20] As was seemingly the case in C-320/91 *Corbeau* [1993] *ECR* I-2533, paras 3 and 15 read in conjunction.

[21] For example, C-209/98 *Sydhavnens Sten &* Grus [2000] *ECR* I-3743, para 79, and the recent judgments in ECJ. Cases C-203/08 (Betfair), 3 June 2010, nyr, paras 46–47 and C-64/08 (Engelmann), 9 September 2010, nyr, paras 52–53, where the ECJ argues that the transparency obligations applicable to the award of service concessions should also apply to licensing systems with only one operator, inter alia, because the effect of such a licensing system is the same as the effect of a service concession. However, see also Drijber and Stergiou 2009, pp. 825–826, taking the standpoint that if the licensing system in question is comparable to the award of an exclusive right, no requirement to tender exists.

definition of a 'contract' in the public procurement Directives is not fulfilled[22]: an exclusive right is typically not granted in combination with a pecuniary interest; instead it is the pecuniary interest.

5.2.2 'Contracts' in Article 106(2) TFEU

Two different types of 'contracts' could be envisaged under Article 106(2) TFEU [ex Article 86(2) TEC]: firstly, the situation where a provider is 'entrusted' with the provision of a SGEI; and, secondly, the situation where particular tasks are 'assigned'.[23] Henceforth the 'particular tasks assigned' will be considered to be the same as PSOs (in the sense that PSOs are requirements from Member States regarding, inter alia, the scope, price or quality of a service).[24] This perception connects Article 106(2) TFEU [ex Article 86(2) TEC] and the *Altmark* test.[25]

Sauter proposes that SGEIs should be defined narrowly, as services, where the imposing of PSOs is necessary[26]:

> It appears consistent with the EU law principle of proportionality to limit the application of the SGEI concept to those cases where it is clear in advance that particular restrictions in relation to EU law obligations concerning free movement, competition, state aid and/or public procurement will be necessary (and therefore proportional) to enable the undertaking(s) charged with SGEI to provide those services, in the sense that they could not otherwise be provided to the requisite standard. Where this is not the case, reserving particular services to specific undertakings would simply not be necessary—and should therefore fail the proportionality standard that is explicitly included in Art. 86(2) EC.

It is clear from the wording of Article 106(2) TFEU [ex Article 86(2) TEC] that only providers of SGEIs to which PSOs have been 'assigned' could be exempted from the rules of the Treaties, as it is the importance of the fulfilment of the PSO which the provision protects. Therefore, application of Article 106(2) TFEU

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[22] For the same conclusion based on different arguments, see Drijber and Stergiou 2009, pp. 825–828.

[23] Due to Article 345 TFEU (ex Article 295 EC), State monopolies of a commercial character will not be considered, however.

[24] This perception is supported by COM(2003) 270 final, supra n. 4, para 17, COM(2004) 374 final, supra n. 4, 6, and Annex I at p. 22. The Commission also refers to 'the particular tasks of general interest' assigned to the providers of SGEIs; see COM(2007) 725 final, supra n. 4, at 6. Cf., Sauter 2008, p. 177, who argues that USOs is the main substantive content of SGEIs, but nevertheless, at 175 and 184, argues that PSOs is the core of SGEIs. PSO has been chosen over USO, because it appears the PSO is wider in scope than USO (where territorial coverage is an essential element, see Sauter 2008, pp. 176–177), and since PSO [in a wide sense, also covering USOs, it is submitted; cf., COM(2007) 725 final, at 6] is central for compensation according to the *Altmark* test, infra n. 25.

[25] ECJ, C-280/00, *Altmark* [2003] *ECR* I-7747, paras 89–93.

[26] Sauter 2008, p. 179. For a seemingly different opinion, see Buendia Sierra 2007, 593 at 627–630.

[ex Article 86(2) TEC] is only relevant to the situations mentioned by Sauter in the recited paragraph, regardless of the more specific definition of SGEIs.

From the perspective of the rules on public procurement, even if the Member States have a right to define SGEIs (political discretion/choice), does that imply that they can also (freely) decide to whom they 'entrust' the provision of SGEIs and to whom they 'assign' PSOs? The answer to this leads to a circular reasoning: a service can only be a SGEI, if it has been 'entrusted' to a specific undertaking but in order to be a SGEI, a PSO must be 'assigned' leading to the result that PSOs related to the specific SGEI can only be 'assigned' to the undertaking 'entrusted' with the provision of this specific SGEI.[27]

Another interpretation could be that PSOs could be 'assigned' to different providers, but Article 106(2) TEFU [ex Article 86(2) TEC] would only make exemption for providers which were also 'entrusted' with the provision of a SGEI. However, such an interpretation would contradict the finding above, i.e., it is the PSO which is protected.

An alternative and more desirable interpretation is that even though the wording of the provision mentions both 'entrustment' and 'assignment' these two seemingly separate formal requirements could be fulfilled contemporarily; i.e., the 'entrustment' of a SGEI implies the 'assignment' of a PSO or vice versa. This interpretation could explain case law where focus on the PSO, rather than on the 'entrustment' of the SGEI,[28] and will be the point of departure for the analysis below.[29] An examination of case law, on the basis of the criterion that the

[27] This seems to have been the case in C-159/94 *Commission* v. *France* [1997] *ECR* I-5815, para 66, where, however, the award of the concession was not an issue.

[28] See, for example, ECJ, Case C-127/73 *SABAM* [1974] *ECR* 313, paras 22–23, where the assignment of (particular) task(s) seems important to the ECJ; ECJ, Case C-258/78 *L.C. Nungesser* [1982] *ECR* 2015, para 9, and ECJ, Case C-66/86 *Ahmed Saeed* [1989] *ECR* 803, para 55; ECJ, Case C-320/91 *Corbeau* [1993] *ECR* I-2533, para 15, where the ECJ only mentions 'entrustment', but nevertheless elaborates on the PSO involved (the ECJ is emphasising the content of the PSOs in a manner suggesting that the SGEI is the PSO); ECJ, Case C-159/94 *Commission* v. *France* [1997] *ECR* I-5815, where paras 72–89 contain a thorough discussion of which PSOs were imposed on the provider of the SGEI; ECJ, Case C-266/96 *Corsica Ferries* [1998] *ECR* I-3949, para 45 (the reference to safety in port waters); ECJ, Joined Cases C-147 and 148/97 *Deutsche Post* [2000] *ECR* I-825, paras 43–45; ECJ, Case C-53/00 *Ferring* [2001] *ECR* I-9067, paras 7, 31 and 32; ECJ, Case 340/99 *TNT Traco* [2001] *ECR* I-4109, para 53; ECJ, Case C-457/99 *Ambulanz Glöckner* [2001] *ECR* I-8089, para 55 and ECJ, Joined Cases C-83, 93 and 94/01P *La Poste* [2003] *ECR* I-6993, para 34; CFI, Case T-289/03 *BUPA* [2008] *ECR* II-81, paras 161–162, where the CFI accepts the argument of the parties that a SGEI is the same as a PSO. Moreover, see Community framework for State aid in the form of public service compensation, *OJ* 2005 C 297/4, para 12, where the first requirement for the act entrusting a provider with the provision of a SGEI is '(a) the precise nature and duration of public service obligations'.

[29] Along the same lines, see Szyszczak 2007, p. 211, Sauter and Schepel 2009, p. 168, and 'Services of General Economic Interest—Opinion Prepared by the State Aid Group of EAGCP' (2006), available at http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html#studies, 2 and 3.

'entrustment' of a SGEI/PSO should be at least peripherally assessed by the ECJ, otherwise the judgment was left out, discloses that the Member States seem to prefer 'entrustment' by legislation,[30] or by concession[31]; both of these forms of 'entrustment' have been accepted by the ECJ.[32]

It is indisputable that the SGEI/PSO must be 'entrusted' by an act of public authority[33]; i.e., the public authority must act in its exercise of public authority function.[34] Moreover, the PSO must be linked to the subject-matter of the SGEI and should contribute to satisfying that interest.[35] The requirement that a SGEI/PSO should be 'entrusted', could therefore be seen as a means, firstly, to avoid circumvention,[36] i.e., not all services qualify for exemption under Article 106(2) [ex Article 86(2) TEC]—the SGEI/PSO must pursue specific ends, i.e., contribute

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[30] For examples of 'entrustment' by legislation, see, e.g., ECJ, Case C-41/90 *Höfner* [1991] *ECR* I-1979, para 24; ECJ, Case C-157/94 *Commission* v. *the Netherlands* [1997] *ECR* I-5699, para 45; ECJ, Joined Cases C-147-148/97 *Deutsche Post* [2000] *ECR* I-825, para 45; ECJ, Case C-340/99 *TNT Traco* [2001] *ECR* I-4109, para 3 and ECJ, Case C-220/06 *Correos* [2007] *ECR* I-12175, para 79.

[31] For examples of 'entrustment' by concession, see ECJ, Case C-393/92 *Almelo* [1994] *ECR* I-1477, para 31, where the concession was granted by a measure of public law; ECJ, Case C-159/94 *Commission* v. *France* [1997] *ECR* I-5815, para 66, and implicitly ECJ, C-209/98 *Sydhavnens Sten & Grus* [2000] *ECR* I-3743, paras 17, 71 and 79 read in conjunction.

[32] See ECJ, Case C-30/87 *Bodson* [1988] *ECR* I-2479, para 18 where the concessions at issue were described as '… *contracts … concluded between communes acting in their capacity as public authorities* and undertakings entrusted with the operation of a public service…' [emphasis added].

[33] ECJ, Case C-127/73 *SABAM* [1974] *ECR* 51, para 20; ECJ, Case C-172/80 *Züchner* [1981] *ECR* 2021, para 7 and ECJ, Case C-66/86 *Ahmed Saeed* [1989] *ECR* I-803, para 55. However, see the Opinion of Advocate General Léger on 10 July 2001 concerning ECJ, Case C-309/99 *Wouters*, para 160, for the point that the ECJ has mitigated the requirement relating to the existence of a formal act of the public authorities.

[34] See also Buendia Sierra 2007, p. 630, who seems to attribute significant weight to the formal public/private law distinction: '…, if a public entity enters into a contract governed by private law with an undertaking for the purpose of carrying out of an economic activity it is not, by definition, acting in the exercise of public authority *functions*.' It is submitted that a distinction needs to be made between the decision to provide a specific SGEI/PSO, the choice of in-house/ex-house and the actual 'entrustment' of a SGEI/PSO (by legislative act/concession) to a third party. At least the first mentioned is an act of public authority, since it is a political choice of what services to provide. It can also be argued that the 'entrustment' of a SGEI/PSO by legislative act is exercise of public authority. See Sect. 5.3 infra on cooperation between public authorities to ensure the provision of public services which they are obliged ('entrusted') to provide by legislation.

[35] ECJ, Case C-159/94 *Commission* v. *France* [1997] *ECR* I-5815, para 68.

[36] Cf., Buendia Sierra 2007, p. 629.

to acknowledged national policies[37]; and, secondly, to distinguish SGEIs/PSOs from sector regulation.[38]

5.2.2.1 'Entrustment'/'Assignment' by Legislative Act

'Entrustment' by legislation is only relevant where the SGEI sector has not been liberalised at EU level, as sector regulation provides for possible ways of 'entrusting' the provision of SGEIs/PSOs, e.g., the rules on public procurement.[39]

It is not obvious that the 'entrustment' of the provision of a SGEI/PSO by a legislative act is a 'contract' in the sense of the rules on public procurement, as it seemingly does not live up to the basic requirement of the 'contract' being entered into by the parties (a contracting authority and a third party). Three recent cases decided in the context of claims regarding the rules on public procurement are of relevance here.

In *Asemfo*, it appears that the absence of 'contracts' due to the relevant legislative set-up was of major importance.[40] Briefly stated, in *Asemfo* the legal framework applicable to the public undertaking Transformación Agraria SA (Tragsa) stipulated that Tragsa was required to carry out various services for the public authorities at their request, within the timeframe stipulated by the public authority and at a tariff fixed by regulation. Advocate General Geelhoed concluded that the statutory regime governing a public undertaking like Tragsa would have to be stipulated to comply with the case law on in-house provision.[41] The ECJ seems to argue two ways: firstly, the relationship between Tragsa and the public authorities was not contractual[42]; and, secondly, the criteria for in-house provision were fulfilled, with regard to the public authorities holding shares in Tragsa.[43] Regarding the first argument, the ECJ stated[44]:

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[37] Sauter 2008, p. 184, links the 'entrustment' requirement to the proportionality test (necessity test) in Article 106(2) TFEU [ex Article 86(2) TEC].

[38] ECJ, Case C-7/82 *GVL* v. *Commission* [1983] *ECR* 483, para 32. Seemingly contrary, see the CFI's ruling in Case T-289/03 *BUPA* [2008] *ECR* II-81, para 182 in conjunction with para 196, where the provision of private medical insurance was regulated, but seemingly no provider was required to supply the insurances. The CFI defined the legislation as an 'act of public authority', but denied that the legislation was a regulation or an authorisation of the providers of private medical insurances; see para 182.

[39] For examples, see Drijber and Stergiou 2009, p. 842–843.

[40] ECJ, Case C-295/05 *Asemfo* [2007] *ECR* I-2999, para 60.

[41] Opinion of Advocate General Geelhoed on 28 September 2006 concerning C-295/05 (*Asemfo*), para 97.

[42] *Asemfo*, paras 54 and 60.

[43] *Asemfo*, paras 57–58 and 61 in conjunction with paras 63–64, where the ECJ, however, did not distinguish between services carried out for shareholders and non-shareholders.

[44] *Asemfo*, para 54.

> It must be observed that, if, which it is for the referring court to establish, Tragsa has no choice, either as to the acceptance of a demand made by the competent authorities in question, or as to the tariff for its services, the requirement for the application of the directives concerned relating to the existence of a contract is not met.

Seemingly, where the legislative regime applicable requires the provider to carry out the orders given by (specified) public authorities, at a tariff fixed by the public authorities, the relationship is not a 'contract' in the sense of the rules on public procurement. It should be noted that the national legislation in question explicitly stated that the relationship between Tragsa and the public authorities should be considered instrumental and not contractual.[45]

Approximately 8 months later, the ECJ elaborated on the above in *Correos*.[46] In *Correos*, Spain claimed that a Cooperation Agreement directly awarded to the universal postal service provider (Correos) by a ministry was not a 'contract', because Correos was an instrument of the Spanish State and was unable to refuse to enter into the Cooperation Agreement[47]; hereby Spain was implicitly referring to *Asemfo*. The ECJ underlined that the ruling in *Asemfo* was confined to the specific circumstances of that case,[48] and it qualified (or generalised) the findings in *Asemfo* to the following[49]:

> It is only if the agreement between Correos and the Ministerio were in actual fact a *unilateral administrative measure solely creating obligations for Correos—and as such a measure departing significantly from the normal conditions of a commercial offer made by that company* [emphasis added], a matter which is for the [national court] to establish—that it would have to be held that there is no contract and that, consequently, [the public procurement directive] could not apply.
>
> In the course of that examination, the [national court] will have to consider, in particular, *whether Correos is able to negotiate with the Ministerio, the actual content of the services it has to provide and the tariffs to be applied to those services and whether* [emphasis added], as regards non-reserved services, *the company can free itself from obligations arising under the Cooperation Agreement, by giving notice as provided for in that agreement* [emphasis added].

It should be noted that in *Correos*, an agreement was made, contrary to what was the case in *Asemfo*. In the recited paragraphs, the ECJ stated that the agreement would only cease to be a 'contract' if it were a 'unilateral administrative measure'; in other words it considered when an agreement is a 'legislative act' rather than a 'contract'. Thus, the attributes mentioned in the recited paragraphs are characteristic for legislative acts, which is the kind of 'entrustment' considered in this section. Where 'entrustment' is made by a legislative act, it will therefore normally not be a contract. The approach taken by the ECJ in *Correos* seem to indicate that a case-by-case assessment will be adopted by the ECJ.

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[45] *Asemfo*, para 51.

[46] ECJ, Case C-220/06 *Correos* [2007] *ECR* I-12175.

[47] *Correos*, para 49.

[48] *Correos*, para 52.

[49] *Correos*, para 54.

On the same day as *Correos* was decided by the First Chamber of the ECJ, *Commission* v. *Ireland* was decided by the Grand Chamber.[50] The set-up in the national legislation was perhaps unusual, in the way that the health board was seemingly responsible for the provision of ambulance services (and could have provided them itself), whereas the local authority concerned could choose to provide the services. Hence, the health board contributed economically to the provision of the ambulance services provided by the local authority.[51] It was undisputed that no written contract was made between the parties (only a draft agreement concerning the health board's financial contributions existed).[52] The ECJ found that[53]:

> … it is conceivable that DCC [the local authority] provides such services to the public in the exercise of its own powers derived directly from statute, and applying its own funds, although it is paid a contribution by the Authority for that purpose, covering part of the costs of those services.

The ECJ declared that under these circumstances, the Commission had not lifted the burden of proof required to establish that a public contract had been awarded.[54] In this way, the ECJ rejected the Commission's claim that where no contract exists in writing, the public procurement specific interpretation of the Treaty should be applied, a claim which had been accepted by the Advocate General.[55] The ECJ instead focussed on the existence of a 'contract' and found that a 'contract' does not exist where the service is provided under statutory powers vested on the provider, even though a contracting authority (public authority) contributes to the coverage of the costs of providing the services.

The examined case law shows a tendency towards formality in the assessment, rendering 'entrustment' by a national legislative act outside the scope of the rules on public procurement, where the ECJ usually prefers effects based assessments; i.e., are the effects of the legislative set-up similar to those of a contractual relation?[56] However, this conclusion is not clear-cut as *Correos* shows signs of a case-by-case assessment; the ECJ may wish to assess whether the legislative act has a character of a contract, in the sense of the rules on public procurement. In this context, it should be noted that when remuneration or compensation for the provision of PSOs is taking place (i.e., a pecuniary interest is at stake), the transaction may be subject to the rules on State aid. A special regime has emerged on

[50] ECJ, Case C-532/03 *Commission* v. *Ireland* [2007] *ECR* I-11353.

[51] *Commission* v. *Ireland*, paras 5–6.

[52] *Commission* v. *Ireland*, para 15.

[53] *Commission* v. *Ireland*, para 35.

[54] *Commission* v. *Ireland*, para 36.

[55] *Commission* v. *Ireland*, para 15 and opinion of Advocate General Stix-Hackl on 14 September 2006 concerning C-532/03 (*Commission* v. *Ireland*).

[56] Cf., Opinion of Advocate General Geelhoed on 28 September 2006 concerning C-295/05 (*Asemfo*), para 58.

assessment of compensation for PSOs, namely the so-called *Altmark* test.[57] Where compensation is paid according to the accumulative conditions in the *Altmark* test, the notification requirement for State aid does not apply.[58] Case law from the ECJ has shown that the *Altmark* test should be taken literally and is not easily fulfilled.[59] It is submitted that, probably, the simplest way of complying with the *Altmark* test would be by awarding the SGEI/PSO through public procurement.[60] Where (part of) the pecuniary interest is an exclusive right, Article 106(1) TFEU [ex Article 86(1) TEC] and its necessity (proportionality) assessment may apply in conjunction with other Articles of the Treaties.

5.2.2.2 'Entrustment'/'Assignment' by Concession

Whereas 'entrustment' by legislation does not obviously exhibit the characteristics needed for the 'act of public authority' to resemble a 'contract' in the sense of the rules on public procurement, such characteristics are present in the case of 'entrustment' by service concession.[61] Where the service concession is remunerated by an exclusive right, the public procurement procedure would probably pivot around the quality of the services in combination with extra financing possibly needed.[62]

Since service concessions have a special status in the public procurement regime, a few comments should be made on SGEIs/PSOs and service concessions. Awards of service concessions are exempted from the public procurement directives,[63] but such exemption requires a specific assessment of whether or not the contract in question is indeed a service concession. Under the rules on public procurement, the essential characteristics of a service concession are that the contract confers a risk on the provider and that the remuneration (at least partially) is paid by users of the service.[64] It could be argued that the transfer of risk in concessions to provide a SGEI/PSO would in many cases be negligible,[65] due to the presumed inelastic demand for such services, coupled with the exemption from the rules of the Treaties, where this is necessary in order to ensure that the

[57] C-280/00 *Altmark* [2003] *ECR* I-7747, paras 89–93.

[58] Article 108(3) TFEU [ex Article 88(3) TEC]. For critique, see, e.g., Nicolaides 2003, p. 561.

[59] ECJ, Joined Cases C-34-38/01 *Enirisorse* [2003] *ECR* I-14243, paras 31–40 and ECJ, Case C-451/03 *ADC Servizi* [2006] *ECR* I-2941, paras 59–68.

[60] See also Müller 2009, p. 40.

[61] On the concept of a 'concession', see, e.g., Neergaard 2005, p. 141.

[62] See also supra n. 21 on licensing schemes, exclusive rights and service concessions.

[63] Article 17 of the Public Sector Directive, and Article 18 of the Public Utilities Directive.

[64] See Neergaard 2005, p. 176; Trepte 2007, pp. 205–206, and for a discussion of recent case law on the concept of a concession, see Kotsonis 2010.

[65] For a discussion of the necessary element of risk, see Kotsonis 2010.

SGEI/PSO can be provided under economically acceptable conditions.[66] However, the purpose of this contribution is not to discuss the concept of a concession, so it will merely be emphasised that where the 'entrustment' is made by concession (or contract, which, as argued, is possibly more likely) the public authority entrusting the SGEI/PSO must adhere to the rules on public procurement.[67]

5.3 Article 106(2) TFEU [ex Article 86(2) TEC] as an Exemption from the Rules on Public Procurement

Even though the possibility of exemption from the rules on public procurement on the basis of Article 106(2) TFEU [ex Article 86(2) TEC] has seemingly not been extensively debated in academic literature,[68] the argument that Article 106(2) TFEU (then Article 86(2) TEC) should provide an exemption from the rules on public procurement has from time to time found its way into public procurement proceedings.[69] So far, the ECJ has explicitly considered arguments based on Article 106(2) TFEU in a public procurement context. In Commission v. Germany, paras 126–129, the argument based on Article 106(2) TFEU was rightly rejected due to obvious absence of necessity. Nevertheless, it is submitted that Article 106(2) TFEU could be the implicit basis on which recent case law in the field of public procurement rests.

The first case of interest is *Commission* v. *Spain* concerning Spanish public procurement law which provided for an exemption from the rules on public procurement for all inter-administrative agreements; that is, cooperation agreements between public authorities and public bodies.[70] The ECJ held that the *Teckal* criteria had to be applied to inter-administrative agreements (otherwise) covered by the rules on public procurement.[71]

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[66] ECJ, Case C-320/91 *Corbeau* [1993] *ECR* I-2533, para 16 read in conjunction with para 19; ECJ, Case C-209/98 *Sydhavnens Sten & Grus* [2000] *ECR* I-3743, para 77, and ECJ, Case C-475/99 *Ambulanz Glöckner* [2001] *ECR* I-8089, para 57.

[67] It could be mentioned that in *Sydhavnens Sten & Grus*, the contracting authority advertised the 'contract' in a press release to attract interested business partners (concessionaires), see ECJ, Case C-209/98 *Sydhavnens Sten & Grus* [2000] *ECR* I-3743, para 24, even though the circumstances of the case took place prior to ECJ, Case C-324/98 *Telaustria* [2000] *ECR* I-10745, where the ECJ underlined the transparency obligations derived from the EC Treaty (now EU and EFU Treaties); see para 62.

[68] However, see Sauter 2008, p. 178; Stergiou 2008, pp. 178–180, and Drijber and Stergiou 2009, pp. 833–834.

[69] For recent examples, see, for example, ECJ, Case C-532/03 *Commission* v. *Italy* [2007] *ECR* I-11353, para 26 and ECJ, Case C-480/06 *Commission* v. *Germany* [2009] I-nyr, para 28.

[70] ECJ, Case C-84/03 *Commission* v. *Spain* [2005] *ECR* I-139, para 9.

[71] *Commission* v. *Spain*, paras 39–40.

The second case of interest is *Commission* v. *Germany* concerning disposal of waste, and the construction of an incineration plant to fulfil this task.[72] The Commission's action, and therefore the judgment, was explicitly limited to the contract between the city of Hamburg and four Landkreise (administrative districts), and did therefore not concern possible 'contracts' between the city of Hamburg and a private party for the construction and operation of the incineration plant.[73] In order for the plant to function on favourable economic conditions (presumably for the operator of the plant, but this is not specified), the city of Hamburg contracted with four Landkreise (administrative districts) to ensure inflow of the optimal amounts of waste for the plants.[74] In the contracts between the city of Hamburg and the four Landkreise, the city of Hamburg reserved a part of the new incineration plant's capacity to the Landkreise, in return for remuneration of operating costs (transferred directly to the operator of the plant) and for access to unused landfill areas in the four Landkreise. The Commission claimed that the contract should have been tendered.

The ECJ initially ruled out the use of the *Teckal* in-house criteria: the Landkreise did not exercise any control in the sense of the first *Teckal* criterion (see Sect. 5.1 supra).[75] The approach taken in *Commission* v. *Germany* therefore constitutes a new line of argumentation. The ECJ argued in the following way[76]:

> It must nevertheless be observed that the contract at issue *establishes cooperation between local authorities with the aim of ensuring that a public task that they all have to perform, namely waste disposal, is carried out* [emphasis added]…
>
> In addition, it is common ground that *the contract* [emphasis added] between Stadtreinigung Hamburg and the Landkreise concerned must be analysed as the culmination of a process of inter-municipal cooperation between the parties thereto and that it *contains requirements to ensure that the task of waste disposal is carried out. The purpose of that contract is to enable the City of Hamburg to build and operate a waste treatment facility under the most favourable economic conditions owing to the waste contributions from the neighbouring Landkreise, making it possible for a capacity of 320,000 tonnes per annum to be attained* [emphasis added]. For that reason, the construction of that facility was decided upon and undertaken only after the four Landkreise concerned had agreed to use the facility and entered into commitments to that effect.

With regard to this argumentation and to the case in its entirety, the following comments could be made.

Firstly, it is submitted that the contract did not concern the provision of services as such; rather it concerned the financing of the new incineration plant. In order for the plant to operate efficiently, under the most economically favourable conditions, it had to operate at a capacity of 320,000 tons. Under the contract, the Landkreise committed to collectively supplying 120,000 tons of waste for incineration and

[72] ECJ, Case C-480/06 *Commission* v. *Germany* [2009] I-nyr.

[73] *Commission* v. *Germany*, paras 31 and 36.

[74] *Commission* v. *Germany*, para 38.

[75] *Commission* v. *Germany*, para 36.

[76] ECJ, Case C-480/06 *Commission* v. *Germany* [2009] I-nyr, paras 37–38.

without this commitment, the city of Hamburg would not have initiated the construction of the incineration plant. The point to be made is that the argumentation recited above is rather similar to that employed in Article 106(2) TFEU (Article 86(2) TEC) cases; especially in *Sydhavnens Sten & Grus*, where an exclusive right to collect certain kinds of waste for recycling was considered necessary by the ECJ in order for the new plant to operate under economically acceptable conditions.[77] The contract in *Commission* v. *Germany* is not very different as it achieves the same aim of efficient operation as the exclusive right did in *Sydhavnens Sten & Grus*, it just had another form. On this basis, it could possibly be argued that the agreement did not fulfil the condition that a 'contract' must concern the provision of works, goods or services, in order for the award to be covered by the rules of public procurement.

Secondly, and along the same lines, the ECJ also seemingly argued that there was no pecuniary interest in the contract, since the city of Hamburg transferred all the Landkreises' payments to the operator of the plant.[78] Hence, the ECJ could also in this way have found that the contract was not a 'contract' under the rules on public procurement. On the basis of the recent case law referred to above, where the ECJ has focussed on the existence of a 'contract' (Sect. 5.2.2.1 supra), this could have been an obvious route for the ECJ to take. Possibly, the solution was less desirable for the ECJ, as this could have necessitated taking into account the issue of the city of Hamburg's involvement with the private operator of the plant (an issue which the judgment, as mentioned, was explicitly delimited from considering) and the payments for landfill capacity.[79]

Thirdly, the ECJ (and the Commission; see para 46) had several times mentioned the 'public task', 'public service objective' and 'legal obligation' which the contract should ensure fulfilment of, namely the disposal of waste.[80] It could be considered whether the contract at issue was a 'normal' service contract or it was a contract for ensuring the SGEI/PSO consisting of incineration of waste?[81] Admittedly, the ECJ did not use the SGEI/PSO terminology in *Commission* v. *Germany*, but Article 86(2) TEC (now Article 106(2) TFEU) was relied upon by Germany.[82] The collection and treatment of different types of waste has previously been considered a SGEI/PSO by the ECJ under specific circumstances.[83] From another perspective, it could be asked whether the subject of the contract mattered

[77] Compare *Commission* v. *Germany*, para 38 and ECJ, Case C-209/98 *Sydhavnens Sten & Grus* [2000] *ECR* I-3743, paras 77–78.

[78] *Commission* v. *Germany*, ibid., para 43.

[79] *Commission* v. *Germany*, para 16.

[80] *Commission* v. *Germany*, paras 37, 38, 41 and 42.

[81] Cf., *Commission* v. *Germany*, para 44: 'It thus appears that the contract in question forms both the basis and the legal framework for the future construction and operation of a facility intended to perform a *public service, namely thermal incineration of waste…*' [emphasis added].

[82] *Commission* v. *Germany*, para 28.

[83] ECJ, Case C-203/96 *Dusseldorph* [1998] *ECR* I-4075, para 67 (implicitly) and ECJ, Case C-209/98 *Sydhavnens Sten & Grus* [2000] *ECR* I-3743, para 75. Cf., Buendia Sierra 2007, p. 630.

in the specific case. In other words: would the ECJ have ruled differently had the contract concerned, for example, software? *Commission* v. *Germany* (II) was also a case on cooperation between public entities (The Central Data Office of the German federal state Baden-Württemberg and the Institute for local-authority data-processing in the German federal state of Bavaria), concerning a contract for development of software for motor vehicle registration.[84] The substance of the judgment concerned the use of the negotiated procedure without notice. The outcome of *Commission* v. *Germany* (II) was that Germany had failed to fulfil its obligations under the relevant public procurement directive. Neither the *Teckal* criteria (possibly because they were not fulfilled) nor the argumentation concerning cooperation between public authorities in *Commission* v. *Germany* were pleaded by Germany or assessed *ex officio* by the ECJ. Otting and Sormani-Bastian draw parallels to *Commission* v. *Germany* and they find that the reason for the different outcomes of the cases is the different aims of the contracts[85]:

> Consequently, it is the authors' view that different treatment seems to lie in the fact that contracts between public authorities which have as their object the provision of services usually offered in the market or the supply of market products usually offered in the market, and which involve the offering of services to another contracting authority in the same way as to any other private economic operator, cannot justify any exemption.

The interpretation offered by Otting and Sormani-Bastian must be understood as referring to the type of services concerned.

It could be considered whether the difference between the two cases rests on the fact that the public entities in *Commission* v. *Germany* acted in their role as public authorities, seeking to ensure the provision of certain services, whereas, even though the Central Data Office of the German federal state Baden-Württemberg, is certainly a public authority, possibly acting in that role when it decided to purchase software, the Institute for local-authority data-processing in the German federal state of Bavaria was *not* acting as public authority when it agreed to supply the software. Probably, the Institute for local-authority data-processing in the German federal state of Bavaria could not be characterised as a public undertaking, as, seemingly, it did not act in on the market but only supplied public authorities with software[86]; however, it was a public entity, and presumably a contracting authority. This interpretation could embrace *Commission* v. *Spain* (see supra), where the ECJ denied that all agreements between public authorities another

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[84] ECJ, Case C-275/08 *Commission* v. *Germany* (II) [2009] I-nyr. The case is only accessible in German and French. However, see Otting and Sormani-Bastian 2010, where the facts are mentioned in detail.

[85] Otting and Sormani-Bastian 2010, NA63.

[86] Cf. Buendia Sierra 1999, p. 42. The public entity delivering the software was in the application described as: '…ha[ving a] legal personality under public law, and was established with the particular purpose to coordinate and promote electronic data-processing in public administration in the interests of the general public.' See action brought on 24 June 2008—*Commission of the European Communities* v. *Federal Republic of Germany* (Case C-275/08) (2008/C 223/44), *OJ* 2008 C 223/28.

public authorities/public bodies could be exempted from the rules on public procurement.

Combining the findings above, and along the lines of the interpretation offered by Otting and Sormani-Bastian, it is proposed that *Commission* v. *Germany* may imply that where the contract is entered into by two or more public authorities acting in that capacity in order to ensure the provision of a SGEI/PSO,[87] which they are under a legislative obligation to provide, the contract is not covered by the rules on public procurement.[88]

On the basis of the above, it seems like the ECJ is opening up to cooperation between public authorities, also where the *Teckal* criteria are not fulfilled. It is proposed that the ECJ has been inspired by the principles underlying Article 106(2) TFEU [ex Article 86(2) TEC], and possibly that it is only the cooperation between public authorities for the provision of SGEIs/PSOs which is exempted. Time will show.

5.4 Conclusions

It has been the purpose of the analysis in this contribution to form some general ideas by taking an integrated perspective on Article 106(2) TFEU [ex Article 86(2) TEC] and the rules on public procurement. SGEIs/PSOs will probably often be provided through in-house arrangements, and are thereby outside the scope of the rules on public procurement, because no ‘contract’ is present. Even where SGEIs/PSOs are ‘entrusted’ to third parties, it is often effectuated by a legislative act, not obviously exposing the attributes characterising a ‘contract’ in the sense of the rules on public procurement. However, it is conceivable that the ECJ will take a case-by-case approach examining the character of the legislative act before it decides whether or not it is a ‘contract’ in the sense of the rules on public procurement.

It appears that an exemption from the rules on public procurement is emerging for contracts between public authorities ensuring the fulfilment of general interest objectives, even where the *Teckal* criteria for establishing in-house provision are not fulfilled. It has been argued that this exemption could be inspired by the principles underlying Article 106(2) TFEU [ex Article 86(2) TEC], but further case law is needed to clarify and substantiate this hypothesis.

[87] See also argument made supra n. 34.

[88] For alternative interpretations, see Treumer 2010, pp. 175–176, arguing that the ECJ was inspired by French case law, Pedersen and Olsson 2010, pp. 41–45, for an interpretation on the basis of the legal framework of inter-muncipality coorperation (i.e., legal entity v. contract).

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