



Cabinet Office Guidance: “Public/Public” Contracts

The Cabinet Office recently published guidance concerning contracts between two public bodies (“Public/Public Contracts”).

The guidance takes the form of restating the key points from the Teckal case¹ and the Hamburg case², and refers to new codification provisions in Regulation 12 of the Public Contracts Regulations 2015 (the “Regulations”).

A reminder of the European case law

Teckal

The Teckal case concerns vertical contractual arrangements, which will be excluded from public procurement rules where a public authority awards a contract to an entity:

- which it controls in a manner similar to the control which it exercises over its own departments;
- which provides 80% or more of its services to the “parent” public authority; and
- which has no direct private sector capital participation.

Hamburg

The Hamburg case concerns horizontal contractual arrangements, which will be excluded from public procurement rules where authorities co-operate:

- to perform public services which fulfil common objectives;
- for public interest reasons; and
- the co-operating authorities perform less than 20% of such services on the market.

Key points to note from the guidance

Regulation 12 of the Regulations seeks to codify and develop the Teckal and Hamburg case law to determine when Public/Public Contracts are excluded from public procurement rules.

¹ Teckal case (C-107/98)

² Hamburg case (C480/06)

Notably:

- control is demonstrated where an organisation exerts decisive influence over both strategic objectives and significant decisions of the controlled organisation;
- percentage tests are to be evidenced by three years financial data where this is available. Where such data is not available, estimates must be shown to be credible;
- private capital contributions may be permitted where they are made compulsory by national legislation and the private entity is not controlling and cannot block decisions;
- co-operation does not necessarily mean that there must be a contractual arrangement in place. It can take the form of a joint venture or other forms of non-contractual co-operation.

The guidance can be accessed here: [Guidance on “Public/Public” Contracts](#).

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