In-house Procurement – How it is Implemented and Applied in Poland

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This article discusses the issue of in-house procurement under Polish regulations and how they are applied by local authorities. The authors focus on special conditions in national provisions additional to those provided for in Directive 2014/24/EU. The Polish legislator allows the award of public contracts in a negotiated procedure without publication (single source procurement) among other differences. Polish regulations provide for the performance of local authority tasks via local authority acts. The authors analyse the relationship between public procurement and competition law with regard to the position of local authorities as entities playing a key role in organising public services markets; in Poland, local authorities, including municipalities, have the status of 'undertaking' when organising the performance of public services. What has been observed on the market is the tendency for municipal companies to use the privilege created for them in in-house procurement regulations to encroach on a market that is not related to the tasks of their owner and compete with private operators. EU law sets some limits on in-house procurement but does not in itself guarantee uniform application of this modality, leaving a great deal of freedom to Member States.

Keywords: Self-governance; In-house procurement; Competition principles; National regulations.

I. Limits on the Freedom of Member States

One of the elements of the new directives on public procurement[1] and concessions[2] that has given and is still giving rise to a great deal of discussion is in-house procurement.

The aim of these regulations is, inter alia, to clarify and regularise the requirements and rules for contracts being awarded without a tender. This was also the main objective of the EU legislator, as mentioned in point 31 of the recitals to Directive 2014/24/EU:

> There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union. The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform

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1 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (EU OJ of 28 March 2014, L 94/65) and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (EU OJ of 28 March 2014, L 94/243).

2 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (EU OJ of 28 March 2014, L 94/1).

> the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.[3]

The extensive case law of the Court of Justice of the European Union (CJEU) and a great deal of legal literature[4] setting out the rules and requirements for in-house procurement have therefore been codified in the new directives.[5]

Of course, after many years of there being no rules at the level of European Union law,[6] any unification of rules on in-house procurement should help align the national system to each other. However, this does not alter the fact that the provisions of Directive 2014/24/EU still leave in many places a great deal of room for interpretation, which will be discussed in this article.

Moreover, European Union law does not in itself guarantee uniform application of in-house procurement rules, as it leaves a great deal of freedom in this respect to the Member States.

In this context, two observations can be made.

Member States still have the sole power to decide whether to make an exception in their legal systems concerning in-house procurement. The findings in, eg a ruling passed by the Polish Constitutional Tribunal before the new directives came into force, still apply:

> ...the aim of the European public procurement law is not to give contracting authorities the right to satisfy public needs themselves, but only to ensure unrestricted competition. Only where national law provides that public tasks may be performed by public authorities themselves, to the exclusion of private economic operators, may the contracting authority award a contract in-house.[7]

The Tribunal also pointed out that the possibility of introducing in-house contracts envisaged by EU law does not prevent the national legislator from putting in place tendering procedures in order to select economic operators to perform specified public tasks.[8] So it is possible that in-house procurement will be permitted as a rule with an exception made for a specific sector, in which the selection of an economic operator should always be preceded by a competitive procedure.

Moreover, the requirements laid down in art 12 of Directive 2014/24/EU are the minimum requirements to be met when considering whether to adopt internal provisions on in-house procurement. However, this does not mean that the national legislator cannot narrow them or introduce additional limitations. An example, apart from the Polish provisions described below, is the Finnish regulation. When setting the scope of the activity that an entity with in-house status should conduct for the contracting authority (or contracting authorities) controlling it, a requirement of 95% was introduced.[9] It was also indicated that income from other (commercial) sources cannot be more than €500,000 a year.[10]

II. In-house Procurement – Provisions and Practice under Polish Public Procurement Law

In-house procurement, ie awarding public contracts to state and local authority companies without a tender, was introduced to the Public Procurement Law of 29 January 2004 (Public Procurement Law or

3 For the purpose of this article the authors refer only to Directive 2014/24/EU.

4 M Comba and S Treumer (Eds), *The In-House Providing in European Law* (DJOF Publishing 2010); J Wiggen, 'Directive 2014/24/EU : The New Provision on Co-operation in the Public Sector' (2014) 3 Public Procurement Law Review 83-93 ; F L Hausmann and G Queisner, 'In-House Contracts and Inter-Municipal Cooperation – Exceptions form the European Union Procurement Law Should be Applied with Caution' (2013) 3 EPPPL 231-237 ; S Roe and L Wisdom, 'Provision of In-House Services following the European Commission's Consultation on an EU Initiative on Concessions' (2011) 2 Public Procurement Law Review 24-27; M Karayigit, 'A new type of exemption from the EU rules on public procurement established: 'in thy neighbour's house' provision of public interest tasks' (2010) 6 Public Procurement Law Review 183-197.

5 Respectively art 12 of Directive 2014/24/EU, art 28 of Directive 2014/25/EU and art 17 of Directive 2014/23/EU.

6 Accordingly art 5.2 Regulation 1370/2007/CE on public passenger transport services by rail and by road and repealing Council Regulations 1191/69 and 1107/70 (OJ EC of 3 December 2007, L 315/1) as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail (OJ EU of 23 December 2016, L 354/22); M Kekelekis and I E Rusu, 'The award of public contacts and the notion of 'internal operator' under Regulation 1370/2007 on public passenger transport services by rail and by road' (2010) 6 Public Procurement Law Review 198.

7 Ruling of the Constitutional Tribunal of 26 February 2014, case ref. no. K 52/12.

8 ibid.

9 Compared to 80% under art 12 of Directive 2014/24/EU.

10 Section 15 of the 1397/2016 Act on Public Procurement and Concession Contracts <https://www.finlex.fi/en/laki/kaannokset/2016/en20161397>.

PPL)[11] by way of the Act of 22 June 2016 amending the Public Procurement Law and Certain Other Acts[12] (Amendment).

The work on the Amendment shows that this was a key issue that had many proponents and a large number of opponents. The proponents raised, though without citing any specific research results or statistics, that:

- in-house procurement is provided for in Directive 2014/24/EU;
- avoiding tender procedures enables municipal property to be managed rationally;
- local authorities do not have suitable instruments to supervise and regulate some services, so it is more efficient to contract them out to entities belonging to a local authority (eg in the waste management sector);
- providing services in-house is cheaper.

However, opponents claimed that:

- provisions on in-house procurement in Directive 2014/24/EU are of a voluntary nature and do not have to be implemented into national law;
- in-house procurement breaches competition rules;
- in-house procurement may in practice lead to private undertakings being eliminated from the market, particularly from the services of general interest and IT services market;
- in-house procurement will not be an engine for searching innovative solutions;
- services on a competitive market are cheaper.[13]

The argument for regulations on in-house procurement being introduced to the Public Procurement Law was the need to 'regularise the legal status' in this area. It was rightly argued that the in-house type mechanism is available in the Public Procurement Law itself,[14] in sector specific rules,[15] and – as regards municipal services – in local authority acts, eg the Municipal Authorities Act[16] and the Municipal Management Act.[17]

Below, we discuss the solutions adopted in the Amendment before moving on to analyse their practical elements based on National Appeal Chamber judgments.

1. In-house Procurement in the Public Procurement Law

In-house procurement was not – unlike in the directives – entirely excluded from the Polish Public Procurement Law. The legislator decided to allow public contracts to be awarded in a negotiated procedure without publication (single source procurement). This applies, as does the entire PPL, to contracts of over €30,000.

The decision for in-house procurement to continue to be covered by the PPL allows it to be retained 'in the system'. On the one hand, this means that it is governed by all the other provisions of the Public Procurement Law, which impose requirements on the contracting authority and the economic operator (in this case, an in-house company), eg to meet selection criteria, to provide proof that there are no grounds for exclusion, the term for which the contract may be concluded (generally a maximum of 4 years), to meet social and environmental requirements. On the other, it enables other operators to question the contracting authority's decision through appeals to the National Appeal Chamber – first instance body in the Polish system providing legal protection measures in public procurement.[18]

This issue is extremely important to operators in view of the serious doubts over the interpretation of the regulations (and of EU law) and how they are applied in practice, which is discussed further on in this article.

As with Directive 2014/24/EU, the Public Procurement Law, in art 67(1)(12)-(15), provides for several instances of in-house procurement.

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11 Consolidated version: Journal of Laws of 2017, item 1579; <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20040190177/U/D20040177Lj.pdf>.

12 Journal of Laws of 2016, item 1020; <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20160001020/U/D20161020Lj.pdf>.

13 Report on public consultations over the draft Act amending the Public Procurement Act and Certain Other Acts of 14 March 2016 – annex to the Minister of Development letter to the Secretary of the Council of Ministers of 21 March 2016 (case no. DDR-V-4300-11/16).

14 Art 4(13) of the Public Procurement Law.

15 Art 22(1)(2) of the Public Transport Act of 16 December 2010 (consolidated text: Journal of Laws of 2017, item 2136; <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20110050013/U/D20110013Lj.pdf)>.

16 Municipal Authorities Act of 8 March 1990 (consolidated text: Journal of Laws of 2018 item 994; <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19900160095/U/D19900095Lj.pdf>

17 Municipal Management Act of 20 December 1996 (consolidated text: Journal of Laws of 2017, item 827; <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19970090043/U/D19970043Lj.pdf)>.

18 More details of legal protection measure systems in European Union states in *Functioning of legal protection measures in EU countries. Key conclusions:* <http://www.stowarzyszeniepzp.pl/images/2017PDF/Functioning-of-legal-protection-measures-in-EU-countries-Warsaw.pdf>.

Apart from the most common situation, where the contracting authority awards a contract to a company that it controls, or to a company under the common control of several contracting authorities, the possibility is provided for one of these companies to award a contract to the contracting authority controlling it (vertical in-house procurement). Contracts can also be awarded among companies controlled by the same contracting authority or contracting authorities (horizontal in-house procurement).

The legislator also provided for contracts between two contracting authorities wishing to cooperate in the provision of public services. This cooperation was also covered by the requirement to apply a single source procedure, though in this case it seems to have been done in an exaggerated manner and under time pressure. So whenever there is mention in other 'public procurement' provisions of, ie contracting out tasks (works, supplies or services),[19] we are probably dealing with a contract that establishes or implements cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common.[20]

It seems that we do not have here relations between contracting authority-economic operator, but rather between contracting authority-contracting authority, who will only later (after the 'cooperation' has started) seek an economic operator (whether in a competitive procedure or using the in-house instrument). This interpretation leads to the theory that this is not public procurement and so the Law should not apply. The same conclusion is reached from art 12(4) of Directive 2014/24/EU.

When comparing the requirements laid down in Directive 2014/24/EU with those of the Public Procurement Law, the Polish legislator, following the Finnish law, also decided to raise the threshold for income earned by in-house entities to over 90%.[21]

To increase the transparency of in-house contracts and to enable them to be controlled to a greater extent by interested private operators, the Polish legislator introduced additional reporting requirements for contracting authorities. Before in-house contracts are awarded, contracting authorities have to publish information in the Public Information Bulletin[22] or on their websites on the intent to conclude a contract, containing at least:

1) the contracting authority's name and address;
2) a description of the subject-matter of the contract and the size or scope of the contract;
3) the estimated value of the contract;
4) the name and address of the economic operator to which the contracting authority intends to award the contract;
5) the legal basis and reasons for choosing a single source procedure;
6) the planned contract performance time limit and the contract term.[23]

A contracting authority cannot conclude a contract in-house before 14 days have passed from publication of the contract notice. This gives interested parties time to question whether the contract was awarded in compliance with the law.

An important solution is the requirement for key parts of a contract for works or services of general interest to be performed by an in-house company itself.[24] In practice, this could mean serious restrictions on subcontracting contract elements and thus a requirement for the owner to ensure that the company has sufficient technical and organisational capacity to perform the contract itself. This is linked with the idea of the main (and often only) activity of in-house entities being to provide to their owner services, which in an organisational sense are 'internal services'.

The legislator also provided the authority supervising the contracting authority (for local authorities this is the *voivod*) with a mechanism to examine that requirements for in-house procurement are met, ie far-reaching powers which include a ban on contracts being concluded and allow applications to be made in court for the invalidation of a contract concluded contrary to the law.[25]

So there is no doubt that the in-house regulations in the Public Procurement Law introduced solutions that exceed those set out in public procurement directives. Importantly, they did not generally restrict the use of this instrument by Polish contracting

19 Art 67(1)(12)-(14) of the Public Procurement Law.

20 Art 67(1)(15) of the Public Procurement Law.

21 Art 67(1)(12)-(14) of the Public Procurement Law.

22 Special website of each contracting authority used to publish public information.

23 Art 67(11) of the Public Procurement Law.

24 Art 36a(2a) of the Public Procurement Law.

25 Art 144b of the Public Procurement Law.

authorities, but introduced additional mechanisms to examine whether they are properly applied in practice.

Further on in this article, the authors describe local authority practice regarding in-house procurement based on cases heard by review bodies.

2. In-house Procurement Practice from the Perspective of Review Bodies

The regulations in question have applied since 1 January 2017. Since then, many contracting authorities (and local authorities) have decided to use this method to confer performance of public tasks. One of the eligibility requirements in public procurement regulations for using in-house procurement is to demonstrate that the company to which the contract is awarded earned, over the past three years, 90% of its income from an activity performed for its owner.

Exceptionally, this requirement can be met based on future assumptions. According to the PPL, this is possible if, in light of the date on which an in-house entity is set up or starts operating, data on average income for the three years preceding the contract award are unavailable or inadequate. In this case, income percentage is set using *credible business projections*.[26] This implements art 12(5) of Directive 2014/24/EU.

In practice, the requirement for 90% of income to be earned from an activity for the contracting authority in the three years prior to a contract being awarded in-house is difficult to meet. Although, according to regulations on local authorities, municipal companies should devote all their activities to performing tasks for their owner, in reality this requirement is not always met. According to a Supreme Audit Office (SAO) report,[27] approx. 1/3 of cases of controlled municipal companies (with 229 having been inspected) conducted an activity contrary to the law, while 43 companies conducted an activity that was entirely unrelated to the local authority's tasks. A common reason for companies conducting an activity outside the scope permitted by the law is the chance to earn additional income. As mentioned, local authorities setting up and joining companies, though account should be taken of the economic balance, is generally done in order to help these authorities perform public tasks. Companies with the participation of a local authority, conducting unlawful activity to a degree not permitted by applicable law, encroach on the area of market competition. As the SAO duly noted, this could lead to distortions in the market, as municipal companies have a privileged position (eg they receive service contracts from the local authority, which is their owner).[28]

In other words, on the one hand municipal companies use the privilege created for them in in-house procurement regulations, and on the other they encroach on a market that is not related to the tasks of their owner and compete with private operators.

We give below examples of mechanisms applied by contracting authorities in this area:

(a) Setting up new special purpose companies in order to demonstrate formally that the requirement to conduct an activity for the municipality is met.

One of the practices enabling local authorities to bypass statutory restrictions when contracting their tasks to municipal companies is to set up subsidiaries (or sister companies) of a municipal company. This happens where a municipal company does not meet the requirement for 90% of income to come from an activity conducted for its owner in the past three years.

In this case, when conferring a contract in-house, the contracting authority decides to set up subsidiaries or sister companies of a municipal company that has already been operating for years. These new entities will not have to meet the historical data requirement and will be able to rely on 'credible business projections'.

It frequently happens that the same persons sit on the management boards of the subsidiaries (sister companies) and the parent company. Moreover, subsidiaries or sister companies often do not have the required capabilities in the form of appropriate equipment, skills or employees, not to mention experience, and despite this, are awarded a contract in-house. It is worth adding that, in order to win the same contract in a competitive procedure, a private operator would have to demonstrate its experience

26 Art 67(9) of the Public Procurement Law.

27 Supreme Audit Office, *Realizacja zadań publicznych przez spółki tworzone przez jednostki samorządu terytorialnego [Performance of public tasks by companies set up by local authorities]*, <https://www.nik.gov.pl/plik/id,10139,vp,12457.pdf>.

28 ibid.

as well as relevant technical, financial and economic potential.

That leads to the assumption that these companies were set up solely to meet statutory requirements, thereby enabling a contract to be awarded in-house.

It turns out, however, that this practice is permitted by case law relevant to public procurement. In one of its judgments, the National Appeal Chamber expressly stated that contracting authorities, directly or through controlled legal entities, are permitted to set up new companies in order to award them in-house contracts by both Directive 2014/24/EU and the Public Procurement Law.[29]

In the authors' view, this practice is questionable, given the general aim of limits being set on in-house procurement, and is similar to a 'device designed to conceal the award of public service contracts to in-house companies'.[30]

(b) Interpretation of the term 'reorganisation of activities'

Another method allowing the use of future data is to 'reorganise the activities' of a company. In this case, data on average income over the three years preceding the contract award may not be relevant and the percentage of activity is set using 'credible business projections'. This results from art 67(9) of the Public Procurement Law and art 12(5) of Directive 2014/24/EU.

The problem here is what activity should be regarded as 'reorganisation of activities'. In most cases, municipal companies have historically conducted (and still conduct) normal commercial activity unrelated to public services. To use in-house procurement, measures need to be taken to limit the company's performance of commercial services to under 10%. The National Appeal Chamber takes the view that withdrawal from part of a commercial market and adapting organisational structure to service in-house procurement (usually by transferring some staff to other or otherwise named departments) are deemed reorganisation.[31]

In the authors' opinion, this understanding of the term 'reorganisation of activities' is too broad and may be regarded as deceptive. Such activities do not lead in any way to an actual change of the activity conducted, but are conducted for a different (internal) client. So historical data are still relevant and should still be the basis for calculating activity percentage. In order to use 'credible business projections', changes in the company and the resulting change in income structure should actually take place.

(c) What is a 'credible business projection'?

A different issue is the 'credibility of business projections', which are to demonstrate that the 90% of income requirement is met. Neither Directive 2014/24/EU nor the Public Procurement Law indicates how these projections should be made or their scope. However, there is no doubt that they should give different, expected or possible variants of the situation that could arise in the near future as regards a given service covered by a contract. Interestingly, the provisions do not specify the period the projections are to cover. In the authors' view, it should be equal to the period for which the in-house contract is awarded. In practice, there are projections that are hard to regard as credible, as they do not take into account potential changes that could occur on a given market (eg in the case of waste management – the number of inhabitants and the quantity of waste they produce). We are not talking here about changes that are purely hypothetical, but those for which there are requirements ordering them to be taken into account.

Moreover, these projections are adjusted to a result set beforehand, ie achieving the said 90%. It may therefore be that they give only the final result, not the method used to reach them. In other words, to be able to examine them (also in a review procedure), it is necessary to include in them input data in the expected variants. Otherwise, instead of 'credible business projections', Directive 2014/24/EU and the Public Procurement Law should refer to 'statements' of interested contracting authorities.

(d) Municipal agreements

Another way of avoiding the '90% of income test' is to gain a new market for the activity to be conducted, by concluding a municipal agreement, ie an agreement between two (or more) local authorities under which one of them entrusts its tasks to another for consideration. Thus the entity to which the task is entrusted apparently gains the possibility of using in-house procurement and awarding a contract to its

29 National Appeal Chamber judgment of 21 April 2017, case no. KIO 625/17.

30 Case C-29/04 *EC vs Austria* [2005] ECLI-670 [42].

31 National Appeal Chamber judgment of 7 February 2017, case no. KIO 96/17.

own company. The in-house company gains a 'new activity' that significantly expands its current operations and enables it to meet the 90% test.

However, for a municipal agreement to qualify for exclusion from Directive 2014/24/EU, it should comply with the public-public cooperation requirements referred to in art 12(4) or provisions on the transfer of powers and responsibilities for the performance of public tasks and not provide for remuneration as indicated in art 1(6).

In both cases, guidelines on application thereof arise from CJEU case law. It seems that particularly the following cases: *EC v Germany*[32], *Piepenbrock*[33] and *Remondis*[34] are relevant to the issue at hand. They set out the main elements of this type of public-public agreement, including municipal agreements.

Basically, public-public cooperation means:

(i) establishment or implementation of cooperation between participating contracting authorities with the aim of ensuring that the public services they have to perform are provided with a view to achieving objectives they have in common;
(ii) implementation of the cooperation is governed solely by public interest considerations;
(iii) the participating contracting authorities perform on the open market the activities covered by the cooperation in a limited scope.[35]

Establishment or implementation of cooperation referred to in art 12(4) of Directive 2014/24/EU and art 67(1)(15) of the Public Procurement Law should involve mutual obligations arising from the provision of a given service. In other words, both local authorities should undertake to provide the service in a way that each of them is responsible for some element specified in the agreement. This clearly shows that the Court regards as important the fact that the contract examined in *EC v Germany* provides for specified obligations for the contracting local authorities directly linked with the subject-matter of the public services. As indicated:

> [w]hile the City of Hamburg assumes responsibility for most of the services forming the subject-matter of the contract concluded between it and the four Landkreise concerned, the latter are to make available to Stadtreinigung Hamburg the landfill capacity which they do not use themselves in order to alleviate the lack of landfill capacity of the City of Hamburg. They also agree to take for disposal in their landfill the quantities of slag remaining after incineration that cannot be utilised in proportion to the quantities of waste which they have delivered.[36]

Moreover, under the contract, the parties must, if necessary, assist each other in performing their legal obligation to execute a specified task. As it was the case in *EC v Germany* in some circumstances for example where the facility concerned has temporarily exceeded its capacity, the parties concerned agree to reduce the amount of waste delivered and thus to restrict their right of access to the incineration facility.[37]

This shows that the 'cooperation' cannot only involve one contracting authority assigning the performance of a specified task to another, but actual co-participation in performing a common task through common use of their own resources.

This condition is entirely understandable and justified. It means that the local authorities do not close the market and restrict competition by entering into the alleged 'cooperation', involving in reality one of them being contracted to perform a number of different tasks assigned to other local authorities. This would lead to unrestricted subsequent closing of local markets and abuse of a dominant position by the municipalities participating in the agreement.

This is supported by the judgment in *Piepenbrock*. The CJEU found that the agreement under which, one public entity assigns to another the task of cleaning certain public buildings constitutes a public service contract and is not subject to exclusion as public-public cooperation. The CJEU drew this conclusion taking into account the fact that, the awarding entity reserved the power to supervise the proper execution of that task, while the awardee got financial compensation intended to correspond to the costs incurred in the performance of the task and was authorised to avail of the services of third parties which

32 Case C-480/06 *EC vs Germany* [2009] ECLI-357.

33 Case C-386/11 *Piepenbrock Dienstleistungen GmbH & Co. KG* [2013] ECLI-385.

34 Case C-51/15 *Remondis GmbH & Co. KG Region Nordb* [2016] ECLI-985.

35 10% under the Public Procurement Law; 20% under Directive 2014/24/EU.

36 *EC vs Germany* (n 32) para 41.

37 ibid 42.

might be capable of competing on the market for the accomplishment of that task.[38]

In turn, in order to speak of the 'transfer of powers and responsibilities for the performance of public tasks', it would be necessary to meet the requirements indicated in the CJEU's judgment in *Remondis*, according to which

> ... a transfer of competences concerning the performance of public tasks exists only if it concerns both the responsibilities associated with the transferred competence and the powers that are the corollary thereof, so that the newly competent public authority has decision-making and financial autonomy.[39]

So conclusion of a municipal agreement under which performance of a given task is conferred involving performance of a specified public service in exchange for reimbursement of costs together with a specified administrative fee does not seem to meet the said requirements. Interestingly, and as is evident from the CJEU's judgment in *Piepenbrock*, it is immaterial whether these agreements are deemed public law (administrative) agreements in domestic law. What is important is whether they lead to public-public cooperation, a transfer of powers and responsibilities concerning the performance of public tasks, or simply to the award of a public contract. It seems here that the aim of the EU regulations and therefore of national law too (if the national legislator so decides) was to introduce requirements, fulfilment of which determines the admissibility of this type of construction, but on certain conditions. A strict interpretation of these conditions guarantees that the fair competition principle is observed, while not restricting public entities' freedom to act.

In Poland, municipal agreements are a fairly common way of regulating inter-municipal cooperation. Not all of them meet the above rule, which means that they cannot be the basis for in-house procurement being awarded by a contracting authority allegedly taking over a task for its municipal company.[40]

III. Local Authority Regulations Allowing In-house Procurement

Polish regulations provide for a model for contracting performance of local authority tasks additional to that indicated above. The dependence between the two regulations was not clarified in the Amendment and has led to controversy.

This refers to two Polish local authority acts, ie the Municipal Authorities Act and the Municipal Management Act. According to art 2 of the Municipal Management Act, municipal services can be provided by local authorities eg through commercial companies. As indicated in case law in this case the Public Procurement Law does not apply as:

> [p]erformance by a municipality of municipal tasks in-house through an organisational unit set up for this purpose does not necessarily require conclusion of an agreement. The basis for conferring performance of these tasks is the act itself of the municipality authority establishing the undertaking and defining the scope of its activities. (...) In the relations between the municipality and the organisational unit it has set up there is also room for conclusion of a contract on implementation of public procurement for the municipality. However, provided we are dealing with contracting performance of tasks that are not included in the scope of the tasks for which the municipality set up the unit[41].

In practice, this means that in Poland we are dealing with two parallel models by which local authorities can contract tasks to its own companies:

- based on the Public Procurement Law and;
- based on local authority acts, which do not provide for the requirements laid down in Directive 2014/24/EU.

It seems that, in the second case, contracting authorities (local authorities), authorities supervising them and the courts should assess all the mechanisms leading to conferment of performance of such tasks in light of the guidelines in Directive 2014/24/EU and CJEU case law.

This is not, however, the case.

One of the reasons for this is the lack of legal protection measures available to operators. With the local authority model, applicable provisions

38 *Piepenbrock Dienstleistungen GmbH & Co. KG* (n 33) para 41.

39 *Remondis GmbH & Co. KG Region Nord* (n 34) para 55.

40 National Appeal Chamber judgment of 27 December 2017, case no. KIO 2567/17.

41 Supreme Administrative Court judgment of 11 August 2005, case no. II GSK 105/05.

supported by grounded case law deprive operators of the possibility of examining whether the in-house procurement requirements laid down in EU law are met. Polish courts reject appeals brought by operators without examining them on the merits. As indicated in case law, in light of art 101(1) of the Municipal Authorities Act, an appeal against a municipality's decision to confer performance of tasks to its own company can only be brought in the event of breach of a *legal interest*. So the appellant should demonstrate how its lawfully protected interests or rights were breached, involving the existence of a direct link between the decision to confer tasks and its own, individual and legally guaranteed situation (not the actual situation). An economic operator must therefore relate art 101 of this Act, which is of a general nature, with a specific substantive norm from which the legal interest of the appellant arises and which was violated by the decision in question.[42] Consequently, this means that a private operator wishing to examine whether conferring performance of tasks to a municipal company is legitimate and lawful (and meets the requirements laid down in Directive 2014/24/EU) is deprived of the legal protection measures guaranteed in Directive 89/665/EEC[43], as it has a *factual interest*,[44] but does not – according to grounded Polish case law – have a *legal interest*.

In the authors' view, regardless of whether we are dealing with in-house contracts awarded pursuant to the Public Procurement Law or local authority acts, in both cases the basis on which they are concluded from the perspective of EU law is Directive 2014/24/EU. So any examination of whether they have been concluded correctly is subject to Directive 89/665/EEC. Consequently, where local authorities award in-house procurement pursuant to the Public Procurement Law and where it is based on local authority acts, the economic operator should be able, based on national law, to examine whether decisions taken by a public entity are correct. This right is conferred directly by art 1(3) of Directive 89/665/EEC.

At this point, the judgment handed down by the CJCE in *Stadt Halle* should be cited. The Court found that, having regard to the objectives, scheme and wording of Directive 89/665/EEC, and in order to preserve the effectiveness of that directive, it must be concluded that any act of a contracting authority adopted in relation to a public service contract within the material scope of Directive 2014/24/EU and capable of producing legal effects constitutes a decision amenable to review within the meaning of Article 1(1) of Directive 89/665/EEC, regardless of whether that act is adopted outside a formal award procedure or as part of such a procedure.[45] The Court went on to argue that, on the basis of those considerations, the approach of the City of Halle – according to which Directive 89/665/EEC does not require judicial protection outside a formal award procedure – should not be adopted.

The Court pointed rightly that the effect of that approach would be to make the application of the relevant European rules optional, at the option of every contracting authority, even though that application is mandatory where the conditions of application are satisfied. Such an option could lead to the most serious breach of law in the field of public procurement on the part of a contracting authority. It would substantially reduce the effective and rapid judicial protection aimed at by Directive 89/665/EEC, and would interfere with the objectives pursued by Directive 2014/24/EU, namely the objectives of free movement of services and open and undistorted competition in this field in all the Member States.[46]

The Court went on to indicate that as to the time from which such a possibility of review is open, it must be noted that no such time is formally laid down in Directive 89/665/EEC. However, having regard to that directive's objective of effective and rapid judicial protection, in particular by interlocutory measures, it must be concluded that Article 1(1) of the directive does not authorise Member States to make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage.[47]

In its summary, the Court found that, as to the persons to whom review procedures are available, it

42 Supreme Administrative Court judgment of 24 September 2014, case no. II OSK 1314/14, Supreme Administrative Court judgment of 9 July 2015, case no. II OSK 2974/13.

43 EU OJ of 30 December 1989, L 395/33

44 See art 1(3) of Directive 89/665/EEC: *The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement.*

45 Case C-26/03 *Stadt Halle* [2005] ECLI-5 [34].

46 ibid 36-37.

47 ibid 38.

suffices to state that under Article 1(3) of Directive 89/665/EEC the Member States must ensure that review procedures are available at least to any person having or having had an interest in obtaining a public contract who has been or risks being harmed by an alleged infringement[48]. The formal capacity of tenderer or candidate is not thus required.[49]

The provisions of Directive 89/665/EEC should be implemented into national regulations, though it is not necessary for the implementation to take place in one specific act of law directly regulating a given area, as the substance of the Directive is to set the objective specified therein, a certain standard that should be achieved in national law by the actions of all state authorities, both legislative and judicial. To exercise the rights provided for in art 1(3) of Directive 89/665/EEC, it is enough for an entity to indicate prejudice in obtaining a specific contract, not harm to the entity's legal interest.[50]

The regulations implementing Directive 89/665/EEC into Polish law are laid down in the Public Procurement Law and the legal protection measures provided therein. According to art 179(1) of the Public Procurement Law, the legal protection measures specified in this section may be used by an economic operator, design contest participant and any other entity which has or had an interest in being awarded the contract and which suffered or may suffer damage as a result of the contracting authority breaching this Law.

However, as is clear from case law (National Appeal Chamber and courts), the National Appeal Chamber, as the authority indicated in the Public Procurement Law responsible for review procedures in the public procurement system

> ...is an authority entitled merely to resolve disputes specified in the Public Procurement Law and therefore only in contract award procedures and only against actions or omissions of contracting authorities. Therefore, if a procedure intended to conclude a contract is not a contract award procedure, the Chamber does not have the power to grant legal protection to participants in the procedure or to entities interested in participating in the procedure.[51]

A local authority's decision to confer performance of municipal tasks without a tender pursuant to local authority acts deprives economic operators of the right – guaranteed in art 1(3) of Directive 89/665/EEC – to question, without having to demonstrate a *legal interest,* the actions of municipal authorities.

There is no doubt that such a decision is an act encroaching on the area of public procurement and constitutes an expression of assigning performance of the municipal tasks (services) specified therein. An exception, whose correctness of application is verified on the basis of the entitlements conferred in Directive 89/665/EEC. So any entity that has or had an interest in obtaining a contact and that sustained or could sustain damage as a result of an alleged breach has the right under EU law, ie under art 1(3) of Directive 89/665/EEC, to have a court examine whether a decision taken by a municipality is correct.

Moreover, the dualism described above of the parallel models in which local authorities can confer performance of their tasks to a municipal company means that they make use of one or the other form dependent on whether in a given case they meet the requirements of Directive 2014/24/EU (if they do not, in many cases they use the local authority model) and whether they are concerned that a given conferment will be questioned by operators, which is possible only under the Public Procurement Law (as opposed to the local authority model). This discretionary and interchangeable use of the two models and even their combination in one economic project could lead to direct conferment of contacts where they do not meet the requirements of Directive 2014/24/EU or to a broader interpretation of these requirements.

IV. Competition Law and In-House Procurement

One of the areas that has recently caused a great deal of discussion in Poland, eg in view of the in-house regulations introduced to the Public Procurement Law, is their relation to competition law. Below the

48 ibid 39

49 ibid 40.

50 A. Sołtysińska, *Europejskie prawo zamówień publicznych. Komentarz [European public procurement law. Commentary*], (Wolters Kluwer 2012).

51 National Appeal Chamber judgment of 25 April 2013, case no. KIO 887/13; Regional Court in Warsaw of 21 June 2013, case no. XXIII Ga 925/13.

authors give a brief assessment of the situation from the perspective of EU law, before moving on to an analysis of Polish law.

1. Local Authorities and Competition Law

From the perspective of the competition rules laid down in the Treaty on the Functioning of the European Union (the Treaty),[52] an undertaking is any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. Moreover, any activity consisting in offering goods and services on a given market is an economic activity.[53]

As a rule, for the purpose of competition law, operators are deemed to be private entities. However, this does not exclude public entities and local authorities being subject to these rules even where they perform tasks assigned to them by law. Of course, competition rules will be excluded where public entities operate in the public law area as entities exercising public authority, as an activity constituting exercise of public authority prerogatives is not considered an economic activity, justifying the application of Treaty competition rules.[54]

However, where issues of performing services on a competitive market come into play, there is no reason for public entities to be excluded from these rules. In this case, it is of paramount importance that these tasks can be and are performed by private entities too,[55] especially if it is activity conducted in order to make profits.[56] As noted in legal literature, competition rules may in this area ultimately not apply to situations where the activity in question has always been carried out by public entities.[57]

As is clear from the EFTA Court judgment, from the perspective of competition rules local authorities that enter the market by providing services (even those assigned to it as public tasks) are subject to the general competition rules provided for in the Treaty on the Functioning of the European Union, including art 102. This entity, as the organiser of the municipal services market, may abuse its dominant (monopolistic) position by conducting activity intended to eliminate private operators from this market, as this type of activity is not obvious exercise of public authority.[58]

Moreover, the local authority, as the owner of the company, is regarded as its trading partner as defined in competition rules, and there is nothing to prevent these rules applying to relations within the same group.[59]

The behaviour of such entity eliminating other market players could be justified under art 106(2) of the Treaty.[60] However, in this case the entity should be obliged to demonstrate why organising competitive procedures for services instead of conferring them on a discretional basis pursuant to in-house procurement rules constitutes *an obstruction in fact or in law to the performance of these tasks.*

Practice shows that local authorities do not give this justification, basing their actions solely on the assumption that they are excluded from competition rules and, independently of the state of affairs on a given market, may freely and without limitation use in-house procurement.[61]

However, according to CJEU case law, it is only if anti-competitive conduct is required of undertakings (here: local authorities) by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that art 102 of the TFEU does not apply (or application is limited). In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings (local authorities). Art 102 of the TFEU may apply, however, if it is found that the national legislation leaves open the possibility of

52 Treaty on the Functioning of the European Union (consolidated version OJ EU of 9 May 2008 C 115/47).

53 Case C-185/14 *Easy Pay AD* [2015] ECLI-716 [37].

54 C-107/84 *EC vs Germany* [1985] ECLI-332 [14].

55 Position taken by the European Commission in the EFTA Court judgment E-29/15 *Sorpa bs.* of z 22 September 2016 [46]. <http://www.eftacourt.int/fileadmin/user_upload/Files/Cases/2015/29_15/29_15_Judgment_EN.pdf>.

56 Opinion of Advocate General F G Jacobs in case C-218/00 *Cisal di Battistello Venanzio & C. Sas* [2001] ECLI-448 [38]

57 Opinion of Advocate General F G Jacobs in case C-67/96 [1999] ECLI-28 [314].

58 *Sorpa bs.* (55) para 56.

59 ibid 103.

60 *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.*

61 *Sorpa bs.* (55) para 71.

competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings (local authorities).[62]

Thus, the CJEU held that if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to art 102 of the TFEU,[63] as dominant undertakings (local authorities) have a special responsibility not to allow their conduct to impair genuine undistorted competition on the common market.[64]

2. Polish Law and Practice

In Poland this situation is clearly regulated in law. According to art 9(2)(5) of the Competition and Consumer Protection Act[65] (CCP Act), it is prohibited for one or several undertakings to abuse a dominant position on the relevant market by counteracting the formation of conditions necessary for the emergence or development of competition. In light of case law, it is prohibited for an undertaking having a dominant position to behave in a way that prevents or impedes the activities of competitors on a specific relevant market, by creating barriers to market entry or to the development of entities already operating on the market.[66]

Local authorities, including municipalities, have the status of undertaking, which clearly results from art 4(1)(a) of this Act, to the extent of which they organise the performance of their own tasks. In light of this article, an undertaking is an individual, legal entity or unincorporated legal entity to which the law gives legal capacity, organising or providing services of general interest that are not economic activity as defined in provisions on the freedom of establishment.

General interest tasks include those regarded in art 7(1) of the Municipal Authorities Act as a municipality's own tasks, which may, to put it simply, include services of general economic interest. So when organising municipal services, local authorities are deemed undertakings and thus their behaviour should be examined in the context of the ban on abusing a dominant position.

Under the CCP Act, *organising the provision of services of general interest* is interpreted broadly to cover all types of activity that involve 'creating the possibility of providing' services of general interest[67] or creating 'all types of frameworks for the provision of such services by other undertakings'.[68] So it seems that a decision on whether a service is to be provided as in-house procurement, and therefore by excluding any competition, and also in a contract award procedure, constitutes an expression of 'organising the provision of services of general interest' and as such should be subject to assessment in terms of the indicated provisions.

Moreover, a local authority has a dominant position (generally monopolistic) on the relevant market (market of organising a given service), as it is the only entity responsible for organising services of general interest in its area. This is because this task was assigned to it by the legislator.

When deciding to award a contract to its own company, regardless of whether this is done in an in-house procedure pursuant to the Public Procurement Law or based on local authority acts, the entity undoubtedly has an effect on the structure of the local market (as it indicates the entity which on this market may operate on an exclusive basis), at the same time affecting the conditions for the provision of these services by private entities. This should be allowed, if at all, only if it is in the public interest (eg there are no private entities providing these services; unsatisfactory quality or excessively high prices for the services provided by private entities).

In this context, the Supreme Court judgment passed at the beginning of 2017 is extremely important.[69] It directly concerns the relationship between the freedom of local authorities to choose the forms in which public services are performed and competition rules.

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62 C-280/08 P *Deutsche Telekom AG* [2010] ECLI-603 [80].

63 ibid 82.

64 ibid 83.

65 Competition and Consumer Protection Act of 16 February 2007 (consolidated text: Journal of Laws of 2018, item 798) <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20070500331/U/D20070331Lj.pdf>.

66 Supreme Court judgment of 19 February 2009, case no. III SK 31/08; Supreme Court judgment of 3 March 2010, case no. III SK 37/09; judgment of the Court of Appeal in Warsaw of 19 September 2013, case no. VI ACa 170/13.

67 Anti-Monopoly Court judgment of 26 March 2003, case no. XVII Arna 35/02.

68 Supreme Court judgment of 20 November 2008, case no. III SK 12/08.

69 Supreme Court judgment of 26 January 2017, case no. CSK 252/15.

The Supreme Court explicitly states that a local authority having a dominant position on the municipal services market cannot abuse it. The very fact that provisions on choosing how public tasks are to be performed give it the right to confer performance of these services to its own company is not decisive. It is necessary to analyse the effect of this decision on competition and whether excluding competition will bring benefits for the public interest.

As indicated by the Supreme Court, '[e]xcluding a municipality from competition rules could arise from special provisions but they would have to be indicated'.[70] This is impossible, as in Polish law there are none. It seems that in EU law such provision may be art 106(2) of the TFEU, though, as indicated, its application requires justification.

So the Supreme Court judgment shows that a municipality that intends to confer a contract on its own company on rules relevant for in-house should make a detailed analysis of whether this will constitute abuse of a dominant position as defined in the CCP Act. In other words, whether it will lead – as the Supreme Court says – to the 'stifling of competition'.

V. Conclusion

Directive 2014/24/EU on in-house procurement, though introducing greater legal certainty primarily on the possibility of, and giving rules for its application, still gives rise to serious interpretational doubts.

These regulations mark the limits within which the national legislator can move when implementing this mechanism in its internal regulations. However, a decision on whether to conduct in-house procurement, in what scope, and whether to provide for additional conditions exceeding the minimum conditions laid down in Directive 2014/24/EU for their application are left to the Member States.

The Polish legislator decided to introduce provisions on in-house procurement to the Public Procurement Law. It increased the requirements of transparency for awarding contracts by introducing publication requirements as regards publishing information on the intent to conclude such contracts and decided to increase the threshold of income earned within in-house procurement to 90%. Importantly, in-house procurement was not excluded from the Law, and award of the same is possible in a negotiated procedure without publication (single source). This allows it to be retained in the system, which means that, eg requirements for participating in procedures, including exclusion requirements, social and environmental aspects, and also legal protection measures, apply to them.

The practice of awarding in-house procurement shows that there are still interpretational doubts over particular requirements, the fulfilment of which allows this instrument to be used. This means to a great extent the issue concerning the scope of the activity conducted by the in-house entity and fulfilment of the 90% threshold of income earned (80% according to Directive 2014/24/EU). Domestic experience shows that both contracting authorities and review bodies take a (too) liberal position in this area, as in the case of public-public cooperation. Here too its scope and limits are defined in Directive 2014/24/EU and case law of the CJCE. However, Polish practice shows the potential irregularities in this area arising from lack of sufficiently clear guidelines in EU law or national law implementing it. When analysing the legal status in Poland it should be pointed out that the Public Procurement Law is not the only act of law concerning in-house procurement. Equally important are local authority regulations. Doubts have arisen over whether they retain the requirements laid down in Directive 2014/24/EU and Directive 89/665/EEC as regards the availability of legal protection measures.

In addition to the issue of requirements for applying in-house procurement, the position of local authorities is problematic in light of competition rules. In Poland, the legislator clearly indicated that these entities within the scope of activities aimed at 'organising the provision of services of general interest' are an undertaking. Consequently, all local authority activity in this area, which naturally covers the issue of in-house procurement, should be analysed in the context of possible abuse of a dominant position.

In the authors' view, all the elements indicated require the development of more precise and uniform interpretations and show the growing convergence of public procurement and competition rules.

70 ibid.