Swimming Against the Tide

The Harmonisation of Self-organisation through Article 12 Directive 2014/24/EU

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This contribution delves into the discretionary power of national legislatures to implement additional or altered criteria in light of Article 12 of Directive 2014/24/EU (ie the institutionalised and non-institutionalised exemptions). Sparked by national implementations of this provision, it creates a stomping-ground for broader discussions on self-organisation within EU public procurement law. In light of the Lithuanian Case law that has been brought before the CJEU (Irgita Case, pending), it discusses what type of harmonisation was used for this provision, if these implementations are, thus, valid in light of EU law, and what this means for the influence of EU public procurement law on the organisation of public tasks on the Member State level.

I. Introduction

If one were asked to list the most notable discussions during the reforms of the Directives on public procurement in 2014,[1] most EU public procurement lawyers would struggle to not include the vehement debate in the EU parliament on public-public cooperation. These discussions predominantly considered if the institutionalised and non-institutionalised exemptions that provide leeway for local, regional and national authorities to cooperate outside the scope of EU public procurement law, should be codified, and subsequently, what criteria should be included for these exemptions in the new batch of Directives.[2]

The amendments that followed in the trilogue in response to the EU Commission's proposal for new Directives on public procurement often represented the desire of public authorities to limit their scope.[3] The public procurement rules were, allegedly, too constraining for them to effectively perform services themselves or in cooperation with other authorities in light of their public tasks. As a consequence, some argued in favour of a broader interpretation or an explicit extension of the mentioned exemptions than what could be inferred from the judgments of the

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1 Directive 2014/24 (EU) of the European Parliament and of the Council of 26 February 2014 on public procurement, OJ 2014 L 94/65; 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, OJ 2014 L 94/243; Directive 2014/23 (EU) of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ 2014 L 94/1.

2 Much academic research has been devoted to analysing these discussions. See, for instance, J Wiggen, 'Public Procurement rules and cooperation between public sector entities: the limits of the in-house doctrine under EU procurement law' (2011) Public Procurement Law Review 157; J Wiggen, 'Public procurement law and public-public co-operation: reduced flexibility but greater legal certainty ahead? The Commission's Staff Working Paper on the application of EU public procurement law to relations between contracting authorities and the 2011 proposal for a new Directive' (2012) Public Procurement Law Review 225; K Wauters, *Cooperative Agreements between Public Authorities* (Cambridge, Intersentia, 2015); W A Janssen, *EU Public Procurement Law & Self-organisation — A Nexus of Tensions & Reconciliations* (The Hague, Eleven International 2018).

3 For an initial observation, see E R Manunza, W Berends, 'Social Services of General Interest and the EU Public Procurement Rules' in U Neergaard et al (eds), *Social Services of General Interest in the EU* (The Hague, TMC Asser Press 2013), 347-384. For an empirical analysis, see T Verhulst, 'Inside the Municipal Lobby: Explaining Local Government Influence on the New EU Public Procurement Directives' (2018) 16(1) Lex Localis 193.

Court of Justice of the European Union (CJEU).[4] The Court had introduced and further interpreted them in a long line of Case law since 1999.[5] In the end, the EU legislature was indeed responsive to this bottom-up call from the national level. It increased the applicability of these exemptions to a great extent through their codification in Article 12 Directive 2014/24/EU.

Interestingly, however, the subsequent implementation of the 2014 Directives on public procurement on the national level sparked a contrary development that appears to swim against the tide of strengthening self-organisation.[6] The Finnish, Lithuanian, Polish and Italian legislatures have — in their own way — limited the scope and use of the institutionalized exemption. As a consequence, their national framework appears to broaden — instead of limit — the scope of EU public procurement law.

In this contribution, I aim to consider the validity of these altered implementations in light of EU public procurement law. Building further on this discussion, I attempt to discuss the broader question of whether the Member States have discretion to limit their own right to self-organisation in this context. As a consequence, the structure of this contribution is as follows. Firstly, I will briefly introduce the nexus between the effectiveness of EU public procurement law and the right to self-organisation, which outlines the playing field of this discussion (Section II).[7] Secondly, the institutionalized exemption and its criteria are introduced (Section III). Thirdly, I will use the national implementations of this exemption in Finland and Lithuania as examples to discuss this issue.[8] (Section IV). This section also includes a discussion of the preliminary questions that have been posed by the Lithuanian court to the CJEU on this subject in the *Irgita* Case and the corresponding opinion by Advocate General Hogan.[9] Fourthly, I will argue that these implementations are indeed in line with EU public procurement law (Section V). Finally, I aim to conclude with some thoughts on how these findings affect the relevant nexus (Section VI).

II. EU Public Procurement Law and the Right to Self-organisation

EU public procurement law regulates the purchasing activities of public authorities in their role as contracting authorities on the Member State level. Its main objective since the 1970s has been the creation of an internal market for public procurement. Through the introduction of detailed procedural rules based on the principles of equality, transparency and proportionality, progress has been made to overcome obstacles to trade for economic operators that want to participate in public procurement procedures abroad. As a consequence, the discretionary power of public authorities to determine 'how' to contract out services to third parties has been limited by EU law.[10] An — often underestimated — side effect of the Directives on public procurement has been that other aspects of self-organisation have been influenced by this field of law. In this light, self-organisation concerns 'the discretionary power of a Member State, including its public authorities, to organize itself as it sees fit'.[11] Striving for the establishment of an internal market for public procurement has, amongst other things, also influenced the discretionary power of a public authority to provide a service in cooperation with other public authorities as it sees fit.[12] Despite their seemingly public character, these contractual arrangements are not exempt from a duty to tender, when it

4 M Burgi, F Koch, 'In-House Procurement and Horizontal Cooperation between Public Authorities: An Evaluation of Article 11 of the Commission's proposal for a Public Procurement Directive from a German Perspective' (2012) European Procurement & Public Private Partnership Law Review 86; R Caranta, 'The In-house Providing: The Law as It Stands in the EU' in M Comba and S Treumer (eds), *The In-house providing in European Law* (Copenhagen, DJØF Publishing 2010),13-52.

5 Most notably, Case C-480/06 *Comission v Germany* [2009] ECR I-04747; Case C-107/98 *Teckal* [1999] ECR I-08121; Case C-51/15 *Remondis* [2016] ECLI:EU:C:2016:985; Case C-26/03 *Stadt Halle* [2005] ECR I-00001.

6 Self-organisation as a concept is further discussed in Section II, and more extensively in Janssen (n 2) 79 onwards.

7 A 'nexus' refers to a multi-facetted relationship.

8 I will refer to the Polish and Italian implementations only in the references if relevant. See extensively on the Polish implementation, W Hartung, K Kuzma, 'In-house Procurement — How it is Implemented and Applied in Poland' (2018) European Procurement & Public Private Partnership Law Review, 171-183, and for the Italian implementation see Art. 192(2) of the of the Italian Public Procurement Code, Legislative Decree No 50 of 2016.

9 Case C-285/18 *Irgita* (pending). The Italian implementation, supra (n 8), has also sparked preliminary questions. Case C-89/19 *Rieco* (pending).

10 P Trepte, 'The Contracting Authority as Purchaser and Regulator: Should the Procurement Rules Regulate What to Buy?' in C Tvarnø, G S Ølykke and C Risvig Hansen, *EU Public Procurement: Modernisation, Growth and Innovation* (Copenhagen, DJØF Publishing 2012), 95.

11 Janssen (n 2) 3.

12 Other elements of self-organisation are the discretionary power to allocate responsibilities and competences to an established public authority as it sees fit, the discretionary power of a public authority to decide on the preferred type of service delivery as it sees fit. Janssen (n 2) 3.

concerns a public contract or concession contract awarded by a contracting authority.[13] The framework of EU public procurement law has been responsive to self-organisation, and has in turn accommodated it by limiting its scope entirely or by providing exemptions. Clearly, the subsequent inevitable balance results in either more room for self-organisation on the national level or in a lessening of the effectiveness of EU public procurement law.

Up until the 2014 Directives on public procurement, the nexus between EU public procurement law and self-organisation remained predominantly unregulated. The exclusive right exemption, now included in Article 11 Directive 2014/24/EU, had previously addressed cooperation between public authorities, but other elements of self-organisation remained untouched by the Directives. As a consequence, the CJEU was forced to fill this interpretative crevice in its Case law. Since the 1970s, the Court has dealt with questions relating to the transfer of responsibilities and competences,[14] the make-or-buy decision,[15] self-supply,[16] non-institutionalised cooperation,[17] and institutionalised cooperation.[18] In these cases, the Court has been willing to provide extensive discretion for the Member States to organise themselves. Elsewhere, I have argued that these cases before the Court have shaped the contours of a 'right to self-organisation', which provides a minimum boundary for the influence of EU public procurement law on the national organisation of public tasks. This is mostly sparked by the absence of a clear division of competences on this subject, meaning that one can wonder up until which point the Directives, based on the internal market provisions, no longer provide a sufficient justification for their influence on the performance of these tasks.[19] In 2009, the Treaty of Lisbon has even elevated this right into primary law through Article 4(2) TEU. This Article reads as follows:

> [t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

Within the context of EU public procurement law, I argue that the reference to 'national identities' also relates to the organisational structure of the Member States and how public services are organised on the national level. This is similar to the CJEU's conclusions in *Sayn Wittgenstein*, when it declared that the constitutional structure of a Member State also fell within its remit.[20] In *Remondis*, the Court confirmed this conclusion by stating that:

> Moreover, it should be borne in mind, first of all, that the division of competences within a Member State benefits from the protection conferred by Article 4(2) TEU, according to which the Union must respect national identities, inherent in their fundamental structures, political and constitutional, including local and regional self-government [...].[21]

As a consequence, self-organisation is, therefore, firmly rooted in the European context through Article 4(2) TFEU and provides the starting point of the discussion on its balance with EU public procurement law. Nevertheless, its significance on the primary level is still limited by the Directives on public procurement in terms of 'how' to procure. As such, its influence is mostly visible in ensuring (1) that concepts falling within and outside its scope must be clearly demarked and (2) that exemptions, including the institutionalized exemption, exist to accommodate self-organisation by public authorities. Accordingly, limitations must find a justification in the internal market objective of this field of law, knowing that no other legal basis or competence provides another route for legislative measures by the EU. This also means that the Case law of the CJEU still remains

13 Article 2(1)(5) Directive 2014/24/EU.

14 Joined Cases C-51 and 54/71 *International Fruit Company* [1971] ECR 1107; Joined Cases C-372 to 374/85 *Traen* [1987] ECR 02141; Case C-264/03 *Commission v France* [2005] ECR I-08831, [38]; *Remondis* (n 5) [26].

15 *Stadt Halle* (n 5) [43].

16 *Stadt Halle* (n 5) [43].

17 *Comission v Germany* (n 5); Case C-159/11 *Asl di Lecce* [2012] ECLI:EU:C:2012:817, [32].

18 *Teckal* (n 5); *Stadt Halle* (n 5); Case C-324/07 *Coditel* [2008] ECR I-08457; Case C-340/04 *Carbotermo* [2006] ECR I-04137; Case C-15/13 *Datenlotsen* [2014] ECLI:EU:C:2014:303; Case C-507/12 *Centro/SUCH* [2014] ECLI:EU:C:2014:2007.

19 Article 345 TFEU provides a clear boundary, nonetheless.

20 Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, [92]. Similarly, the Court decided this in light of languages. See for an extensive discussion, L Besselink, 'National and constitutional identity before and after Lisbon' (2012) Utrecht Law Review, 36. Furthermore, 'language' has also been accepted by the Court to constitute a national identity. Case C-391/09 *Runevič-Vardyn and Wardyn* [2011] ECR I-03787, [86].

21 Case C-156/13 *Digibets* [2014] ECLI:EU:C:2014:1756, [34]; *Remondis* (n 5) [41].

relevant in this discussion. As such, the right to self-organisation provides a minimum boundary of the influence of EU public procurement law on the discretion of public authorities to self-organize themselves as they see fit.

III. The Battleground of Harmonisation: The Institutionalised Exemption

When discussing the Finnish and Lithuanian implementations, it is first important to briefly outline the roots and development of the institutionalised exemption. As a personification of the right to self-organisation, the CJEU interpreted this exemption in the milestone Case of *Teckal*.[22] The Court ruled that the award of a public contract could be exempted from EU public procurement law:

> 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.[23]

Whereas many interpretative questions have sparked debate since 1999,[24] this is not true for the conclusion that, if it concerned a legally distinct entity,[25] the fulfilment of two criteria would create a chain of authority that would make 'two become one'.[26] Firstly, a contracting authority must exercise control over a separate legal entity (control-criterion). Secondly, the separate independent entity must perform the essential part of its activities for this controlling contracting authority (activities-criterion).[27] A third criterion was added in *Stadt Halle* when the Court introduced a ban on private capital participation.[28]

Despite the significant amount of Cases that followed *Teckal*,[29] much legal uncertainty remained present in relation to the institutionalised exemption. Whereas an attempt to codify the institutionalised exemption failed in the legislative process leading up to the 2004 Directives on public procurement, this did successfully take place in 2014 when Article 12 was included. This Article predominantly codifies the Case law of the CJEU, thereby creating more legal certainty, but also alters and extends its scope. In relation to the institutionalised exemption, the latter becomes visible, for instance, (1) through the exten-

22 *Teckal* (n 5).

23 *Teckal* (n 5) [50].

24 In addition to these references in note 3, also see K Weltzien, 'Avoiding the procurement rules by awarding contracts to an in-house entity — scope of the procurement directives in the classical sector' (2005) Public Procurement Law Review, 237; F Avarkioti, 'The application of EU public procurement rules to 'in house' arrangements' (2007) Public Procurement Law Review,22-35; T Kaarresalo, 'Procuring in-house: the impact of the EC procurement regime' (2008) Public Procurement Law Review, 242-254; M Comba, 'In-House Providing in Italy: the circulation of a model', in M Comba and S Treumer (eds), *The In-house providing in European Law* (Copenhagen, DØjf Publishing 2010), 95-117. Dutch legal literature has also paid substantial attention to this relationship: ER Manunza, *EG-aanbestedingsrechtelijke problemen bij privatiseringen en bij de bestrijding van corruptie en georganiseerde criminaliteit* [EU public procurement problems related to privatisations and the fight against corruption and organized crime] (Deventer, Kluwer 2001); E H Pijnacker Hordijk, G W van der Bend, J F van Nouhuys, *Aanbestedingsrecht: Handboek van het Europese en het Nederlandse aanbestedingsrecht*, [Public procurement law: Handbook of European and Dutch public procurement law] (The Hague, Sdu 2009); E R Manunza, W Berends, 'Social Services of General Interest and the EU Public Procurement Rules' in U Neergaard et al (eds), *Social Services of General Interest in the EU* (The Hague, TMC Asser Press 2013), 347-384; E Weisbeek, 'Een nieuwe uitzondering op de aanbestedingsplicht? De horizontale in-house opdracht in het arrest Datenlotsen' [A new exemption from the duty to tender? The horizontal in-house contract in the Datenlotsen ruling] (2014) Tijdschrift Aanbestedingsrecht188; WA Janssen, A van Onna, 'De implementatie van de inbestedingsdoctrine in de Nederlandse rechtsorde' [The implementation of the in-house doctrine in the Dutch legal order] (2015) Tijdschrift Aanbestedingsrecht, 134-144; S van Garsse, K Verhoest, '(Samen) doen of laten doen? Over inbesteden, uitbesteden, samenwerken, of afstoten' [Make, buy or ally? About insourcing, outsourcing, cooperation or privatisation] (2016) Vlaams tijdschrift voor overheidsmanagement, 97-109; MJJM Essers, CAM Lombert, *Aanbestedingsrecht voor overheden: Naar een maatschappelijk verantwoord aanbestedingsbeleid* [Public procurement law for public authorities: Towards a societally responsible public procurement policy] (Alphen aan den Rijn, Vakmedianet 2017).

25 Caranta referred to it as 'formally, but not substantially distinct': Caranta (n 4) 16.

26 Manunza referred to a 'gezagsstructuur' in Dutch: Manunza (n 24) 199.

27 I will refer to the activities that are not performed for controlling contracting authority, referred to as 'market activities'.

28 *Stadt Halle* (n 5) [51].

29 See, for instance, *Stadt Halle* (n 5); Case C-231/03 *Coname* [2005] ECR I-07287; Case C-458/03 *Parking Brixen* [2005] ECR I-08585; *Carbotermo* (n 18); Case C-410/04 *ANAV* [2006] ECR I-03303; Case C-295/05 *Tragsa* [2007] ECR I-02999; *Coditel* (n 18) Case C-573/07 *Sea Srl* [2009] ECR I-08127; Case C-196/08 *Acoset* [2009] ECR I-09913; Case C-182/11 *Econord* [2012] ECLI:EU:C:2012:758; *ASL di Lecce* (n 17); Case C-386/11 *Piepenbrock* [2013] ECLI:EU:C:2013:385; *Datenlotsen* (n 18); *Centro/SUCH* (n 18).

sion of the activities criterion from 90% to 80%, (2) by adding the possibility for horizontal and reversed awards to be exempted as well, (3) via a provision that provides a gateway towards accepting certain forms of private capital participation and (4) by allowing control to take place indirectly via holding company.[30] These changes have provided more discretion for public authorities to organise themselves as they see fit, thereby increasing the remit of the right to self-organisation.

IV. Limiting Self-Organisation: A Contrary Movement on the Member State Level

As stated in the introduction, developments have, however, become visible in which Member States are in fact limiting their own right to self-organisation through the implementation of the institutionalised exemption, which are discussed below.

1. The Finnish Limitation of the Activities Criterion

In Finland, the *Laki julkisista hankinnoista ja käyttöoikeussopimuksista* (Finnish Public Procurement Act), which implements the 2014 Directives on public procurement, altered the activities criterion in a three-step method.[31] It did not include the 20% percentage of Directive 2014/24/EU, but limited the market activities to 5% of an entity's turnover with a maximum of €500 000. However, if there is insufficient competition in the market, a percentage of 10% can still be used. Furthermore, a lack of competition can be proven by publishing a transparency notice. If no interested parties respond to this notice within fourteen days, this alternative percentage can be applied for three years. Furthermore, the 20% rule is only be able if the total turnover for market activities constitutes a maximum of €100 000 over three years.

This Finnish approach finds its roots in the idea of 'competitive neutrality'. As such, these limitations are linked to Finnish Competition Act.[32] As a consequence, cooperations should not — or as little as possible — operate on the market, because their operations may distort competition due to the public status and the related benefits of these service providers. The effects of this altered implementation will affect all contracting authorities, but it appears that larger authorities will be limited more substantially. Their operations are unlikely to fall under the €500 000 or €100 000 thresholds. It appears that no legal proceedings have yet been initiated against this implementation. Hence, the Finnish limitation is vested in an alteration of Article 12's criteria, namely the activities-criterion.

2. The Lithuanian General Limitation of the Institutionalised Exemption

In Lithuania, the legislature implemented Article 12 Directive 2014/24/EU in Article 10 of the Law on Public Procurement (as applicable on 1 July 2017). This implementation provides different limitations, such as the choice to not allow for any forms of direct capital participation, despite the new possibility granted in Article 12.[33] Two general limitation have additionally been included in Article 10(2), which states that

> an in-house transaction may be concluded only in an exceptional case, when the conditions set out in paragraph 1 of this article are satisfied and the continuity, good quality and availability of services cannot be ensured if they are purchased through public procurement procedures.

and Article 10(5), which states that

> Public undertakings, public limited liability companies, and private limited liability companies in which State-owned shares grant more than half of the votes at the general meeting of shareholders may not conclude any in-house transactions.

Furthermore, Article 4 of the *Lietuvos Respublikos konkurencijos įstatymas* (Lithuanian Competition Act) provides that,

30 See more extensively Wiggen 2011 and 2012 (n 2); W A Janssen, 'The Institutionalised and Non-Institutionalised Exemptions from EU Public Procurement Law: Towards a more Coherent Approach?' (2014) Utrecht Law Review 17; Wauters (n 2) 2015.

31 Article 15 and 16 Finnish Government's legislative proposal HE 108/2016, 105-106.

32 Competition Act (No 948/2011).

33 Article 10(1)(3) of the Law on Public Procurement (as applicable on 1 July 2017) 'there is no direct private capital participation in the controlled contracting authority.' See in comparison, Article 12(1)(C) Directive 2014/24/EU (n 1).

> when carrying out the assigned tasks relating to the regulation of economic activities within the Republic of Lithuania, entities of public administration must ensure freedom of fair competition.[34]

Also, the Competition Act continues with

> entities of public administration shall be prohibited from adopting legal acts or other decisions which grant privileges to, or discriminate against, any individual economic entities or their groups and which give rise to, or may give rise to, differences in the conditions of competition for economic entities competing in a relevant market, except where the difference in the conditions of competition cannot be avoided when complying with the requirements of the laws of the Republic of Lithuania.[35]

As a consequence, both the Lithuanian Law on Public Procurement and Competition Act limit the application of the institutionalised exemption to a great extent. Hence, the limitation of this implementation in fact derives from the additional criteria inside and outside the remit of public procurement law.

V. Assessing Article 12: What Type of Harmonisation?

Building upon the previous paragraphs, it has become clear that the crux of the discussion lies in the question what type of harmonisation has been used in Article 12 Directive 2014/24/EU. The nexus between EU public procurement law and self-organisation, thus, follows the path of a classic EU law question. As a consequence, the objective of the Directives on public procurement, system of the applicable framework, and the wording of Article 12 can be relevant to conclude if it concerns minimum or total harmonisation.[36] For this purpose, it is first necessary to make a distinction between two types of cases at hand: (1) the Lithuanian example in which the application of Article 12 is limited generally by other criteria or provisions (additional criteria) and (2) the Finnish example in which the criteria of Article 12 are altered in the national implementation (altered criteria).

1. Category 1: Additional Criteria

The first category concerns additional criteria that have been added on top of the criteria of Article 12 Directive 2014/24/EU.[37] To consider the Lithuanian implementation, the most relevant source is the *Irgita* Case that was initiated by preliminary question by the *Lietuvos Aukščiausiasis Teismas* (Lithuanian Supreme Court), which is still to be decided upon by the CJEU. In this case, the municipality of Kaunus awarded a contract for the maintenance and management of plantations, forests and forest parks in the region of this municipality following a public procurement procedure to Irgita in the beginning of 2014. In March 2016, however, the municipality decided to directly award a contract for similar services to Kauno švare in which it held 100% of the shares. Consequently, Irgita challenged the validity of this award in light of the competition provision, whilst acknowledging that the criteria of the institutionalised exemption were indeed fulfilled.[38] Subsequently, the Lithuanian Supreme Court posed questions to the CJEU, which amongst other things related to the validity of the additional requirements posed by the Lithuanian Competition Act.[39]

a. The Advocate General's Opinion in Irgita

On 7 May 2019, the Advocate General Hogan concluded in the *Irgita* Case that the competitive requirements are allowed and that, thus, Article 12 Directive

34 Opinion of AG Hogan, *Irgita* (n 9) [10].

35 Law of 23 March 1999, No VIII-1099.

36 Case 148/78 *Ratti* [1979] ECR 1629; Case C-11/92 *Gallaher* [1993] ECR I-35545.

37 In addition to the Lithuanian implementation, the discussion in this paragraph is also relevant for the Polish and Italian implementations. The Polish legislature has, for instance, introduced 'additional reporting requirements' for in-house contracts. Hartung (n 7) 2018, 173. The Italian legislature has introduced an additional requirement that these contracts can only be concluded 'when there is clear evidence of failure in the relevant market'. See the reference for preliminary ruling mentioned in (n 9).

38 The application of the institutionalised exemption seems to be limited more extensively in Section 5 of Article 10, which adds that 'public undertakings, public limited liability companies, and private limited liability companies in which State-owned shares grant more than half of the votes at the general meeting of shareholders may not conclude any in-house transactions'.

39 I will not address the questions related to the *ratio temporis* of Directive 2004/18/EC and 2014/24/EU. See Opinion of AG Hogan, *Irgita* (n 9) [29-34].

2014/24/EU is not 'exhaustive'.[40] After considering that these 'in-house transactions' fall outside the scope of public procurement law, he discusses the degree of harmonisation that is allegedly applied in Article 12 Directive 2014/24/EU in general. He recalls in his line of reasoning that full harmonisation would prevent further measures, because it would undermine the introduced harmonisation.[41] The arguments in favour of minimum harmonisation of the entire Article are, according to the Advocate General, found in the absence of reasons in favour of full harmonisation to which the Directive itself does not refer. Firstly, recital 4 Directive 2014/24/EU only aims to harmonise the acquisition of works, supplies and services and not more generally 'the disbursement of public funds'.[42] Secondly, it is clear that the scope of Article 12 may not be expanded, but

> the purpose of that directive is not compromised if Member States are allowed to apply more stringent rules that further limit the right to enter into in-house transactions.[43]

Furthermore, full harmonisation would mean that

> a contracting authority must enter into an in-house transaction (or carry out the service at issue by its own means) in cases in which the requirements of Article 12(1) can be fulfilled.[44]

According to the Advocate General, this is supported by the fact that Article 12 merely provides an exemption. Furthermore, Article 1(4) of this Directive also refers to the 'freedom' of contracting authorities to define and organize services of general economic interest, meaning that

> Member States are also free to provide for the application of public procurement procedures in cases in which EU law does not prohibit the use by a public authority of its own resources or indeed the conclusion of an in-house transaction.[45]

According to the Advocate General, these limitations must, as always, still comply with the fundamental rules of the TFEU.[46] Finally, the referring court had questioned if such an implementation can only occur by means of specific and clear positive provisions of the law on public procurement, rather than by Case law on the basis of provisions of competition law. The Advocate General considers in this light that the Member States are also free to decide how to implement additional requirements.[47] Hence, the Advocate General concludes that Article 12 Directive 2014/24/EU must be seen as minimum harmonization, thereby allowing the additional limitations of the institutionalized exemption vested, for instance, in the Lithuanian Competition Act and the Law on Public Procurement.

b. Preliminary Conclusion: Minimum Harmonization

In general, I concur with the conclusion of the Advocate General in the *Irgita* Case.[48] The main argument in favour of minimum harmonisation is that limiting the possibility of applying this exemption in fact increases the effectiveness of EU public procurement law and its objective to create an internal market for public procurement. As a consequence, more public contracts and concession contracts potentially fall under a duty to tender, because the institutionalised exemption can, for instance, only be applied if its use does not adversely affect competition. This is in line with the various Cases of the CJEU on minimum harmonisation, which have centred around the question if the conditions imposed in fact aid the objective of the Directive or limit it.[49]

More emphasis of the Advocate General's reasoning could have been placed, however, on the discretionary power of the Member States to depict the outcome of the make-or-buy decision, irrespective of the type of harmonisation in public procurement. In *Stadt Halle*, the CJEU recognised already that

> A public authority which is a contracting authority has the possibility of performing the tasks con-

40 Opinion of AG Hogan, *Irgita* (n 9) [35] onwards.

41 ibid [43].

42 ibid [44].

43 ibid [45].

44 ibid [46].

45 ibid [47-48].

46 ibid [51-54].

47 ibid [55-58].

48 See for this conclusion Janssen (n 2) 159.

49 See generally P J Slot, 'Harmonisation' (1996) European Law Review, 378; *Gallaher* (n 36); Case C-203/96 *Dusseldorp* [1998] ECR I-04075; Case C-169/89 *Gourmetterie van den Burg* [1990] ECR I-02143.

> ferred 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.[50]

As such, it confirmed that EU public procurement law has no say over the decision to perform a service through self-supply, cooperation or by contracting an economic operator following a public procurement procedure. Directive 2014/24/EU also confirms this in a crystal-clear position on this aspect of self-organisation:

> the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.[51]

Knowing that contracting authorities have full discretion under EU public procurement law to choose for any type of service provision, it is unclear why the Advocate General in the *Irgita* Case takes the position that full harmonization is ultimately undesirable, because it would limit this discretion. I argue contrarily that full harmonization would not *oblige* a contracting authority to award a contract directly based on the institutionalized exemption if its criteria are fulfilled, but simply result in the conclusion that the criteria of this exemption cannot be altered through a national implementation.[52] As generally agreed upon, total harmonisation entirely limits the discretion of the legislatures of the Member States to implement changes.[53] As such, the system of the Directives limits the introduction of additional exemptions. Contrarily, it does not, however, limit the discretion of contracting authorities to use the exemptions that are included. A reasoning based on the objective of the Directives on public procurement further supports this analysis. The internal market objective would be hampered if full harmonisation of an exemption would lead to an obligatory application of this exemption.

Finally, based on the above conclusion in Section II, I argue that the right to self-organisation at least implies that, should there be discussions about the type of harmonisation — now and in the future –, that it is clear that the existence of this right should temper quick conclusions that argue in favour of total harmonisation. Such harmonisation would leave no discretion for the Member States to decide on regulating self-organisation themselves within the context of the Directives.

All in all, I argue that national limitations, such as those in the *Irgita* Case, are indeed possible in light of the internal market objective of Directive 2014/24/EU. Needless to say, these conditions must also be in line with the TFEU, but this is seemingly not problematic, given the nature of these competitive limitations that only apply to national contracting authorities.

2. Category 2: Altered Criteria

The second category concerns an implantation that alters the criteria of Article 12 Directive 2014/24/EU.[54] The Finnish example is not the first time that the activities-criterion has been subjected to substantial debate over the last 17 years. For example, early on the question arose how *Teckal*'s 'essential' had to be interpreted and if it should be assessed quantitatively or qualitatively.[55] Also, the question was often raised — if a percentage of activities could be established — how this percentage should be calculated.[56] Knowing the focus on the activities-criterion, I will introduce the first question in the following, which has particularly focussed on quantifying how much

50 *Stadt Halle* (n 5) [48].

51 Recital 31 Directive 2014/24/EU.

52 *Ratti* (n 36).

53 See Slot (n 49) 382.

54 In addition to the Finnish implementation, the discussion in this paragraph is also relevant for the Polish implementation. The Polish legislature has implemented 90% instead of 80% for the activities-criterion. Hartung (n 7) 2018, 173.

55 It appears that a quantitative assessment based on what really occurs in practice instead of in the statutes must be the starting point. *Carbotermo* (n 18) [64]; Opinion of AG Kokott, *Parking Brixen* (n 29) [79-91]; Opinion of AG Stix Hackl, *Stadt Halle* (n 18) [83]; Wauters (n 2) 145; Janssen (n 2) 154.

56 Article 12(5) Directive 2014/24/EU clarifies that the activities-criterion needs to be based on the average total turnover, or in the absence of such data, an appropriate alternative activity-based measure. In *Carbotermo* (n 17), the Court clarified that the activities, which must be taken into account, are those activities relating to the awarded contract. *Carbotermo* (n 18) [65]. In *Undis,* the Court clarified that third parties are parties that do not exercise any control over the formally independent entity. [..] In addition, it clarified that it is not relevant who is on the receiving side of these services, who pays for them or in what territory these activities take place. *Carbotermo* (n 18), [66-68].

room there must be for market activities without falling outside the scope of this exemption. Over the years, various percentages have been suggested to constitute 'essential' in the CJEU's Case law and literature.[57] The absence of market activities in *Coditel* left no room for debate.[58] Other Cases, such as *Stadt Halle,*[59] *Datenlotsen*[60] and *Parking Brixen*, provided more substance as the involved cooperation was indeed active on the market, respectively 39,75%, 5,14%, or as argued for by the AG in *Parking Brixen*, 20%.[61] The Court was, however, the clearest in *Tragsa* when it concluded that 10% of market activities would fulfil the activities criterion.[62]

In the lead up to the 2014 Directives on public procurement, the EU Commission's proposal followed *Tragsa* and included a percentage of 90%, meaning that 10% of market activities were allowed. Subsequently, a plethora of percentages followed in the legislative process.[63] For instance, it was even suggested to provide a separate category for waste-incineration plants, which was not adopted either in the end or to include a much stricter approach leaving no room for market performance.[64] Quite contrarily, ultimately, the amount of market activities was doubled and allowed for 20% of market activities in Article 12(1)(b) Directive 2014/24/EU. All in all, the choice for a specific percentage must be commended, because it contributes to legal certainty and settles the debate on the activities-criterion's scope.[65] As such, it strengthened the right to self-organisation.

a. Preliminary Conclusion: Minimum Harmonization

Similar to category 1 discussed above, I argue that the activities-criterion also concerns minimum harmonisation. For this, it is important to consider the individual criteria in addition to the objective of the involved Directive 2014/24/EU. A general statement on Article 12 Directive 2014/24/EU is not possible, when it concerns an alteration of such a criterion. Indeed, the arguments posed in Section V.1.b. on the objective of this Directive and that a limited implementation aids the coming about of the internal market, and that the right to self-organisation poses an extra hurdle for the conclusion of total harmonisation, are similarly valid in this case. Furthermore, the wording and the system of this Directive provides additional arguments:

> more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority

Based on this phrase, I argue that the words 'more than' also indicate the type of harmonisation. It merits the conclusion that this specific aspect of Article 12 indeed concerns minimum harmonisation.[66] This conclusion is supported by the structure of the institutionalised exemption, which aims to establish a

57 It included, for example, 'above 50%', 'to a predominant extent', 'almost exclusive' and 'exclusive'. Opinion of AG Kokott, *Parking Brixen* (n 29) [84].

58 *Coditel* (n 18) [27].

59 *Stadt Halle* (n 5) [19].

60 *Datenlotsen* (n 18)[11].

61 This built upon the idea that Article 13 of Directive 93/38 could be read analogeously to the Directive 93/36 Opinion of AG Kokott, *Parking Brixen* (n 29) [90-93]. This Court rejected this conclusion. *Carbotermo* (n 18) [55]. AG Mengozzi also argued against it: 'In effect, an activity which accounts for a fifth of an entity's total activity cannot, as far as I am concerned, be defined, purely in quantitative terms, as a marginal activity.' Opinion of AG Mengozzi, *Centro/SUCH* (n 18) [62].

62 *Tragsa* (n 28).

63 Most importantly, it is commendable that suggestions to refer to 'essential part', 'the bulk' or 'most of the activities' instead of a percentage have been rejected. Amendment no 467 Committee on the Internal Market and Consumer Protection, *Draft report on the proposal for a directive of the European Parliament and of the Council on public procurement (Amendments 167 — 468)*, 2011/0438(COD); Amendment no 20-22 Committee on the Environment, Public Health and Food Safety, *Opinion of the Committee on the Environment, Public Health and Food Safety for the Committee on the Internal Market and Consumer Protection on the proposal for a directive of the European Parliament and of the Council on public procurement*, 2011/0438(COD).

64 The 100% was proposed in the following: Amendment no 31 Committee on the Internal Market and Consumer Protection, *Draft report on the proposal for a directive of the European Parliament and of the Council on public procurement,* 2011/0438(COD). It explained: 'leaving the possibility for legal persons to carry out 10% of their activity on the open market opens the way to serious distortions of competition and damages to SMEs, especially at the local level'. Amendment no 474 Committee on the Internal Market and Consumer Protection, *Draft report on the proposal for a directive of the European Parliament and of the Council on public procurement (Amendments 469 — 763)*, 2011/0439(COD).

65 Wiggen (n 2) 227; Wauters (n 2) 85.

66 See for this conclusion Janssen (n 2) 159.

chain of authority. As mentioned above, the purpose is, thus, to achieve an intimate relationship through concrete and effective control mechanisms (the control-criterion) and through its activities (activities-criterion), which resembles the relationship between a contracting authority and its own department. The activities-criterion, then, ensures that a minimum level of activities is provided by the controlled legal person for the controlling contracting authority or contracting authorities. This must be at least 80%, but 'more than' indicates that higher percentages also fulfil this requirement. As a consequence, this criterion's purpose is not to provide room for, or limit, market activities, but to define the essential part of activities.[67] This reasoning aligns with the *Gallaher* Case.[68] The Tobacco Labelling Directive 89/622/EEC stated that 'at least 4%' of a cigarette package's cover should consist of health-warnings related to smoking. The CJEU ruled that this was not at the discretion of the cigarette producers, but that it also concerned minimum harmonisation.[69] The British implementation of 6% was, thus, allowed under EU law.[70] In the Finnish scenario, it means that an implemented percentage that is lower than 20% aids the coming about of the internal market and must, therefore, be deemed valid in light of EU law.

Alternatively, it could also be argued that, as the EU Commission puts it, that this criterion ensures that EU public procurement law remains applicable if the controlled entity is in competition with other undertakings in the market.[71] Advocate General Léger described that the purpose of this criterion is that these activities are limited in the extent to which the entity can use its advantages of being a non-competitively selected service provider of a contracting authority whilst competing in the market.[72] As such, one could say, as is common with exemptions to EU law, that this criterion must be interpreted strictly, given the potential distortive effects of these market activities on competition. Interestingly, this is not the same as the main objective of EU public procurement law, even though debate has taken place if 'competition' as such can also be seen as one of its main exemptions. Even though it does not concern a mainstream position, it would allegedly extend the possibility to alter criteria for which one would need to argue that the objectives of this field of law are broader than merely the internal market.[73]

Finally, the *Gallaher* Case also clarifies that competitive concerns of cooperation do not undermine the legality of the Finnish implementation.[74] Arguably, the competitive position of these cooperations could be lessened due to the limitation of — more profitable — market activities. The CJEU is clear on this front. It has clarified that reserved discrimination is accepted under within EU law. In the *Gallaher* Case, the Tobacco Labelling Directive prohibited a ban or restriction of the sale of products that complied with the Directive. Consequently, foreign products that complied with the 4% would need to be allowed on the British market, whereas national producers had to comply with the 6% in national implementation. As Slot puts it 'minimum harmonisation may lead to unequal conditions of competition or, in other words, to reverse discrimination'.[75] Similarly to the Finnish case, it would mean that national cooperations can legally be placed in a disadvantageous position under EU law.

VI. Concluding Thoughts on Self-Organisation

In this contribution, I have delved into a topic that involves the nexus between the right to self-organisation and the effectiveness of the Directives on pub-

67 Interestingly, the non-institutionalised exemption does refer explicitly to the market activities: 'the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation'. Similarly, though, reference is made to 'less than'. One could argue that in relation to this exemption there is no need to establish a chain of authority, and one must indeed look in the direction of market distortion instead to find a justification for an alteration.

68 *Gallaher* (n 36) [16-21].

69 T van de Brink, 'Refining the Division of Competences in the EU: National Discretion in EU Legislation' in S Garben, I Govaere (eds), *The Division of Competences between the EU and the Member States* (Oxford, Hart Publishing 2017), 257.

70 See similarly a case in which an EU Directive ensured that the surface of a chicken cage would be at least 450 cm^2, whereas the German implementation of 550 cm^2 was also deemed in line with EU law. Article 1 of this Directive provided that 'this directive lays down the minimum standards for the protection of laying hens kept in battery cages'. Case C-128/94 *Hönig* [1995] ECR I-03389.

71 European Commission, 'Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation')', 4 October 2011, SEC(2011) 1169 final, 11.

72 Opinion of AG Léger in Case C-94/99 *ARGE* [2000] ECLI:EU:C:2000:330, [60-62]; *Carbotermo* (n 17) [60].

73 A Sánchez-Graells, *Public Procurement and the EU Competition Rules* (Oxford, Hart Publishing 2015).

74 *Gallaher* (n 36) [22]; *Hönig* (n 70) [17].

75 Slot (n 49) 385.

lic procurement. As a consequence, it discussed the type of harmonisation of Article 12 Directive 2014/24/EU. This discussion was sparked by alternative limitations of the right to self-organisation on the national level, more specifically the institutionalised exemption. The Finnish and the Lithuanian implementations of this provision have been discussed. As a consequence, two categories can be identified, namely that of additional criteria and that of altered criteria.

The analysis of the contribution has shown that both scenarios merit the conclusion that this concerns minimum harmonisation. It allows these Member States to swim against the tide of self-organisation. This is interesting, because the debate in recent years has predominantly focussed on the expansion of the institutionalised exemption. I have based these findings on the general argument that both categories aid the internal market objective of the 2014 Directives on public procurement. More specifically, for the altered criteria category, I considered that a more specific reading of the wording of the activities-criterion and the system of the institutionalised exemption also supports this conclusion. Furthermore, should there be any doubt, I argue that the existence of the right to self-organisation at least provides a higher threshold to conclude in favour of total harmonisation. Finally, the competitive disadvantage that cooperations might experience due to stricter implementations cannot be seen as a valid argument to counter this implementation. Hence, the Member States are allowed to introduce criteria relating to competitive objectives, thereby ensuring that the Directives on public procurement do not extend beyond the reach of their legal basis in the free movement Articles.

I conclude with two final thoughts. Firstly, it is clear that both the Finnish and Lithuanian legal frameworks of competition law and public procurement law regulate institutionalised cooperation. As a consequence, the general legal framework includes the internal market objective and other competitive objectives. Therefore, it is of interest to note that the CJEU's approach towards the activities-criterion (90%) would have prevented potential competitive issues falling under competition law, and that the EU legislature's approach (80%) has opened the door for more uncompetitive behaviour by contracting authorities. Consequentially, EU public procurement law is less effective in preventing these competitive issues on the market, making it interesting to consider an integrated approach for future reforms. Secondly, the above conclusion that these national limitations of the right to self-organisation, vested in Article 4(2) TEU, are indeed valid within the context of EU law, enforces the idea that this right shelters the national organisation of public tasks by providing a minimum boundary of the influence of EU public procurement law. It confirms that the regulatory power to legislate, in addition to, or, an alteration of the Directives, is firmly in the hands of the Member States, should they wish to limit this right themselves.