https://doi.org/10.12697/JI.2024.33.11

Pilleriin Peedosk

Head of Procurement, Elering AS
Doctoral student, University of Tartu

Life after *Irgita* (C-285/18) – More Questions Than Answers[*1]

Abstract. The principles governing public procurement – equal treatment, non-discrimination, transparency, proportionality, etc. – serve upholding the fair use of public resources and ensuring compliance with EU-level law. Sometimes, the open market is not the most efficient option, particularly when the public sector possesses the necessary resources. To address this, the EU's procurement directives permit deviations from established public procurement rules for in-house transactions or horizontal co-operation within the public sector. These involve determining whether to utilise internal resources or external ones, however, recent European Court of Justice cases have revealed uncertainties with regard to the process of this 'make or buy?' decision. While Member States retain freedom in evaluating how to meet their needs, that freedom is not unlimited and must be balanced with adherence to general principles of EU law. The article addresses the doubts that persist notwithstanding the Court's analysis, most notably in *Irgita* (C-285/18). In light of a clear need for clarity related to the addressees of the key rule, its applicability, and the impact of general principles of EU law on the make-or-buy decision, the discussion tackles these matters as pressing questions.

Keywords: public procurement, the make-or-buy decision, in-house transaction, horizontal co-operation, EU public procurement law

Introduction

The rules of public procurement are rooted in the principles of equal treatment, non-discrimination, transparency, and proportionality, to guarantee use of public resources that is fair, transparent, and efficient and to ensure compliance with the principles of the Treaty on the Functioning of the European Union (TFEU).[*2] Public contracts with a value above a set threshold must be concluded in line with co-ordinated procurement-procedure rules, for ensuring that those principles receive practical effect and that public procurement is open to competition.[*3]

1 This work was supported by the Estonian Research Council (under grant PRG1449).

2 These rules are set forth in several instruments: Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance [2014] OJ L94/1; 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 [2014] OJ L94/65; 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 and repealing Directive 2004/17/EC [2014] OJ L94/243.. These are referenced jointly as the procurement directives.

3 Directive 2014/24/EU, art 1.

Procuring goods, services, or construction works on the open market may not always be the most efficient way to use public resources, especially when the public sector already has what is needed.[*4] It is unreasonable to procure from the open market merely on grounds of a generic notion that the open market should generally be preferred. This is why the EU's current procurement directives allow deviation from the established procurement rules when the contracting authorities wish to provide or organise services themselves through entities in the public sector under the control of the contracting authority (via in-house transactions or vertical co-operation) or collaborate for these within the public sector (in horizontal co-operation).[*5]

The decision as to whether the contracting authorities already have the resources themselves, all of the necessary resources are otherwise available in the public-sector realm, or something still needs to be sourced from the market is made at a stage prior to public procurement. This decision has been called a 'make or buy?' decision.[*6] Since it represents the contracting authority's choice of externalising vs. internalising aspects of its activities,[*7] the 'make' in 'make or buy?' encompasses both an in-house transaction and horizontal co-operation undertaken by contracting authorities.[*8] It should be noted that the definition employed in this paper for 'make' encompasses only the two exceptional models of public–public co-operation – vertical and horizontal – that have been excluded from the scope of the procurement directives. The so-called purest form of 'make', wherein the contracting authority has, for example, engaged the required personnel directly and provides the services for itself, is not included since it is beyond doubt that a contracting authority in these conditions need not turn to the market and has no obligation to adhere to the corresponding EU law.[*9] Services for which the contracting authority has its own staff and things that said contracting authority already owns are not covered by public procurement rules in any case.[*10]

While incorporating the option to choose 'make' was much anticipated by contracting authorities and Member States alike, in practice the make-or-buy decision still is accompanied by confusion.[*11] As Member States have begun to restrict and modify the articulations of whether and when contracting authorities are allowed to opt for 'make', the question of whether individual EU members even are allowed to impose such additional conditions has recently become the subject of several European Court of Justice (ECJ) cases,[*12] with the first to receive the Court's attention being *Irgita*.[*13]

4 William A Janssen, 'Swimming against the Tide: The Harmonisation of Self-Organisation through Article 12 Directive 2014/24/EU' (2019) 14 Eur Procurement & Pub Private Partnership L Rev 145, 145; Carri Ginter and Ivo Pilving, '§ 12. Sisetehing ja hankijatevaheline koostöö' [In-House Transactions and Co-operation between Contracting Authorities]' in Mari Ann Simovart and Mart Parind (eds), *Riigihangete seadus: kommenteeritud väljaanne* [Public Procurement Act: Commented Edition] (Juura 2019) 171–72.

5 Directive 2014/24/EU, arts 5, 12; Directive 2014/23/EU,arts 5, 13; Directive 2014/25, arts 7, 28–30; Kristian Pedersen and Erik Olsson, 'Commission v Germany – a New Approach to In-House Providing?' (2010) 1 PPLR 33, 34, 39; Case C-26/03 *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] EU:C:2005:5, paras 48–49; Case C-107/9*8 Teckal Srl v Comune di Viano, Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* [1999] EU:C:1999:562, paras 50–51.

6 William A Janssen, *EU Public Procurement Law & Self-Organisation: A Nexus of Tensions & Reconciliations* (Eleven International 2018) 10, 15; Mario Sõrm, Carri Ginter, and Mari Ann Simovart, 'Transparency Obligations for Make or Buy Decisions' [2023] (1) PPLR 1, 2.

7 Stephanie Hötte, 'Ode to Liberty? – The Determination of Services of General (Economic) Interest and the "Make-or-buy" decision' (2020) 45 European Law Review 487, 491.

8 Sõrm, Ginter, and Simovart (n 6) 12–14; Hötte (n 7) 493–94.

9 Sõrm, Ginter, and Simovart (n 6) 12.

10 Directive 2014/24/EU, art 1(2).

11 Janssen (n 6) 251–92; Hötte (n 7) 506; William A Janssen and Erik Olsson, 'On Competition, Free Movement and Procurement: Irgita's Public Cooperation Conundrum' (2020) 15 Eur Procurement & Pub Private Partnership L Rev 2, 2. – DOI: https://doi.org/10.21552/epppl/2020/1/4.

12 Case C-285/18 *Kauno miesto savivaldybė, Kauno miesto savivaldybės administracija v UAB 'Irgita', UAB 'Kauno švara'* [2019] EU:C:2019:829; Case C-11/19 *Azienda ULSS n 6 Euganea v Pia Opera Croce Verde Padova* [2020] EU:C:2020:88; Joined Cases C-89/19 to C-91/19 *Rieco SpA v Comune di Lanciano, Ecolan SpA (C-89/19), Comune di Ortona, Ecolan SpA (C-90/19), Comune di San Vito Chietino, Ecolan SpA (C-91/19)* [2020] EU:C:2020:87; Case C-835/19 *Autostrada Torino Ivrea Valle D'Aosta – Ativa SpA v Presidenza del Consiglio dei Ministri, Ministero delle Infrastrutture e dei Trasporti, Ministero dell'Economia e delle Finanze, Autorità di regolazione dei trasporti* [2020] EU:C:2020:970; Joined Cases C-383/21 and C-384/21 *Sambre & Biesme SCRL (C-383/21), Commune de Farciennes (C-384/21) v Société wallonne du logement (SWL)* [2022] EU:C:2022:1022; Case C-796/18 *Informatikgesellschaft für Software-Entwicklung (ISE) mbH vs Stadt Köln* [2020] EU:C:2020:395.

13 *Irgita* (ibid), paras 29.2–29.3.

The Court has explained in its case law that, although the nature of the exception itself cannot be changed by national legislation,[*14] the Member States are free to choose how they meet their own needs (per the principle of free administration). However, this freedom is not unlimited – 'due regard to the fundamental rules of the TFEU, in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency' should be exercised.[*15] Over the history of its decisions, the Court has employed a wide range of wordings when speaking of such principles and rules of EU law[*16], reflecting a variety-rich landscape; accordingly, the term 'general principles of EU law' is used in this article for the sake of clarity. Also, though there are many, quite different central principles of EU law to which ECJ case law refers (the protection of fundamental rights,[*17] direct effect,[*18] freedom to conduct business,[*19] etc.), the term as employed in this paper is confined primarily to the principles of equal treatment, non-discrimination, mutual recognition, proportionality, and transparency, all of which the ECJ cites by name in relevant case law.

Regrettably, the Court's analysis does not afford enough clarity. Problems have arisen in connection with how to understand and implement the ECJ's instructions, because many questions that have needed resolution were not appropriately addressed.[*20] This article proposes answers to the some of the most pressing questions that have remained:

(i) who the addressees of the Court's rule[*21] that the general principles of EU law shall be followed in the context of make-or-buy decisions are;
(ii) when the obligation to follow those general principles of EU law shall apply; and
(iii) how the general principles of EU law influence the activities of Member States or contracting authorities in connection with make-or-buy decisions.

The paper does not delve into the matter of the relationship between the principle of free administration and EU law[*22] or the issue of legal remedies[*23] associated with make-or-buy decisions, both of which have been raised in addition. These questions deserve specific analysis, and there are plans to make them a part of further, related research.

1. The 'who' question

From reading *the* case law of the ECJ, it is unclear whose activities the Court has aimed to regulate – Member States', contracting authorities', or those of both. Perhaps it is unsurprising, then, that the opinions of commentators seem to head in different directions.

14 Ginter and Pilving (n 4) 171.

15 *Irgita* (n 12), para 48.

16 For example, the Court has spoken of 'general principles', 'fundamental rules', 'fundamental principles', some 'particularly important' principle(s), 'essential principles', 'overarching principles', etc. For details, consult Päivi J Neuvonen and Katja S Ziegler, 'General Principles in the EU Legal Order: Past, Present and Future Directions' in Katja S Ziegler and others (eds), *Research Handbook on General Principles of EU Law: Constructing Legal Orders in Europe* (Edward Elgar 2022) 9–11. – DOI: https://doi.org/10.4337/9781784712389.00007.

17 Niall O'Connor, 'Whose Autonomy Is It Anyway? Freedom of Contract, the Right to Work and the General Principles of EU Law' (2020) 49 Industrial Law Journal 285, 291. – DOI: https://doi.org/10.1093/indlaw/dwz024; Case C-29/69 *Erich Stauder v City of Ulm - Sozialamt* [1969] EU:C:1969:57.

18 Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Administratie der Belastingen* [1963] EU:C:1963:1.

19 Joined Cases C-184/02 and C-223/02 *Kingdom of Spain and Republic of Finland v European Parliament and Council of the European Union* [2004] EU:C:2004:497 51.

20 See, for example, Janssen and Olsson (n 11) 2–3, 12; Janssen (n 4); Wojciech Hartung, 'In-House Procurement – the Discretion of Member States Confirmed, the Relationship with Competition Law Remains Open: Case C-285/18 Irgita, Judgment of the Court of Justice of the European Union (4th Chamber) of 3 October 2019' (2019) 14 Eur Procurement & Pub Private Partnership L Rev 262, 266–67. – DOI: https://doi.org/10.21552/epppl/2019/4/10; Sõrm, Ginter, and Simovart (n 6).

21 Here and in the rest of the article, any reference to 'the Court's rule' or 'the rule' points to the ECJ's conclusion that general principles of EU law must be followed also in the taking of make-or-buy decisions.

22 Janssen (n 4) 150–54; Hötte (n 7) 507; Janssen and Olsson (n 11) 4–5; Carri Ginter, Kadri Härginen, and Mario Sõrm, 'In-House Transactions: Lost in Translation?' (2020) 30(3) PPLR 117, 126–28; Sõrm, Ginter, and Simovart (n 6) 10–12.

23 Janssen (n 6) 251–54.

At this juncture, it should be noted that, in the legal literature, the make-or-buy decision seems to exist at two distinct layers. It is considered to be both a policy choice made by a Member State[*24] and a choice specific to a contracting authority[*25]. These two layers get discussed mostly in a 'mixed' manner that does not distinguish clearly between them. The *case law of the ECJ* is no exception. That is one of the factors in why the Court's instructions might be difficult to understand.

1.1. Member States

In *Irgita*, the Court focused primarily on the Member States as the addressees of the mandate to follow the general principles of EU law.[*26] This is logical when one considers the facts of the case and the questions being analysed.[*27] The main 'take-away' from the decision is that the Member States have the freedom to choose and regulate how their contracting authorities meet their needs; i.e., they are free to decide whether to alter the regulation pertaining to when a contracting authority is allowed to opt for 'make', at least within the limits of the general principles of EU law.[*28]

It appears that the main addressees of the Court's rule expressed in *Irgita* are the Member States in their legislative role, since they are the ones able to impose additional conditions on conducting in-house transactions, through national regulation. Whether to do so or not is a policy choice that the Member State must make for itself.[*29] At this level, make-or-buy decisions are policy choices or even 'state measures' the execution of which is possible only via legislative powers.[*30] This reasoning gains further support from the Court's conclusion that the additional conditions at issue must be in accordance with the principles of transparency and legal certainty.[*31] Furthermore, that conclusion was reiterated in *Rieco*.[*32]

The list of addressees received clarification in *Autostrada*, in which national, regional, and local authorities were named.[*33] The non-national entities too hold an obligation to follow the general principles of EU law, in that they are responsible for the legislation at their respective levels.

Therefore, the consistent element found in the case law is that the rule is addressed to those who are acting in a legislative capacity. Hence, a link has been established between the obligation to comply with the general principles of EU law and the national legislature's ability to impose additional conditions on opting for 'make'. This conclusion extends to conditions that have merely been altered or modified by the Member State.[*34] In that case too, the national rules for choosing 'make' may differ from the rules laid down in the procurement directives.

1.2. Contracting authorities

Little uncertainty surrounds the impact of EU law's general principles on make-or-buy decisions **as policy choices**. That is quite clearly explained. The picture for contracting authorities, in contrast, is considerably muddier.

The *Autostrada* decision merely identifies the contracting authorities as those who must follow the policy decisions of the national legislators/policymakers.[*35] With *Irgita*, the ECJ stated that, even if the

24 Sõrm, Ginter, and Simovart (n 6) 3, 7.

25 Janssen (n 6) 15.

26 The Attorney General did not examine this question in his opinion in *Irgita* at all. In other cases, no opinion of the Attorney General was drafted, since the results were orders of the ECJ.

27 One of the main questions analysed in *Irgita* was whether art 12(1) of Directive 2014/24 must be interpreted as precluding a rule of national law whereby a Member State imposes conditions on the possibilities for a contracting authority's execution of an in-house transaction that are not laid down in said article.

28 *Irgita* (n 12), paras 45–49.

29 Sõrm, Ginter, and Simovart (n 6) 3, 7.

30 Ibid 7.

31 *Irgita* (n 12), paras 51–57.

32 *Rieco* (n 12), paras 37, 38.

33 *Autostrada* (n 12), paras 49–50.

34 See also Janssen (n 4) 150–54.

35 *Autostrada* (n 12), paras 49–50.

conditions for an in-house transaction are met and the activities involved therefore lie beyond the scope of the procurement directives, the Member States and their contracting authorities remain obliged to show due regard for the principles of equal treatment, non-discrimination, mutual recognition, proportionality, and transparency (the general principles of EU law specified in the ruling).[*36]

Therefore, not only should the national rules for in-house transactions and co-operation be in accordance with the general principles of EU law, but also the decisions of the contracting authorities are covered by this requirement. By dint of this conclusion, the general principles of EU law directly influence the framing for contracting authorities' activities.

With EU law exerting an influence in this way, the situation could imply that the balance between the principle of free administration and the internal-market rules is tipping more toward the EU. If such a shift is desired, subjecting the choices of the contracting authorities to the general principles of EU law is understandable, since these choices clearly affect the internal market.

The language visible in subsequent case law too indicates that contracting authorities are intended to count among the addressees of the Court-stated rule. Choices made in favour of one particular way of providing services at a stage prior to public procurement must likewise comply with the general principles of EU law.[*37]

2. The question of when

The second question is when the obligation to consider the general principles of EU law in make-or-buy decisions applies to the Member States and contracting authorities.[*38]

2.1. Conditions limiting the 'make' alternative

It is evident from the case law that an obligation to consider the general principles of EU law is in force when the Member States (or other national legislators) have introduced additional criteria that contracting authorities must fulfil if wishing to opt for 'make'.

Firstly, well-recognised case law states that 'the fundamental rules of the TFEU *generally* apply to the economic activities of public bodies, even in cases […] outside the ambit of the directives on public procurement[,] provided that those public bodies do not carry them out themselves, including by means of in-house transactions'.[*39] There is no need for the value of the economic activity to be over a certain threshold[*40]; however, some cross-border interest should be evident.[*41] Accordingly, the freedom a Member State may exercise when imposing additional requirements on when contracting authorities are allowed to apply the 'in-house' exception is not unlimited, naturally.[*42]

This reasoning is consistent with case law treating other matters related to public procurement law. For instance, if those Member States that have stipulated additional criteria in their national law that relevant entities '*must satisfy in order to be allowed to participate in reserved public procurement procedures',*

36 *Irgita* (n 12), para 61.

37 Ibid, para 50; *Azienda ULSS* (n 12), para 54; *Rieco* (n 12), para 38. The exception in this regard is the *Autostrada* decision, which makes no mention of the choice of the contracting authority (also see the discussion above).

38 Magdalena Jaś-Nowopolska and Hanna Wolska, 'Impact of the Judgement of [the] CJEU in Case C-285/18 on In-House Transactions in Poland' [2021] (1) Przegląd Prawno-Ekonomiczny 63, 72. – DOI: https://doi.org/10.31743/ppe.10348; Janssen (n 4) 151; *Irgita* (n 12), Opinion of AG Hogan EU:C:2019:369, paras 51–53.

39 *Irgita* (n 12); Opinion of AG Hogan (ibid), para 51.

40 Ibid, para 52.

41 Case C159/11 *Azienda Sanitaria Locale di Lecce, Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] EU:C:2012:817, para 23; Case C-336/12 *Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S* [2013] EU:C:2013:647, para 26.

42 *Irgita* (n 12); Opinion of AG Hogan (n 39), paras 51, 53.

these conditions must similarly respect the general principles of EU law.*[43] That meshes with the conclusions of several commentators.*[44]

When a Member State has decided to restrict the opportunities of its contracting authorities to resort to their own resources, it has, in essence, voluntarily limited their right to exercise freedom of administration.*[45] This, in turn, implies that said Member State has voluntarily expanded the scope of EU law, the area of application of public procurement rules.*[46]

The idea of limiting the possibility of opting for 'make' so as to favour public procurements is inherently in accordance with internal-market objectives, as public procurement helps ensure the efficient use of public funds.*[47] That said, a question arises here as to why compliance with the general principles of EU law needs additional attention from the Member States, as any restrictive additional conditions should already be in accordance with objectives associated with the internal market.

It is clear from the foregoing discussion that there is no question over whether the obligation to consider the general principles of EU law applies when the Member State has altered the conditions or added its own via national law such that there are stricter limits to the possibility of opting for 'make'.

2.2. Conditions that favour choosing 'make'

Relaxing the conditions for when an in-house transaction or horizontal co-operation is permitted is clearly out of the question, not to mention removing them altogether. Such an undertaking would render regulation of the in-house- and horizontal-co-operation exceptions utterly meaningless and stand in stark contradiction to the *Teckal criteria*.*[48]

However, the notion that a Member State could add conditions that render the 'make' option more appealing, encouraging recourse to the public sector in preference to the open market, is not unheard of.*[49] When hearing *Azienda ULSS n. 6 Euganea*, the ECJ faced the question of whether it is acceptable for the local regulation to allow a procedure for public procurement of medical-transport service to commence only if partnership between entities within the public sector to this end (horizontal co-operation) proves impossible.*[50] In that case, the ECJ once again referenced the principles reiterated in *Irgita*. Namely, as long as the national legislation is in accordance with the general principles of EU law, the Member State is allowed to give preference to horizontal co-operation.*[51] Of course, this allowance obtains on condition that the preference criteria specified *do not narrow the scope envisioned under* the procurement directives and therefore do not '*jeopardise the objectives of the internal market*'.*[52]

2.3. Contracting authorities' choice

At first glance, there is no rational justification for applying the rule to follow the general principles of EU law only for those make-or-buy decisions of contracting authorities made in Member States that have imposed additional or amended conditions on make-or-buy decisions. Many Member States have transposed the rules from the procurement directives to national law without any additions or other amendments.*[53] The contracting authority must still check whether the conditions set in the procurement directives are fulfilled. Ultimately, the impact of choosing 'make' on the internal market is similar across the board.

43 Case C-598/19 *Confederación Nacional de Centros Especiales de Empleo (Conacee) v Diputación Foral de Gipuzkoa* [2021] EU:C:2021:810, paras 32–33.

44 Janssen and Olsson (n 11) 10.

45 Janssen (n 4) 145; Sõrm, Ginter, and Simovart (n 6) 3.

46 Janssen (n 4) 145; Sõrm, Ginter, and Simovart (n 6) 3; Irgita (n 12); Opinion of AG Hogan (n 39), para 49.

47 Ibid.

48 Ginter, Härginen, and Sõrm (n 22) 119.

49 Aleksandra Sołtysińska, 'Providing Compliance with the Condition of Economic Dependence in In-House Contracts' (2022) 17 Eur Procurement & Pub Private Partnership L Rev 158, 167. – DOI: https://doi.org/10.21552/epppl/2022/3/5; Sõrm, Ginter, and Simovart (n 6) 4; *Azienda ULSS* (n 12), paras 47, 54.

50 *Azienda ULSS* (n 12), paras 46–47.

51 Ibid, para 54.

52 Sõrm, Ginter, and Simovart (n 6) 4.

53 Janssen (n 4) 146.

One argument for such a distinction could follow from, for example, a make-or-buy decision possibly entailing some additional risk to the functioning of the internal market. However, reasoning on this foundation is not justified. Subjecting the range of circumstances wherein a contracting authority may opt for the in-house exception to additional conditions already reduces risks to the internal market. There is no logic in imposing another set of additional conditions (linked to the general principles of EU law) in those situations wherein the Member States have already limited the 'make' possibilities available to contracting authorities.

The other argument, a more convincing one, is that the general principles of EU law should be imposed on the make-or-buy decisions of contracting authorities when the contracting authority has limited its own right of self-organisation – for example, by having previously concluded a contract covering the same subject matter as a result of a public procurement procedure.[*54] In this situation, the contracting authority has itself decided to follow the rules of the procurement directives with regard to the contract.

This would mean that the obligation to consider the general principles of EU law is not universally applicable to all make-or-buy decisions but pertinent only for those for which the contracting authorities themselves have, by choosing to operate under the EU law, chosen to be subject to the procurement directives in a situation wherein they should not have done so.

Also among the possible interpretations that the literature identifies behind the *case law* of the ECJ is that, while neither the procurement directives nor the EU treaties regulate make-or-buy decisions, '*EU law might apply to the execution of the desired activity*'.[*55] The general principles of EU law hold for the (performance of the) transaction, which itself is concluded on the basis of the exception granted for in-house transactions.[*56] Given the Court's instructions, this is the least plausible interpretation.

3. The question 'how'

One of the most important questions inevitably surfacing as one reads the *Irgita* judgement is what effect this obligation to follow the general principles of EU law in make-or-buy decisions has on Member States and contracting authorities in practice. There seems to be a common understanding that the Court's decision ushers in some positive obligations.[*57] However, there is much confusion as to what those obligations are.[*58]

It has been rightly noted that the Court would not reiterate the obligation to follow general principles of EU law if there were no positive obligations that the Court would like the Member States and contracting authorities to adhere to.[*59] Unfortunately, we find that the ECJ's decisions fall short of supplying clear instructions for honouring the relevant principles.

Above all, answering this question has practical value. If the rule's addressees do not know their obligations, complying with them is going to be tricky. In addition, which obligations must be adhered to might differ, depending on the addressee.

3.1. The goal

The idea that transactions or decisions beyond the scope of the procurement directives are nevertheless subject to the general principles of EU law is neither new nor revolutionary. This is evident, for example, from the case law on in-house and concessions operations.[*60]

54 Janssen and Olsson (n 11) 10; Jaś-Nowopolska and Wolska (n 38) 72.

55 Hötte (n 7) 491.

56 Susie Smith, 'In-House Transactions under Article 12 of Directive 2014/24: The ECJ Decision in Irgita' (2020) 2 NA49–NA54 PPLR 4.

57 Ibid 5; Sõrm, Ginter, and Simovart (n 6) 4–5; Janssen and Olsson (n 11) 8; Jaś-Nowopolska and Wolska (n 38) 71.

58 *Irgita* (n 12), para 48.

59 Sõrm, Ginter, and Simovart (n 6) 8.

60 Case C-324/98 *Telaustria Verlags GmbH, Telefonadress GmbH v Telekom Austria AG* [2000] EU:C:2000:669, para 60; Case C-573/07 *Sea Srl v Comune di Ponte Nossa* [2009] EU:C:2009:532, para 38; Case C-231/03 *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [2005] EU:C:2005:487, paras 16–17; Case C-410/04 *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari, AMTAB Servizio SpA* [2006] EU:C:2006:237, para 18; Case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen, Stadtwerke Brixen AG* [2005] EU:C:2005:605, para 46.

Jurisprudence features several attempts to explain why *make-or-buy* decisions, opting for 'make' in particular, cannot reasonably be entirely free of obligations. Advocate General Sanchez-Bordona highlighted in one opinion[*61] that the exclusion of in-house transactions from the public procurement framework bears a risk of undermining the objective of creating a thriving internal market in this area: the more that some contracts get excluded, the less room remains for the formation and development of an internal market in public procurement.[*62] Inappropriate use of the mechanisms provided for by the procurement directives could also lead to 'shrinking' of the market on the demand side and reduce the number of suppliers that the market could sustain.[*63] Furthermore, abuse of a dominant position on the part of contracting authorities cannot be ruled out.[*64] Internalisation restricts market access for private operators[*65] in any case, especially for small and medium-sized enterprises (SMEs).[*66] It should be noted that Sanchez-Bordona recognised that positive effects too are possible – for example, 'incentivising private operators to offer better contract terms'.[*67]

All the effects mentioned above sound highly plausible. When the Member States favour the 'make' option, potential for impacts on the functioning of the EU internal market is quite evident. A market that could be open to domestic and foreign economic operators disappears once a 'make' route has been chosen. Were all Member States or contracting authorities to choose to meet their needs by means of public resources, the internal market would be non-functional. Legal regulation of public procurement is necessary if the internal market is to be 'complete'[*68] and non-distorted.

Public procurement is also among the important mechanisms contributing to reaching the EU's strategy-level objectives – sustainable, inclusive growth; efficient use of public-sector funds; etc. – and thereby facilitating such outcomes as the participation of SMEs in public procurement while also supporting the potential for contracting authorities to support the common goals of society.[*69] Therefore, more frequent recourse to the exceptions permitted for in-house and horizontal co-operation is bound to render public procurement a less efficient measure in this respect.

3.2. The obligations

Legal literature posits several possible sets of positive obligations that the Member States and contracting authorities must adhere to. For example, it has been proposed that contracting authorities should consider the impact of a decision to 'make' on the other market participants[*70] or announce any intention to opt for 'make',[*71] but consensus in this regard is lacking.

3.2.1. Transparency

The principle of transparency has been analysed more thoroughly than the others in the context of make-or-buy decisions. Scholars have highlighted it as the general principle of EU law that is most likely to entail certain positive obligations,[*72] although most commentators would not prefer such an implication informing practice.[*73]

61 *Informatikgesellschaft* (n 12), Opinion of AG Sanchez-Bordona.

62 Ibid, para 31.

63 Ibid, para 33.

64 Ibid.

65 Wojciech Hartung, Katarzyna Kuźma, and William A Janssen, 'Article 12 Public Contracts between Entities within the Public Sector' in Roberto Caranta and Albert Sanchez-Graells (eds), *European Public Procurement: Commentary on Directive 2014/24/EU* (Edward Elgar 2021) 131. – DOI: https://doi.org/10.4337/9781789900682.00021.

66 *Informatikgesellschaft* (n 12), Opinion of AG Sanchez-Bordona, para 35.

67 Ibid, para 34.

68 *Stadt Halle* (n 5), paras 23, 44.

69 Directive 2014/24/EU, Recital 2; Directive 2014/25/EU, Recital 4.

70 Sõrm, Ginter, and Simovart (n 6) 5–8; Janssen and Olsson (n 11) 6–7; Jaś-Nowopolska and Wolska (n 38) 71.

71 Janssen and Olsson (n 11) 8.

72 Sõrm, Ginter, and Simovart (n 6) 9.

73 Ibid; Janssen and Olsson (n 11) 8; Jaś-Nowopolska and Wolska (n 38) 72.

The ECJ explicitly analysed a Member State's obligation to follow the principles of transparency and legal certainty.[*74] The position it took in consequence is that 'the conditions to which the Member States subject the conclusion of in-house transactions should be made known by means of rules that are sufficiently accessible, precise and predictable in their application to avoid any risk of arbitrariness'.[*75]

For Member States, applying the principle of transparency to make-or-buy decisions is pivotal to respecting the rights of contracting authorities and economic operators both. The rights of a contracting authority come to the fore when its right to opt for 'make' has been restricted, whereas the rights of the economic operator are more relevant when the national legislator has implemented regulations that lead to a preference for in-house transactions or horizontal co-operation. However, the fundamental issue in every case is that additional rules or rule amendments adopted by the Member State must be accessible and understandable to all. In this setting, the positive obligations that the Member States must adhere to in their legislative role seem clear, logical, and aligned with the goal set (i.e., the aim of making sure that all contracting authorities and other market participants know the rules for 'make').

It is more difficult to answer the question of **which** transparency obligations contracting authorities have in the domain of make-or-buy decisions. One possible obligation identified is a duty of notifying the market as a whole about the intent to conclude an in-house or horizontal co-operation transaction[*76], though this is not scholars' preferred solution and would fly in the face of the principle of free administration.[*77]

Although such conclusions have a logic behind them, it is difficult to agree with them completely when factoring in the views of the ECJ. The Court's rulings considering make-or-buy decisions would not have repeated the rule of honouring the general principles of EU law if there were no obligations that the contracting authorities could, and indeed must, fulfil.[*78] On those occasions when their make-or-buy decision might have a cross-border impact, transparent action on the part of the contracting authorities is all the more necessary. Otherwise, it would be nearly impossible to guarantee meeting the objectives of the internal market.

3.2.2. Equal treatment and non-discrimination

The principles of non-discrimination and of equal treatment are mutually distinct, though closely related. Perhaps more accurately, one could construe these as two sides to a single principle, though[*79]: in essence, equal treatment dictates that 1) comparable situations must not be treated differently and that 2) mutually distinct situations must not be treated in the same way unless such treatment is objectively justified.[*80]

These principles could be guaranteed in the actions of contracting authorities and other market participants via national legislation, through transparency[*81]; as indicated above, this is possible when, for example, the rules are equally available to everyone and the regulation is applied uniformly. The national rules should not unnecessarily promote favouring one economic operator over another. All contracting authorities (at least those within any given sector) should be able to exercise these exceptions on the same basis.

When we turn our attention to the decisions of contracting authorities in this arena, it is hard to see exactly what the obligation to follow general principles of EU law could entail. Opting for 'make' inherently entails market participants not being on equal footing with the party entering an in-house or co-operation transaction with the contracting authority.

One possible expression of the principle of equal treatment might be to oblige the contracting authority to notify the larger market of any planned 'make' decisions (as explained above). Notifying the market

74 *Irgita* (n 12), paras 51–57.

75 Ibid, para 55.

76 Janssen and Olsson (n 11) 8.

77 Ibid; Sõrm, Ginter, and Simovart (n 6) 9–14.

78 Sõrm, Ginter, and Simovart (n 6) 8.

79 Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK, Volume 1* (3rd edn, Sweet & Maxwell / Thomson Reuters 2014) 621; Michael Steinicke and Peter L Vesterdorf (eds), *EU Public Procurement Law: Brussels Commentary* (Beck 2018) 294; *Parking Brixen* (n 61), para 48.

80 Joined Cases C-21/03 and C-34/03 *Fabricom SA v État belge* [2005] EU:C:2005:127, para 27; Case C-304/01 *Kingdom of Spain v Commission of the European Communities* [2004] EU:C:2004:495, para 31; *Conacee* (n 43), para 36.

81 *Parking Brixen* (n 61), para 49.

would give the various market players information that might be important for them and, thereby, a chance to act when they think that their rights are being violated. Notification should be required only with regard to those 'make' decisions that might have cross-border implications or where the contracting authority had chosen at some earlier point to follow the rules stated in the procurement directives. A universal requirement of notification (covering all 'make' decisions, to ensure adherence to the equal-treatment principle) would be contrary to the very purpose of an in-house transaction. That is, exercising the right to choose 'make' would become unduly complicated in practice.

3.2.3. Mutual recognition

The principle of mutual recognition is represented in specific parts of individual procurement directives.[*82] These focus on the obligation *to 'recognise qualifications obtained in another Member State even though the enterprise or person who claims to possess the qualifications does not hold the documentation otherwise required in the first Member State'*.[*83]

In examining this within the context of legislative aspects of the make-or-buy decision, it is hard to see a place for the principle of mutual recognition anywhere. The whole idea of regulating make-or-buy decisions revolves around the choice of the Member States to either limit 'make' or grant it some priority over 'buy'. If 'make' is selected, contracting authorities are free to accept any qualifications they find fitting – though, of course, within the limits arising from professional/certification/education requirements and the contract's subject matter.

3.2.4. Proportionality

Applying the final principle cited, proportionality, means that the rules laid out by the Member States or contracting authorities must not go beyond what reaching the objectives' set forth in the TFEU necessitates.[*84]

This principle is relatively easy to apply to make-or-buy decision-making in national legislation. In cases wherein the Member States limit contracting authorities' possibilities for selecting 'make', it is important that the limits set be proportional and not exceed what is necessary for achieving the aim for the regulation. For instance, the Member State's goal could be to promote competition and entrepreneurship in one specific field. Here, a proportional restriction would not limit, let alone ban, exercising the in-house-sourcing or horizontal-co-operation-agreement exception in every field. It would cover only the field whose market operations the Member State wishes to encourage. Estonia has done just that in the waste-management sector: the state does not allow appealing to either of the two exceptions here[*85], because it seeks to promote equal treatment of all economic operators and support competition in this specific field.[*86]

In circumstances wherein the national regulation implemented favours a choice of 'make', the Member State's analysis must go further. The Member State should consider the national perspective and the overall viewpoint of the EU, since such an implementation could harm the internal market. If the legislator's goal is to promote, for example, co-operation among public authorities or to apply safeguards such that the quality of certain services is sufficiently high, the regulation must allow preferential use of the exceptions only in respect of the target services.

Ascertaining any concrete obligations of a contracting authority with regard to the principle of proportionality is much more challenging, because the contracting authority's room for choosing 'make' is already limited via the legislative rules. The authority is free to opt for 'make' only when the criteria for appealing to the in-house or the horizontal-co-operation exception are evidently met. Though contracting authorities usually do retain the option of deciding whether to exercise the exception or instead conduct a public procurement procedure for the service or work needed, it seems that the principle of proportionality does not entail any additional obligations for the contracting authorities.

82 Directive 2014/24/EU, art 42(3)(b).

83 Steinicke and Vesterdorf (n 80) 12.

84 *Conacee* (n 43), para 42.

85 The Waste Act (*Jäätmeseadus*): RT I 2004, 9, 52...RT I, 17032023, 37, s 1(5).

86 'XI Parliament, VII Session, Regular Session of the Plenary Assembly', para 15 <https://stenogrammid.riigikogu.ee/201011241400#PKP-24347> accessed on 29 March 2024.

4. Conclusions

The obligation to follow the general principles underlying EU law rests not only with the Member States but also with the local governments when they are acting in their legislative role. In addition, the choices of the contracting authorities are subject to the general principles of EU law. For the Member States, the obligation to follow this rule encompasses situations in which the Member State limits or broadens the range of contracting authorities' opportunities to choose 'make'. For those authorities, in turn, the general principles come into play when a cross-border interest might be touched by the make-or-buy decision or when the contracting authority decided earlier on to follow the rules set by the procurement directives.

It is clear that the Court expects Member States and contracting authorities to fulfil positive obligations so as to ensure that the general principles of EU law are effectively taken into consideration. For Member States, these obligations are relatively apparent. Their legislation regarding 'make' must be transparent, so that the conditions and possible obligations are clearly understandable to all. This, in turn, helps the Member States guarantee equal treatment at the level of the contracting authorities and any relevant market participants. Limiting or broadening with additional conditions should never exceed what is necessary to reach the goal behind the further conditions. The states thus make sure that said conditions are proportional.

In contrast, identifying the obligations that fall on the contracting authorities is far more challenging. The most logical and appropriate duty would be to publish notices of the intent to choose 'make'. Beyond this, it proves tricky to name specific obligations that are appropriate for the contracting authorities without at the same time rendering taking advantage of the exception for in-house or horizontal co-operation entirely meaningless. If the ECJ has a goal of ensuring that the contracting authorities honour some positive obligations, one would hope that the Court at some point issues guidelines in connection with this as well.