Hilary Term
[2011] UKSC 7
On appeal from: [2009] EWCA Civ 490

JUDGMENT

Brent London Borough Council and others (Harrow London Borough Council) (Appellant) *v* Risk Management Partners Limited (Respondent)

before

Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lord Brown
Lord Dyson

JUDGMENT GIVEN ON

9 February 2011

Heard on 8, 9 and 13 December 2010

Appellant	*Respondent*
Jonathan Sumption QC Rhodri Williams QC (Instructed by Weightmans)	John Howell QC Javan Herberg James Segan (Instructed by Sedgwick Detert Moran & Arnold LLP)

LORD HOPE

1. In 2006 and 2007 a number of London local authorities entered into arrangements for mutual insurance against various classes of risk, including property, liability and terrorism. Mutual insurance occurs where a group of similarly placed persons or organisations agree to insure each other against risks in which they all have an interest. It relieves its members of the profit element which is built into an ordinary commercial premium. The criteria for membership may also reduce the level of risk, and thus the overall cost of cover, in comparison with the level of premium that is needed where risks are accepted from a large number of policy holders, some of whom represent a greater risk than others. The aim of the arrangements that the London local authorities entered into was to reduce the cost of premiums to its members and to raise the standard of risk management. In pursuing these objectives they were acting solely in the public interest.

2. The insurance was to be provided by London Authorities Mutual Ltd ("LAML"), a company limited by guarantee. One of the local authorities involved in these arrangements was the London Borough of Brent ("Brent"). On 9 October 2006 Brent's Executive gave approval in principle to Brent's participation in LAML, subject to a report from officers once they had fully explored the option and taken legal advice. On 13 November 2006 the Executive was told that the cost of the insurance premiums with LAML would be at least 15% less than the premiums Brent was paying an insurance company for its insurance, and that this saving could be used in its budget to fund priority growth or to reduce overall expenditure and hence the level of council tax. Having also been advised that Brent had power to enter into the arrangements, the Executive resolved to give approval to its participation in capitalising LAML.

3. In December 2006 Brent decided to invite tenders for combined and miscellaneous insurance for the period commencing 1 April 2007. The invitation, which was divided into seven lots and was issued in accordance with the Public Contracts Regulations 2006 (2006 SI/5) ("the 2006 Regulations"), was extended to, among others, Risk Management Partners Ltd ("RMP"). RMP was informed that the invitation was being issued because it was not clear whether LAML would be a viable option until January 2007, by which date it would be too late to seek tenders. This invitation was abandoned because the brokers had used incorrect documentation. Brent became a member of LAML, as did nine other of the 32 London boroughs including Harrow London Borough Council ("Harrow"), by subscribing to its Memorandum and Articles of Association on 18 January 2007. In February 2007 Brent again invited tenders in accordance with the 2006

Regulations for the same period, to be submitted by 23 February. RMP submitted a tender. LAML did not do so. It took no part in the public procurement process.

4. On 16 March 2007, after LAML had been authorised to carry out insurance business by the Financial Services Authority, Brent paid to LAML the sum of £160,500 as a capitalisation amount. On 27 March 2007 it entered into a guarantee by which it undertook to pay sums on demand to LAML up to an aggregate amount of £609,500. On the same date Brent informed RMP that it had abandoned the contract award procedure that was being carried out in accordance with the 2006 Regulations for six of the seven lots, as it was proposing to award the contract to LAML. On 30 March 2007 LAML submitted an offer to insure Brent in respect of terrorism, liability, property and contents for 2007-2008. Brent accepted this offer and, on payment of premiums of £520,328.14, it became a participating member of LAML. On 6 April 2007 it issued a press notice announcing that LAML had opened for business. The court was informed that the company is now in provisional liquidation.

5. The business of LAML was restricted to the provision of insurance to participating members or persons or bodies sponsored by them, referred to in the Memorandum of Association as affiliates. It was funded by paid and guaranteed contributions from participating members, by premiums, by supplementary calls on participating members and by reinsurance placed in the open market. The management of its affairs was vested in a Board which comprised a majority of directors appointed by participating members. There had to be at least two independent directors. On 27 March 2007 LAML entered into a management agreement with Charles Taylor & Co Ltd to perform for it the various management services described in the agreement.

6. RMP decided to challenge these arrangements. It claimed that, as a commercial insurer, it might have obtained the insurance business that was placed with LAML had the tender process under the 2006 Regulations not been discontinued. Its challenge took two distinct forms. First, RMP took proceedings in the administrative court seeking judicial review of Brent's decision to participate in LAML on the ground that it was beyond its statutory powers. Harrow and LAML participated in those proceedings as interested parties. Secondly, in separate proceedings in the Queen's Bench Division, RMP claimed damages against Brent on the basis that by entering into insurance contracts under the mutual insurance scheme it had acted in breach of the 2006 Regulations.

7. By a judgment delivered on 22 April 2008 Stanley Burnton LJ declared that Brent had no power under either section 111 of the Local Government Act 1972 or section 2 of the Local Government Act 2000 to participate in establishing LAML or become a participating member of that company, or to make payment of the

capitalisation amount or to grant a guarantee to the company: [2008] EWHC 692 (Admin); [2008] LGR 331. By a further judgment delivered on 16 May 2008 Stanley Burnton LJ held that Brent had acted in breach of the 2006 Regulations when it abandoned the tender process and awarded the insurance contracts to LAML: [2008] EWHC 1094 (Admin); [2008] LGR 429. His judgment in that action was confined to the issue of liability. He reserved issues of causation and quantum of damages. He granted permission to appeal in both cases. By a single judgment the Court of Appeal (Pill, Moore-Bick and Hughes LJJ) affirmed both decisions and dismissed the appeals: [2009] EWCA Civ 490; [2010] PTSR 349.

8. The scope of the dispute has narrowed considerably since the decision of the Court of Appeal. There have been two significant developments. First, on 12 November 2009 Royal Assent was given to the Local Democracy, Economic Development and Construction Act 2009 ("the 2009 Act"). Section 34 of the 2009 Act gives power to local authorities to enter into mutual insurance arrangements of the kind in issue in this case. It also permits the benefit of such arrangements to be extended to other persons to be specified by regulation. That section is not yet in force, but it is expected to be brought into force shortly. This change in the law has largely superseded any question as to the statutory power of local authorities to enter into such arrangements. Secondly, the proceedings between Brent and RMP have been settled. This has resulted in Brent being given leave to withdraw its appeal to this court. In the result the appeal is now confined to the question of principle arising in the damages action only, in which Harrow still has an interest. This is whether, by entering into the mutual insurance arrangements with LAML, Harrow was acting in breach of the 2006 Regulations.

9. In their written case Counsel for Harrow explain why, notwithstanding the enactment of section 34 of the 2009 Act, this question of principle continues to be of considerable importance. Until it ceased trading in 1992, most insurance provided to local authorities in the United Kingdom was provided by Municipal Mutual Insurance Ltd. As its name indicates, that company was a mutual insurer. It was created on the initiative of a number of local authorities and had been in existence since 1903. Mutual insurance is potentially a source of significant financial savings for local authorities, and it provides other advantages which are not readily available in the commercial insurance market. The effect of the decisions of Stanley Burton LJ and the Court of Appeal, if they are allowed to stand, is that local authorities are likely to find it difficult in practice to avail themselves of their expanded powers under section 34 of the Act of 2009 because of the requirement that they must comply with the 2006 Regulations. This is a source of real concern not only to Harrow but also to other local authorities insured by LAML or who are interested in obtaining mutual insurance on a similar basis. There are currently six other actions for damages pending in the High Court against local authorities who contracted with LAML. They have been stayed pending this appeal.

The Public Contracts Regulations 2006

10. The 2006 Regulations were made under section 2(2) of the European Communities Act 1972. They give effect to Council Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L134, p 114). The broad object of Directive 2004/18/EC, and of the Regulations that give effect to it, is to ensure that public bodies award certain contracts above a minimum value only after fair competition, and that the award is made to the person offering the lowest price or making the most economically advantageous offer. Directive 2004/18/EC replaced earlier EC legislation to the same effect, including Directives 92/50/EEC and 93/36/EEC with which some of the decisions of the European Court that it will be necessary to refer were concerned. But the differences between them are not relevant to the issue arising in this appeal. So I shall refer to them all, without regard to which of them was in play in each case, as "the Directive".

11. Regulation 5 of the 2006 Regulations provides that the Regulations apply whenever a contracting authority "seeks offers" in relation to the award of a variety of public contracts and other arrangements, including a Part A services contract. It is agreed that insurance contracts of the kind and values awarded by Brent to LAML were contracts under which services specified in Part A of Schedule 3 were to be provided and that the definition of "a Part A services contract" in regulation 2(2) is satisfied. Regulation 30(1) sets out the basic rule. It provides that a contracting authority shall award a public contract on the basis of the offer which (a) is the most economically advantageous from the point of view of the contracting authority or (b) offers the lowest price. Regulation 3 provides a list of bodies that are to be taken to be a contracting authority for the purposes of the Regulations. Among those listed is "a local authority". Harrow is a contracting authority for those purposes, as of course was Brent.

12. Various expressions used in the 2006 Regulations are defined in regulation 2. The expression "public contract" means a public services contract, a public supply contract or a public works contract. "Public services contract" means

> "a contract, in writing, for consideration (whatever the nature of the consideration) under which a contracting authority engages a person to provide services but does not include –
>
> (a) a public works contract; or
>
> (b) a public supply contract;
>
> but a contract for both goods and services shall be considered to be a public services contract if the value of the consideration attributable

> to those services exceeds that of the goods covered by the contract and a contract for services which includes activities specified in Schedule 2 that are only incidental to the principal object of the contract shall be considered to be a public services contract."

"Services provider" means a person who offers on the market services and who sought, or would have wished, to be the person to whom a public services contract is awarded or to participate in a design contest and which is a national of and established in a relevant state. RMP, as a commercial insurer, is a person who offers on the market services within the meaning of that definition.

The issues

13. Harrow does not claim to have observed the 2006 Regulations when it placed insurance with LAML. As in Brent's case, the contract which it entered into with LAML was not put out to tender. The question which Harrow raises in its defence is whether the 2006 Regulations apply to the kind of collective provision of services that its contract with LAML involved. Article 1(2)(a) of the Directive defines "public contracts" as

> "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."

It submits that the question what is a "public contract" for the purposes of the EU public procurement regime is a question of EU law. Under English law a contract requires agreement between two distinct juridical persons. But EU law has developed its own autonomous concepts for determining whether the parties to an agreement are sufficiently distinct for it to constitute a "public contract". It is fundamental to the operation of the regime that it applies only to contracts awarded to external contractors, and is not intended to prevent a public authority from procuring the relevant goods or services from its own resources. This gives rise to no particular difficulty where a public authority seeks to make use of services that it can provide for itself in-house. The problem arises where the public authority wishes to procure them from a distinct juridical entity with which the authority is closely associated or from a distinct juridical entity which is closely associated with a consortium of authorities to which it belongs.

14. There is now a substantial body of case law in the Court of Justice of the European Union on this issue. The leading decision is *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* (Case C-107/98) [1999] ECR I-8121 ("*Teckal").* AGAC was a corporate entity which had been set up by a consortium of Italian municipalities to provide energy and environmental services to the participating authorities. For some time prior to 1997 Teckal had supplied fuel to Viano and had serviced its heating systems. In May 1997 Viano decided to switch its custom to AGAC. It did so without inviting competing tenders from other interested persons. Teckal challenged this decision on the ground that Viano had failed to comply with Directives 92/50/EEC (as to services) and 93/36/EEC (as to goods). Viano's case was that it had decided to undertake these matters itself through a body which had been set up for the purpose.

15. In para 41 of its judgment the court said:

> "In order to determine whether the fact that a local authority entrusts the supply of products to a consortium in which it has a holding must give rise to a tendering procedure as provided for under Directive 93/36, it is necessary to consider whether the assignment of that task constitutes a public supply contract."

In para 49, as to whether there was a contract for this purpose, it said that the national court must determine whether there had been an agreement "between two separate persons". In para 50 it then gave guidance as to how the issue as to whether it was a public service contract was to be determined:

> "In that regard, in accordance with article 1(a) of Directive 93/36, it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities."

In para 51 it said that the Directive applied only to contracts between a public authority and an entity which was "formally distinct from it and independent of it in regard to decision-making".

16. Two conditions must therefore be satisfied if a contract between a public authority and a legally distinct entity is to be taken out of the scope of the Directive. First, the public authority must exercise control over the entity with which it contracts. But it may wish to co-operate with other public authorities in the procurement of services. As the contractor in *Teckal* was a consortium company, the decision in that case suggests, without actually saying so, that control can be exercised by a public authority jointly with other public authorities. This condition was referred to in argument as "the control test". Secondly, the contractor must carry out the essential part of its activities with the controlling local authority or authorities. This condition was referred to as "the function test".

17. The *Teckal* exemption is not referred to anywhere in the Directive. It is a judicial gloss on its language. Harrow submits that it reflects the court's view of the Directive's wider economic purpose and its traditional concern with economic substance as opposed to legal form. Its case is that agreements between a public authority and a controlled entity, although satisfying all the requirements of contractual validity imposed by the national law of contract, are nevertheless not to be treated as "public contracts" for the purposes of the Directive if the reality is that they are in-house arrangements made by the public authority itself or by a group of public authorities acting collectively for their public purposes. RMP has however raised a threshold issue as to whether the *Teckal* exemption has any application in domestic law to the public procurement regime that the 2006 Regulations set out. This is because the Regulations are drafted in terms of English law and do not refer to or expressly enact the exemption.

18. It was agreed that the following issues arise on this appeal:

(1) Does the *Teckal* exemption apply to the 2006 Regulations?
(2) If so, is the exemption applicable where the contract is for insurance?
(3) If so, to satisfy the *Teckal* "control test", must the contracting authority exercise a control over the legally distinct entity which is similar to that which it exercises over its own departments, or is it sufficient that control is exercised by the contracting authorities collectively?
(4) If it is sufficient that the contracting authorities exercise that control collectively, is that requirement satisfied in this case?
(5) Is the *Teckal* "function test" also satisfied in this case?
(6) Is a reference to the Court of Justice required on issue (2) or the issues about the "control test"?

19. Stanley Burnton LJ held that the *Teckal* exemption applied to the 2006 Regulations. He held that the term "contract" in the Regulations should be construed in the light of the expressed intention to implement the Directive and as requiring two contracting parties that do not satisfy the *Teckal* conditions: [2008]

LGR 429, para 65. He rejected RMP's argument that it would be inconsistent with the *Teckal* exemption to apply it to insurance: para 67. The real issue, as he saw it, was whether on the facts the requirements of the exemption were satisfied. Having examined the Memorandum and Articles of Association of LAML and the Rules appended to the Articles, he said that the general picture that they gave was of a business the administration of which was relatively independent, and of a relationship between Brent and LAML that was inconsistent with *Teckal*: para 78. He did not find it necessary to consider whether the function test was satisfied.

20. The Court of Appeal agreed with Stanley Burnton LJ on the question whether the *Teckal* exemption formed part of the 2006 Regulations: [2010] PTSR 349, paras 133 (Pill LJ), 225 (Moore-Bick LJ). It held that the requirements of the *Teckal* control test were not satisfied. Pill LJ said that the nature of LAML's business and the possibly differing interests of different authorities and affiliates, were antithetic to the necessary local authority control: para 131. Moore-Bick LJ said that the facts showed that the Board of LAML was intended to exercise a substantial amount of discretionary control over the way the company was run, particularly in relation to its dealing with individual members, and that the nature of the relationship between the member as insured and LAML was essentially one between independent third parties: para 236. Pill LJ said that, if he had found that the *Teckal* control test was satisfied, he would have been prepared to find that the *Teckal* function test was satisfied also: para 132.

"Does the Teckal exemption apply to the 2006 Regulations?"

21. Mr Howell QC for RMP submitted that the 2006 Regulations should be construed and applied in the same way as any other regulations made under domestic law, unless they were found to be incompatible with EU law. There was no such incompatibility in this case. They were within the powers of section 2(2) of the European Communities Act 1972, as it permits a domestic measure to be wider in its effects than the EU measure to which it gives effect. So it would not have been incompatible for them to have subjected more contracts to the procurement regime than EU law required. They did not contain a *Teckal* exemption, but the Directive did not in terms do so either. As for their terms, they did not simply reproduce the wording of the Directive. On the contrary, they set out the requirements for procurement in domestic law in terms of domestic legal concepts. Instead of adopting the definition of "public contracts" in article 1(2)(a) of the Directive, they provided their own definitions of "public contract" and "public services contract". The definitions were all couched in terms of domestic contract law, in the interests of greater certainty. There was no evidence as to whether national contract procurement rules in other member states included a *Teckal* exemption, but there was nothing odd about having different contract procurement regimes. The Commission could have directed that it was to be applied in all Member states, but it had not done so.

22. I do not find these arguments persuasive. It is a sufficient answer, as Mr Sumption QC for Harrow submitted, to say that the basis for implying the *Teckal* exemption into the 2006 Regulations is to be found in their underlying purpose, which was to give effect to the Directive. The absence of any reference to the exemption in the Regulations is of no more significance than the absence of any reference to it in the Directive that was being transposed. The exemption in favour of contracts which satisfy its conditions was read into the Directive by the European Court in *Teckal* because it was thought to be undesirable for contracts of that kind to be opened up for public procurement. This was not just a technicality. It was a considered policy of EU law. It would be odd if a significant and policy-based exemption were to apply in some member states and not others, especially as one of the aims of the Directive was to harmonise procedures. This can be seen from recital (2) of the preamble to the Directive, which states in part:

> "for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on [the principles of non-discrimination, mutual recognition, proportionality and transparency] so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition."

23. Furthermore, as some of the authorities that I will refer to later show, the *Teckal* exemption applies equally to cases where, because the relationship does not fall within the scope of the Directive, the issue is one as to its compatibility with articles 12, 43 and 49 of the EC Treaty: *Parking Brixen GmbH v Gemeinde Brixen* (Case C-458/03) [2005] ECR I-8585; *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa)* (Case C-295/05) [2007] ECR I-2999; *Coditel Brabant SA v Commune d'Uccle* (Case C-324/07) [2008] ECR I-8457. So it does not depend on the meaning to be given to particular words or phrases in the Directive, such as those to be found in the definition of "public contracts" in article 1(2)(a). The basis for it is more fundamental than that. That is why, as Advocate General Geelhoed pointed out in *Asemfo* [2007] ECR I-2999, paras 58-59, services where no element of a contract for a pecuniary interest is involved (and which, for that reason, lie outside the scope of the Directive but are within the scope of the EC Treaty) but which have the same effect in economic terms as an arrangement in which one authority entrusts services under contracts for pecuniary interest to an entity which is under the control of another authority (which are "public contracts" within the meaning of the Directive) should be judged as far as possible by the same measure.

24. It is true that section 2(2) of the European Communities Act 1972 is in wide terms. It does not confine any measures made under it to doing the minimum necessary to give effect to a Directive. But, if it is to be within the powers of the subsection, the measure has to arise out of or be related to an EU obligation. As

Waller LJ said in *Oakley Inc v Animal Ltd (Secretary of State for Trade and Industry intervening)* [2006] Ch 337, para 39, the primary objective of any secondary legislation under section 2(2) must be to bring into force laws which, under the Treaties, the United Kingdom has agreed to make part of its laws. There is nothing in the Explanatory Memorandum to the Regulations that was prepared by the Office of Government Commerce and laid before Parliament to indicate that it was intended to depart from the jurisprudence of the court as to the scope of the Directive. In paras 7.2-7.4 of the Memorandum it was stated that the change to the legislation was necessary to implement the new public procurement Directive, that it clarified and modernised the previous texts and that the simpler and more consistent public sector text should reduce the burdens involved under the EU rules. If the *Teckal* exemption were to be held not to apply to the 2006 Regulations, it could only be because the purpose of the Regulations was to apply the public procurement rules to relationships that fell outside the regime provided for by the Directive. But that would not be consistent with the Memorandum, and it would not be a permitted use of the power.

25. As for the meaning and effect of the 2006 Regulations, I think that it would be wrong to apply a literal approach to the words and phrases used in it, such as in the definitions of "public contract" and "public service contract". A purposive approach should be adopted. As Lord Diplock in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 881 indicated, this means that regard must be had to the context in which the Regulations were made, to their subject matter and to their purpose. Would it be inconsistent with the achievement of that purpose if the *Teckal* exemption were not to be held to apply to them? Was this an exemption to which Parliament must have intended them to be subject? Having regard to the background of EU law against which the Regulations were made, the definitions in the Regulations can be taken to express the same idea as those in the Directive. Thus something which amounts to a contract in domestic law can nevertheless be held, without doing undue violence to the words of the Regulations, not to be a relevant contract for the purpose of the public procurement rules.

26. I would hold accordingly that the *Teckal* exemption does apply to the 2006 Regulations. By implication, the rules that it lays down do not apply to contracts between a public authority and a person which is legally distinct from it if, but only if, the control and function tests identified in *Teckal* are both satisfied.

Is the exemption applicable where the contract is for insurance?

27. Mr Howell's argument on this issue was based in the proposition that the *Teckal* exemption applies only where there was no contract, by which he meant that there was in substance no agreement between two separate persons. A contract

of insurance, which by its very nature transferred the insured risk from one person to another, could not meet that requirement. It was inherently a contract between two different people. Insurance is not something which can be internal to the contracting authority. So the arrangements between Harrow and LAML were not entitled to the benefit of the exemption.

28. Mr Sumption's reply to this submission was equally short. It was obvious that a person could not insure himself. As Moore-Bick LJ said in the Court of Appeal, para 236, the nature of the relationship between the participating member and LAML as insurer was essentially one between independent third parties. But it was not a pre-condition of the *Teckal* exemption that the services which were the subject of the contract between the local authority and the other person should be services that were capable of being provided by one of the local authority's own departments. Stanley Burnton LJ was right to observe that there was no reason why a public authority could not establish a captive insurer with its own resources: [2008] LGR 429, para 67.

29. I would reject Mr Howell's proposition that the *Teckal* exemption applies only where there is no agreement between two separate persons. That is a misreading of paras 50 and 51 of *Teckal*. It is, of course, necessary that there be a contract for pecuniary interest concluded in writing between one or more economic operators for the Directive to be applicable: see the definition of "public contracts" in article 1(2)(a). The whole point of the *Teckal* exemption, however, is to build on that starting point and to define the circumstances in which, as para 50 puts it, the position can be otherwise. It assumes that there is a contract between two separate entities. So the mere fact that the nature of the relationship between an insured and his insurer is essentially one between two independent parties does not, of itself, make the exemption inapplicable.

30. It is a necessary consequence of the nature of that relationship that the transfer of risk from one person to another is not a service that a local authority can provide for itself. But I can detect no indication from what was said in paras 50-51 of *Teckal* and subsequent authorities that this is a factor of the slightest importance. This point is confirmed by the court's reasoning in *Commission of the European Communities v Federal Republic of Germany* (Case 480/06) [2009] ECR I-4747, para 47: see para 51, below. What matters is whether the arrangement satisfies the control test. If it does, an insurance contract is as just as eligible for exemption under *Teckal* as a contract for the collection and disposal of waste.

The control test

31. The first issue as to the application of the control test to this case is one of principle. It arises where, as in this case, several local authorities combine together to procure services from an entity which is formally distinct from any of them. For the *Teckal* exemption to apply must each contracting authority exercise the required control over the formally distinct entity itself in a manner which is similar to that which it exercises over its own departments? Or is it sufficient that the contracting authorities exercise that control over it collectively? In short, is individual control necessary?

32. The answer to this question lies at the heart of this case. This is because of the way the Rules annexed to LAML's Articles of Association deal with the handling and settlement of claims by LAML. The third paragraph of rule 21 provides that all lawyers and others appointed by LAML for the account of the participating member shall be answerable to LAML without prior reference to the participating member. Rule 22 sets out the powers of the board relating to recoveries from LAML. It provides:

> "The board shall consider claims which may be paid by [LAML] in accordance with these rules, but the board shall have power from time to time to authorise the managers to effect and determine payment of claims without prior reference to the board. Without the prior agreement of the board, no member director of [LAML] shall sit on the board while it is engaged in the consideration or settlement of any claim in which the participating member of that member director is interested."

The effect of rule 22, as Stanley Burnton LJ observed [2008] LGR 429, para 78, is that a participating member will normally be excluded from the Board's consideration of its insurance claim.

33. The degree of independence of decision-making in the handling and settlement of claims is apparent also from rule 21 and from article 11 of LAML's Articles of Association which provides that a participating member shall cease to be a participating member if the board in its judgment determines it is undesirable for a participating member to continue to be a participating member. These provisions are both appropriate and desirable given the importance of ensuring that there is fair dealing between all the participating members if one of them seeks an indemnity from LAML. But they are very different from those which an individual local authority would agree to with one of its own departments. It is hard to see how these arrangements could be said to be similar to that which Harrow, in

particular, exercises over the departments which it employs to carry out its functions as a local authority. Everything therefore is likely to depend on whether control can be exercised by the local authorities collectively.

34. In *Teckal* there was collective control. AGAC was a consortium established by 45 Italian municipalities to manage and control energy and environmental services. Viano, which was a member of the consortium, had been supplied with fuel and had its heating services serviced by Teckal, which was a private company. It decided to switch its custom to AGAC without inviting tenders from others. Teckal challenged this decision on the ground that Viano had failed to comply with the then current Directives. It was met with the argument that Viano had merely decided to undertake these things for itself through a body which had been set up for the purpose. The question whether individual control was necessary was not explored by the court. The control test in para 50 is expressed in the singular, not the plural: "similar to that which *it* exercises over *its* own departments." The ruling is also expressed in the singular. But the function test in para 50 ends with the phrase "the controlling authority or *authorities*." (emphases added) The point of principle was left open. So it is necessary to examine some of the later cases in which the *Teckal* exemption has been developed and explained to find the answer to it.

35. Mr Sumption selected six cases in support of his argument that it is now plain that it is enough if the control is exercised collectively. He summarised his submission in this way. Where the contractor is controlled by a consortium of public authorities, and is sufficiently identified with their public purposes and functions, the control test will be satisfied. This will be so even though it is in the nature of collective control that no single authority can be said to exercise the kind of control which it would have over one of its own departments. In effect EU law treats the controlling group as if it were a single public authority dealing with a captive contractor – that is to say, a contractor which is wholly identified with the controlling group and has no wider commercial objectives.

36. There is no doubt that the case law on the *Teckal* exemption has become progressively clearer as the European Court has developed its jurisprudence on public procurement and has placed a growing emphasis on the underlying rationale.

37. In *Stadt Halle v Arbeitsgemeinschaft Thermische Restabfall und Energieverwertungsanalage TREA Leuna* (Case C-26/03) [2005] ECR I-1 ("*Stadt Halle*") the City of Halle decided to award a contract for the handling and disposal of its waste to RPL, a company with limited liability. Just over three quarters of RPL's shares were held by a wholly owned subsidiary of a company wholly owned by Halle. Just under one quarter were held by a private company. Leuna

challenged the proposed contract on the ground that Halle had failed to comply with the Directives. The question was whether the existence of a substantial private shareholding in the contractor was inconsistent with the control test. The court observed in para 49 that in *Teckal* the distinct entity was wholly owned by the public authorities. On the other hand, participation, even as a minority, of a private undertaking excluded the possibility of the contracting authority exercising a control similar to that which it exercises over its own departments. This was incompatible with the *Teckal* exemption because the element of private capital meant that the control test was not satisfied.

38. That was not a case about collective control as the City of Halle was not a member of a consortium. But the case is of interest nevertheless. In her opinion Advocate General Stix-Hackl broke new ground when she addressed the issue of what she called "quasi-in-house procurement." In para 49 she said that this differed from in-house supply in that it involved awards to an entity entirely separate from the contracting authority and having legal personality. In her opinion the case turned on the application of the control test and, despite the minority shareholding, this test was satisfied: paras 62, 70. The court disagreed with her only on the question whether the control test was satisfied. Any exception to the application of the obligation to apply the Community rules in the field of public procurement must be interpreted strictly: para 46. In para 48 the court identified the exception on which the City of Halle sought to rely:

> "A public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. In such a case, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority. There is therefore no need to apply the Community rules in the field of public procurement."

The minority shareholding by the private company in RPL made all the difference, however. The award of a public contract to what the court termed a semi-public company without calling for tenders would interfere with the objective of free and undistorted competition and give it an advantage over its competitors: para 51. The control test was not satisfied.

39. In *Parking Brixen GmbH v Gemeinde Brixen* (Case C-458/03) [2005] ECR I-8585 ("*Parking Brixen*") the municipality of Brixen granted a concession for the management of two car parks to a company which it wholly owned. The court held that this was a public service concession to which the then applicable Directive did

not apply: para 43. But it said that public authorities are nevertheless bound to comply with the fundamental rules of the EC Treaty in general and with the principles of non-discrimination on grounds of nationality in particular as set out in articles 12EC, 43EC and 49EC: para 49. Their application did not depend on the existence of a contract. The *Teckal* principles could be transposed to the Treaty provisions, but it was not appropriate to apply the Community rules to public service concessions which were excluded from the scope of the public procurement Directives: para 61. The application of the rules in articles 12EC, 43EC and 49EC was precluded if the control exercised was similar to that which the public authority exercises over its own departments and if the concessionaire carries out the essential part of its activities with the controlling authority: para 62. As already noted, these findings provide authority for Mr Sumption's submission that the application of the *Teckal* exemption does not depend on the meaning to be given to particular words or phrases in the Directive, such as those to be found in the definition of "public contracts" in article 1(2)(a): see para 23, above. The court recognised that the basis for the Directive was to be found in the fundamental rules that were to be found in the EC Treaty.

40. The problem for Brixen was that the concessionaire was a company limited by shares resulting from the conversion of a special undertaking of the public authority. Applying the control test as described in *Teckal*, the court said in para 65 that the assessment must take account of all the legislative provisions and relevant circumstances:

> "It must follow from that examination that the concessionaire in question is subject to a control enabling the concession-granting public authority to influence the concessionaire's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions."

At the time of the award the concessionaire was wholly owned by the municipality, but it had become market-oriented. In pursuance of its objects it had begun to perform services on a commercial basis to third parties, its statute provided for the obligatory opening up of the company to private capital, considerable powers of management were conferred on its Board with in practice no control by the municipality and it could effect certain transactions up to a value of €5m Euros without the prior authority of a meeting of the shareholders: paras 67-68. Because of these elements it was not possible for the concession-granting public authority to exercise over the concessionaire control similar to that which it exercised over its own departments. So the award of the concession to such a body could not be regarded as a transaction internal to the public authority to which the rules of Community law did not apply: paras 70-71. That case did not involve a consortium. But the court endorsed the point made in *Stadt Halle*, at para 48, that it was not appropriate to apply the Community rules on public procurement in case

where a public authority performs tasks in the public interest for which it is responsible without calling upon external entities.

41. The decisive influence test described in *Parking Brixen*, at para 65, was applied in *Carbotermo SpA v Comune di Busto Arsizio* (Case C-340/04) [2006] ECR I-4137 ("*Carbotermo*"). This was a consortium case. The municipality of Busto Arsizio had awarded a contract for the supply of fuel and the maintenance and upgrading of its heating equipment to AGESP SpA. Its decision to do so was challenged by Carbotermo because it did not call for tenders before awarding the contract. Busto Arsizio owned 99.98% of the shares in the company of which AGESP was a wholly owned subsidiary. The remaining 0.2% of the shares was held by a number of adjoining municipalities. The key issue was control. Applying the test described in *Parking Brixen* the court said in para 37:

> "The fact that the contracting authority holds, *alone or together with other public authorities*, all of the share capital in a successful tenderer tends to indicate, without being decisive, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments, as contemplated in para 50 of *Teckal.*" (emphasis added)

Here, for the first time, the court recognised that individual control was not necessary for the *Teckal* exemption to apply. The contracting public authority could exercise control over the contractor alone or together with other public authorities. The point was made despite the fact that the proportion of shares held by the other public authorities was very small.

42. It was held nevertheless that the control test was not satisfied. The statutes of both AGESP and its parent company conferred the broadest possible discretion on the boards of each of them for their ordinary and extraordinary management. They gave no control or specific voting powers to the commune to enable it to restrict the boards' freedom of action. The court said that the control that the commune was given over these two companies could be described as consisting essentially of the latitude conferred by company law of a majority of the shareholders and that this places considerable limits on its power to influence the decisions of the companies: para 38. The fact that any influence that it might have on AGESP's decisions was through a holding company might also weaken any control that might possibly be exercised: para 39. It followed that the contracting authority did not exercise over the successful tenderer a control similar to that which it exercised over its own departments. The court went on to deal with the *Teckal* function test. It held that the undertaking in question could be viewed as carrying out the essential part of its activities with the controlling authority within

the meaning of *Teckal* only if that undertaking's activities were devoted principally to that authority and any other activities were only of marginal significance: para 63. This condition could be met, where the undertaking was controlled by several public authorities, if it carried out the essential part of its activities with all of those authorities together: para 70.

43. *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa)* (Case C-295/05) [2007] ECR I-2999 ("*Asemfo*") was another case about collective control. It was also a Treaty case. Tragsa was a Spanish company which was owned as to 99% by the State and as to the remaining 1% by four autonomous communities. It was established to carry out agricultural, forestry and other rural development activities for those public bodies. Although it was a legally distinct entity, it was obliged to act in accordance with instructions received from them and to carry out work at rates fixed by regulation. It could not negotiate terms. Asemfo complained that the legal regime applicable to Tragsa, which allowed it to execute public works without being subject to the public procurement rules, was not compatible with Community law. Advocate General Geelhoed observed in para 38 of his opinion that the effect of this regime, which created obligations in public law only, was that the contractual element between the contracting authority and the contractor considered in previous cases was entirely absent. But he said, following *Parking Brixen*, that the issue of compatibility with primary Community law, and in particular with articles 12EC, 43EC and 49EC, had to be assessed: para 52. The court too noted in para 54 of its judgment that the requirement for the application of the Directives relating to the existence of a contract was not met. But it went on to consider whether the *Teckal* exemption applied.

44. Dealing first with the control test, the court referred to the point made in *Carbotermo*, at para 37, that the fact that all of the share capital in a successful tenderer is held, alone or with other public authorities, by the contracting authority tends to indicate, generally, that the contracting authority exercises over that company a control similar to that which it exercises over its own departments: para 57. It rejected the argument that the condition could only be met for contracts performed at the demand of the Spanish State, which held a 99% interest in Tragsa, and not those which were the subject of a demand from the autonomous communities. Tragsa could not be regarded as a third party in relation to the communities which held a part of its capital: paras 60-61. As to the function test, it said in para 62 that it followed from the case law that, where several authorities control an undertaking, that condition may be met if that undertaking carries out the essential part of its activities, not necessarily with any one of those authorities but with all of them together: *Carbotermo*, para 70.

45. The court's finding in paras 60-61 of *Asemfo* as to the position of the autonomous communities is an important indication of the way the element of

collective control operates. All members of the consortium are entitled to take the benefit of it in the application of the *Teckal* exemption. The decisive influence that a contracting authority must exercise over the contractor may be present even if it is exercisable only in conjunction with the other public authorities. It is also clear, as was pointed out in *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Adiminstración General del Estado* (Case C-220/06) [2007] ECR I-12175, para 52, that a critical factor in the court's decision in *Asemfo* was that, as Tragsa was an instrument and technical service of the Spanish Administration, it was required to implement only work entrusted to it by the General Administration of the State, the autonomous communities or the public bodies subject to them.

46. The principles applied in the previous cases were developed and expanded in *Coditel Brabant SA v Commune d'Uccle* (Case C-324/07) [2008] ECR I-8457 ("*Coditel*"). The Belgian municipality of Uccle awarded a contract for the operation of its cable television network to a co-operative called Brutélé, which had been set up by a consortium of municipalities with separate legal personality. Uccle had joined the consortium in order to be able to contract with Brutélé. Coditel challenged the award of the contract on the ground that Uccle had not followed the public contract procurement process. The court held that the method of remuneration, which came not from the municipality but from payments made by the users of the network, was characteristic of a public service concession: para 24. So, like *Parking Brixen*, this was a Treaty case to which the rules set out in articles 12EC, 43EC and 49EC applied.

47. Following *Carbotermo*, para 37 and *Asemfo*, para 57, the court said that the fact that Uccle, the concession-granting public authority, held together with other public authorities all of the share capital in Brutélé tended to indicate, but not conclusively, that the control test was satisfied: para 31. It was clear that Brutélé was an inter-municipal company whose members were all public authorities and that it was not open to private members. The fact that its governing council was composed of representatives of the participating public authorities showed that it was under the control of the public authorities, as they were able "to exert decisive influence over both Brutélé's strategic objectives and significant decisions": paras 32-34. The fact that the governing council enjoyed the widest powers of management was noted in para 35. But this was not fatal because, as the court said in para 36:

> "The question arises as to whether Brutélé has thus become market-oriented and gained a degree of independence which would render tenuous the control exercised by the public authorities affiliated to it."

Having noted that Brutélé's object under its statutes was the pursuit of the municipal interest – that being the raison d'être for its creation – and that it did not pursue any interest which was distinct from that of the public authorities affiliated to it, it held that the control that was exercised over it could be regarded as similar to that exercised by the participating public authorities over their own departments: paras 38-41. It was the exclusively public nature of the interest that Brutélé was pursuing that was decisive in this assessment.

48. The court then addressed the question whether the control had to be exercised by each of the participating public authorities individually or whether it can be exercised jointly by them, with decisions taken by a majority, as the case may be: para 43. In answer to this question the court said it would be consistent with its reasoning in *Carbotermo*, paras 70 and 71, and *Asemfo*, para 62, to consider that the condition as to the control exercised by the public authorities may also be satisfied if account is taken of the control exercised jointly over the concessionaire by the controlling authorities. It then made these important rulings:

> "46 According to the case law, the control exercised over the concessionaire by a concession-granting public authority must be similar to that which the authority exercises over its own departments, but not identical in every respect (see, to that effect, *Parking Brixen*, para 62). The control exercised over the concessionaire must be effective, but it is not essential that it be exercised individually.
>
> 47 Secondly, where a number of public authorities elect to carry out their public service tasks by having recourse to a municipal concessionaire, it is usually not possible for one of those authorities, unless it has a majority interest in that entity, to exercise decisive control over the decisions of the latter. To require the control exercised by a public authority in such a case to be individual would have the effect of requiring a call for competition in the majority of cases where a public authority seeks to join a grouping composed of other public authorities, such as an inter-municipal cooperative society.
>
> 48 Such a result, however, would not be consistent with Community rules on public procurement and concession contracts. Indeed, a public authority has the possibility of performing the public interest tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments (*Stadt Halle*, para 48).

> 49 That possibility for public authorities to use their own resources to perform the public interest tasks conferred on them may be exercised in cooperation with other public authorities (see to that effect, *Asemfo*, para 65."

It noted that in *Asemfo*, paras 56-61 the court recognised that in certain circumstances the condition relating to the control exercised by the public authority could be satisfied where such an authority held only 0.25% of the capital in a public undertaking: para 53.

49. Mr Howell said that the court had lost sight in *Coditel* of the fact that the purpose of the function test – which was what it was discussing in *Carbotermo*, paras 70 and 71, and *Asemfo*, para 62 – was different from that of the control test. The last sentence of para 46 was a non-sequitur. In paras 47-48 the court had conflated two different things, namely becoming a member of an association of contracting authorities and the awarding the association a contract. The Directive did not apply to the first, but it did to the second. And the court did not, when it referred to *Asemfo*, para 53, ask itself what were the circumstances in which the condition could be satisfied. It had therefore not grappled with the Directive and its scope. I would not, for my part, accept these criticisms. It is plain that the question of collective control arose directly in that case. The court's reasoning shows that it was concerned with substance rather than with form. That was the point that was made in *Asemfo*. The proposition in the last sentence of para 46 encapsulates a perfectly rational principle. I do not see it as containing a non-sequitur. The message which it conveys is very clear. Collective control is enough. Individual control is not necessary.

50. In *Commission of the European Communities v Federal Republic of Germany* (Case 480/06) [2009] ECR I-4747 ("*Commission v Germany*") four local authorities entered into a contract with the cleansing department of the City of Hamburg to enable it to build a larger waste treatment facility than it required for its own purposes. Capacity was to be reserved for them for a price to be paid to the facility's operator so that it would serve their purposes also. The contract was not put out for tender. The Commission challenged the arrangement on the ground that there had been a failure to comply with the Directive. The City of Hamburg was not a member of a consortium, and it was admitted that the four local authorities did not exercise any control which could be described as similar to that which they exercised over their own departments. On these facts the local authorities did not satisfy the *Teckal* control test: para 36. Their contract was nevertheless held to fall outside the Directive, for three main reasons. First, the contract established cooperation between local authorities with the aim of ensuring that a public task they all had to perform was carried out: para 37. It was concluded solely by public authorities without the participation of any private party, and it did not provide for

or prejudice the award of any contracts that might be necessary in respect of the construction and operation of the waste treatment facility: para 44. And *Coditel*, para 48 and 49 had established that a public authority had the possibility of performing the public interest tasks conferred on it by using its own resources without being obliged to call on outside entities not forming part of its own departments, and that it may do so in co-operation with other public authorities: para 45.

51. The Commission said that, had there been cooperation by means of the creation of a body governed by public law to which the various local authorities entrusted performance of the task in the public interest of waste disposal, it would have accepted that the use of the facility did not fall under the rules of the Directive: para 46. But it maintained that, as there was no such body, a call for tenders should have been issued. The court summarised its response in para 47:

> "It must be observed, though, first, that Community law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks. Secondly, such cooperation between public authorities does not undermine the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the member states, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors (see, to that effect, *Stadt Halle*, paras 50 and 51)."

52. The reasoning in that paragraph shows how far we have travelled since the court issued its judgment in *Teckal*. The same approach is taken whether the case concerns a service concession, to which the provisions of the Treaty apply, or a public service contract which falls within the ambit of the Directive: *Sea Srl v Comune di Ponte Nossa* (Case C-573/07) [2009] ECR I-8127, para 35. There is now a much clearer focus on the purpose of the Community rules on public procurement so as not to inhibit public authorities from co-operating with other public authorities for the purpose of carrying out some of their public service tasks. The exact basis for the decision in *Commission v Germany* is not easy to detect from a reading of the court's judgment. But it does confirm the conditions that need to be satisfied to fall within the *Teckal* exemption: para 34. Collective control is enough, and para 47 tells us that public authorities do not require to follow any particular legal form in order to take advantage of it. So long as no private interests are involved, they are acting solely in the public interest in the carrying out of their public service tasks and they are not contriving to circumvent the rules on public

procurement (see para 48), the conditions are likely to be satisfied. As to the last point, it should be noted that the management agreement between LAML and Charles Taylor & Co was put out for public tender, as were all LAML's reinsurance contracts. There is nothing in para 47 of *Commission v Germany* which cannot equally be said of the arrangements that are under scrutiny in this case.

53. I would sum up my conclusions on the control test, in the light of the guidance offered by these authorities, as follows. Individual control is not necessary. No injury will be caused to the policy objective of the Directive if public authorities are allowed to participate in the collective procurement of goods and services, so long as no private interests are involved and they are acting solely in the public interest in the carrying out of their public service tasks. *Asemfo* shows that the decisive influence that a contracting public authority must exercise over the contractor may be present even if it is exercisable only in conjunction with the other public authorities. This was confirmed by the last sentence of para 46 of *Coditel* and re-affirmed in *Sea Srl v Comune di Ponte Nossa*, paras 54-57. Where such a body takes its decisions collectively, the procedure used for the taking of those decisions is immaterial: *Sea Srl*, para 60.

54. These points illustrate the strength of the presumption referred to in *Carbotermo*, para 37 and *Asemfo*, para 57 that applies where the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer. The fact that two or more public authorities have collaborated to secure a service which is designed exclusively for the performance of their public functions, as in *Commission v Germany* where they did not hold any share capital in the cleansing department, carries at least as much weight. The argument that the control test was satisfied failed in *Carbotermo* because the broadest possible discretion was conferred on the boards of the parent company and its subsidiary for their ordinary and extraordinary management. No control was given to the commune to enable it to restrict the boards' freedom of action, in the form of specific voting powers or otherwise. It would have been otherwise if the commune had had power to give directions to the boards on strategic matters or important issues of policy.

Is the control test satisfied in this case?

55. This is a matter for the domestic court to determine in the light of the jurisprudence of the European Court. Mr Sumption accepted that, if he was wrong on the question whether individual control was necessary, his case must fail. For the reasons I have given in paras 48 and 49 above, I am satisfied that collective control is enough. This means that the test will be satisfied even though it is in the

nature of collective control that no single authority can be said to exercise the kind of control which it would have over its own departments.

56. The relevant facts as to the control of LAML are as follows. The Board had the normal powers of management under articles 4 and 36 of its Articles of Association. It consisted of not less than five and no more than 11 directors, of whom at least two had to be independent directors: article 16(a). The Chairman was selected from the directors, but he was not to be an independent director: article 16(c). No meeting of the directors was to be quorate unless the majority of directors present were member directors, that is to say directors representing a participating member: article 39 read with article 33(f) and (g). Membership was personal to the London local authority concerned, and it was not transferable: article 10. The participating members each had one vote at general meetings under article 15(a), and the member directors were elected by them. By article 1 it was provided that regulation 70 of Table A of the Companies (Tables A-F) Regulations 1985 (SI 1985/805) was expressly incorporated. So the special resolution procedure, as defined by section 283(1) of the Companies Act 2006, applied. This meant that the Board was subject to direction by the participating members in general meeting, so long as they achieved a 75% majority. 100% of the voting rights at general meetings lay with the participating members.

57. The insurance that might be offered to members was governed by the rules annexed to LAML's Articles of Association. Under rule 16 LAML could offer only such insurance as the participating members had agreed at general meeting. The effect of rule 22 was that a member director of a participating member would normally be excluded from the board's consideration of its insurance claim. But this is a matter of detail. I cannot agree with Stanley Burnton LJ [2008] LGR 429, para 78 that the general picture that these provisions give is of a business the administration of which was relatively independent, or with the Court of Appeal [2010] PTSR 349, paras 131, 236 that the nature of LAML's business and the possibly differing interests of different authorities were antithetic to the necessary local authority control. It is true that, when it came to claims, the nature of the relationship between each participating member as insured and LAML was essentially one between independent third parties. But, as I have already said, individual control is not required. Collective control over strategic objectives and significant decisions was with the participating members at all times. They controlled a service which was designed exclusively for the performance of their public functions. No private interests whatever were involved. On these facts I would hold that the *Teckal* control test is satisfied.

The function test

58. This issue can be dealt with quite shortly. The question where several public authorities control an undertaking, as the court made plain in *Carbotermo*, para 70, and *Asemfo*, para 62, is whether that undertaking carries out the essential part of its activities with all of the public authorities together in the consortium. As was explained in *Asemfo*, paras 62 and 65, this does not necessarily have to be with any one of those authorities individually. It is enough that it is with the same authorities collectively as exercise control over it. This is because, if this test is satisfied, it shows that implementation of the cooperation between the public authorities is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest by those authorities. The absence of private capital and private customers is another important indication that the cooperation is for that purpose only, and that there is no risk of putting any private undertaking at a disadvantage vis-à-vis its competitors: *Commission v Germany*, para 47.

59. In this case the relevant facts are these. There was no private involvement in the affairs of LAML, which had no external or private capital, other than the presence on the Board of a minority of independent directors. This was required by the Financial Services Authority as a condition of its authorisation of LAML as an insurer. The main objects of the company were to provide insurance to participating members and affiliates. All the other objects in its Memorandum were restricted by reference to the main objects of the company. The expression "participating member" meant any London Borough that subscribed to the Memorandum and Articles of Association and had received an indemnity from LAML. By definition they were all public authorities. For the purposes of the Memorandum "affiliates" comprised various persons or bodies associated with a participating member in respect of whom that participating member was empowered to arrange an indemnity. They were insured only in their capacity as affiliates. LAML existed only to serve the insurance needs of its members. Rule 16 of its Rules confined the persons to whom LAML might offer indemnity to the London local authorities. It could only be provided to an affiliate if the insurance was arranged by a participating member, who was responsible for payment of the premium. As already noted (see para 52, above), all major contracts for the provision of goods and services to LAML were put out for public tender in accordance with the 2006 Regulations, including in particular its reinsurance contracts.

60. I would hold that, on these facts, it is plain that the *Teckal* function test also is satisfied. It follows that, as the *Teckal* exemption applies to the 2006 Regulations and the arrangements between LAML and the London local authorities satisfy both tests, Harrow did not act in breach of the Regulations when it entered into insurance contracts with LAML under the mutual insurance scheme.

Is a reference required?

61. I would hold that the answers to be given to issue (2) and the issues about the control test do not give rise to any questions on which further guidance needs to be sought from the Court of Justice of the European Union by means of a preliminary ruling under article 267TFEU (ex article 234EC).

Conclusion

62. I would allow the appeal.

LORD RODGER

63. The facts and issues in this appeal have been explained by Lord Hope, whose detailed account I gratefully adopt. The ultimate question for this court is whether Brent was entitled to enter into contracts of insurance with LAML without first putting those contracts out to tender in accordance with the Public Contracts Regulations 2006 ("the 2006 Regulations"). Those Regulations were made in order to implement Directive 2004/18/EC ("the Directive") on public procurement of goods, works and services. Even though the proceedings involving Brent have now been settled, the question arising out of those proceedings remains significant because it determines the answer to the further question: would a local authority such as Harrow be entitled, in the future, to enter into contracts of insurance with LAML without having first having complied with the 2006 Regulations?

64. At the hearing before this court the debate concentrated on whether the relationship between Harrow and LAML was such that the so-called "*Teckal* exemption" would take effect, with the result that the Directive would not apply – and, even if that were the position, whether an equivalent exemption applies in the case of the 2006 Regulations.

65. The *Teckal* exemption derives from what the Court of Justice said in *Teckal Srl v Comune di Viano* (Case C-107/98) [1999] ECR I-8121, 8154, paras 49 and 50, in relation to Council Directive 93/36/EEC on the co-ordination of procedures for the award of public supply contracts:

> "49. As to whether there is a contract, the national court must determine whether there has been an agreement between two separate persons.

> 50. In that regard, in accordance with article 1(a) of Directive 93/36, it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities."

66. It is common ground that the *Teckal* exemption applies to the current Directive. In order to understand why it does so, it is necessary to look at the purpose of the Directive and the wider context in which it operates.

67. The starting point is that

> "the principal objective of the Community rules in the field of public procurement … [is] the free movement of services and the opening-up to undistorted competition in all the member states. That involves an obligation on all contracting authorities to apply the relevant Community rules where the conditions for such application are satisfied": *Stadt Halle v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* (Case C-23/03) [2005] ECR I-1, 46, para 44.

So the requirements of the Directive apply where a contracting authority sets out to purchase from an outside supplier, say, a product or services which it requires. In that event the Directive ensures that potential suppliers have a proper opportunity to compete for the contract.

68. It follows, of course, that the Directive has no application in a situation where a public authority obtains the product or services which it requires from its own resources – as it is perfectly free to do. The Court of Justice pointed this out in para 48 of its judgment in *Stadt Halle* [2005] ECR I-1, 47-48:

> "A public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. In such a case, there can be no question of a contract for pecuniary interest concluded with an entity

> legally distinct from the contracting authority. There is therefore no need to apply the Community rules in the field of public procurement."

In short, the Directive is not intended to protect the commercial sector by forcing public authorities to obtain the services which they need on the commercial market. For instance, a local authority can have its own architect's department and does not need to look outside to obtain the services of an architect or architects to design municipal buildings or housing. It is free to obtain these services in-house. The purpose of the Directive is simply to ensure that, if public authorities do decide to obtain the services which they need from outside bodies, proper procedures are followed to ensure that potential providers of the services have an opportunity to compete for the work.

69. While the general approach is clear, its application can give rise to problems where an authority obtains the services or products which it requires not from one of its own departments, but from a separate body which, it claims, is so closely connected with it that the authority should still be regarded as, in substance, obtaining the services or products in-house rather than from an outside body. Obviously, if interpreted over-generously, that broadening of the circumstances in which the Directive does not apply might tend to undermine its effective operation. The two criteria laid down in *Teckal* are designed to guard against that risk. If, but only if, they are satisfied, the Directive does not apply because, even though the public authority is intending to contract with another body for the supply of the products or services, the authority can still be regarded as fulfilling its requirements in-house, rather than looking to an outside body to fulfil them. Again, since they are preconditions for an exception to the application of the obligations in the Directive, the criteria must be interpreted strictly: *Stadt Halle* [2005] ECR I-1, 47, para 46.

70. In practice, a local authority which can afford, say, to run its own architect's department is unlikely to see any real advantage in simply establishing that department as a separate legal entity with which it can then enter into contracts to meet its requirement for architectural services. Such an arrangement would probably not, for example, save costs. But local authorities and other public bodies may well be able to make considerable savings by co-operating to obtain the services and products which they require. For instance, a single local authority might not have enough work to make it economically worthwhile to have its own architect's department; but, between them, two authorities might well have enough work to make such a department viable. The possibility of local authorities co-operating in the provision of services has long been recognised: section 101(5) of the Local Government Act 1972 makes provision for two or more local authorities

to discharge any of their functions jointly. So, for example, two or more local authorities may arrange for trading standards services to be provided jointly.

71. Equally, two or more authorities may co-operate to obtain the architectural services which they require. One possible way of doing this would be for the authorities to co-operate to establish and finance a body which was separate from them but whose employees could design buildings for them. Each of the authorities would then contract with the body for the design services that it required.

72. Does the Directive apply if a local authority intends to contract with such a body to provide the products or services which it requires? The Court of Justice has seen no reason to distinguish in principle between a situation where the body in question exists to serve the interests of a single local authority and a situation where it exists to serve the interests of several authorities. In both situations the *Teckal* criteria apply. Indeed, the cases which have come before the Court of Justice have tended to concern situations where several local authorities were co-operating to obtain products and services. That was the position in *Teckal* itself and, for example, in *Stadt Halle* [2005] ECR I-1 and *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa)* (Case C-295/05) [2007] ECR I-2999.

73. In short, not only are local authorities free to use their own resources to perform the services which they exist to provide, but they may also co-operate with other local authorities to ensure that, collectively, they have the necessary resources to do so. See, for example, *Coditel Brabant SA v Commune d'Uccle* (Case C-324/07) [2008] ECR I-8457, 8504, paras 48-49:

> "Indeed, a public authority has the possibility of performing the public interest tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments (*Stadt Halle*, para 48).
>
> 49. That possibility for public authorities to use their own resources to perform the public interest tasks conferred on them may be exercised in cooperation with other public authorities…."

The Court of Justice reaffirmed this, in the context of a different kind of arrangement between a number of local authorities, in *Commission of the*

European Communities v Federal Republic of Germany (Case C-480/06) [2009] ECR I-04747, 04777, para 45.

74. Where the co-operation among the local authorities takes the form of establishing a body which then provides them with the necessary products or services, the Directive will not apply if, in substance, each of the co-operating authorities is intending to obtain the products or services from the resources contributed by the co-operating authorities for the use of the body. In such a case, in substance, the authority is intending to obtain the products or services in-house, in co-operation with other public authorities.

75. Since the whole point is that the Directive does not apply in the case of such an arrangement because the public authorities are intending to obtain the products or services from their own resources which are to be administered in the public interest, it is essential that any body which the authorities establish does not involve any private investment. As the Court of Justice observed in *Stadt Halle* [2005] ECR I-1, 48, para 51:

> "the award of a public contract to a semi-public company without calling for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, in particular in that such a procedure would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors."

Under reference to this passage, the Court of Justice returned to the point in *Commission v Germany* [2009] ECR I-04747, 04777, para 47, where it said that the co-operation among the public authorities in that case:

> "does not undermine the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the member states, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors…."

76. A couple of months later the Court of Justice summarised its approach in *Sea Srl v Comune di Ponte Nossa* (Case C-573/07) [2009] ECR I- 8127, 8151, paras 45-46:

> "… the fact of the contracting authority's holding, together with other public authorities, all the share capital in a contractor company, tends to indicate, but not conclusively, that that contracting authority exercises over that company control similar to that which it exercises over its own departments.
>
> 46. In contrast, the holding, even a minority holding, of a private undertaking in the capital of a company in which the contracting authority in question also has a holding too means that, on any view, it is impossible for that contracting authority to exercise over that company control similar to that which it exercises over its own departments" (internal citations omitted).

So, if a body becomes market-oriented, the award of a contract to it by a public authority cannot be regarded as a transaction internal to that authority to which the rules of Community law do not apply. Cf *Parking Brixen GmbH v Gemeinde Brixen* C-458/03 [2005] ECR I-8585, 8637, para 71.

77. Assuming, however, that there is no private investment, how are the *Teckal* criteria to be applied to a body, such as LAML, which provides services to more than one contracting authority?

78. The first of the two cumulative criteria for holding that the Directive does not apply is that "the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments":*Teckal* [1999] ECR I-8121, 8154, para 50. The Court of Justice has gone on to explain that this means that the authority should have a power of decisive influence over both the "strategic objectives and significant decisions" of the body with which it intends to contract: *Parking Brixen GmbH v Gemeinde Brixen* [2005] ECR I-8585, 8635, para 65.

79. Is it enough, however, if this decisive influence is exercised by all the authorities combined, or must it be exercised by the individual authority which intends to contract with the body concerned? There is an obvious contrast in para 50 of *Teckal* (set out at para 65 above) between the reference to the control which "the local authority" (singular) exercises over "its own departments" in the first criterion and the reference to the activities which the person concerned carries out

with "the controlling local authority or authorities" (singular or plural). On that basis Mr Howell QC submitted on behalf of RMP that the Directive always applies unless the authority which is intending to contract has, itself, the necessary degree of control over the other prospective party to the contract.

80. But, as a matter of substance, that argument is really inconsistent with the European Court's thinking on the right of local authorities to co-operate in such matters. As already explained, the court recognises that a local authority can perform its services for the public either entirely out of its own resources or by co-operating with other local authorities to perform them out of their pooled resources. That co-operation may take the form of the authorities establishing and financing a body to provide what they require. If, taken overall, the control of the body by the authorities is great enough to satisfy the first *Teckal* criterion, this will be an indication that the body is there to carry out the purposes of the local authorities which control it – and, hence, that it is not to be regarded as an outside body vis à vis any of them. For this reason, the mere fact that any single authority does not exert the necessary degree of control by itself is irrelevant.

81. If there were ever any doubts on this matter, they were settled decisively by the decision of the Court of Justice in *Coditel Brabant* [2008] ECR I-8457, 8503-8504, paras 46-51:

> "46. According to the case law, the control exercised over the concessionaire by a concession-granting public authority must be similar to that which the authority exercises over its own departments, but not identical in every respect (see, to that effect, *Parking Brixen*, para 62). The control exercised over the concessionaire must be effective, but it is not essential that it be exercised individually.
>
> 47. Secondly, where a number of public authorities elect to carry out their public service tasks by having recourse to a municipal concessionaire, it is usually not possible for one of those authorities, unless it has a majority interest in that entity, to exercise decisive control over the decisions of the latter. To require the control exercised by a public authority in such a case to be individual would have the effect of requiring a call for competition in the majority of cases where a public authority seeks to join a grouping composed of other public authorities, such as an inter-municipal cooperative society.

> 48. Such a result, however, would not be consistent with Community rules on public procurement and concession contracts. Indeed, a public authority has the possibility of performing the public interest tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments (*Stadt Halle*, para 48).
>
> 49. That possibility for public authorities to use their own resources to perform the public interest tasks conferred on them may be exercised in cooperation with other public authorities (see, to that effect, *Asemfo*, para 65).
>
> 50. It must therefore be recognised that, where a number of public authorities own a concessionaire to which they entrust the performance of one of their public service tasks, the control which those public authorities exercise over that entity may be exercised jointly."

82. Although *Coditel Brabant* was a public concession case, the reasoning of the court is general and is equally applicable to a case like the present. Moreover, I see no force in Mr Howell's suggestion that the last sentence of para 46 involves a non sequitur. Rather, the court is making the cogent point that, in a situation where a number of public authorities have combined to exert effective control over the body and any one of them intends to contract with it, the fact that this authority exercises control along with the others indicates, though not conclusively, that the body is not to be regarded as an external entity – and that the Directive should therefore not apply. The position which the Court of Justice has adopted on this matter is not only unmistakable but is consistent with its overall thinking as to why the Directive does not apply in such cases. Not surprisingly, the court reaffirmed its view in *Sea Srl v Comune di Ponte Nossa* (Case C-573/07) [2009] ECR I- 8127, 8153-8155, paras 54-63.

83. Moreover, as Advocate General Trstenjak pointed out in *Coditel Brabant* [2008] ECR I-8457, 8482, para 82, if the individual local authority had to exercise the necessary control, "then inter-municipal cooperation would in future be rendered virtually impossible. For it is an important feature of genuine cooperation that decisions are made as equals and that one of the partners in the cooperative does not dominate." So the approach advocated by Mr Howell would, in effect, rule out genuine co-operation or collaboration among authorities. The Advocate General continued:

> "83. As stated, that would render virtual impossible even pure inter-municipal cooperation. Inter-municipal cooperating regional authorities would then always have to reckon with the likelihood of having to award their tasks to private third parties making more favourable bids; that would be tantamount to the compulsory privatisation by means of procurement law of public-interest tasks.
>
> 84. To construe the first *Teckal* criterion so narrowly would be to attach disproportionate weight to competition-law objectives at the same time as interfering too much with the municipalities' right to self-government and with it in the competences of the member states" (citations omitted).

See also *Sea Srl v Comune di Ponte Nossa* (Case C-573/07) [2009] ECR I- 8127, 8154, paras 56 and 57.

84. In the light of these considerations I am satisfied that the first *Teckal* criterion is to be applied by reference to the control exercised by all the authorities which have co-operated to establish and finance the body with which the individual authority intends to contract.

85. I have already noted that the Directive will apply if there is private investment in the body with which the local authority intends to contract or if the body is market-oriented. The Directive has to apply in such circumstances in order to prevent the body concerned enjoying an unfair competitive advantage. The second *Teckal* criterion is therefore designed to ensure that the Directive always applies unless, in substance, the body concerned only trades with the local authority or authorities – unless, in short, it is not market-oriented. In other words, the body must remain within the public authority sphere and cannot go out and compete with other suppliers for other primary insurance business on the open market. It would obviously be unfair if the body could compete in this way, but, when one of the local authorities was contemplating contracting with it, other suppliers were prevented from competing for the business. The second criterion prevents this.

86. The second *Teckal* criterion is not difficult to apply to the facts which give rise to this appeal. In terms of clause 3(1) of the Memorandum, the object of LAML is "to receive premiums from participating members or affiliates and to indemnify through a mutual fund the liabilities, losses or expenses incurred by participating members or affiliates in accordance with the rules." In other words, there is no question of LAML insuring anyone other than participating members and affiliates. Affiliates are public bodies sponsored by participating members. In

that situation the essential part of LAML's activities is, unquestionably, with the boroughs which are participating members.

87. The evidence in the case shows that at the beginning of the 20th century many United Kingdom public authorities co-operated to establish a mutual insurance company, Municipal Mutual Insurance Ltd ("MMI"), which would provide insurance cover to the authorities which were members of the company. MMI flourished and, over the years, established itself as the leading provider of insurance to public bodies. But, for various reasons, including the increase in claims against authorities in the 1980s, by 1992 MMI was no longer in a position to write new business or to renew existing business and it eventually ceased trading.

88. The idea that local authorities and other public authorities should work together to arrange the efficient and economical provision of insurance cover is therefore by no means new. Although the detailed arrangements differ, the idea behind LAML is essentially the same as with MMI. The relevant London boroughs set up a company limited by guarantee, for which they provided the necessary resources by means of paid capital contributions and guaranteed capital contributions. In the case of a shortfall in the capital requirement of LAML, participating members (those who receive an indemnity from this company) can be called on to make an additional paid or guaranteed contribution. Participating members are entitled to vote at a general meeting of the company.

89. In particular, it should be noted that a 75% majority of participating members present and voting at the meeting may issue any direction to the board by special resolution. In my view, for this reason, the authorities who contract with LAML have a power of decisive influence over both the strategic objectives and significant decisions of LAML. In respectful disagreement with the Court of Appeal, I would hold that this is sufficient to satisfy the first *Teckal* criterion.

90. In summary, LAML is a vehicle which the participating London boroughs control and through which they can arrange for the provision of insurance to each other and to their affiliates out of resources which they provide in the form of capital contributions and premiums. No capital is contributed by any private body – nor is any such contribution envisaged in the future. Of course, like any other insurance company, LAML reinsures some of its risks on the secondary reinsurance market and, in doing so, it follows the public procurement procedure set out in the 2006 Regulations. But the overall purpose and effect of the arrangement is that primary insurance should be provided to public authorities out of the resources which they and the other public authorities provide for the purpose. Therefore – to adapt the formulation of Advocate General La Pergola in *Arnhem v BFI Holding BV* (Case C-360/96) [1998] ECR I-6821, 6839, para 35 –

so far from removing primary insurance from the ambit of the responsibilities of the local authorities, the whole purpose of the scheme is to keep it within that ambit and not to transfer it to an outside body.

91. I am accordingly satisfied that in the circumstances of this case both of the *Teckal* criteria are satisfied and that, since the local authorities are not to be regarded as contracting with an outside body, Community legislation which is designed to secure the free movement of services and the opening-up to undistorted competition has no application. So the Directive is not intended to apply where a borough such as Harrow intends to contract with LAML.

92. The 2006 Regulations give effect to the Directive in English law. In other words, they are the way in which English law secures the free movement of services and the opening-up to undistorted competition in relation to contracts which are to be placed by English local authorities. That being the purpose of the Regulations, they, too, cannot be meant to apply in circumstances where that purpose is not relevant because a contracting authority intends to contract with a body which is not properly to be regarded as an outside body. Although the *Teckal* criteria were formulated with particular reference to the predecessors of the Directive, they are simply a way of identifying situations where the authority can be regarded as obtaining the products or services which it requires in-house and, so, where there is no need to secure the free movement of services and the opening-up to undistorted competition. In my view, the criteria are an equally good indication of situations where, for that reason, the 2006 Regulations have no application. The insight of Advocate General Trstenjak in para 83 of her opinion in *Coditel Brabant* [2008] ECR I-8457, 8482, is instructive. To hold that the Regulations did apply in these circumstances would involve saying that the legislature intended to attach weight to competition law objectives in an area where they have no legitimate application. This would, in turn, involve inappropriate interference with local authorities' right to co-operate in discharging their public functions.

93. For all these reasons, which are essentially the same as Lord Hope's, I would hold that the 2006 Regulations do not apply where a local authority, like Harrow, intends to enter into a contract of insurance with LAML. The appeal should accordingly be allowed.

LORD WALKER, LORD BROWN AND LORD DYSON

94. For the reasons given by Lord Hope and Lord Rodger, with which we entirely agree, we too would allow this appeal.